CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2024

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CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2024

ALBANIA

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1. What are the main competition-related pieces of legislation in Albania?

Law no. 9121, enacted on July 28, 2003, On the protection of competition, as amended (Competition Law) supplemented by guidelines and regulations issued by the Albanian Competition Authority (ACA).

Competition Law is broadly aligned with the provisions of the acquis, as below:

- Articles 101 and 102 of Treaty on the Functioning of the European Union.
- Council Regulation (EC) No 1/2003 of December 16, 2002, On the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
- Council Regulation (EC) No 139/2004 of January 20, 2004, On the control of concentrations between undertakings.
- Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

2. Have there been any notable recent (last 24 months) updates of Albania competition legislation?

In November 2023, the Albanian Competition Authority presented a draft law that does not introduce entirely new legislation but rather enhances a significant part of the provisions of the current law in the institutional, procedural, and substantive parts.

Additionally, it incorporates new provisions that align with the acquis communautaire, thereby facilitating Albania's compliance with its obligations under the Stabilization and Association Agreement and advancing its European integration process.

The objectives and intended effects of the draft law are:

- Harmonization with the EU acquis and the implementation of EU standards in the field of competition protection, adapting to the challenges of the time and new concepts in the field of competition protection (i.e., partially approximation with (i) Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings, (ii) Directive (EU) 2016/943 of the European Parliament and of the Council of June 8, 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use, and disclosure, (iii) Council Regulation (EC) No 1/2003 of December 16, 2002, On the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (iv) The glossary of terms used in EU competition policy: Antitrust and concentration control;
- Enhancing the authority of the ACA to ensure free and effective competition in the market, therefore, maximizing the effectiveness of competition protection;
- Guaranteeing better treatment for the preservation of confidentiality and trade secrets related to enterprises that follow procedures based on the legal framework of competition protection;
- Incorporation of a comprehensive and current legal framework, including "agreements in offers," during public procurement procedures "killer acquisitions," and "invitation for prohibited agreements" as the ACA competencies; reflecting the best experiences of EU countries.

3. What are the main concerns of the national competition authority in terms of agreements between undertakings? How is the sanctioning record of the authority?

The Albanian Competition Authority dedicates its primary efforts to vigilantly monitoring, conducting thorough investigations, and performing in-depth analyses within critical sectors that have a substantial impact on the well-being of Albanian consumers. These markets include the mobile phones market, building materials market (bricks, iron, cement, and concrete), procurement market, audiovisual media, as well as the milk production market and its by-products. Furthermore, the ACA assigns significant importance to the implementation of specific assessments of the conduct exhibited by companies that maintain a dominant market position by means of concession agreements.

In 2022, the ACA imposed fines amounting to a total of ALL 224,225,947 for significant breaches of Competition Law. This is the most stringent financial penalty imposed in the past five years.

Decisions rendered by the ACA are available for free on its official website.

4. Which competition law requirements should companies consider when entering into agreements concerning their activities in Albania?

When engaging in operations in Albania, companies/undertakings must abide by several competition regulations to ensure compliance with the Competition Law, which establishes the standards to safeguard fair and efficient competition in the

market by outlining guidelines for the behavior of the undertakings.

The Competition Law provides constraints with regard to (a) prohibited agreements (b) abuse of the dominant position and (c) concentrations of undertakings.

(a) Prohibited agreements

Agreements are all types of accords reached between undertakings, decisions/recommendations of groupings of undertakings, as well as coordinated practices between undertakings operating at the same level (i.e., horizontal agreements) or at different levels agreements (i.e., vertical agreements) regardless of their form, written or not, or their coercive force.

Competition Law prohibits any agreement which has as its object or effect the prevention, restriction, or distortion of competition, and in particular those which:

- directly or indirectly fix purchase or selling prices, or any other trading conditions;
- limit or control production, markets, technical development, or investments;
- divide markets or sources of supply;
- apply dissimilar conditions to equivalent transactions to other trading parties, thereby placing them at a competitive disadvantage;
- agreements are conditional on the acceptance by the other contracting parties of extra obligations that, by their nature or commercial usage, are unrelated to the object of the agreement.

The prohibition stated above may be waived in the case of agreements that contribute to improving the production or distribution of products, or to promoting technological or economic progress. In such cases, customers or consumers shall receive a sufficient portion of the benefits, and the agreement (i) should not impose restrictions on the activities of participating undertakings that are not necessary to achieve the aforementioned objectives; and (ii) should not significantly restrict competition regarding the products or services that are the subject of these agreements.

(b) Abuse of the dominant position

A dominant position is defined by the Competition Law as the economic power held by one or more undertakings, which enables them to hinder effective competition in the market, making them capable of acting, in terms of supply or demand, independently of other market participants such as competitors, customers, or consumers.

Any abuse by one or more undertakings of a dominant position in the market is prohibited. Such abuse may, in particular, consist in:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets, or technical development;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- prerequisites for entering into contracts with third parties, such that the latter accept additional that is not pertinent to the subject matter of the contracts at hand, either by definition or in accordance with commercial customs.

(c) Concentrations of undertakings

A concentration shall be deemed to arise where a change of control on a lasting basis results from:

- the merger of two or more independent undertakings or parts of undertakings;
- the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by the purchase of shares or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings; or
- direct or indirect control over one or more undertakings or part of the latter.

Control shall be constituted by rights, contracts, or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, particularly by (i) ownership or the right to use all or part of the assets of an undertaking and (ii) rights or contracts which confer decisive influence on the composition, voting, or decisions of the organs of an undertaking.

The merger control applies to mergers when all of the following turnover thresholds are met:

- combined worldwide turnover of all parties exceeds ALL 7 billion and domestic turnover of at least one party exceeds ALL 200 million OR; or
- combined domestic turnover of all parties exceeds ALL 400 million and domestic turnover of at least one party exceeds ALL 200 million.

5. Does a leniency policy apply in Albania?

According to the Competition Law and Regulation on Fines and Leniency, the may grant full or partial leniency, if an undertaking assists in the identification and prohibition of the prohibited agreement as well as in the identification of the

responsible parties through the provision of evidence and data not previously obtained by the authority, that enable the latter to (i) initiate an investigation regarding a prohibited agreement or (ii) discover a violation related to a prohibited agreement.

Full leniency may be granted to the first company that provides the ACA information in relation to the identification and prevention of a cartel, the identification of the responsible persons, and submits new evidence for which the ACA was not aware, enabling the latter to initiate an investigation in relation to a prohibited agreement and to identify such violation of Competition Law.

In order to benefit from the full leniency a company should provide to the ACA:

- A copy of the prohibited agreement, or a description of such agreement including the subject; the products; the relevant market; the duration; the signing date; the location; and any other detail that may help the ACA;
- the names and addresses of the companies/parties in the agreement; and
- the name and address of the premises of the business and, if necessary, the names of the persons involved in such prohibited agreement.

Furthermore, the company should:

- be available to answer the questions of the ACA;
- not destroy, falsify, or alter the relevant information in relation to the prohibited agreements; and
- provide any other information related to the prohibited agreement.

Companies that fail to satisfy the criteria for receiving full leniency may be granted partial leniency in exchange for submitting evidence to the ACA regarding the alleged infringement which represents significant added value to the evidence already in the possession of the ACA.

The level of leniency may be (i) for the first company: 30-50% of the fine (ii) for the second company: 20-30% of the fine; and (iii) for the following companies: up to 20% of the fine.

To be eligible for the leniency program, companies must consistently comply with the Authority during the inquiry and refrain from engaging in prohibited agreements once they start submitting information to the ACA. No leniency is accorded when information is submitted after the investigation has been closed.

6. How is unilateral conduct treated under Albanian competition rules?

A dominant position is not prohibited per se but rather the abuse of such a dominant position. The Competition Law recognizes the existence of single (where one undertaking is involved) and collective (where several more undertakings are involved) dominant positions.

As in Section 4, a dominant position is defined as the economic power held by one or more undertakings, which enables them to hinder effective competition in the market, making them capable of acting, in terms of supply or demand, independently of other market participants such as competitors, customers, or consumers.

Such abuse may, in particular, consist in:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets, or technical development;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- prerequisites for entering into contracts with third parties, such that the latter accept additional that is not pertinent to the subject matter of the contracts at hand, either by definition or in accordance with commercial customs.

When assessing the dominant position of one or more undertakings, various factors are considered:

- the relevant market shares of the undertaking or undertakings in question and those of other competitors;
- barriers to entry in the relevant market;
- potential competition;
- the economic and financial capacity of the undertakings;
- economic dependence of suppliers and buyers;
- the countervailing power of buyers;
- the development of the distribution network of the undertaking and the opportunities to use the product resources;
- economic links with other undertakings;
- other relevant market characteristics such as product homogeneity, market transparency, the undertaking's cost and size uniformity, demand stability, or free production capacity.

The Guideline on the Dominant Position issued by the ACA provides some of the forms of the abuse of the dominant price squeezing position inter alia predatory pricing, exclusive agreements, market restrictions, and price squeezing.

The Guideline on the Dominant Position, issued by ACA, delineates various ways in which dominant positions can be abused. These include predatory pricing, whereby one or more undertakings set prices below the cost of production to drive

competitors out of the market, ensuring high future profits; exclusive agreements in which the contractor is obligated to sell solely the products or services provided by the provider; market restriction exists whereby the supplier of products or services mandates that the vendor offer those items or services exclusively within a specified market; and price squeezing, where a dominant enterprise that is vertically integrated imposes unjustifiable prices on suppliers with whom it can conduct business through a subsidiary.

7. Are there any recent local abuse cases of relevance?

A record-breaking 99 decisions were rendered by the Competition Commission in 2022, the most in the seventeen-year history of the ACA. Also, during this year, 15 monitorings were carried out in sensitive markets with a direct impact on the well-being of the consumer, and 11 investigative procedures were carried out, namely: in the wholesale market of diesel fuel and gasoline; in the wholesale market of international call termination; in the market of drugs and medical devices; in the import, production and wholesale market of vegetable oil; in the import and wholesale market of chemical fertilizers; in the market where non-bank financial entities operate; in the Tirana International Airport parking facilities management; in the market of service provision of measuring instruments through fuel and liquefied gas distribution instruments; in the cement production/import and wholesale market; in the concrete production market; in the market of production, transmission and digital sale of audio and video products to cable operators (repeaters of programs supported by cable network).

Notwithstanding the fact that the ACA prioritizes education over fine imposition for the subjects under investigation, it is worth mentioning that at the conclusion of the investigative processes, the competition authority levied four fines totaling ALL 224,225,947 for serious violations of Competition Law. This represents the most severe financial sanction imposed over the last five years.

8. What are the consequences of a competition law infringement?

Competition law infringements are subject to fines by the ACA. Hence, failure to notify the merger is subject to a fine of up to 1% of the total domestic turnover of the preceding financial year of each of the undertakings subject to the notification requirement. In fixing the amount of the fine, both the gravity and the duration of the infringement should be considered.

The ACA may impose on the notifying undertakings fines not exceeding 1% of the total turnover of the preceding financial year, in case they refuse to provide information, or the said information is incomplete or misleading.

Legal and contractual transactions undertaken before clearance is obtained shall be of no effect.

Finalization of a merger without clearance from the ACA is an infringement and therefore is subject to a fine of up to 10% of the total domestic turnover of the preceding financial year if the merger restricts competition.

Further, according to the provisions of Competition Law, natural persons (i.e., company directors), can be liable for failure to notify or for implementing a transaction without approval. In such cases, ACA may impose fines up to ALL 5 million.

9. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Albanian market?

Please refer to Section 4 (c) – Concentrations of undertakings

Further, the Competition Law applies to "foreign to foreign" transactions carried out from undertakings whose activity has an impact/influence in the Albanian market. However, the concept of "impact/influence" has not been further defined by the ACA's regulatory framework. In practice, although the undertakings participating in the merger may not have any local physical presence (branch, subsidiary, or assets), but are present in Albania indirectly (imports/sales through distributorship agreements), the authority has considered the merger subject to its jurisdiction, provided that the notification thresholds are met.

10. What is the normal merger review period?

The Competition Law outlines the process of evaluating mergers from the ACA as consisting of two phases Phase I – preliminary proceedings and Phase II – in-depth proceedings.

Phase I: Two months beginning on a working day after ACA confirms receipt of the notification, or, if the notification is incomplete, on the day after a completed notification is received (subject to a 2-week extension).

In the case of a simplified procedure (short-form decision declaring a concentration compatible with the internal market pursuant to the simplified procedure), Phase I is 25 days from the date of written confirmation that the file is complete.

Phase II: Three months from the commencement of the proceeding to approve (with or without conditions) or prohibit a transaction. Where conditions are imposed, this period is extended for up to two months.

Submission of remedies: If the parties are required to submit

remedies during Phase I/Phase II the following deadlines shall be applied:

- During Phase I, remedies should be presented to the ACA within 20 calendar days after the receipt of the notification. In the case of the submission of remedies during Phase I, the timeframe for adopting a decision from ACA is extended by two weeks.
- When proposed during Phase II, the remedies should be submitted within 65 calendar days from the day on which proceedings were initiated. Where the deadlines for the final decision have been extended pursuant to the Merger Regulation, also the deadline for remedies is automatically extended by the same number of days. The ACA may accept remedies/commitments that are submitted for the first time after the expiry of this period only in exceptional cases.
- Where the parties submit their remedies/commitments within less than 55 calendar days after the initiation of proceedings, the ACA takes its final decision within 90 calendar days of the date of initiation of proceedings. If the parties submit their remedies/commitments on the 55th calendar day or afterward (even after the 65th calendar day, if those remedies/commitments should be acceptable due to exceptional circumstances) the period for the ACA to take a final decision is increased by 105 working days.
- Where the parties submit remedies/commitments within less than 55 calendar days but submit a modified version on day 55 or thereafter, the period to take a final decision will also be extended to 105 calendar days. If the parties believe that more time is needed for the investigation of the competition concerns and for the respective design of appropriate commitments, they may suggest to the Authority to extend the final deadline. Such a request should be made before the end of the 65-calendar day period.

11. Are there any fees applicable where transactions are subject to local competition review?

Yes, fees range from ALL 15,000, which is the filing fee, and ALL 500,000, which is the clearance fee.

12. Is there any possibility for companies to obtain State Aid in Albania?

Yes, companies can obtain state aid in Albania pursuant to the rules and procedures outlined by Law no. 9374, dated April 21, 2005 On State Aid, as amended (Law on State Aid). The Law on State Aid largely reflects Articles 107 and 108 Treaty on the Functioning of the European Union. The implementing legislation is partially aligned with the EU acquis only in some areas, e.g., the General Block Exemption Regulation. The Law on State Aid incorporates the regulations of the Stabilization and Association Agreement into the domestic legislation.

The purpose of the Law on State Aid is to establish guidelines and procedures for overseeing state aid control to promote the economic and social progress of the nation as well as aims to fulfil Albania's commitments under international agreements that include provisions on state aid. Law on State Aid prohibits any aid granted from state resources, in any form, which, directly or indirectly, distorts or threatens to distort competition by favoring one or more certain undertakings or the production of certain products.

The Law on State Aid establishes the State Aid Commission (SAC) as the decision-making body that evaluates and authorizes state aid schemes and individual aid and may recover unlawful aid.

Forms of state aid mainly include:

- grants and subsidies;
- exemption, reduction, and differentiation of taxes;
- remission of arrears and fines:
- debt forgiveness or covering losses;
- guarantees on loans or the granting of loans with low interest rates;
- reduction of social security obligations;
- reduction of the price of offered products, sale of state property below market price, or purchase of products at a higher price than market price;
- increasing the state capital in enterprises or changing its value under circumstances that are not acceptable to a private investor operating under normal economic conditions.

Activities conducted in the Republic of Albania pertaining to production and services are governed by the Law on State Aid, excluding agriculture and fisheries.

13. What were the major changes brought by the COVID-19 pandemic? Have any of them stuck and how likely is it for these changes to continue to do so in the foreseeable future?

Albania did not undergo any substantial changes in competition legislation due to the COVID-19 pandemic. ■

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1. What are the main competition-related pieces of legislation in Croatia?

The main legislative source of competition law in Croatia is the Croatian Competition Act (Official gazette nos. 79/2009, 80/2013, 41/2021, 155/2023 – the Competition Act), in addition to the directly applicable rules of EU competition law. Competition Act sets out general rules on anti-competitive agreements (closely following the wording of Article 101 of the Treaty on the Functioning of the European Union – TFEU), abuse of dominance (closely following the wording of Article 102 TFEU) and merger control, as well as the rules governing the status and powers of the Croatian Competition Agency (CCA), procedural rules governing investigations and proceedings conducted by the CCA and the conditions for imposition of fines for violations of Croatian and EU competition laws (including the immunity from fines within a leniency program).

There is also a number of implementing regulations governing specific types of agreements, block exemptions, and merger control procedures before the CCA, as well as calculation of fines and leniency, including (i) Horizontal Agreements Block Exemption Regulation (Official gazette no. 72/2011); (ii) Vertical Agreements Block Exemption Regulation (Official gazette no. 37/2011); (iii) Technology Transfer Block Exemption Regulation (Official gazette no. 9/2011); (iv) Transport Sector Block Exemption Regulation (Official gazette no. 78/2011); (v) Motor Vehicle Block Exemption Regulation (Official gazette no. 37/2011); (vi) Regulation on Agreements of Minor Importance (Official gazette no. 9/2011); (vii) Relevant Market Regulation (Official gazette no. 9/2011); (viii) Regulation on the criteria for setting fines (Official gazette nos. 129/2010, 23/2015); and (ix) Regulation on the Criteria for Granting Immunity from Fines (Official gazette nos. 129/2010, 96/2017 – the Leniency Regulation).

Finally, Article 74 of the Competition Act expressly provides that when applying the Competition Act, and in particular in case of any ambiguities or lacunae in its interpretation, CCA is required to apply the criteria developed in EU competition law (including the criteria developed in case law of the Court of Justice of the European Union, as well as soft law documents such as notices and guidelines adopted by the European Commission).

2. Have there been any notable recent (last 24 months) updates of Croatian competition legislation?

There have been no notable updates of Croatian competition legislation within the last 24 months.

3. What are the main concerns of the national competition authority in terms of agreements between undertakings? How is the sanctioning record of the authority?

Based on information published by the CCA, the CCA is primarily focused on investigating and sanctioning horizontal agreements (cartels), which are generally considered by the CCA as causing the highest financial damage to consumers, the market, and society as a whole. In particular, the CCA has announced its intention to further investigate and sanction bid-rigging cartels (the most serious type of cartels), and for this purpose, the CCA has obtained access to the Croatian electronic registry of public tenders. In this context, the CCA has also initiated the development of a digital tool that could help the CCA discover bid rigging cartels in public tender procedures.

Furthermore, the CCA announced that it intends to continue monitoring the developments in the digital markets after having conducted several sector inquiries which warranted further procedural steps against undertakings active in these markets.

In the past two years, the CCA adopted only two decisions on the imposition of fines against undertakings participating in prohibited agreements, while the CCA ended one infringement proceeding with a commitment decision. In one of the above-mentioned infringement proceedings, the CCA imposed a record-breaking EUR 281,836.88 fine for resale price maintenance on a Croatian bike supplier.

The fine imposed by the CCA's decision against the local bike supplier is the highest fine imposed to date in a vertical agreements case in Croatia. Based on evidence collected during the proceedings (including in a dawn raid), the CCA established that the supplier agreed to fix the minimum resale prices of bicycles with 15 Croatian distributors during the period from September 2013 to June 2018. The CCA's infringement decision defines the relevant product and geographic market as a Croatian market for the sale of Cube bicycles. The CCA established in the infringement decision that distributors' tacit acceptance of the implementation of the supplier's anti-competitive unilateral business policy aimed at resale price maintenance constituted an agreement within the meaning of Article 8 of the Croatian Competition Act. The supplier proposed commitments to address CCA's competition concerns during the proceedings. However, since the CCA found that the investigated practice constituted a hardcore restriction of competition, the CCA rejected the supplier's proposal as not sufficient to eliminate the negative effects and restore effective competition in the market. The CCA decided to conduct the infringement proceedings and impose the fine solely against the supplier as the organizer of the controversial anti-compet-

itive business policy. On the other hand, the CCA decided not to conduct proceedings against individual distributors parties to the agreement, particularly taking into account the supplier's market position and market power, as well as the fact that the supplier was evaluating its distributors on an annual basis and was able to decide on further (termination of) supply of the relevant bicycles to the distributors. With regard to the level of fine, when determining the basic amount of the fine (which, depending on the gravity of the infringement, may typically be determined in the amount of up to 30% of the value of sales in the relevant market during the last year of the infringement or the last year for which there are complete financial statements), the CCA used 5% as the appropriate percentage of the value of sales.

On the other hand, the fines imposed by the CCA to date in horizontal cases were typically larger than fines for prohibited vertical agreements. The highest fine imposed by the CCA on a single undertaking in cartel proceedings amounted to EUR 861,901.91 on a member of a betting shop cartel (while the total fine imposed on all cartel members amounted to EUR 1,287,411.24, noting that this decision was subsequently annulled by the Croatian High Administrative Court for failure to adduce sufficient evidence on the existence of the cartel.

4. Which competition law requirements should companies consider when entering into agreements concerning their activities in Croatia?

Croatian competition laws generally follow EU competition law, and CCA regularly applies principles and criteria developed in the jurisprudence of the Court of Justice of the EU as well as in decisions and soft law documents adopted by the European Commission.

The Competition Act prohibits all agreements between two or more independent undertakings, decisions of associations of undertakings and concerted practices which have as their object or effect the restriction of competition, and in particular those which: (1) directly or indirectly fix purchase or selling prices or any other trading conditions; (2) limit or control production, markets, technical development, or investment; (3) share markets or sources of supply; (4) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (5) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. Under the Competition Act, an agreement refers to contracts, specific contractual clauses, oral or written agreements between undertakings and concerted practices resulting from such agreements, decisions of undertakings or associations of undertakings, general terms of business, and other documents which are or may form a part of an agreement.

The rules on restrictive agreements apply to both horizontal agreements (i.e., agreements between undertakings active at the same level of supply and distribution) and vertical agreements (i.e., agreements between undertakings active at different levels of supply and distribution). The Competition Act requires that an agreement is made between two or more independent undertakings, and in this context, agency agreements in which the agent does not act as an independent economic operator will typically fall outside the scope of Article 8(1) of the Competition Act (closely following the wording of Article 101(1) of the TFEU).

When entering into vertical agreements concerning their activities in Croatia, companies should be aware that the Croatian vertical block exemption rules have not (yet) been aligned with Regulation (EU) 2022/720 (EU Vertical Block Exemption Regulation) and that there are specific differences between EU and Croatian competition law in this area. The Croatian Vertical Agreements Block Exemption Regulation establishes a safe harbor for vertical agreements provided that the market shares of both the supplier and buyer parties to the agreement on the relevant markets do not exceed 30% and that the vertical agreement does not include any of the hardcore restrictions of competition within the meaning of Article 9 of the regulation. The fact that a vertical agreement does not meet the criteria for block exemption does not mean that the agreement concerned falls within the scope of Article 8(1) of the Competition Act, or that it does not fulfill the conditions for individual exemption under Article 8(3) of the Competition Act. In such cases, the agreement must be individually assessed and companies are required to perform their own self-assessment of agreements. If the agreement does not restrict competition within the meaning of Article 8(1) of the Competition Act, or if a restrictive agreement meets the conditions for individual exemption under Article 8(3) of the Competition Act, such an agreement would be valid. On the other hand, an agreement restrictive of competition within the meaning of Article 8(1) of the Competition Act that does not meet the conditions for individual exemption under Article 8(3) of the Competition Act would constitute a competition law infringement and would be null and void (please see the below section regarding consequences of competition law infringements).

5. Does a leniency policy apply in Croatia?

Yes. The leniency policy is governed by the rules of the Competition Act and Regulation on the Criteria for Immunity from Administrative Fines (Official gazette nos. 129/2010, 96/2017 – the Leniency Regulation) and is available only in cartel cases.

Under the Competition Act, the CCA is authorized to grant

full immunity from a fine to a cartel member who is first to report the cartel to the CCA and deliver information, facts, and evidence enabling the CCA to initiate proceedings and conduct a dawn raid or to establish the infringement. Full immunity from fines is not available to cartel ringleaders. Partial immunity from fines is available for cartel members who do not satisfy conditions for full immunity but provide to the CCA additional evidence with significant added value. The CCA is typically required to grant a reduction of fine in the following amounts for undertakings that are eligible for partial immunity: (a) a reduction between 30% and 50% for the undertaking that is first to provide evidence with significant added value to the CCA; (b) a reduction between 20% and 30% for the undertaking that is second to provide evidence with significant added value; and (c) a reduction of up to 20% for any subsequent undertaking eligible for reduction of fine.

In addition, regardless of whether the undertaking applies for full or partial immunity, the leniency applicant must (i) provide continuous, full and prompt cooperation to the CCA from the moment of filing the leniency application; (ii) cease any participation in the cartel, unless the CCA considers that such participation is necessary for successful conduct of a dawn raid; and (iii) refrain from destroying, tampering, or concealing evidence of the cartel, as well as from disclosing its leniency application to third parties.

The immunity from fines that may be granted by the CCA within a leniency program does not affect the criminal liability of the person or entity responsible for a competition law violation that is also a criminal offense (such as bid rigging).

6. How is unilateral conduct treated under Croatian competition rules?

In Croatia, unilateral conduct is typically assessed in the context of the rules governing abuse of dominance which closely follow the wording of Article 102 of the TFEU. Article 13 of the Competition Act prohibits any abuse of dominant position by one or more undertakings on the relevant market, in particular consisting in: (1) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (2) limiting production, markets or technical development to the prejudice of consumers; (3) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (4) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The Competition Act provides for a definition of a dominant position. Under Article 12 of the Competition Act, it is presumed that an undertaking holds a dominant position if due to its market power such undertaking is able to behave on the relevant market to an appreciable extent independently of its actual or potential competitors, consumers, buyers, or suppliers, in particular if: (a) there are no significant competitors on the relevant market, and/or (b) the undertaking has significant market power in relation to its actual or potential competitors, particularly taking into account its market share and the time during which such market share is held; financial power; advantage in access to the market or sources of supply; association with other undertakings; barriers to entry or expansion; the undertaking's ability to impose market conditions; and the undertaking's ability to exclude competitors from the market. Furthermore, the Competition Act contains a rebuttable presumption that an undertaking whose market share in the relevant market exceeds 40% may be in a dominant position. This being said, holding or acquiring a dominant position is not unlawful in itself, but only conduct that constitutes an abuse of a dominant position would infringe Croatian competition laws.

If the CCA's investigation results in a finding that one or more undertaking(s) have abused their dominant position, the CCA is authorized to adopt an infringement decision that would contain (i) a finding to the effect that the conduct in question is a violation of Article 13 of the Competition Act and/or Article 102 of the TFEU, (ii) an order for the undertaking(s) concerned to bring the infringement to an end, (iii) order to the undertaking(s) concerned to take specific action to eliminate the harmful effects of the infringement (including both behavioral and structural measures that are proportionate to the infringement and necessary to bring the infringement to an end), and (iv) an order to pay the fine.

7. Are there any recent local abuse cases of relevance?

There are no relevant recent local cases related to abuse of a dominant position.

8. What are the consequences of a competition law infringement?

Consequences of competition law infringements include (i) fines; (ii) preliminary measures; (iii) structural or behavioral remedies imposed by CCA; and (iv) nullity of the restrictive agreements.

Specifically, if the CCA finds that the undertaking(s) have either entered into a prohibited agreement, or abused their dominant position, or have implemented a prohibited concentration, or failed to comply with the CCA's decision on measures to restore effective competition or preliminary measures, the CCA is authorized to impose a fine in the amount of up

to 10% of the relevant undertaking's total annual worldwide turnover for the last financial year for which there are completed financial statements.

The fine is calculated based on a two-step methodology which typically includes (i) determination of the basic amount of fine and (ii) adjustments to the basic amount. The basic amount is determined by CCA against an appropriate percentage (up to 30%) of the undertaking's turnover on the relevant market (value of sales) on which CCA established infringement, exclusive of VAT and other taxes directly related to sales. The CCA is required to determine in each individual case whether the appropriate percentage of the value of sales should be determined in the lower (up to 15%) or upper part of the range (between 15% and 30%). In deciding what percentage of the value of sales should be used, the CCA will consider the gravity of infringement (and in the assessment of gravity will rely on a number of factors, such as the market share of the infringing party or the geographic scope of the infringement). The determined percentage of the value of sales is then multiplied by the number of years of the undertaking's infringement (where the periods of less than six months are counted as half a year and periods longer than six months but shorter than one year as a full year). The so-calculated basic amount may then be reduced or increased depending on whether there are mitigating circumstances (e.g., substantially limited role in infringement, or effective cooperation with the CCA outside undertaking's statutory obligations to do so) or aggravating circumstances (e.g., recidivism, continued infringement, refusal to cooperate, obstruction of the CCA's investigation, actions taken with a view to ensuring participation of other undertakings in the infringement). Croatian competition laws provide an illustrative but not exhaustive list of these adjustment factors. In case of repeated or continued infringement, the basic amount of the fine is increased by an additional 100% for each instance of repeated infringement, subject always to the statutory cap for the fine of 10% of the worldwide turnover.

On the other hand, certain less serious infringements of Croatian competition laws (for example, failure to notify a concentration to the CCA, providing inaccurate or untruthful information to the CCA, failure to comply with the CCA's request for information, gun-jumping) are subject to a fine of up to 1% of undertaking's total annual worldwide turnover achieved in the last financial year for which there are complete financial statements.

As of April 2021 (and the implementation of the ECN+ Directive into Croatian laws), the CCA is also authorized to impose periodic penalty payments (daily fines) for an undertaking or an association of undertakings that does not comply with the CCA's request (e.g., request for information), or that does not appear for an interview, or that obstructs the conduct of a dawn raid, or that does not comply with the CCA's decision on interim measures or order to bring the infringement to an end, or commitment decision. The maximum daily fine cannot exceed 5% of the undertaking's average daily turnover for each day of non-compliance with the CCA's decision/order.

In addition to the CCA's authority to impose a fine, if a competition law violation consists of the conclusion of a prohibited (horizontal or vertical) agreement, such agreement is automatically by operation of law null and void.

Furthermore, the CCA is authorized to impose interim (preliminary) measures in cases of emergency related to infringements of the Competition Act and/or Articles 101 and 102 TFEU, where there are sufficient indicia and danger from significant and irreparable damage for competition. In its decision on the imposition of interim measures, the CCA may order the undertaking to bring specific conduct to an end, to satisfy certain conditions, or it may impose other proportionate measures that are necessary to eliminate harmful effects of restrictive practices (which typically cannot last longer than 12 months).

9. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Croatian market?

The Croatian merger control regime is primarily governed by the Competition Act and the Regulation on the Manner and Criteria for Assessment of Concentrations of Undertakings (Croatian Merger Regulation). The merger control regime applies to concentrations. The Competition Act defines a concentration of undertakings as a change of control on a lasting basis by: (a) merger by acquisition or merger by forming a new company; or (b) acquisition of direct/indirect control or the controlling influence of one or more undertakings over one or more other undertakings or parts thereof by way of acquisition of a majority shareholding or a majority of the voting rights, or by other means in accordance with the provisions of the Croatian Companies Act and other laws. The creation of a full-function joint venture is also considered to be a concentration within the meaning of the Competition Act.

The parties to the concentration are required to file a merger notification to the CCA in case the following thresholds are cumulatively met: (a) the combined worldwide annual turnover of all the undertakings concerned is at least EUR 132,722,808 in the financial year preceding the concentration, provided that at least one undertaking participating in the concentration has a seat or a branch office in Croatia; and (b) the aggregate national turnover in Croatia of each of at least two undertakings concerned is at least EUR 13,272,280 in the preceding financial year. When calculating the turnover, the following shall be

taken into account: (i) turnover of the undertakings concerned; (ii) turnover of undertaking in which the undertaking concerned directly or indirectly holds more than half shares or stock, or owns more than half of the capital business assets, or has the power to exercise more than half of the voting rights, or has the power to appoint more than half of the members of the management board, supervisory board or appropriate managing body, or has the right to manage the undertaking's affairs in another way; (iii) turnover of the undertaking which has in the undertaking concerned the rights or powers listed in (ii); (iv) turnover of undertakings in which the undertaking referred to in (iii) has the rights or powers listed in (ii); and (v) turnover of undertakings in which two or more undertakings referred to in (i)-(iv) jointly have the rights or powers listed in (ii).

In the case where control is acquired by one undertaking over the whole or part of another undertaking, the merger notification must be submitted by the acquirer. In all other cases, all parties to the concentration are responsible for submitting the notification to the CCA. The merger notification is filed with the CCA before the concentration is implemented, after the conclusion of the agreement on the acquisition of control or decisive influence, or after the announcement of a public bid which is the basis for the acquisition of control. Exceptionally, the notifying parties are allowed to file the notification with the CCA even before the signing of the agreement or announcement of the public bid if they show actual good faith intention to conclude the agreement or announce the public bid.

10. What is the normal merger review period?

Once the CCA receives a merger notification, the CCA publishes a notice on its website, inviting all interested parties to provide written opinions and objections about the notified concentration within a deadline set out by the CCA (which cannot be shorter than eight or longer than 15 days). CCA must conclude its Phase I investigation within 30 days from the date of receipt of the complete notification. The CCA will provide a written confirmation of complete notification and the Phase I review period will start running from the date of such confirmation. If the CCA does not adopt a decision on the commencement of Phase II investigation, the notified concentration will be presumed approved. In such case, the CCA will deliver a confirmation of the cleared concentration to the notifying party and will publish such confirmation on the CCA's website. On the other hand, if the CCA finds that the concentration may give rise to an appreciable effect on competition in the relevant market, the CCA will take a decision on the commencement of Phase II investigation. Phase II process must generally be completed within three months from the CCA's decision on the commencement of Phase II proceedings, with a possibility for the CCA to extend this deadline for an additional three months.

11. Are there any fees applicable where transactions are subject to local competition review?

There are no administrative fees charged in merger control proceedings conducted by the CCA.

12. Is there any possibility for companies to obtain State Aid in Croatia?

State Aid may be obtained in Croatia in accordance with the EU state aid rules, i.e., the conditions provided under Articles 107 - 109 of the TFEU.

What were the major changes brought by the COVID-19 pandemic? Have any of them stuck and how likely is it for these changes to continue to do so in the foreseeable future?

There were no major changes in Croatia brought about by the COVID-19 pandemic in the area of competition law. However, it appears that certain procedural novelties introduced by 2021 amendments to the Competition Act (which are still in force today) were motivated by the extraordinary circumstances caused by the COVID-19 pandemic. Specifically, the amended rules governing the oral hearing and the party's right to defense in proceedings conducted by the CCA now provide that in extraordinary circumstances (for example, in case of an epidemic or natural disaster), the oral hearing may be held by means of electronic communications. In such cases, the minutes of the oral hearing drafted by CCA's officials must be delivered to the parties within 24 hours from the date of the hearing. ■

DENTONS

CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2024

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1. What are the main competition-related pieces of legislation in the Czech Republic?

The main competition-related legislation includes:

a) Act No 143/2001 Coll., on Protection of Economic Competition (Czech Competition Act)

This is the Czech Republic's key local competition law legislation. The scope includes: (i) anticompetitive agreements and concerted practices, (ii) abuse of a dominant position, (iii) national merger control, (iv) restrictions of competition by public authorities, and (v) powers of and procedure before the Czech Competition Authority (CCA) regarding (i) through (iv).

b) Act No 262/2017 Coll., on Damages Claims in the Field of Competition Law

The act implements Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for competition law infringements and provides for: (i) substantive provisions related to damage claims (including special presumptions and limitation periods, and certain rules on the calculation of damages), and (ii) certain points of procedure, including a special discovery procedure to alleviate the information asymmetry between claimants and defendants.

c) Act No 395/2009 Coll., on Significant Market Power in the Sale of Agricultural and Food Products and its Abuse (Czech SMP Act)

This act transposes among others Directive 2019/633 of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

The scope includes: (i) the assessment and prevention of unfair commercial practices of a supplier with significant market power in the agricultural and food supply chain, and (ii) the form of the contract between the supplier with significant market power and the buyer.

The SMP legislation is single-sided. This means that only purchasers of food and/or agricultural products, or their alliances in individual relationships with suppliers of those products, are obliged to refrain from the proscribed unfair commercial practices.

d) Act No 215/2004 Coll., on Regulation of Certain Relations in the Area of State Aid

This act deals with the (i) exercise of state administration of state aid, (ii) rights and obligations of providers and state aid beneficiaries and de-minimis aid vis-à-vis the competent national coordinating authority (the CCA), and (iii) certain issues of cooperation between the state and the European Commission in the area.

e) Act No 526/1990 Coll., on Prices

Under certain provisions of this act, a seller must not abuse its superior economic position to obtain an undue pecuniary advantage. The concept of "superior economic position" is not equivalent to that of dominance under competition law and can catch situations of relative market power (see Section 6).

2. Have there been any notable recent (last 24 months) updates of Czech competition legislation?

Yes, 2023 brought quite material amendments to the Czech Competition Act (i) transposing the ECN+ Directive and (ii) supplementing the current law with the practical experience of the CCA. In addition, the Czech SMP Act saw important changes last year, significantly expanding its scope of application.

