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‘Barriers to exit’ in Bulgarian Merger Control

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By 19 July 2018 the Bulgarian competition authority (***“the Bulgarian NCA”/ “CPC”***) had never blocked a transaction in a merger control procedure.[1] Since then, CPC has prohibited a total of 4 concentrations[2], including proposed acquisitions of the Bulgarian subsidiaries of CEZ A.S. (***“CEZ BG group”***) by various investors twice.[3] The last prohibition occurred on 24 October 2019 and serves as a suitable occasion to comment on the recent trends in Bulgarian merger control which could make leaving the Bulgarian market a truly difficult task.

1. **Background**

The first of the two successful bidders for the CEZ businesses in Bulgaria was Inercom Bulgaria, which was surprisingly prohibited to acquire the CEZ BG group without even getting into a Phase II investigation and without being given the opportunity to propose commitments.[4] The decision (***“the Inercom – CEZ decision/merger”***) was formally justified with a minor horizontal overlapping of activities between the undertakings concerned on the market of production of solar energy. Nobody in fact understood what the actual combined market share of the parties would be following the merger because this data was completely deleted from the public version of the decision rather than shown in a range[5]. For the first time in its merger practice CPC justified its merger decision with reasons related to the potential impact of a notified transaction on national security. Amongst the arguments for the prohibition CPC specifically noted the existing vertical integration of the target group, its financial resources and solid experience in the energy sector – all being factors existing prior to and regardless of the contemplated change of control.

After a couple of months and while challenging this prohibition at court[6], Inercom Bulgaria made a second attempt to obtain a green light for the proposed acquisition, but this time after having entirely disposed with its solar energy business. Despite of the material change in the circumstances (the buyer ceased to participate on the allegedly affected market), CPC refused to review the second notification with the argument that the ‘same transaction’ was already prohibited and the case still pending at court.

On 12 April 2019 CEZ announced it had terminated the Share Purchase Agreement with Inercom Bulgaria and would continue negotiations with two other bidders.[7]

On 3 October 2019, more than a month after being approached by the newly selected bidder –

Eurohold[8], CPC officially started the review of the notification on the proposed acquisition of the CEZ BG group. This time it took one week for CPC to formally open a Phase II investigation and two weeks afterwards to issue its prohibition decision (***"the Eurohold – CEZ decision/merger"***), not even respecting the statutory 30-day period for submission of an opinion on the competition concerns and proposal of commitments.

2. **The Bulgarian merger control test: dominance + SIEC and possible efficiency defense**

Importantly, under the Bulgarian law CPC shall clear the concentration if the latter does not lead to creation or strengthening of a dominant position, which would significantly impede effective competition on the relevant market (Art. 26, para 1 of the Bulgarian Protection of Competition Act /***"PCA"***/). Moreover, even if such dominance is created or enforced, the concentration could be still cleared for efficiency reasons, i.e. if it aims modernization of the respective commercial activity, improvement of the market structures, better satisfaction of the consumers' interests and overall, the positive effect prevails over the negative impact on the competition (Art.26, para 2 of PCA).

Thus, a proper assessment of a notified merger requires a three-step analysis:

1. first, whether dominance is created or strengthened as a result of the transaction,
2. second, whether the creation or strengthening of such dominance would significantly impede the effective competition on a relevant market, and
3. third, whether the transaction would lead to benefits that outweigh the negative impact on competition.

Consequently, in order to prohibit a merger, CPC needs to prove not only significant impediment of effective competition, but that the merger would change the market structure by creating or strengthening a dominant position on a specific market. In this regard, the rules on merger control in Bulgaria still sticks to the old EU two-limbed dominance test.[9]

3. **Phase II on a fast track**

The formal reason for CPC to open in-depth investigation in the Eurohold – CEZ merger was concerns about alleged 'conglomerate effects' leading to a significant competitive advantage for the merged undertaking at the retail supply of electricity market at freely negotiated price (**FNP energy market**). It was found that companies from Eurohold's economic group are active on the insurance market and, in particular, provided insurance – guarantees. A specific type of the latter was the insurance – guarantee, which the traders of electricity used as an alternative to the bank guarantee for the purpose of their participation at the Bulgarian Energy Exchange. CEZ BG group, on its part, included two companies trading with electricity at the FNP energy market, which potentially could benefit from such type of insurance. CPC disregarded the fact that Eurohold's companies had never offered insurance – guarantees to traders of electricity before the transaction because providing such guarantees fell within the scope of their licenses and consequently they were capable to provide such guarantees. The CPC concluded that following the merger Eurohold would be able to leverage its strong position on the insurance market to strengthen the position of CEZ BG group on the FNP energy market.

