

Follow-up: Bulgarian Commission for Protection of Competition blocks key transaction initially found not to constitute a concentration

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In 2016, the Bulgarian Commission for Protection of Competition ("BCPC") was notified for the intention of two of the biggest Bulgarian companies operating on the market of the manufacturing, repair and trade of defence-related products to merge. EMKO Ltd. aimed to acquire direct and sole control over Dunarit JSC by means of purchasing newly issued shares of the company's capital.

With its decision BCPC initially found that the notified transaction did not constitute a concentration by means of Art. 24, para. 1 of the Bulgarian Competition Protection Act ("BCPA") and therefore was not subject to mandatory clearance^[1]. This decision subsequently faced appeal and was subject to full instance review.

The Bulgarian Supreme Administrative Court ("SAC"), acting as final instance annulled the merger control decision due to turnover miscalculation and the case file was sent back to the BCPC with binding instructions for rendering a new decision^[2]. Details about the grounds for annulment and SAC's arguments were provided in previous [blog post](#).

On 12.04.2019 BCPC rendered new decision, which contrary to the one made three years and three-instance-review earlier, blocks the notified transaction. According to the BCPC's analysis the transaction would generate both horizontal and conglomerate effects on the market of production and trade with defence related products, which will lead to a significant advantage for the merging undertakings before their competitors and would ultimately hinder the effective competition.

BCPC's grounds for blocking the transaction could be summarised as follows:

- After the transaction EMKO Ltd. and Dunarit JSC as a united group of companies would gain leadership position on the market of production of defence-related products, having aggregate market share of 30-40%, as the transaction will result in merging two of the five biggest producers of defence-related products on the territory of the Republic of Bulgaria. This amount is relatively close to the 40% market share, presumed by the Methodology^[3] to create a dominant position or to strengthen already existing dominance and may create an opportunity to prevent or distort effective competition.
- EMKO Ltd. and Dunarit JSC are already found to have dominant position in the production of some defence-related products as both companies are sole producers of certain products on the territory of the Republic of Bulgaria. As a result, the merger will create for the merging entities a product portfolio, where part of the products has no competitor-producer on the Bulgarian market.
- A horizontal overlap in the activity of EMKO Ltd. and Dunarit JSC in the production of certain defence-related products will be established after the merger, as EMKO Ltd. will gain control over a direct competitor. This will lead to eliminating the mutual competitive pressure and the competitive prices of the overlapping defence-related products produced, as well as to significant reduction of the possible alternatives for other traders.
- Existence of high entry barriers of administrative, legal and structural nature, which may prevent potential market entrants to compete.

Additionally, in terms of trade/realization of defence-related products, BCPC finds that:

- Given the specific characteristics of the products, combined with the established significant market power of the merging undertakings, it may justifiably be implied the incentive and the ability of the merging companies to restrict the access of local (Bulgarian) or foreign traders and producers to the relevant market, including the Bulgarian defence-related market.

BCPC established that the trade with the produced defence-related products takes place predominantly (95%) outside of the territory of the Republic of Bulgaria and even outside of the territory of the European Union, competitors of the merging undertakings are not only local (Bulgarian) entities, but also foreign based companies. As a result, the concentration will have conglomerate effects on the market of trade with defence-related products.

- After the concentration, the expansion of the portfolio of products produced may stimulate the merging undertakings to increase prices and change the terms of cooperative supply with competitors (consumers), the access of the latter to important products for their own production activities that have so far been received by another local manufacturer (Dunarit JSC, for instance) may also be limited.

Interesting fact to mention is that EMKO Ltd. has proposed measures to safeguard competition after the concentration including refraining from interfere with the competitors, who have the technical ability to produce the defence related products, for which the merging entities have dominance, maintaining independent pricing policy by the merging entities and refraining from package deals, etc. This proposal, however, was deemed by the BCPC to be filed after the expiration of the statutory deadline and therefore was not even considered by the competition authority.

Historically regarded, this decision is the third transaction that has been blocked by the BCPC during the last year. It is subject to appeal before the Administrative Court - Sofia by the parties and by any third party having legally interested within 14 days as of the date it is communicated to the parties and for third interested parties - as of its publication.

^[1] Bulgarian Commission for Protection of Competition Decision No.588/11.08.2016;

^[2] Bulgarian Supreme Administrative Court Decision No.800/21.01.2019;

^[3] Methodology for conducting a survey and determining the market position of the undertakings on the relevant market adopted with Bulgarian Commission for Protection of Competition Decision No.393/21.04.2009;