A) Amendment to the Czech Competition Act – ECN+ implementation

On July 29, 2023, an amendment to the Czech Competition Act seeking mainly to implement the ECN+ Directive (Directive 2019/1/EU) came into force. However, the amendment went significantly beyond what the ECN+ Directive required. The most relevant changes include:

a) The CCA has the possibility to access and use as evidence records and data on telecommunications traffic (wiretaps) obtained by the police in criminal proceedings.

b) Complainants' identity protection has been enshrined in statutory provisions. Even though in practice it was possible to obtain some protection before, the law now provides that the CCA can adopt measures upon the complainant's request to protect its identity and conduct the investigation so as to prevent disclosure of the identity to competitors or suppliers/customers if there is a threat of retaliation.

c) In terms of conducting on-site inspections (dawn raids), the CCA is no longer required to specify an address where the dawn raid is to be conducted. It is sufficient to identify the undertaking without having to specify its precise registered office address. This could, in principle, afford the CCA some flexibility to conduct raids across various locations and remove some administrative burden on its part.

d) Changes to the CCA's "settlement procedure" – The CCA now has the discretion to grant a reduction of 10-20% for undertakings, which cooperate under the settlement procedure. Previously, the reduction was set at a fixed 20%. Additionally, the law now provides that the CCA can also impose a ban on

public contracts to undertakings benefitting from the settlement procedure, but for a maximum duration of one year only.

e) The possibility to apply for leniency is no longer limited to cartels ("secret" horizontal agreements or concerted practices). It has been explicitly extended to all "secret" agreements and so can theoretically catch also vertical restraints (such as RPM practices).

f) Other minor changes include:

- The CCA's role and cooperation within the European Competition Network;
- Members of the association are jointly and severally liable for the payment of a fine in case the association fails to pay;
- Joint and several liabilities for offenses of entities forming a single undertaking;
- Clarification on the conditions under which a ban on participation in public procurement may be imposed.

B) Amendment to the Czech SMP Act

On January 1, 2023, a major amendment to the Czech SMP Act came into force, expanding the range of undertakings in the scope of the Act to all undertakings in the agricultural and food chain in the position of a supplier:

a) Whose turnover exceeds EUR 2 million and at the same time exceeds the turnover of the buyer party, or

b) Whose total turnover in the Czech Republic exceeds CZK 5 billion (approximately EUR 197 million).

The Czech SMP Act basically applies to any undertaking which, even if only marginally, purchases agricultural or food products in the course of their business activities and achieves the relevant turnover. In addition, the new rules apply to purchasing alliances whose members' turnover exceeds the statutory turnover criteria.

Since January 1, 2024, when the remaining part of the new law entered into force, the CCA has already opened two investigations pursuant to new rules.

C) New proposals introduced by the Czech Competition Authority

In mid-January 2024, the CCA published an outline of several far-reaching legislative proposals aimed at strengthening its powers. The initiative is at an early stage but has already been subject to criticism by legal practitioners for being excessive.

In particular, the CCA seeks to obtain:

a) Power to impose structural changes (remedies) in concentrated markets without the need to prove concrete anticompetitive conduct by any of the undertakings,

b) Access to geo-location data from telecom operators to better detect cartels,

c) Post-closing review of concentrations (a call-in model), and

d) Possibility to grant 'rewards' for individual whistleblowers.

According to the proposal, the CCA could:

- Impose remedial measures after a sector inquiry, were it to find a long-term distortion of competition. Measures could take the form of, e.g., FRAND norms and standards, divestments, or unbundling (to various degrees, including organizational and accounting separation) between undertakings' divisions;
- Conduct full-scale unannounced on-site inspections (dawn raids) without necessarily suspecting the inspected undertaking of any anticompetitive behavior;
- Access telecommunications location data for the CCA, which in practice means that the CCA could remotely monitor the location of individual managers and employees and use that information to prove anticompetitive behavior;
- Have the discretion to call on undertakings to notify transactions for merger control review even if they are below the turnover criteria of mandatory pre-closing notification thresholds (see Section 10). The CCA could do this retrospectively even for completed mergers.

3. What are the main concerns of the national competition authority in terms of agreements between undertakings? How is the sanctioning record of the authority?

The past two years have seen the CCA's increased activity in investigating and sanctioning antitrust violations. According to the CCA's 2022 annual report (2023 not yet published at the time of writing), the CCA conducted about 30 antitrust proceedings which was the highest number of cases per year investigated in history. Statistics show that bid-rigging and resale price maintenance cases remain the CCA's priorities. Fines for antitrust violations totaled CZK 437 million (approximately EUR 18 million) in 2022. The CCA is increasingly strict when it comes to sanctioning dawn raid obstructions and has imposed fines at the statutory maximum (1% of the undertaking's annual turnover) in a number of cases recently. In January 2024, the CCA issued revised guidelines on procedures for setting fines, with the aim to punish hard core violations of competition law more severely.

In 2023, the CCA issued a special brief on anticompetitive agreements in the employment sector and has settled two cases (without imposing fines) of potentially problematic decisions of associations that sought to create a network of non-compete restrictions in employment agreements across the respective industries.

The CCA has not articulated any particularly welcoming position on sustainability agreements, but in our view, it will in practice take note of the EU Commission's revised Horizontal Guidelines and considerations on sustainability agreements contained therein.

4. Which competition law requirements should companies consider when entering into agreements concerning their activities in the Czech Republic?

All undertakings entering the Czech market should align their commercial policies with applicable competition law rules, but these correspond to EU competition law rules in most material aspects. For companies familiar with the basic principles of EU antitrust rules, the Czech legal environment should not bring many surprises or necessitate radical changes to corporate policies or business models.

Effective January 1, 2024, the CCA has adopted a guideline on compliance programs, setting out criteria that undertakings' compliance programs should meet to qualify for an up to 5% discount from any fines imposed for antitrust violations. Adequate internal compliance programs have been accepted by the CCA as a mitigating factor reducing in the final amount of fine in several cases through 2022 and 2023.

5. Does a leniency policy apply in the Czech Republic?

Yes, the leniency program has proved an effective source of leads for the CCA's investigations of anticompetitive agreements. Similarly to the EU Commission's leniency program, the CCA will grant immunity to the first leniency applicant to inform about a "secret" anticompetitive agreement, and up to 50% discount from fines to further leniency applicants if they provide some value-added information (all applicants need also to plead guilty and fulfill a further set of standard leniency conditions). In the case of a bid-rigging infringement, successful leniency applicants will also avoid black-listing from public tenders.

Until July 29, 2023, only a party to a "secret" horizontal agreement, i.e., an agreement between competitors, could apply for leniency. Post-amendment, parties to vertical agreements (e.g., a distribution agreement), especially those containing hard core restrictions such as resale price maintenance (RPM), can also apply for leniency. The CCA has found it difficult to uncover the full scope of vertical agreements, particularly in cases of practices with wide market coverage, and so this amendment was meant to encourage undertakings subject to vertical restraints to come forward.

Based on recent public comments of the CCA's officials, it appears that the authority will be more careful in weighing leniency and settlement procedure applications. For example, where undertakings show only modest efforts to cooperate in detecting the infringements, the CCA may be less generous than heretofore.

6. How is unilateral conduct treated under Czech competition rules?

The Czech Competition Act has a definition of dominant position (and of collective dominance) functionally equivalent to that established by EU courts' case law with one exception: the law sets a rebuttable presumption of non-dominance if the undertaking's market share is below 40%.

Similarly, the concept of abuse of dominant position is functionally equivalent to Article 102 of the Treaty on the Functioning of the EU (TFEU). There are two differences in the list of examples of what practices may constitute abuse: unlike Article 102 TFEU, the Czech Competition Act explicitly lists predatory prices and refusal to access to essential facilities as abuses. However, given the established EU case law on these types of abuse, there are no differences in practice (the lists of typical abuses being non-exhaustive in both Czech and EU law). The CCA is empowered to apply Article 102 TFEU to conduct that has an effect on trade between EU Member States.

We see some difference in the frequency of abusive refusal to supply cases – these seem to occur more often in the CCA's practice than at the EU level. At a recent conference, the CCA officials hinted at a possibility of increased focus on abusive behavior in local markets (such as excessive prices or refusal to supply important inputs in a certain limited geographic area or facility).

Finally, as mentioned above in response to Question 1, unilateral price conduct can be also caught by Act No 526/1990 Coll., on Prices (Act on Prices), which prohibits a seller from using its superior economic position to obtain an undue pecuniary advantage. The concept of "superior economic position" is not equivalent to that of dominance under competition law and can catch situations of relative market power (i.e., market power that stems from the imbalance between specific contractual parties). Czech courts have clarified that infringement of the Act on Prices is a separate infringement from abuse of a dominant position within the meaning of the Czech Compe-

tition Act and can be investigated in parallel or as a stand-alone offense. This legislation is typically enforced by the Ministry of Finance (although a sectoral price regulation under this act would be enforced by the appropriate sectoral ministry). Although enforced less frequently, there have been some cases in which the financial authorities have imposed significant fines for this infringement type.

7. Are there any recent local abuse cases of relevance?

Abuse of dominance cases are fairly rare in the Czech Republic: in the past 10 years, the CCA has issued only 17 decisions on the merit involving abuse of dominance, including commitments decisions.

Noteworthy decisions include:

- Ceske drahy, a.s. (2023): The CCA issued a "negative" decision stating that the national railway company had not engaged in predatory pricing on route Praha-Ostrava. The case is interesting mainly procedurally. The CCA launched the proceedings in 2010 following a competitor complaint, but because it was unable to make any meaningful progress, the case was taken up by the EU Commission in 2016, only to be closed six years later without finding an infringement. Resuming its jurisdiction, the CCA finally issued a negative decision in early 2023.
- Honeywell, spol. s.r.o. (2023): The CCA accused Honeywell of tying the provision of maintenance training services and certificates to purchases of certain technical emergency equipment. The CCA accepted Honeywell's commitment to end the tying practice, without imposing a fine.
- CHAPS spol. s.r.o. (2018): The CCA found that CHAPS had abused its position as an entity having exclusive statutory access to data on public transport connections, by refusing to provide access to that data to downstream service providers (such as consumer app developers). The case is unique even in the European context as the CCA defined a separate relevant market for data even if that data was not traded (so a hypothetical relevant product market). The CCA's decision was later quashed by the court due to procedural irregularities.

8. What are the consequences of a competition law infringement?

For violation of rules under the Czech Competition Act, the CCA may impose a fine of up to 10% of the undertaking's or association of undertakings' yearly net turnover. The same fines also apply under the Czech SMP Act. The CCA has adopted new guidelines on the methodology for setting the fines with effect from January 1, 2024.

If the anticompetitive conduct relates to public procurement procedures (bid-rigging), the undertaking may also be sanctioned with a ban on performing public contracts. The blacklisted undertaking's identity is then published on the CCA's website.

The CCA may impose (and accept) proportionate behavioral or structural remedies to ensure that effective competition is maintained or restored.

The latest amendment to the Czech Competition Act brought about two changes to fining rules: (i) if an association of undertakings fails to pay the fine, its member undertakings guarantee its payment of up to 10% of their net yearly turnover, (ii) legal entities that form a single undertaking and participated in an infringement are jointly and severally liable to pay the fine.

In cases of gun-jumping (failure to notify a merger or implementing it before the CCA's clearance) the CCA can impose fines but also order a de-merger (divestment of the acquired business or other method of unwinding the transaction).

Finally, the most serious types of competition law violations can be criminal offenses under the Czech Criminal Code. In the case of bid-rigging, individuals as well as legal entities can be prosecuted. In cases of other competition law infringements, only individuals can be prosecuted.

9. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Czech market?

Local merger control rules are based on the concept of control and turnover thresholds functionally equivalent to the EU Merger Regulation. The CCA has a particularly experienced and effective merger control unit.

It is mandatory to notify even foreign-to-foreign transactions meeting the statutory turnover thresholds. The thresholds can be met even by only one party having any activity in the Czech Republic (this is an issue typically in cases of purely extraterritorial joint ventures). Even though there is a provision in the Czech Competition Law requiring local nexus for a merger to be caught, under the current CCA's interpretation, any transaction where the undertakings concerned meet the turnover thresholds is taken also to meet the local nexus requirement.

In late 2023, the CCA announced that it would conduct a thorough review of the local merger control regime, including the following aspects:

- Suitability of turnover thresholds (their level, as well as the concept more generally);
- Local nexus requirement (or rather the lack of it);

- Whether the CCA could issue any guidance explaining its policy on the recent developments in EU law, including the EU Commission's approach to Article 22 referrals of sub-threshold transactions and the Towercast doctrine, under which an acquisition by a dominant undertaking can amount to abuse of dominance;
- Possibility of a call-in model for sub-threshold transactions (see Section 2).

10. What is the normal merger review period?

There are three main statutory timelines in the CCA's merger control process:

1. In a simplified procedure (criteria for which are largely equivalent to the "old" EU simplified procedure), within 20 calendar days of receiving the complete simplified notification, the CCA must:

- Approve the concentration; or
- Request that the notifying party submit a full (standard) notification.

2. In a standard procedure, within 30 calendar days of receiving the complete full notification, the CCA must:

- Issue a decision that states that the concentration falls outside the jurisdiction of the office; or
- Approve the concentration, provided that the concentration does not result in a significant impediment to effective competition.

Both of the above proceedings can be regarded as analogous to Phase I proceedings before the EU Commission.

3. During the initial 30-calendar day period, if the CCA comes to the conclusion that the concentration raises serious concerns about whether it would result in a significant impediment to competition, the CCA notifies the parties that it will continue investigating, (essentially opening an in-depth Phase II procedure such as under EU law). The CCA must issue its final decision within five calendar months of receiving the complete notification.

If the CCA does not issue any decision within the above deadlines, the concentration is deemed cleared.

Note that the standstill obligation applies until the transaction becomes unappealable, i.e. until the parties waive the right of appeal or on the lapse of the 15th calendar day after the clearance decision has been delivered to the parties. The market practice is to waive the right of appeal on the same day that the clearance decision is issued.

11. Are there any fees applicable where transactions are subject to local competition review?

A fee of CZK 100,000 (approximately EUR 4,000) is payable with the notification to the CCA (irrespective of whether simplified or full – see Section 10).

12. Is there any possibility for companies to obtain State Aid in the Czech Republic?

Companies can obtain state aid under the same conditions as companies in other EU Member States. The substantive and procedural rules for the state aid are directly applicable EU law (treaties and regulations). The state through its departments notifies any state aid measures and schemes to the EU Commission and participates in the approval process. The CCA performs certain coordination roles (see Section 1).

13. What were the major changes brought by the COVID-19 pandemic? Have any of them stuck and how likely is it for these changes to continue to do so in the foreseeable future?

During the pandemic, the CCA struggled with control of practices that spiraled prices of certain indispensable products and services (such as non-perishable food). When revising its guidelines on the methodology of setting the fines (effective from January 1, 2024), the CCA introduced a new example of aggravating circumstance as cases where the anticompetitive conduct concerns indispensable products such as food, pharmaceuticals, or energy.

The CCA had announced that it would not conduct any on-site inspections (dawn raids) at the height of the pandemic, but once the crisis was over, it restarted its dawn raids with much vigor and announced that it would continue investigating with increased frequency. ■

Bird & Bird

CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2024

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1. What are the main competition-related pieces of legislation in Hungary?

The cornerstone of the Hungarian regulatory regime with respect to competition is Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition (Competition Act), which lays down fundamental competition law prohibitions. Competition law within the European Union is a fully harmonized area of law, and consequently, the rules of EU competition law are directly applicable to Hungarian legal practice. The key item of legislation for EU competition law is the Treaty on the Functioning of the European Union (TFEU).

The Competition Act encompasses the key elements of Hungarian competition law, covering a broad spectrum, from antitrust matters and merger control regulation to unfair competition. Additionally, it outlines regulations concerning the Hungarian Competition Authority (Gazdasagi Versenyhivatal, GVH) and sets out detailed rules governing competition control procedures as well as private enforcement with respect to competition law infringements.

Consumer protection is a central element of the Hungarian competition law landscape, in which the main legislative instrument is Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices (Consumer Protection Act). There are also several other laws containing certain competition law or consumer protection law requirements that must be met in corporate business practice, such as Act CLXIV of 2005 on Trade (Trade Act), Act XCV of 2009 on the Prohibition of Unfair Trading Practices Applied Against Suppliers Relative to the Marketing of Agricultural and Food Products (Unfair Agricultural Trading Act) and Act XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities (Advertising Act).

Furthermore, there are sector-specific government decrees providing exemptions for specific categories of agreements restricting competition, such as (i) vertical agreements (Government Decree No. 306/2022, Hungarian VBER), (ii) technology transfer (Government Decree No. 86/1999), (iii) specialization (Government Decree No. 467/2023), (iv) vehicle aftermarket (Government Decree No. 204/2011), and (v) research and development (Government Decree No. 456/2023).

These laws are supported by the GVH's soft law tools, which include frequently updated non-binding guidelines, notices, and communications as well as extensive case law.

2. Have there been any notable recent (last 24 months) updates of Hungarian competition legislation?

Competition law is one of the fastest-changing areas of law, as regulation follows market changes, as well as EU developments and legislation. There have been a few notable changes in competition legislation recently, such as:

i. increase in the maximum fine for infringements: the maximum fine has been increased from 10% to 13% of the worldwide net turnover of a whole group of companies for the preceding financial year.

ii. increase in merger thresholds, filing fees, and fines for gun-jumping: the merger thresholds for triggering a notification obligation were significantly increased compared with the previous thresholds, with the legislator expecting the new thresholds to lead to fewer notifications and a lighter administrative burden on businesses. Filing fees have risen by 30% on average, while the maximum daily fine for gun-jumping has been increased by 50%.

iii. new notice on relevant markets: the GVH must annually publish on its website a list of the markets affected by mergers that have been cleared without a detailed decision issued by the authority. The notice is non-binding, it is still a valuable resource for current GVH case law on market definition.

iv. new Hungarian VBER: Hungarian VBER entered into force following the implementation of Commission Regulation (EU) 2022/720 (EU VBER) and regulates the exemption of certain categories of vertical agreements.

v. new tool: formal notice for suspected infringements: the GVH may preventively inform businesses of suspected infringements without opening a competition control procedure in a formal notice, giving them 45 days (or 60 for small businesses) to respond.

vi. GVH can initiate investigations pursuant to the DMA Regulation: the GVH is appointed as the authority in Hungary for cooperating with the European Commission (Commission) on enforcing the Digital Markets Act (Regulation (EU) 2022/1925 (DMA Regulation). The GVH is authorized to initiate proceedings to determine whether a gatekeeper complies with obligations under the DMA regulation.

vii. GVH can shut down websites in the event of a breach of the DSA Regulation: the Digital Services Act (Regulation (EU) 2022/2065 (DSA Regulation) applies to businesses established in Hungary or providing internet intermediary services in Hungary. Where such businesses act in breach of the DSA Regulation, the GVH, from March 1, 2024, may order the in-

accessibility of electronic data (e.g., a website) where doing so is necessary to prevent a risk of serious harm to consumers.

viii. GVH can launch investigations based on the FSR Regulation: the GVH was appointed as the authority responsible for the Commission's requests for investigation pursuant to Regulation (EU) 2022/2560 on foreign subsidies (FSR Regulation – directly applicable in Hungary) distorting the internal market. The GVH may launch targeted investigations to examine the legality of foreign subsidies granted to market players.

Additionally, the implementation of EU Directive 2019/2161 (Omnibus Directive) introduced several new rules into existing consumer protection laws, with respect to, for example, price displays, sale prices, reviews, and endorsements. Finally, the introduction of a price monitoring tool was designed in support of the GVH's fight against inflation in the food retail sector.

3. What are the main concerns of the national competition authority in terms of agreements between undertakings? How is the sanctioning record of the authority?

Cartel (mainly public procurement cartels) and resale price maintenance (RPM) cases have dominated recent GVH practices. The GVH regularly carries out accelerated sector inquiries, as well as market studies (recent ones have concerned green claims and artificial intelligence) of products/services/practices most affecting Hungarian consumers. GVH uses this approach to explore market circumstances and then initiate individual investigations (if needed).

Over the past ten years, GVH's cartel practice has been cyclical, both in terms of fines imposed and the number of cases initiated and closed. Traditionally, however, cartel cases were those that attracted significant fines. In 2019 GVH's enforcement focus shifted towards consumer protection cases, as seen in the drastic increase in the magnitude of fines imposed by the GVH in those cases. While previously fines extended to a maximum of a few hundred million HUF, this went up to billions of HUF, with the highest consumer protection fine reaching HUF 2.5 billion.

In 2021, this trend reversed when the GVH reallocated resources towards cartel investigations, resulting in a record fine of HUF 16.3 billion (approximately EUR 42.5 million) imposed on companies involved in agreements restricting competition (mostly cartel cases) and a record-breaking HUF 14.1 billion (approximately EUR 36.8 million) imposed in the fertilizer cartel in Hungary. Since 2021, the GVH remained vigilant by discovering several public procurement cartels concerning the construction, road construction, anesthesia equipment, shipping services, and road salt and imposing hundreds of millions of forints (million euros) in each case.

Nevertheless, in 2023 the GVH again imposed higher fines in consumer protection cases (mostly against tech giants) than in antitrust matters.

4. Which competition law requirements should companies consider when entering into agreements concerning their activities in Hungary?

The requirements for competition law when entering into agreements within Hungary are, in most cases, identical or largely similar to those established within the European Union.

The same legal framework applies to both horizontal and vertical agreements. Nevertheless, agreements between companies under the same control (i.e., belonging to the same group of companies) are not deemed to restrict competition.

Section 11 of the Competition Act (and Article 101 of the TFEU) prohibits any agreements and concerted practices between companies that are aimed at the prevention, restriction, or distortion of competition, or which may have such an effect. This non-exhaustive list of prohibitions includes price fixing, market allocation, preventing market entry, limiting production, bid rigging, and sharing commercially sensitive information.

There are exemptions (de minimis, block, and individual) to this general prohibition.

De minimis: agreements of minor importance (where the combined market share of the participants does not exceed 10% in horizontal agreements and 15% in vertical agreements) are exempted from the prohibition, provided that they do not contain hard-core restrictions (e.g., price-fixing, market division, resale price maintenance).

Block exemption: certain groups of vertical agreements may benefit from the vertical block exemption regulations (notably the Hungarian VBER) and are exempted from the prohibition, provided that the combined market share of the participants does not exceed 30% and the agreements do not contain hard-core restrictions.

Individual exemption: an agreement can be exempted from the prohibition under the Competition Act if it leads to positive economic effects, while a fair share of these benefits reaches consumers, the agreement does not restrict competition more than is necessary to achieve these benefits, and competition is not completely eliminated as a result of the agreement.

It is advisable to exercise caution if one party to an agreement holds a dominant position/significant market power (see Section 6) or the agreement includes restrictions on resale prices, a non-compete clause, a non-solicitation clause, exclusivity

clauses, joint selling or purchasing cooperation, as those could present a significant risk if they are not compliant with applicable competition law principles.

5. Does a leniency policy apply in Hungary?

Yes. The regulations governing the Hungarian leniency policy are set forth in the Competition Act and further detailed in the leniency notice (Notice No. 14/2017) issued by the GVH. In cartel cases, the cartel participant(s) that facilitate the GVH's effective discovery of cartels may be granted immunity from or a reduction in fines.

Full immunity may be granted to a company that first:

- provides the GVH with a basis for obtaining a court order in advance to carry out a dawn raid, provided that the GVH did not have sufficient evidence to carry out a dawn raid, or
- proves that an infringement has been committed, provided that, at the time the evidence was provided, the GVH did not have sufficient evidence to prove the infringement and no undertaking fulfilled the preceding conditions.

A company may be eligible for a reduced fine, if:

- the company provides the GVH with evidence of the infringement that represents significant added value compared to the evidence available to the GVH, but
- there was a prior leniency applicant in the case, or
- the evidence provided in the leniency application does not otherwise justify immunity from the fine.

The reduced fine is up to 30-50% for the first company, 20-30% for the second company, and 20% for any additional company meeting the above requirements.

To be eligible for immunity or a reduced fine, the leniency applicant(s) must comply with several conditions: (i) must cease its participation in the infringement immediately; (ii) must cooperate with the GVH until the end of the competition enforcement procedure; (iii) must not reveal, without explicit permission from the GVH, the fact that it has submitted a leniency application; (iv) must refrain from destroying, falsifying, or concealing relevant evidence, or from disclosing the existence or any details of its application while the GVH assesses the application. Furthermore, immunity cannot be given to a company that has acted to coerce another company to participate in the infringement.

6. How is unilateral conduct treated under Hungarian competition rules?

Unilateral conduct becomes a concern when a company enjoys a dominant position (as set out in the Competition Act) or has significant market power (as set out in the Trade Act and the Unfair Agricultural Trading Act) and exploits this power for its own benefit, negatively impacting other competitors and consumers.

Abuse of dominant position:

The Hungarian regulation is based on the provisions of Article 102 of the TFEU. According to Section 22 of the Competition Act, a market player is considered dominant in a relevant market if it can conduct its economic activities largely independently of other market participants. There is a presumption of dominance for companies with a market share exceeding 40%.

The mere existence of a dominant position is not considered illegal but the abuse of such position is not permitted.

The Competition Act provides a non-exhaustive list of exclusionary and exploitative practices that are deemed to constitute an abuse of a dominant position:

- unfair purchase or selling prices: fixing selling or purchasing prices or imposing other inequitable contractual clauses;
- restriction of output: restricting production, distribution, or technological development to the detriment of final trading parties;
- discrimination: applying dissimilar business conditions (prices, terms, payment deadlines) for equivalent performances by creating disadvantages in their competitive position;
- refusal to deal: refusing to establish or maintain business relations adequate for the nature of the transaction without any justification;
- tying and bundling: rendering the sale or purchase of goods dependent on the sale or purchase of additional goods, or making the conclusion of a contract dependent on agreeing to commitments that are not typically part of the subject of the contract;
- predatory pricing: using prices that are excessively low to force competitors out of the market or to prevent them from entering.

Abuse of significant market power:

The Trade Act prohibits the abuse of significant market power against suppliers. Significant market power differs from the dominant position and is deemed to be established if the consolidated net revenues generated by a group from trading activities for the preceding year exceeds HUF 100 billion (approximately EUR 261 million) or if it enjoys or is likely to enjoy a one-sided bargaining position in connection with a supplier. Under the Trade Act, abusive practices include undue discrimination, unjustified contract modification, undue restriction of access to marketing channels, imposing unfair conditions, and applying unjustified charges.

In 2020, the Trade Act introduced new requirements for agreements between beverage manufacturers with significant market power and the HoReCa (hotels, restaurants, cafes) units they contract with. The violation of these rules falls under the jurisdiction of the GVH.

The Unfair Agricultural Trading Act promotes fair business practices among companies involved in trading agricultural and food products and their suppliers and prohibits abusive practices by companies with significant market power.

7. Are there any recent local abuse cases of relevance?

In any year over the past 10 years, around or less than 5% of GVH's cases were abuse of dominance cases. The GVH initiated about 2-5 cases per year and did not impose fines for the abuse of dominance more than twice a year. These numbers show that abuse of dominance caught by the GVH is rare in Hungary.

2021 was a record year with the GVH launching eight abuse of dominance cases in the technology, beverages, and construction industry in Hungary, these are still ongoing, and no other case has been opened since.

8. What are the consequences of a competition law infringement?

Violating competition law can result in severe consequences for companies and in some cases for individuals. These consequences typically include:

- an infringement decision: the decision-making body of the GVH, the Competition Council can establish a breach of competition law.
- fines (warning): the Competition Council can impose a fine of up to 13% of a group's worldwide turnover for the year preceding the decision. Instead of a fine, the Competition Council may issue a warning to first-time offender SMEs.
- ordering the termination of an infringement: the Competition Council can order the termination of conduct in breach of competition rules.
- the prohibition of future infringements: the Competition Council can prohibit future conduct in breach of competition law.
- imposing commitments: the Competition Council has wide discretion in imposing prescribing commitments/obligations proportionate and necessary to eliminate the infringement.

The Competition Council's decision to impose the above sanctions may be challenged in court.

To mitigate or avoid the above sanctions, companies under investigation may (i) offer to undertake certain commitments (both in antitrust and consumer protection cases), (ii) engage in a settlement procedure (in antitrust cases), or (iii) submit a leniency application (in cartel cases – Section 5).

Voluntary commitments can help avoid competition fines and may include direct compensation elements, a modification of the infringing practice, educational campaigns, compliance programs, etc. A 10-30% fine reduction may be achieved by engaging in a settlement procedure during the investigation, where the company under investigation must acknowledge the infringement and waive its right to seek judicial remedy. GVH guidelines contain detailed rules on commitments, settlement, and leniency.

Additional consequences – outside of competition enforcement procedure – typically include:

- nullity: contracts may be declared null and void by the court due to competition law infringements. The Court may also order the termination, amendment, or conclusion of a contract if it includes provisions breaching competition law.
- private damages actions: private antitrust damages actions may be initiated and damages sought against companies in violation of Section 11 of the Competition Act or Article 101 of the TFEU by anyone affected by the infringement (competitors, companies, or consumers). The Competition Act contains a rebuttable presumption that the cartel infringement influenced (raised) the price charged by the infringer by 10%.
- exclusion from public procurements: companies must be excluded from public procurement procedures if, within the past three years, a final and enforceable decision by the GVH or any other Member State competition authority, has established that they engaged in behavior restricting competition in violation of Section 11 of the Competition Act or Article 101 of the TFEU, and consequently, these

authorities have imposed fines on them.

- criminal liability: criminal charges may be brought against individuals operating public procurement cartels.
- reputational damages: beyond legal penalties, companies found guilty of violating competition laws often face bad PR. The GVH issues press releases (usually both in Hungarian and English) about its closed cases and those are often picked up by media outlets.

9. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Hungarian market?

Hungarian merger control rules are set out in the Competition Act and enforced by the GVH. A transaction is notifiable to the GVH (i) if there is a change of control and (ii) the turnover of the parties involved meets the relevant thresholds set out in the Competition Act.

Transactions subject to merger control:

The following transactions are subject to merger clearance:

- the acquisition of sole or joint control over the whole or part of a previously independent company;
- the merger of two or more previously independent companies; and
- the creation of a full-function joint venture.

Notification thresholds:

The GVH must be notified of the transaction if:

- the combined Hungarian net turnover of all parties (i.e., the acquirer(s) and the target) exceeds HUF 20 billion (approximately EUR 52 million) in the preceding financial year; and
- the individual Hungarian net turnover of each of at least two parties exceeds HUF 1.5 billion (approximately EUR 3.9 million) in the preceding financial year (Mandatory Thresholds).

Concentrations that do not meet the above Mandatory Thresholds but: (i) involve parties with a combined Hungarian net turnover exceeding HUF 5 billion (approximately EUR 13 million), and (ii) may lead to a significant lessening of competition on the relevant market(s) can be voluntary notified to the GVH (Voluntary Thresholds).

For the calculation of the relevant turnover, the net turnover generated in the previous business year from goods and services sold in the territory of Hungary is taken into account, while intra-group turnover must be disregarded. Specific rules apply to the calculation of thresholds for mergers involving insurance companies, credit institutions, financial enterprises, or investment companies, which are largely in line with those set out in the EU's Jurisdictional Notice.

Exemption under notification:

A special "public interest exemption" exists under the Hungarian competition regime, which permits the government to qualify a merger as "strategic" and exempt it from the merger control filing requirement.

Irrespective of the notification thresholds, a temporary acquisition for the purpose of resale does not need to be notified in cases where certain types of financial companies and investment funds acquire assets or shares of another undertaking if the resale is carried out within a one-year period.

EU merger control and foreign-to-foreign filing:

Mergers that meet the EU merger control filing thresholds will be assessed by the Commission in line with the "one-stop shop" principle.

Foreign-to-foreign mergers are also subject to Hungarian merger control review if they meet the local merger control filing thresholds.

10. What is the normal merger review period?

The merger control process has been significantly streamlined over the past few years, resulting from a combination of legislative reforms, the introduction of a new type of fast-track procedure, and higher thresholds for notification, as well as the reduction in the administrative burden on companies.

The typical timeline for reviewing a merger control process is as follows:

1. Pre-notification meeting with the GVH (optional but recommended): This initial step involves a voluntary meeting between the parties and the GVH to discuss the merger and receive preliminary feedback.

2. Submission of the notification form: the parties involved in the merger submit a detailed notification form to the GVH, officially starting the review process.

3. GVH assessment – three possible procedures:

Fast-track procedure: the GVH may opt for a speedy review if the merger appears unlikely to raise significant competition concerns and acknowledges the transaction by issuing an administrative certificate (the deadline is eight days provided that no additional information is requested); If this is not the case,

the GVH opens the investigation phase:

Phase I Investigation: a more detailed review is conducted to assess the merger's impact on competition. If concerns are minor or can be mitigated with commitments, the GVH may approve the merger at this stage (the waiting period is 30 days, which may be extended by 20 days);

Phase II Investigation: if the merger raises significant competition concerns or if the analysis from Phase I is inconclusive, a comprehensive investigation is undertaken to make a final decision (it lasts an additional three months, which may be extended by two months).

The clock stops until GVH's requests for information are complied with. If the GVH fails to issue its decision within the applicable waiting period, its approval is deemed to be granted. The GVH uses the significant impediment to effective competition (SIEC) test for its assessment of mergers and will clear transactions that do not result in an SIEC, particularly by creating or intensifying a dominant position in the relevant market.

At the end of the GVH assessment, the GVH may (i) approve the transaction, (ii) prohibit the transaction or (iii) impose structural or behavioral remedies if the anticipated anti-competitive effects of the transaction can be prevented by the given remedy.

4. Possible follow-up investigation: depending on the outcome of the procedure and the conditions attached to any merger approval, the GVH may conduct further investigations to ensure compliance with the conditions.

Filing is mandatory in the case of mergers reaching the Mandatory Thresholds and voluntary in the case of reaching the Voluntary Thresholds. An application for clearance is submitted using the simplified filing forms that can be downloaded from the GVH website and is available in both Hungarian and English.

There is no deadline for filing, but a merger cannot be implemented prior to receiving GVH clearance. There are no specific sanctions for not filing per se, but severe sanctions, including suspension or reversion of all integration steps and financial penalties, apply for closing before clearance. The GVH may investigate transactions reaching the Voluntary Thresholds for six months after closing in the absence of notification.

11. Are there any fees applicable where transactions are subject to local competition review?

The applicable notification fee varies based on the level of analysis required before reaching a decision (i.e., Fast-track procedure, Phase I or Phase II procedure). The applicable fees are as follows:

(i) For a Fast-track procedure, a fee of HUF 1 million (approximately EUR 2,600) is to be paid at the time of submission of the notification form;

(ii) for a Phase I procedure, an additional HUF 4 million (approximately EUR 10,400) is to be paid;

(iii) for a Phase II procedure, an additional HUF 19 million (approximately EUR 49,600) is to be paid.

12. Is there any possibility for companies to obtain State Aid in Hungary?

State Aid is primarily regulated by EU law (i.e., Articles 107-109 of the TFEU). This means EU state aid principles and practices are fully applicable in Hungary. Therefore, the Hungarian legislator has not created a detailed set of rules for state aid, instead, it defers to the relevant EU legislation.

Hungarian companies are eligible to receive state aid, but the provision of such aid and the conditions under which it is provided must always adhere to the prevailing EU regulations. To ensure compliance, there may be instances where collaboration with the Commission or the submission of a notification to it is necessary regarding the state aid that is to be granted.

The main piece of legislation in Hungary is Government Decree No. 37/2011. on state aid procedure under EU competition law and the regional aid map (State Aid Decree). It lays down the core requirements for the granting of regional aid, the rules for the notification procedure, the legal foundation of the regional aid map, introduces provisions for the accumulation of aid from various sources, specifies transparency requirements, defines the necessary content of aid measures, and lists the different categories of aid.

Under the procedural regulations set forth by the State Aid Decree, all entities granting aid are required to inform the State Aid Monitoring Office (Tamogatasokat Vizsgalo Iroda) of their planned aid measures. The State Aid Monitoring Office is tasked with evaluating the conformity of each proposed measure with applicable EU rules and regulations.

13. What were the major changes brought by the COVID-19 pandemic? Have any of them stuck and how likely is it for these changes to continue to do so in the foreseeable future?

While the COVID-19 pandemic brought a few temporary (mostly procedural) measures affecting competition law, the core areas of competition law remained unchanged.

There are two notable permanent COVID-19 amendments in the Competition Act:

(i) A merger is exempted in regard to the notification obligation if it involves a venture capital fund or a private equity fund, where the state directly or indirectly controls the majority of ownership rights through a COVID-19-related refinancing scheme aimed at investment protection if the fund alone or together with other entities acquires controlling rights;

(ii) The introduction of the accelerated sectoral inquiry, which authorizes the GVH to quickly identify and address market problems if there are reasonable grounds to suspect that competition within a sector is distorted or restricted and urgent intervention is needed. This legal tool has been used by the GVH quite regularly (e.g., in ceramic bricks, construction wood, coronavirus rapid tests, COVID-19 antigen tests, non-perishable food, dairy, and online booking services). ■

CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2024

KOSOVO

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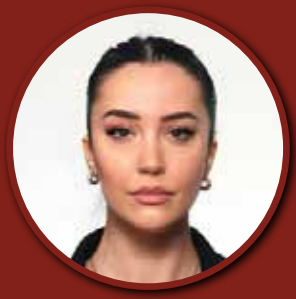

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1. What are the main competition-related pieces of legislation in the Republic of Kosovo?

