COMPETITION POLICY IN EASTERN EUROPE AND CENTRAL ASIA

Merger control

OECD-GVH Regional Centre
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Inside a competition authority: **MONTENEGRO**

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Foreword

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Merger control makes an important contribution to the functioning of markets by ensuring that competition, and thus consumers, are not negatively affected by economic concentration in the marketplace. Merger review can also foster innovation, as competition leads to better market outcomes. It does so, not only by lowering prices or increasing output, but also by improving product quality, variety, and innovation.

Consolidation is a business strategy that involves merging, purchasing, or partnering among companies that share goals and or products. This strategy is often used to create economies of scale, increase market share, benefit from more efficient networks, or even creating ecosystems that enhance cooperation and productivity. It can also seek to decrease competition in a market or increase the market power of the market power of the resulting entity that could then have more opportunities to abuse this power, increase prices, reduce quality or innovation. This is why competition authorities consider merger control as vital.

Consolidation can occur in various forms, including horizontal, vertical, and conglomerate mergers.

Horizontal consolidation implies combining different companies that operate in the same industry or market (such as companies manufacturing similar products). The goal of horizontal consolidation can be to increase market share and eliminate redundant operations, achieving cost savings through economies of scale and therefore lead to efficiency.

Vertical consolidation implies the combination of several companies that operate in different stages of the supply chain (such as a manufacturer and a supplier). This type of consolidation can aim to improve operational efficiency and reduce costs by integrating the supply chain and reducing transaction costs.

Conglomerate consolidation refers to the combination of companies that operate in unrelated industries. This type of consolidation usually aims at diversifying the company's activities. Therefore, they usually reduce the risk of relying on a single product or market.

Consolidation can also take the form of partnerships, joint ventures, or strategic alliances. These agreements involve two or more companies working together to achieve a common goal, such as developing a new product or entering new markets. Partnerships can be a useful way of sharing resources, knowledge, and expertise while minimizing risk and costs. They are nevertheless in the spotlight of competition agencies, as they can imply sharing relevant commercial information or even agreements that can lead to competition infringements.

The decision to pursue a consolidation strategy should be based on a deep analysis of the potential benefits and the risks of the operation. Benefits may include increased market share, cost savings, access to new technology, and improved operational efficiency. However, there are also potential risks, such as integrating different corporate cultures, losing key personnel, and regulatory issues.

In any event, those operations can imply a risk of competition in the market as the number of competitors decreases and the market power of the resulting entity can have a relevant impact on the market structure, consumers, and competitors.

The theories of harm that competition authorities apply when analysing mergers are not static. They keep pace with the evolution of commercial practices, enforcement trends and precedents. They also take into consideration the disruption created in the markets due to the digitalization of the economy and the industry.

Those new theories of harm include attention to what is known as **killer acquisitions** that focus on the elimination of competition in a market. In those operations, the acquirer does not seek to remove an existing competitor, but rather eliminate a potential entrant, extending therefore the duration of its monopolistic position.

This situation can lead to an increase in prices for direct consumers or users (such as advertisers) or to a reduction of innovation. To evaluate these acquisitions more accurately, competition agencies should focus on the capacity of the acquired company to be a real competitor of the acquirer on the number of potential entrants.

In the case of the **reverse killer acquisitions**, competition agencies focus on the merger of a company with market power in market 1 that acquires a monopolist in market 2. This can reduce the competitive pressure in both market 1 and 2.

Especially in the case of **conglomerate mergers**, access to data of consumers from the acquired company can lead the acquirer to potentially tip in order to consolidate its position in several markets.

Those new theories of harm underline the problems that mergers can emerge for consumers and on competition and try to react accordingly to the new possibilities (positive and negative) that are opened up as a result of digitalization.

Competition agencies should not develop a negative position considering that any merger in high-tech markets is necessarily anti-competitive, but nor should they think that there are no reasons for concern.

Therefore, it is necessary to make case-by-case analyses and understand the characteristics of the affected markets, the strategies of the companies, and the possible responses of their competitors.

All those reasons lead the RCC OECD-GVH to organise a seminar on merger control held in Budapest in February, the results of which were seen as very useful by the 30 participants. This was also the reason why we decided to focus this particular Newsletter on the latest developments on merger control, not only by discussing some experiences of certain agencies in the region, but also by widening up the scope to other relevant experts in other jurisdictions.

As this is the first Newsletter, I hope I will be able to gather several relevant articles that will give you food for thought and will help you in your work.

I also hope that we will be able to consider this Newsletter a useful tool for cooperation and for an exchange of information that will strengthen our network and increase the efficiency of our work.

I count on your cooperation for this goal. You can certainly count on mine.

Programme 2023

A. Seminars on competition law	
14-16 February	**Seminar – Merger control in times of uncertainty** Merger control is a forward-looking exercise that requires a complex skill set, particularly in times of uncertainty. This seminar will focus on theories of harm for merger cases, basic economic methods, investigative steps and effective merger remedies. Special emphasis will be put on the adequate treatment of innovation. Merger control experts from OECD countries will present case studies, and participants will practise their merger skills in hypothetical exercises.
28-30 March	**Seminar – Intellectual property rights and competition policy: friends or foes?** The objective of intellectual property rights is to protect investments in research and creative activities. With digitalisation, the importance of intangible assets has increased and IP rights have taken on a prominent role. This seminar will discuss in what circumstances IP rights can give rise to competition concerns and how competition authorities can address these concerns without undermining firms' incentives to invest and innovate.
30-31 May	COMPETITION LAB FOR JUDGES **Stepping up with the fundamentals of competition law: Key developments in digital markets and regulated industries** This seminar will address key developments in the notions of market power, dominance and abuse are examined, initially in 'traditional' settings and then in digital markets, to better highlight how to apply the traditional competition law concepts to digital markets. The sessions on regulated markets will examine key developments in the pharmaceuticals, telecommunications and energy sectors both under an Article 102 TFEU and an Article 101 TFEU angle, in the latter case with a focus on horizontal cooperation agreements.
19-21 September	**Joint Seminar in cooperation with the State Service for Antimonopoly and Consumer Market Control under the Ministry of Economy of the Republic of Azerbaijan in Baku – Competition advocacy to embed competition principles in regulations** Some laws and regulations may unduly restrict competition, insofar as they go further than necessary to achieve their policy objectives. Building on the OECD's Competition Assessment Toolkit, this seminar will showcase the experience of advanced competition authorities with identifying unnecessary restraints and developing alternative, less restrictive measures that still achieve government policy objectives. Special consideration will be given to effective way to approach policy makers.
3-4 October	GVH STAFF TRAINING **Day 1 – How innovation is affecting enforcement and competition advocacy** **Day 2 – Breakout sessions** In separate sessions, we will provide dedicated trainings and lectures for the merger section, the antitrust section, the economics section, the consumer protection section, and the Competition Council of the GVH.
30 November – 1 December	COMPETITION LAB FOR JUDGES **Stepping up with the economics of competition law: Between competition and regulation** This seminar will explore the economic concepts underlying competition law enforcement in digital markets and regulated sectors. Through references to case examples and recent key developments, the seminar will address market power, abuse of dominance, theories of harm, while highlighting the impact of regulation on the competitive landscape.
12-14 December	**Seminar – Detection tools** Unannounced inspections at company premises, referred to commonly as dawn raids, have long been a vital tool used to detect and prosecute cartels. By conducting dawn raids, it is possible for competition agencies to search company premises, seize key evidence and interview relevant employees. The seminar will explore the tools available to competition authorities to detect cartels.

B. Training video project - "Key Competition Topics explained in few minutes"
Three additional videos
Two special videos for Judges

C. RCC review "Competition Policy in Eastern Europe and Central Asia"
Two issues of the review (January and July), both in English and in Russian

D. RCC Annual Report
Edition on the RCC Activity 2023, both in English and in Russian

MERGER CONTROL

Improvement: The Institution of Concentration in the Republic of Armenia

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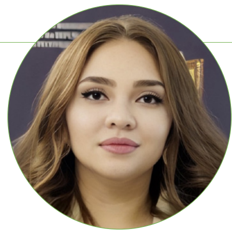

Seda Vskanian
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State control of economic concentration is one of the main and important functions in the field of economic competition protection, as it provides an opportunity to assess the state of competition in a product market and forthcoming changes resulting from concentration, to identify or predict the possibility of restricting economic competition in the relevant product market or to clarify the issue of leading to a dominant position or possible infringement of consumer interests.

Concentration control was provided for in the first version of the Law on Protection of Economic Competition, adopted in 2000 (hereinafter, the Law), which confirms the importance of this institution in the field of competition protection.

Improvement of concentration control tools has been a constant priority of the Commission for the Protection of Competition of the Republic of Armenia (hereinafter referred to as the Commission). Over the years, more efficient mechanisms for assessing concentrations have been introduced, taking into account international best practices.

The RA Law HO-92 on Amendments to the RA Law on Protection of Economic Competition, adopted on 3 March 2021, set out the new wording of the Law. The new wording of the law included, inter alia, amendments to improve the concentration control tools.

The adoption of the revised Act has helped to address the issues that arise in assessing concentration and resolving legislative gaps.

It is important to note, however, that by-laws have also been adopted in order to enforce the law. These bylaws regulate a number of critical issues related to concentration and simplify and clarify the procedure for submitting declarations of concentration.

The most significant and noteworthy changes introduced by the Act and the regulations are

Expansion of the list of reorganisations, actions or transactions deemed to be concentrations

Under the previous regulation, five main types of reorganisations, acts or transactions were considered to be a concentration; such regulation allowed business entities, through other transactions, not to submit to the Commission certain transactions currently subject to declaration. Taking the above into account, the scope of reorganisations, actions or transactions deemed to be a concentration was supplemented, in particular, the list of cases deemed to be a concentration included the establishment of a legal entity in the Republic of Armenia by more than one business entity as prescribed by law, and acquisition of the right to use an object of intellectual property, including a means of individualisation.

Establishment of specific features of concentration assessment proceedings

The Law sets out the specifics of concentration assessment proceedings. In particular, the deadlines for concentration assessment proceedings have been clarified, depending on the complexity of the proceedings. Under the previous regulation, for all forms of concentration, the time limit for conducting concentration assessment proceedings was 90 days. Due to the need to ensure the most predictable and efficient administration, the institution of a “simplified procedure” was introduced, which allows for the assessment of mixed concentration and concentration of economic entities belonging to the same group within one month. At the same time, in the case of concentrations requiring a longer assessment - horizontal and vertical concentrations - the time limit is three months, which can be extended for up to three months by a reasoned decision of the Commission. The above changes are based on the interests of both business entities and the state, as well as the public, and enable business entities, in the cases provided for in the Law, to obtain the approval of the Commission in an expeditious manner.

