EUROPEAN COMMISSION

Brussels, 10.08.2021
C(2021) 6003 final

PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

ENERGETICKÝ A PRŮMYSLOVÝ HOLDING, a.s.,
Pařížská 130/26
Josefov, 110 00 Praha 1
Czech Republic

SLOVENSKE ŽELEZNICE
Kolodvorska ulica 11
1506 – Ljubljana
Slovenia

Subject: **Case M.10169 – EPLI / SŽ / JV**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 12 July 2021, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which EP Logistics International, a.s. ("EPLI", Czech Republic), controlled by ENERGETICKÝ A PRŮMYSLOVÝ HOLDING, a.s. ("EPH", Czech Republic), and SLOVENSKE

1 OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

2 OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

Commission européenne, DG COMP MERGER REGISTRY, 1049 Bruxelles, BELGIQUE
Europese Commissie, DG COMP MERGER REGISTRY, 1049 Brussel, BELGIË

Tel: +32 229-91111. Fax: +32 229-64301. E-mail: COMP-MERGER-REGISTRY@ec.europa.eu.

ŽELEZNICE, d.o.o. ("SŽ", Slovenia) acquire within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation joint control over a newly created company ("JV", Slovenia)[3] by way of purchase of shares. EPLI and SŽ are designated hereinafter as the "Parties".

1. THE PARTIES

(2) **EPLI** offers rail freight transport services in the Czech Republic, Germany, Poland, Hungary, Slovakia and Austria. It also offers freight forwarding services, in Hungary, the Czech Republic, Germany, Poland and Slovakia. **EPH** is a vertically integrated energy utility covering the complete value chain ranging from cogeneration, power and heat generation, natural gas transmission, gas storage, as well as gas, heat and electricity distribution and supply.

(3) **SŽ** is the Slovenian state-owned provider of rail freight transport and freight forwarding services and rail passenger transport. Among others, companies within SŽ Group also act as railway infrastructure manager in Slovenia and as a provider of traction and inspection and maintenance services for rail vehicles.

(4) The **JV** will be composed of SŽ - Tovorni promet, d.o.o., ("SŽ-TP", Slovenia) and Fersped, d.o.o., ("Fersped", Slovenia), both currently owned and controlled by SŽ. SŽ-TP offers conventional and intermodal rail freight transport and some accompanying logistics services related to rail transport predominantly in Slovenia and, to a smaller extent, in Austria and Croatia. Fersped offers freight forwarding services in Slovenia.

(5) The Parties explain that for SŽ, the proposed transaction is an opportunity to expand the businesses of SŽ-TP and Fersped by overcoming its current limitations to raise additional financing with a view to revive and expand SŽ-TP's rolling stock and operations in Central and Southeast Europe For EPH, in turn, the proposed transaction embodies an opportunity to further build and strengthen its logistics division by expanding its activities to Southern Europe. This is in line with EPLI's railway strategy to build an independent freight railway alliance in Southeast Europe.[4]

2. THE OPERATION

(6) In accordance with the Investment and Shareholders' Agreement of 2 December 2020 ("ISHA"), the Parties will set up the JV in Slovenia to which SŽ will transfer all its shares in SŽ-TP and Fersped. The transfer of SŽ-TP and Fersped to the JV will go along with a share capital increase by EPLI, following which SŽ will hold a 51 % and EPLI will hold a 49 % stake in the share capital of the JV.[5]

---

3 Publication in the Official Journal of the European Union No C 290, 20.7.2021, p. 16-17.

4 Form CO, paragraphs 15-16.

5 From CO, paragraphs 1-3.

3. THE CONCENTRATION

(7) The Transaction constitutes a concentration within the meaning of Articles 3(1)(b) and 3(4) of the Merger Regulation.

3.1. Joint control

(8) The Parties will jointly control the JV. The JV will have a two-tier management structure with a Management Board and a Supervisory Board. The Management Board, responsible to run the day-to-day affairs of the company, will consist of five members and each Party will have the right to appoint two. The Chairman will be appointed by unanimous vote of the Supervisory Board.