In the Republic of Kosovo, the main competition-related pieces of legislation include:

The Competition Law (Law no 08/L-056) establishes the legal framework for ensuring fair competition and preventing anti-competitive practices in the market. It outlines the powers and responsibilities of the competition authority in Kosovo (Competition Authority), procedures for investigating and sanctioning anti-competitive behavior, as well as rules governing mergers and acquisitions. The Competition Law is partially aligned with (i) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty; (ii) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation); (iii) Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices; and (iv) Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

Also, the Law on State Aid (Law no 05/L-100) regulates the granting of state aid by public authorities to businesses and organizations in Kosovo. It aims to prevent distortions of competition within the internal market by ensuring that state aid is granted in a transparent and non-discriminatory manner and that it complies with EU state aid rules. This law partially complies with Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the implementation of Article 108 of the Treaty on the Functioning of the European Union.

2. Have there been any notable recent (last 24 months) updates of Kosovo competition legislation?

There were no notable amendments to the competition legislation in the Republic of Kosovo in the last 24 months.

3. What are the main concerns of the national competition authority in terms of agreements between undertakings? How is the sanctioning record of the authority?

The main concerns of the Competition Authority regarding agreements between undertakings primarily revolve around ensuring fair competition and preventing anti-competitive practices in the market. The Competition Authority closely monitors agreements between undertakings to detect any potential violations of competition law, such as price-fixing, market allocation, and collusion, which could harm consumers or stifle competition. Additionally, the Competition Authority is vigilant in assessing agreements that may lead to the abuse of dominant market positions, as such behavior can distort competition and harm the overall functioning of the market.

In terms of the Competition Authority's sanctioning record, there have been relatively few instances of parties being found guilty. Between 2016 and 2023, the authority imposed fines on only 15 petrol companies found to have violated the Competition Law during the months of November and December 2018, specifically for breaches related to prohibited agreements.

4. Which competition law requirements should companies consider when entering into agreements concerning their activities in Kosovo?

When entering into agreements concerning their activities in Kosovo, companies should carefully consider several competition law requirements to ensure compliance with regulations and avoid potential legal consequences. Some of the key considerations include:

(a) Anti-competitive Agreements – Companies must refrain from entering into agreements that restrict competition, such as price-fixing, market allocation, and collusion. These agreements are prohibited under competition law and can lead to severe penalties if detected.

All agreements aimed at preventing, restricting, or distorting competition in the relevant market are strictly prohibited. Specifically, agreements that:

- Directly or indirectly fix prices or manipulate trading conditions;
- Impose limitations or exert control over production, markets, technological advancements, or investments;
- Divide markets or sources of supply among competitors;
- Implement unequal conditions for similar transactions with other trading entities, unfairly disadvantaging them in competition;
- Make the conclusion of a contract contingent upon the acceptance of additional obligations that are unrelated to the contract's subject matter or commercial purpose.

These prohibitions aim to safeguard fair competition and promote market efficiency and consumer welfare.

(b) Abuse of Dominant Position – Companies with significant market power must avoid abusing their dominant position to eliminate or restrict competition. This includes practices

such as predatory pricing, tying, and discriminatory behavior towards competitors or customers.

The abuse of a dominant position is strictly prohibited under the Competition Law.

An enterprise or group of enterprises engages in such abuse if they:

- Directly or indirectly establish unfair purchase or sale prices or impose other unfair trading conditions.
- Restrict production, markets, or technological advancements to the detriment of consumers.
- Apply different conditions to equivalent transactions with other enterprises, placing them at a disadvantage in competition.
- Condition contract agreements with additional obligations that are irrelevant to the contract's subject by nature or commercial use.
- Set prices or terms with the intent or result of impeding the entry of competitors or their products into the relevant market or expelling them from it.
- Deny access to networks or infrastructure to another enterprise under terms that prevent them from competing effectively.

(c) Merger Control – Companies planning mergers or acquisitions in Kosovo must comply with merger control regulations. They should assess whether their proposed transactions meet the thresholds set out in the competition law and notify the Competition Authority accordingly.

A concentration shall be subject to the clearance and approval of the Competition Authority if the following thresholds are met:

If the participants in the concentration have a combined worldwide turnover:

(i) of at least EUR 20 million and one concentration participant has a domestic turnover of at least EUR 1 million; or

(ii) at least 2 concentration participants have a combined domestic turnover of at least EUR 3 million

By proactively considering and addressing these competition law requirements, companies can mitigate legal risks, safeguard their reputation, and contribute to a competitive and fair business environment in Kosovo.

5. Does a leniency policy apply in the Republic of Kosovo?

Yes, a leniency policy does apply in the Republic of Kosovo. Under the provisions of the Competition Law, the Competition Authority possesses the authority to grant leniency to participants of prohibited agreements under certain conditions. This leniency is granted to those who are the first to report the violation and provide substantial evidence that facilitates the initiation or determination of the prohibited agreement. Moreover, even if participants do not meet the criteria for full exemption from fines, they may still receive reduced fines if they provide decisive evidence.

The specific procedures and criteria governing leniency are outlined in Administrative Instruction No. 04/2023, titled "On Determining the Procedure and Criteria for Leniency or Fine Reduction," issued by the Competition Authority. These criteria include immediate cessation of involvement in the cartel upon request, full and sincere cooperation with the Competition Authority, and the provision of relevant information and evidence regarding the cartel.

Furthermore, enterprises considering a leniency request must adhere to strict guidelines during the process. They must refrain from destroying, falsifying, or concealing evidence related to the cartel and must abstain from disclosing any facts or the content of their intended request until the competition authority issues a notice of findings.

The leniency policy serves as a crucial instrument in uncovering and prosecuting cartel behavior, thereby fostering competition and safeguarding consumer interests in Kosovo. By incentivizing proactive reporting and cooperation, the policy promotes transparency and strengthens enforcement efforts against anticompetitive practices.

The Competition Authority in Kosovo may grant exemption from fines to enterprises involved in a cartel if they fulfill certain conditions outlined in the relevant Administrative Instruction. These conditions include declaring their participation in the cartel and being the first to provide substantial evidence. This evidence should be presented at the time when the Competition Authority receives the request to initiate proceedings regarding the cartel, provided that the Competition Authority lacks sufficient evidence until that moment. The exemption does not apply to the initiator or instigator of the cartel.

6. How is unilateral conduct treated under Kosovo competition rules?

The Competition Authority in Kosovo assesses unilateral conduct to determine if it violates Competition Law and undermines the competitive process in the market. Some forms of unilateral conduct that may be considered abusive include:

(a) directly or indirectly sets unfair purchase or sale prices or other unfair trading conditions;

(b) restricts production, markets, or technological development to the detriment of consumers;

(c) applies different conditions for equivalent transactions with other enterprises, placing them at a competitive disadvantage;

(d) conditions the conclusion of a contract with additional obligations that, by their nature or commercial use, are unrelated to the subject of the contract;

(e) sets prices or other conditions aimed at or resulting in hindering entry into or exit from the relevant market for particular competitors or their products;

(f) denies another enterprise access to the network or infrastructure under appropriate terms, making it impossible for it to act as a competitor.

If the Competition Authority determines that unilateral conduct constitutes an abuse of dominance, it may take enforcement action against the company. This could include imposing fines and ordering behavioral remedies to cease the abusive conduct.

7. Are there any recent local abuse cases of relevance?

As previously mentioned, the Competition Authority in the Republic of Kosovo has recorded relatively few instances of parties found guilty. A notable case involved 15 companies fined for engaging in prohibited agreements. The fines ranged from EUR 50,000 to EUR 989,000, with the latter marking the highest fine ever imposed in such cases.

8. What are the consequences of a competition law infringement?

In Kosovo, the Competition Authority has the authority to impose fines in the event of a violation of the regulations set forth by the Competition Law.

The maximum fine amount cannot surpass ten percent (10%) of the total turnover generated by the enterprise or group of enterprises globally in the last fiscal year, as reported in the financial statements.

When determining the fine, the Competition Authority considers mitigating and aggravating factors, taking into account the severity and duration of the infringement, as well as its impact on other market participants and consumers. Initially, the Competition Authority establishes the base fine amount for the violation, which may then be adjusted based on the circumstances surrounding the case.

9. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Kosovo market?

Yes, there are competition law requirements that apply to mergers and acquisitions occurring or impacting on the Kosovo market. Companies engaging in such transactions must comply with the merger control provisions outlined in the Competition Law.

Subject to the Competition Law, the concentration of enterprises is created through:

a. Merger of two or more independent enterprises or parts of these enterprises;

b. Acquisition of direct or indirect control over one or more enterprises or parts of enterprises, by:

- acquiring shares, or a part of them;
- acquiring majority of voting rights; and
- any other way based on the provisions of laws in force.

The acquisition of control is achieved by transferring the rights, by contract or in another way that enables the enterprises, alone or together, to exercise decisive influence over other companies on a permanent basis.

The acquisition of control is realized especially with:

i. transfer of ownership or the right to use all or part of the enterprise's assets;

ii. transfer of rights or contracts that bring decisive influence on the composition, voting, or decisions of corporate bodies.

Key requirements and procedures related to mergers and acquisitions under the Competition Law include:

Notification Requirement – Companies meeting the above thresholds must notify the Competition Authority of Kosovo of their proposed mergers or acquisitions before completing the transaction. The thresholds are typically based on the combined turnover or market share of the merging parties and are designed to capture transactions that may significantly affect competition in the market.

Pre-merger Notification – The merging parties are required to submit a notification to the Competition Authority detailing the transaction's specifics, including information on the parties involved, the relevant markets affected, and the potential competitive impact of the merger or acquisition.

Review Process – Upon receiving a merger notification, the Competition Authority will assess the transaction's potential impact on competition in the relevant markets. This may involve conducting a thorough investigation, gathering additional information from the parties and third parties, and analyzing the competitive effects of the proposed merger or acquisition. During the assessment for the clearance of concentration, the Competition Authority evaluates whether the notified concentration would not significantly impede effective competition in the relevant market, particularly as a result of the creation or strengthening of a dominant position. The effects of concentrations among current or potential competitors in the same relevant market are assessed based on the Competition Authority's Administrative Instruction on the Assessment of Horizontal Concentrations. The effects of concentrations among enterprises active in different relevant markets are assessed based on the Competition Authority's Administrative Instruction on the Assessment of Non-Horizontal Concentrations.

Clearance Decision – Following its review, the Competition Authority will issue a decision either clearing the merger or acquisition if it determines that it does not raise significant competition concerns, or issuing conditions or remedies to address any identified anti-competitive effects.

Prohibition – In cases where the Competition Authority finds that a proposed merger or acquisition would significantly harm competition in the market, it may prohibit the transaction from proceeding.

It's important for companies involved in mergers and acquisitions in Kosovo to carefully assess whether their transactions trigger merger control obligations under the Competition Law and to comply with the notification requirements and procedures accordingly. Failure to do so could result in significant penalties.

10. What is the normal merger review period?

The normal merger review period in Kosovo can vary depending on the complexity of the transaction and the specific circumstances of the case. However, as per the Competition Law, the Competition Authority in cases of a simplified review process (when the notified transaction would not give rise to any competition concerns) completes the process within 30 calendar days from the date of receiving a complete notification to review a merger or acquisition transaction.

If the Competition Authority requires additional information or determines that the transaction raises significant competition concerns, it may extend the review period by issuing a formal request for further information. In such cases, the authority has an additional 60 days from the date of issuing such a conclusion to complete its review and issue a final decision.

11. Are there any fees applicable where transactions are subject to local competition review?

Yes, there are fees applicable when transactions are subject to local competition review in the Republic of Kosovo. Specifically, for the clearance of concentration requests, procedural expenses are incurred. These fees vary depending on the stage of the review process.

Initially, there is a fee of EUR 1,000 for the submission of a request for concentration clearance, as outlined in Article 15 of the Competition Law, which applies to participating enterprises.

Subsequently, upon verification and issuance of clearance by the Commission, a fee of EUR 6,000 is charged. It's important to note that these fees must be paid at the time of submission of the request or notification by the enterprises, respectively.

These fees contribute to covering the administrative costs associated with the competition review process, ensuring effective oversight and enforcement of competition laws in Kosovo.

12. Is there any possibility for companies to obtain State Aid in the Republic of Kosovo?

Yes, companies in the Republic of Kosovo may have the possibility to obtain state aid, subject to certain conditions and regulations. State aid refers to financial assistance or other benefits granted by a government or public authority to specific companies or sectors, which can include subsidies, tax breaks, grants, or favorable loan terms.

In Kosovo, state aid is regulated by the Law on State Aid Control, which aims to ensure that state aid granted by public authorities complies with European Union (EU) regulations and does not distort competition within the internal market. The law establishes procedures for the notification, assessment, and monitoring of state aid measures to prevent any adverse effects on competition or trade.

Companies seeking to obtain state aid in Kosovo must typically submit a notification to the relevant authority, providing details of the proposed aid measure and demonstrating how it complies with the legal requirements, including criteria related to the necessity, proportionality, and compatibility of the aid

with EU state aid rules.

The authority in Kosovo is responsible for overseeing state aid measures and ensuring their compliance with national and EU regulations. The authority assesses notified state aid measures to determine whether they meet the legal criteria and may require adjustments or impose conditions on the aid to address any potential distortions of competition.

Overall, while companies in Kosovo may have the possibility to obtain state aid to support their activities or investment projects, it is essential to adhere to the legal requirements and procedures established by the Law on State Aid Control to avoid any violations of competition law and ensure compliance with EU regulations.

13. What were the major changes brought by the COVID-19 pandemic? Have any of them stuck and how likely is it for these changes to continue to do so in the foreseeable future?

In Kosovo, the COVID-19 pandemic did not cause any substantial alterations in competition legislation. ■

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CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2024

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1. What are the main competition-related pieces of legislation in Lithuania?

The primary legislative framework governing competition is the Law on Competition of the Republic of Lithuania (Competition Law), which encompasses various aspects such as anti-competitive agreements, abuse of dominance, and merger control, imposes specific fair competition obligations on public institutions and provides specific provisions for the enforcement of state aid. This law also prohibits unfair trading practices including the disclosure of commercial secrets, improper employee poaching, and trademark misuse while regulating private claims for damages. Additionally, it establishes the institutional structure, outlines enforcement procedures, and liability provisions, and addresses international cooperation.

Complementing the Competition Law, there exist several related pieces of legislation.

The Law on Prohibition of Unfair Practices by Retailers and the Law on the Prohibition of Unfair Trading Practices in the Agricultural and Food Supply are the sector-specific laws.

The aim of these laws is to prevent retailers having significant market power from abusing it and to ensure the balance of interests between these entities and food and beverage suppliers.

Prohibitions of unfair practices provided for in these laws apply to the five biggest retailers: Lidl Lietuva, Maxima LT, Norfos mazmena/Rivona, IKI Lietuva, and Rimi Lietuva.

Protection from unfair practices of the above-mentioned retailers is given to food and beverage suppliers that:

- are established in any EU Member State or outside the EU;
- entered into a wholesale purchase and sale agreement with the five biggest retailers on the purchase of food and beverages intended for sale to consumers;
- have an annual turnover from ordinary economic activities, including the annual turnover of all associated undertakings, that did not exceed EUR 350 million in the past financial year.

The laws prohibit the performance of any actions contrary to fair business practices, whereby the retailers' operational risk is passed onto suppliers or additional obligations are imposed on them, or which restrict the ability of suppliers to operate freely in the market and which are expressed as requirements for the supplier.

If the actions of a retailer violate provisions of the laws, such a retailer shall be liable under the procedure set by the latter laws.

Furthermore, the Law on Municipal Government, primarily focused on municipal governance, contains provisions mandating municipalities to obtain approval from the Lithuanian Competition Authority before undertaking new economic activities or establishing new entities.

2. Have there been any notable recent (last 24 months) updates of Lithuania competition legislation?

In 2023, amendments to the Competition Law were adopted. These amendments aim to create conditions for more effective enforcement of competition and state aid rules in Lithuania. Among the most important changes, rules on the recovery of unlawful and/or incompatible with the EU internal market state aid were introduced.

In 2022, the Lithuanian Government adopted a resolution approving the description of the procedure for setting fines for infringements of the Competition Law, which took effect from May 1, 2023. This change led to a more detailed regulation of the methodology for setting fines and established that some circumstances could lead to a reduction of a fine, even if it reaches a maximum threshold of up to 10% of the total annual worldwide turnover.

In 2022, amendments to the Law on Public Procurement were adopted, according to which, when the Competition Council's decisions on anti-competitive agreements in public procurement become final, the contracting authorities that carried them out will be obliged to go to court, either their own or through the central purchasing body, if it has made the relevant procurement, or to take other measures of compensation for damages and claim compensation for damages. The amendments to the law provide that, unless proven otherwise, the damage caused in public procurement by restrictive agreements between suppliers shall be deemed to be equivalent to 10% of the value of the supplies, services, and works covered by the concluded contract and, in the event of termination of the contract, of the value of the payments made by the contracting authority for those supplies, services, and works.

A pretty notable draft amendment to the Competition Law is currently under discussion in Parliament. It aims to provide an additional function of the Competition Council – consulting undertakings (public and private) on their compliance with Competition Law requirements. This draft also includes an amendment according to which appealing against the Competition Council's decision to impose a fine on an undertaking suspends the enforcement of the fine and the interest until the date on which a final ruling is awarded. Currently, the legislation provides that a fined undertaking must pay it despite appealing the Competition Council's decision.

3. What are the main concerns of the national competition authority in terms of agreements between undertakings? How is the sanctioning record of the authority?

Horizontal anti-competitive agreements are one of the centerpieces of the Competition Council's attention.

Recent Competition Council's decisions on cartels:

- Lithuanian Pharmacy Association and eight pharmaceutical companies restricted competition when they agreed on the margins of reimbursable medicines before submitting them for approval to the Ministry of Health;
- Lithuanian Association of Real Estate Agencies and its 39 members agreed not to solicit each other's clients and brokers, and thus restricted competition.

Both decisions are appealed, and court decisions are pending.

As far as vertical agreements go, the Competition Council has not been very active until now. However, in 2023, cosmetics wholesalers and retailers were fined for price-fixing agreements on skincare and other cosmetic products.

4. Which competition law requirements should companies consider when entering into agreements concerning their activities in Lithuania?

In general, the competition law landscape in Lithuania closely aligns with that of other EU jurisdictions, with both the Competition Council and national courts striving to maintain consistency with the practices of the European Commission and courts.

Agreements involving international companies in Lithuania tend to be vertical in nature, such as distribution or similar supply agreements. A degree of caution is advisable when such agreements include clauses restricting resale prices (such as outright bans on buyers setting their resale prices independently or recommending a price, which, when not followed, can be grounds for terminating the distribution agreement), exclusivity arrangements (such as single branding or exclusive distribution), or quantity-forcing agreements (such as minimum purchase volume requirements). While such arrangements may often be justifiable when neither party's market share surpasses 30%, certain specific provisions, like fixed or minimum resale price restrictions, or single branding agreements extending beyond five years, may prove more challenging to justify.

It's important to consider that the Lithuanian market is relatively small, and the Competition Council tends to be cautious regarding geographic market definitions extending beyond Lithuania's borders. Consequently, exceeding the 30% market share threshold, beyond which justifying vertical restraints becomes more difficult, is more likely, especially in cases where geographic market definitions are expansive.

5. Does a leniency policy apply in Lithuania?

It does. The leniency policy hasn't changed for quite some time, and the conditions are as follows:

- disclosing participation in an anti-competitive agreement;
- the first person to provide evidence not already possessed by the Competition Council, sufficient enough for conducting raids or establishing the infringement.
- halting involvement in the infringement, unless instructed otherwise by the Competition Council;
- cooperating with the Competition Council throughout the investigation;
- not attempting to conceal any evidence of the infringement or disclosing leniency application intentions to other parties;
- not being the one who initiated the agreement itself.

If some conditions are met and others not (e.g., served documents first but was the one who initiated the agreement), the undertaking can have its fine reduced rather than exempted from it.

An individual acting as a whistleblower has the opportunity to present evidence to the Competition Council regarding a potential horizontal or vertical price-fixing agreement. If the stipulated conditions outlined in the Law on Competition are fulfilled, the whistleblower may be eligible for a monetary reward of up to EUR 100,000.

6. How is unilateral conduct treated under Lithuanian competition rules?

Unilateral conduct under the Competition Law is treated quite similarly as in the European Union under TFEU Article 102.

Holding a dominant position is not prohibited, however, dominant undertakings shall comply with stricter requirements as opposed to their competitors that do not exercise such market power. It shall also be prohibited to abuse a dominant position within a relevant market by performing any acts which restrict or may restrict competition, limit the possibilities of other undertakings to act in the market, or violate the interests of consumers.

Such abuse may, in particular, consist in:

- imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets, or technical development to

the prejudice of consumers;

- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Abusing a dominant position may result in:

- a fine of up to 10% of the total annual worldwide turnover in the preceding business year;
- the restricted right of the manager of the enterprise to manage a public and/or private legal entity, or be a member of the collegial supervisory and/or governing body for three to five years, as well as a fine of up to EUR 14,481;
- victim's claims for damages;
- loss of good repute.

7. Are there any recent local abuse cases of relevance?

The last case was investigated and ruled in 2010 (margin squeeze conducted by an ex-monopolist internet infrastructure holder). The Lithuanian market is relatively small and it seems that the Competition Council's priorities lie within agreements between undertakings and mergers.

It is worth noting that a lot of sectors (telecommunications, internet, energy) where the presence of dominance can be found are often supervised by specific authorities such as the Communications Regulatory Authority or the National Energy Regulatory Council, and the Competition Council is not involved.

8. What are the consequences of a competition law infringement?

For the undertaking:

- a fine (up to 10% of gross annual turnover in the previous financial year);
- prohibition to partake in public procurement (up to three years);
- damage to reputation;
- threat of legal action for damages (private enforcement).

For management:

- fine (up to EUR 14,481);
- restriction for the CEO to be elected as CEO in any Lithuanian company whatsoever (three to five years). A list of persons to whom this restriction is imposed is published on the commercial registry's website.

The Competition Council has the right to also impose fines for not complying during an investigation. For example, before the New Year, one of the biggest Lithuanian beer wholesalers was fined for approximately EUR 810,000 because during a raid an employee deleted a text message which contained valuable information.

9. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Lithuanian market?

Yes. An M&A deal must be notified to the Competition Council and clearance must be obtained if these conditions are met:

- at least two of the undertakings participating in the merger have at least EUR 2 million of annual turnover in Lithuania;
- the aggregate amount of annual turnover amongst all of the participating undertakings in the merger is above EUR 20 million in Lithuania.

The Competition Council can initiate an investigation on its own initiative up to one year after the merger is finished if it believes that the merger can create a dominant position or otherwise restrict competition (ex-post review). In this case, the annual turnover of the participants in the deal is irrelevant.

10. What is the normal merger review period?

The general rule is that the investigation should take up to four months to complete.

However, depending on the complexity of the merger, it can be longer or shorter. In practice, it can take up to a month to get the filling admitted. Usually, the undertaking submitting the notice and the Competition Council exchange information before the notice is formally filed and admitted.

After admission, depending on the complexity of the merger, it can take from one month to more than half a year. This can happen if the Competition Council rules a "stop-the-clock" decision. This is done if the submitting entity fails to provide information requested by the authority. Such a decision can be valid for up to three months. If the information is not provided until then, the investigation must be terminated and the notice is deemed unsubmitted.

If the clearance is subject to commitments (e.g., annulling part of the merger; selling off a portion of the merger entity, etc.), the investigation can be prolonged for another month.

11. Are there any fees applicable where transactions are subject to local competition review?

Yes. The fee for providing a merger notice from March 1, 2024, stands at EUR 21,100. This fee is reviewed each year and can be changed. The fee for the examination of a request to perform individual merger actions currently is EUR 7,000.

Until February 29, 2024, the fees were EUR 22,700 and EUR 7,600 respectively.

12. Is there any possibility for companies to obtain State Aid in Lithuania?

Yes, European Union regulations regarding State Aid apply within Lithuania.

As per the provisions outlined in the TFEU, member states, Lithuania included, are obliged to notify the European Commission of any intended aid plan. However, exceptions exist; for instance, aid falling under de minimis thresholds or aid granted within block exemptions does not necessitate prior notification. Approval from the European Commission must be obtained before aid can be attributed. The European Commission holds exclusive jurisdiction to ascertain the conformity of granted aid with European Union legislation.

State aid allocated to companies may be provided either through approved aid schemes or individual aid projects. Aid schemes establish the terms, conditions, forms, and legal frameworks for dispensing aid to businesses, outlining the objectives (e.g., training, research, development) and its modalities (e.g., tax benefits, guarantees). Depending on factors such as the sector in which the company operates and its activities, the company can seek aid under an approved aid scheme. The conditions and criteria for aid eligibility within the aid scheme vary based on its specifics, objectives, sectoral focus, and other pertinent factors.

The Competition Council is the coordinating body on state aid subject to EU state aid rules. It carries out an examination of State aid projects, mediates between the Lithuanian authorities and the EC on State aid issues, provides guidance to state aid providers, collects information on the state aid granted, and maintains a register of State aid granted and irrelevant (de minimis) aid.

13. What were the major changes brought by the COVID-19 pandemic? Have any of them stuck and how likely is it for these changes to continue to do so in the foreseeable future?

There have been no significant changes implemented under Lithuanian national competition law in connection to the COVID-19 crisis. ■

CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2024

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1. What are the main competition-related pieces of legislation in the Republic of Moldova?

The Republic of Moldova has a young competition regime compared to other European countries with a long and stable market economy experience. After more than 40 years of a Soviet-planned economy, Moldova obtained its independence in 1991 and since then has developed its national legislation in the spirit of a free economy. Since its independence, one of Moldova's international commitments toward its European partners was to create legislation based on non-discrimination, transparency, and fairness that would promote the competition policy of the state by preventing, limiting, and suppressing anticompetitive conducts on the market.

The first experience of Moldova to regulate rules promoting competition was the Law on Limitation of Monopolistic Activity and Development of Competition No. 905 dated January 29, 1992, repealed on September 14, 2012. The law represented the foundation of competition-based principles and market behavior in the young Moldovan democracy. In 2000, the Parliament had a second attempt to adjust competition rules and adopted the Law on Protection of Competition No. 1103 dated June 30, 2000, repealed on September 14, 2012. This law was the first attempt to institutionalize an independent state agency dedicated to promoting competition policy, examining anticompetitive conducts, and approving takeover transactions.

The Competition Law No. 183 dated July 11, 2012, which is currently in force, is the result of transposing into Moldovan law Articles 101-106 of the TFEU of 25 March 1957, the Council Regulation (EC) No. 1/2003 dated December 16, 2002, on the Implementation of the Rules on Competition Laid Down in Article 81 and 82 of the treaty, and partially the Council Regulation (EC) No. 139/2004 of January 20, 2004, on the Control of Concentrations between Undertakings. Simultaneously, the Parliament approved the Law on State Aid No. 139 dated June 15, 2012.

Below is a list of secondary legislation on competition and state aid in Moldova.

- Regulation on the Assessment of Vertical Anticompetitive Agreements No. 13 dated August 30, 2013;
- Regulation on the Assessment of Horizontal Anticompetitive Agreements No. 14 dated August 30, 2013;
- Regulation on Assessment of Anticompetitive Technology Transfer Agreements No. 15 dated August 30, 2013;
- Regulation on Dominant Position and the Assessment of Abuse of Dominant Position No. 16 dated August 30, 2013;
- Regulation on Economic Concentrations No. 17 dated August 30, 2013;
- Regulation on the Acceptance of Commitments Submitted by Undertakings No. 2 dated January 22, 2015;
- Regulation on the Council of Experts of the Competition Council No. 1 dated March 3, 2016;
- Regulation on the Form of Notification, Procedure for Examination and Adoption of Decisions on State Aid No. 1 dated August 30, 2013;
- Regulation on State Aid for Employee Training and for the Creation of New Jobs No. 5 dated August 30, 2013;
- Regulation on Aid for Rescuing Beneficiaries in Difficulty No. 6 dated August 30, 2013;
- Regulation on State Aid for the Establishment of Enterprises by Women Entrepreneurs No. 7 dated August 30, 2013;
- Regulation on State Aid for Research and Development and Innovation No. 8 dated August 30, 2013;
- Regulation on State Aid Granted to Small and Medium-Sized Enterprises No. 10 dated August 30, 2013;
- Regulation on State Aid Granted to Beneficiaries Entrusted with the Operation of Services of General Economic Interest No. 11 dated August 30, 2013;
- Regulation on State Aid Intended to Remedy a Serious Disturbance in the Economy No. 12 dated August 30, 2013;
- Regulation on State Aid Register No. 3 dated August 30, 2013;
- Regulation on Assessment of State Aid for Financing of Airports and Start-Up Aid to Airlines No. 4 dated July 25, 2014;
- Regulation on Assessment of State Aid for Railway Undertakings No. 3/10 dated September 8, 2016;
- Regulation on Assessment of State Aid for Rapid Deployment of Broadband Electronic Communications Networks No. 3/1 dated September 8, 2016;
- Regulation on Assessment of State Aid for the Steel Sector No. 3/2 dated September 8, 2016;
- Regulation on Assessment of State Aid for Public Service Broadcasting No. 3/3 dated September 8, 2016;
- Regulation on Assessment of State Aid for Films and Other Audio-visual Works No. 3/4 dated September 8, 2016;
- Regulation on Assessment of State Aid for Public Rail and Road Passenger Transport Services No. 3/5 dated September 8, 2016;
- Regulation on Assessment of State Aid to Shipmanagement Companies No. 3/6 dated September 8, 2016;
- Regulation on Assessment of State Aid for Postal Services No. 3/7 dated September 8, 2016;

- Regulation on Assessment of State Aid for Culture and Heritage Conservation No. 3/8 dated September 8, 2016;
- Regulation on Assessment of State Aid for Sport and Multifunctional Recreational Infrastructures No. 3/9 dated September 8, 2016;
- Regulation on Assessment of State Aid for Environmental Protection No. 03 dated December 3, 2020;
- Regulation on De Minimis Aid No. 01 dated 06 August 2020; Regulation on Assessment of State Aid for Regional Development No. 02 dated October 15, 2020.

2. Are there any notable recent (last 24 months) updates of the Moldovan competition legislation?

A. Amendments to the Competition Law

In July 2023, Moldova adopted Law No. 199/2023 which marked some of the most significant changes brought to the Moldovan Competition Law since 2012. Even though Moldova is not an EU state member yet, the Moldovan Competition Law was amended to transpose the EU Directive 1/2019 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. Amendments aimed to strengthen the investigative powers of the competition council and address other aspects to make Moldovan rules in line with the EU competition law regime.

Below we summarize the main amendments to the Competition Law that were recently introduced:

a) Updates on the computation of fines

(1) The maximum level of fines has increased, as follows:

- for the breach of antitrust rules (cartels, vertical agreements, abuse of dominant position, failure to notify economic concentration) undertakings risk fines of up to 10% of the total worldwide turnover (maximum 5% of the total turnover before the reform);
- for the breach of procedural rules (providing false or misleading information or obstructing dawn raids) undertakings risk fines of up to 1% of the total worldwide turnover (maximum 0.5% of the total turnover before the reform).

(2) Fines may be applied to a "single economic unit" defined as "parent undertaking and its subsidiary where that subsidiary, although having a separate legal personality, does not decide independently on its conduct on the market but fulfills, in all material respects, the instructions given by the parent undertaking and therefore forms a single undertaking, so that the anti-competitive conduct of the subsidiary may also be attributed to the parent undertaking." This amendment will become effective in 2026.

(3) As an exception to the principle of personal liability, the competition council will apply the criteria of economic continuity and legal continuity, as defined under the EU case law. As such, fines may be imposed on economic or legal successors of undertaking who broke the Competition Law. This amendment will become effective in 2026.

b) New remedies

Besides leniency and commitment procedure, an additional remedy for the undertakings is included, namely the acknowledgment of offense. Undertakings can acknowledge the anti-competitive conduct in exchange for an up to 30% reduction of the fine.

c) Expanding inspection powers of the competition council

The amendment expands and clarifies the scope of evidence that may be collected and used as evidence by the competition council, namely documents, oral statements, electronic messages, recordings, and any other objects containing information, regardless of its form and type of support on which the information is stored (e.g., smartphones, computers, servers, digital clouds).

Attorney-client privilege over particular documents and information may be disregarded by the competition council's inspectors during dawn raids if the undertaking does not provide an adequate justification and the relevant elements confirming the confidential character of the information. This rule does not apply however to the communication between the undertaking and attorneys within the framework and solely for the right of defense of the investigated undertaking about the ongoing investigation which may not serve as evidence.

d) EU competition principles and case law are directly applied in Moldova

Even though Moldova is not an EU member state, the EU competition rules and case law will be directly applied by the Competition Council, courts, undertakings, and other actors involved. The competition council must ensure compliance of its activity, including the performance of investigation powers, with the general principles of European Union competition law and the Convention for the Protection of Human Rights and Fundamental Freedoms.

e) Increase of the thresholds triggering competition clearance of economic concentrations

Following the amendments, the aggregated income for undertakings that triggers the notification of an economic concentration to the competition council increased to MDL 50

million (worldwide turnover of all undertakings involved) and to MLD 20 million (total turnover obtained on the Moldovan territory by at least two undertakings involved).

f) Amendments to the secondary antitrust legislation

Law No. 199/2023 established the obligation of the Competition Council to update the existing secondary legislation within six months from the date of its entry into force and to adopt the new secondary legislation necessary for the application of the Competition Law.

First, it is necessary to update the Regulation on Organization and Functioning of the Competition Council adopted in 2012, to reflect all the changes recently made to the Competition Law. The Regulations concerning the evaluation of technology transfer agreements, horizontal agreements, and vertical agreements, as well as the Regulation on the establishment of market dominance and assessment of abuse of a dominant position, all issued in 2013, need to be brought in line with the new legislation adopted at the EU level. The Merger Regulation also needs adjustment to reflect the latest developments in the EU, especially those to digital mergers. The Regulation on acceptance of commitments, adopted in 2013, is also outdated and requires to be amended by detailing the conditions and procedure for assessing the commitments proposed by the undertakings under investigation, according to the new provisions of the Competition Law.

B. Amendments to the State Aid Legislation

In November 2023, Moldova also amended the Law on State Aid. The new amendments will become effective in January 2024 and may be summarized as:

- increasing the amount of de minimis aid from MDL 2 million (EUR 100,000) to MDL 5 million (EUR 250,000);
- supplementing the law with new definitions, such as eligible costs, aid intensity, the date of granting the state aid, and the date of payment of state aid;
- supplementing the state aid assessment procedure with a simplified notification;
- clarifying the provisions regarding the notification procedure and the calculation of deadlines;
- clarifying the rules of the investigation procedure, including extending the period for assessing state aid measures from 120 days to 18 months;
- clarifying the provisions regarding the calculation of interest on aid that is subject to repayment.

3. What are the main concerns of the national competition authority in terms of agreements between undertakings? How about the sanctioning record of the authority?

Article 5 of the Competition Law is based on Article 101 TFEU and provides that any agreements between undertakings or associations of undertakings, decisions by associations of undertakings, and concerted practices (agreements) which have as their object or effect the restriction, prevention or distortion of the competition shall be prohibited without the need for a prior decision to do so. The distinction between by object and by effect is made according to the EU legislation and case law.

Article 5 shall not apply to anti-competitive agreements or categories of anti-competitive agreements which fulfill cumulatively the conditions for exemption laid down in the law, namely: a) contribute to the improvement of the production or distribution of products or the promotion of technical or economic progress; b) ensure consumers a fair share of the benefit obtained; c) do not impose on the undertakings concerned restrictions which are not indispensable for the attainment of the objectives referred to at letters a) and b); d) does not allow undertakings to eliminate competition in respect of a significant part of the products concerned.

The categories of exempted agreements are regulated by two regulations of the Competition Council approved in 2013, which are currently under the scrutiny of modification, as they are not in line with the new block exemption rules existent at the EU level.

The main concerns of the competition council in the precedent years (2017 - 2023) in terms of agreements between undertakings related mostly to bid-rigging and hardcore cartels affecting price competition. No decision on sanctioning anti-competitive vertical agreements was issued by the Competition Council during the period mentioned above.

Anti-competitive agreements are considered serious violations and fines can reach 10% of the involved undertaking's total worldwide annual turnover.

Investigations concerning horizontal agreements are initiated at complaint or ex officio. Most of the investigations on horizontal agreements initiated in the 2017-2022 period were initiated ex officio.

Starting with 2017, all anticompetitive agreements examined and sanctioned by the Competition Council were mostly related to acts of bid-rigging infringements during public acquisition procedures (most often, tenders for construction works). The numbers of decisions issued by the Competition Council in 2017 – 2023 sanctioning anti-competitive agreements and

fines levels are reflected below:

- 2017: Eight cases with fines totaling MDL 4,805,022 (approximately EUR 240,251)
- 2018: Eight cases with fines totaling MDL 10,492.896.7 (approximately EUR 524,644)
- 2019: Two cases with fines totaling MDL 4,317,000 (approximately EUR 215,850)
- 2020: Zero cases
- 2021: Three cases with fines totaling MDL
- 2022: Seven cases with fines totaling MDL 1,168,078 (approximately EUR 61,477).