Clarification of cases not considered as concentration and establishment of the specifics of transactions carried out between a group of persons

Among the most important changes is the establishment of a broader list of reorganisations, actions or transactions that are not considered to be concentrations. It should be noted that prior to the legislative changes, only reorganisations, actions or transactions between business entities that are group entities were not considered to be concentrations. Meanwhile, under the current legislation, concentration is not considered to be

- transactions by business entities to acquire securities listed on stock exchanges;
- transactions of business entities concluded through auctions conducted on the basis of a judicial act;
- acceptance of inheritance.

It is noteworthy that, unlike in the previous regulation, transactions carried out within a group of persons are now regarded as concentration. At the same time, the Law provides for a procedure under which transactions performed within a group of persons shall not constitute a concentration, if the group of persons, one month prior to the conclusion of the transaction, in compliance with the requirements established by law, submits to the Commission a list of persons and justifications, which the Commission shall review within 10 working days. Upon publication of the list of persons on the official website of the Commission, the group of persons undertakes to notify the Commission thereof within 10 days after conclusion of the transaction.

Provision of grounds for prohibiting concentrations

The clarification of the grounds for prohibiting a concentration is one of the significant changes, because under the previous regulation, there were no clear grounds for prohibition and the Commission took into account circumstances that impede economic competition, including leading to a dominant position or strengthening a dominant position or worsening competitive conditions, when assessing the concentration to be declared.

The amendments to the Act establish grounds for prohibiting concentration, in particular, concentration is prohibited if

- According to the findings of the Commission, economic competition on the relevant product market will be suppressed, limited, prohibited or otherwise impaired as a consequence of the concentration, or
- According to the findings of the Commission, concentration will lead to the emergence or strengthening of a dominant position, unless the economic operator substantiates that the concentration will result in favourable competitive conditions in the goods market and will not prejudice the interests of consumers, or
- According to the Commission's findings, there will be a disadvantage to consumers as a result of the concentration, or
- to assess the effect of concentration on the relevant product market a participant in the concentration does not provide information considered material by the Commission and it is not possible to obtain this information from other sources, or
- to assess the impact of concentration in the relevant product market a participant in the concentration provided false information considered material by the Commission, which had a negative effect on the course and results of the Commission's examination.

As a result of this amendment, the grounds on which the Commission can prohibit concentration have become clearer to business entities.

Procedure for declaring concentration

The next most important step to improve the institution of concentration is the Commission's Decision "On establishing the amount of assets and revenues of concentration participants to be declared, the procedure for declaring concentration and the form of declaration and repealing the decision of the State Commission for Protection of Economic Competition No. 478-N of 16 December 2016" No. 322-N of 9 November 2021, in which significant changes to the thresholds for declaring concentration for the benefit of business entities were introduced. In particular, the amount of assets and revenues has been increased (collective threshold - 4 billion AMD for participants of concentration).

The main reason for this is that the government has not yet established a single asset and revenue size, with a minimum of 3 billion drams for one of them, a single value of assets and revenues has been established and the separation of sizes by type of concentration has been excluded.

At the same time, the regulations concerning the procedure for declaring concentrations and the declaration form were clarified and, in accordance with the amendments to the Law, improved.

Consequences of forbidden concentration

As a result of the legislative changes, there are also specific consequences of the introduction of concentrations prohibited by the Commission's decision to be declared.

At the same time, in cases provided for in the Act, the Commission may decide to give instructions if favourable competitive conditions on the relevant product market are restored as a result of the Commission's investigation.

It should be noted that the previous regulation did not stipulate clear consequences for non-compliance with the Commission's order; it only noted that the banned concentration introduced was subject to liquidation (termination, dissolution) by the Commission's decision.

Mechanisms to facilitate the process of declaring concentration

The Commission has introduced an e-Compete digital platform that allows for a more streamlined submission of documents, including the declaration of concentration and other documents related to it.

Notably, the e-Compete digital platform allows the Commission to obtain the information necessary for production more quickly, including the revenues and assets of business entities, their affiliations, as well as asset acquisitions. In doing so, obtaining information from the system does not require any additional action, but is directly downloaded automatically.

It should be emphasised that the Commission also had a problem with access to information under the previous regulation. In particular, information necessary for the proceedings, including official information of the Central Depository of the Republic of Armenia, holders of securities, persons providing investment services with the right to keep a register, were not provided to the Commission until the amendments to the decision of the Government of the Republic of Armenia, which expressly established the requirement to provide access to this information to the Commission as well.

Thus, it can be stated that the amendments initiated by the Commission have contributed to a more efficient implementation of concentration assessment proceedings, expediting the process, increasing the number of declared concentrations and raising public awareness. At the same time, it should be noted that the improvement of competition law is a continuous process and the Commission is currently studying and building up new experience on the basis of law enforcement practice to initiate and implement the next stage of reforms.

Merger Control in the Republic of Serbia: Outdoor Advertising Market as the Relevant Product Market[*]

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The Serbian legal framework for merger control consists of the Law on Protection of Competition (hereinafter: the Law)[1], Regulation on the Criteria for Defining the Relevant Market (hereinafter: the Relevant Market Regulation)[2] and Regulation on the Content and Manner of Submitting Notification on Concentration.[3] On its website, the Commission for Protection of Competition of the Republic of Serbia (hereinafter: Commission) also provides several instructions.

The Commission decides on the permissibility of mergers in administrative procedures, and addresses the rights and obligations of the merger parties. The purpose of merger control is to protect competition, i.e. to prevent anticompetitive mergers. Mergers between undertakings are permitted unless they significantly restrict, distort or prevent competition on the market of the Republic of Serbia or any part of it, and especially if that restriction, distortion or prevention is the result of creating or strengthening a dominant position.

The merger investigation procedure is based on ex ante merger control. The Commission determines the permissibility of a merger in relation to the criteria prescribed in Article 19 of the Law and adopts the appropriate decision.

Where in merger control proceedings the Commission can find reasonable grounds that the proposed merger fulfills the conditions of permissibility, it enacts a merger clearance decision in a summary procedure. The merger control proceedings instituted ex officio are governed by Article 62 of the Law, stipulating the conditions under which the Commission can approach such investigations. The clearance of mergers subject to conditions is regulated by Article 66 of the Law stipulating that the Commission can enact a merger clearance decision, in addition to regulating special conditions, period of performance and arrangements for monitoring compliance in the context of a cleared merger.

The Regulation on the Content and Manner of Submitting Notification on Concentration, adopted in 2016, has greatly streamlined and facilitated the filing of merger notifications as it enables undertakings, under the conditions laid down by the Regulation, to notify the Commission on the proposed merger in a summary form and provide considerably less information and documentation. This notably reduces the costs both for undertakings and the Commission, especially with regard to economy of resources.

Alma Quattro-Tegetlab Joint Venture Case

In December 2016, the Commission received a short (summary) form of merger notification by two undertakings active in the outdoor advertising market in the territory of the Republic of Serbia – ALMA QUATTRO Belgrade and TEGETLAB LLC Belgrade. The merger concerned the creation of a 50/50 joint venture with the aim of establishing a new company operating on a long-term basis and having all functions of an independent undertaking (full-function JV).[4]

ALMA QUATTRO is the Serbian leader in outdoor advertising whose parent company is the largest outdoor advertising corporation in the world and the market leader in Europe (JC Decaux SA, France). It was planned that the JV would be active in the same relevant market, as an outdoor advertiser.

During the proceedings, in a short form notification the parties stated that the Mass media advertising market should be the relevant product market. The basis for the Commission's approach to product market definition in the advertising and media industries was that each type of medium constitutes a

* The usual disclaimer applies

1 Law on Protection of Competition ("Official Gazette of the RS", 51/09, 95/13), http://www.kzk.gov.rs/kzk/wp-content/uploads/2011/07/Law-on-Protection-of-Competition2.pdf.

2 Regulation on the Criteria for Defining the Relevant Market ("Official Gazette of the RS", 89/09), https://kzk.gov.rs/kzk/wp-content/uploads/2016/11/08-Regulation-on-the-criteria-for-defining-the-relevant-market.pdf.

3 Regulation on the Content and Manner of Submitting Notification on Concentration ("Official Gazette of the RS", 5/16), https://kzk.gov.rs/kzk/wp-content/uploads/2016/11/01-Regulation-on-the-content-and-manner-of-submitting-notification-on-concentration-20161.pdf.

4 See Alma Quattro-Tegetlab case, decision number 6/0-02-33/2017-8, March 3, 2017, https://kzk.gov.rs/kzk/wp-content/uploads/2017/04/33-905-Alma-Quattro-Tegetlab.pdf.

separate market – other media were not substitutable for outdoor advertising. Therefore, the Commission issued a formal request to the parties to submit a full (regular) notification in order to get further information about market structure and competitors. The notifying parties changed their opinion and agreed to submit a full notification. The merger was to be approved in a summary procedure.

Product Market Definition

Pursuant to the provisions of the Relevant Market Regulation, the relevant product market represents a set of goods and/or services which the consumers consider interchangeable in terms of their characteristics, common purpose and price.

In the Alma Quattro-Tegetlab case, the outdoor advertising market was defined as the relevant product market. The parties proposed that the relevant product market should be the Mass media advertising market, but the Commission took the view that the outdoor advertising market constituted a distinct product market, and that the other forms of media (newspapers, magazines, TV, radio, internet) were not to be included in the market.

The Commission was concerned about the market position the JV would hold in the market for outdoor advertising in Serbia and the market share of the Serbian leader in this market – ALMA QUATTRO, which was around 50-60%. The notifying parties tried to argue that the relevant market was much larger than outdoor advertising, including all types of advertising, having in mind that its market share on that market was around 5-10%. The parties stated that the relevant product market was media advertising, including newsprint, television, radio, outdoor and internet.

The Commission had one previous case in which the relevant product market was defined as Mass media advertising market, because the outdoor advertising market was a small and emerging market, and it was still undeveloped. In the current case, the Commission took a different approach because it referred to cases from comparative practice in which the outdoor advertising market was defined as a separate product market. The Commission considered outdoor advertising to be in a different market to other media advertising. The Commission's market enquiries and analysis in the current case were consistent with this view. Taking all the evidence into consideration, the Commission concluded that the relevant product market affected by the proposed transaction was outdoor advertising.

