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PPF Mergers in Bulgaria - a Tale of Double Standard

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The contemplated acquisition of Nova Broadcasting Group AD by PPF TMT Bidco 2 B.V (the latter entity and its economic group hereinafter referred to as “**PPF**”) along with a separate acquisition of the vertically integrated business of CEZ Group of companies (owned by CEZ a.s.) by the Bulgarian company Inercom EAD have been making the news in Bulgaria lately. Both notified transactions “didn’t pass the smell test” applied by the Bulgarian Commission on Protection of Competition (“**CPC**”). The two blocking decisions have been, coincidentally or not, announced on the same date (19 July 2018) and they both comprise a serious deviation from the well-settled decisional practice of the CPC so far. All this necessitates the standard applied by the Bulgarian competition watchdog to be appraised under the “smell test” itself.

In this blog post we comment on the rationale as expressed in the CPC’s blocking decision in the PPF/Nova merger, against the background of the EC clearance of another PPF acquisition in Bulgaria, cleared in parallel by the European Commission. In the authors’ opinion, there are no persuasive legal and economic reasons in support of the CPC blocking decision. Whether this is due to any political influence on the proceeding whatsoever, as suggested by some authors across the Bulgarian media, is a matter beyond the scope of the present blog post.

1. Procedural background

On 22 May 2018 a merger proceeding was opened by the Bulgarian Commission for Protection of Competition upon notification by PPF TMT Bidco 2 B.V regarding its intended acquisition of sole control over Nova Broadcasting Group AD (“**Nova**”). The Nova group comprises one of the two largest TV broadcasters in Bulgaria and is also active in online advertising, magazines, news websites and e-commerce. On 25 May the CPC issued a decision opening a Phase II investigation of the merger.

On 22 June 2018 the European Commission (“**EC**”) opened a merger proceeding (M.8883) upon notification by PPF Group N.V. (the latter entity and its economic group hereinafter also referred to as “**PPF**”) regarding its intended acquisition of sole control over **Telenor**’s subsidiaries in Bulgaria, Hungary, Montenegro and Serbia.

2. The CPC prohibits the PPF/Nova merger

On 19 July 2018 the CPC announced a decision prohibiting the acquisition by PPF of Nova (*“the PPF/Nova merger decision”*), which happens to be the first ever refusal by the CPC to clear a notified merger.

The decision does not even mention the pending PPF/Telenor merger, although the latter could affect, *inter alia*, the Bulgarian markets of wholesale and retail supply of TV channels and of TV advertising, all of which are relevant to the PPF/Nova merger.

Various aspects of the PPF/Nova merger decision (and their impact on the legality of the latter) are discussed in section 4 below.

3. The PPF/Telenor merger before the EC - no issue whatsoever

Section 1.2 of the CO submitted to the EC by PPF expressly referred to the share purchase agreement entered by PPF for acquisition of 100% of Nova. In that context, the acquiring company noted: *“The combination of NBG and Telenor Bulgaria in PPF’s portfolio would give rise to technically vertically affected markets in connection with the market for wholesale supply of TV channels in Bulgaria, the market for retail supply of TV services to end users in Bulgaria and the market for the sale of TV advertising space in Bulgaria. However, given the lack of circumstances which would allow the Parties to engage in market foreclosure, there arise no competition concerns in this respect.”*

On 27 July 2018 the EC announced a decision under Art. 6(1)(b) of the Merger Regulation, whereby the EC found that the proposed transaction would raise no competition concerns. According to the EC, the transaction would not give rise to horizontal overlaps, as the companies’ activities are confined to the different territories in which they hold their respective telecommunication licenses. In addition, the Commission found that the vertical links between the upstream markets for wholesale international roaming and wholesale mobile and fixed call termination services and the downstream markets for retail mobile and fixed telecommunications services arising from the transaction would be unproblematic. The EC decision does not at all discuss the possible impact of the PPF acquisition of the Telenor CEE business in conjunction with its parallel intended acquisition of Nova TV in Bulgaria (notified to the CPC). Whether this is due to the timing of events (the CPC blocked the PPF/Nova acquisition prior to the EC clearance) remains unknown as the EC decision is silent on the matter.

4. Comments on the CPC prohibition of the PPF/Nova merger

4.1 Debut of the e-commerce market in the CPC decisional practice

In the PPF/Nova merger decision the CPC for the first time in its decisional practice has treated e-commerce as a self-contained market (as opposed to defining separate markets for the respective product categories - e.g. retail sale of household appliances, as the CPC has done in the past). This may be due not so much to a general shift in the understanding of the CPC but rather to the approach by the acquiring company. The latter, in its notification regarding the concentration, explicitly pointed out that the contemplated merger “*would affect the e-commerce market*” in view of the horizontal overlap thereon of activities between the merging companies. Ironically, the CPC used precisely this horizontal overlap as a leading antitrust concern (as opposed to other, non-antitrust concerns voiced in the decision) to refuse clearance of the transaction. Strangely though, the CPC seems to be concerned for possible negative effects on the e-commerce market, despite the merging undertakings each having a market share in the range of 0-5% (as per the CPC decision).

