GETTING THE DEAL THROUGH

GLOBAL COMPETITION REVIEW

The international journal of competition policy and regulation

GETTING THE DEAL THROUGH – MERGER CONTROL 2005

Bulgaria
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1. What is the relevant legislation and who enforces it?

The statutory act, which sets out the legal framework for merger control, is the Law on the Protection of Competition (Official Gazette No. 52 of 1998, as subsequently amended) (the "Law"). The primary responsibility for the enforcement of the Law rests with the Commission on the Protection of Competition (the Commission), an independent state body consisting of seven members elected by parliament with a term of office of five years. The Commission has decision-making powers with regard to the investigation, grant of approval or blocking of concentrations. Further information about the Commission and its activities can be found on its website: www.cpc.bg.

The regulatory framework is supplemented by relevant provisions of the Association Agreement between Bulgaria and the European Communities (the Association Agreement), the Rules for Implementation of the Competition Provisions of the Association Agreement and secondary legislation issued by the Commission.

2. What kinds of mergers are caught?

The Law applies to the following types of concentrations:

(i) merger of two or more independent companies;

(ii) acquisition of control over a company by person(s) who already control one or more other companies; and

(iii) creation of a joint venture company.

The Law does not consider as 'concentration':

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(i) portfolio investments made by banks, non-banking financial institutions and insurance companies, provided that those institutions do not exercise their voting rights in order to influence the competitive behaviour of the company and only with a view of preparing the disposal of their equity interest within one year of the date of acquisition;

(ii) the exercise of control by a trustee or a liquidator of a company; and

(iii) the exercise of control by a financial holding company with the sole purpose of maintaining the full value of the investment in the company.

3. Are joint ventures caught?

The Law treats as a concentration the establishment of a joint venture, which carries on commercial activity on a lasting basis and functions as an economically independent agent. The Law does not distinguish between concentrative and cooperative joint ventures.

4. Is there a definition of 'control' and are minority and other interests less than control caught?

Control, within the meaning of the Law, may be acquired by way of obtaining legal rights, entering into contracts, or in any other way which either separately or jointly, and having in mind considerations of fact or law, provides for the exercise of decisive influence over an undertaking, in particular by:

(i) acquisition of title of, or right to use, all or part of the assets of an undertaking;

(ii) acquisition of rights or contracts which confer a decisive influence with regard to the composition, exercise of voting rights and the decisions of the organs of an undertaking.

The Commission has further specified that a shareholder would exercise control where such shareholder:

(i) owns more than one-half of the share capital or assets of an undertaking; or

(ii) has the right to exercise more than one-half of the votes of an undertaking; or

(iii) has the powers to appoint more than one-half of the members of the management bodies of an undertaking; or

(iv) has the powers to appoint the legal representative of an undertaking; or

(v) has the right to otherwise manage an undertaking.

The Commission has explicitly stated that a minority shareholder can exercise control, provided that such shareholder's equity interest entitles it to exercise decisive influence over the competitive behaviour of an undertaking. In order to establish whether the decisive influence test is met, the Commission would look at considerations of fact and law, such as rights provided by the charter or other corporate documents, shareholders' and/or other agreements. In a recent decision (Decision 141/19.05.2004) the Commission applied the test provided by the EC Commission Notice on the Concept of Concentration in order to determine which veto rights of a minority shareholder should be considered to confer joint control over an undertaking and which are normally accorded to minority shareholders in order to protect their financial interests and do not relate to strategic decisions on the business policy of the joint venture.

5. What are the jurisdictional thresholds?

The Law sets out a single jurisdictional threshold. A concentration must be notified prior to its completion if the aggregate turnover of the participants in the concentration on the Bulgarian product or services market for the year preceding the concentration exceeds BGN 15,000,000 (about Euro 7,669,400).

An amendment of the Law in force as of February 2003 provided that the threshold takes into account the turnover on the relevant Bulgarian product or services market. However, in its most recent practice the Commission has taken the view that for the purpose of turnover calculation it would take into account the whole turnover of the undertakings concerned on the Bulgarian market. Under this approach the authority does not distinguish between

turnover realised on the affected markets and turnover realised on other vertically situated or conglomerate markets.