Proceeding from the legal criteria, i.e. the characteristics and intended use of outdoor advertising, it was found that outdoor advertising was not interchangeable with any other advertising media. There are several reasons why it is appropriate to conclude that, while outdoor advertising represented only a small proportion of total advertising, it nevertheless constituted a distinct product market and other media were not substitutable for outdoor advertising:

- outdoor advertising (or out of home advertising) is a type of advertising that can reach people in public places or consumers in particular environments and can address them "on the go" or while in transit;
- the outdoor advertising market is for the provision of space for outdoor advertising such as billboards, public transport vehicles, street furniture (e.g. bus shelters, free standing panels, decorative columns, kiosks and other urban amenities), airports, shopping malls, etc.;
- outdoor advertising may be used to reach a mass audience quickly or to target specific groups in specific geographical locations. Outdoor advertisers could reach narrowly targeted areas (for example, a billboard might target only consumers within a neighborhood) and their messages have specific and enduring attributes;
- customers who want or need to use outdoor advertising would not switch to another advertising medium if outdoor advertising prices increased by a small but significant amount.
- for many advertising customers, outdoor advertising's particular combination of characteristics makes it an advertising medium for which there are no close substitutes, although outdoor advertising is considered as a necessary advertising medium for other media, or as a necessary advertising complement to them;
- outdoor advertising companies negotiate prices individually with advertisers. During individual price negotiations between advertisers and outdoor advertising companies, advertisers provide the outdoor advertising companies with information about their advertising needs, including their target audience and the desired exposure.

As regards the relevant geographic market definition, the proposal of the merging parties that it should be defined as the market of the Republic of Serbia is acceptable. As a reason for this definition, it is stated that the clients of ALMA QUATTRO and TEGETLAB implement their campaigns to a large extent on a national basis – due to the significant linguistic, social and cultural differences and understanding of consumers and clients that vary from one country to another, as well as the fact that most clients buy advertising space in the territory of the Republic of Serbia. In addition to the above, the fact that ALMA QUATTRO owns a network of advertising media located in several cities, namely 2,189 advertising media in 31 places in the territory of the Republic of Serbia, is also important.

In its practice, the Commission has consistently found that the product market for advertising has to be defined narrowly, on the basis that each different medium constitutes a separate relevant product market.[5]

Lessons learnt

The analysis in the Alma Quattro-Tegetlab case shows the importance of a precise definition of the relevant market, which is a crucial first step in the Commission's assessment in many merger (and antitrust) cases. This confirms that market definition is one of the most important analytical tools to examine and evaluate competitive concerns in merger control cases.

The result of the Commission's investigation confirmed its doubts about product market definition, and the Commission concluded that other media were not substitutable for outdoor advertising. The Commission analysed the practices of twelve jurisdictions and referred to cases from comparative practices in which the outdoor advertising market was defined as a separate product market, unlike in the previous case, where the Commission accepted the arguments of the parties. Such comparative analysis was helpful because each example served as an appropriate guide or template for understanding other, as well as future, cases.

5 See https://kzk.gov.rs/kzk/wp-content/uploads/2019/05/05122018-728-Mondo-Adriagrupa-sr.pdf, https://kzk.gov.rs/kzk/wp-content/uploads/2019/01/kopernkus-antena-group.pdf, https://kzk.gov.rs/kzk/wp-content/uploads/2021/04/283-22-03-2021-United-Media.pdf, https://kzk.gov.rs/kzk/wp-content/uploads/2021/10/22-09-2021-597-Ringier-AG.pdf, https://kzk.gov.rs/kzk/wp-content/uploads/2022/05/UNITED-MEDIA-681.pdf.

Economic Concentration in the Republic of Kazakhstan

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In accordance with the Entrepreneurship Code of the Republic of Kazakhstan, in order to prevent the monopoly and (or) restriction of competition, the competition authority (the Agency for Protection and Competition Development of the Republic of Kazakhstan) regulates economic concentration.

Economic concentration is primarily achieved through mergers and other actions that allow for control over the business activities of market actors, including trust, joint venture and engagement agreements. The pooling of capital and other resources resulting from concentration may be a factor in increasing the efficiency of certain companies and industries. However, under certain conditions, such actions may have a negative effect on competition and therefore require prevention of excessive concentration of market power.

In this regard, one of the main "classic" elements in the competition protection system is control over economic concentration transactions. Under Kazakh law, the consent or notification of the competition authority is required for transactions (acts) where the aggregate book value of assets of economic concentration participants or their aggregate volume of sales of goods for the last fiscal year exceeds ten million times the monthly calculation index.

Today, the Agency's function of reviewing applications for consent to economic concentration is a public service provided free of charge to legal entities and private individuals.

In order to improve quality and accessibility, the Agency, together with the national operator in the field of information technologies of the Republic of Kazakhstan, has carried out work on digitalization of the public service, which is now available online. A service recipient can apply for consent electronically, which in turn will eliminate the need to submit paper documents.

This work will be enshrined at the level of the Rules of public service provision, where submission of documents through the portal will be a mandatory condition.

The next stage will partially automate the collection of information filled in by the service recipient to confirm the accuracy and reduce the amount of information provided by the service recipient.

In particular, it is planned to automate obtaining information about individuals (ID number, document number, etc.) and legal entities (business ID, general classifier of economic activity, etc.).

Regarding the practical side of the issue, for example, in 2022 the competition authority received 80 applications for consent to economic concentration, of which 29 transactions were granted consent, 1 transaction was prohibited, 2 transactions were terminated due to revocation.

Currently, applications for consent to economic concentration are considered by the competition authority according to the granting procedure which happens in 2 stages:

Stage 1 – verification for completeness and relevance of the submitted materials (10 calendar days). Based on the results of the review of the submitted materials, the competition authority shall notify the service recipient of the acceptance or denial of the application.

Stage 2 – verification for restriction of competition (30 calendar days with the right to suspend the deadline), following the results of which the antimonopoly authority makes a decision on consent or prohibition of economic concentration.

In addition to reviewing incoming applications, the competition authority may review cases already reviewed earlier.

One of the most recent examples is the recent review of the competition authority's decision against a dominant company in the cellular communications market.

In particular, changes are made to ensure the revision of radio frequencies for the provision of cellular communication services.

Another example is the application of a company for the acquisition of subsoil use rights for the exploration of solid minerals. The Agency found that in case of mineral resources discovery, the subsoil use contract gave the right to extract the relevant resources without a tender. Thus, in case the transaction was agreed without conditions, there were risks of further monopolisation and restriction of competition.

As a result, taking into account the opinion of the interested state authorities of Kazakhstan, a decision was made to grant consent to economic concentration, subject to fulfilment of obligations to prevent restriction of competition, including abuse of dominant position and anti-competitive, concerted actions. Also, mandatory notification of the competition authority of the planned volume of extraction and sale of resources in case of their commercial discovery (gives the right to establish additional requirements in case there are signs of restriction of competition).

Regarding the refusal of the competition authority: if we see that the transaction restricts competition, such transaction will be prohibited. However, there have been few such cases in the experience of the competition authority. Usually, no more than one or two cases per year.

In general, it may be noted that the competition authority's consent to economic concentration is conditioned on the fulfilment of certain requirements by participants of economic concentration. Such requirements are designed to eliminate or mitigate the negative impact of economic concentration on competition.

As noted by the OECD, competition authorities in many countries use proxies to effectively facilitate the enforcement of transactions and independent monitoring. The proxy must be independent and is appointed or approved by the competition authority for both complex unbundling transactions and the need to monitor the enforcement of behavioral conditions.

The institution of a proxy has been widely used by the competition authorities in other countries, as it ensures a professional, expert approach to the implementation of the competition authority's decision, engineering the best solutions together with the business and structurally liaising with the competition authority.

In this regard, in order to ensure monitoring and facilitate the enforcement of the competition authority's decisions on actions aimed at ensuring competition, the Agency introduced the institution of a proxy to monitor compliance with the terms of economic concentration transactions and approved the procedure for maintaining the register of proxies.

The legislation of the Republic of Kazakhstan imposes a fine for untimely receipt or non-receipt of consent in case of unlawful actions of market participants in the course of economic concentration.

Thus, economic concentration without obtaining the consent of the competition authority, as well as the failure of market players to fulfil the requirements that conditioned the decision to give consent to economic concentration are punishable by a fine:

for individuals in the amount of 80 MCI (Monthly Calculation Index),

for small business entities in the amount of 200 MCI,

for medium-sized enterprises in the amount of 320 MCI,

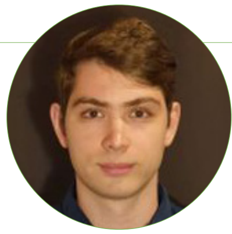
for large businesses in the amount of 1,600 MCI.

Similar penalties are provided for failure to submit or late submission of a notification to the competition authority on economic concentration.

Appraisal of HCA Conduct in Franchise Markets

Flórián Bárány

Former Case Handler, Hungarian Competition Authority



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This summary seeks to shed light on how the Hungarian Competition Authority operate (hereinafter: "HCA") with regards to the appraisals of relevant products and the geographic markets in markets where franchise agreements between the market players on different levels of the distribution chain are present or even predominant. Consequently, this paper will present and compare the similar and varying features of those markets and contractual relationships that subsequently lead to establishing a separate market for the franchisors.

HCA has conducted several competition (and specifically merger) proceedings where the undertakings have links with each other through franchise relationships regulated by civil law. Although in these cases, it has always been implied that such commercial franchise links cannot lead to establishing "control" in terms of competition law, however, due to a shift in the Competition Council's (hereinafter: "Council") practice, when in its decision no. VJ/21/2022 (hereinafter: "Decision"), they determined that franchise owners and their services belong to a separate product market, not to the market in which the franchisees offer their services.

Furthermore, for an international comparison and a broader context, the paper also points to the practice and the correlated regulating soft laws of the European Commission (hereinafter: "EC" or "Commission"), which also underpin the HCA standpoint as per the Decision.

This paper argues that undertakings linked to each other through franchise agreements inherently? belong to separate product markets. Thus, from an economic point of view, it deems that these undertakings are evidently active on different levels of the same supply chain.

Cases surrounding how HCA and sectors alike operate

HCA franchise-related practice had not been particularly thorough, nor well-defined prior to the Decision. , However, some cases show that the Council had introduced and laid down some preliminary or implied observations on how to appraise the competition law aspects of such franchise commercial partnerships. In this regard, the notion of "control" (as generally known in competition law defined in Section 23 (2) of the Hungarian Competition Act[1]) has a particular relevance, and, the extent of the group of undertakings, as well as the size of the total market and the market share of the participating competitors, must be taken into consideration.

Markets where franchise commercial relationships are predominant and, as a result, have been closely scrutinised by the HCA in recent, include:

1. the grocery retail sector: the grocery sector has inevitably been the most looked at sector with franchise commercial relationships in how HCA practice. Simulteously, the Council shared its thoughts on the competition appraisal of franchise business models prior to making its decision in on case nr. VJ/21/2022.
2. pharmacy and optics sector: unsurprisingly, several cases have been presented to the Council that required deliberation and to question the extent to which such undertakings in cases where pharmacy and optic chains have been investigated.
3. real estate agency industry: in due course, the Council explained why a franchise agreement in itself does not automatically establish control over the partner undertakings and what the main differences between the two services (franchise services franchisee) represent. These are presented below in Section 5.