4.2 An overarching media market definition - an emerging trend in Bulgaria?

In its recent media sector inquiry, when commenting on the advertising market the CPC underlined that it need not narrowly segment the latter depending on the type of media used (TV, radio, print media, etc.). According to the Commission, the market should rather be viewed as a media advertising market in its entirety. As noted in a [previous blog post](#), this constitutes a considerable departure from the previous case law of the CPC. In its PPF/Nova merger decision the CPC, this time outside the sector inquiry context, seems to follow its novel approach by referring to “*the leading positions of the acquired undertaking in the field of media services*”. Actually, the quoted formulation possibly implies an even broader market definition. While in the sector inquiry the CPC merged all types of advertising into an all-encompassing “*media advertising market*”, here the CPC goes some steps further by merging all types of media and services provided thereby (advertising, provision/distribution of media content, etc.) into a single “*field of media services*”. It remains to be seen whether such an overarching approach would also gain ground in contentious antitrust proceedings before the CPC regarding prohibited agreements or abuse of dominance.

4.3 Barriers to entry had abruptly risen for just three weeks after the media sector inquiry

In the PPF/Nova merger decision the CPC states that there are significant barriers to entering the media markets, whereas in its media sector inquiry (adopted some three weeks prior thereto) the CPC had taken just the opposite stance - that barriers to entry are low (which had also been the opinion of the various market players in their replies within the sector inquiry). It is very doubtful whether a radical market change has occurred during the three weeks following the sector inquiry. Even if the market has somehow undergone a massive Kafkaesque metamorphosis, then it was up to the CPC to demonstrate such a market change with clear economic evidence, as opposed to mere verbal allegations to that effect in the blocking decision.

4.4 All of a sudden, there appeared a risk of a dominant player emerging

In its media sector inquiry the CPC had acknowledged that there was no dominant undertaking on the media advertising market. Further, as far as online news are concerned, the CPC noted that *"[o]nline news services are being conducted in a digital environment, which on its part excludes the presence and establishment of a dominant player"*. Although the contemplated transaction would not lead to a consolidation of market shares largely altering the market landscape, in the PPF/Nova merger decision the CPC opined that the transaction would *"lead to creation or strengthening of dominance, which would prevent competition on the relevant markets"*. How such dominance would be created or strengthened by virtue of the transaction itself (which changes almost nothing in terms of market power) remains unexplained by the CPC, and virtually unknown.

No word of substance was uttered by the CPC in its blocking decisions as regard to the test applied in merger proceedings by virtue of the Bulgarian Protection of Competition Act ("PCA") itself (in force since 2008). Art. 26 PCA provides for substantive criteria of the appraisal of the transaction in question: whether or not it leads to the creation or strengthening of a dominant position, as a result of which effective competition on the relevant market would be significantly impeded.

4.5 Merger control in Bulgaria - do we have a test at all?

Both literally and in essence, this substantive test requires much more than just declarative statements regarding market shares. In making the appraisal the Commission shall take into account:

- the need to maintain and develop effective competition in view of, among others, the structure of all the markets concerned and actual or potential competition;
- the market position of the undertakings concerned and their economic and financial power;
- the alternatives available to suppliers and users;
- their access to suppliers or markets;
- supply and demand trends for the relevant goods and services;
- the interests of the intermediate and the ultimate consumers; and
- technical and economic development, provided that it is to consumers' advantage and does not form an obstacle to competition.

Nevertheless, none of the above has been genuinely analyzed and discussed in its correlation by the Bulgarian CPC in its two blocking decisions announced on the same date.

4.6 Engaging in attempted behavioral psychology instead of sound economic analysis

In its PPF/Nova merger decision the CPC has done little to no economic analysis (apart from some declaratory statements which could hardly be called "analytical" and / or "substantial"). At the same time, it has engaged in speculations regarding the possible future conduct of the merged entity without linking those behavioral prospects to the expected objective market situation following the merger (i.e. if and to what extent the merger would enable and incentivize the undertaking to behave in

a certain manner). Instead of digging deeper into the market *status quo* before and after the contemplated transaction, the CPC seems to take a deep look into the crystal ball by subjectively guessing the future conduct of the post-merger economic group by noting “*a possible significant change in the conditions and prices of Nova to the detriment of the end consumer*” and by taking into account the “*investment intentions*” (not specified in the CPC decision) of the acquiring entity as purported factors for assessing whether the transaction would create or strengthen a dominant position. The Bulgarian CPC totally omitted to explain the causality in-between. Therefore its analysis is not supported by any solid economic evidence, thus leaving its statements unsubstantiated.