In 2021, the Competition Council issued a cartel decision which represents the highest fine applied by the authority to date, for a fixed-price cartel among four distributors of fertilizers and crop protection products. The competition council fined the distributors a combined fine of MDL 130 million (about EUR 4.3 million) for operating a five-year price-fixing and information-sharing cartel. The cartel decision of the competition council was appealed by the involved undertaking. No final court decision has been issued yet.

The competition council also opened investigations into vertical restraints, but none of such investigations resulted in sanctioning decisions, and most of them were resolved by accepting commitments submitted by the involved undertakings.

The Competition Council examines the anticompetitive agreements as administrative violations of competition law. It has broad investigatory powers, including the right to request any information and documentation and conduct dawn raids on the premises of undertakings and individuals' residences. Dawn raids represent an investigation instrument that is frequently used by the competition council and not only in anticompetitive agreements investigations.

The competition council also has the right to inspect and seize documents and electronic evidence, and request statements from representatives and employees of undertakings involved. Individuals' interviews by the competition council must rely on the voluntary cooperation of the respective individuals.

Undertakings and individuals involved in anticompetitive agreements may be subject to criminal investigations and liability under the Moldovan Criminal Code. Criminal investigations of anticompetitive agreements are within the competence of the Prosecution Office. As a matter of law, administrative procedures before the competition council and criminal investigations against undertakings and individuals can proceed simultaneously. Although the legal framework is in place, no criminal conviction has been obtained in an anti-competitive agreement case to date.

4. Which competition law requirements should companies consider when entering into agreements concerning their activities on the Moldovan territory?

One of the competition law risks with serious consequences is anti-competitive horizontal agreements where two or more undertakings agree not to compete. The substantive principles in terms of anti-competitive agreements, including in the case of cartels, reflected in the Moldovan Competition Law are modeled after Article 101 of the TFEU. Thus, similarly, in other EU countries, Moldovan law prohibits cartels including agreements to fix prices, engage in bid-rigging, limit production, or share customers or markets. This is not an exhaustive list of restrictions that may be considered unlawful under the competition law.

Cartels may exist in any form (written, verbal, explicit, or implicit). It may also involve sharing or exchanging commercially sensitive information with competitors directly, or indirectly through a third party.

Besides cartels, Moldovan law prohibits vertical restrictions that prevent, restrict, or distort competition or have the potential to do so. As in the case of cartels, the form of anti-competitive vertical restraints is not important for legal qualification.

To identify potential risks of horizontal or vertical restrictions in agreements, companies should consider all factors and conditions implied by their commercial practices, intended or creating the potential to distort competition. It is recommended for companies to consider the following factors:

- if their customers are also their competitors;
- if they attend the same trade and professional associations as their competitors;
- if market conditions are transparent enough so that competitors' conduct and business practices are noticeable;
- if their contract contains exclusivity clauses of long-duration of five years or more;
- if their contract contains restrictions for the resale of goods or services, for example with respect to prices;
- if the agreement involves joint selling or purchasing; or
- if the agreement involves provisions on collaboration with competitors.

These illustrative examples of factors to be considered do not constitute horizontal or vertical restraints or anticompetitive conduct by themselves. They can create or increase the risk of potential scrutiny by the competition council which needs to be carefully assessed by companies.

To be noted similar to EU regulations, competition law provides for block and individual exemptions, when an anti-competitive agreement may be excluded from the application of Article 5. To benefit from block or individual exceptions regulated in Article 6 of the competition law, the involved undertakings need to prove the existence of exemption criteria.

In addition, it is worth mentioning that Article 8 of the competition law regulates the de minimis exemptions from the application of Article 5 applicable to certain agreements where the parties have very low market shares. The de minimis market share thresholds in Moldova are 10% for horizontal agreements and 15% for vertical agreements. A de minimis exemption does not apply to hardcore restrictions, such as price-fixing, sharing of customers, and a range of vertical intra-brand restraints such as resale price maintenance.

5. Does a leniency policy apply in Moldova?

The leniency policy is regulated by Section III Articles 84-92 of the competition law and was modeled following EU regulations. The leniency allows undertakings that are part of anti-competitive agreements to self-report to the competition council and hand over evidence that would enable the competition council to discover secret anti-competitive agreements and to obtain information to commence investigations. Undertakings who self-report may obtain total immunity from fines or a reduction of the fines that the competition council would have otherwise imposed on them.

The leniency policy is not very successful in Moldova among undertakings. From its institution by the competition law in 2012, only seven leniency applications were submitted to the competition council. Undertakings usually apply for leniency after the competition council has sent the investigation report or has collected all the evidence necessary to establish the infringement.

It is worth mentioning that the unpopular character of leniency might be the result of inconsistencies between the competition law, exonerating the self-reporting undertaking from liability, and the Criminal Code, where no exoneration from criminal liability existed until 2018. In 2018 the corresponding amendments were made to the Criminal Code, excepting a self-reporting undertaking from criminal liability if they collaborate with the competition council within the limits of the leniency policy provided by the competition law.

6. How is unilateral conduct treated under Moldovan competition rules?

Article 11 of the competition law prohibits the abuse of a dominant position held by one or more undertakings and provides a non-exhaustive list of potentially unlawful conduct.

The single firm conduct provision in Articles 10 and 11 of the competition law is based on the same principles as Article 102 of the TFEU. A dominant position is defined as the position of economic power which an undertaking benefits from, and which allows it to prevent effective competition in the relevant market, giving it the possibility to behave independently, to a considerable extent, of its competitors, clients, and consumers. The dominance in one or more relevant markets may be held by a single undertaking, a group of undertakings (single dominant position), or jointly by two or more undertakings, or by two or more groups of undertakings (collective dominant position).

Under Article 10 para (4) of the competition law, the presumption of dominance in Moldova is the individual share of one undertaking or cumulative shares of several undertakings exceeding 50%. At the same time, Regulation No. 16/2013 provides that a dominant position is unlikely if the undertaking's market share is less than 40% of the relevant market. The law does not preclude a finding of dominance for market shares below the thresholds in specific circumstances, nor do market shares alone conclusively establish dominance if other circumstances establish the undertaking is still facing effective competition in the market and is not capable of unilaterally exercising decisive influence.

Article 11 para (1) of the law stipulates that the abuse by one or more undertakings of a dominant position in the relevant market shall be prohibited. Abuse of a dominant position represents a serious violation of competition law and may result in sanctions in the form of fines of up to 10% of the involved undertaking total annual turnover.

In the case of abuse of the dominant position, the competition council must first define the relevant market in which the dominant firm operates. Afterward, it must determine if the firm is in a dominant position using a set of indicators, such as market shares, the asymmetry of market shares, or the height of entry barriers. If the firm is in a dominant position, the Competition Council must show that the dominant firm abused its market power to exclude an as-efficient competitor. The abuse of dominant position demonstrates that the practice is not the result of the firm's intrinsic superiority over competitors.

The assessment of a dominant position is not based solely on the size of the undertaking and its market position. While market share is important, it does not determine on its own whether an undertaking is dominant. It will also depend on a range of factors and require detailed legal and economic assessment.

Dominance itself is not prohibited when it results from the firm's merit. The competition policy aims to ensure that the

dominant firm does not use its position to exclude as-efficient competitors.

7. Are there any recent local abuse cases of relevance?

In 2020, three investigation cases of abuse of dominant position finalized with infringement decisions for a total amount of fines applied of MDL 35.711 million (approximately EUR 1,78 million).

The competition council discovered an abuse of the dominant position on the market of access to airport infrastructure and facilities within International Chisinau Airport. The infringement decision states that the dominant undertaking offered unfair and unjustified renting conditions and differentiated tariffs for renting services to handling companies. The competition council imposed a fine of MDL 31.635 million on the dominant undertaking and issued a prescription to remove the identified violations.

Another abuse case that was finalized in 2020 is related to an abuse identified on the market of TV programs retransmission services through CATV and IPTV technologies on five streets in Chisinau city. The competition council found dominant two entities of the same group in the market of wired internet access. According to the decision of the competition council, the dominant undertakings used their dominant position in the market of wired access to the internet to exclude a competitor from the TV programs retransmission market. In this case, the Competition Council imposed fines of MDL 2.053 million, and MDL 169,200, respectively.

In 2020, the Competition Council also penalized an abuse of the TV advertising market of the Republic of Moldova, produced by conditional granting of additional discounts for the placement of advertising. The competition council claimed that the dominant undertaking created competitive disadvantages for TV channels and advertisers by offering discriminatory remunerations for exclusivity upon procurement of TV advertising. The imposed fine, in this case, was MDL 1,852 million.

The competition council is active in preventing abusive unilateral conduct. It has initiated several new investigations, including against a digital platform. The most common theories of damage relied upon by the competition council concerned refusal to market foreclosure (the dominant undertaking offers different conditions or discriminatory treatment to similar customers or competitors, thus making it more difficult to compete effectively) and exclusivity agreements (use of exclusive contracts or agreements to prevent competitors from having access to significant resource, including financial resources, leading to foreclosure of competition).

8. What are the consequences of a competition law infringement?

An undertaking that has engaged in anti-competitive behavior by participating in an anti-competitive agreement, committing abuse of dominant position, or failing to notify a notifiable economic concentration and so infringed the competition law may be subject to fines imposed by the competition council. The fines reflect the gravity and duration of the infringement and are calculated according to the formula provided by the competition law. The starting point for the fine is the percentage of the undertaking's annual turnover for the year precedent to the infringement decision of the competition council. This is then multiplied by the duration factor, dependent upon the number of years the infringement lasted. The fine can be increased in case of aggravating circumstances (e.g., repeated infringement) or decreased, in case of attenuating circumstances (e.g., active collaboration with the competition council during the investigation). The maximum level of fine is capped at 10% of the overall annual turnover of the undertaking.

In addition to anti-competitive practices, the competition law prohibits certain acts of unfair competition. Investigations on unfair competition are initiated by the competition council only upon complaint. In case of an infringement decision, the fine to be applied will be determined according to similar rules on fines' individualization as for anti-competitive conduct. The maximum level of fine for unfair competition is capped at 1% of the overall annual turnover of the undertaking.

Besides fines imposed on undertakings, the competition council may also issue prescriptions to entities that violated the competition law imposing the obligation to remove the violations. Prescriptions are issued for cases of anti-competitive conduct of Moldovan public authorities.

9. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Moldovan market?

Control of economic concentration is another area of the competition policy in Moldova. The definition of an economic concentration follows the model of the EC regulations. The key concept to identify an economic concentration is that of acquisition of control or decisive influence.

Economic concentrations are subject to review by the competition council only if the following cumulative thresholds are met:

(i) worldwide turnover of all undertakings involved exceeds MDL 50 million (approximately EUR 2.5 million), and

(ii) each of at least two undertakings involved had a domestic

turnover of at least MDL 20 million (approximately EUR 1 million).

Notifications of mergers that meet the thresholds are mandatory and a notifiable transaction must not be closed prior to obtaining the approval of the competition council. Failure to notify a transaction is considered a serious offense and sanctions may reach 10% of annual worldwide turnover.

Review of notifications of economic concentrations represents a major part of the competition council's activity. The industries most active in notified mergers and acquisitions were food retail and non-food retail.

Since its creation, the Competition Council issued a significant number of decisions for failure to notify economic concentrations, representing most cases when fines were imposed under competition law.

Almost half of the economic concentrations reviewed by the Competition Council since 2014 were not duly notified by the parties involved. However, the competition council usually authorizes the economic concentrations, even when operations are not duly notified if it does not foresee any anti-competitive effects on the markets.

Since the competition law entered into force in 2012, no duly notified economic concentration was refused by the authority. In the period between 2014 and to date, there were a limited number of cases when the Competition Council sought remedies or had been blocked by the Competition Council. Thus, in more than 40 merger notifications duly submitted by undertakings to date, only three mergers were approved with commitments proposed by undertakings and approved by the competition council. The commitments proposed and accepted by the competition council represented behavioral remedies. One unnotified concentration was declared illegal, fined MDL 21 million (approximately EUR 1 million), and dissolved in 2015. The merger in question involved several leading tourism operators and led to a de facto monopolization of the most popular foreign tourism destination.

10. What is the normal merger review period?

The merger review process in Moldova closely follows the European model. Merger review is divided into two phases of procedure, including:

(1) A Phase I period, lasting for up to 30 working days period, calculated from the date when the complete notification is considered effectively submitted by the competition council. In practice, most notifications are incomplete when first submitted, extending the actual Phase I review period until all necessary information and documents are provided for the purposes of the notified transaction. At the end of the Phase I period, the competition council may issue a no-objection decision if the transaction does not raise competitive concerns or, in case of the existence of such concerns, they were resolved by the involved undertakings by commitments. If serious concerns exist that have not been resolved by commitments at Phase I, the competition council may issue a decision on opening the Phase II investigation.

(2) A Phase II investigation period, lasting up to 90 working days for mergers that have raised concerns during the initial review period. At the end of the Phase II period, the competition council may issue a no-objection decision, a decision approving the merger subject to commitments proposed by undertakings, or a decision prohibiting the transaction due to serious competition concerns. Phase II reviews are rarely used by the competition council.

Moldovan law also provides for a simplified notification process, which is available for transactions where the aggregate market shares of the undertakings involved do not exceed 15% (horizontal relations) or 25% (vertical relations).

11. Are there any fees applicable where transactions are subject to local competition review?

The notification of economic concentration and its review by the competition council is subject to a state fee of 0.1% of the annual turnover of all undertakings involved obtained in Moldova but may not exceed MDL 125,000 (approximately EUR 6,250). The notification fee is transferred to the budget of the competition council.

12. Is there any possibility for companies to obtain State Aid in the Republic of Moldova? If yes, under what conditions?

According to the Law on State Aid and the Association Agreement between the European Union and the Republic of Moldova, state aid granted in the Republic of Moldova, in any form whatsoever, which distorts or threatens to distort competition by favoring certain undertakings, or the production of certain goods and services that affects trade between the Parties is generally deemed illegal.

However, the Law on State Aid provides for several categories of state aid exempt from notification and a set of categories of state aid that can be considered compatible with normal market competition, provided that aid is notified to and approved by the competition council.

The following categories of state aid are considered a priori compatible with the normal competition environment and are exempted from notification:

a) state aid of a social character granted to individual consumers, provided that aid is granted without any discrimination related to the origin of goods or services; or

b) aid granted for the purpose of eliminating the consequences of natural disasters and other exceptional situations.

The following categories of state aid may be considered compatible with a regular competition environment:

a) state aid aimed at the remediation of a severe disturbance in the economy;

b) state aid granted for employee training and for the creation of new jobs;

c) state aid granted to SMEs;

d) state aid granted for research and development and innovation;

e) state aid granted for environmental protection;

f) state aid granted to the beneficiaries entrusted with the operation of services of general economic interest;

g) state aid provided for rescuing beneficiaries in difficulty;

h) state aid for the establishment of enterprises by women entrepreneurs;

i) sectoral state aid; or

j) state aid for regional development.

These categories of state aid have to be notified and are evaluated according to the regulations approved by the competition council.

According to Law No. 169/2017 on the Approval of the National Program on Competition and State Aid for 2017-2020, the total amount of state aid granted should not exceed 1% of GDP by 2020.

The total amount of state aid granted in the Republic of Moldova, according to the latest data published by the Competition Council, was EUR 40,127 million, EUR 58,461 million, and EUR 96,276 million in 2017, 2018, and 2019, respectively.

13. What were the major changes brought by the COVID-19 crisis in the field? How likely is it for these changes to stick?

The COVID-19 crisis did not significantly affect the activity of the competition council. No major changes have been implemented in the competition policy due to the COVID-19 situation.

Undertakings were under the obligation to observe the competition law requirements without any exemptions or derogations during the emergency declared by the Moldovan Parliament in 2019-2020. The competition council stressed that the emergency should not be used by undertakings to commit abuses and other anticompetitive conduct, or as an excuse for not complying with competition regulations.

The pandemic crisis resulted in restrictions on physical interactions with the competition council that encouraged undertakings to use electronic means of communication for filings under the competition law and the Law on State Aid.

A significant share of state aid granted in 2020 and 2021 was directed at dealing with the pandemic and its economic consequences. The respective aid was exempted from notification obligation, as it is considered a priori compatible with legal requirements. ■

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What are the main competition-related pieces of legislation in Montenegro?

Competition protection in the Montenegrin market and the control and monitoring of compliance with state aid and other issues relevant to competition protection and state aid control are primarily regulated by the Law on Competition Protection (Official Gazette of Montenegro no. 44/2012, 13/2018, and 145/2021) and the Law on State Aid Control (Official Gazette of Montenegro no. 74/2009 and 57/2011).

In addition to these laws, as the primary mechanism for competition protection, competent authorities, in carrying out their duties within their jurisdiction, also utilize secondary legislation, namely rulebooks and decrees, issued based on the laws.

Below, is the list:

Decrees

- Decree on the group exemption for vertical agreements from prohibition (Official Gazette of Montenegro 13/14)
- Decree on the group exemption from prohibition for horizontal agreements on research and development (Official Gazette of Montenegro 13/14)
- Decree on the group exemption from prohibition for horizontal agreements on specialization (Official Gazette of Montenegro 13/14)
- Decree on the group exemption from prohibition for agreements on the distribution of spare parts and servicing of motor vehicles (Official Gazette of Montenegro 13/14)
- Decree on the group exemption from prohibition for agreements on technology transfer (Official Gazette of Montenegro 59/14)
- Decree on the group exemption from prohibition for agreements in road, rail, and inland waterway transport, and agreements on consortia in scheduled maritime transport (Official Gazette of Montenegro 59/14)

Rulebooks

- Rulebook amending the rulebook on the content and manner of submitting requests for individual exemption of agreements from prohibition (Official Gazette of Montenegro 48/20)
- Rulebook on the method and criteria for determining the relevant market (Official Gazette of Montenegro 18/13)
- Rulebook on the content and manner of submitting requests for individual exemption from agreements (Official Gazette of Montenegro 18/13)

Have there been any notable recent (last 24 months) updates of Montenegro competition legislation?

The current Law on Competition Protection in use has been effective since October 8, 2012, when the previous Law on Competition Protection ceased to be valid (Official Gazette of the Republic of Montenegro no. 69/2005 and 37/2007). It has undergone several amendments, notably in 2018 and 2021, through the adoption of:

- Law on Amendments to the Law on Competition Protection (Official Gazette of Montenegro no. 13/2018 dated February 28, 2018, entering into force on March 8, 2018)
- Law on Amendments to the Law on Competition Protection (Official Gazette of Montenegro no. 145/2021 dated December 31, 2021, entering into force on January 8, 2022).

The most recent amendments to the law were, therefore, in 2021 (specifically, coming into force on January 8, 2022). These latest amendments concern the competencies of the Competition Protection Agency (AZK) and its bodies.

What are the main concerns of the national competition authority in terms of agreements between undertakings? How is the sanctioning record of the authority?

In accordance with the Law on Competition Protection, the Competition Protection Agency is an institution with public authority, responsible for administrative and expert tasks in the field of competition protection. These tasks include assessing agreements among market participants, determining abuse of dominant position, evaluating the permissibility of market participant concentrations, as well as individual exemptions of agreements from prohibition on the market, and tasks related to state aid, specifically monitoring compliance with state aid, allocation, and utilization of state aid in accordance with the law.

Under the legal regulations, the agency has the authority to impose fines on market participants ranging from 1% to 10% of the total annual revenue in the financial year preceding the year in which the infringement occurred. Additionally, fines ranging from EUR 1,000 to EUR 4,000 can be imposed on responsible individuals within market participants or within state organs, state administration bodies, and local government bodies, if such bodies are involved as market participants. Finally, a fine (ranging from EUR 4,000 to EUR 40,000) is prescribed for market participants who fail to submit a request for approval for implementing a concentration within the statutory deadline.

Regarding the agency's penalty records, according to the 2022 Annual Report of the agency (the latest available report), there were 12 issued offense orders, with all 12 resulting in legal proceedings, and the total amount of fines imposed by the agency amounted to EUR 3,246,812.36.

Moreover, in 2022, the agency filed 21 requests to initiate misdemeanor proceedings.

Which competition law requirements should companies consider when entering into agreements concerning their activities in Montenegro?

Legal and natural persons conducting business activities and participating in the production and sale of goods or services within the territory of Montenegro must ensure that agreements they conclude do not have as their objective or effect the prevention, restriction, or distortion of competition in the relevant market. This applies to both written and oral agreements, contracts, individual contract terms, explicit or tacit agreements, concerted practices, and decisions of associations of market participants (agreements), which:

1) Directly or indirectly determine purchase or sale prices or other trading conditions;

2) Restrict or control production, markets, technical development, or investments;

3) Divide markets or sources of supply;

4) Apply different conditions to equivalent transactions with other participants in the same market, thereby placing them in a competitively disadvantageous position;

5) Make the conclusion of agreements subject to the acceptance of additional obligations by the other contracting party, which, by their nature or commercial purpose, are not related to the subject matter of the agreement;

6) Determine the obligation to apply a specific price in subsequent sales or otherwise ensure the application of a recommended resale price.

Does a leniency policy apply in Montenegro?

In the previous period, according to available data, the leniency policy was not applied in Montenegro. The position of the competent authority is that efforts must be made in the upcoming period to improve the use of this policy, all aimed at detecting cartels. It is important to note that the Competition Agency's report for the year 2023 has not been presented, so we do not have accurate information about the actions of the competent authorities in the previous year in this regard.

How is unilateral conduct treated under Montenegro competition rules?

In addition to agreements that prevent, restrict, or distort competition, as discussed earlier, acts or actions that constitute a violation of competition in the market, within the meaning of this law, include abuse of dominant position and concentrations that prevent, restrict, or distort competition or the free development of an open market economy, particularly the creation or strengthening of a dominant position in the market.

Abuse of a dominant position in the market is considered to include:

1) Directly or indirectly imposing unjustified purchase or selling prices or other unjustified business conditions;

2) Restricting production, markets, or technical development to the detriment of consumers;

3) Applying different conditions to transactions of the same type with other market participants, thereby placing them at a competitively disadvantageous position;

4) Making the conclusion of agreements conditional upon accepting additional obligations which, by their nature or commercial purpose, are not related to the subject matter of such agreements.

Concentrations that create a new or strengthen an existing dominant position of one or more participants, individually or jointly, which may significantly affect the prevention, restriction, or distortion of effective competition in the relevant market, are prohibited, except in cases where the participants in the concentration demonstrate that the concentration will benefit consumers and that the effects of the concentration will outweigh the negative effects of creating or strengthening a dominant position.

The Competition Agency initiates proceedings to investigate competition infringements ex officio when, based on submitted initiatives, information, documents, and other available data, it reasonably suspects the existence of a competition infringement.

What are the consequences of a competition law infringement?

When the Competition Agency determines that an agreement prevents, restricts, or distorts competition in the relevant market, it will issue a decision prohibiting the implementation of that agreement. Through the decision, the agency will order the parties involved in the proceedings to fulfill certain conditions or take certain measures, in accordance with the law, proportional to the committed infringement, to eliminate

harmful consequences and establish effective competition in the market, as well as deadlines for their execution.

Furthermore, if the Competition Agency determines abuse of a dominant position, it will, through a decision, establish the dominant position of the participant in the market and the action of the participant in the relevant market that constitutes the abuse of the dominant position and prevents, restricts, or distorts market competition, as well as the duration of the abuse. The agency will prohibit the actions and behaviors by the parties involved in the proceedings that constitute the abuse of the dominant position and impose measures, in accordance with the law, and deadlines for their execution.

If there is a risk of irreparable harm to the individuals directly affected by the actions or acts under investigation, the Competition Agency may order a temporary measure to cease the performance of those actions or the application of acts, or require the undertaking of actions or refraining from taking actions to prevent or mitigate their harmful consequences.

Additionally, the law also provides for judicial protection and stipulates that compensation for damages caused by acts and actions constituting a competition infringement determined by the decision of the agency shall be sought in civil proceedings before the competent court.

As previously stated, the law also prescribes fines for violations in cases where an agreement is negotiated, concluded, or executed, thereby preventing, restricting, or distorting competition, in cases of abuse of dominant position, implementation of prohibited concentrations, failure to suspend the implementation of a concentration until the agency issues a decision approving the intended concentration, and non-compliance with measures, conditions, and deadlines determined by the decision. These fines apply to both market participants and responsible individuals within market participants.

Are there any recent local abuse cases of relevance?

As indicated earlier, the Competition Agency of Montenegro has not presented its work results for the year 2023 yet, but this is expected in the near future. For now, we can mention that in the previous year, the Agency determined that the Association of Travel Agencies of Montenegro had adopted a Price List of travel agency services, which had the objective or effect of preventing, restricting, or distorting competition in the relevant market, pursuant to Article 8, paragraph 1, point 1 of the Law on Competition Protection. Consequently, it was prohibited and declared null and void.

Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Montenegro market?

Yes, there is. Specifically, Article 50 of the Competition Protection Law prescribes the following:

"Concentration as defined in Article 16 of this Law shall be carried out solely upon approval issued by the Agency at the request of the market participants.

A request under paragraph 1 of this Article may be submitted under the condition that:

1) The combined total annual revenue of at least two participants in the concentration realized in the market of Montenegro exceeds five million euros in the previous financial year;

2) The combined total annual revenue of the participants in the concentration realized in the global market in the previous financial year exceeds twenty million euros if at least one of the participants in the concentration during that period generated one million euros of revenue in the territory of Montenegro.

Upon becoming aware of the implementation of a concentration, the Agency may order the participants in the concentration to submit a request for approval for the implementation of the concentration if their combined market share in the relevant market of Montenegro exceeds 60%.

The burden of proving the combined market share of the participants in the concentration lies with the Agency.

Revenue generated within the group of participants in the concentration shall not be taken into account in calculating the combined total annual revenue under paragraph 2 of this article."

Therefore, the first scenario requiring a request for concentration approval is when at least two participants in the concentration (buyer, seller, company) must have a combined total annual revenue realized in the market of Montenegro exceeding EUR 5 million in the previous financial year.

The second scenario requiring a request for concentration approval is when the combined total annual revenue of the participants in the concentration realized in the global market in the previous financial year exceeds EUR 20 million, provided that at least one of the participants in the concentration generated EUR 1 million of revenue in the territory of Montenegro during that period.

Therefore, if none of the participants generated EUR 1 million of revenue in the territory of Montenegro during the

previous financial year, then it is not relevant how much revenue was generated in the global market.

Regardless of the aforementioned, the agency may, subsequently, upon becoming aware of the implementation of a concentration, order the participants in the concentration to submit a request for approval for the implementation of the concentration if their combined market share in the relevant market of Montenegro exceeds 60%.

What is the normal merger review period?

The process of evaluating a concentration begins on the day of receiving a complete request for the issuance of approval for the implementation of the concentration.

In the process of handling the request for approval for the implementation of the concentration, the agency will:

1) Reject the request for concentration approval if the conditions discussed in the previous question are not met. In this case, the agency makes a decision within 25 working days from the date of submitting the request.

2) Suspend the procedure if the applicant withdraws the request. In this case, the agency makes a decision within 25 working days from the date of submitting the request.

3) Approve the concentration when, based on the assessment of its effects according to legal criteria, it is determined that the concentration does not significantly prevent, restrict, or distort effective competition, primarily by creating or strengthening a dominant position in the market. In this case, the agency makes a decision within 105 working days from the date of submitting a complete request.

4) Approve the concentration while imposing additional measures, conditions, and obligations that the participants in the concentration must fulfill before or after the implementation of the concentration. In this case, the Agency makes a decision within 125 working days from the date of submitting a complete request.

5) Reject the request when, based on the assessment of its effects according to legal criteria, it is determined that the concentration would significantly restrict effective market competition in the relevant market, especially by creating a new or strengthening an existing dominant position.

In this case, the agency makes a decision within 130 working days from the date of submitting a complete request.

Participants in the concentration are obliged to suspend the implementation of the concentration until the agency issues a decision approving the intended concentration or until the expiry of the statutory deadlines for issuing a decision. Exceptionally, participants in the concentration may continue the implementation of a public offer in accordance with the law, provided that the acquirer of control does not exercise voting rights over the subscribed shares or stakes or does so solely with the aim of protecting the value of the acquired company until the agency issues a decision. Upon a reasoned request from the acquirer to protect their rights or the property of the acquired company, the agency may, at the request for approval for the implementation of the concentration, resolve the matter on an expedited basis.

The agency will revoke the decision approving the concentration if the decision is based on inaccurate or untrue data and facts.

If the agency assesses that the implementation of the concentration would prevent, limit, or distort competition, it will inform the applicant for the approval of the concentration of the essential facts, circumstances, and conclusions on which it will base its decision, for clarification. The applicant may propose measures in their response aimed at ensuring that the implementation of the concentration does not prevent, limit, or distort competition. If the agency determines that the proposed measures do not prevent, limit, or distort competition, it will issue a decision approving the concentration and order of the implementation of measures and deadlines for their implementation, as well as the method of monitoring the implementation of measures. The agency will revoke the decision conditionally approving the concentration if the participants in the concentration do not implement the proposed measures.

If the agency fails to issue a decision within the aforementioned deadlines, the procedure is suspended.

Are there any fees applicable where transactions are subject to local competition review?

The tariff regarding the amount of fees payable in proceedings before the Competition Protection Agency regulates the issue of fees in concentration proceedings. Specifically, the fee amounts vary depending on the case, as follows:

- The fee for issuing a decision rejecting the request for approval of the concentration amounts to EUR 600;
- The fee for issuing a conclusion on the suspension of the procedure for issuing approval for the implementation of the concentration, if the applicant withdraws the request, amounts to EUR 600;
- The fee for issuing a decision rejecting the request for approval for the implementation of the concentration amounts to EUR 1,000;
- The fee for issuing a decision approving the concentration

in an expedited procedure amounts to 0.03% of the total annual revenue of all participants in the concentration generated in the previous financial year, provided that the fee amount cannot exceed EUR 15,000;

- The fee for issuing a decision approving the concentration in an examination procedure and a decision on conditional approval of the concentration amounts to 0.07% of the total annual revenue of all participants in the concentration generated in the previous financial year, provided that the fee amount cannot exceed EUR 20,000.

The aforementioned fees from the tariff are paid into the agency's account, and proof of payment of the fee is submitted at the request of the market participants.

Is there any possibility for companies to obtain State Aid in Montenegro?

Yes, there is, with the state aid control established by the Law on State Aid and Support Control in 2007 and accompanying subordinate legislation.

State aid can be granted in various forms, including:

1) Subsidies or subsidized interest rates on loans;

2) Fiscal incentives (tax, contributions, and other public revenues);

3) State or municipality guarantees;

4) Transfer of profits and/or dividends from the state or municipality to the recipient of state aid;

5) Debt write-offs owed to the state, municipality, or legal entity managing and disposing of public revenue and state property;

6) Sale of immovable property by the state or municipality at a price lower than market value or purchase at a price higher than market value;

7) Use of state property free of charge or at a lower-than-market-rate compensation; and

8) Other assistance in accordance with the law.

What were the major changes brought by the COVID-19 pandemic? Have any of them stuck and how likely is it for these changes to continue to do so in the foreseeable future?

Having in mind that the COVID-19 pandemic was not considered a reason for declaring a state of emergency, there were no significant changes in this area. It should be noted that in 2020, the Government introduced three sets of measures to aid citizens and the economy.

The first set of measures included:

- Mitigating the negative impact of the pandemic on the financial system by deferring loan repayments for 90 days.
- Deferring the payment of taxes and contributions on salaries, as well as other obligations under the Law on Reprogramming, for up to 90 days.
- Establishing a new credit line by the Investment and Development Fund (IRF) for economic assistance.
- Advancing payments to contractors for investment works.

The implementation of the second set of measures was essentially a continuation of the first set, as follows:

- Subsidies for closed activities
- Subsidies for the tourism sector
- Subsidies for vulnerable sectors, including entrepreneurs, micro, small, and medium-sized enterprises (excluding state institutions, local self-government, and enterprises majority-owned by the state or local self-government)
- Subsidies for new employment

The implementation of the third set of measures also continued the initiatives from the first set and included:

- New credit lines are provided by the Investment and Development Fund
- Fiscal incentives, such as lower VAT rates (7%) for certain economic sectors like tourism
- Direct support for SMEs
- Defined structure and timeline for investment by sector ■

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CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2024

NORTH MACEDONIA

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1. What are the main competition-related pieces of legislation in North Macedonia?

The main legal act regulating competition protection aspects in North Macedonian is the Law on the Protection of the Competition, adopted in 2010, with four amendments that followed, the last being in 2018 (Competition Law). Parallel to the Competition Law, there are several byways which have been adopted in the course of the period between 2012 and 2016 (decrees and guidelines), that are intended to reflect EU competition guidelines and rules locally.

Moreover, in line with the Competition Law, and in accordance with the Stabilization and Association Agreement concluded between the European Communities and North Macedonia (at the moment of signing, Former Yugoslav Republic of Macedonia) (SAA), for determining the forms of disruption of the competition that can have effect to the trade relations between North Macedonia and the European Communities, accordingly, the criteria arising out of the rules of the EU on appropriate application of its competitions rules, apply.

Additionally, the Law on control over state aid, adopted in 2010, (State Aid Law) represents part of the local competition legal framework, along with the several bylaws adopted in respect to the procedure of granting state aid. The State Aid Law is aligned with Articles 107-109 of the Treaty on the Functioning of the European Union (TFEU) and applies to any form of state aid granted by state aid providers, regardless of whether it is granted under the aid scheme or as individual aid, which may affect trade in the state, trade between the Republic of North Macedonia and EU, as well as the trade between the Republic of North Macedonia and other countries which, together with the Republic of North Macedonia, are parties to the internal agreements ratified by the Republic of North Macedonia, which contain provisions for state aid.

As is the case with competition protection rules, also in the case of assessment of granting of state aid, according to Article 69 of the SAA, the criteria for determining the application of state aid rules in the European Union are applied in an appropriate manner locally.

The supervision of the enforcement of the competition legislation in North Macedonia is conducted by the Commission for Protection of the Competition of the Republic of North Macedonia (Commission).

2. Have there been any notable recent (last 24 months) updates of Macedonian competition legislation?

No changes have been introduced in Macedonian competition legislation in the past two years. However, with the aim to align with the EU competition legislation, it is expected that the Macedonian Commission will work in the near future on the alignment with the changes in the EU competition legislation and therefore, we expect the adoption and implementation of the new EU competition legislation to be on the top of the list of priorities of local authorities, including the new EU Vertical Block Exemption Regulation and guidelines on vertical restraints that entered into force in EU back in 2022.

Furthermore, the Macedonian competition legal framework also is expected to be expanded with the adoption of the recently announced draft of the Law on Prohibition of Unfair Trading Practices in the Chain of Supply of Agricultural and Food Products, awaiting the approval of the Assembly of the Republic of North Macedonia.

3. What are the main concerns of the national competition authority in terms of agreements between undertakings? How is the sanctioning record of the authority?

As an overall assessment, the number of infringement procedures initiated by the Commission annually is relatively modest. Namely, based on the latest available annual report of the Commission, a total of six misdemeanor decisions have been rendered throughout 2022, where a total of MKD 114.38 million was imposed as fines under the same (approximately EUR 1.85 million). Of the total six cases, four cases were in respect to prohibited agreements, one for abuse of dominant position, and one case of gun-jumping, as a more severe misdemeanor.

Comparatively, in 2021, the number of misdemeanor decisions was five (with fines totaling approximately EUR 74,640; three prohibited decisions; one case of prohibited agreement and abuse of dominant position; and, again, one case of gun jumping).

In 2020, the number of misdemeanor decisions was three (with fines totaling approximately EUR 110,134; two for concerted practices - cartel and one procedural misdemeanor).

Based on the above, and in line with the available data of the Commission, a slight increase can be noted in the number of sanctioned activities by the Commission annually as well as an increase in the total amount of imposed fines which might be a signal that the Commission is taking a step forward in emphasizing its presence as the relevant authority in the field.

In terms of agreements, the Commission's practice shows that the main competition concerns are clauses and agreements on dividing markets by customers, resale price maintenance, and non-compete clauses, identified mainly in vertical agreements.

4. Which competition law requirements should companies consider when entering into agreements concerning their activities in North Macedonia?

The competition concerns on agreements between undertakings provided in the local Competition Law are completely aligned with Article 101(1) of the TFEU, providing that such agreements, decisions, and concerted practices, which, as their object or effect aim for the distortion of the competition, are prohibited, specifically those which:

(i) directly or indirectly fix purchase or selling prices or any other trading conditions;

(ii) limit or control production, markets, technical development, or investment;

(iii) share markets or sources of supply;

(iv) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(v) condition the conclusion of contracts to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(jointly referred to as "restricted agreements, decisions, and concerted practices")

The prohibitions referred to above do not apply to agreements that contribute to the promotion of the production or distribution of goods and services or to promoting technical or economic development, provided that the consumers have a proportionate share of the resulting benefit, and which:

(i) do not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives, and

(ii) do not enable such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Agreements of minor importance, i.e., agreements between smaller companies, where the joint market share of the parties to the agreement and undertakings under their control on the market does not exceed the threshold of 10% where the agreement is horizontal or the threshold of 15% where the agreement is concluded on the vertical level, are also exempted from the prohibitions given in the definition of restricted agreements, resolutions, and practices. These exemptions will not apply if the agreement involves "hardcore" restrictions such as price fixing and market sharing which are illegal regardless of the size of the parties or their market share.