(9) The Supervisory Board will be composed of six members. EPLI will have the right to appoint/remove two, while SŽ will have the right to appoint/remove four, including the Chairman of the Supervisory Board. The Supervisory Board will decide on all strategic commercial business decisions of the JV, such as budget, business plan, and appointing/removing the Chairman of the Management Board. In order for such decisions to be adopted, the Supervisory Board will require a majority of five out of six votes. Consequently, all strategic commercial decisions will require the consent of both Parties.[6]

3.2. Full functionality

(10) The JV will be full function. It will combine the activities of the already existing companies SŽ-TP and Fersped, operating in rail freight transport and freight forwarding respectively. The JV will continue to have its own presence on the market offering third parties its own product offering, distinct from the offering of the parents.

(11) Moreover, the JV will be bestowed with all the resources, including finance, staff and assets as well as all required functionalities (such as rolling stock, transhipment/handling equipment, warehouses, workforce, licenses and safety certificates required to provide rail freight transport services) to conduct on a lasting basis its business activities.[7]

4. UNION DIMENSION

(12) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (EPLI: EUR […] million, SŽ: EUR […] million).[8] Each of them has a Union-wide turnover in excess of EUR 250 million (EPLI: […] million, SŽ: EUR […] million) but they do not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State. The Transaction therefore has a Union dimension.

---

6 Form CO, paragraph 70-78.

7 Form CO, paragraph 43-62.

8 Turnover calculated in accordance with Article 5 of the Merger Regulation.

5. COMPETITIVE ASSESSMENT

(13) The Transaction leads to horizontal and vertical links between the activities of the JV and the Parties with respect to rail freight transport and freight forwarding services.

5.1. Market definitions

5.1.1. Rail freight transport

(14) In previous decisions, the Commission considered a separate market for rail freight transport.[9] The Commission also considered a further segmentation of the market into single wagon and block trains. Block trains are entire trains running from a single point of origin to a single point of destination. Single wagon trains are assembled in a marshalling yard in the region of origin, transported to a marshalling yard in the region of destination and disassembled into single wagon loads for transport to their final destination (often by intermodal transport). The provision of single wagon services requires a more complex organisational structure, a large rail network and a sufficient scale of operations.[10] The Commission also left open the question whether there are separate markets for domestic and international rail freight transport.[11]

(15) The Commission has previously held that in view of different technical and regulatory requirements the markets for domestic and for international rail freight services tend to be national, but could become international on certain routes which are part of a corridor.[12] In certain situations, the Commission also found that a corridor-based approach might best reflect the competitive situation. The Commission also considered a distinct market for cross-border rail freight transport services between two neighbouring countries.[13]

(16) The exact market definition in this case can be left open, as the Transaction does not give rise to serious doubts as to its compatibility with the internal market under any plausible market definition.

5.1.2. Freight forwarding

(17) In previous decisions, the Commission defined freight forwarding as "the organisation of transportation of items (possibly including activities such as customs clearance, warehousing, ground services, etc.) on behalf of customers according to

---

9 Case COMP/M.5855 - DB/ Arriva, paragraphs 144-145; Case COMP/M.5480 Deutsche Bahn / PCC Logistics, paragraphs 20-22; Case COMP/M.5096 RCA / MÁV Cargo, paragraph 27-38; Case COMP/M.4746 Deutsche Bahn / EWS, paragraphs 13-17.

10 Case COMP/M.5579 - TLP/ Ermewa, paragraph 67; Case COMP/M.5855 - DB/ Arriva, paragraphs 147-149; Case COMP/M.5480 Deutsche Bahn / PCC Logistics, paragraphs 23-25; Case COMP/M.5096 RCA/MÁV Cargo, paragraphs 39-40; Case COMP/M.4746 Deutsche Bahn / EWS, paragraphs 19-21.

