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Legal Interest of Third Parties to Appeal Merger Clearances in Bulgaria

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Bulgarian administrative law sets the bar high for legal interest of third parties not being an addressee of an administrative act to appeal the latter. A notorious example for the lofty threshold is the case regarding the revocation of the license of Corporate Commercial Bank. The majority shareholder in the bank appealed the revocation of the license. The Bulgarian Supreme Administrative Court (“SAC”) however ruled that the shareholders in the bank did not have legal interest to appeal because they were, according to the court, only indirectly affected by the license revocation (*SAC Ruling ? 363/13 January 2015*). Notably, the ruling was accompanied by an elaborate dissenting opinion by one of the three judges comprising the court panel.

Against the above background, it is no wonder that appeals by third parties of merger clearances granted by the Bulgarian Commission on Protection of Competition (“CPC”) are anything but a straight-forward exercise. The present blog post aims at providing an overview of the pertinent case law which comprises rulings on opposite ends of the spectrum – from strict and formalistic to broad and liberal notions of legal interest in the context of appeals against merger clearances.

1. Competitors of the undertakings concerned

A category of third parties whose legal interest to appeal merger clearances has enjoyed consistent recognition in Bulgarian case law are the competitors of the undertakings concerned. The SAC has admitted such appeals by a competitor of the parties to the transaction (*SAC Judgment ? 5327/18 May 2006*), including a competitor of the acquiring undertaking, whereas the latter was yet to enter the Bulgarian market via the acquisition at issue (*SAC Judgment ? 11012/1 August 2011*) and a company active at one of the levels within the relevant market (*SAC Judgment ? 3495/12 March 2019*).

Importantly though, the SAC has denied legal interest to an association of competitors of the undertakings concerned, emphasizing that only the competitors themselves (as opposed to a union thereof) would have legal interest to appeal the merger clearance (*SAC Ruling ? 6776/31 May 2017*).

2. Entity controlling the target undertaking

In a rather peculiar case, the SAC acknowledged legal interest to appeal a merger clearance of a company which controlled the target undertaking, whereas the appellant was a number of levels above the target company in the corporate chain (*SAC Ruling dated 1 July 2016 in adm. case ? 1141/2016*). Importantly, the change of control in this case was not the result of a voluntary disposal by the controlling entity, but the outcome of enforcement of security (pledge over shares in the target company).

3. Consumers – clients of the acquiring undertaking

On two occasions the SAC has taken diametrically opposed stances regarding the legal interest of a consumer – client of the acquiring undertaking to appeal the merger clearance.

In the first case the SAC ruled that a client of the acquiring undertaking, who alleged possible prejudice to his consumer interests as a result of the acquisition, did have legal interest to appeal the merger clearance (*SAC Judgment ? 8271/10 June 2011*).

Five years later, the very same consumer appealed a merger clearance for an acquisition of another company by the same acquiring undertaking. In that case however the SAC ruled that the appellant's capacity as a client did not automatically grant him the right to appeal the merger clearance, especially considering that the allegations for prejudice of consumer interests were only general and not precisely specified (*SAC Ruling ? 6886/9 June 2016*).

4. Assignor of receivables payable by the target undertaking

In its *Judgment ? 10365/3 August 2018* the SAC ruled that the assignor of receivables payable by the target undertaking had legal interest to appeal the merger clearance. The appellant argued that in its capacity of assignor it would be liable towards the assignee considering the resulting change in the ability of the target undertaking to pay its obligations. The SAC acknowledged the assignor's legal interest to appeal and underlined that legal interest in the merger context had its own specifics reflected in the case law of the Court of Justice of the European Union (CJEU). The cassation court panel, reviewing the aforementioned first-instance judgment, confirmed this finding and further emphasized that “*legal interest in cases of mergers shall be perceived broadly and based on the CJEU case law*” (*SAC Judgment ? 800/21 January 2019*).

5. Unsuccessful bidder in the tender for the target company

The clearance of the most recent Bulgarian bank merger was appealed by a bidder whose offer to buy the target company was not accepted by the seller[1]. In its appeal the bidder argued *inter alia* that the CPC must have prohibited the transaction because the latter formed part of an unlawful state aid.

By its *Ruling ? 706/22 May 2019* the Sofia District Administrative Court /SDAC/ (which as of 1 January 2019 reviews as first court instance the decisions and rulings of the CPC) found that the appellant did not have legal interest to appeal the merger clearance because it could not be

negatively affected by the merger clearance itself, having not been a party to the merger control proceedings and given that, according to the SDAC, the allegations in the appeal concerned the bidding process and not the legality of the clearance. The SDAC further noted that state aid concerns are irrelevant in merger control proceedings under Bulgarian law.

The bidder appealed the above SDAC Ruling before the SAC which annulled it and remanded the case to the SDAC for review of the appeal on its merits. In its *Ruling ? 10135/2 July 2019* the SAC underlined that whether or not the activity of the appellant was threatened by the cleared merger was a matter on the merits of the case, and not an issue of admissibility/legal interest.

6. Conclusion

Based on the case law reviewed herein, the only category of third parties enjoying sufficient certainty in terms of legal interest to appeal a merger clearance seem to be the competitors of the undertakings concerned. For all other categories of third parties the question of legal interest remains widely open, with the bar being set higher or lower on a case-by-case basis – much to the prejudice of legal certainty and judicial consistency.

[1] The author has been and is currently representing the appellant in this case

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