In the same direction, the local Competition Law provides exemptions from the application of prohibitions i.e., the definition of restricted agreements, practices, and decisions for certain types of agreements, such as:

(i) vertical agreements for the exclusive right of distribution, selective right of distribution, exclusive right of purchasing and franchising;

(ii) horizontal agreements for research and development or specialization;

(iii) agreements for the transfer of technology, license, or know-how;

(iv) agreements for distribution and repairing motor vehicles;

(v) insurance agreements, and

(vi) agreements in the transport sector.

The block exemptions of those agreements are still subject to certain thresholds and conditions provided in the Commission's guidelines and decrees, however, the exemptions would not apply in case the agreements contain "hardcore" restrictions, such as resale price maintenance or territorial/customer restrictions.

Accordingly, when entering into agreements concerning their activities, companies should assess if the respective agreements have as their object or may result in the distortion of the competition and in that course, should take into consideration the above listed restrictions. Furthermore, the companies should assess their market position and market share on the market of products/activities encompassed by the agreement and the possibilities of the agreements falling under any of the exemptions.

It is advisable that undertakings conduct a self-assessment of the agreements before executing them, as the Competition Law does not give an option to, nor provide obligation, for the parties to ask the Commission to assess and approve the agreements or allow exemption to the respective agreement from the scope of restricted agreements. The Commission may initiate the procedure for assessment of an agreement, i.e., parties' conduct, in case any concerned third party refers to the Commission and raises the concern on potential anticompetitive object or effect of a respective agreement and/or conduct. The agreements, decisions, or specific articles therein, which are prohibited under local law, are null and void.

5. Does a leniency policy apply in North Macedonia?

Yes. Under the Competition Law – specifically, Article 65 – a leniency policy can be applied to undertakings who have confessed to their participation in a cartel, which can result in complete, or partial relief from the potential imposition of misdemeanor sanctions as a result of their participation in the cartel, subject to fulfillment certain criteria under the Law: (i) providing sufficient proof which will enable the Commission to initiate a misdemeanor procedure, or (ii) provides sufficient proof that will allow the Commission to render a decision in course of an active misdemeanor procedure, if the rendering of such decision would not be possible without the provided evidence from the party seeking application of leniency.

Accordingly, the leniency relief will apply only if the party seeking application of leniency fulfills simultaneously several conditions:

(i) cease to partake in the cartel following the filling of the leniency request;

(ii) cooperates completely and actively with the Commission, including providing necessary data in the shortest possible terms;

(iii) does not inform other cartel members of the filled leniency request;

(iv) prior filling of the leniency request does not disclose its content to third parties, save for authorities that are competent in sanctioning the cartel outside of North Macedonia, and

(v) does not destroy, withhold, or forge relevant evidence that will serve to determine facts of relevance in the course of the Commission's decision-making process.

6. How is unilateral conduct treated under North Macedonia's competition rules?

The Competition Law prohibits the collective, but also the unilateral conduct of undertakings limiting competition within the market. Same as Article (101) of the TFEU which is implemented in local legislation, Article 102 of the TFEU which prohibits the abuse of a dominant position, is also implemented in the local Competition Law.

In the meaning of the Competition Law, an undertaking shall have a dominant position on the relevant market if, as a potential seller or purchaser of certain types of products and/or services:

(i) has no competitors in the relevant market, or

(ii) compared to its competitors, it has a leading position in the relevant market, especially in relation to the following:

- the market share and position and/or
- the financial power and/or
- the access to sources of supply or the market and/or
- the connection with other undertakings and/or
- the legal or factual barriers to entry for other undertakings on the market and/or
- the capability to dictate the market conditions, taking into consideration its supply or demand and/or
- the capability to exclude other competitors from the market by turning towards other undertakings.

The undertaking shall be presumed to have a dominant position if its market share of the relevant market exceeds 40% unless the undertaking proves otherwise. It shall be presumed that two or more legally independent undertakings have a joint dominant position in a relevant market if they act or participate jointly in the relevant market.

Any abuse of a dominant position on the relevant market or a substantial part of it is prohibited. The abuse, within the meaning of Competition Law, in particular, consists of:

(i) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(ii) limiting production, markets, or technical development to the prejudice of consumers;

(iii) applying different conditions to equivalent or similar legal transactions with other trading partners, thereby placing them in a position of competitive disadvantage;

(iv) conditioning the execution of agreements with acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such agreements;

(v) unjustified refusal to cooperate or encouraging and requesting from other undertakings or associations of undertakings not to purchase or sell goods and/or services to a certain undertaking, with an intention to harm that undertaking in a dishonest manner;

(vi) unjustified refusal to allow another undertaking to access its own network or other infrastructure facilities for adequate remuneration, if without such access, because of legal or actual reasons, the other undertaking becomes unable to operate as a competitor in the relevant market.

7. Are there any recent local abuse cases of relevance?

The Commission's practice in terms of abuse cases is relatively modest, yet, in our opinion, it is the result of the still low awareness of companies on their rights and instruments for protection against anticompetitive behaviors or practices of their competitors, especially of the markets leaders.

Looking into the annual reports of the Commission, officially reporting all administrative and infringement cases reviewed annually by the Commission, only two abuse cases were reviewed and sanctioned in the past two years.

Nevertheless, no matter the lack of abuse cases of relevance to be mentioned, it is our impression that lately, the Commission is getting more active in pursuing potential abuses and other types of infringement cases. Overall, the most frequent industries generating competition infringement cases and sanctions are the pharmaceutical and the TMT industry.

8. What are the consequences of a competition law infringement?

Generally, the Competition Law recognizes two types of infringements – "severe" infringements and "light" or so-called "procedural" infringements. Sanctions for infringements provided in the Competition Law are construed according to the category of the infringement. The infringements resulting from breach of rules on restrictive agreements, abuse of dominance, failure to notify concentrations, and gun-jumping, are considered severe infringements and the envisioned sanctions for such infringement are monetary fines which can range up to 10% of the annual worldwide turnover of the undertaking committing the infringement. In addition to the monetary fine, the Commission may impose a temporary ban on the performance of a specific activity in a duration of three to 30 days against the undertaking and a temporary ban on the performance of a profession, activity, or duty in a duration of three to 15 days against the legal representative of the entity.

In the case of procedural infringements, such as failure to act upon the orders of the Commission or obstructing the activities of the Commission, the sanctions are monetary fines which can range up to 1% of the annual turnover of the undertaking committing such infringement.

Parallel to the consequences under the infringement clauses provided in the Competition Law, the beach of the Competition Law may also result in potential civil court claims against undertakings by third parties, concerned and/or damaged with the activities of the undertaking committing the infringement under the Competition Law, potentially resulting with liability to indemnify such third parties' damages caused by such misconduct.

Furthermore, the prevention, restriction, or distortion of competition is also qualified as a criminal activity and is sanctioned under the Criminal Code (Article 283), specifically providing that:

(1) A responsible person in a legal entity who will enter into an agreement or participate in the conclusion of an agreement, decision, or concerted conduct, prohibited by law, which aims to prevent, limit, or distort competition, and therefore the legal entity will acquire property benefit on a large scale or will cause damage on a large scale, shall be punished with imprisonment from one to ten years.

(2) The responsible person in the legal entity shall be exempted from punishment, if he discovered or made a significant contribution to the discovery of the concluded contract, adopted decision, or concerted behavior prohibited by law, which resulted in the competent authority for the protection of competition in a procedure for determining the existence of a cartel, in accordance with the rules for the protection of competition, to determine an exemption, that is, a reduction of the fine of the legal entity.

9. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Macedonian market?

The competition approval of M&A transactions by the Commission should be one of the first concerns of the parties before entering into a transaction. The competition approval by the Commission, where an analysis of the transaction would result in a conclusion that filling of a notification for concentration before the Commission should be made, is usually one of the conditions preceding the closing of the transaction.

Under the Competition Law, M&A transactions which result in a concentration are subject to prior notification to, and approval by the Commission, in case any of the following thresholds are met:

(i) Any of the parties in the transaction has registered corporate presence in North Macedonia and the combined worldwide turnover of all parties in the transaction exceeds EUR 10 million in the year preceding the transaction and/or

(ii) The combined annual turnover of all parties in the transaction, generated in North Macedonia, exceeds EUR 2.5 million and/or

(iii) Any of the parties in the transaction has a market share of 40% on the relevant market or the combined market shares of all the parties in the transaction on the relevant market exceed

60%.

In the meaning of the Competition Law, a concentration shall be deemed to arise where a change of control on a lasting basis results out of:

(i) the merger of two or more previously independent undertakings or parts of undertakings;

(ii) the acquisition of direct or indirect control of the whole or parts of one or more other undertakings by - one or more persons already controlling at least one undertaking, whether by the purchase of securities or assets, by means of an agreement or in other manner stipulated by law;

(iii) the creation of a joint venture performing on a long-lasting basis the functions of an autonomous economic entity.

The essential trigger for existing a concentration is the change of control, while the "control" from the competition aspect understands rights, contracts, or any other means which, either separately or in combination, and having regard to the considerations of fact and law involved, confer the possibility of exercising decisive influence over an undertaking (determining the strategic commercial behavior of an undertaking).

A concentration of shall not be deemed to arise where: 1) banks, saving houses and other financial institutions or insurance companies the normal activities of which include legal transactions and dealing in securities, hold on a temporary basis securities with a view to reselling them within a period of one year from the date of acquisition, and provided that they do not exercise voting rights in respect to those securities with a view to influence the competitive behavior of that undertaking on the market; 2) control is exercised by an authorized person in a procedure related to bankruptcy or liquidation of an undertaking and concerning undertakings that are established outside the Republic of North Macedonia, by persons who perform the corresponding function according to the legislation under which the undertaking is founded; 3) investment funds acquire capital interest in undertakings, provided that they exercise the acquired rights only with a view to maintain the full value of their investments and provided that they do not influence the competitive behavior of the undertakings on the market.

The merger filing shall be made once the transaction act is executed, but before the transaction is closed (standstill obligation).

The filing obligation is on the undertaking/s acquiring control, while in the case of mergers or the creation of a joint venture, the merging parties, i.e., joint venture partners shall make the filing jointly.

The parties in the concentration are obliged to notify the concentration to the Commission prior to its implementation and following the execution of the merger agreement, i.e., the announcement of the public bid for the purchase or the acquisition of the controlling interest in the nominal capital undertaking.

The parties may notify the Commission of their serious intention for concluding an agreement or, in the event of a public bid, when they have publicly stated their intention of participating therein if such an agreement or public bid would have as an effect creation of a concentration.

The Competition Law does not provide for exemptions from the filing obligation in case a transaction meets any of the specified thresholds, even if it is a foreign-to-foreign transaction with no effect on any of the local markets.

M&A transactions that represent concentration in the meaning of the Competition Law may be approved by the Commission with or without certain conditions and/or obligations to the parties or be rejected as being in contradiction to the provisions of the Competition Law.

10. What is the normal merger review period?

The statutory term for reviewing and approval by the Commission of a transaction that represents the concentration in the meaning of the Competition Law, but does not result in any distortion of the competition on the relevant market/s (such as transactions where parties' activities do not overlap or their market shares are quite low) is 25 business days. The 25-business days term commences as of the date of filing of the complete notification on the concentration, with all mandatory information and appendixes included. The Commission reviews the completeness of the filing and issues a formal certificate of completeness generally within a one-week period following the filing. If the notification is deemed incomplete, the 25-business days' term will start as of the day the parties complete/supplement the filing with the missing information and/or documents.

If, in the course of the initial 25-business days term for reviewing the filing (first phase), the Commission determines that the transaction could result in serious distortion on the competition in the relevant market, especially with creation of, or straitening the dominant position of any of the parties (which usually could be the case where the parties to the transaction are one of the strongest competitors on the relevant market), the Commission will initiate a detail investigation of the effects of the intended concentration on the relevant market (second phase), which can take up to 90 business days following the date of issuing of the decisions for commencement with the investigation. The term of 90 business days might be extended

upon request of the parties, but not for more than 20 business days in total. In the second phase, the parties may propose the Commission with certain measures (behavioral and/or structural) in order to remedy and mitigate the potential negative effect of the transaction on the competition in the relevant market.

Based on experience, the Commission complies and issues the relevant decisions within the statutory terms, however, if the Commission fails to adopt a decision within the statutory terms, the notified concentration will be considered approved, by virtue of the Competition Law.

11. Are there any fees applicable where transactions are subject to local competition review?

The filling fee, payable to the Commission for the merger filing, is MKD 6,000.00 (approximately EUR 100) while the fee for the issuance of the merger clearance decision amounts to MKD 30,000 (approximately EUR 500), which, compared to the filling fees in neighboring countries, are significantly lower.

12. Is there any possibility for companies to obtain State Aid in North Macedonia?

Considering that state aid may cause an unfair advantage to the beneficiary with respect to their competitors and potentially distort the fair competition on the market, there is a general prohibition on state aid, except if it is approved by the Commission in accordance with the State Aid Law. The Macedonian State Aid Law is generally aligned with Articles 107-109 of TFEU.

As an exemption from the general prohibition, the granting of state aid is always permitted in cases where:

(i) the aid is of a social nature, granted to individual consumers, if there is no discrimination related to the origin of the goods and/or services, or

(ii) the aid compensates for the damage caused by natural disasters or other exceptional events, including military actions.

The granting of state aid can be allowed by the Commission if it concerns:

(i) regional aid for promoting the economic development of areas in the state in which the standard of living is extremely low or where there is high unemployment,

(ii) aid intended for the removal of difficulties in the domestic economy or for the promotion of the realization of projects of significant economic interest for the state,

(iii) aid for rescue and restructuring of companies in difficulty,

(iv) aid intended for the promotion of culture and the protection of cultural heritage, when it does not significantly affect trade conditions and market competition,

(v) horizontal assistance, and

(vi) other state aid granted on the basis of legal act.

State aid in North Macedonia can be provided in the form of:

(i) subsidies,

(ii) writing off or assuming debts,

(iii) exempting, reducing, or delaying the payment of public fees,

(iv) granting loans under favorable conditions,

(v) providing guarantees from state aid providers under favorable conditions,

(vi) investments by state aid providers with a rate of return lower than the rate of return on investments that can be expected when investing under normal market conditions and

(vii) reduction of prices of goods and/or services by state aid providers below market prices, especially in case of sale of shares, buildings or land owned by state aid providers. subventions, tax incentives or reliefs, granting loans by the state authorities, etc.

State aid for supporting investment projects (construction or reconstruction of facilities, investments in equipment and machinery, opening new job positions) in North Macedonia is regulated by the Law on financial support of investments, which in the meaning of the State Aid Law, represents a state aid scheme.

During the COVID-19 pandemic, the Government also introduced various instruments to support local businesses to survive the negative impact of the pandemic, and such were subject to assessment by the Commission.

The procedure for approval of state aid by the Commission is similar to the procedure for reviewing and approval of concentrations, except for the terms for the review and approval process, which are longer. Namely, the term for approval of the state aid where it is permissible in the meaning of the State Aid Law is 60 days of the receipt of the complete application for approval, while in cases where the Commission has certain doubts if the proposed state aid is permissible, the Commission will initiate an investigation and the procedure should be completed within an 18 months period.

13. What were the major changes brought by the COVID-19 pandemic? Have any of them stuck and how likely is it for these changes to continue to do so in the foreseeable future?

The COVID-19 pandemic generated not only a major worldwide health crisis but also a major economic one, witnessed by a great disturbance in the supply and demand of many product and services markets globally.

The economic consequences of the COVID-19 pandemic required swift Government action in order to keep the national economy functional. Many state aid measures were introduced by the Government for different types of businesses suffering most from the COVID-19 lockdown, considering that such interventions were necessary to help the businesses overcome the crisis. The Commission, while approving most of such instruments of support of the specific businesses, considered the impact of the pandemic and also the public interest in supporting those businesses.

Evidently, the COVID-19 pandemic increased the level of concentration on markets globally, as companies could not survive the economic impact of the pandemic and rather opted to exit the market or be acquired by stronger competitors. Under the effect of the latter, it is reasonable to presume that the number of mergers has increased.

Although there was no such relevant practice in North Macedonia, in other jurisdictions, competition authorities emphasized public policy objectives in reviewing concentrations during the pandemic, even to the extent of rejecting acquisitions in order to save the national companies or to ensure their production of certain products in their territory.

The changes incurred during the pandemic, with respect to the competition protection concerns and also other regulations and practices, are already leaving the scene in North Macedonia yet would remain a unique practice and we hope that the future will not bring any similar times of crisis where such practice would be needed again. ■

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1. What are the main competition-related pieces of legislation in Poland?

In Poland, the cornerstone of competition law is the Act of 16 April 1993 on Combating Unfair Competition (Ustawa o zwalczaniu nieuczciwej konkurencji) and the Act on Competition and Consumer Protection, enacted on February 16, 2007 (Ustawa o ochronie konkurencji i konsumentow).

The Act on Combating Unfair Competition is a fundamental legal framework in Poland designed to protect fair market competition. This law outlines what constitutes unfair competition and includes

a comprehensive list of practices considered to be unfair. Key provisions address issues such as the infringement of trade secrets, counterfeiting of products, misleading markings on products, or advertising that can deceive consumers regarding their origin, quantity, quality, components, manufacturing process, suitability, and maintenance, among other significant characteristics, prohibited advertising, and violation of patented secrets. The act allows for civil claims by businesses harmed by unfair competition and establishes criminal penalties for certain violations. It also highlights the role of the President of the Office of Competition and Consumer Protection in taking action against practices that violate the principles of fair competition, aiming to protect not only the interests of individual entrepreneurs but also consumer interests and ensure fair and equitable conditions of market activity.

The Competition and Consumer Protection Act sets out the rules for the promotion and protection of competition and outlines the principles for the protection of the interests of both entrepreneurs and consumers within the framework of the public interest. The law includes provisions on anti-competitive practices, infringements of the collective interests of consumers, and the prohibition of unfair contract terms. It also provides for measures to prevent anti-competitive mergers between entrepreneurs and their associations. In particular, the law designates the competent authorities in charge of competition and consumer protection matters.

Supplementary regulations influencing competition law include the Act of March 8, 2013, addressing the prevention of undue delays in commercial transactions (Ustawa o przeciwdzialaniu nadmiernym opoznieniom w transakcjach handlowych), and the Act of April 21, 2017 concerning claims for restitution of damages resulting from violations of competition law (Ustawa o roszczeniach o naprawienie szkody wyrzadzonej przez naruszenie prawa konkurencji).

Ensuring compliance with competition law is the responsibility of the Office of Competition and Consumer Protection – OCCP (Urzad Ochrony Konkurencji i Konsumentow – UOKiK), tasked with monitoring and enforcing compliance with these statutory provisions.

2. Have there been any notable recent (last 24 months) updates of Polish competition legislation?

Over the past twenty-four months, apart from the state aid measures to combat the COVID-19 pandemic, there has been notable progress in the area of competition law. Toward the end of 2022, revisions were made to the regulations on payment congestions. The President of the Office for Competition and Consumer Protection was given the power to issue soft summonses to entrepreneurs, bypassing the need for administrative proceedings. Upon receipt of such a summons, entrepreneurs may provide explanations on identified risks of payment congestions, thereby promoting an improved payment culture among their business partners.

Effective January 1, 2023, the Omnibus Directive, aimed at enhancing consumer rights protection, fostering fair treatment of consumers by businesses, and promoting collaboration among consumer protection authorities, has been enacted in Poland. Also effective from the same date are the Digital Directive and the Commodities Directive. The former sets out rules for contractual obligations relating to the provision of digital content or services, while the latter sets out rules for contractual obligations relating to the sale of goods.

In May 2023, the latest amendment to the Competition and Consumer Protection Act entered into force. This amendment incorporated Directive 2019/1 of the European Parliament and of the Council (EU) dated December 11, 2018, commonly referred to as the "ECN+ Directive." The amendment broadened liability for restrictive practices, established protocols for imposing fines on business associations, replaced delayed penalties with new periodic penalties, altered rules concerning inspections and searches, extended the "leniency" program to collusive bidding, and streamlined the exchange of information and mutual recognition of competences among EU member states' competition authorities, with the aim of enhancing law enforcement effectiveness and ensuring the proper functioning of the internal market.

Furthermore, since June 2023, provisions of the Council of Ministers' Decree concerning the exclusion of certain types of vertical agreements from restrictive agreement prohibitions have been effective in Poland. This new regulation mirrors the European Commission's Vertical Block Exemption Regulation (VBER) directly. This development holds particular significance for entities engaged in distribution systems, notably in selective distribution networks such as the automotive industry, emphasizing the need for compliance and strategic adaptation.

3. What are the main concerns of the national competition authority in terms of the agreements between undertakings? How is the sanctioning record of the authority?

The Polish competition authority, primarily represented by the President of the Office of Competition and Consumer Protection, focuses on various concerns regarding agreements between undertakings to ensure fair competition in the market. Some of the main concerns include:

- Anti-competitive agreements – the OCCP scrutinizes agreements between undertakings that aim to distort competition, such as cartels, price-fixing agreements, market allocation agreements, and bid rigging schemes.
- Abuse of dominant position – the authority monitors the conduct of dominant market players to prevent abuse of their position, including unfair pricing practices, discriminatory behavior, and refusal to deal with competitors or customers.
- Vertical restraints – the OCCP evaluates agreements between undertakings at different levels of the supply chain, such as vertical agreements between manufacturers and distributors, to ensure they do not restrict competition unfairly, for example, through resale price maintenance or exclusive dealing arrangements.
- Merger control – the authority assesses mergers and acquisitions to prevent concentrations that could significantly impede effective competition in the market, particularly those that may lead to the creation or strengthening of a dominant position.

In terms of sanctioning, the OCCP has a track record of imposing fines and other penalties on entities found to have violated competition law. The authority's enforcement actions aim to deter anti-competitive behavior and protect the interests of consumers and businesses. Sanctions typically include fines proportional to the seriousness and duration of the infringement, which can amount to a significant percentage of the undertaking's turnover.

While the provisions of the law state that these fines are up to 10% of the yearly turnover of the undertaking, OCCP has issued specific guidelines detailing the methodology for calculating fines based on the circumstances of each case, enabling companies to gauge the financial risk associated with infringements, a protocol actively adhered to by the OCCP in practice.

The OCCP also actively utilizes its authority to impose personal fines of up to PLN 2 million on managers responsible for unfair practices. Additionally, the OCCP may impose behavioral remedies or structural measures to restore competition in affected markets. The authority's enforcement efforts contribute to maintaining a competitive and fair business environment in Poland.

4. Which competition law requirements should companies consider when entering into agreements concerning their activities in Poland?

When entering into agreements concerning their activities in Poland, companies should consider various competition law requirements to ensure compliance with Polish regulations. Some key considerations include:

Prohibition of anti-competitive agreements

Companies should be aware of the prohibition against anti-competitive agreements, such as price-fixing, market allocation, and bid-rigging. Any agreements that restrict competition in the Polish market may be deemed illegal and subject to fines.

Dominance and abuse of dominance

Companies with a dominant position in the Polish market should be cautious of engaging in abusive conduct, such as predatory pricing, refusal to deal, or discriminatory practices. Such conduct may be subject to scrutiny under Polish competition law.

Merger control

Companies planning mergers or acquisitions that meet certain turnover thresholds must notify the Polish Competition Authority (OCCP) and obtain clearance before completing the transaction. Failure to comply with merger control requirements can result in fines and even nullification of the transaction.

Vertical restraints

Agreements containing vertical restraints, such as exclusive distribution arrangements in some cases, resale price maintenance, or territorial restrictions, may require careful assessment to ensure compliance with Polish competition law. While some vertical restraints may be permissible under certain conditions, others may be considered anti-competitive.

Timeliness of commercial payments

When concluding contracts relating to their activities in Poland, companies should be aware of the restrictions introduced to combat late payment in both B2B (business-to-business) and B2G (business-to-government) transactions. Entrepreneurs are obliged to report annually to the OCPP on the timeliness of payments in their commercial transactions. The Office therefore has all the data it needs to penalize non-compliance with the rules aimed at reducing undue delays in

commercial transactions, showing a clear willingness to enforce these rules.

Information exchange

Companies should be cautious when exchanging sensitive information with competitors, customers, or suppliers. Information exchange that leads to the coordination of competitive behavior, such as price signaling, may raise concerns under Polish competition law.

Leniency program

Companies that uncover their involvement in cartel activity may benefit from leniency or immunity from fines if they cooperate with the competition authority's investigation. Understanding the requirements and procedures of the leniency program can be crucial for companies involved in anti-competitive conduct.

Compliance programs

Implementing effective compliance programs can help companies prevent violations of competition law in Poland. Training employees on competition law requirements, establishing reporting mechanisms for potential violations, and conducting regular audits can all contribute to ensuring compliance.

Penalties for non-compliance

Companies should be aware of the potential penalties for non-compliance with Polish competition law, including fines of up to 10% of the company's (or capital group) turnover, director disqualifications, and damages claims from affected parties.

Overall, companies operating in Poland should carefully assess their agreements and business practices to ensure compliance with the country's competition law requirements and mitigate the risk of antitrust violations. Seeking legal advice from experts familiar with Polish competition law can also be beneficial in navigating these complexities.

5. Does a leniency policy apply in Poland?

Poland's Office of Competition and Consumer Protection implements a leniency program under the country's competition law. This program allows entrepreneurs and their managers to seek reduced or waived penalties if they've been involved in restrictive agreements.

Entrepreneurs seeking leniency must adhere to specific conditions outlined in the Law on Competition and Consumer Protection. They must submit an application containing detailed information and evidence as specified in Article 113a (2) of the law. This includes details about the prohibited agreement, the involved parties, products or services affected, the circumstances of the agreement, and evidence supporting the application.

Applicants must cooperate fully with the OCCP, providing relevant evidence or information, ensuring no hindrance to the investigation, and refraining from tampering with evidence. They must also cease participation in the agreement upon filing the leniency application.

The leniency program extends to managers who knowingly allowed the violation of competition laws through their actions or inactions. The rules for participation apply to managers, requiring them to provide necessary information within their capacity.

Applicants can be completely exempted from monetary penalties for their first application. Subsequent applicants may receive a reduction in fines, up to 50% depending on the order of application and quality of cooperation. Additionally, the leniency plus program offers an extra 30% reduction if new information about another agreement is provided.

Information and evidence provided under the leniency program are released to other parties only before a decision is issued unless otherwise agreed upon by the applicant.

6. How is unilateral conduct treated under Poland's competition rules?

In the legal framework of Poland, the acquisition of a dominant position by an economic entity is permissible, but its misuse is prohibited under competition law. These matters are governed by the Law on Competition and Consumer Protection. In Polish competition law, abuse of dominant position refers to actions taken by a dominant market player that exploits their powerful position to restrict competition unfairly. Such abuse can take various forms, including:

- Unfair pricing practices – this involves setting prices at either excessively high or abnormally low levels to eliminate or limit competition unfairly.
- Restriction of production, market, or technical development – dominant entities may engage in practices that hinder the production, market access, or technological advancements of competitors, thereby maintaining their dominant position without legitimate competitive merits.
- Imposing non-uniform contract terms – using contractual terms that create disparities in competition, such as offering preferential conditions to certain customers while imposing burdensome terms on others, with the intention of distorting competition.
- Predatory behavior – deliberately undercutting prices to drive competitors out of the market, with the intention of

raising prices once competition is eliminated.

- Refusal to deal or supply – refusing to supply goods or services to competitors or customers without justifiable reasons, thereby impeding their ability to compete effectively.
- Tying and bundling practices – forcing customers to purchase unwanted products or services along with the desired ones, leveraging the dominant position in one market to strengthen it in another.
- Exclusive dealing – imposing exclusive contracts or agreements that prevent customers or suppliers from dealing with competitors, thereby foreclosing competition in the market.
- Discriminatory behavior – treating similarly situated customers or competitors differently without reasonable justification, with the aim of undermining competition.

An entrepreneur is considered to hold a dominant position if its market share exceeds 40%. However, surpassing this threshold does not inevitably establish dominance. Other entrepreneurs operating within the market may possess significant competitive capabilities, enabling effective competition despite one entity's substantial market share. Additionally, dominance can be jointly held by multiple entrepreneurs through coordinated actions, known as a "collective dominant position."

Abuse of a dominant position is prohibited under Polish competition law as it distorts the level playing field and undermines the benefits of competition, such as lower prices, innovation, and consumer choice. The Office of Competition and Consumer Protection is responsible for enforcing these provisions and may impose fines or other penalties on entities found guilty of abusing their dominant position. Such penalties may reach up to 10% of the entrepreneur's annual turnover from the year preceding the penalty imposition. Furthermore, the decisions made by the OCCP are publicly disclosed to inform the public about entrepreneurs' unfair practices and the repercussions of abusing a dominant position. Additionally, the OCCP is empowered to prevent the emergence of dominant positions in the market by overseeing concentrations of entrepreneurs. If a concentration is anticipated to establish or reinforce a dominant position, the OCCP reserves the authority to decline approval or impose specific obligations on the involved entrepreneurs.

7. Are there any recent local abuse cases of relevance?

Recently, there has been a lack of notable antitrust investigations concerning the abuse of market dominance in recent years. The most recent instance appears to be a determination by the President of the Office of Competition and Consumer Protection in early 2021 regarding Poczta Polska's (Polish Post) abuse of its dominant position in the domestic wholesale market for services encompassing the acceptance, sorting, movement, and delivery of letter mail and address advertising mail.

8. What are the consequences of a competition law infringement?

Infringements of competition law entail administrative, civil, and potentially criminal liabilities. Administrative liability, the most common consequence, consists mainly of fines, with the amount of the fine depending on the gravity, duration, and nature of the infringement.

Antitrust violations may result in fines of up to 10% of an entrepreneur's total global turnover. Additionally, fines of up to EUR 50 million may be imposed for obstructing inspections, providing false information, or failing to comply with requests from the OCCP. The Competition and Consumer Protection Act details the criteria for determining fines for various types of infringements, including a list of mitigating and aggravating circumstances. These circumstances are assessed collectively and individually for each case and entrepreneur, and they vary in importance and affect the reduction or increase of fines. Mitigating circumstances that may lead to a reduction of the fine include coercion, voluntary rectification of the infringement, voluntary cessation of the infringement before or immediately after the opening of the procedure, proactive measures to stop or rectify the infringement, and cooperation with the office during the investigation, in particular by contributing to a speedy and efficient procedure. Aggravating factors that may increase the penalty include: leading or initiating an agreement restricting competition or encouraging others to participate, coercing or pressuring others to comply or continue the infringement, previous similar infringements, and intentional infringement.

Corporate managers face fines of up to PLN 2 million (personal liability) for deliberate breaches of specific antitrust laws, while inadvertent violations may incur fines of up to 50 times the average salary. The President of the OCPP shall impose fines on managing individuals, taking into account relevant legal circumstances in separate steps, including:

- the nature of the violation, its seriousness;
- the extent of the managing individual's impact on the violation;
- aggravating and mitigating factors;
- the duration of the infringement;
- previous violations of the Competition and Consumer Protection Act, excluding those similar to the current violation being penalized;
- the appropriateness of the penalty, considering the

violation as a whole, including the income of the managing person from the enterprise (taking into account the duration of the violation);

Failure to implement OCCP decisions may lead to additional penalties of up to EUR 10,000 per day.

Civil liability arises from antitrust infringements, entitling affected parties to full compensation for damages incurred, such as increased prices or lost profits. The Law on Claims for Reparation of Damage Caused by Breach of Competition Law, aligning with EU Directive 2014/104/EU, facilitates private enforcement in Poland. Claimants benefit from extended five-year statutes of limitations and have access to district courts.

While the Polish legal system doesn't directly impose criminal sanctions for antitrust violations, certain actions may constitute criminal offenses under the Criminal Code, such as unlawful interference with public tenders. However, non-compliance with requests from the Consumer Ombudsman carries a misdemeanor penalty, with fines starting at PLN 2,000.

At the European level, the European Union may impose fines of up to 10% of a company's total global turnover for antitrust violations. The European Commission considers various factors in determining penalties, including the nature, severity, and duration of the breach. Moreover, periodic fines of up to 5% of an entrepreneur's average daily turnover may be imposed for delays or non-compliance with obligations or information requests.

9. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Polish market?

Excessive consolidation among companies can detrimentally impact competition. Hence, the primary responsibility of the Office of Competition and Consumer Protection is to oversee transactions between enterprises, focusing on those with potential influence on the Polish market.

Under the Act on Competition and Consumer Protection, the acquisition of control is broadly defined as any direct or indirect acquisition of rights that provides the ability to exercise decisive influence over undertakings. Transactions subject to scrutiny include mergers of independent entities, acquisition of exclusive or shared control over undertakings, formation of joint ventures, and asset acquisitions.

For a merger to require notification in Poland, it must exceed certain thresholds. These include:

- Total global turnover of participating undertakings exceeding EUR 1 billion in the financial year preceding notification; or
- Total turnover within Poland surpassing EUR 50 million for participating undertakings in the financial year preceding notification.

Notification to OCCP is feasible once the merger intent is sufficiently defined, and supported by evidence such as conditional agreements, letters of intent, memoranda of understanding, written offers, or joint resolutions of undertakers' governing bodies. Notably, notifications are to be submitted by active participants of the merger – namely, purchasers of stocks, shares, or assets of the other undertaking.

10. What is the normal merger review period?

In accordance with the provisions outlined in the Law on Competition and Consumer Protection, antimonopoly proceedings concerning concentration cases are typically finalized within one month from the date of initiation.

However, this timeline does not encompass periods for submission of notifications by other participants involved in the concentration, payment of application fees, rectification of defaults, or supplementation of information, which the authority may request repeatedly throughout the proceedings.

In practice, the duration of proceedings may extend beyond one month due to these factors.

In justified circumstances, such as complex mergers, those likely to significantly restrict competition in the market, or mergers necessitating market studies, phase two of antitrust proceedings may be initiated. This initiates an extension of the merger clearance deadline by an additional four months. It is important to note that similar to phase one, this extension does not include the waiting period mentioned previously.

The extension of the one-month deadline is determined through a decision issued by the OCCP. While there is no provision for appeal against this decision, it must include appropriate justification.

11. Are there any fees applicable where transactions are subject to local competition review?

An application to initiate antimonopoly proceedings in concentration cases incurs a fixed fee of PLN 15,000, payable by the notifying entrepreneur. This fee must be remitted in cash at the cashier's office or via bank transfer to the tax office associated with the seat of the President of the Office.

In cases involving more than one party, a single fee is charged. This fee is based on the request to initiate an antimonopoly procedure and not on the number of parties involved.

12. Is there any possibility for companies to obtain State Aid in Poland?

The competencies of the President of the Office of Competition and Consumer Protection regarding public aid are governed by the Act of April 30, 2004, on proceedings in public aid cases. Under this act, the President of the Office assesses aid projects, notifies the European Commission, represents the Polish government in Commission proceedings, and oversees public aid granted to entrepreneurs in Poland.

Aid programs, defined as normative acts such as laws or regulations, establish the legal framework for providing specific support to entrepreneurs. These programs also outline the principles and conditions for granting aid, including the eligible recipients, forms of support (e.g., grants, tax payment installments, guarantees), purposes (e.g., training, research, and development, environmental protection, employment enhancement, restructuring), granting authorities, maximum support amounts, and program durations.

It is essential to note that aid programs typically do not specify individual recipients but instead provide a general and abstract framework for aiding eligible entrepreneurs.

Before an aid program can take effect, it must receive approval from the European Commission, unless it falls under de minimis aid or block exemption programs, which do not require Commission approval. The Council of Ministers decides on whether to notify the Commission of the program, following a review of the President of the OCCP's opinion on its compliance with internal market regulations. Upon Council approval, the OCCP President proceeds with the necessary notification.

The Polish legal system also includes provisions for individual aid, which is aid granted outside of established aid programs. Individual aid, including aid for restructuring, is based on normative acts not approved by the European Commission as aid programs. Restructuring aid requires the development of a comprehensive restructuring plan by the entrepreneur, outlining actions aimed at restoring long-term market competitiveness. This plan must be grounded in realistic assumptions and implemented expeditiously.

The European Commission possesses the authority to establish regulations that preapprove certain types of aid, thereby exempting them from the requirement of prior notification and approval. These exemptions encompass projects falling under block exemptions and de minimis aid.

Block exemptions, governed by EU Regulation 651/2014, cover various categories of support, including regional aid, aid for small and medium-sized enterprises (SMEs), environmental protection aid, research and innovation aid, training aid, aid for disadvantaged and disabled workers, and aid for cultural, sports, and infrastructure projects.

De minimis aid, on the other hand, represents a special category of state support deemed insignificant in its potential to distort competition across the EU due to its nominal value. Widely utilized by entrepreneurs, de minimis aid involves acquiring public funds or enjoying specific concessions, without the need for formal reporting.