When an undertaking concerned belongs to a group of companies, the Bulgarian turnover of the group as a whole must be taken into account. In this respect the Commission applies the criteria provided by Article 5 (4) of Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings.

Turnover figures are calculated on the basis of net sales of products and provision of services derived during the financial year preceding the concentration. When the concentration involves acquisition of control over part of one or more enterprises, regardless of whether or not such part constitutes an independent legal entity, only the turnover of the part, which is subject to the transaction, shall be taken into account.

In concentration of banks and non-banking financial institutions, turnover figures shall be calculated on the basis of the incomes according to the financial statements for the last financial year after deducting all taxes. The turnover of insurance companies is calculated on the basis of the insurance premiums, less all taxes, statutory contributions and fees.

6. Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory, provided that the jurisdictional threshold has been met. There are no specific exceptions from filing.

7. Are foreign-to-foreign mergers caught?

The Law applies to all enterprises engaging in business activities in Bulgaria, or outside its territory, if such enterprises explicitly or tacitly impede, restrain, limit or are in a position to impede, restrain, or limit competition within the territory of Bulgaria. Foreign-to-foreign mergers are therefore caught, provided that they meet the jurisdictional threshold discussed in 5 above.

The Commission does not require local corporate presence in order to find basis for its jurisdiction with regard to a foreign-to-foreign merger. It will

suffice if the merging entities exercise commercial activity in Bulgaria through direct sales, or through agents or independent distributors.

8. What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Law establishes a pre-merger notification system. It is accepted that a pre-merger notification must be filed prior to completion. Where the concentration takes place on the basis of a publicly announced tender or bid procedure, the notification must be filed within seven days upon publication of the results of such offer or bid.

Failure to notify the Commission, when notification is required, may lead to the imposition of pecuniary penalty.The penalties provided by the Law range from BGN 5,000 (about Euro 2,560) up to BGN 300,000 (about Euro 153,390). Repeated violations are subject to penalties ranging between BGN 100,000 (about Euro 51,130) and BGN 500,000 (about Euro 255,650). According to a Methodology on Determination of Pecuniary Sanctions under the Law on Protection of Competition, adopted by the Commission, the particular penalty should not exceed 10% of the turnover of the undertaking concerned. In addition, the Commission has the power to order adequate measures for the restitution of the pre-concentration status. This may include an order for divestment of the combined capital, shares or assets, as well as an order for termination of joint control.

9. Who is responsible for filing and are filing fees required?

In instances of acquisition of control the obligation to notify the Commission rests with the entity acquiring control. In mergers and in cases involving establishment of joint ventures, the filing must be made by all the entities concerned.

The Tariff of the Fees Charged by the Commission for the Protection of Competition Under the Law on the Protection of Competition establishes a two-tier filing fee system. There is a flat filing fee of BGN 2,000 (about Euro 1,030), payable at the time of filing. In the event that the concentration is approved, an additional fee is payable. Such fee is equal to the amount equivalent to 0.1% of the combined turnover of the undertakings concerned on

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the Bulgarian market but not to exceed BGN 60,000 (about Euro 30,770)_. No additional fee is due where the Commission finds that the notified transaction does not constitute a concentration within the meaning of the Law, or where the Commission blocks the concentration.

10. What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The participants to a concentration are under an obligation to suspend implementation until receipt of clearance by the Commission. The suspension obligation applies to both first and second stage investigations. The Law does not explicitly address the question whether in the context of a foreign-to-foreign concentration, foreign closing prior to Bulgarian merger control clearance would constitute a breach of the Law. In its practice so far the Commission has accepted undertakings by parties that early closing outside Bulgaria is made subject to local suspension, until Bulgarian merger control approval.