The importance of identifying and establishing different markets for the two economic activities lays in (i) the size of the markets and the market shares of the undertakings therein, is based on the underlying relevant market and, as with the former - (ii) the relevant competitive connections and

1 Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition

concerns must be assessed and compared following the same criteria.

In its “mid-aged” decision on no. VJ/53/2012, the Competition Council ruled that three different models are identifiable and distinguishable in the grocery retail sector, and that all of them must be appraised differently in line with the competition laws. In this regard, three types of business models have been identified and distinguished - in terms of ownership and operation - by the HCA in the retail sector:

a. proprietary chains, where a group of companies operate a network of stores and where none of which have any semblance of independence (e.g., Tesco, Spar, Lidl);
b. the franchise chains are independently owned stores and which are largely uniform in terms of appearance and product selection for consumers. They form a network that is free to decide on other salient conditions of their operation, in particular on non-promotional prices and opening hours (CBA, Coop, Reál);
3. independent (small) stores completely shape their own business policy, including their appearance, pricing, selection and opening hours.

Apparently, especially since the case of proprietary chains or the entirely independent small stores business models, there is one (or more) specific entity - either the head or the grassroot company – which has the sole and entire freedom to choose how to regulate and shape its own business. It is only the franchise chain business model where the question of control in competition law terms raises questions from the above three business models. The question is whether there is any contractual link between the parties that could serve as a basis for applying Section 23 (2) c) as a form of control (control based on contractual relationships).

In the same case, the Council pragmatically assessed that the undertakings belonging to the same franchise-group – provided that their contractual relationship does not entail control in terms of competition law - could be considered as each other’s competitor and whether they consider each other as competitors – which would qualify them as independent undertakings.

In reply to the HCA question, one outstanding position has been identified based on the responses made by the market players. The notifying party as well as other franchise-system operators, have clearly stated that although the members belong to the same franchise system, they are still competitors of each other, especially since the local retail unit operators have enough freedom to set pricing, which enables them to compete with each other.

According to one of the market players, it was stated that competition within the chain is limited only to geographical distance, because it is not usual for several stores belonging to the same chain to operate in close proximity of each other. Another market player stated that there is some competition between stores belonging to franchise chains, however, this competition - taking into account the centrally determined elements of operation and business activity, e.g., the coordinated promotional practice – is less intense than among other competing stores. Similar conclusions have been drawn in the Council pharmacy-, optics- and logistics-related businesses, where the independency of the companies had been implied.2

As a result, it is established that the Council’s practice – apart from those cases, where explicit comments have been made about the competitive nexus among the franchisees - was also already aware of other affected businesses, (such as grocery and pharmacy retail or logistics) .The fact that members of the same franchise system – similarly to the grocery retail distinction - must be considered as competitors (i.e. independent from each other in the sense of competition law), taking into account that the franchisees have a high level of discretion when for instance determining pricing and selection.

As a result, franchisees have not been considered as being part of the same group of undertakings, which also presupposes that they must not be considered when calculating the maximum level of fine or when appraising the possible anticompetitive agreements of the parties.

Franchise markets in the Commission’s practice

Considering that it had not been clearly established prior to the Decision, and to also be a little more concise, the HCA presented and referred to cases at the European Commission’s (hereinafter: “Commission”) practice, as well as soft-laws as one version of legal interpretation.

Firstly, the HCA sheds light on the fact that the Commission established in the hotel-chain sector established 3 three different business models of operating hotel-chains3, namely (i) under the first model, hotels are owned or leased and managed by the same company under its own name or brand; (ii) under the second model, a company – either a hotel chain or a specialized management company (“white label management companies”) – manages hotels for a management fee on behalf of their owner; (iii) under the third model, hotel chains franchise one of their brands to hotel owners, who either manage their hotels themselves or use a third management company.

The Commission – in this regard – considered a segmentation of the overall market for hotel accommodation services by ownership type. Specifically, the Commission distinguished between three types of hotels: (i) economically and legally independent hotels; (ii) voluntary chains consisting

2 Cases no. VJ/142/2007 and VJ/32/2015
3 Case M.7902 – Marriott International/Starwood Hotels & Resorts Worldwide (“Marriott International”)

of groups of independent hotels which carry out their marketing, promotion, purchasing etc. under one and the same hotel brand; and (iii) integrated chains which operate hotels directly through subsidiaries or indirectly by a franchise or management contract.

Second, although the HCA did not refer to this fact in its Decision, , the above-mentioned approach is also supported by Section 19 of the Commission's Notice on the application of rules in merger control proceedings4, according to which " […] franchising agreements do not normally confer control over the franchisee's business on the franchisor. The franchisee usually exploits the entrepreneurial resources on its own account, even if essential parts of the assets may belong to the franchisor". In the present case, the investigation did not reveal any circumstances that would require a deviation from this principle.

In connection with the above, the HCA has concluded that, based on the experiences of the hotel chain management sector, the franchisors and the franchisees can and should be examined as being on different levels of the supply chain, and as a result, as belonging to separate product markets.

Case VJ/21/2022 – the franchise systems in the real estate agency industry

The latest competition case dealing with franchise markets in the HCA's practice was of particular importance in paying attention to defining and identifying the common features of franchise markets, as well as to the appraisal of the notion of control and the extent of a group of undertakings. This case revolved around the clearance of a merger in the real estate agency sector, a sector which is virtually unimaginable without franchise chains. The main prerequisite question was to clarify – as per merger control proceedings – the exact extent of the product and geographic markets.

In the HCA's point of view, the real estate brokerage market, as with the hotel management markets (as supported by the earlier mentioned Commission's practice), can be divided into two product markets, namely (i) the services provided by real estate brokerage networks and (ii) the markets for the performance of real estate agency activities.

Such an appraisal was - in addition to the analogous application of the segmentation used in the hotel management industry - supported by the data provided by third parties, in which the market participants almost unanimously confirmed that the two services are fundamentally different to each other and require a completely different approach.

One significant difference, for example, was that the services provided by network operators are B2B activities provided to partner offices, while real estate brokerage services are provided by offices/agents to consumers (B2C).

According to the HCA's market research, it identified another goal of the networks is continuous expansion, with the ultimate goal of of establishing national coverage. Accordingly, the networks generally estimate their market power on a national level (the investigation presented that some networks specifically - because of their local knowledge, or in an effort to create one - strive to establish a regional network and owe their success to this).

Furthermore, and in contrast to the uniform objectives of networking at the national/regional level, the (local) real estate agency activity carried out by real estate agents/partner offices can only be successfully carried out locally, by geographic area and by property type, but only by taking the special, different conditions into account.

In addition to the above, another significant market player emphasized that the real estate agency service usually consists of "ad hoc" assignments, as opposed to a network operation, which is an immanently organized and planned activity for a prolonged period of time. According to the findings of the investigation, the notifying party and the target undertaking are primarily engaged in real estate brokerage network operation, i.e., in addition to the transfer of franchise rights and know-how, they provide services to offices belonging to the network.

In connection with the above, the HCA then deemed that the control between the franchisor and franchisee companies cannot be established either, because (i) the ultimate controlling owners of the companies operating the partner offices are persons other than the ultimate controlling owners of the companies operating the network (ii) under the franchise relationship, the franchisor was allowed only to make non-binding common sense recommendations to the partner agencies (e.g., by providing professional advice, training or contract templates) and finally (iii) the franchisor did not have veto right or any other power of control over the business plan of the partner offices at the time of the acceptance of the business plan by the partner offices. The franchisor only provided consultancy services in the development of the business plan at the time of joining the franchise, if requested by the joining partners.

In addition - to a negligible extent - the two parties also provide real estate brokerage services directly to consumers through the operation of real estate offices belonging to their own group of undertakings, whose offices are part of their own network.

After careful consideration, the HCA concluded that the participants' overriding input in the merger was (i) the operation of a network of real estate agents (i.e., services provided

4 The Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on „thecontrol of concentrations between undertakings"

to real estate businesses) and (ii) the provision of real estate agency services (i.e., services provided to consumers).5

A summary of the decisions made by the Council follow:

15. Businesses operating real estate brokerage networks typically combine the real estate agency offices belonging to the network (hereinafter: partner offices) according to two separable solutions.

16. One solution is the so-called operation according to the franchise model, which consists of the operation of a network of partner offices that are independent from each other - from the point of view of competition law management - and the establishment of franchise contractual relations with partner offices. The Nagygyörgy Group and Open House also operate according to this model, owing to the fact that they also have a real estate agent's office operated by their own company within the network. In addition to the participants in the merger, this solution is typically - but not exclusively - used by real estate brokerage networks with national coverage (e.g., Duna House, Immo1, Tecnocasa, City Cartel, RE/MAX).

17. The other solution is the so-called ownership model, the essence of which is that the network unites only real estate agency offices operated by self-owned companies, and thus the real estate agency and real estate brokerage network management activities remain within the same group of undertakings. This model is a typical practice for networks with smaller, regional operating areas (e.g., Lido Home, House36, A1 property).

18. In the case of networks operating according to the franchise model, the person operating the network and the person operating the real estate offices are typically separated, instead the two businesses performing different activities are in a relationship of franchisees and franchisors. Within the framework of the franchise legal relationship, the franchisor defines the image and various operating guidelines. At the same time, the approval rights of franchisors do not extend to matters such as approval of the business plan, determination of pricing, i.e., franchisees enjoy independence in determining their own market behaviour, the franchisor does not create a management relationship in the sense of competition law. and between the franchisee and partner offices.

19. The franchisor - also based on the answers of the contacted competitors - can provide the franchisee with the following services: (i) network strategy creation, (ii) transfer of real estate agent know-how, (iii) customer relationship management (CRM) system and other business management providing the necessary tools, (iv) maintaining a database, (v) creating a marketing strategy and developing marketing tools, (vi) coordinating the marketing activities of the partner offices, and (vii) providing trademarks, brand names, image elements and (viii) know-how.

Summary / Conclusionary remarks

As suggested above, the appraisal of franchise markets and the main differences had not yet been clearly established prior to 2022, until the GVH brought its decision that shed spotlight also on the specialties of these markets.

The question is not at all theoretical, as the exact market definition is the basis of any competitive assessment. The paper argued and presented that both the Hungarian, as well as the European practice, perceive the franchise markets as separate product markets, considering that the franchisees – from an economic point of view - are present on a different level of the supply chain than the franchisers and provide their services to consumers instead of business.

Furthermore, the franchisees have a high level of discretion in deciding on their selection, their pricing and their partners, while no other contractual provisions can be identified that could serve as a basis for a form of control in terms of competition law.