13. What were the major changes brought by the COVID-19 pandemic? Have any of them stuck and how likely is it for these changes to continue to do so in the foreseeable future?

At the outset of the COVID-19 crisis, a substantial array of new aid initiatives was implemented, while the reach and magnitude of existing aid programs were augmented at both the European Union and domestic levels. There is no doubt that an unprecedented effort has been made in this area by both national and EU authorities.

The financial support provided by the EU and Poland was mainly used by companies to mitigate the effects of the pandemic and its economic consequences. Despite these extensive aid measures, there were no notable alterations made to Polish competition law in response to the COVID-19 crisis. ■

CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2024

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1. What are the main competition-related pieces of legislation in Romania?

Besides the EU rules and related guidelines on competition, which may also apply in Romania, the main competition-related instruments are (i) Competition Law no. 21/1996 (Competition Law) and (ii) Unfair Competition Law no. 11/1991.

Other relevant pieces of legislation include:

- Government Emergency Ordinance (GEO) no. 170/2020 concerning actions for damages for competition law infringements;
- Law no. 81/2022 concerning unfair competition practices between undertakings active in the agricultural and food supply chain;
- GEO no. 23/2021 concerning measures for the implementation of EU Regulation 2019 /1150 on promoting fairness and transparency for business users of online intermediation services.

Although not a competition law instrument, particular regard must also be given to GEO no. 46/2022 concerning the implementing measures of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, establishing a framework for the screening of foreign direct investments into the Union.

Primary legislation is further fleshed out by way of e.g., Government decisions or guidelines issued by the competition authority, which set out procedural rules or offer indication on the interpretation and application of the law.

2. Have there been any notable recent (last 24 months) updates of Romanian competition legislation?

Yes, the legislator has been increasingly active in this field, especially in response to EU initiatives and actions. In particular, we note the following recent developments:

- GEO no. 108/2023 – which sought, among others, to transpose Directive 2019/1 (ECN+ Directive). This resulted in increased powers for the Romanian Competition Council (RCC) in terms of e.g., the conduct of dawn raids/ investigations, attribution of liability, etc.
- GEO no. 84/2022 on preventing and combating speculative actions – introduced, among others, new categories of unfair competition practices (e.g., exploitation of superior bargaining position).
- Law no. 81/2022 concerning unfair competition practices between undertakings active in the agricultural and food supply chain – aimed at transposing Directive (EU) 2019/633. The law sets out lists of practices that are either subject to a blanket ban or prohibited unless certain conditions are met.
- GEO no. 46/2022 – introduced a new screening mechanism for foreign direct investments and greenfield investments which (i) fall under certain sectors deemed sensitive and (ii) exceed EUR 2 million in value. This regime has subsequently been subject to amendments seeking, among others, an ever-wider scope of application (as a consequence, both non-EU and EU investors may now be subject to review from a national security perspective).

3. What are the main concerns of the national competition authority in terms of agreements between undertakings? How is the sanctioning record of the authority?

Based on recent figures, anti-competitive agreements remain at the forefront of RCC's enforcement action – with 77% of the total amount of the fines in 2023 being imposed for anti-competitive agreements between undertakings.

On a more granular level, more than half of all investigations launched in 2023 and 44% of the ongoing investigations concern potential cartel cases. Market sharing, bid rigging, and exchanges of sensitive information have all been subject to tight scrutiny and hefty fines. By way of example, the RCC sanctioned in 2022/ 2023:

- 65 companies and an association with total fines of more than RON 130 million (approximately EUR 26 million) for taking part in an agreement on the automotive repair and maintenance services market in Romania;
- three companies with fines totaling approximately RON 20.5 million (approximately EUR 4.1 million) for bid rigging in a tender organized by the Ministry of Internal Affairs for the implementation of the center for the provision of electronic services;
- three insurance companies and an insurance broker with total fines amounting to approximately RON 15 million (approximately EUR 3 million) for anti-competitive agreements on the Romanian aviation insurance market; the companies were found to have split the larger clients into four tenders they had organized.

That is not to say that restrictions such as resale price maintenance included in vertical agreements (i.e., between companies operating at different levels of the production/ distribution chain) escape scrutiny. See, in this regard, the sanction imposed by the RCC (totaling EUR 25 million) on a TV and mobile phone producer and three large online retailers for an anti-competitive agreement consisting of resale price fixing.

4. Which competition law requirements should companies consider when entering into agreements concerning their activities in Romania?

Companies should carefully consider the rigors of Article 101 of the Treaty on the Functioning of the European Union (TFEU) – prohibiting anti-competitive agreements. The reasons are twofold. First, this article must be applied directly by the RCC when trade between EU Member States may be affected. Second, the corresponding Romanian rule (Article 5 of the Competition Law) largely mirrors the EU provision.

Accordingly, all agreements between undertakings, decisions by associations of undertakings, and concerted practices that have as their object or effect the prevention, restriction, or distortion of competition are prohibited. This prohibition refers both to cartels and vertical agreements, and covers, among others, agreements to fix prices, limit outputs, share markets, etc.

Certain restrictions included in vertical agreements may be block-exempted (permitted without further formalities) should they satisfy the conditions provided for in Commission Regulation (EU) 2022/720 (applicable also in Romania). Other specific EU instruments may be relevant depending on e.g., the nature or scope of the agreement.

For agreements that are not block-exempted, an individual exemption could apply, provided that the conditions in Article 101 (3) TFEU are met – in practice, these conditions are rather difficult to prove.

5. Does a leniency policy apply in Romania?

The RCC may apply a leniency policy where companies cooperate with the authority during an investigation and voluntarily provide information regarding anti-competitive agreements and their involvement.

As a point of departure from EU rules, the leniency policy may apply in cases of cartels, as well as vertical agreements. Granting immunity from fines (or a reduction thereof) is subject to strict conditions laid down in the Competition Law and secondary legislation.

6. How is unilateral conduct treated under Romanian competition rules?

Unilateral conduct may constitute an abuse of a dominant position (competition law infringement) or an exploitation of a superior bargaining position (unfair competition practice).

As regards the prohibition of abuses of dominance, Article 6 of the Competition Law largely mirrors the corresponding EU provision (Article 102 TFEU). As dominance in itself is not sanctioned, both a dominant position (under Romanian law, there is a rebuttable presumption of dominance where market shares exceed 40% on the relevant market; dominance may nevertheless be found even below that percentage, depending on e.g., the market shares of competing undertakings, the structure of the market, etc.) and abusive conduct must exist. Examples of abusive conduct include predatory prices, margin squeeze, refusal to supply, price discrimination, etc., and may lead to either exclusionary effects for competitors or exploitative effects for consumers.

Even where the company falls short of dominance, caution should be exercised so as not to fall under the prohibition of exploitation of a superior bargaining position. In brief, such a position may be found where significant imbalances in the relationship with a partner exist (by reference to a series of cumulative factors including lack of alternatives for the partner, the importance of the relationship in the activity of the partner, etc.). Abusive conduct may consist of e.g., unjustified refusal to supply or purchase, the imposition of conditions which are unduly onerous or discriminatory, or unjustified termination of business relations with a partner. Should an infringement be established, fines for legal persons range between RON 50,000 (approximately EUR 10,000) and RON 500,000 (approximately EUR 100,000).

7. Are there any recent local abuse cases of relevance?

Several abuse cases are currently being investigated by the RCC. Perhaps the most prominent are:

- The investigation concerning Apple – alleged abuse of its dominant position in the iOS app distribution market, allegedly committed by limiting access to user data used for advertising purposes and, at the same time, favoring Apple's own technological services displaying online advertising in iOS-compatible apps.
- The investigation concerning Sony – alleged abuse of its dominant position on the market for video game consoles, allegedly committed by exclusively selling PlayStation-compatible video games through the PlayStation Store and by eliminating third-party distribution of activation codes for PlayStation-compatible video games.

8. What are the consequences of a competition law infringement?

Should an infringement of Articles 5 or 6 of the Competition Law be established, undertakings may be subject to fines of up to 10% of the total global turnover derived in the year prior to the sanctioning decision – a specific percentage depending on gravity, duration, and circumstances. On top of that, agreements and decisions infringing these articles are null and void.

Following the latest amendments to the Competition Law, concepts such as the single economic unit and economic/ legal continuity are now expressly regulated under Romanian law. In practical terms:

- the turnover derived at the global level by all natural and legal persons part of a single economic unit may be taken into account by the RCC when determining the maximum level of fines. Moreover, persons part of a single economic unit are jointly and severally liable for paying imposed fines; and
- the authority may find legal or economic successors of an undertaking liable and fine them, to prevent undertakings from escaping liability through legal/ organizational changes.

Further, infringing companies may be subject to private damages claims.

In terms of personal consequences, the acts of managers, legal representatives, or persons exercising management functions who conceive or organize, with intent, an anti-competitive practice prohibited by Article 5 of the Competition Law which does not benefit from an exemption constitute criminal offenses and may be sanctioned by imprisonment or a fine and restriction of certain rights.

9. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Romanian market?

Transactions are subject to merger control in Romania provided that they (i) imply a change of control within the meaning of EU merger regulations and (ii) meet certain turnover thresholds.

As regards the relevant thresholds:

In the case of the acquisition of sole control, the turnover thresholds are as follows:

- all undertakings concerned (Buyer together with the group it belongs to and the Target) had an aggregated total turnover (worldwide) in the year prior to the transaction (signing) exceeding the RON equivalent of EUR 10 million, and
- each of the parties concerned (i.e., the Buyer and its group, on one hand, and the Target, on the other hand) had a turnover in Romania in the year prior to the transaction (signing) exceeding the RON equivalent of EUR 4 million.

In the case of the acquisition of joint control, the thresholds should be met by at least two of the parties concerned.

Specific rules in terms of turnover calculation are laid down in secondary legislation issued by the RCC, reflecting EU guidelines.

Should the transaction fulfill the above conditions, implementation must be postponed pending clearance (i.e., standstill obligation) – sanctions for failure to observe this obligation (which amounts to gun jumping) may be up to 10% of the total global turnover derived in the year prior to the issuance of the sanctioning decision.

Further, transactions may also be subject to Foreign Direct Investment review, provided that Target's activity falls under certain areas of activity (broadly drafted) deemed sensitive from a national security perspective and the value of the transaction exceeds EUR 2 million.

10. What is the normal merger review period?

In terms of legal deadlines for the clearance process, there is no maximum duration, just a 20-day time limit for the RCC to address additional questions (calculated from filing, and then from the date of each answer from the notifying party), and then a 45-day time limit to issue the decision (calculated from the date the RCC has all information) requested.

In practice, the average duration of a clearance process is about 2-2.5 months for a complete notification form and 1.5 months for a simplified form (applicable under certain conditions).

Separately, where transactions are subject to Foreign Direct Investment screening, the FDI approval process usually takes (absent unforeseen circumstances) about 2.5-3 months (and runs in parallel with merger control).

11. Are there any fees applicable where transactions are subject to local competition review?

As regards merger control, a filing fee (of approximately EUR 970), as well as an authorization fee (assuming no in-depth investigation is launched, between EUR 10,000 and EUR 25,000, depending on the target's turnover in Romania in the year prior to the decision and on whether commitments are necessary) are applicable.

As regards the Foreign Direct Investment review, an examination contribution in the amount of EUR 10,000 is due at the date of filing (reimbursed, should the authority find the notified investment out of the scope of the screening regime).

12. Is there any possibility for companies to obtain State Aid in Romania?

As the EU State aid rules and principles are fully applicable, companies may seek to obtain State aid in Romania. State aid (irrespective of form) may be obtained on the basis of individual measures approved by the European Commission or of schemes issued under the EU exemption regulations. Eligibility criteria tend to be sector-specific and depend on factors such as the objective of the scheme in question.

13. What were the major changes brought by the COVID-19 pandemic? Have any of them stuck and how likely is it for these changes to continue to do so in the foreseeable future?

The COVID-19 pandemic has determined the adoption of multiple (albeit temporary) State aid measures (e.g., support for airlines, certain employers, undertakings active in the tourism sector).

As for measures likely to persist, we note the amendment brought to Unfair Competition Law no. 11/1991 by GEO no. 84/2022 on preventing and combating speculative actions. This sought to introduce, among others, an additional class of unfair practices (applicable in exceptional circumstances).

In essence, actions such as charging unjustifiably high prices, unjustifiably limiting production or sales, stockpiling goods in order to create a deficit on the Romanian market, and subsequently reselling them at an unjustifiably increased price are qualified as unfair practice provided that (i) they are committed during periods of partial or total mobilization of the armed forces, state of war, state of siege, state of emergency, state of alert or other crisis situations explicitly established by normative acts and (ii) concern products deemed to be under "speculative risk." ■

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1. What are the main competition-related pieces of legislation in the Republic of Serbia?

The main competition-related pieces of legislation are:

- Constitution of the Republic of Serbia (Ustav Republike Srbije "Official Gazette of the RS", no. 98/2006), which guarantees equal legal status to participants on the market. Article 84 prescribes that acts that are contrary to the Law and restrict free competition by creating or abusing monopolistic or dominant positions are strictly prohibited;
- Law on Protection of Competition (Zakon o zastiti konkurencije "Official Gazette of the RS", no. 51/2009 and 95/2013) (the Law);
- Law on General Administrative Procedure (Zakon o opstem upravnom postupku "Official Gazette of the RS", no. 18/2016 and 95/2018 (Authentic Interpretation and 2/2023 – decision of the Constitutional Court)). In the procedure before the Commission for the Protection of Competition (the Commission), the general administrative procedure is applied unless otherwise provided by the Law.

In addition, the following secondary acts of legislation are relevant:

- Regulation on the Content and Manner of Submitting Notification on Concentration (Uredba o sadrzini i nacinu podnosenja prijave koncentracije "Official Gazette of the RS", no. 5, January 25, 2016);
- Regulation on Criteria for Setting the Amount Payable on the Basis of Measure for Protection of Competition and Sanctions for Procedural Breaches, Manner and Terms for Payment Thereof and Conditions for Determination of Respective Measures (Uredba o kriterijumima za odredjivanje visine iznosa koji se placa na osnovu mere zastite konkurencije i procesnog penala, nacinu i rokovima placanja i uslovima za odredjivanje tih mera"Official Gazette of the RS", no. 50/2010, July 23, 2010);
- Regulation on the Conditions for Leniency from Payment of Measure for Protection of Competition (Uredba o uslovima za oslobadjanje obaveze placanja novcanog iznosa mere zastite konkurencije "Official Gazette of the RS', no. 50/2010, July 23, 2010);
- Regulation on Agreements on Specialization Between Undertakings Operating on the Same Level of Production or Distribution Chain Exempted from Prohibition (Uredba o sporazumima o specijalizaciji izmedju ucesnika na trzistu koji posluju na istom nivou proizvodnje ili distribucije koji se izuzimaju od zabrane "Official Gazette of the RS", no. 11/2010, March 5, 2010);
- Regulation on Agreements Between Undertakings Operating on a Different Level of Production or Distribution Chain Exempted from Prohibition (Uredba o sporazumima izmedju ucesnika na trzistu koji posluju na razlicitom nivou proizvodnje ili distribucije koji se izuzimaju od zabrane "Official Gazette of the RS", no. 11/2010, March 5, 2010);
- Regulation on Research and Development Agreements Between Undertakings Operating on the Same Level of Production or Distribution (Uredba o sporazumima o istrazivanju i razvoju izmedju ucesnika na trzistu koji posluju na istom nivou proizvodnje ili distribucije koji se izuzimaju od zabrane "Official Gazette of the RS", no. 11/2010, March 5, 2010);
- Regulation on the Content of Request for Individual Exemption of Restrictive Agreements from Prohibition (Uredba o sadrzini zahteva za pojedinacno izuzece restriktivnih sporazuma od zabrane "Official Gazette of the RS" no. 107/2009);
- Regulation on the Criteria for Defining the Relevant Market (Uredba o kriterijumima za odredjivanje relevantnog trzista "Official Gazette of the RS", no. 89/2009, November 2, 2009).

2. What are the main concerns of the national competition authority in terms of agreements between undertakings? How about the sanctioning record of the authority?

The Commission is mostly concerned with horizontal and vertical agreements containing hardcore restrictions (e.g., price fixing and market sharing agreements), as well as with unreported mergers, and finally with the creation and abuse of dominant positions.

In accordance with the information published in the latest Annual Report (2023), the Commission has worked on 104 breaches of competition cases initiated ex officio, out of which 42 were transferred from the previous year and 62 were initiated in 2022. 52 cases were transferred to 2023, 35 were terminated or cancelled and three ended in the imposition of relevant fines (all three for the conclusion of prohibited restrictive agreements).

On April 20, 2023, the Commission reached the conclusion instituting proceedings ex officio against undertakings KTG Solucije d.o.o. Subotica from the Republic of Serbia and Eco sense d.o.o. Subotica from the Republic of Serbia. Proceedings were instituted ex officio to investigate infringements of competition and to establish the existence of a restrictive agreement. The Commission has issued a decision in this proceeding, determining the existence of a restrictive agreement between the mentioned companies.

In another case, in March 2023, the Commission found out

about a merger of two companies which was created by the acquisition of control on Hotel Tonanti in Vrnjacka Banja by HOTELSKO, UGOSTITELJSKO I TURISTICKO PREDUZECE MOSKVA DOO BEOGRAD (STARI GRAD) and initiated proceedings against the parties.

Decisions reached by the Commission are publicly available at the following website (https://www.kzk.gov.rs/en/odluke).

3. Which competition law requirements should companies consider when entering into agreements concerning their activities on the Serbian territory?

Companies entering the Serbian market need to consider the same, or at least very similar, competition law requirements as they would when entering any EU jurisdiction. This is due to the fact that the relevant rules in Serbia are largely transcribed from the relevant EU rules (except for the EU-wide context). Namely, to provide a few examples, the companies should conduct basic research regarding:

1) Potential definition of relevant product market(s) where they intend to be active;

2) Market shares of potential business partners on such relevant product markets;

3) Own market share upon entering the market;

4) Pros and cons of potential exclusivity or selective distribution arrangements (e.g., exclusive purchase, sale, distribution, etc.);

5) Level of scrutiny that a particular product market is subjected to by the Commission in accordance with its previous practice.

4. Does a leniency policy apply in the Republic of Serbia?

Yes, there is a leniency policy applicable in Serbia specifically when it comes to restrictive agreements, as envisaged by Article 69 of the Law and the relevant secondary acts of legislation and Commission instructions. Under this regime, participants in a prohibited restrictive agreement may be fully or partially exempted from paying a fine. A party to a restrictive agreement who first notifies the Commission of the existence of an agreement or provides evidence on the basis of which the Commission initiates or terminates proceedings in connection with a restrictive agreement may enjoy full immunity from payment of a fine. Relief from the commitment to pay a monetary sum shall be implemented under the condition that the Commission, at the moment of submission of evidence, had no knowledge of the existence of the agreement or, if it had the knowledge, it did not have enough evidence to enact a conclusion on initiation of proceedings. For the agreement participant who fails to fulfill conditions for full exemption from the fine, the amount of the fine may be reduced, conditioned on the delivery of evidence submitted to the Commission during the procedure that was not available at the time. Provisions of Article 69 shall not apply to an agreement participant who initiated the conclusion of the agreement.

5. How is unilateral conduct treated under the Serbian competition rules?

Competition-infringing unilateral conduct falls under the rules on abuse of a dominant position in the market, which is explicitly prohibited.

The following are listed as examples of abuse of a dominant position under the Law, practices which:

1) directly or indirectly impose unfair purchasing or selling prices or other unfair business conditions;

2) limit production, markets, or technical development;

3) apply dissimilar business conditions to equivalent operations with respect to a variety of undertakings, by which some undertakings are placed in unfavorable positions compared to competitors;

4) condition the conclusion of an agreement with the acceptance of supplementary obligations by the other party, that given their nature or trading customs are not related to the subject of the agreement.

The Commission carries the burden of proving the existence of a dominant position in the relevant market.

6. Are there any recent local abuse cases of relevance?

The Commission publishes all the decisions made about mergers and acquisitions, competition infringements (restrictive agreements, abuse of dominant position, administrative measures), market tests, and individually exempted agreements on its website: http://www.kzk.gov.rs/en.

On August 19, 2022, the Commission reached the decision on measures for the protection of competition in assessment proceedings brought ex officio against undertaking SF1 COFFE d.o.o. Novi Sad. The Commission established that the undertaking SF1 COFFE d.o.o., during regular and auction sales to wholesale customers, negotiated and implemented a business strategy in which it set prices for Nespresso brand coffee machines in further sales. These prices were fixed amounts equal

to the retail prices for various models of machines, thereby resulting in restrictive agreements.

In another case, on December 29, 2023, the Commission reached the decision on measures for the protection of competition in assessment proceedings brought ex officio against undertakings companies KTG Solucije d.o.o. Subotica and Eco sense d.o.o. Subotica. The Commission established that the undertakings negotiated terms for participation in public procurement procedures with the buyers Sportski centar Soko from Sombor, Javno komunalno preduzece Stadion Subotica, and Specijalna bolnica za rehabilitaciju Banja Kanjiza. As a result, they entered into a restrictive agreement aiming to significantly disturb, restrict, and prevent competition.

The participants in the restrictive agreement have been imposed with competition protection measures, while the company KTG Solutions had its fine reduced under the leniency program, in accordance with Article 69 of the Law. It is significant that this is the first case in which the Commission has determined the fulfillment of conditions for reducing the obligation to pay a monetary amount of competition protection measures based on a report submitted by a participant in the restrictive agreement during the proceedings (i.e., after the initiation of the proceedings).

7. What are the consequences of a competition law infringement?

The procedure of investigating infringements of competition shall be initiated ex officio when the Commission learns based on submitted initiatives, and/or otherwise available information, that there are plausible indications of the infringement, as well as in the case of investigation of a concentration.

The conclusion on the initiation of the procedure passed by the President of the Commission must contain a description of the action or the provisions of the law which might present the infringement of competition, the legal basis and reasons to initiate the procedure, as well as an invitation to all natural and legal persons to send the Commission the documents and other relevant information they may have.

If the Commission finds that there has been an infringement of competition, it will determine an administrative measure in the form of an obligation to pay a fine. A pecuniary fine of up to 10% of total annual income earned in the territory of the Republic of Serbia shall be imposed on an undertaking if it:

1) abuses a dominant position in the relevant market;

2) concludes or implements a prohibited restrictive agreement, or a restrictive agreement that was not exempted under Article 60 of the Law;

3) does not perform or execute protective measures or the measure of de-concentration (de-merger);

4) implements a concentration that was not approved or does not obey an order to halt the concentration.

The Commission can also impose a measure of elimination of the infringement of competition, such as e.g., preventing the probable occurrence of the same or similar infringement, by giving orders to undertake certain behavior or prohibit certain behavior (behavioral measures).

The decision on the infringement of the competition as well as the order on initiation of the ex officio procedure shall be published in the Official Gazette of the Republic of Serbia and on the Commission's website. The order to initiate the procedure shall not be published if the President of the Commission assesses that the course of events in the procedure might be jeopardized due to its publication.

8. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Serbian market?

Yes, there is, arguably even in cases that do not impact the Serbian market. Namely, the concentration of undertakings occurs in the following cases:

1) mergers and other statutory changes in which a merger of undertakings occurs, within the meaning of the law governing the status of companies;

2) acquisition of direct or indirect control, by one or more undertakings over another or more undertakings or over part or parts of other undertakings, who may represent an independent business entity;

3) the joint venture of two or more undertakings in order to create a new undertaking or to gain joint control over an existing undertaking that operates on a long-term basis and has all functions of an independent undertaking.

Concentrations of undertakings shall be permitted, unless they significantly restrict, distort, or prevent competition in the market of the Republic of Serbia or its part, especially if that restriction, distortion, or prevention is the result of creating or strengthening of a dominant position.

The permissibility of concentration of undertakings shall be determined in relation to:

1) structure of the relevant market;

2) actual and potential competitors;

3) market position of participants in concentration and their

economic and financial power;

4) possibility of the choice of suppliers and customers;

5) legal and other barriers to entering the relevant market;

6) level of competitiveness of participants in concentration;

7) supply and demand trends of the relevant goods or services;

8) technical and economic development trends;

9) interests of consumers.

It should be noted that, due to the manner in which the relevant financial thresholds are set up, any concentration engaged in by an entity that achieves over EUR 100 million worldwide and over EUR 10 million in Serbia becomes notifiable in Serbia. This is the reason why many foreign-to-foreign transactions are notified in Serbia, and it has been the target of significant criticism from the professional community.

9. What is the normal merger review period?

The Law explicitly provides that the Commission shall issue a Phase I clearance decision, or a decision to commence a Phase II investigation, within one calendar month of the date of filing a complete notification (complete with all information and supporting documentation including translation of documentation into Serbian language). The one-month period starts running from the first calendar day following the submission of a complete notification.

In practice, the case handlers sometimes extend this deadline by requiring additional information to be submitted by the parties and therefore "stopping the clock" (i.e., indicating that the notification was not complete as submitted).

The Commission issues the clearance in Phase I if the concentration does not lead to the "creation or strengthening of a dominant position."

A concentration is deemed to be cleared if the Commission fails to deliver a decision within one month following the submission of a complete merger notification (four months if ex officio investigation proceedings are opened).

The Commission is obliged to issue the decision in Phase II within four months from the date of issuing the conclusion on the commencement of Phase II. The 4-month period starts running from the first calendar day following the date of issuance.

10. Are there any fees applicable where transactions are subject to local competition review?

There is an initial filing fee of 0.03% of the global annual turnover of all parties to the concentration (but it cannot exceed EUR 25,000). However, the final fee amount depends on the outcome of the case:

i. if the notification is dismissed (for formal reasons), the fee will amount to EUR 500;

ii. if the notification is withdrawn, the fee will amount to EUR 900;

iii. if the concentration is cleared in Phase I, the fee will amount to 0.03% of the global annual turnover of all parties to concentration (but cannot exceed EUR 25,000);

iv. if the concentration is cleared in Phase II, the fee will amount to 0.07% of the global annual turnover of all parties to concentration (but cannot exceed EUR 50,000); and

v. if the concentration is prohibited, the fee will amount to EUR 1,200.

The fee must be submitted with the application and, if the outcome is (i), (ii), or (v), the Commission will transfer any overpayment back to the parties.

11. Is there any possibility for companies to obtain State Aid in the Republic of Serbia? If yes, under what conditions?

Companies do have the possibility to obtain state aid under certain circumstances.

Categories of state aid that can be granted under the Law on State Aid Control (Zakon o kontroli drzavne pomoci "Official Gazette of RS", no. 73/2019) and the Regulation on Rules for State Aid Granting (Uredba o pravilima za dodelu drzavne pomoci "Official Gazette of RS", no. 13/2010, 100/2011, 91/2012, 37/2013, 97/2013, 119/14, 23/2021 – other regulation, 23/2021 - other regulation, 62/2021 – other regulation, 99/2021- other regulation, 62/2021- other regulation, 20/2023 – other regulation, 43/2023 – other regulation and 48/2023 – other regulation) include:

- Regional operating state aid;
- Horizontal state aid for environmental protection;
- Sectoral state aid;
- State aid for providing services of general economic interest.

Specific types of sectoral state aid for which special grant rules are defined in this regulation include:

1) steel sector;

2) coal sector;

3) transport sector.

Depending on the sector in which the state aid is provided, the conditions for obtaining it are different. For example, regional state aid is granted to stimulate economic development in less developed areas, primarily those in which the standard of living is extremely low, or in which there is high unemployment.

Regional state aid for operations can also be granted to cover operating expenditures, but only if the following conditions are cumulatively fulfilled:

1) state aid contributes to equal regional development;

2) state aid is proportionate to the difficulties that need to be removed;

3) state aid is time-limited and diminishing over time.

The conditions for obtaining State Aid are defined in the Regulation on Rules for State Aid Granting available at the following link: https://www.paragraf.rs/propisi/uredba-pravilima-dodelu-drzavne-pomoci.html. ■

CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2024

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1. What are the main competition-related pieces of legislation in the Republic of Slovenia?

Competition law in the Republic of Slovenia is primarily regulated by the Prevention of Restriction of Competition Act (ZPOmK-2), along with the directly effective and applicable European Union laws. Two competition law implementing acts are in effect, namely (i) Decree on the procedure for granting immunity from, and reduction of, administrative sanctions for companies who are parties to cartels, and (ii) Decree on the concentration of companies notification form. Additionally, the Criminal Code prescribes a criminal offense of illegal restriction of competition. Furthermore, certain sector-specific acts also include provisions concerning competition, such as the Mass Media Act, which especially provides for certain additional restrictions regarding concentrations, and the Agriculture Act, which provides for specific regulation of both material and procedural aspects (including certain fines/consequences) of certain prohibited acts for undertakings with substantial market power.

2. Have there been any notable recent (last 24 months) updates of the Slovenian competition legislation?

There have been some notable updates in the competition legislation in the Republic of Slovenia within the last 24 months. The new Prevention of Restriction of Competition Act (ZPOmK-2) entered into force on October 26, 2022, and it became applicable three months after its entry into force. The new ZPOmK-2 defines a new unified procedure for establishing infringements of competition law together with the imposition of penalties on legal entities for breach of competition rules – administrative sanctioning and provides for transposition of the provisions of Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. To reflect the legislative changes, novel decrees were adopted, providing some updates. Additionally, the ZPOmK-2 was recently amended (i.e., amendment ZPOmK-2A was adopted on January 30, 2024, entering into force on February 24, 2024). With the amended ZPOmK-2, the control over implementation and breaches of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services and Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) is entrusted on the Slovenian Competition Protection Agency(-Javna Agencija Republike Slovenije za Varstvo Konkurence; CPA), while also certain other modifications concerning inter alia access to file and information, remedies, limitation period, leniency, and administrative sanctions have been introduced. Furthermore, the CPA published for the first time the guidelines for setting administrative fines, which provide not only guidance for the determination of the amount of fines in antitrust proceedings but also regarding the setting of fines in concentrations, procedural breaches, and certain breaches of the Agriculture Act.

3. What are the main concerns of the national competition authority in terms of agreements between undertakings? How about the sanctioning record of the authority?

The Slovenian Competition Protection Agency considers as its priority the most serious violations stemming from the anti-competitive agreements. No further division that would indicate a higher priority of certain specific issues was indicated by the CPA in its publicly available communications.

Administrative sanctions for competition law infringements in the Republic of Slovenia were introduced only recently with the new ZPOmK-2. Previously, fines were set in the misdemeanor procedure, which was usually conducted as a follow-on procedure to administrative proceedings, in which a competition infringement is identified and any remedies set. The sanctioning record of the CPA is difficult to assess since case law on misdemeanor proceedings is limited. However, due to the introduction of the new unified procedure, which no longer requires the conclusion of the administrative procedure first, and also the publication of the sanctioning guidelines, it can be expected that the sanctioning activity of CPA could increase. For example, according to publicly available information, the CPA already imposed the first administrative sanction in an administrative procedure in December 2023 in a settlement procedure. The settlement concerns the finding of infringement by the adoption of an anti-competitive agreement in the form of rules of undertakings (i.e., Article 5 of the ZPOmK-2 and Article 101 of the TFEU) by the Veterinary Chamber of Slovenia with the introduction of rules on advertising and offering discounts for their services by the members of the chamber. CPA imposed an administrative sanction of EUR 43,000 for an infringement that lasted almost eight years. This is the first decision issued by the agency on the basis of the new ZPOmK-2 and the first issued on the basis of settlement submission. The decision is pursuant to the publicly available information not yet final.

4. Which competition law requirements should companies consider when entering into agreements concerning their activities on Slovenian territory?

The CPA regularly studies and follows the recent practices of the European Commission and the Courts of the European Union, along with their guidelines. The competition law requirements when entering the agreements on Slovenian territory are therefore in the majority of instances the same or at least very similar to those developed within the European Union. Consequently, the requirements and prohibitions set and developed in European Union law are thus applicable and should be considered.

5. Does a leniency policy apply in the Republic of Slovenia?

The leniency policy in the Republic of Slovenia is applicable and is modeled on the European Commission's leniency policy. It is regulated by the Prevention of Restriction of Competition Act (ZPOmK-2) and the Decree on the procedure for granting immunity from, and reduction of, administrative sanctions for companies who are parties to cartels. The CPA acknowledges the potential of leniency policy for the purpose of detection of cartels and considers raising awareness regarding leniency proceedings as one of its priorities.

In addition to leniency, there is also an option for settlement submission. In the latter proceeding, the administrative penalty for undertakings can be reduced by up to 20%.

6. How is unilateral conduct treated under Slovenian competition rules?

Under Slovenian competition rules, unilateral conduct is regulated with a prohibition of abuse of dominant position, which is modeled on the prohibition under Article 102 TFEU. Dominant position is defined as the ability of an undertaking to act to a significant degree independently of its competitors, clients, or consumers. Furthermore, a dominant position is presumed in cases of a market share of an undertaking in the territory of the Republic of Slovenia above 40% or, in the case of joint dominance, a market share of more than 60%. Abuse is not defined in the ZPOmK-2, but only a non-exhaustive list of examples is noted, such as in the event of a dominant undertaking (i) directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions, (ii) limiting production, markets or technical development to the prejudice of consumers, (iii) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or (iv) making the conclusion of contracts subject to the acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

7. Are there any recent local abuse cases of relevance?

There is one recent local abuse case of relevance, which ended with a commitment decision, as have the majority of proceedings in recent years. That recent case (date of commencement: November 4, 2021) concerned the alleged abuse of dominance by the company PLASTKOM d.o.o., wherein the company conditioned its further business cooperation with performers of waste candle management operations on the conclusion of new contracts, requiring contracting partners to deliver all collected waste candles for processing to PLASTKOM d.o.o. Additionally, PLASTKOM d.o.o. purportedly inflated processing fees, especially for electronic candles, and applied unequal conditions for comparable deals with contracting partners, placing them in a competitively disadvantaged position. On March 30, 2023, the CPA also stopped the proceeding against the company Telekom Slovenije d.d., with the case concerning the alleged abuse of the company's dominant position regarding access to the broadband network market. The case was initiated in 2004 but was stopped without finding any infringement, after it was returned by courts for re-examinations following previously adopted infringement decisions in two instances, due to the difficulties with obtaining all relevant information for establishing infringement for such time so far in the past. Based on the publicly available information, one case that is not yet closed, concerns the conduct of the company Pro Plus d.o.o. in the field of distribution of audio-visual content. That case was commenced on February 1, 2017, with no further information publicly available on its status.

8. What are the consequences of a competition law infringement?

The consequences of competition law infringements depend on their severity and nature. Thus, the CPA can issue a fine or administrative penalty, but it also has several other options. The CPA can in particular order the undertaking to stop with the infringement, and may impose on the undertaking certain measures, which it deems suitable to remedy the infringement and its consequences, such as the sale of activity, transfer of intellectual property rights, etc. The CPA may furthermore in certain instances inter alia revoke certain decisions, such as the commitment decision, or the decision on the compatibility of concentration, and commence with the proceeding.

Regarding the proceedings and rules regarding sanctions and finding of violations, the new ZPOmK-2 introduced a new unified procedure. Previously the CPA had to identify violations of competition law in administrative procedure, while the

fines were levied upon undertakings in a separate misdemeanor procedure. Now both are decided in a single administrative procedure. Regardless, the ZPOmK-1 may still be applicable in some cases in the future. The provisions on administrative sanctioning of undertakings per the ZPOmK-2 apply to breaches that can be considered administrative offenses and are committed after the entry into force of the ZPOmK-2. In addition, the administrative and minor offense proceedings that are not yet final at the date of applicability of the ZPOmK-2 have to be finalized in line with previously applicable procedures. However, if the rules from the ZPOmK-2 could be considered more beneficial for the offender then the ZPOmK-2 rules may apply also in those cases. However, it is not clear yet, if provisions on administrative sanctions could be regarded as more beneficial for the offender in practice and their application for older cases will be settled through case law. There are also certain specifics for transitory situations concerning damages proceedings.

The CPA can impose an administrative sanction in the amount of up to 10% of the undertaking's annual turnover in the preceding business year for restrictive conduct (anti-competitive agreements, abuse of dominant position, violation of commitment decision, etc.), and up to 10% of the annual turnover of the undertaking concerned along with other entities within the group in the preceding business year for concentration-related violations (failure to notify or suspend transactions pending clearance, violation of decision on incompatibility of concentration, etc.). In broader cases of obstruction of the CPA's activities (e.g., transmission of incorrect or misleading information, failure to respond to a summons), the CPA may impose an administrative sanction in the form of periodic payments or of a single pecuniary amount not exceeding 1% of the annual turnover of the undertaking in the preceding business year. The periodic payments option may be used particularly to compel undertakings to submit complete and accurate information upon request, and to comply with judicial decisions, agency findings of infringement, interim measures, commitments, etc. In these instances, the CPA may impose on the undertaking a periodic administrative sanction in the form of a daily fine of up to 5% of the undertaking's average daily total turnover in the preceding business year.

The parent undertaking can also be found responsible and is jointly responsible for the payment of administrative fines (the financial obligation of each undertaking in that regard cannot exceed the highest amount for which the undertaking would be responsible if it alone committed the administrative offense). Specific rules are in place also regarding legal and commercial succession, issuance of administrative fines to business associations, accomplices, etc.