11. What are the issues and possible sanctions involved in closing before clearance?

See 10 above. Parties that implement prior to clearance run the risk that the Commission may subsequently block the concentration, or attach conditions or obligations to the approval. Failure of the parties to comply with such a decision of the Commission carries a penalty ranging between BGN 100,000 (about Euro 51,130) and BGN 500,000 (about Euro 255,650). Apart from any monetary sanctions, closing prior to merger control clearance may result in an order by the Commission for the restitution of the pre-merger status, including restitution by way of separation of the combined capital, shares or assets or termination of joint control.

12 Are there any special merger control rules applicable to public takeover bids?

The Law sets out special rules applicable to public takeover bids only with respect to the filing deadline. As already discussed in 8 above, where the concentration takes place on the basis of a publicly announced tender or bid

procedure, the notification must be filed within seven days upon publication of the results of such offer or bid. It is not sufficiently clear whether the 7 days term should also apply to public takeover bids in the context of public offering of securities.

13 What is involved in and how detailed is the preparation of a filing?

The Law requires that a pre-merger notification contain information about:

(i) the participants in the concentration;

(ii) the legal and economic structure of the concentration;

(iii) the relevant markets;

(iv) the companies over which the participants in the concentration exercise control;

(v) joint market share and joint turnover of the participants in the concentration;

(vi) principal competitors, suppliers and customers.

The Commission has developed guidelines, which must be followed in the process of preparation of a notification. In addition to the submission of a notification containing all necessary information listed above, the Commission requires the submission of a number of supporting documents, including documents relating to the personal/corporate status of the entities concerned, balance sheets and financial reports from the last two years preceding the concentration, business plans and other documents pertaining to the contemplated transaction. Where the documents are in a language other than Bulgarian, such documents have to be supplied with a certified Bulgarian translation. Official documents issued by non-Bulgarian authorities need to be legalised in accordance with the applicable rules.

The Commission will not register a notification until it is satisfied that all relevant supporting documents have been submitted.

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14. What is the timetable for clearance and can it be speeded up?

Upon registration of the notification, the Commission has a one-month period in which to undertake and complete an initial review of the proposed concentration. Following the completion of the investigation and based on its findings the Commission may:

(i) block the concentration;

(ii) decide that the proposed concentration does not fall within the scope of the merger control rules;

(iii) approve the concentration; or

(iv) take a decision to initiate a full-blown (i.e. second-stage) investigation into the proposed concentration.

The Commission usually uses the whole period allowed by Law in order to complete the initial review. As a practical matter, the Commission often hands down its decisions after the expiry of the one-month period. Pursuant to the Law for Limitation of the Administrative Regulation and the Administrative Control over Commercial Activities where a permission of an administrative body is required for the completion of a single transaction and no decision has been issued in this respect within the time prescribed by law, it is presumed, unless otherwise provided by law, that such permission has been granted. However, it is not sufficiently clear whether this principle also applies to decisions of the Commission.

Where the proposed concentration raises serious concerns that it will create or strengthen a dominant position, and that the effective competition on the relevant market(s) will be impeded, restricted or otherwise limited, the Commission may decide to initiate a full (second-stage) investigation into the transaction. A decision to initiate a second-stage investigation must be published in the Official Gazette. The Commission will then have three months to complete the investigation and make a final decision.

15. What are the typical steps and different phases of the investigation?

The primary sources of information used by the Commission in establishing the parameters of the relevant markets are state agencies such as the National Statistics Institute, customs and administrative authorities, public registries, etc. The Commission would also contact and collect information from third parties such as customers, suppliers, competitors, distributors, professional and trade associations.

The Commission has broad investigative powers to conduct site visits and to order the submission of documents, agreements and information.

Upon completion of the review process the Commission holds a public hearing, where parties may once again submit evidence or other relevant information. The Commission will typically issue its decision a few days after the announcement of the decision.

16. What is the substantive test for clearance?

The Commission will approve a concentration if it does not lead to the establishment or strengthening of a dominant position, where such dominant position would materially limit or impede competition in the relevant market. The Law establishes a rebuttable presumption of the existence of a dominant position where the market share in a relevant market exceeds 35 per cent.