5 However, substantial overlap in the activities of the parties was only identified in the market of services provided by real estate brokerage networks, therefore the HCA focused on this market when evaluating the expected competitive effects of the merger

Bold Strides in the Field of Merger Control: the Case of Electronic Communications Sector in Croatia

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Ten years ago, The Croatian Competition Agency (CCA) was facing a huge challenge. For almost a decade, the Council of the Croatian Competition Agency had managed to retain the third independent rival in the relevant market through the adoptions of conditional merger approvals (decisions made in 2014 and 2017) with some pioneering work within this area of the market. On completion of complex, in-depth investigations of the proposed acquisitions, decisions were made.

In 2014, the Croatian telecommunications market was dominated by two large players – the incumbent Croatian Telekom (HT) and VIPNet (nowadays A1). They expanded over time through organic growth and acquisitions of small companies on the market that did not meet the merger guidelines. There had also been some independent undertakings on the market, but at that time their authority faded, thus a pre-bankruptcy settlement of Optima Telekom was executed before the Commercial Court of Zagreb on April 30, 2014.

HT was amongst the largest creditors of Optima, so together with Zagreb Bank, they signed an agreement of strategic partnership which decided that HT would take over the management of Optima.

The CCA accepted the failures of the Optima merger and determined that even if it had had an adverse impact on competition, it may have been better for competition rather than blocking it and thereby causing the undertaking to go out of business.

The CCA deemed that the acquisition would probably have caused competition to suffer substantially unless significant interventions had been made.

Given the level of market shares and market power attributed to operators with the only two that had market positions which really mattered, the market was not reasonably symmetric, despite the fact that there were alternative operators active at the wholesale and retail levels of market.

The Implementation of a proposed merger would have meant an increase in concentration and a decrease in competition levels in the market.

According to the Croatian Competition Act, mergers will only be deemed to have taken place if the transaction results in a change of control over a business, and merger notification is only required if there is a change of control on a lasting basis. However, in that scope, the CCA allowed the deal to go through with a limitation on a duration of the proposed concentration.

The duration of the HT and Optima concentration was limited to a period of four (4) years starting with HT's control over Optima. From the moment when all of Optima's general assembly decisions foreseen in the pre-bankruptcy settlement were duly made and were officially recorded in the court register, taking place on 10 July 2014. This date is seen as the new, recognised starting point of the duration of the concentration. Upon the expiration of the four-year period, the concentration is automatically terminated, without any possibility of extension.

In cases where shares were not sold by the expiration of the four-year duration of concentration, any possibility of HT's control over Optima became void.

HT agreed that during the concentration, and in view of Optima's previous business trends, it will ensure such management over Optima that at the end of the term of the concentration will not lead to Optima's assets being undercapitalized as per the original benchmarks set at the beginning of the period of concentration when comparison benchmarks were originally defined.

With regards to the measures that ensure the independence of Optima's business, HT has committed to a series of measures, among which is the implementation of a Chinese Wall between HT and Optima employees involved in Optima Telekom business relating, to all sensitive business information, except for the reporting of financial data necessary for consolidation processes.

In 2017. a new merger proposal was brought before the CCA. Optima submitted an application to the CCA for an intended concentration. It was basically a merger within an existing merger proposition. Optima Telekom, who was still under the management control of HT at the time, proposed to take over H1 Telekom, an alternative telecom operator which had been facing financial difficulties.

Accordingly, following a change in circumstances, HT submitted a request to prolong the temporary management of Optima for an additional three-year period continuing until 10 July 2021.

The successful completion of their merger took place in 2017 and the commitments offered by Optima had the objective to eliminate any negative impact caused by the concentration in question, were accepted by the CCA.

This new decision made by the CCA partially repeals its decision of 19 March 2014 in which it conditionally approved the concentration between HT and Optima. Some circumstances that could not have been foreseen or avoided and that were beyond the control of the parties to the concentration, lead to situations in which certain commitments defined in the 2014 decision could not be met within the prescribed deadlines.

Consequently, the revised decision defines new measures, conditions and deadlines that must be met by the parties to the concentration in the forthcoming period, with the view to retaining Optima as the third independent rival in the relevant market, or to open, through buying Optima out and creating the possibility of a new third operator in the Croatian telecommunication market.

Therefore, this decision set forth that if two or more offers of equal value are submitted/tendered to purchase Optima shares, favour will be afforded to the bidder not from the relevant market.

Up until July 2021, Optima had been managed by the undertaking HT based on decisions made by CCA, which prescribed appropriate measures, to preserve Optima as a third market competitor.

The process of the sale of Optima Telekom shares started on 31 January 2020. The announcement of the sale was made public and designed to accept bids from any interested party. The subsequent approval to choose the investment bank Credit Suisse, which in turn was mutually agreed to by HT and Zagreb Bank, who then oversaw the process of the sale.

HT and Zagreb Bank signed an agreement to sell 54.31 percent of Optima Telekom to Telemach Hrvatska, owned by United Group.

The CCA unconditionally gave clearance in the first phase of the concentration between the undertaking Telemach and Optima.

Telemach used the acquisition strategy to enter the market in electronic communication in fixed-line network services where Optima had exclusively been present and thereby inheriting Optima market shares. The concentration led to minimum horizontal overlap with Optima in retail fixed broadband access market and subscription television market, where Telemach had been present on a small scale. Accordingly, it was assessed that by the implementation of the concentration concerned market shares will not be increased in any of the relevant markets. By the acquisition of Optima, Telemach will provide integrated telecommunication services in fixed and mobile telephony able to offer convergent services as the third integrated telecommunication services rival competing in the Croatian market.

In light of the above, the CCA concluded, that the merger in question was expected to have pro-competitive effects based notably on the fact that the third rival is retained in the electronic communication fixed-line network market, and that the third integrated operator in mobile and fixed-line network to be created to compete with the incumbent leading operators more effectively by offering convergent services. The formation of the third fully integrated competitor in the electronic communications sector ascertains potential efficiencies based on the ability of the integrated operators in mobile and fixed-line networks to offer convergent products, thus ensuring a counter-balance to already existing competitors and to the benefit of the consumers. The creation of the third rival in the market where until then there had been only two competitors for a significant period, will therefore contribute to the strengthening of competition and consequently benefit the consumers.

In closing, interventions made by the CCA have comprehensively identified and addressed problems with competition. These interventions are to prevent any further adverse effects which may arise from anti-competitive mergers.

Merger Control Regime for Technology Undertakings, with Special References to Decisions of the Turkish Competition Board

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The Preliminary Sectoral Research Report on E-Market Platforms dated April 2021, issued by the Turkish Competition Authority ("TCA") indicated that a process had been initiated to regulate digital markets. The purpose of the process was to determine how gatekeeper undertakings in digital markets were conducting their businesses; in particular those with which had the characteristics of basic platform services, what they must refrain from, and how they must meet preliminary regulations regarding such practices.[1] With this in mind, it called for authorization from the Turkish Competition Board ("TCB" or "the Board") who recommended that all acquisitions overseen by gatekeeper marketplaces, and without being subject to turnover thresholds specified under the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board no. 2010/4 ("Communiqué no. 2010/4").

The Communiqué Amending Communiqué no. 2010/4, published in the Official Journal no. 31768 dated 04 March 2022, extends the scope of this recommendation, and defines the term "technology undertaking". This term enhances TCB's control over acquisitions of technology undertakings and play a significant role in such the validity of acquisitions subject to TCB authorization. The aim was to prevent problems with undertakings which had considerable market power in digital markets and prevent them from negatively affecting competition by acquiring newly established or developing undertakings, known as killer acquisitions.[2]

We will now examine the term "technology undertaking" based on TCB decisions and explain the new threshold guidelines for the acquisition of technology undertakings.

Technology Undertakings

According to Article 4/1-e of Communiqué no. 2010/4, technology undertakings are defined as undertakings operating on digital platforms, such as software and gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals, and health technologies, or assets related to these undertakings.

According to the findings, TCB has twelve possible definitions for the term technology undertaking but only apply to specific cases as of May 2022, when the aforementioned amendment came into force. Upon studying these definitions, it has become apparent that TCB considers the field of operation of an undertaking while evaluating whether it falls under the category of a technology undertaking. If the undertaking subject to acquisition operates in one of the fields specified in the definition (e.g., financial technologies, software, pharmacology, or digital platforms), TCB deems it a technology undertaking. In this context, six definitions from TCB are provided, and relevant excerpts from the wordings are provided below:

- "When the transaction subject to notification [TCB's authorization] is examined, it deems that HIZLIPARA is a payment and electronic money institution established for intermediating all kinds of money transfers and payment transactions. Within this framework, it is understood that HIZLIPARA operates in the field of financial technologies under the definition of technology undertaking included in Communiqué no. 2010/4 in terms of the services it provides (…)."[3]
- "(…) within the scope of the transaction subject to notification [TCB authorization], it is understood that MICRO FOCUS, the acquired undertaking, operates in the field of software, including Turkey, and therefore is equal to a technology undertaking."[4]
- "(…) it is understood that MAKRONET, subject to the acquisition, operates in the field of software, and thus it is the same in nature to of a technology undertaking."[5]

1 TCA, The Preliminary Sectoral Research Report on E-Market Platforms, Ankara: April 2021, paragraph727.
2 TCA, The Final Sectoral Research Report on E-Market Platforms, Ankara: April 2022, paras 782-783.
3 Decision of TCB, File no. 2022-4-046, Decision no. 22-54/842-347, Date of the Decision: 08 December 2022, paragraph 13.
4 Decision of TCB, File no. 2022-1-032, Decision no. 22-51/745-309, Date of the Decision: 10 November 2022, paragraph 6.
5 Decision of TCB, File no. 2022-1-030, Decision no. 22-50/733-305, Date of the Decision: 03 November 2022, paragraph 7.