Additionally, penalties for breach of competition rules are defined for responsible individuals and individuals who control another undertaking and are issued in misdemeanor proceedings and can include payment of the fine:

for the responsible individual (e.g., CEO, responsible employee of the company): from EUR 5,000 to EUR 30,000

for an individual who controls another undertaking: from EUR 3,000 to EUR 15,000

Instead of a fine, the CPA can also issue a warning but only for the responsible individuals and individuals, who control another undertaking.

Regarding major violations, the limitation period is five years from the occurrence of a violation of competition law, but in any case, the procedure for the imposition of fines is not allowed or the administrative penalty cannot be issued after ten years from the occurrence of the breach.

In administrative sanctioning proceedings (for undertakings), despite the mentioned absolute limitation period, the latter is nevertheless suspended and does not run during the conduct of the ordinary or extraordinary judicial proceedings against a decision on administrative offense, or when it cannot start or continue pursuant to the law, and recommences after the judicial decision becomes final. In that regard, the time elapsed before the suspension is counted toward the limitation period. Additionally, in the event, that the final decision or court ruling is revoked in the extraordinary judicial proceeding and the absolute limitation period runs out until such time or would run out in a period shorter than two years, the limitation period in a new proceeding on administrative fine amounts to two years.

Undertakings and the responsible persons may additionally be held criminally liable for the criminal offense of illegal restriction of competition pursuant to Article 225 of the Criminal Code, with the prison sentence envisioned in a span from six months to five years. In that regard, the Liability of Legal Persons for Criminal Offences Act provides for certain penalties for legal entities for the violation of the above-mentioned criminal offense. The penalties are in particular the (i) penalty payment of at least EUR 50,000 or at most the amount of two hundred times the resulted damage or unlawfully acquired proceeds, obtained with a criminal offense; (ii) confiscation of assets of the legal person (instead of penalty payment); and (iii) cessation (start of liquidation proceedings) of the legal entity, if the business/activity of the legal person was in total or to a large extent used for the execution of criminal offenses (instead of penalty payment). Furthermore, for a certain period of time, a prohibition to conduct certain business activities of the legal entity and a prohibition of disposal of the company's securities may also be imposed, while any monetary benefit obtained with or due to the criminal offense can be taken.

Additionally, note that the undertakings may also be subject to private damages proceedings.

9. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Slovenian market?

Mergers & acquisitions need to be notified to the CPA in the event that both legal and economic conditions are fulfilled. The legal condition is fulfilled in the event of a change of control on a lasting basis over an undertaking. This could occur due to (i) the merger of two or more previously independent undertakings or part of undertakings, (ii) the acquisition of direct or indirect control over the whole or parts of one or more other undertakings, or (iii) the establishment of a full-function joint venture. As part of the economic condition, the following merger control thresholds for the obligation to notify the merger to the CPA currently apply:

(i) joint annual turnover on the Slovenian market in the business year prior to the merger of all the undertakings concerned jointly must be above EUR 35 million, and

(ii) either:

- annual turnover on the Slovenian market in the business year prior to the merger of the target is at least EUR 1 million, or
- in cases of joint ventures annual turnover on the Slovenian market in the business year prior to the merger of at least two undertakings concerned is above EUR 1 million (at least two parties must each individually achieve a turnover of EUR 1 million in Slovenia for this threshold to be met).

With a requirement that annual turnover in the Slovenian market is the only relevant turnover for the establishment of a merger control threshold and especially with a requirement that the target must have an annual turnover in Slovenia, merger control is limited to mergers having a possible effect on the Slovenian market.

If EU thresholds are met, a merger does not have to be notified to the CPA but should be notified to the European Commission only.

In addition, companies have to inform the CPA of, and the CPA can review, the mergers in which the above-stated thresholds are not met, but undertakings concerned have a joint market share on the relevant market in Slovenia of above 60%. The undertakings involved in a concentration must inform the CPA of such concentration within 30 days of the conclusion of a contract, announcement of a public bid, or the acquisition of a controlling interest. The CPA may also prompt the undertaking concerned to inform it of a concentration. The CPA may at its sole discretion then request the undertakings concerned to notify the concentration to the CPA within 25 business days from the day on which the parties informed the CPA about it. Following such request from the CPA, notification is mandatory and the same rules as for the other notified mergers apply. There are no implications for parties that do not voluntarily (without any request or prompting) approach the CPA in such circumstances, however (i) non-compliance with a request to notify concentration, or (ii) breach of stand-still obligation, represent administrative offenses, for each of which the CPA can issue an administrative penalty.

In cases where the jurisdictional thresholds are met, notification is mandatory, and a stand-still obligation applies until a final decision by the CPA. Furthermore, a stand-still obligation applies to mergers, which do not reach annual turnover thresholds, if the CPA requires parties to notify a merger due to high market shares (see above), from the day when parties are informed about the CPA's request to notify. Notifying parties can, however, ask the CPA to allow them to exercise rights from the merger if this is required to safeguard the value of the intended investment or for the performance of services in the public interest.

10. What is the normal merger review period?

ZPOmK-2 provides only an indicative and non-mandatory timeline regarding the merger review. The review period, therefore, varies depending on the potential contentiousness of the notified merger, with the indicative timeline being the following.

The deadline for filing a notifiable transaction is 30 days after the conclusion of the contract, the announcement of the public bid, or the acquisition of a controlling interest, whichever is first. The running of this deadline commences on the day of the first of those instances. In cases where the CPA requires parties to notify a merger due to their high market shares, a 30-day deadline for filling notification starts to run from the day when parties are informed about the CPA's request to notify.

For a review of the merger by the CPA, there is only an indicative timetable, which is not binding for the CPA. Within 25 business days from the receipt of the complete notification the CPA should issue:

(i) a decision finding that the notified merger is not notifiable,

(ii) a decision clearing the notified merger (first phase decision), or

(iii) an order commencing a second-phase review.

In cases where the notifying parties offer remedies in the first phase, the deadline for issuing a first-phase clearance decision or commencement of a second phase is prolonged for an additional 15 business days.

In a second phase review, the CPA should issue a decision clearing or banning the merger within 60 business days from the issuing of an order on the commencement of the second phase review. In cases where the notifying parties offer remedies in the second phase, the deadline for issuing a decision is prolonged for an additional 15 business days. The remedies may per the new amendment be proposed at the latest within 45 days from the order commencing a second-phase review, with later submissions to be considered only exceptionally.

Note that "business days" excludes any days when the CPA does not work, namely weekends and public holidays. The deadline runs from the day after the day on which a full and complete notification is received by the CPA. The CPA however is not obliged to issue a confirmation of completeness, so it is difficult to assess when the indicative timeline would start to run.

11. Are there any fees applicable where transactions are subject to local competition review?

For the purpose of merger review, an administrative fee in the amount of EUR 2,000, determined by the Administrative Fees Act, is payable.

12. Is there any possibility for companies to obtain State Aid in the Republic of Slovenia? If yes, under what conditions?

State Aid may be obtained in the Republic of Slovenia, under the conditions prescribed by the Treaty on the Functioning of the European Union (Articles 107, 108, and 109).

13. What were the major changes brought by the COVID-19 pandemic? Have any of them stuck and how likely is it for these changes to continue to do so in the foreseeable future? crisis in the field? How likely is it for these changes to stick?

The COVID-19 measures that concerned the CPA were primarily focused on procedural aspects, i.e. the deadlines and method of submissions. These changes are no longer in place. Nevertheless, during the COVID-19 lockdown(s), the CPA changed its approach regarding communication, with more communication occurring via electronic messages as well as meetings taking place online. This practice has so far stuck and is still present.

There were no changes with respect to the application of substantive rules or evaluation of cases by the CPA. ■

CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2024

TURKIYE

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1. What are the main competition-related pieces of legislation in Turkiye?

The basis of Turkish competition law practices is Act No. 4054 on the Protection of Competition and secondary legislation prepared based on this act. The substantial provisions of competition law in Turkiye are Articles 4, 5, 6, and 7 of Act No. 4054:

- Pursuant to Article 4, agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion, or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited. Article 5 of the law relates to agreements that are exempted from the prohibition in Article 4 of this law on grounds of efficiency.
- The abuse by one or more undertakings of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or concerted practices is illegal and prohibited by Article 6.
- Article 7 set out the merger control regime in Turkiye. Accordingly, mergers and acquisitions that result in a significant lessening of effective competition within a market for goods or services in the entirety or a portion of the country, particularly in the form of creating or strengthening a dominant position are prohibited.

The powers of the Turkish Competition Board for dawn raids and information requests are designed in Articles 14 and 15 of Act No. 4054, and administrative fines in Articles 16 and 17. Accordingly, the Turkish Competition Authority (TCA) has a broad power to request all kinds of information and documents from undertakings and to carry out dawn raids. Administrative fines vary depending on the type, gravity, and duration of the violation but are determined as 10% of the annual turnover of the undertakings at most.

A set of secondary legislation has been prepared in line with the above provisions of Act No. 4054, either as communiques, regulations, or guidelines. The secondary legislation in force is listed as such:

Communiques:

- Block Exemption Communique on Vertical Agreements (Communique No: 2002/2)
- Communique On Agreements, Concerted Practices and Decisions and Practices Of Associations Of Undertakings That Do Not Significantly Restrict Competition (Communique No: 2021/3)
- Communique on the Commitments to Be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices And Decisions Restricting Competition, and Abuse Of Dominant Position (Communique No: 2021/2)
- Communique on the Increase of the Lower Threshold for Administrative Fines specified in Paragraph 1, Article 16 of the Act no 4054 on the Protection of Competition, to be Valid until 31/12/2024 (Communique No: 2024/1)
- Communique On the Payments to Be Made by Joint-Stock and Limited Companies Pursuant to Act No 4054 (Communique No: 2017/4)
- Block Exemption Communique on Vertical Agreements in The Motor Vehicles Sector (Communique No: 2017/3)
- Block Exemption Communique on Research and Development Agreements (Communique No: 2016/5)
- Block Exemption Communique on Specialization Agreements (Communique No: 2013/3)
- Communique On the Procedures and Principles To Be Pursued In Pre-Notifications And Authorization Applications To Be Filed With The Competition Authority In Order For Acquisitions Via Privatization To Become Legally Valid (Communique No: 2013/2)
- Communique on the Application Procedure for Infringements of Competition (Communique No: 2012/2)
- Communique on the Mergers and Acquisitions Calling for the Authorization of the Competition Board (Communique No: 2010/4)
- Communique on the Regulation of the Right of Access to the File and Protection of Trade Secrets (Communique No: 2010/3)
- Communique on Hearings Held vis-a-vis the Competition Board (Communique No: 2010/2)
- Block Exemption Communique in Relation to the Insurance Sector (Communique No: 2008/3)
- Block Exemption Communique on Technology Transfer Agreements (Communique No: 2008/2)
- Communique on the Conclusion of the Organization of the Competition Authority (Communique No: 1997/5)

Regulations:

- Regulation on Active Cooperation for Detecting Cartels (Active Cooperation/Leniency Regulation)
- Regulation on the Settlement Procedure
- Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position
- Regulation on Promotion and Title Change of Competition Authority Employee

- Regulation on Competition Authority Professional Employee
- Regulation on Competition Authority Disciplinary Supervisors
- Competition Authority Budget and Accounting Regulation
- Competition Authority Tender Regulation
- Regulation on the Working Procedures and Principles of the Competition Authority

Guidelines:

- Guidelines on the Examination of Digital Data during On-Site Inspections
- Guidelines On Vertical Agreements
- Competition Assessment Guidelines
- Guidelines Explaining the Block Exemption Communique on Vertical Agreements in the Motor Vehicles Sector
- Guidelines on the Application of Articles 4 and 5 of the Act no 4054 on the Protection of Competition to Technology Transfer Agreements
- Guidelines On the Explanation of The Regulation On Active Cooperation For Detecting Cartels
- Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position
- Guidelines on the General Principles of Exemption
- Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control
- Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions
- Guidelines on the Assessment of Horizontal Mergers and Acquisitions
- Guidelines on Horizontal Cooperation Agreements
- Guidelines on Remedies That are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions
- Guidelines On Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions
- Guidelines on the Voluntary Notification of Agreements, Concerted Practices, and Decisions of Associations of Undertakings
- Guidelines on the Definition of Relevant Market
- Guidelines on Certain Subcontracting Agreements Between Non-Competitors

In Turkish competition law, Act No. 5236 on Misdemeanors is taken as a basis for the statute of limitations. Accordingly, the statute of limitations for competition law investigations is eight years. Any anti-competitive practice that has taken place in the last eight years can be investigated and penalized by the TCA.

Due to the proximity of competition investigations to criminal law investigations, in line with the approach of the European Union Court of Justice, competition investigations in Turkiye should also act in accordance with the basic principles of criminal law (presumption of innocence, the principle of legality in crime and punishment, etc.). Decisions taken by TCA as a result of an investigation to the contrary may be subject to annulment in the administrative jurisdiction in this context.

Finally, since the decisions taken by TCA are subject to judicial review and fall within the administrative jurisdiction, Act No. 2577 on the Administrative Jurisdiction Procedures, which regulates the procedures for appealing the decisions taken by the competition authority to the courts, gains importance in the judicial dimension of competition law. Appeals to the courts and higher courts against the decisions of the competition authority must be made in accordance with the rules outlined in this law.

2. Are there any notable recent (last 24 months) updates of the Turkish competition legislation?

The long-lasting bill of Law on The Act on the Protection of Competition (Competition Act) was ratified by the Turkish Parliament on June 16, 2020. This amendment is the most extensive reform of the antitrust enforcement system since the enactment of the Competition Act in 1994. The most significant changes for the last two years are explained below:

a) Leniency Procedure

The new Regulation on Active Cooperation for Detecting Cartels issued by the Turkish Competition Board entered into force upon publication in the Official Gazette dated December 16, 2023.

The Regulation on Regulation on Active Cooperation for Detecting Cartels, published in the Official Gazette dated February 15, 2009, and numbered 21142, has been in force for more than fourteen years. In light of the implementation results recorded during this period since the Regulation entered into force, the changes in the relevant legislation, particularly in the settlement procedure, and the practices of peer countries, it has become necessary to update the regulation on active cooperation.

The new version of the regulation basically includes the following:

- To make a clear distinction between the active cooperation institution, which is essentially a method of obtaining evidence, and the settlement institution, which is an alternative file finalization procedure, the requirement to

submit documents that create added value to those who will apply for active cooperation,

- Providing legal certainty that those in a vertical relationship with the parties to the aggregation-distribution cartel or other cartel facilitators, who in practice are held liable for administrative sanctions in the same way as the cartel parties, may also benefit from active cooperation,
- In some cases, a reasonable time limit should be imposed on applications for active cooperation in order to avoid disruption of investigations with a legal time limit,
- In case new information and documents are obtained by the applicant, determining the deadline for their submission,
- Determination of the fate of the application for active co-operation in the event that the applicants apply for active co-operation with the idea that they may have been a party to a cartel and the application in question is accepted and decided by the Competition Board, but the infringement is not considered as a cartel by the Board at the end of the investigation process,

b) Amendments in Communique Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board, No: 2010/4

Communique on the Mergers and Acquisitions Calling for the Authorization of the Competition Board, No: 2010/4 (Communique) has been amended on March 4, 2022. With this amendment, the turnover thresholds for authorized mergers and acquisitions were updated, a special subparagraph was introduced for technology undertakings, changes were made to the test for significant lessening of effective competition, turnover calculations for financial institutions were revised and the notification form was completely changed.

One of the most significant amendments has been made in the thresholds that need to be exceeded for authorization from the Turkish Competition Board when there is a permanent change in control. Accordingly, the limit of TRY 100 million in subparagraph (a) of the first paragraph of Article 7 of Communique No: 2010/4 was amended to TRY 750 million, the limit of TRY 30 million was amended to TRY 250 million, the limit of TRY 30 million in subparagraph (b) was amended as TRY 250 million and the limit of TRY 500 million was amended as TRY 3 billion.

Additionally, the Amending Communique not only revises turnover thresholds but also outlines the notion of technology undertakings with a definition added to Article 4, first paragraph. These include businesses in digital platforms, software, gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals, and health technologies.

According to the amendment, companies in these sectors operating in Turkiye or involved in R&D or service provision within Turkiye won't need to meet the previously stipulated turnover threshold of TRY 250 million for acquisition.

Together with these amendments, a new version of the Article 7 of the Communique is as follows:

- "if the transaction parties have TRY 750 million turnover in Turkiye in total and TRY 250 million turnover in Turkiye of at least two of the transaction parties separately, OR,
- in acquisition transactions, the turnover of the asset or activity, in merger transactions, the Turkiye turnover of at least one of the transaction parties exceeds TRY 250 million and the world turnover of at least one of the other transaction parties exceeds TRY 3 billion,

then these transactions need to be notified to the Authority in order to be granted permission.

Operating in the geographical market of Turkiye or having R&D activities or providing services to users in Turkiye in the transactions related to the acquisition of technology undertakings that offer; in subparagraphs (a) and (b) of the first paragraph TRY 250 million thresholds are not sought."

In 2020, an amendment to Article 7 of Law No. 4054 introduced the criterion of significantly lessening effective competition in the assessment of merger and acquisition transactions. This change was incorporated into the Amendment Communique to align Act No. 4054 with Communique No: 2010/4. Consequently, the regulation now prohibits mergers or acquisitions that lead to a substantial reduction in effective competition across the nation or in specific regions, especially those resulting in the establishment or reinforcement of a dominant market position.

Lastly, amendments were made regarding the turnover calculation for banks, financial leasing, factoring and financing companies, insurance, reinsurance and pension companies, and other financial institutions.

c) Increase on the Lower Limit of the Administrative Fine

On December 20, 2023, the lower limit of administrative fines stipulated in the first paragraph of Article 16 of Act No. 4054 on the Protection of Competition was increased to TRY 167,473, to be valid from January 1, 2024, to December 31, 2024, based on the revaluation rate of 58.46%.

3. What are the main concerns of the national competition authority in terms of agreements between undertakings? How about the sanctioning record of the authority?

The main concerns of the Competition Authority in terms of horizontal agreements are any agreement between the parties that will affect their future competitive behavior. In this context, the exchange of information and agreements between competitors on strategic issues such as price, maturity, discount, quantity, new products, coverages, R&D, etc. are the main horizontal competition concerns. Additionally, territory or customer sharing between competitors is also among the horizontal concerns that are the main focus of the Competition Authority.

In addition to these core competition concerns, in the Guidelines on Horizontal Cooperation Agreements, the Competition Authority describes competition concerns regarding various behaviors listed as follows:

*a) In Terms of Standardization Agreements Between Competi*tors

- First, if undertakings were to engage in anti-competitive discussions in the context of standard-setting, this could reduce or eliminate price competition in the markets concerned, thereby facilitating a collusive outcome in the market.
- Second, standards that set detailed technical specifications for a product or service may limit technical development and innovation. In addition, standards that require the exclusive use of a particular technology for a standard or that force the members of the standard-setting organization to exclusively use a particular standard may lead to the same effect. The risk of limiting innovation is increased if one or more undertakings are excluded from the standard-setting process without an objective reason.
- Standardization agreements may lead to restrictive effects on competition by preventing certain undertakings from obtaining effective access to the results of the standard-setting process, that is to say, to the technical specifications and/or to the intellectual property rights essential for the implementation of the standard. In case an undertaking's access to the results of the standard is either completely prevented or tied to prohibitive or discriminatory terms, there is a risk of creating restrictive effects on competition.

b) In Terms of Exchange of Information Between Competitors

- The exchange of competition-sensitive information can result in restrictive effects on competition by artificially increasing transparency in the market, thereby facilitating the coordination of competitive behavior between undertakings. This can occur through different channels.
- Information exchange may lead to undertakings arriving at common and collusive expectations concerning the uncertainties in the market. Thus, undertakings can then reach a common understanding in order to coordinate their competitive behavior, without an explicit agreement. Information exchange in this way may lead to a collusive outcome in the market. The exchange of information about the plans of the undertakings concerning future conduct is the most convenient means of such an understanding.
- Through the use of a monitoring mechanism, information exchange can render the market transparent and allow a collusive outcome in the market or improve the sustainability of such conduct (internal stability) by making it easier for undertakings to identify any practice of their competitors that is in violation of an anti-competitive agreement between them and to retaliate against such practices. Such a monitoring mechanism may be created by the exchange of current or historical data.
- Information exchange can lead to the exclusion of competitors who are not parties to the agreement (external stability) by improving the sustainability of collusive outcomes. When the market becomes sufficiently transparent due to exchanges of information, undertakings parties to the agreement can be informed on when and how potential competitors will enter the market, target the new entrants, and, as addressed in the next section, foreclose the market to potential competitors.

c) In Terms of Research and Development Agreements

- R&D cooperation can restrict competition in various ways. First, it may reduce or slow down innovation, leading to fewer or lower-quality products coming to the market.
- Secondly, R&D cooperation may lead to increasing prices by significantly reducing competition between the undertakings that are not parties to the agreement in product or technology markets, or by making coordination of competitive conduct in those markets possible.
- Also, R&D cooperation may lead to market foreclosure for competitors. However, a market foreclosure effect may only arise if at least one of the parties holds, if not a dominant position, significant market power concerning a key technology and derives exclusive benefits from the results of the R&D efforts of the parties.

d) In Terms of Production Agreements

- Production agreements, and in particular production joint ventures, may cause a restriction of competition by leading the parties to align output volumes, product

quality, product price, and other competitively important parameters. This may happen even if the parties market the products independently.

- Production agreements may lead to higher prices or reduced output, product quality, product variety, or innovation, that is to say, to a collusive outcome, as a result of the parties' coordinating their competitive behavior as suppliers.
- Production agreements may furthermore lead to the foreclosure of related markets to other undertakings. For instance, by gaining enough market power, parties engaging in joint production activities in the upstream market may be able to raise the price of a key component for a downstream market, and thus they could use the joint production activity to raise the costs of their competitors downstream and, ultimately, force these competitors off the market. This, as a result, could have adverse effects on the consumers by allowing the parties to increase their market power downstream and to sustain prices above the competitive level, or through other ways.

e) In Terms of Joint Purchasing Agreements

- Joint purchasing arrangements may lead to restrictive effects on competition in the purchasing and/or downstream selling markets, such as an increase in product prices, reduction in output, product quality and variety or innovation, market allocation, or foreclosure of the market to other possible purchasers.
- If downstream competitors purchase a significant part of their products together, the incentive for price competition on the selling markets may be considerably reduced.
- In case the parties have a significant degree of market power in the purchasing market (buying power), there is a risk that they may force suppliers to reduce the variety or quality of products they produce. This situation may bring about certain restrictive effects, such as a reduction in quality, lessening of innovation efforts, or ultimately a sub-optimal amount of supply.
- The buying power of the parties to the joint purchasing arrangement could be used to foreclose competing purchasers by limiting their access to efficient suppliers. This is more likely where there are a limited number of suppliers and there are barriers to entry on the supply side of the upstream market.
- In general, however, joint purchasing arrangements are less likely to give rise to competition concerns if the parties do not have market power in the selling markets.

f) In Terms of Commercialization Agreements

- Commercialization agreements can lead to restrictions on competition in several ways. First of all, commercialization agreements may lead to price-fixing.
- Secondly, in commercialization agreements, the parties may restrict supply by determining the production volume to be put on the market.
- Thirdly, commercialization agreements may become a means for dividing the markets or allocating customers, for example in cases where the parties' production facilities are located in different geographic markets or when the agreements are reciprocal.
- Finally, such agreements may also result in a collusive outcome by leading to an exchange of competitively sensitive information related to subjects falling within or outside the scope of the cooperation or by leading to a commonality of costs.

Lastly, certain risks have arisen in the field of human resources in terms of "labor markets" in Turkish competition as revealed by the recent investigations carried out and decisions made. TCA underlines in its past decisions that labor should be considered as input, and thus agreements to be made among undertakings in labor markets would be different from "purchasing cartels." In this context, we come across two basic types of infringement which are: i) information exchange/agreement related to employee wages and benefits, and (ii) no-poaching agreements among undertakings engaged in the field of human resources.

Wage-fixing agreements refer to the agreements made among undertakings for fixing wages of employees working in the same sector or keeping their wages at a certain level. No-poaching and no-hiring agreements refer to agreements intending to ensure that undertakings do not poach or hire the employees of each other. In other words, agreements concluded directly or indirectly intending to make sure that no job offers are made by an undertaking to the employees of another undertaking or that undertakings do not hire the employees of other undertakings cause risks to arise. This kind of agreement can also be perceived as an infringement of competition law rules. Thus, information exchange among undertakings in relation to employee wages and benefits may be interpreted as an exchange of competitively-sensitive information even if they do not reach the extent of an agreement, and may cause grounds for the establishment of an infringement.

In this regard, several investigations initiated by the TCA in the past two years against numerous industries. Considering the problems in labor markets and the benefits to be derived if these problems are addressed by means of using competition law instruments, the TCA underlines that it aims to maintain the competitive structure of the labor law by being aware of the contribution made by employees to the process of making the products and services available for consumers in a digital

era where creativity and innovative intelligence have become particularly important. Thus, the authority may consider gentlemen's agreements concluded to make sure that undertakings do not hire the employees of each other or agreements/information exchanges intending to fix employee wages and other benefits, which mainly include financial benefits, as infringement in this regard.

The number of horizontal infringement decisions taken by the TCA in recent years is as follows:

- 2023: 55
- 2022: 38
- 2021: 30
- 2020: 31
- 2019: 23
- 2018: 36
- 2017: 35
- 2016: 26
- 2015: 32
- 2014: 67
- 2013: 71

4. Which competition law requirements should companies consider when entering into agreements concerning their activities on Turkiye's territory?

In Turkiye, competition law rules are set in Act No. 4054 on the Protection of Competition. Similar to global practice, there are three main rules regarding the anti-competitive behavior of undertakings and in addition to that one exemption method is arranged under Turkish competition law. These rules will be explained with their purposes below.

Agreements, Concerted Practices, and Decisions Limiting Competition (Article 4):

Article 4 prohibits agreements and practices between undertakings that have the effect of preventing, restricting, or distorting competition. According to the article, the term agreement is used to refer to all kinds of compromise or accord to which the parties feel bound, even if these do not meet the validity conditions set in civil law and it is not important whether the agreement is written or oral. Even if the existence of an agreement between the parties cannot be established, direct or indirect relations between undertakings that replace their own independent activities and ensure coordination and practical cooperation are prohibited if they lead to the same result. Thus, it is intended to prevent the undertakings from legitimizing acts limiting competition via fraud against the law. Most of the time, in order to deal with their common problems, undertakings form associations among themselves that may or may not have a legal personality. These associations can make decisions that serve to generate more earnings for their members by preventing competition between the members. Such behaviors are also prohibited.

Vertical or horizontal agreements can restrict competition. It is accepted that horizontal agreements have competition-distorting effects by object since they are between competitors.

In a legal regime where agreements restricting competition are prohibited, these agreements are generally made in secret, and proving their existence is quite difficult, sometimes even impossible. For this reason, in some cases, it can be accepted that undertakings are engaged in a concerted practice. Thus, the burden of proof for not being engaged in concerted practice has been passed to the relevant undertakings and the intent was to prevent the act becomes unworkable due to the difficulty of proof.

Exemption (Article 5):

Implementation of the prohibition of Article 4 in an absolute manner may have some unwanted consequences. Hence, if the beneficial effects caused are greater than the harmful effects, agreements restricting competition can be exempted from the prohibition of Article 4. For such an exemption to be granted, four conditions listed in the article must exist at the same time. First, the agreement or concerted practice or decisions of an association of undertakings limiting competition must have positive effects on the economy. In case these positive effects are not reflected on the consumer and stay as firm profits, the exemption will not be implemented. The fact that the consumer receives a just share of the benefit created also reveals the social side of competition law. Also, if less limitation on competition can be sufficient to achieve these beneficial effects, the litigious agreements will not benefit from the exemption. Only those competition limitations that are necessary and compulsory for achieving the beneficial effect will be granted an exemption. It is such that, with these limitations, competition must not be eliminated in a significant part of the relevant product market.

Exemption decisions will be made for certain periods and these decisions will be renewable if the specified conditions exist. Thus, the board will be given the opportunity to monitor the changes that may emerge or the developments that may cause a restriction in competition within the relevant market, after the exemption decision has been taken.

Also, the chance to be granted a block exemption is given to the groups of agreements that carry the conditions. Thus, both a legal certainty is secured for these agreements and the beneficial effects of these agreements are brought into the economy.

Besides the block exemption, an individual exemption mechanism also exists. Undertakings can carry out a self-assessment and if their agreement fulfills the requirements, their agreement will be considered valid.

Abuse of Dominant Position (Article 6):

In terms of competition law, an undertaking's growth through its own internal dynamics and obtaining a dominant position in various sectors is not an objectionable situation. On the other hand, it is prohibited for undertakings that obtain a dominant position in a market to abuse their position to restrict, prevent, or distort competition in Turkiye, or use their position in a way that would cause these effects.

In some cases, the undertaking may gain a dominant position because of the protections provided by law. Especially industrial and trade property rights grant such protection. The use of these rights must in no way serve the purpose of eliminating competition. Most encountered abuse cases in practice are as follows:

a) preventing, directly or indirectly, another undertaking from entering the area of commercial activity, or actions aimed at complicating the activities of competitors in the market;

b) making direct or indirect discrimination between purchasers with equal status by offering different terms for the same and equal rights, obligations, and acts;

c) purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price;

d) conducts that aim to distort competitive conditions in another market for goods or services by means of exploiting financial, technological, and commercial advantages created by dominance in a particular market; or

e) restricting production, marketing, or technical development to the prejudice of consumers.

Mergers or Acquisition (Article 7):

According to Article 7 of the act, any merger or acquisition that would result in a significant lessening of effective competition within a market for goods or services in the entirety or a portion of the country, particularly in the form of creating or strengthening a dominant position, is prohibited.

Accordingly, parties to a merger should submit an application to the TCA for authorization, if (i) the total turnovers of the transaction parties in Turkiye exceed TRY 100 million, and turnovers of at least two of the transaction parties in Turkiye each exceed TRY 30 million, (ii) The asset or activity subject to an acquisition, and at least one of the parties of the transaction in merger transactions have a turnover in Turkiye exceeding TRY 30 million and the other party of the transactions has a global turnover exceeding TRY 500 million.

5. Does a leniency policy apply in Turkiye?

There is a leniency procedure under Turkish competition law. Any leniency application must be submitted before the settlement application. If both leniency and settlement applications are accepted, the parties may benefit from both discounts. With the leniency procedure, full immunity or reduction from the penalty may be granted if the undertaking meets the conditions. In Turkish competition law, cartel facilitators can also apply for leniency just as cartel competitors.

Under Turkish competition law, the leniency procedure is only applicable to cartels. A cartel is defined, according to the Regulation on Active Cooperation for Detecting Cartels dated December 16, 2023, as:

- price determination,
- sharing of customers, suppliers, regions, or trade channels,
- limiting the amount of supply or setting quotas, and
- agreements that restrict competition and/or concerted actions, regarding consensual action in tenders,

between competitors.

The TCA expects that:

- a list of the products affected by the cartel subject to the application, the duration of the cartel, the names of the undertakings that are parties to the cartel, the dates and locations of the negotiations related to the cartel, the participants, and the information and documents owned about the cartel must be submitted;
- information and documents submitted by the applicant must be value-added documents.
- information and documents regarding the cartel subject to the application should not be concealed or destroyed;
- unless otherwise stated by the unit in charge that it would make it difficult to detect the cartel, being a party to the cartel subject to application is terminated;
- unless otherwise specified by the unit in charge, the application is kept confidential until the notification of the investigation report; and
- active cooperation continues until the final decision of the Board after the completion of the investigation.

Finally, another necessary condition for not imposing a fine by making use of full immunity is that the undertaking applying for leniency should not have forced other undertakings to form the cartel.

Applicants may be given time to complete their applications by submitting a list of the products affected by the cartel, the duration of the cartel the names and/or trade names of the undertakings party to the cartel, and, if any, the cartel facilitators.

If additional information and documents are obtained by the applicant after the completion of the applications, such information, and documents must be submitted to the records of the Authority as a matter of urgency and before the end of the second written defense period.

In order to be considered for a full immunity:

- First, before the board decides to conduct a preliminary investigation, it is regulated that, independently from other undertakings that are parties to the cartel, the first undertaking fulfilling the conditions or the first manager or employee who filed an application independent of the undertaking would not be fined (managers and employees of the undertaking can also file a leniency application).
- The second possibility envisaged to benefit from full immunity is that the application is made within the time frame determined as "from the preliminary investigation decision to the notification of the investigation report." However, in this case, there should not be a leniency application made before the board's preliminary research decision. If there is such an application, only that applicant will benefit from full immunity. In this second possibility, the board does not have sufficient evidence to prove the cartel, and the information and documents to be submitted in the application must conclude that the violation exists. In this case, it is possible to say that the board has a discretionary power to grant full immunity. In this way, it aims to prevent cartel members from waiting for an investigation to begin in order to apply for the leniency program.

From the board's decision to conduct a preliminary investigation to the notification of the investigation report, undertakings that present information and documents specified in the directive and fulfill the conditions but fail to benefit from the regulation on non-penalty mentioned above, independently of their competitors, will benefit from a fine reduction.

In this scope:

- The penalty to be imposed on the first undertaking is reduced between 25% and 50% of the total fine. In this case, the penalties to be imposed on the managers and employees who accept the violation of the attempt and actively cooperate are also reduced or penalties may not be imposed on the condition that they are not less than 25%.
- The penalty to be imposed on the second undertaking is reduced between 20% and 40%. In this case, the penalties to be imposed on the managers and employees who accept the violation of the attempt and actively cooperate are also reduced or penalties may not be imposed on the condition that they are not less than 20%.
- The penalties to be imposed on other undertakings are reduced between 15% and 30%. In this case, the penalties to be imposed on the managers and employees who accept the violation of the attempt and actively cooperate are also reduced or penalties may not be imposed on the condition that they are not less than 15%.
- Finally, if, as a result of the evidence presented, the fines increase due to the prolongation of the violation period or similar reasons, the first undertaking presenting the relevant evidence and the managers and employees who accepted the violation of this undertaking and actively cooperated will not be affected by this increase.

The requirements expected from the parties and the process in the leniency process are similar whereas full immunity from the fine is possible for the first comer in the leniency mechanism. The rest of the lenient undertakings may be eligible for discounts. The penalty to be imposed on the second undertaking is reduced between 20% to 40%. The penalties to be imposed on other undertakings are reduced to 15% and 30%.

6. How is unilateral conduct treated under Turkish competition rules?

Article 6 of Act No. 4054 prohibits one or more undertakings from abusing their dominant position in the goods or services market. The purpose of this regulation is to limit the competitive power of one or more undertakings that have the power to determine the economic parameters such as price, supply, production, and distribution amount by acting independently from the customers of the competitors in the market. Meaning that the aim is to prevent a monopoly situation that will occur with non-competitive practices in the markets.

The law does not prohibit being in a dominant position or taking a dominant position, but the abuse of this situation restricts competition. In this context, it is of great importance to determine the dominant position.

In determining the dominant position, factors such as market share, barriers to entry to the market, vertical integrity, substitutability of the product, and the quality of the product are taken into account, and it is evaluated whether an undertaking

(or association of undertaking) can act independently from its competitors and customers.

Some examples of abuse are given by the law. In this context, making the activities of a rival undertaking difficult, preventing an undertaking from entering the market, applying different conditions to the buyers in an equal situation, and stipulating the purchase of a good with another good, are considered as abuse of dominant position. However, it should be noted that cases of abuse are not limited to the examples mentioned above. For example, applying an excessively high selling price can also be considered an abuse of a dominant position.

7. Are there any recent local abuse cases of relevance?

Significant abuse of dominant position decisions of the Turkish Competition Authority in recent years can be summarized as follows:

1. Google Decision (27.10.2022, 22-49/717-300): TCA's investigation regarding Google resulted in a decision to monitor the compliance measures submitted by Google for a period of time to see whether the obligations set forth by TCA are met and to review the measures if deemed necessary. With the investigation, TCA decided that Google has a dominant position in the general search services market and violated Article 6 of Act No. 4054 by placing text advertisements at the top of the general search results in an indefinite and intensive manner, making it difficult for organic results that do not generate advertising revenues to operate in the content services market. In order to address the TCA's competitive concerns, Google committed to changing the labeling of the paid nature of text ads from "advertisement" to "paid sponsored ad" and to reduce the scale of text ads by reducing the volume of text ads on the results page. TCA assessed that these commitments were not sufficient to address the competition concerns. Subsequently, Google offered a broader package of commitments and offered to:

- Reduce the maximum number of ads at the top of the search page from four to three,
- Eliminate user uncertainty about the paid nature of the ads by replacing the "ad" label in the search results with a "paid sponsored ad" label,
- Reduce the volume of text ads on the search results page.

2. Obilet Decision (29.09.2022, 22-44/649-280): TCA concluded that the allegations that Obilet abused its dominant position by preventing the bus companies, to which Obilet sells tickets through exclusivity agreements, from working with competing online ticket comparison and sales websites are not clear and serious violations, and therefore, the existing competition concerns can be addressed with the commitment procedure. Accordingly, Obilet has made the following commitments in order to address the competitive concerns:

- The contracts to be concluded with the carrier companies shall not include exclusivity provisions that cause competitive concerns, the provisions in this respect in the existing contracts, if any, shall be amended within six months and notified to the Authority in writing, and such provisions shall not be included in the new contracts to be concluded,
- No contractual provision will be included for the carrier companies to work only with Obilet and no non-contractual behavior, guidance or pressure will be made in order to create this effect, and
- The commitments will be valid for three years.