4.7 Refusing merger clearance for non-antitrust concerns

Quite worryingly, in the PPF/Nova merger decision the CPC reasons its reluctance to clear the contemplated acquisition with non-antitrust concerns. Regardless of how noble or reasonable those may sound, considerations such as “*the social significance of media*” and “*the considerable number of mass communication means, which the merged group would possess*” have no role to play in the economic context of a merger assessment. The proper response to such concerns lies in possible future legislative amendments (granting sectoral regulatory bodies with the power to block a transaction for such reasons) but not in *ad hoc* refusals to clear a merger in purported pursue of some abstract social/community interest.

4.8 Phase II - further investigation or just buying some time?

A simple comparison between the CPC decision opening the Phase II investigation and the final decision prohibiting the PPF/Nova merger following such purported investigation shows that the difference between the two decisions pertains to as few as three additional paragraphs, comprising 22 lines. Those express concerns for possible post-merger market advantage due to the “*the considerable number of mass communication means, which the merged group would possess*” (where in reality the actual number of media remains largely identical to that before the merger, since the acquiring entity has almost no media activity in Bulgaria) and some abstract thoughts on barriers to entry (in stark contradiction with the statements of the CPC in its own media sector inquiry, adopted three weeks before the blocking decision).

Further, a comparison between the CPC decision refusing the PPF/Nova merger and previous CPC Phase II decisions exposes a rather disturbing picture.

In its most recent prior Phase II investigation (the Sopharma/Pharmastore merger) in 2017, the CPC requested additional information from regulators and market players and additionally analysed the position of the acquiring undertaking on product submarkets as well as the existing vertical relations in the sector. The CPC decision opening the Phase II investigation was 28 pages long and the CPC decision clearing the merger and containing the results of the Phase II investigation – 53 pages long.

In an earlier Phase II investigation (the VIP Security/G4S Security merger) in 2016-2017, the CPC underlined that the significant market shares of the merging entities necessitated the collection of “*additional evidence regarding their economic*

and financial power, the possibilities for access to the market, the degree of influence of the existing barriers to entry, etc.” and also that the Phase II investigation “*enables the survey of more clients*” as well as to obtain “*detailed knowledge of the dynamics of use of those services*”. In this decision the CPC further noted that the Phase II investigation enabled the CPC to “*obtain a more comprehensive picture of the analysed markets and the conditions under which they function, as well as to make an analysis with a greater degree of credibility as a result of the collected data and opinions*”. Strikingly, there is no trace of such an approach in the CPC decision prohibiting the PPF/Nova merger.

In a 2014-2015 Phase II investigation (the Vivacom/NURTS merger) the CPC gathered additional information from associations of advertisers and advertising agencies as well as from other TV broadcasters in order to investigate whether a market advantage would indeed arise as a result of the acquisition and whether such an advantage would distort competition on the relevant market. In contrast, there is no sign in the PPF/Nova merger decision that the CPC sent a single questionnaire to anyone – a competitor/a client/a regulator – either in the first or the second stage of the investigation. It appears that either the CPC is an omniscient authority which does not need any external cooperation or that the CPC does not want to receive such cooperation when the latter would undermine the credibility of its own desired findings.

All in all, it apparently needs to be reminded that Phase II investigations must be used for additional investigation enabling more profound analysis and not for the purpose of buying some time in expectation of external instructions (political or other) whether to clear the transaction. Anything else is nothing short of abuse of power – which under Bulgarian law is a self-standing ground for annulment of the CPC decision. Of course, it could have been worse – on the same day when the CPC prohibited the PPF/Nova merger, it also refused clearance of the Inercom/CEZ merger without even bothering to open a Phase II investigation. In the authors’ opinion, this results in the nullity of the Inercom/CEZ merger decision due to lack of temporal competence of the CPC (as the latter does not at all have the power to refuse clearance before opening a Phase II investigation).