- "As a result, Pharmalex (…) is a technology operating in the field of pharmacology, the transaction is considered as an acquisition transaction subject to Board."[6]
- "Within the scope of the transaction subject to notification [TCB authorization], it is understood that CASTIK, the acquiring undertaking, and KLARAVIK, the acquired undertaking, operate in the field of digital platforms, and therefore are no different to technology undertakings."[7]
- "Within the scope of the transaction subject to notification [TCB authorization], due to MANDIANT, the acquired undertaking operates in the field of software including Turkey, it is no different to a technology undertaking."[8]

Secondly, pursuant to Article 5/3 of Communiqué no. 2010/4, the formation of a joint venture that would permanently fulfil all the functions of an independent economic entity constitutes an acquisition transaction. In this case, TCB considers a joint venture as a technology undertaking if its field of operation falls within the definition given in the Communiqué. Relevant excerpts from three TCB decisions on this matter are as follows:

- "At the end of the transaction subject to notification [TCB authorization], VEPARA will be acquired by HEDEF HOLDİNG and HEDEF GİRİŞİM, the undertakings within HEDEF GROUP, respectively at the rates of (…) % and (…) % through share transfer. (…) In this context, it is evaluated that VEPARA will be jointly controlled by HEDEF GROUP and Nedim VURAL. / (…) / It is stated in the Notification Form that VEPARA will operate in the field of electronic money and payment services. VEPARA is defined as a paying agency unifying digital wallet, virtual POS, money transfer, and other similar services under a single structure. In these markets, VEPARA provides individual digital wallet, bulk money transfer, payment by link, subscription management, recurring payment, and virtual POS services to its customers. Within this framework, VEPARA is considered a technology undertaking in terms of the services it provides to its customers (…)"[9]
- "Notwithstanding, it is understood that ACE subject to the joint venture, operates in the mobile games market, therefore it is to considered a technology undertaking."[10]

"Notwithstanding, INVENT, subject to the joint venture, provides its customers with cloud-based software and stock and price optimization solutions in global and Turkish markets, INVENT shall be considered a technology undertaking."[11]

Finally, it deems that TCB interprets the term "field of operation" broadly. TCB finds it sufficient to consider an undertaking as a technology undertaking, even if it only partly operates its in the specified market or is active in such markets. Relevant excerpts from TCB decisions regarding this broad interpretation, which may create uncertainty and hesitation in practice, as follows:

"It was notified that IFGL also provides services through digital platforms to its customers who already have digital access, as a small part of its operations in the life insurance sector in Turkey, and within this context, it has approximately 230 registered users with access to and use these digital platforms in Turkey. Due to this limited digital platform operation, it states that IFGL falls within the scope of the definition of 'technology undertaking' specified under Communiqué no. 2010/4."[12]

"That given, it deems that AIRTIES is a provider of residential Wi-Fi solutions for broadband operators and provides software services enabling broadband operators to deliver and manage Wi-Fi networks to residential customers. Therefore, by considering the software services provided by AIRTIES, it is concluded that AIRTIES is a technology undertaking within the scope of Communiqué no. 2010/4."[13]

"When the Notification Form is assessed, and since ALLEGHANY develops software to manage reassurance companies' systems and sells these products on to third parties, it is understood that the undertaking is active in the scope of financial technologies stated under the definition of 'technology undertaking' of Communiqué no. 2010/4 and is therefore included in the scope of technology undertaking."[14]

Control in Acquisition of Technology Undertakings

Under Article 7 of the Act on the Protection of Competition no. 4054 ("APC"), mergers and acquisitions which result in a significant reduction in effective competition are illegal and therefore prohibited. However, the types of mergers and acquisitions that require notification and authorization from TCB to become legally valid are specified in communiqués issued by the Board. These transactions subject to TCB authorization are regulated under Article 7 of Communiqué no. 2010/4. According to this article:

1. In a merger or acquisition transaction as specified under Article 5 of this Communiqué, authorization of the Board shall be required for the relevant transaction to carry legal validity in case,
    - Total turnovers of the transaction parties in Turkey

6 Decision of TCB, File no. 2022-3-068, Decision no. 22-52/775-319, Date of the Decision: 23 November 2022, paragraph 5.
7 Decision of TCB, File no. 2022-5-034, Decision no. 22-41/582-242, Date of the Decision: 08 September 2022, paragraph 7.
8 Decision of TCB, File no. 2022-1-016, Decision no. 22-26/425-174, Date of the Decision: 09 June 2022, paragraph 8.
9 Decision of TCB, File no. 2022-4-043, Decision no. 22-53/816-335, Date of the Decision: 01 December 2022, paragraphs 6 and 9.
10 Decision of TCB, File no. 2022-1-035, Decision no. 22-54/823-336, Date of the Decision: 08 December 2022, paragraph 13.
11 Decision of TCB, File no. 2022-1-031, Decision no. 22-51/744-308, Date of the Decision: 10 November 2022, paragraph 11.
12 Decision of TCB, File no. 2022-4-014, Decision no. 22-23/372-157, Date of the Decision: 18 May 2022, paragraph 10.
13 Decision of TCB, File no. 2022-6-022, Decision no. 22-25/403-167, Date of the Decision: 02 June 2022, paragraph 7.
14 Decision of TCB, File no. 2022-4-038, Decision no. 22-42/625-261, Date of the Decision: 15 September 2022, paragraph 8.

exceed seven hundred and fifty million Turkish Lira, and turnovers of at least two of the transaction parties in Turkey each exceed two hundred and fifty million Turkish Lira, or

- The asset or activity subject to acquisition in acquisition transactions, and at least one of the parties of the transaction in merger transactions have a turnover in Turkey exceeding two hundred and fifty million Turkish Lira and the other party of the transactions has a global turnover exceeding three billion Turkish Lira.

2. The thresholds of two hundred and fifty million Turkish Lira mentioned in sub-paragraphs (a) and (b) of the first paragraph do not apply to transactions relating to the acquisition of technology undertakings operating business or having R&D operations in the geographical market of Turkey or providing service to users in Turkey.

As is seen in the second paragraph of Article 7, TCB's control area is expanded for transactions related to the acquisition of technology undertakings. TCB authorization is required if the total turnovers of the transaction parties in Turkey exceed seven hundred and fifty million Turkish Lira or if one of the parties to the transactions has a global turnover exceeding three billion Turkish Lira. However, it is important to note that for these thresholds to apply to technology undertakings, the undertaking not only needs to meet the definition of a technology undertaking but also needs to operate a business or engage in R&D in the geographical market of Turkey or provide services to users in Turkey.

Concluding Remarks

Digitalization and rapid technological advancements, on the one hand, present opportunities; on the other hand, bring new challenges that need to be addressed by public authorities. Competition authorities, including the Turkish Competition Authority, play a crucial role in ensuring effective competition in these dynamic fields, fostering ongoing developments, and spreading the benefits of technological advancements to society.

In this context, Turkey has taken measures to broaden the control area of the Turkish Competition Board for transactions involving the acquisition of technology undertakings. This regulation aims to protect newly established or emerging undertakings and prevent killer acquisitions targeting these undertakings. However, the definition of technology undertakings and the broad interpretation of this term by the Turkish Competition Board have raised uncertainties and hesitations in practice. It is expected that the Turkish Competition Authority will make new decisions and issue guidelines to address these concerns to provide clarity in determining which undertakings should be considered technology undertakings.

Overall, the evolving legislative efforts in Turkey demonstrate the commitment to adapt competition rules to the digital economy and emerging technologies, ensuring fair competition and fostering innovation.

Combinations: Mergers, Acquisitions and Takeovers - An Overview of Indian Law

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"To desist from non-competitive behaviour, the operation of cartels by groups of companies to keep the prices high must end. It is unacceptable to obstruct the forces of competition from having freer play. It is even more distressing in a country where the poor are severely affected by rising commodity prices. Cartels are a crime and go against the grain of an open economy. Even profit maximization should be within the bounds of decency and greed! If a liberalized economy has to succeed, we must give full play to competitive forces and the private sector should show some self-restraint in this regard."

Former Prime Minister of India Dr. Manmohan Singh

The economic policy of 1991 opened doors for commencement of the LPG era in India. The aim of competition law is to enable proper exercise of freedom of trade, promote and sustain competition in the market for the benefit of the consumers and economy in turn, so the business houses and traders, for their selfish ends, do not tamper with the supply and demand forces in the market.

The Antitrust/ Competition Law, in consonance with required law of the 21st century, to promote global trade, had a piecemeal beginning in India from 2002. The emergence of regulatory governance in India dates back to 2007 and more effectively from 2009 onwards. Regulation of markets became a necessity in the aftermath of globalization and liberalization of the economy, as the economy was thrown open to competition within and from abroad from 1991 onwards.

In a free market economy, vested interest groups, large monopolistic firms and other stakeholders were able to distort the process of competition and deprive markets of their ability to deliver efficient results. It was realized that India's old competition law i.e., the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 had outlived its utility and a new law was needed in line with new economic philosophy to protect and nurture the competitive process. Based on the recommendation of an expert committee, the Competition Act, 2002 (hereinafter the Act) was enacted in the year 2002 and partly notified in January 2003 initially.

Recently, the Indian Parliament approved the Competition Amendment Act, 2023, on April 11, 2023. The Amendment Act has also been published in the Official Gazette, although it is yet to come into force. The main thrust of the Amendment Act is to counter the dominance of Big Tech, and it brings about weighty changes to the Competition Act, 2002. To enhance review of global transactions, the Amendment Act has amended Section 5 of the Act (which deals with combinations) by introducing the concept of 'deal value threshold' (in addition to the asset and turnover (top line) based criteria) and, thus, expanded the review scope of the Competition Commission of India. The introduction of the deal value threshold for combinations is likely to bring under the CCI's ambit 'killer acquisitions' that are especially prevalent in digital markets, like the acquisition of WhatsApp by Facebook.

Beginning of new era:

The era of enforcement against monopolies and restrictive trade practices gave way to competition enforcement with the constitution of the Competition Commission of India (CCI) in 2009. The overreaching aim of the Commission is to create and sustain fair competition in the economy that will provide a 'level playing field' to the producers and make the markets work for the welfare of the consumers. An appellate body called the Competition Appellate Tribunal was later set up in May 2009, with final appeal lying with the Supreme Court of India. In 2009, the earlier MRTP Act was repealed and the MRTP Commission established under that Act was abolished. MRTP Commission's pending cases were transferred to CCI.

Major challenges:

In a developing economy like India, initially various stakeholders perceived competition regulation as a new bureaucratic hurdle in carrying on business. The level of awareness even among economic stakeholders was limited. Not many perceive the Act as "business friendly" though in the ultimate analysis it will lead to higher efficiency, lower costs and improvement of quality. These are the reasons that delayed the notification (implementation) of provisions relating to combination regulations (mergers and acquisitions) and antitrust law evolution. Due to apprehensions in the minds of industry regarding combinations review, it was only after an extensive consultation process that it was enforced from June 2011.

The Competition Act, 2002

The passing of the Competition Act, 2002 is an attempt to shift focus from curbing monopolies to promoting competition. With the enforcement of the Competition Law, India joins the circle of global economic powers with effective tools to combat anti-competitive agreements and abuses of dominant positions; powers to review mergers and acquisitions.