The Commission, however, has the discretion to approve a concentration which leads to the establishment or strengthening of a dominant position if it is expected to achieve positive results, such as: (i) modernisation of a business, a branch of the economy, or the national economy as a whole; (ii) structural improvement of the market; (iii) attraction of investment; (iv) new job openings; (v) better satisfaction of the interests of consumers. Furthermore, the Commission may approve a concentration if the benefits of such a concentration outweigh the negative impact associated with the establishment or strengthening of a dominant position.

17. Can a merger be challenged on oligopoly grounds (including coordinated effects)?

Although the Commission has not yet challenged a concentration on oligopoly grounds, it may do so where appropriate.

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18 Is there a special substantive test for joint ventures?

No, the Law has not established and the Commission has not developed a special test for joint ventures.

19. Apart from high market shares, what other concerns may the authorities have (e.g. vertical foreclosure, portfolio effects, elimination of close substitutes)?

Apart from high market shares, the Commission may have other concerns including vertical foreclosure, portfolio effects and elimination of close substitutes when assessing the impact of the concentration. In its practice, the Commission has also considered factors such as the lack of competitors on the relevant market, the existence of serious entry barriers, the market position of the parties upon the completion of the concentration and the potential for future changes of that position, the economic and financial strength of the parties, possibilities for cross-subsidy, etc.

20. To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

The Law provides an opportunity and the Commission does occasionally consider broader policy considerations, in particular when it weighs the positive effects of a concentration vis-à-vis the negative impact associated with the establishment or strengthening of a dominant position. (See 16 above).

21. To what extent does the authority take into account economic efficiencies in the review process?

The Commission considers all possible effects (either positive or negative) when assessing a concentration. It may approve a concentration if the benefits (as a whole) of such a concentration outweigh the negative impact associated with the establishment or strengthening of a dominant position. In a number of cases, the Commission has taken into account the economic efficiencies of the

proposed concentration and has bases its decisions on such considerations despite the relatively high market shares of the parties.

22. Is it possible to remedy competition issues, for example by giving divestment undertakings?

The Law provides that the Commission may attach to its clearance decision conditions or obligations, provided that such remedies are directly related to the implementation of the concentration, and that they are strictly aimed at guaranteeing the preservation of competition in the market. The Commission has discretion with regard to the negotiation and determination of the character and parameters of the remedies. Although examples of the imposition of structural remedies are rare, in its recent practice the Commission has approved transactions subject to divestment undertakings with respect to specific assets. There are already a number of examples where the Commission has applied behavioural remedies, including *inter alia* undertakings that the parties concerned would: (i) preserve certain lines of supply over a specific period of time upon implementation of the concentration, (ii) ensure the arms length access of competitors or customers to an essential facility, (iii) ensure that clients will have continuing access to services which are not tied in service packages, or (iv) coordinate with the Commission future price increases undertaken by a dominant entity.

23. What are the basic conditions applicable to a divestment or other remedy?

The Commission, has not developed special rules concerning the conditions and timing of the application of remedies. Whenever remedies are imposed, the Commission retains continuous jurisdiction and monitors their implementation.

24. What solutions (such as a local 'hold separate arrangement') might be acceptable to remedy local issues in a foreign-to-foreign merger?

So far the Commission has neither blocked nor ordered remedial action in foreign-to-foreign mergers. However, it may be expected that, where appropriate, the Commission may craft measures to remedy local issues in

foreign-to-foreign merger. Divestiture or keep-separate undertaking could possibly be applied where the participants have a local corporate presence and the transaction entails a local transfer of shares or assets. In cases where the participants do not have a local corporate presence, the Commission may seek to remedy the negative effects associated with post-concentration integration of distribution and/or supply networks.

25. In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

We are not aware of cases in which the Commission has developed a test for assessment of ancillary restrictions. When the issue arises, it is most likely that the Commission would follow the criteria established in the EC Commission Notice on Restrictions Directly Related and Necessary to Concentrations.