4.9 Conditional clearance of mergers in Bulgaria remains a chimera

Notably, the PCA does provide for conditional clearance of mergers. Of course, as a matter of practicality, it is up to the notifying party to propose possible measures for safeguarding competition. There is no sign in the PPF/Nova merger decision that such measures have been proposed in the course of the proceedings. Nevertheless, the CPC is empowered to also impose such conditions/measures on its own initiative. In the authors’ opinion, this was the proportionate response by the CPC to its concerns voiced in the decision, as opposed to an outright prohibition of the transaction. In our view, dropping the merger as regards the activities of the parties on the e-commerce market (where the horizontal overlap occurs) or the divestiture of this business or other activities (such as online news) could suit both the purpose of maintaining sufficient competition on the relevant markets and the need to preserve an investor-friendly climate without disproportionate prohibitions of transactions. Unfortunately, the CPC has shown reluctance towards such flexibility, preferring rather an either/or

approach - either the transaction is unconditionally cleared, or clearance is refused. Strangely, in the recent past the CPC has been keen to demonstrate sufficient flexibility in the fuel retail cartel proceedings, where it accepted commitments for what was obviously a severe infringement of competition law (where commitments are inadmissible according to the PCA) - pricing coordination in the course of five years. In the authors' opinion this results in the nullity of the CPC decision on the fuel retail cartel due to lack of subject-matter competence of the CPC to review and accept commitments in case of severe antitrust infringements.

5. Concluding remarks

The CPC's PPF/Nova blocking merger decision, alongside the CEZ / Inercom EAD blocking merger decision create competition law precedents unknown within the Bulgarian authorities. They both radically deviate from the standard implemented by the CPC in its own decisional practice throughout previous years when it comes to analysing market effects, but also from those applied by the other national competition authorities and the European Commission (including the latter's clearance of the PPF/Telenor merger).

It is worth noting that, as a rule of thumb, blocking merger decisions are (and should be) rare in competition law practice. They must be well-reasoned in order to justify such a serious intervention of the national competition authority within the "free economic initiative".

Therefore, the primary questions that the Bulgarian competition watchdog should have asked itself cumulatively within its appraisal were: (i) whether the merger would create a dominant position or strengthen already existing dominance and (ii) whether such dominance would result in significant impediment to effective competition.

Vested by the law with the power to promote competition, the Bulgarian national competition authority must fully honor the key legal principles in the exercise of this prerogative. Otherwise it could seriously affect free economic initiative as proclaimed by Art. 1(1) PCA and may risk turning itself into "*inquisition*" instead.

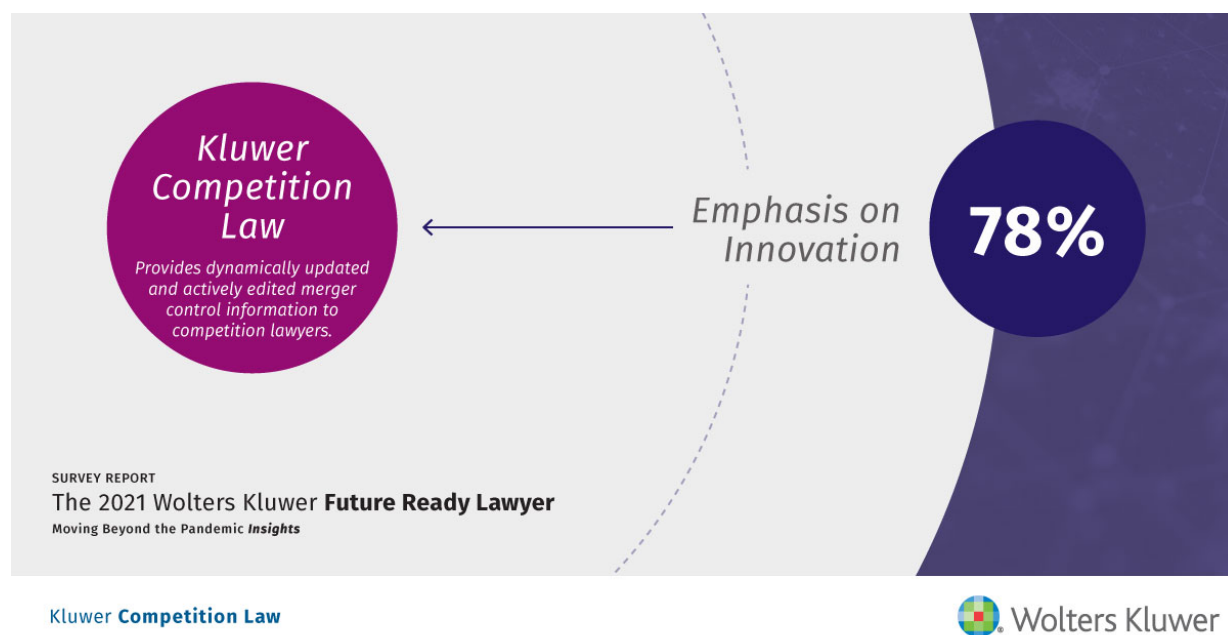
Even though both merger decisions have been widely criticised by the competition experts' society in Bulgaria, with the decisions having been appealed by the relevant parties, the ball is now in the Supreme Administrative Court of Bulgaria to decide whether such criticism is indeed justified.

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