The Act however, had a legal challenge, which delayed the establishment of the Commission and enforcement of the Act to 2009. The Act was subsequently amended by the Competition (Amendment) Act, 2007 embodying the modern principles of competition law. As in most modern competition laws, the Indian law also seeks to (a) prohibit anti-competitive agreements, including cartels; (b) prevent abuse of dominant position; (c) regulate mergers and acquisition, and (d) propagate competition advocacy. The Act established a Commission comprising of a chairperson and a maximum of 6 members. The Commission is vested with the same broad powers as are available to competition authorities in other jurisdictions. The Competition Commission of India (hereafter called as the "CCI"), is empowered to inflict hefty financial penalties (and even imprisonment in case the penalties are not paid) on firms and individuals in case there is a violation of Law. Thus, it is now vital for all companies that deal with India, to give due weightage to the Indian Competition Law in decisions affecting their Indian businesses and antitrust impacts on firms' longer-term as well as day-to-day operational issues.

Instead of a creation of trust and trusteeship agreements, the current trend is to combine through **Mergers & Acquisitions.** Therefore, CCI also looks and monitors the M&A. Presently; the merger control regime is prevailing in India. Therefore, the Competition Commission of India has entered into the global antitrust space.

Additionally, now under the new law, antitrust must be factored into the due diligence and contractual negotiation processes of mergers and acquisitions to ensure that any risks arising from antitrust compliance are addressed properly. The commission (CCI) is granted with the powers of merger review, which process will also affect the feasibility of certain deals. The Indian competition law was inspired by the laws on restrictive agreements and dominant firm conduct, as well as merger regulation, in jurisdictions with long-standing enforcement records, most notably the European Union.

The Competition Act, 2002 introduces the three enforcement areas usually found in modern competition law regimes compatible with the EU. Many concepts of the law are similar to those found in other jurisdictions, such as the European Union or the US competition law. Nevertheless, as the market conditions are very different in India, these concepts are not necessarily to be interpreted or applied in the similar way.

Sections 5&6 of the Competition Act defines combination and the procedure to regulate and control combinations. The term Combination thus deals with all types of mergers and acquisitions.

Combination under Section 5 in the Competition Act, 2002

Combination. —The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—

(a) any acquisition where—

(i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have,—

(A) either, in India, the assets of the value of more than rupees one thousand crore or turnover more than rupees three thousand crore; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover of more than fifteen hundred million US dollars; or

(ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—

(A) either in India, the assets of the value of more than rupees four thousand crore or turnover of more than rupees twelve thousand crore; or

(B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover of more than six billion US dollars; or

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if—

(i) the enterprise over which control has been acquired, along with the enterprise over which the acquirer already has direct or indirect control jointly have,—

(A) either in India, the assets of the value of more than rupees one thousand crore or turnover of more than rupees three thousand crore; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars; or

(ii) the group, to which enterprise whose control has been acquired, or is being acquired would belong after the acquisition, jointly have or would jointly have,—

(A) either in India, the assets of the value of more than rupees four thousand crore or turnover of more than rupees twelve thousand crore; or

(B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover of more than six billion US dollars; or

(c) any merger or amalgamation in which—

(i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,—

(A) either in India, the assets of the value of more than rupees one thousand crore or turnover of more than rupees three thousand crore; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover of more than fifteen hundred million US dollars; or

(ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have,—

(A) either in India, the assets of the value of more than rupees four thousand crore or turnover of more than rupees twelve thousand crore; or

(B) in India or outside India, the assets of the value of more than two billion US dollars or turnover of more than six billion US dollars. Explanation.—For the purposes of this section,—

(a) "control" includes controlling the affairs or management by—

(i) one or more enterprises, either jointly or singly, over another enterprise or group;

(ii) one or more groups, either jointly or singly, over another group or enterprise;

(b) "group" means two or more enterprises which, directly or indirectly, are in a position to—

(i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or

(ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or

(iii) control the management or affairs of the other enterprise;

(c) the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout-design or similar other commercial rights, if any, referred to in sub-section (5) of section 3.

Regulation of combinations under Section 6 in the Competition Act, 2002

6. Regulation of combinations. —

(1) No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

(2) Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, may, at its own discretion, give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within seven days of—

(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;

(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.

(3) The Commission shall, after receipt of notice under sub-section (2), deal with such notice in accordance with the provisions contained in sections 29, 30 and 31.

(4) The provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.

(5) The public financial institution, foreign institutional investor, bank or venture capital fund, referred to in sub-section (4), shall, within seven days from the date of the acquisition, file, in the form as may be specified by regulations, with the Commission the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be. Explanation. —For the purposes of this section, the expression—

(a) "foreign institutional investor" has the same meaning as assigned to it in clause (a) of the Explanation to section 115AD of the Income-tax Act, 1961 (43 of 1961);

(b) "venture capital fund" has the same meaning as assigned to it in clause (b) of the Explanation to clause (23FB) of section 10 of the Income-tax Act, 1961 (43 of 1961).

Inquiry into combination by Commission

Section- 20(1) The Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India: Provided that the Commission shall not initiate any inquiry under this sub-section after the expiry of one year from the date on which such combination has taken effect.

(2) The Commission shall, on receipt of a notice under sub-section (2) of section 6 inquire whether a combination referred to in that notice or reference has caused or is likely to cause an appreciable adverse effect on competition in India.

(3) Notwithstanding anything contained in section 5, the Central Government shall, on the expiry of a period of two years from the date of commencement of this Act and thereafter every two years, in consultation with the Commission, by notification, enhance or reduce, on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies, the value of assets or the value of turnover, for the purposes of that section. (4) For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factors, namely:

a. (a) actual and potential level of competition through imports in the market;
b. extent of barriers to entry into the market;
c. level of combination in the market;
d. degree of countervailing power in the market;
e. likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
f. extent of effective competition likely to sustain in a market;
g. extent to which substitutes are available or arc likely to be available in the market;
h. market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
i. likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
j. nature and extent of vertical integration in the market;
k. possibility of a failing business;
l. nature and extent of innovation;
m. relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
n. whether the benefits of the combination outweigh the adverse impact of the combination, if any.

In line with most competition law regimes, the Act introduces mandatory competition law review of certain mergers and acquisitions (referred to as "combinations").

In the past couple of years, the Act's system for combination review has been intensively debated in India and abroad. Concerns were identified, especially because of how the Act defines classes of transactions capable of being reviewed and the jurisdictional thresholds identifying transactions that are to be reviewed by the CCI. The CCI inter alia introduced a fast track for clearing combinations having little competition concerns, brought in de minimis provisions, and exempted certain categories of transactions from mandatory notification.

Institutional framework:

The CCI is empowered with the enforcement of the Act with reference to prohibitions of restrictive agreements and abuses of dominant positions and it will be charged with pre-closing review of combinations, in addition to advisory and advocacy tasks. The Competition Appellate Tribunal has jurisdiction to hear appeals brought against the CCI's decisions. Appeals against orders of the Tribunal can be challenged in the Supreme Court of India.

The CCI has wide ranging powers of investigation in support of its mandate. It can order the production of documents; summon witnesses, and record statements on oath. It can also undertake search and seizure operations (so-called "dawn raids") at the premises of firms, and individuals. Pending the final outcome of an investigation, the CCI may adopt interim measures.

The Damages claims resulting from infringements of the provisions of the Act relating to anti-competitive agreements, abuse of dominance and regulation of combinations will only be admissible – in the Competition Appeals Tribunal – once the CCI has established that an infringement has occurred. Damages claims may also be brought in case of contravention of any orders of the CCI or Appellate Tribunal. Enforcement will be concentrated to one specialist agency and litigation channelled into one specialist court. This concentration of jurisdiction should facilitate development of decisional practice and case law.

The CCI has extra-territorial jurisdiction, in the sense that it can undertake an inquiry notwithstanding the fact that an agreement or an abuse of dominance or a combination has taken place outside India so long as there is an Appreciable Adverse Effect on Competition within India.

Indian context

It is important to compare the existing merger enforcement provisions of India to those in the US\EU to examine its suitability as against the global scenario. It may be noted that in the US, as per the Sherman Act and the Clayton Act, horizontal mergers, that is, merger of firms in the same market are treated most harshly as they are most likely to have anti-competitive repercussions. Vertical mergers, as those between suppliers and customers, are treated significantly less stringently. The severance of undertaking can be ordered if the combined market share exceeds prescribed limits, as in Standard Oil and AT&T and as being contemplated in the Microsoft case. However, Indian laws have not adopted this approach; severance of undertakings can be ordered only if large market share of the combined undertaking is found to be against public interest.

In a developing country, there is a requirement to establish monolith organizations on a level where they will be able to take on global players on the basis of sheer size and economies of scale. Thus, the absence of enforcement guidelines is a blessing in disguise, as they do not impose restrictions on capital and asset build up. The enactment of Competition Law must not be too strict with pre-merger requirements but allow the merger to take place without any restrictions. The only question that remains to be answered is if the merger would result in an increased burden on the consumer. This is the approach that has been adopted by the Indian Law.

In this context, it is heartening to note that the Supreme Court of India in the Hindustan Lever case, took note of the liberalization process and the steps taken by Parliament which make it clear that the legislative actions were not against mergers, even if they lead to an increase in market share after amalgamation.

The Hindustan Lever case involved the proposed merger of Hindustan Lever Limited (HLL) and Tata Oil Mills Co. Ltd (TOMCO). HLL had 54 per cent share of the soaps market and 83 per cent share of the detergent market. TOMCO had 24 per cent share in the soaps market. In a separate ruling, the Supreme Court approved the merger of HLL and TOMCO and stated that a merger cannot be stopped on what might happen in future.

Intellectual property concerns

Apart from the restructuring the Indian industry through mergers and acquisitions among multinational corporations, the emerging scenario in India appears to be one of market presence consolidation and dominance in such core industries as communication, information technology and biotechnology.

This would give rise to a number of intellectual property concerns regarding the enforcement of competition laws in hi-tech industries characterized by rapid innovation and substantial intellectual property rights. The stakes in this are extremely high. A continued advancement in technology is crucial to the development of the economy. More than ever before, increases in productivity and sustained economic growth are tied to the country's ability to innovate. Hence, it is crucial that Indian economic laws, including Competition and Intellectual Property Laws, create a legal environment that fosters and does not suppress innovation.

An inorganic growth or the external growth refers to growth in business operations or finances facilitated by the mergers, acquisitions, takeovers etc. Within the broader inorganic growth strategies, there are various forms, which are similar in spirit but different in either the structural form or the legal procedures. These sub-categories of inorganic growth may be called by different names such as amalgamation, acquisition, merger, etc. However, the nomenclature and these differences are inconsequential to the competition assessment in India.

The competition assessment is undertaken in accordance with the substance, the spirit of the transaction and not by its structural form. The Competition Act, 2002 uses the term 'combinations' to include the various M&A forms stated above. Not all M&As are required to be pre-notified to the Commission for competition assessment. When used in the context of the Competition Act, a combination means and implies M&A transactions which meet the threshold set out in the Act. The Competition Act, 2002 also uses the expressions acquisition, merger and amalgamation in section 5 of the Act. However, only those transactions which exceed the value of asset or the turnover require prior-approval from the Competition Commission of India and qualify as a "combination".