26. Are customers and competitors involved in the investigation and what rights do complainants have?

Customers and competitors may petition the Commission where a concentration has been implemented in breach of merger regulations. As noted in 15 above, the Commission will often approach competitors and/or customers in order to get their views, including with regard to the effects which implementation of a concentration will have on competition. As a general matter the Law does not prevent or exclude customers and competitors from getting involved in the investigation and in the public hearings held by the Commission. The particular mode and procedural framework of their involvement, however, may vary and will be determined by the Commission.

27. What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Law does not provide a procedure for publicising either the fact of a filing or the initiation of investigation by the Commission. However, upon registration of a notification, the Commission publishes a note on its website and invites interested third parties, if any, to submit their comments and views with respect to the proposed concentration.

The Law explicitly provides that: (i) decisions that a concentration does not fall within the scope of merger control rules; (ii) decisions approving the concentration without initiating second stage investigation; and (iii) decisions for initiation of second stage investigation shall be published in the Official Gazette. Although not explicitly provided for by the Law, also subject to publication in the Official Gazette are decisions to block a concentration and decisions approving a concentration after the end of a second stage investigation. All decisions of the Commission become publicly available through electronic databases and compilations published by the Commission itself. The Commission also keeps a public register of its decisions.

The Law ensures broad publicity to instances of second stage investigation. As noted above, decisions for the initiation of second stage investigations are subject to publication in the Official Gazette.

28. What powers do authorities have to prohibit or otherwise interfere with a transaction?

In addition to its authority to block concentrations and/or to attach conditions and obligations, including with respect to concentrations that have already been implemented, the Commission has authority to monitor on a continuous basis the compliance with its decisions. The enforcement powers of the Commission are coupled with authority to impose pecuniary penalties and fines, which may range from BGN 5,000 (about Euro 2,560) up to BGN 500,000 (about Euro 255,650). The Commission is also vested with the authority to order adequate measures for the restitution of the pre-concentration status in case of the parties' failure to notify the Commission when this is mandatory. This may include an order for divestment of the combined capital, shares or assets, as well as order for termination of joint control. In addition, the Commission may nullify previously granted authorisation of a concentration if its decision was based on false or incomplete information provided by the parties, as well as when the parties breach the Commission's decision.

Further, the Commission has the power to conduct site visits and to order the submission of documents, agreements and information.

The Commission has authority to recommend abrogation of acts of the administration, including secondary legislation, which are incompatible with

the Law. Where necessary, the Commission may petition judicial authorities and request that such acts be set aside.

29 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

In 2004 the Commission adopted 25 decisions related to concentrations (increase from 24 in 2003). Five of these decisions concerned foreign-to-foreign mergers, and in one of them the undertakings concerned had no subsidiaries or branches in Bulgaria. In its practice regarding foreign-to-foreign mergers, so far, the Commission has never: (i) prohibited such a merger; (ii) imposed conditions or (iii) initiated a second stage investigation.

The Commission has not initiated second stage investigations in 2004. The Commission did not block any of the investigated concentrations in 2004 but imposed conditions on 3 of them (structural conditions in 1 case and behavioural conditions in 2 cases). Since the beginning of 2005 (until 20 July) the Commission imposed structural conditions in 2 decisions, as well as behavioural conditions in one of them.

30. Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Commission has developed close working relations with the European Commission and a number of national competition authorities. On a couple of occasions involving foreign-to-foreign mergers, the Commission has requested information about the status of proceedings from other national competition authorities.

31. What are the opportunities for appeal or judicial review?

All merger control decisions of the Commission are subject to judicial review. The court of jurisdiction is the Supreme Administrative Court. The right to appeal expires 14 days upon the delivery of the decision of the Commission. However, (i) decisions that a concentration does not fall within the scope of merger control rules, and (ii) decisions approving the concentration without

initiation of a second stage investigation may be appealed within 14 days as of their publication in the Official Gazette.

As a general matter, the right to lodge appeals against decisions of the Commission is restricted to persons who have taken part in the proceeding before the Commission. However, (i) decisions that a certain transaction does not constitute a concentration, and (ii) decisions approving a concentration without initiating a second stage investigation could also be appealed by any other interested party. The Law provides a broad definition of the term 'interested party', which includes any person, undertaking or association whose interests may potentially be affected by a violation of the Law.

32. Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no special rules regarding merger control, which apply to foreign investment. However, as noted above, the Commission may view the fact that certain transaction attracts foreign investment as a positive result to be weighed against the potential negative impact associated with the establishment or strengthening of a dominant position.

In some sectors there are special regulations which would apply to mergers and acquisitions in addition to the merger control rules of the Law. The Law on the Banks and the Insurance Law, for example, require approval by the respective regulatory authority for acquisitions of interests exceeding certain statutory levels in banks and insurance companies. The Law on Public Offering of Securities requires the disclosure of interests in publicly traded companies. In other sectors, such as telecommunications and energy, where operators act under licence, the regulatory authority which issues the licence often reserves to itself the right to give prior approval to any transfer of shares of such licensed operators. Similarly, as a matter of practice, state and municipal authorities which privatise public assets impose an obligation that the subsequent transfer of shares of privatised enterprises executed within a certain period of time may take place only with the prior approval of the respective privatisation authority.

33. Are there current proposals to change the legislation?

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We are not aware of any such proposals.

Updates & Trends

In October 2004 the Tariff of the Fees Charged by the Commission for the Protection of Competition Under the Law on the Protection of Competition was amended and the flat fee payable at the time of filing changed from BGN 500 (about Euro 269) to BGN 2,000 (about Euro 1,030). The fee payable upon clearance of a concentration changed from BGN 500 (about Euro 269) to an amount equivalent to 0.1% of the combined turnover of the undertakings concerned on the Bulgarian market but not to exceed BGN 60,000 (about Euro 30,770).

During 2004 and the first half of 2005 the Commission more often than before sought to remedy competition concerns by way of imposing conditions, both structural and behavioral, to its clearance decisions.

Since 2004 the Commission applies stricter standards with regard to the comprehensiveness of the information contained in merger filings. The Commission now refuses the registration of notifications, where the amount of information which they contain is deemed by the Commission insufficient for completion of the review process within the statutory one month period.

During the first half of 2005 the Commission continued to rely strongly on the practice of the EC Commission for guidance in cases where Bulgarian law does not provide detailed regulation. Particular examples include *inter alia* direct references in the Commission's decisions to the EC Commission Notice on the Concept of Undertakings Concerned and the EC Commission Notice on the Concept of Concentration.

QUICK REFERENCE TABLE

1. **Voluntary or mandatory system?**

   Mandatory system.

2. **Notification trigger/ filing deadline.**

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Notification is mandatory if the combined turnover on the Bulgarian market for the year preceding the concentration exceeds 15 million Bulgarian Levs (BGN) (€7,669,103).

Notification must be filed prior to closing. Where the concentration is effected through execution of an agreement on the basis of publicly announced tender offer or bid, the notification must be filed within 7 days as of publication of the results of the tender offer or the bid.

3. Clearance deadlines (Stage 1/ Stage 2).

Initial review must be completed within one (1) month of registration of the notification. Stage two investigations must be completed within three (3) months of initiation.

4. Substantive test of clearance.

Whether the concentration leads to the establishment or strengthening of dominant position, which would materially limit or impede competition on the relevant market.

5. Penalties.

Filing Violations:

A fine between BGN 5,000 and BGN 300,000 (€2,556 and €153,382) for failure to notify, for late filing or for implementation prior to receipt of clearance.

In addition, the Commission may order restitution of the pre-merger status, including separation of the combined capital, shares or assets or termination of the joint control.

Misleading or Incorrect Information:

The Commission may impose penalties to individuals who obstruct the work of the Commission by either not cooperating with the Commission, or providing false information. The penalties range from BGN 500 up to BGN 10,000 (€255 up to €5,112). The Commission may nullify previously granted authorisation of a concentration if its decision was based on false or incomplete information.

Failure to Comply with a Decision of the Commission:

A fine between BGN 100,000 and BGN 500,000 (€51,127 and € 255,636)

6. **Remarks.**

Special rules for calculation of turnover for banks and insurance companies.