11 Case COMP/M.5855 - DB/ Arriva, paragraphs 146; Case COMP/M.4746 Deutsche Bahn / EWS, paragraph 18.

12 The European Rail Freight Corridors ("RFC") network is composed of 11 cross-border corridors. It was established by Regulation (EU) 913/2010 of the European Parliament and of the Council of 22 September 2010 concerning a European rail network for competitive freight, OJ L 276, 20.10.2010, p. 22.

13 COMP/M.5579 - TLP/ Ermewa, paragraph 69-73; Case COMP/M.5855 - DB/ Arriva, paragraphs 162; Case COMP/M.5480 – Deutsche Bahn / PCC Logistics, paragraphs 29-32; Case COMP/M.5096 RCA/MÁV Cargo, paragraphs 43-47; Case COMP/M.4746 Deutsche Bahn / EWS, paragraph 32.

their needs".[14] The Commission also considered possible sub-segmentations of the freight forwarding product market, namely (i) between domestic freight forwarding and cross-border freight forwarding, and, (ii) depending on the modes of transport, by air, land, and sea. The Commission also considered a further subdivision of land freight forwarding according to the different modes of transport, in particular rail and road.[15]

(18) In its previous decisions, the Commission has left open whether the freight forwarding market or subdivisions thereof could be considered as national due to language and regulatory barriers or as larger in view of a trend by major competitors to create networks which are trans-national or even EEA-wide.[16]

(19) The exact market definition in this case can be left open, as the Transaction does not give rise to serious doubts as to its compatibility with the internal market under any plausible market definition.

5.2. No horizontal concerns

5.2.1. Rail freight transport

(20) EPLI and SŽ-TP are active in the provision of rail freight transport.

(21) When considering market delineations based on national markets or based on cross-border rail freight transport services between two neighbouring countries, the Transaction does not give rise to any affected market. First, SŽ-TP is active in Slovenia, Austria and Croatia. EPLI is active in the Czech Republic, Slovakia, Hungary, Poland, Austria and Germany.[17] The Parties' activities therefore overlap only in Austria. However, EPLI, (through its subsidiary RML) obtained a licence to operate in Austria only in 2020 and has not generated any revenues there yet. Furthermore, the Parties estimate SŽ-TP's market share in the provision of rail freight transport in Austria at below [0-5]%.[18] Second, the Parties are not active in rail freight transport between two and the same neighbouring Member States.

(22) When considering market delineations based on corridors, EPLI and SŽ-TP are active on two corridors: RFC5 and RFC11. However, the Parties are not active on the same sections of the corridors. SŽ-TP is active only on the sections within Slovenia while EPLI is active on the sections running through Hungary (RFC11) and Poland (RFC5). The Parties' activities therefore do not overlap and they do not compete with each other on these corridors. In addition, the Parties estimate that their combined market shares on each of these corridors would be well below 20% and would not give rise to affected markets.[19]

---

14 See recently, case COMP/M.9221 – CMA CGM / CEVA, paragraph 10 and the references there.

15 See recently, case COMP/M.9221 – CMA CGM / CEVA, paragraph 11 and 17 and the references there. Specifically with respect to freight forwarding by rail see case COMP/M.5480 – Deutsche Bahn / PCC Logistics, paragraphs 12-14 and the references there.

16 See recently Case COMP/M.9221 – CMA CGM / CEVA, paragraph 10 and 17 and the references there. Specifically with respect to freight forwarding by rail see Case COMP/M.5480 – Deutsche Bahn / PCC Logistics, paragraphs 15-17 and the references there.

17 Form CO, paragraph 106, figure 2.

18 Form CO, paragraph 107.

19 Form CO, paragraph 213-214.

(23) Market participants responding to the Commission's market investigation did not raise horizontal competition concerns with respect to rail freight transport.

(24) Consequently, the Transaction does not give rise to serious doubts as to its compatibility with the internal market with respect to the horizontal overlaps in rail freight transport.