Pursuant to Article 83, para 2 of the Bulgarian Protection of Competition Act (PCA), any interested party is entitled to present information or opinion regarding the effect of the concentration on competition in the relevant market within a period of 30 days. CPC, however, issued its decision prior to expiry of the said period and failed to provide its preliminary conclusions regarding the effect of the concentration on the relevant market (as required by Art. 85(2)(2) PCA), as well as to provide Eurohold with no less than 14 days to submit its opinion thereon (as required by Art. 85(3) PCA) – a number of procedural defects, which gave a reason for one of the CPC members to sign with dissenting opinion. These procedural omissions by CPC build upon a recent trend against due process in Bulgarian merger control in the form of prohibiting transactions even without opening the mandatory phase of in-depth investigation (as the case with Inercom – CEZ merger was) or without a genuine further investigation within this second phase (as happened in the PPF – Nova TV merger[10]). Given the nature of the competition concerns, it was not unexpected that CPC asked the energy and insurance regulators for opinions on the impact of the proposed transaction at the relevant markets, but it was quite unusual to see in a merger decision that CPC obtained such an opinion from the National Security Agency (which obviously had investigated in detail the acquiring group). In practice, CPC limited its in-depth investigation to collection of opinions from various public authorities and non-profit organizations, but notably no one of the parties' competitors, clients or suppliers was formally approached for comments. Such an approach not only resulted in the procedural defects stated above, but it inevitably bears the risk of insufficient analysis, as will be demonstrated below.

4. **Market definition – zoom in and zoom out**

The prohibition decision regarding the Eurohold – CEZ merger exhibits a controversial approach by CPC towards market definition. On the one hand, despite formally defining separate product markets within the energy sector, CPC did not analyse potential dominance on each of those markets, but preferred to refer abstractly to *"leading positions"* and *"the electric energy sector"*. When it turned to the markets wherein the buyer is active however, CPC virtually dissected the "insurance sector" and focused on a very specific type of insurance, i.e. the so – called "insurance-guarantee" intended for the traders with electricity. Such a double standard within one and the same decision manifests a serious lack of predictability even regarding crucial starting points such as market definition and market segmentation.

This trend follows from the Inercom-CEZ decision, where CPC deviated from its well-established practice and, contrary to the approach of the EU Commission in *BEH Electricity*[11], defined the relevant market as narrow as possible, namely production and wholesale supply of *solar* energy only.

5. **CEZ Trade – riding the dominance/non-dominance roller coaster**

In the Eurohold – CEZ decision CPC focuses predominantly on the trader of electricity CEZ Trade, repeatedly emphasizing its leading market position on the FNP energy market. Notably, in contentious antitrust proceeding in the end of 2017 the Bulgarian NCA found the same company not being dominant.[12] It remains an enigma how exactly CEZ Trade has suddenly emerged as a dominant market player provided that there was no horizontal overlap in this merger – the CPC

prohibition decision is silent on the matter. Similarly, in the PPF – Nova TV merger prohibition[13] CPC found that the transaction would create or strengthen dominance, despite stating in its then very recent media sector inquiry that there was no dominant undertaking on the media advertising market.

6. **Game of Shares**

The purported economic analysis by CPC of the Eurohold – CEZ merger virtually goes down to calculation and comparison of market shares[14]. It is settled case law however that market shares are only a starting point in the assessment whether an undertaking is/could become dominant (this being the first step of the two-fold merger control test under Bulgarian law). As to the second limb of the test – the SIEC requirement – the CPC limits itself to general comments regarding financial resources, without using any counterfactuals to identify the practically probable market effect of the notified merger. Such an approach is hardly desirable, unless one wishes to replace economic analysis with an abstract game of axiomatic statements of a general nature.

At the same time, if CPC wishes to put so much attention to market shares, it should have cleared the Inercom – CEZ merger unconditionally given that the combined market share at the so narrowly defined market was still in the range of 0-5 %.

7. **Who fears conglomerate mergers?**

Out of the four merger prohibitions in CPC decisional practice to date, two relate to conglomerate effects, whereas the Eurohold – CEZ merger is the only one prohibited solely based on conglomerate effects in terms of economic grounds (as will be shown below, the CPC tends to also rely on non-economic/non-antitrust grounds to justify merger prohibitions). Notably, in the Emco – Dunarit merger[15] there was a combination of horizontal and conglomerate effects. Interestingly, in the context of previous merger clearances the CPC has expressly acknowledged that conglomerate mergers which do not lead to horizontal or vertical effects do not result in any alteration of the market structure and thus necessitate no further analysis.[16]

On a separate note, the theory of harm underlying the prohibition in Eurohold – CEZ decision itself is rather questionable. CPC alleged to be concerned about potential '*conglomerate effects'* but in fact the insurance companies and the traders of electricity were clearly in the position of a supplier and a client, when it comes to the problematic product – insurance-guarantee (which leads to a pure vertical concentration and requires different analysis). Insurance and supply of electricity are not neighboring markets, nor the concerns expressed by CPC related to potential tying or bundling of the products at these two markets[17]. The inability of CPC to define properly its theory of harm is another obstacle before the companies in exercising their right of defense.