3. Tadim Decision (07.07.2022, 22-32/505-202): With the allegation that Tadim abused its dominant position in the packaged dried nuts market and made it difficult for its competitors to operate competitive concerns raised before the TCA as follows;

- Ensuring the removal of the competitors through various ways such as the installation of stands at the points where the rival undertaking is located, free products, discount applications, and prepayments,
- To enter the sales points where Tadim is not present in a way that forces retailers to only work with Tadim,
- Not leaving enough space for the stands of competing products by placing stands at the points where this cannot be achieved, trying to reduce the visibility of the products of competing brands by exhibiting all product groups of Tadim together in their own stands, and-
- To ensure that Tadim, as a single brand, maintains its loyal customer quality by continuing its support at the points where it is present, with practices that have caused competitive concerns.

A number of commitments were made binding by TCA to ensure that the market remains competitive. Accordingly, Tadim and its dealers:

i. Shall not establish a verbal or written exclusivity relationship with small retailers such as grocery stores, monopoly dealers, kiosks, and fuel station stores operating in the field of packaged dried nuts sales.

ii. Shall not provide any benefits under any name whatsoever such as additional discount, additional premium, higher or more premium, free goods, free stand or product, service fee, or promotion in return for the retail outlet purchasing more than 60% of the packaged sunflower seeds or other packaged dried nuts from Tadim in any period (e.g., one year).

iii. Shall not pay any premiums (e.g., prepaid premiums, wholesale prepaid premiums, annual prepaid premiums, etc.) before the purchase or sale of packaged dried nut products to the consumer in return for exclusive work, not buying competing products, stopping the purchase of competing products or single brand work.

iv. Shall not offer special premiums, free goods, or other benefits in return for exclusive work, competitor exclusion, single brand work, and similar forms of work, even if a retail outlet that buys and sells the products of more than one undertaking, including Tadim, requests it.

v. Shall ensure that each of its dealers sells to retail sales points with a fixed discount rate to be determined on a district basis independently of Tadim.

vi. Shall sign and submit to the Turkish Competition Authority the attached protocol with its dealers in relation to the matters set out in (i) (v) above (Annex Draft Additional Protocol to the Dealership Agreement).

vii. The relevant employees of Tadim and its dealers will be trained on competition law and the matters set forth in this commitment.

viii. In the event that a written contract is concluded between a Tadim dealer and a retail outlet, such contract shall be prepared to reflect the matters contained in this commitment and a copy of the contract signed by the parties shall be left to the retail outlet that is a party to the contract.

ix. The notification text below will be shared with all Tadim retail sales points in return for signature and one copy will remain at the point.

"We sincerely thank you for choosing Tadim products! You, our esteemed retailer who delivers Tadim products to our consumers: The decision to sell only Tadim products is entirely yours. You are completely free to choose the products of the company you want. Any promise, commitment, contractual clause, or obligation that requires you to sell only Tadim products is invalid. Any promise, commitment, contractual clause, or obligation that would prevent you from selling TADIM products together with dried nuts or sunflower seed products of competing brands is also void. No premium, promotion, or discount application made by Tadim and Tadim dealers shall put you under the obligation not to buy from a competitor, to exclude a competitor, or to work with Tadim as a single brand. You can purchase Tadim's sunflower seeds, each type of dried nuts, dried fruits, and bar products separately and independently from others. Tadim will continue to compete with its quality as before."

4. Nadirkitap Decisions (July 18, 2022, 22-16/273-122 and April 7, 2022, 22-16/273-122): TCA decided that Nadirkitap, which provides intermediary services in the online sales platform of second-hand books, abused its dominant position by not providing the data of its seller members who want to market their products through rival intermediary service providers and by making the activities of rival undertakings more difficult. Therefore, TCA decided to impose an administrative fine against Nadirkitap.

5. Meta Decision (October 20, 2022, 22-48/706-299): In 2021, the TCA identified competitive concerns that Meta and its subsidiaries violated Article 6 of the Act No. 4054 and decided to open an investigation against the undertakings on the grounds of making it difficult for competitors operating in the personal social networking services and online display advertising markets by combining data collected from Facebook, Instagram, WhatsApp, and Messenger services, and creating an entry barrier in the market. With its findings and examinations, TCA decided to:

- Impose an administrative fine on Facebook for abusing its dominant position,
- Make Facebook take the necessary measures to end the infringement and to ensure the establishment of effective competition in the market and submit them to the TCA,
- Make Facebook submit a report to the TCA annually for a period of five years from the start of implementation of the first compliance measure.

6. Trendyol Decisions (September 23, 2021, 21-44/650-M , May 18, 2022, 22-23/364-154 , January 5, 2023, 23-01/2-2, February 27, 2023, 23-11/177-54, April 4, 2023, 23-19/355-122): Starting in 2021, the findings made by the TCA and the measures made binding upon these findings with the Trendyol decisions, which include multiple preliminary investigations and interim injunctions, can be summarized as follows:

Firstly, the TCA has found that Trendyol has a dominant position in the multi-category online marketplaces market and Trendyol abused this dominant position by interfering with the algorithm and using the data of third-party sellers who sell on the Trendyol marketplace, giving an unfair advantage to its own retail activity and thus making the activities of its competitors more difficult. TCA has decided that this was a violation of Article 6 of Act No. 4054 and imposed an administrative fine on the undertaking.

In addition, in order to end the infringement and to ensure the establishment of effective competition in the market, Trendyol was obliged to (i) take necessary measures by avoiding interventions made through algorithms and coding that would provide an advantage over its competitors, (ii) avoid the use of any data obtained and generated/generated from the marketplace

activity for private label products related to its retail activity and take all necessary technical, administrative and organizational measures to ensure this, (iii) keep certain data requested by the TCA for three years.

Following this decision, multiple preliminary investigations were opened against Trendyol and it was found that; (i) Trendyol intervened in the algorithms to increase the number of followers of Trendyol-branded products and (ii) manipulated the real numbers. (iii) It was also found that low seller ratings for Trendyol-branded products were deleted, (iv) Trendyol's own brand Trendyolmilla was listed high in brand filters as a result of algorithm intervention, (v) and data of competing sellers were used to make analysis and predictions regarding Trendyol-branded products.

Even though these preliminary investigations have not concluded with an investigation yet, TCA decided that late interventions in digital markets may cause irreparable harm and therefore an interim measure was mandatory. Accordingly, TCA decided that Trendyol must (i) cease all kinds of actions, behaviors, and practices, including interventions through algorithms and coding, that provide an advantage over its competitors, (ii) not share and use data for other products and services, and (iii) not discriminate against sellers using the platform.

8. What are the consequences of a competition law infringement?

The substantive penalties for violations of competition are regulated in Article 16 of Act No. 4054. An administrative fine of up to 10% of the annual gross income generated at the end of the fiscal year preceding the decision date, and up to 5% of the fine imposed on the employees of the undertaking or association of undertakings that are found to have a decisive effect on the violation. The following aggravating/mitigating factors are taken into account in the appraisal of the penalty:

- the recurrence of the violation,
- the duration of the violation,
- the market power of undertaking or associations of undertakings,
- the decisive effect of the undertaking or associations of undertakings in the realization of the violation,
- whether undertakings or associations of undertakings comply with the commitments given,
- whether undertaking or associations of undertakings assist in the investigation, and

the weight of the actual or potential damage.

It should be noted that the above-mentioned penalties may not be imposed or the fines may be reduced, taking into account the nature, effectiveness, and timing of the cooperation, to undertaking or associations of undertakings and their employees, who actively cooperate with the institution within the framework of the repentance program in order to reveal the violation of the law.

Act No. 4054 does not only contain penalties to be applied to competition law infringements. In this context, it envisages fines in case of preventing on-site inspections, which is one of the most important tools in revealing competition violations. Considering that it will be difficult to obtain information and documents regarding the violation in the ongoing process if an on-site investigation is prevented, the fine to be applied in this case has been determined to be a deterrent, at the level of five per thousand of the annual gross income of the undertaking at the end of the previous financial year.

In cases where mergers and acquisitions subject to permission are carried out without permission, false or misleading information is provided in exemption/negative clearance applications, and the information requested in accordance with the law is not provided fully and accurately, an administrative penalty of one thousandth of the annual gross income generated at the end of the previous fiscal year is in accordance with the law.

Finally, another type of punishment brought by Act No. 4054 is temporary fines. These fines are penalties given for each day in case of the occurrence of the situations listed in Article 17 of the law. They were regulated as fixed penalties in the first version of the law. Later, these penalties were made proportional to the gross income of the undertakings or associations of undertakings, in order to ensure deterrence and the application of penalties commensurate with the power of the undertaking.

9. Is there any competition law requirement in case of mergers & acquisitions occurring in or impacting the Turkish market?

According to the Communique on the Mergers and Acquisitions Calling for the Authorization of the Competition Board, No:2010/4 (Communique) when there is a permanent change in control either by a merger of two or more undertakings or acquisition of direct or indirect control of all or part of one or more undertakings by one or more undertakings or persons by means of the purchase of shares or assets, contract or any other means and if the transaction is above the turnover thresholds given in Communique, then the transaction needs to be notified to the TCA in order to be evaluated whether the said transaction will adversely affect competition on the market or not.

As mentioned in the second question, the Communique has

been amended in 2022. With this amendment, the turnover thresholds for authorized mergers and acquisitions were amended, a special subparagraph was introduced for technology undertakings, amendments were made to the test for significant lessening of effective competition, turnover calculations for financial institutions were revised and the notification form was completely changed.

One of the most significant amendments has been made in the thresholds that need to be exceeded for authorization from the Turkish Competition Board when there is a permanent change in control. Accordingly, the limit of TRY 100 million in subparagraph (a) of the first paragraph of Article 7 of Communique No. 2010/4 was amended as TRY 750 million, the limit of TRY 30 million was amended as TRY 250 million, the limit of TRY 30 million in subparagraph (b) was amended as TRY 250 million and the limit of TRY 500 million was amended as TRY 3 billion.

Additionally, the Amending Communique not only revises turnover thresholds but also outlines the notion of technology undertakings with a definition added to Article 4, first paragraph. These include businesses in digital platforms, software, gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals, and health technologies. According to the amendment, companies in these sectors operating in Turkiye or involved in R&D or service provision within Turkiye won't need to meet the previously stipulated turnover threshold of TRY 250 million for acquisition.

Together with these amendments, a new version of the Article 7 of the Communique is as follows:

- "if the transaction parties have TRY 750 million Turkiye turnover in total and TRY 250 million Turkiye turnover of at least two of the transaction parties separately, OR,
- in acquisition transactions, the turnover of the asset or activity, in merger transactions, the Turkiye turnover of at least one of the transaction parties exceeds TRY 250 million and the world turnover of at least one of the other transaction parties exceeds TRY 3 billion,

then these transactions need to be notified to the Authority in order to be granted permission.

Operating in the geographical market of Turkiye or having R&D activities or providing services to users in Turkiye in the transactions related to the acquisition of technology undertakings that offer; in subparagraphs (a) and (b) of the first paragraph 250 million TRY thresholds are not sought."

In 2020, an amendment to Article 7 of Law No. 4054 introduced the criterion of significantly lessening effective competition in the assessment of merger and acquisition transactions. This change was incorporated into the Amendment Communique to align Act No. 4054 with Communique No. 2010/4. Consequently, the regulation now prohibits mergers or acquisitions that lead to a substantial reduction in effective competition across the nation or in specific regions, especially those resulting in the establishment or reinforcement of a dominant market position.

Lastly, amendments were made regarding the turnover calculation for banks, financial leasing, factoring and financing companies, insurance, reinsurance and pension companies, and other financial institutions.

10. What is the normal merger review period?

For merger or acquisition agreements that fall within the scope of Article 7 of the Turkish Competition Act and exceed the turnover thresholds within the scope of the Communique, the Board must make a preliminary examination within fifteen days from the date of notification and decide whether it has given permission for the transaction or that the transaction should be taken into final examination and notify the parties. However, when the authority requests information from the undertaking while the investigation continues, the fifteen-day examination period starts again after the reply letter of the undertaking is submitted to the institution's records. In this case, it can be said that the first phase merger review period takes approximately one to two months in practice.

11. Are there any fees applicable where transactions are subject to local competition review?

No fee is charged by the TCA for mergers and acquisitions that are subject to the examination.

12. Is there any possibility for companies to obtain State Aid in Turkiye? If yes, under what conditions?

In Turkiye, companies can obtain State Aid. However, there is no control for State Aid in terms of competition law.

13. What were the major changes brought by the COVID-19 crisis in the field? How likely is it for these changes to stick?

Foremost there is no major legislative change in competition law that came with the COVID-19 crisis in Turkey. Besides that, several preliminary investigations and investigations were launched for specific sectors such as FMCG, healthcare, etc., due to the concerns that increased with the COVID-19 crisis. During the COVID-19 crisis, the following developments occurred:

- The TCA initiated an examination of food price increases

in the COVID-19 period based on the observations that food prices and fresh fruit and vegetable prices in particular are rising excessively. The authority announced that the highest possible available in the legislation will be applied to individuals and institutions engaged in anti-competitive actions in this period.

- The TCA President issued a press statement that the people and institutions that caused the increase in prices and supply shortages, especially in the food market, during this harsh period will be punished severely under Act No. 4054.
- The oral hearings are to be held online for a long period of time. During the COVID-19 crisis, several oral hearings were held online and with third parties participating online.
- As part of COVID-19 measures, the TCA announced that all applications, petitions, and document submissions to the authority, should be made online.
- The TCA initiated an investigation against 29 companies that operate in the beauty/hygiene/health, food, and chain retailing sectors.

To sum up, while there were no major legislative changes in this field during the COVID-19 crisis, and although the physical system is now being used again for oral hearings, many meetings, such as settlement and leniency meetings and other meetings, can be held online upon the request of the party and with the approval of TCA. ■

INTEGRITES

CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2024

UKRAINE

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1. What are the main competition-related pieces of legislation in Ukraine?

During the 1919-1991 Soviet period in its history, Ukraine was not able to join the Western countries in their move toward establishing competition law. Thus, the competition law in Ukraine commenced its development in the early 90s shortly after Ukraine had gained its independence. The results that were achieved are quite satisfactory – although there is room for further improvement, Ukrainian competition law is a well-established and functioning institution.

First of all, it is worth noting that the Constitution of Ukraine mentions competition. To wit, Article 42 says that the state shall ensure the protection of competition within business activity. It goes further, prescribing that monopolistic abuse, unlawful restriction of competition, and unfair competition are not acceptable.

Then, there are four laws dedicated specifically to competition issues:

1) the Law of Ukraine, On Antimonopoly Committee of Ukraine (the AMC Law)

This law establishes the authority over Ukrainian competition – the AMC, and defines its composition, powers, and functions. The AMC Law provides for a 7-year tenure for AMC members, who are State Commissioners. This is longer than normal tenures for the president, the parliament, and the Cabinet of Ministers – which all were involved in the formation of the AMC.

2) the Law of Ukraine, On Protection of Economic Competition (the Competition Law)

This is the primary law governing competition issues in Ukraine. The Competition Law provides for the key definitions, defines the main antitrust violations (namely abuse of dominance and anticompetitive concerted actions), establishes the merger control regime, and establishes sanctions that the AMC can apply in instances of non-compliance.

3) the Law of Ukraine, On Protection Against Unfair Competition

This law prohibits unfair competition in general and provides for specific instances of unfair competition, such as defamation, trade libel, misleading consumers, etc.

4) the Law of Ukraine, On State Aid to Commercial Undertakings (the State Aid Law)

The State Aid Law establishes state aid regulation on the national level in Ukraine. It provides for the key compatibility rules as well as for the AMC's state aid monitoring system. Further state aid compatibility criteria are usually elaborated by the AMC and adopted by the Cabinet of Ministers.

Also, Ukraine's major codifications address competition issues. The Civil Code of Ukraine states, as a limitation of civil rights, that civil rights cannot be used for the abuse of monopoly, unlawful restriction of competition, and unfair competition. The Commercial Code of Ukraine contains more than 15 articles dedicated specifically to competition issues. However, these articles are mostly of a declarative nature and/or duplicate norms from the above-mentioned laws. Therefore, neither the AMC nor courts of law typically refer to the Commercial Code of Ukraine in the context of competition matters.

And, surely, there are plenty of regulations that have been elaborated and adopted, mostly by the AMC, to further develop provisions of the previously mentioned laws, inter alia:

- the regulation on the procedure for filing applications with the Antimonopoly Committee of Ukraine in order to obtain its approval prior to the concentration of undertakings (the Merger Regulation);
- the regulation on the procedure for filing applications with the AMC for obtaining its prior approval for concerted practices;
- the guidelines on the applicability of the Ukrainian merger control rules to joint ventures (the Joint Ventures Guidelines);
- the rules for consideration of claims and cases on the violation of the laws on protection of economic competition (the Investigation Rules);
- the procedure for the filing of applications with the AMC for release from liability for violation of Ukrainian competition law (the Leniency Regulation);
- the methodology for assessment of a monopoly (dominant) position of undertakings in a market;
- the guidelines on the application of the SSNIP test;
- the model conditions for the concerted practices of undertakings for the general exemption for the prior clearance for concerted practices obtained from the AMC (the General Block Exempts);
- the model conditions for the concerted practices of undertakings regarding the supply and use of goods (the Vertical Block Exempts);
- the guidelines on the application of the State Aid Law; and
- the guidelines on the calculation of fines for Ukrainian competition law violations (the Fines Guidelines).

2. Have there been any notable recent (last 24 months) updates of Ukrainian competition legislation?

On August 8, 2023, the Law of Ukraine "On amendments to certain laws of Ukraine regarding improving competition law and activities of the Antimonopoly Committee of Ukraine" No.3295-IX (Law 3295-IX) was adopted. It primarily amends the Competition Law and the AMC Law. These amendments are considered an important step within the ongoing "competition reform" aimed at further harmonization of Ukrainian laws and regulations with EU competition law.

The amendments introduced by Law 3295-IX can be grouped into three key blocks:

I. Amendments regarding investigations by the AMC

New procedural rules for obtaining dawn raid (inspection) court warrants via amendments to the Commercial Procedural Code and provide for the detailed powers of the AMC during dawn raids. Before Law 3295-IX the AMC did not need a court warrant to conduct a dawn raid. However, on the other hand, the AMC's powers within the context of a dawn raid were rather ambiguous and provided room for appeal. In consideration of this, the AMC mostly avoided dawn raids as an active tool of its investigations.

Accordingly, new powers for the AMC inspection team are envisaged:

- in accordance with a court warrant, to enter and to have unrestricted access to the premises and places of data storage owned or used by the subject of inspection;
- to receive copies or extracts from documents, as well as seize relevant property for further extraction of information from it;
- in accordance with a court warrant, to seal the premises that are subject to inspection;
- in accordance with a court warrant, to inspect the premises that are subject to inspection;
- to demand oral or written explanations from the company management and staff members;
- to conduct photo or video recording or to use other technical means to obtain evidence;
- to prohibit any persons who are present at the premises subject to inspection to conduct any actions regarding documents or other objects containing data.

II. Amendments regarding merger control:

- disregarding the financial results of the seller group in the event that the target is not active in Ukraine for two years preceding the year of the transaction, and subject to seller losing control over the target in the result of the concentration results. In other words, if the target and its subsidiaries have not had nexus to Ukraine for more than two years, then the seller group's assets or revenues are not taken into account when determining whether the proposed transaction triggers financial thresholds.
- excluding from the definition of concentration situations in which an undertaking reaches or exceeds 25% of the votes in a general meeting in cases where they do not obtain control (previously reaching or exceeding 25% was deemed concentration regardless of obtainment of control over the target undertaking).
- recognizing transactions concluded between the same companies within two years as a single concentration.

III. Amendments regarding the institutional capability of the AMC:

- increasing remuneration for AMC staff making it dependent on minimum wages, which are regularly updated;
- fine collection procedure improvements:

o instead of filing a statement-of-claim to the court in order to obtain an enforcement order from the court (where the court's decision could be appealed to a higher venue), according to the amendment, a decision from the AMC has the power of an enforcement order and can be enforced by authorities immediately after a 2-month period, during which the company may pay the fine;

o introduction of solidary liability regarding the payment of fines by affiliated companies;

- grants the AMC powers to access certain governmental databases;
- establishes settlement procedures for the AMC (governmental agencies in Ukraine rarely opt for settlements, as enforcement authorities see it as a corruption red flag);
- improving leniency policy by allowing decreases in fines beyond the first applicant.

Moreover, despite ongoing war and a new chairman, the AMC revised and adopted new versions of two important regulations:

1) Rules for determining the amount of a fine (a very important regulation, as the Competition Law provides for high maximum fines of 10%, 5%, or 1% of an undertaking's revenue; more detailed criteria will be put into place that will determine the amount for fines in various circumstances; this will provide business with an adequate level of certainty; the importance of these regulations is so high that establishing such rules was one of the conditions of the EU-Ukraine Association Agreement in 2014).

2) Rules for conducting consumer surveys (interviews).

Both adopted texts are pending approval from the Ministry of Justice, which reviews these types of regulations. Afterward, the new versions of these regulations will be published and will enter into effect.

Also, in 2023 the AMC published guidelines on the peculiarities of defining market boundaries for markets with significant buyer power.

3. What are the main concerns of the national competition authority in terms of agreements between undertakings? What is the sanctioning record of the authority?

Agreements between undertakings that do not amount to concentration could still be deemed concerted practice (when the agreement concerns competitive behavior in the market). The AMC's main concern is when such concerted practice can be anticompetitive, meaning that it may negatively impact competition or already do so (leads or may result in prevention, elimination, or restriction of competition, as the Competition Law states). Generally, the implementation of anti-competitive concerted practices is prohibited, unless the AMC grants a permit.

In 2021, the AMC imposed its largest total fine for anticompetitive concerted practice on petroleum-producing companies and fuel stations allegedly controlled by an oligarch. As the companies involved denied their affiliation, the AMC accused them of coordinating prices, which led to fines totaling EUR 140 million. To compare, the total amount of fines issued annually for anticompetitive concerted practice typically does not exceed EUR 20 million. This case was the AMC's second major move against oligarchs following the 2019 decision on the compulsory divestment of OSTCHEM (see the section below dedicated to abuse cases).

It is worth mentioning that the AMC is very active in investigating bidding rings. In fact, the vast majority of anti-competitive concerted practice cases are cases on bid rigging. For example, in the most recent available annual report (2022) the AMC does not highlight any other cases involving anticompetitive concerted practice.

As one of Ukraine's priorities is the fight against corruption, especially in times of war, the AMC is doing its part: they are attentive to one of the fields that are most exposed to corruption – public procurement. The AMC's investigations on bid rigging carry considerable significance, as they have additional consequences for violators. A company that is recognized as a participant in bid rigging is banned from public procurement for three years. In many B2G markets, it is a huge impediment to further businesses, as one cannot simply avoid consequences and register a new legal entity. Many public procurement tenders require specific experience or a history of governmental contracts from the applicants.

4. Which competition law requirements should companies consider when entering into agreements concerning their activities in Ukraine?

As mentioned above, the AMC may grant permits for concerted practices. Also, there are general and specific block exemptions and, if in compliance, do not require filing with the AMC in order to implement respective concerted practices.

When considering whether one should apply to the AMC, the following shall be taken into account:

The first step is to assess whether an agreement can be considered a concerted practice. Then it is essential to understand in which markets the agreement would take place and what the market shares of the participants in these respective markets are.

After that, it is possible to understand whether the agreement falls under any of the general exemptions provided by the Ukrainian competition law framework, which allows the implementation of concerted practices without the AMC's prior clearance.

Thus, horizontal agreements generally can be implemented, if there are no parties holding a dominant position and the combined market share of the parties in the relevant market is less than 15%.

In the case of vertical agreements, restraints are acceptable if the parties' combined market share is less than 30% of the relevant market and the restraint itself is not significant (for example, resale price maintenance via fixed or minimum prices, restriction of active sales, restriction of cross-supplies, etc.).

Following such self-assessment, it is possible to decide whether there is a need to file for AMC clearance. When filing for AMC clearance for concerted practice, one should demonstrate that the anti-competitive effect of the contemplated concerted practice is outweighed by other positive economic effects such as production improvement, technical development, providing advantages to SMEs, etc.

5. Does a leniency policy apply in Ukraine?

Yes, Ukraine has had a leniency policy for over a decade. Although leniency policies have proven to be beneficial around the world, in Ukraine they are not quite as popular. There could be a lot of factors to that, but one of them is definitely a cultural one. During the Soviet occupation, a "no-snitching"

culture and distrust of authorities was deeply embedded in Ukrainian society and is still affecting the coming generations. This effect is so deep it affects not only managers and owners of Ukrainian companies, but also local management of international businesses.

Nonetheless, according to the Competition Law, an undertaking involved in cartel activities may apply for total immunity from fines for anticompetitive concerted practices if it reports itself and provides the AMC with sufficient evidence of collusion.

The leniency conditions to obtain immunity are as follows:

- the AMC was unaware of the reported collusion;
- the applicant duly cooperates with the AMC;
- the applicant provides sufficient evidence regarding the collusion;
- the applicant exited collusion unless remaining in the cartel is essential for the investigation; and
- the applicant has not coerced other undertakings to participate in collusion, has not falsified or covered information from the AMC, etc.

Before the recent amendments, there was also a condition that the applicant should be the first to disclose the information on collusion. Now this condition has been altered, and though such applicants cannot obtain full immunity, they can receive reduced fines: 50%, 30%, and 20% decreases in fines are available for the second, third, and fourth applicants.

For the last decade, there have been only a few known instances of leniency application. We hope that with the amendments going into effect, this instrument will become more popular in Ukraine.

6. How is unilateral conduct treated under Ukraine's competition rules?

Like most European jurisdictions, Ukraine does not directly prohibit the mere existence of a monopoly or dominance in the market. Surely, such a situation is undesirable, and the AMC is obliged to prevent it via the merger control regime. However, when a monopoly occurs, for example, due to "survival of the fittest" (bankruptcy of major competitors) the AMC cannot apply any measures to the newly established monopolist based on the sole fact of having gained a monopolistic position.

According to the Competition Law, a company holds a dominant position in the market, if:

- it has no competitors in the market; or
- it is not subject to significant competitive pressure due to competitors' restricted access to raw materials, distribution channels, market barriers, etc.

Also, the Competition Law contains a presumption that an undertaking holds a dominant position if its market share exceeds 35% unless the undertaking proves it is subject to significant competition in the market. In some cases, an undertaking holding a market share of less than 35% can be viewed as dominant as well, if the AMC is able to prove it is not subject to significant competition.

Moreover, the Competition Law also operates with a concept of collective dominance. Therefore, several undertakings are considered to be holding collective dominancy, if:

- up to three undertakings hold a 50% market share; or
- up to five undertakings hold a 70% market share.

In such cases, each undertaking is considered to hold a dominant position in a relevant market.

As was mentioned above, the very holding of a dominant position is not an infringement. However, once a company, through whatever means, gains a monopolistic or dominant position in its market, it becomes subject to many more restrictions. Namely, a large portion of its behavior could be interpreted as abuse of dominance.

The wording of the Competition Law suggests that the abuse of dominance is an undertaking's action or failure to act, which causes or may cause the prevention, elimination, or restriction of competition or discrimination against other undertakings. Evidently, a dominant undertaking that is abusing its market power is prohibited and may be sanctioned with substantial fines or even a compulsory divestment.

The Competition Law provides a non-exhaustive list of examples of abusive behavior which effectively comprises the restrictions for any undertaking holding a dominant position. They are as follows:

- monopolistic pricing strategies, i.e., setting prices that could not be set in a competitive market;
- discrimination, i.e., unjustified application of different prices or conditions in equivalent transactions;
- imposing additional obligations on the counterparty to enter into the agreement, which by their nature or according to established commercial practice, do not relate to the subject matter of the agreement;
- the limitation of production, markets, or technological development, which harms or may harm other undertakings, buyers, or sellers;

the refusal to purchase or sell goods in the absence of other alternatives;

unjustified limitation of the competitive potential of other undertakings; and

creating barriers to entry or exit of the market or elimination of buyers, sellers, or other players in the market.

7. Are there any recent local cases of abuse that are of relevance?

The biggest case of the year was the investigation against state-owned, oil and gas company Naftogaz of Ukraine (Naftogaz). After the liberalization of the natural gas market, Naftogaz decided to develop its B2C branch by supplying natural gas directly to businesses and households. At the same time, Naftogaz and its subsidiaries held the major share in natural gas extraction and import. The AMC decided that Naftogaz being vertically integrated discriminated against other B2C players when concluding contracts for gas supply with them. In late December 2023, the AMC fined Naftogas quite heavily – fines for affiliated companies totaled around EUR 35 million.

This is probably the biggest fine the AMC has imposed on a state-owned company. It is very important that the AMC shows its willingness to scrutinize state-owned companies, as historically authorities in Ukraine have been very reluctant to confront other authorities or state-owned businesses. This trend should be reversed; this is particularly important given that Ukraine has large state-owned companies in many sectors.

It is quite rare for the AMC to conclude an investigation without declaring a violation. Usually, if the AMC sees that the case is not strong enough for such a declaration, they will drop it in the earlier stages. However, in 2023 the AMC concluded an investigation that did not result in the company being recognized as abusing its dominance. The case involved a state-owned company that operates the platform for government auctions. It was initially accused of "imposing additional obligations on the counterparty to enter into an agreement, which by their nature or according to the established commercial practices, do not relate to the subject matter of the agreement." Following the investigation, however, the accusation was dropped.

Also, though not very recent (the AMC decision was rendered in 2019), we should mention the OSTCHEM case, as it was the first case in 20 years in which the AMC imposed compulsory divestment. OSTCHEM was a major producer of mineral fertilizers in Ukraine and Europe (now many of its assets are destroyed by war). To understand its influence on the Ukrainian economy and on the global grain supply, we should mention that mineral fertilizers comprise up to 30% of the cost of grain production. Essentially, the AMC accused OSTCHEM of exploitative pricing practices. The AMC's case was not strong enough and did not survive litigation. However, it is an important milestone that demonstrates that the AMC is capable of moving against an oligarch-owned business with aggressive sanctions.

8. What are the consequences of a competition law infringement?

The main penalties under the Competition Law are of an administrative nature.

The most common sanction applied by the AMC is a fine, which is calculated as a percentage of the undertaking's revenue for the year preceding the year of the fine's imposition. Typically, the fine is applied (and measured) regarding the legal entity's commitment to infringement. However, in certain cases, the AMC can apply a fine to the entire group of companies (for example, if the infringing entity is an SPV and the direct beneficiary of the infringement is the group's parent company).

10% of the preceding year's revenue being fined is for the most serious violations, such as abuse of dominance and anti-competitive concerted practice (collusions). Infringements such as failure to file for a merger or anti-competitive practice clearance have a 5% fine limit. Relatively minor infringements such as providing the AMC with false information, ignoring the AMC request, or obstructing the AMC inspection have a 1% fine limit.

As mentioned, due to quite large potential fines, detailed criteria to determine the fine amount will be available. Establishing these rules was one of the conditions of the EU-Ukraine Association Agreement in 2014. They were published for the first time in 2015. The new version of the rules for determining the amount of a fine is currently in the process of approval.

For example, as mentioned, failure to file for merger clearance is subject to a fine of up to 5% of revenue. According to the 2016 guidelines on the determination of the amount of a fine, if the concentration resulted in monopolization or distortion of competition, the fine range should be 5-15% of the revenue from the relevant and adjacent markets; if concentration has not impacted markets, the fine should be in the range between UAH 255,000 (approximately EUR 8,000) and 7.5% of the revenue on the relevant and adjacent markets.

Besides fines, the AMC has a powerful instrument known as compulsory divestment. During the last two decades, it has been employed once, in 2019 (for the details, see the section above dedicated to abuse cases).

Also, Ukraine has private antitrust litigation. Unfortunately, it is quite unpopular despite the statutory rule, according to which damages caused by abuse of dominance or anti-competitive concerted practice shall be paid in double. The unpopular-

ity of private antitrust litigation is due to the Ukrainian court's flawed practice of calculating damages in general.

The courts are reluctant to award damages unless they can be very clearly calculated, as it was in the case of the Nibulon company. Nibulon is a major Ukrainian agricultural company. Upon receiving the complaint, the AMC decided that the state-owned railway company applying additional tariffs specifically to Nibulon was abusing its monopoly. The damages amounted roughly to EUR 2 million and were easily calculated as the additional tariff was applied for a limited period of time. Therefore, Nibulon was awarded approximately EUR 4 million in court.

9. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Ukrainian market?

Yes, and more. As it has been mentioned, Ukraine has a well-established merger control regime. It catches most typical transactions such as mergers, acquisitions, takeovers, JV establishments, etc. Moreover, any acquisition of control over an undertaking falls under the definition of concentration. An AMC permit is required for transactions that meet qualifying thresholds.

From the point of view of companies with international operations, the Ukrainian merger control regime has three major flaws, one of which has been mitigated with recent legislative amends:

1) Foreign-to-foreign transactions are often caught by the Ukrainian merger control regime

The Competition Law shall apply exclusively to transactions potentially affecting the competition landscape in Ukraine. Article 2 of the Competition Law states that this law is applicable to the relations that impact or may impact competition in Ukraine. However, the impact on competition is something intangible and vague, but merger control thresholds are real. Therefore, in practice, the AMC can impose a fine for not clearing a transaction that formally triggers the thresholds but has little to no effect on Ukraine.

Fortunately, this problem has been addressed by legislators in the recent amendments to the Competition Law. Moving forward, if Target and its subsidiaries do not have nexus to Ukraine for more than two years, then the Seller group's assets or revenues are not taken into account when determining whether the transaction triggers financial thresholds. In practice, this means that a good part of foreign-to-foreign transactions will not be caught by the Ukrainian merger control regime.

2) Thresholds are relatively low

Nowadays, Ukrainian law operates only with financial thresholds (before 2016 there was also a 35% market share threshold).

The current financial thresholds are:

I. Assets or revenue of the Buyer and Seller groups together – EUR 30 million worldwide

Assets or revenue of the Seller group (including the Target) – EUR 4 million in Ukraine

Assets or revenue of the Buyer group – EUR 4 million in Ukraine

OR (an alternative threshold)

II. Assets or revenue of any participant's group – EUR 8 million in Ukraine

Revenue of the group of any other participant in concentration – EUR 150 million worldwide

All the thresholds shall be calculated according to the financial statements for the last financial year in accordance with the exchange rate established by the National Bank of Ukraine and effective on the last day of the financial year.

3) Post-notification is not available

If a transaction is caught by the Ukrainian merger control regime, the respective parties shall obtain prior clearance from the AMC before concluding the deal. Closing a deal without prior clearance is a finable violation. Nevertheless, many international businesses opt to close the deal regardless of Ukrainian clearance. Then the post-factum filing is submitted. The AMC usually clears the deal post-factum and simultaneously fines the parties (usually, is the buyer party who is responsible for filing in most acquisition deals).

As to the procedure for obtaining merger clearance, the full procedure takes 45 days after filing. For cases in which the parties' combined market share does not exceed 15% of the relevant market or 20% of the adjacent markets, a fast-track procedure (25 days and less information disclosed) is available. In the event the competition authority finds grounds for prohibition of concentration (which are (i) potential monopolization of the market; (ii) potential restriction of competition in the market), it may start Phase II, which usually takes several months.

As to the volume of disclosure, it is quite reasonable in cases where the filing is eligible for the fast-track procedure. Otherwise, the full structure of the parties' groups must be disclosed

along with information on the activities. In practice, the AMC often grants motions not to disclose irrelevant information.

Also, Ukrainian merger control has pretty common exemptions such as transactions among affiliated entities (given that affiliation was established in compliance with the Ukrainian merger control regime), establishing JV for coordination purposes (it is deemed concerted practice and also requires the AMC permit but under another procedure), temporary investment by an investment or financial services company (given that an investment company would not participate in management including general meetings of shareholders), etc.

It is a joint obligation to file for both the buyer and the target in cases of acquisition and for all parties in a merger or when establishing a JV. In the latter case, the liability for failure to notify lies on every party. In cases of acquisition, the buyer is liable. Also, in case of acquisition, if the target or the seller is non-cooperative, the buyer can submit a solo filing, and the AMC will request the needed information from the other party.

The grounds for prohibiting concentration are very limited: i) potential monopolization of the market; (ii) potential restriction of competition in the market. Moreover, in recent years the AMC has actively applied remedies in cases that would have been prohibited concentration perhaps five or 10 years ago.

Also, the Competition Law prescribes that once the AMC prohibited concentration the Cabinet of Ministers can, with certain limitations, overrule the AMC's decision when national interests outweigh the interest of maintaining competition in the market. However, historically this procedure has been invoked once or twice around 20 years ago.

In general, the Ukrainian merger control regime, despite its flaws, is sufficiently developed and, which is more important, developing in the right direction. The AMC has competent merger control staff allocated among three key departments responsible for the energy sector, production and retail of goods, and service industries (including, inter alia, banking and telecom). Once one has submitted a filing to the AMC, they may expect professional communication and performance. ■

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