5.2.2. Freight forwarding

(25) EPLI and Fersped are not active in freight forwarding in the same Member States. SŽ is active in freight forwarding through its subsidiary Fersped only in Slovenia while EPLI is active in the Czech Republic, Slovakia, Poland, Germany and Hungary.[20] Although EPLI purchases rail freight transport in Slovenia, its customers are not Slovenian but are based in the Czech Republic, Slovakia, Poland, Germany and Hungary. Consequently, when considering national markets for freight forwarding the Parties' activities do not overlap. The Parties estimate their market shares in each of these countries to be less than [0-5]% and their combined EU-wide market shares to be negligible.[21] The Transaction would therefore not give rise to affected markets for freight forwarding under any plausible market definition.

(26) Market participants responding to the Commission's market investigation did not raise horizontal competition concerns with respect to freight forwarding.

(27) Consequently, the Transaction does not give rise to serious doubts as to its compatibility with the internal market with respect to the horizontal overlaps in freight forwarding.

5.3. No vertical concerns

(28) Rail freight transport is an upstream input for the downstream provision of rail freight forwarding services. SŽ-TP is the only provider of single wagon services in Slovenia both for domestic and international traffic. It is also the only provider of domestic block train services. In the market for international block train services in Slovenia, SŽ-TP's market share is above [80-90]%.[22] EPLI purchases rail freight transport in Slovenia from one of SŽ-TP's competitors in order to transport goods from the Port of Koper in Slovenia and from the Italian border (originating from the Port of Trieste) to the Hungarian border.[23] The Transaction therefore gives rise to vertically affected markets between SŽ-TP international rail freight transport in Slovenia upstream and EPLI's international rail freight forwarding in its countries of operation (for which it arranges rail freight transport through Slovenia) downstream.

5.3.1. No concern of input foreclosure

(29) Input foreclosure arises where, post-merger, the new entity would be likely to restrict access to the products or services that it would have otherwise supplied absent the merger, thereby raising its downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the

20 Form CO, paragraph 106, figure 2.
21 Form CO, paragraph 181 et seq.
22 Form CO, paragraphs 178-180.
23 Form CO, paragraph 288.

merger.[24] The concern in this case would therefore be that the JV would restrict the access of EPLI's competitors in the downstream market for international freight forwarding to SŽ-TP's upstream input of international rail freight transport in Slovenia. Such concern is unlikely to arise however, for the following reasons.

(30) First, the JV will be jointly controlled by SŽ-TP and EPLI. SŽ-TP is unlikely to support an input foreclosure strategy that would require the JV to restrict its sales on the one hand, resulting in lower sales and lower profits, and that would benefit only EPLI on the other hand, by hypothetically weakening EPLI's competitors. EPLI's demand represents less than [0-5]% of the market for rail freight transport in Slovenia and would therefore be unlikely to compensate for the loss of business that an input foreclosure strategy would represent for the JV.[25]

(31) Second, it is doubtful that the JV will be able to engage in input foreclosure with respect to international block trains. As pointed out by the Parties and confirmed by market participants,[26] several competitors of SŽ-TP are active in rail freight transport in Slovenia and others have recently obtained a licence to provide such services in Slovenia.[27] SŽ-TP's market shares have been declining in recent years.[28] Customers would therefore have alternatives to the services of SŽ-TP should it engage in input foreclosure.

(32) The market investigation did not find strong evidence that competitors of SŽ-TP will face barriers to expand their activity should SŽ-TP engage in input foreclosure. According to the Parties there is sufficient capacity on the Slovenian rail network to allow competitors to increase their activity.[29] Some market participants however opined that there is a problem of congestion on the Slovenian rail network and pointed out specifically to the train station operated by SŽ-TP outside of the port of Koper that serves as an important gateway for the international freight that is carried through Slovenia.[30] However, as acknowledged by the market participants,[31] SŽ-TP has a regulatory obligation to provide under equitable, non-discriminatory and transparent conditions, access to the railway infrastructure including marshalling yards and train formation facilities, such as shunting facilities.[32] Indeed, market participants also said that cooperation with SŽ-TP in the past has been good and is expected to continue post-Transaction.[33] In addition, customers could avoid the port

---

24 Guidelines on the assessment of non-horizontal mergers, recital 31.

25 Form CO, paragraph 288.

26 Form CO, paragraph 239, minutes of call with market participant [ID186], paragraphs 8 and 9; minutes of call with market participant [ID104], paragraph 3; minutes of call with market participant [ID117], paragraphs 4, 7 and 11; minutes of call with market participant [ID95], paragraph 11.