8. **The role of 'national security' in merger control**

In its Inercom – CEZ decision CPC expressly stated that *"the present concentration is of strategic importance for the country, whereas the potential effects thererof would directly affect national*

security". During the Phase II investigation of the Eurohold – CEZ merger the Bulgarian NCA seemed to maintain this sentiment as it requested an opinion from the State Agency for National Security (along a number of state bodies). Such non-antitrust concerns have also been expressed in the PPF – Nova decision, where reference had been made to *"the social significance of media"* and *"the considerable number of mass communication means, which the merged group would possess"*. Important as they may be, such abstract notions arguably should have no role to play in the economic context of a merger assessment.

9. **Are there sufficient commitments?**

Although Eurohold proposed commitments not to develop and sell insurance products, directed towards electricity traders in Bulgaria (which was the alleged competition concern of the CPC), the Bulgarian NCA rejected such commitments outright by merely classifying them as "insufficient" without stating any reasons thereon. Admittedly, CPC does enjoy certain discretion when reviewing proposed commitments, but it is still somewhat strange to not engage in any attempt to improve the allegedly insufficient commitments by way of their amendment/revision.

Considering the sudden rise in importance of conglomerate concerns, the only certain commitment would be for the acquiring undertaking to dispose of any and all of its businesses so as to strike out any actual or imaginary conglomerate effect of the transaction – as absurd as it sounds.

10. **Takeaways**

Considering the above-described recent developments in Bulgarian merger control, the following key takeaways emerge:

- No considerable reliance is to be associated with procedural rights in Bulgarian merger proceedings;
- Market definition become more and more unpredictable to the extent that no great expectations may be posed upon previous CPC decisional practice;
- Elaborate EC-style economic analysis is not to be reasonably expected, while non-economic factors such as *'impact on national security'* tend to become relevant;
- A company found non-dominant in one procedural context (e.g. abuse of dominance proceedings) could quickly turn out to be dominant in another (e.g. merger control proceedings);
- Conglomerate concerns are on the rise, so care should be taken when planning and structuring a transaction (and potentially restructuring an economic group) prior to filing a merger notification;
- Deficiencies in defining a proper theory of harm could prejudice the companies' right to defense and to propose appropriate commitments
- The financial strength could turn into a significant disadvantage if one wishes to buy a business in Bulgaria;
- Once admitted to enter the Bulgarian market, an investor may face major difficulties in overcoming CPC-driven barriers to exit.

The views expressed herein are personal opinions of the authors and do not reflect the views of

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[1]
http://competitionlawblog.kluwercompetitionlaw.com/2018/07/23/bulgarian-commission-protection-competition-blocks-two-transactions/

[2] In comparison, for 15 years enforcement practice under the EU Merger Regulation, the European Commission has prohibited 11 mergers.

[3] All comments are made on the public versions of the decisions, as published on the official web-site of CPC.

[4] CPC Decision ? 805 dated 19 July 2018, currently under appeal at the Supreme Administrative Court

[5] According to interviews in the press the combined market share was about 2.5 %.

https://www.investor.bg/energetika/472/a/advokat-reshenieto-na-kzk-da-spre-sdelkata-za-chez-strada-ot-pylna-lipsa-na-motiv-265409/

[6] Kremena Yaneva – Ivanova represents Inercom Bulgaria in the said proceedings

[7]
https://seenews.com/news/cez-cancels-inercom-deal-due-to-unlawful-obstructions-by-bulgaria-650770

[8] https://www.cez.cz/en/investors/inside-information/1852.html

[9] Bellamy & Child, European Community Law of Competition, Sixth edition, para 8.195, p.747

[1 0]
http://competitionlawblog.kluwercompetitionlaw.com/2018/09/20/ppf-mergers-bulgaria-tale-double-standard/

[11] EU Commission’s antitrust decision in case No. AT.39767- BEH ELECTRICITY

[12] CPC Decision ? 1475 dated 14 December 2017

[13] CPC Decision ? 804 dated 19 July 2018

[14] The proper calculation of these shares itself became a subject of discussion and attracted the criticism of various commentators.

[15] CPC Decision ? 469 dated 11 April 2019

[16] CPC Decision ? 191 dated 12 February.2014

[17] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para 93

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