

Kluwer Competition Law Blog

Follow-up: Despite the corporate changes within the acquirer, the Bulgarian Commission for Protection of Competition refused to consider a new merger clearance proceeding (Inercom/CEZ case)

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In July this year, the Bulgarian Commission for protection of competition (the “Bulgarian Commission”) blocked the acquisition of the vertically integrated business of CEZ Group of companies (owned by CEZ a.s., Czech Republic) in Bulgaria by Inercom EAD (Bulgaria). The refusal to approve the CEZ/Inercom transaction was discussed in a previous [post](#).

In August 2018, Inercom made significant structural changes in its business. The beneficial owner of the Inercom - a natural person - Ms. Varbakova, exited the management of the companies operating photovoltaic power plants. The exit was an attempt to address the Bulgarian Commission’s argumentation that by the fact that following the transaction, Inercom will become dominant on the market for production of electricity from photovoltaic power plants.

Both Inercom and CEZ filed appeals against the Decision of the Commission before the Bulgarian Supreme Administrative Court. The appeals were scheduled to be heard on 14th May 2019.

Probably in an attempt to avoid the huge delay in closing the transaction, the Inercom group tried to restructure in order to address the concerns of the Bulgarian Commission.

Once the corporate changes were registered with the Bulgarian Commercial Register, Inercom submitted a new notification before the Bulgarian Commission. Inercom argues that the implemented changes within the management structure of Inercom group of companies eliminate the obstacles for approval of the transaction by the Bulgarian Commission, since the deal will not lead to any horizontal or vertical effects that may negatively impact the effective competition and would not lead neither to establishment of a dominant position nor to strengthen of one.

On 18.10.2018 the Bulgarian Commission issued a ruling by which refused initiation of new merger clearance proceedings for the CEZ/Inercom deal. Despite the

implemented corporate changes within the Inercom group of companies, the Bulgarian Commission decided that the parties and the subject matter to the new merger clearance are the same as these under the blocked transaction. Having in mind this along with the submitted appeal by Inercom against the Bulgarian Commission's decision for blocking the transaction, the administrative procedure is still pending. Under Art. 27 of the Competition Protection Act, a pending administrative proceeding is ground for refusal to initiate merger clearance between the same parties for the same transaction. As an addition argument, the Bulgarian Commission uses Art. 130 of the Administrative Procedure Code, where once a case is accepted by a court, no other state authority may decide on this case.

Unfortunately, the Bulgarian Commission did not consider any question on the merits of the new filing, including whether transferring the ownership of the companies to a relative (a sister) would be considered as having any impact on the control from competition point of view.

The ruling of the Commission is subject to appeal before the Supreme Administrative Court within 7 days as from its notification to Inercom.

Conclusion

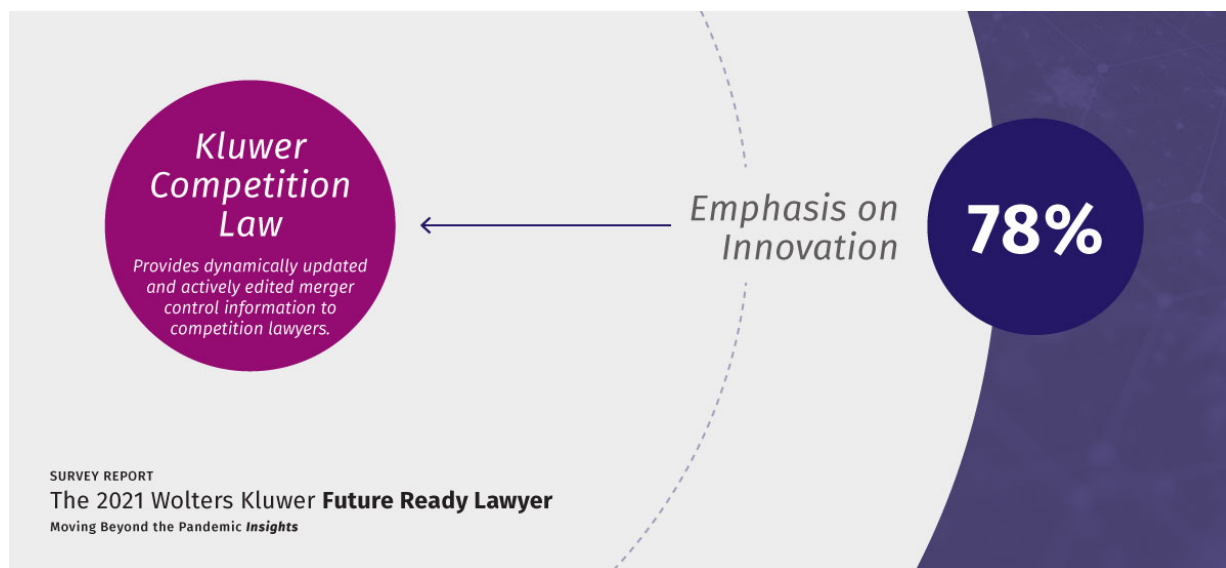
From procedural law point of view, it is interesting how the Supreme Administrative Court will react to the implemented corporate changes within the Inercom group of companies. The exit of Ms. Varbakova from the management of the companies engaged in production of renewable energy is significant for the competition law effect out of the transaction. It might be considered either as a new circumstance to be taken into consideration when deciding on the appeal of the first decision of the Bulgarian Commission or as circumstance leading to difference between the "two" transactions, i.e. the first one - with Ms. Varbakova and the production of renewable energy on board and the second one - without them.

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