27 Adria Transport, Rail Cargo Carrier, Primol – Rail, Ten Rail, Metrans.

28 Form CO, paragraphs 178-180.

29 Form CO, paragraph 238.

30 In that train station, SŽ-TP is providing shunting services that are essential for rail freight transport at the port of Koper. Minutes of call with a market participant [ID104], paragraph 5; minutes of call with a market participant [ID95], paragraph 8.

31 Minutes of call with a market participant [ID104], paragraph 7; minutes of call with a market participant [ID95], paragraph 8. See also Form CO, paragraphs 314-315, 378 and footnote 176.

32 Directive 2012/34/EU of the European Parliament and the Council of 21 November 2012, establishing a single European railway area (recast), Article 10 and Annex II, point 2.(c).

33 Minutes of call with a market participant [ID95], paragraph 7 and 9.

of Koper by shipping cargo to and from the nearby ports of Trieste in Italy and Rijeka in Croatia.[34]

(33) Third, the Transaction is also unlikely to affect the JV's incentive and ability to engage in input foreclosure with respect to single wagon services in Slovenia, for which it will be the only provider. EPLI does not arrange single wagon services in Slovenia and the Transaction therefore does not create a vertical link between the Parties' activities with respect to single wagon services.[35] In addition, single wagon services represent a small share ([10-20]%) of demand for international rail transport in Slovenia (that is, the segment in which EPLI is active)[36] and these services could be replaced, at least to a certain extent, by road transport services.[37] Finally, although SŽ already had pre-Transaction freight forwarding activities through Fersped, market participants said that in the past cooperation with SŽ-TP on single wagon services has been good and they expect it to continue in the future.[38]

(34) Finally, the market participants responding to the market investigation did not raise any specific input foreclosure concerns with respect to the Transaction. Rather they expect good cooperation with SŽ-TP to continue and maybe even improve because of the investment expected by EPLI.[39]

5.3.2. No concern of customer foreclosure

(35) Customer foreclosure may occur when a supplier integrates with an important customer in the downstream market. Because of this downstream presence, the merged entity may foreclose access to a sufficient customer base to its actual or potential rivals in the upstream market (the input market) and reduce their ability or incentive to compete. In turn, this may raise downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger.[40]

(36) The Parties are unlikely to be able post-Transaction to engage in customer foreclosure. EPLI is not a significant customer of rail freight transport in Slovenia, representing less than [0-5]% of demand.[41] There are several other freight forwarders representing significantly larger share of demand for rail freight transport in Slovenia, for instance, Intereurope ([10-20]%), Schenker ([0-5]%), DSV Transport ([0-5]%), Cargo Partner ([0-5]%), Kuehne+Nagel ([0-5]%).[42] Market participants confirmed that a switch of EPLI to SŽ-TP would not result in customer foreclosure.[43]

---

34 Form CO, paragraph 244 et seq.

35 Form CO, paragraph 331 and footnote 178; Minutes of call with market participant [ID104], paragraph 7.

36 Form CO, paragraph 179.

37 Call with a market participant [ID129], paragraph 6.

38 Call with a market participant [ID186], paragraph 8; Call with a market participant [ID95], paragraph 10.

39 Minutes of call with market participant [ID186], paragraph 9; Minutes of call with market participant [ID104], paragraph 7; Minutes of call with market participant [ID117], paragraphs 5 and 12; Minutes of call with market participant [ID95], paragraph 9-11; Minutes of call with market participant [ID129], paragraph 9.

40 Guidelines on the assessment of non-horizontal mergers, recital 58.

41 Form CO, paragraph 288.

42 Form CO, Table 21.

43 Minutes of a call with a market participant [ID104], paragraph 6.

6. CONCLUSION

(37) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(*Signed*)
Margrethe VESTAGER
Executive Vice-President