The Competition Commission of India has also issued the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 to set out the procedure. Further, the Government of India has the power to exempt class of transactions under section 54 of the Act by issuing notifications in this regard. This section focuses on all the three factors relevant to the scope of combinations in the Competition Act viz., the substance of the provisions of section 5 (referred above), the regulations related to notification of combinations and GOI notifications.

Laws Governing M&A in India under the Companies Act, 2013

Section 230-240 of the Companies Act covers the provisions relating to M&A including arrangements that cover companies, their members, and creditors. Section 232 talks about the procedure for the same. Moving ahead towards Section 233 read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, talks about fast-track mergers. This section was inserted to prevent companies from going through a lengthy procedure given under S-232. Provided they need to have approval from shareholders, directors, creditors of the company. In short, each person is directly related to a company. Section 237 says that the central government has the power for amalgamation in the public interest, and also lays down the procedure for the same. National Company Law Appellate Tribunal (NCLAT) deals with all grievances under company law.

The following laws primarily govern mergers and acquisitions ("M&A") in India:

- the Companies Act, 2013 and the rules, orders, notifications and circulars issued thereunder (as amended) (the "**Companies Act**"), which prescribes the general framework governing companies in India, including the manner of issuance and transfer of securities of a company incorporated in India and the process for schemes of arrangements of such companies;
- the Indian Contract Act, 1872 (as amended) (the "**Contract Act**"), which governs contracts and the rights that parties can agree to contractually under Indian laws;
- the Specific Relief Act, 1963 (as amended) (the "**Specific Relief Act**"), which prescribes remedies available to private parties for breach of contract;
- the Income Tax Act, 1961 (as amended), which prescribes taxation-related considerations with respect to M&A in India, and to transactions that have cross-border elements. Double taxation-avoidance treaties also play an important role;
- the Competition Act, 2002 (as amended) (the "**Competition Act**"), which regulates combinations (such as M&A) of companies and prohibits anti-competitive agreements, which have or are likely to have an appreciable adverse effect on competition in India;
- the Foreign Exchange Management Act, 1999 and the rules and regulations issued thereunder (as amended) (the "**FEMA**"), read together with the circulars, directions and rules issued by the Reserve Bank of India (the "**RBI**"), which collectively regulate foreign investment in India (the "**Foreign Exchange Regulations**"), including the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 (the "**Cross Border M&A Regulations**"), which govern mergers between Indian companies and foreign companies;
- the consolidated Foreign Direct Investment Policy Circular of 2020 (as amended), read together with the press notes issued by the Department of Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India (the "**DPIIT**");
- various pieces of Central Government and State Government labour legislation, which govern employment-related matters (such as terms of service, payment of wages, work conditions, safety, health and welfare of workers, etc.); and
- the Securities and Exchange Board of India Act, 1992 and the rules and regulations issued thereunder (as amended) (the "**SEBI Act**") read together with the circulars, notifications, guidelines and directions issued by the Securities and Exchange Board of India (the "**SEBI**"), which regulate the securities markets in India including acquisitions involving companies listed on stock exchanges in India (the "**SEBI Regulations**").

Further, additional sector-specific regulations may become applicable to a typical M&A transaction in India depending on the industry sector.

Mergers and amalgamations. In India, schemes of mergers and amalgamations are court-driven processes and require the sanction of the National Company Law Tribunal (the "NCLT") in order to be implemented. As an exception, fast-track mergers are possible in cases of mergers between certain categories of companies (e.g., mergers between small companies, start-ups, or between a holding company and its wholly owned subsidiary) where such mergers can be undertaken outside the NCLT process but with the approval of the Central Government.

In addition, the Cross Border M&A Regulations lay down the regulatory framework to facilitate international merger transactions in India. Any M&A transaction that complies with the conditions set out under the Cross Border M&A Regulations will be deemed to have been approved by the Reserve Bank of India (RBI). A certificate signed by the managing director, whole time director and company secretary of the concerned companies declaring that such compliance will be submitted to the NCLT. In addition, depending on the residential status of the resultant entity (Indian or foreign entity), compliance with the Foreign Exchange Regulations will need to be ensured by the parties. The Cross Border M&A Regulations define a 'cross-border merger' as a 'merger, amalgamation or arrangement' between an Indian company and foreign company in accordance with the rules under the Companies Act.

Merger control law

According to the relevant provisions of the Act, only those mergers & acquisitions are liable to be regulated that qualify under the definition of combinations under Section 5. Size is currently the only criteria for stipulating the post-merger review of mergers & acquisitions. Other arguably more valid criteria, such as the market size of a particular industry or the market share of an industry player, are not included. In India no provisions exist for the regulation of those mergers & acquisitions that do not fall within the meaning of combination and yet have the potential to affect competition adversely. There may arise a situation where not every merger comes under the definition of combination, yet may give rise to serious competition concern in a market. Therefore, most enterprises with a lower asset value and turnover would be excluded from this stipulation. Let us suppose a situation where there are only two competitors for a product and they decide to merge. However, their asset values as well as turnover are such that their merger would fall outside the definition of combination as given in the Act. Hence, despite causing clear appreciable adverse effect on competition, the merger would go unregulated.

In fact, the Associated Chambers of Commerce in India has carried out an analysis of the implications of the Act and its findings, report that practically every investment in India by a global major, will cross the thresholds stipulated in Section 5. The Competition Commission of India (CCI) will be able to investigate the deal irrespective of the position, the investment or joint venture will occupy in the marketplace. Conversely a smaller enterprise which may have a dominant position in the same marketplace will not necessarily meet the criteria and may avoid investigation.

The threshold values indicated serve only as a trigger for the investigative process and do not render the merger bad per se. The CCI would carry out a more detailed investigation before any action is taken against the particular merger. However, in view of the dynamics of the Indian economy and the unstable currency rates, the threshold values serve little purpose. It is therefore suggested that a suitable compromise would lie in listing several criteria like asset valuation and net turnover, market share, etc, the satisfaction of even one of which could trigger an investigation.

Conclusion

The Competition Commission of India has been active for less than two decades but the number of disposal of cases and the working of the Competition Appellate Tribunal, is evidence of the fact that in the short regime it has several achievements to its credit. The BRICS and the other consortiums of Nations have taken note of the same. India is emerging as a strong economy, whose presence inevitably goes unnoticed. There are large number of Foreign Direct Investments, Foreign Exchange Management Law, amended Companies Act, and a continuous passing of regulations and policies on promoting competition, Information and Technology Laws, and a home for a huge market, due to which Indian soil is aspired as a preferred destination in the transnational trade system.

We can conclude by stating that, the Competition law of India upholds the constitutional directives laid down in the Article 39 of the Constitution of India. Under this Article, the State is directed that the ownership and control of material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

As a part of the Central Govt.'s initiative of ease of doing business, regular efforts are taken to make Mergers and Acquisitions (M&A) filings simpler and faster. The CCI has introduced an automatic system of approval for combinations under the Green Channel route. Under this process, a combination is deemed to have been approved upon filing of the notice in the prescribed format. This system seeks to significantly reduce the time and cost of transactions for parties seeking approval under the Competition Act, 2002. However, it is essential to be cautious that the purpose of the Antitrust / Competition law is not defeated in this endeavour. The intensity and velocity of the Competition law must be sensitive to the need of each economy and thus there cannot be an absolute uniformity of Laws, Regulations and Policies at the global level.

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Rental Management: Horizontal Impact in Vertical Relationships

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In December 2022, the President of UOKIK defined the warehouse space rental market - a new segment of the commercial real estate space market, specific to the Polish market, and classified the potential vertical impact on downstream markets as a horizontal relationship, consolidating existing case law practice.

The first such ruling in Poland was a franchise case (Eurocash/Eko Holding, 2016), where the President of the Office of Competition and Consumer Protection (UOKIK - Polish Competition Authority, hereinafter: NCA held that, under certain circumstances, the market power (market share) of franchisees could be attributed to the franchise network organiser. The decisions made in late 2022 are a response to the aggressive business model of financing development in the real estate market based on multiple project concentrations and represent a consolidation of past practices. NCA issued two decisions in analogous merger cases regarding the market for warehouse space rental where the management of the space was not limited to governance but also included the management of the space for rent. As a result, NCA qualified the manager's influence on management as if it were participating in the targeted (downstream) market. This means that in certain vertical mergers, if an upstream company, owing to contractual agreements, has equal rights to the downstream companies or may reach non-coordinated effects on the downstream market. The President of UOKiK classifies that a company's market shares in both markets as the combined market shares in the downstream market.

Both cases correspond - the concentration concerned the formation of a greenfield joint venture by two companies active in the market for renting warehouse space. The concentration was intended to create a joint-venture vehicle for a new greenfield warehouse investment. The JV was to construct real estate warehouse and then rent the constructed warehouse space out to third parties and subsequently carry out activities aimed at selling this warehouse space. One of the notifying parties was the developer of the warehouse space, which it leased out for 2-3 years to third parties and then to resell it to a property investor. The other notifying party was a real estate investor who had already been leasing out warehouses to third parties in its portfolio. Thus, there was a common relevant market in the concentration- the local market for renting out warehouse space in the municipality.

The first notifying party, who had also been developing warehouses at the time, was active at all levels of the warehouse real estate business - development, rental, and management of third-party space. Analysing the case, the NCA concluded that the notifying party, which owns the warehouse space (as the owner) and leases it to third parties on its behalf, as well as manages third-party space, as a manager may exert influence on the lease of such space owned by third parties. The combined shares of owned space and managed third-party space - assuming the local size of warehousing space to be leased - would significantly exceed 20%, so the NCA conducted a market investigation. The warehouse space market in Poland has developed dramatically over the last 10 years and has almost quadrupled. In 2010, warehousing space was 6.4 million m2 in 2015 - 9.9 million sqm and 2021 - 23.8 million m2. In the local geographic relevant market, the growth of construed warehouse space reached 250% in three years, and the increase of warehouse space under construction was almost eight times that.

Up until this decision, the jurisprudence of the NCA in the product market of real estate corresponded to the European Commission's practice – the market could be divided into the market for real estate development services, the market for real estate rental and the market for real estate management, and commercial and residential properties constitute separate product markets. At the same time, following the previous case law practice of the President of the Office, the following markets are distinguished as separate markets with regards to commercial space rental: office space rental, retail space rental and industrial space rental. In the past, NCA defined the market for the rental of commercial space and pointed out that warehouse space is flexible in terms of the use in question for various purposes and considered warehouse space as industrial. In this case, due to the rapid development and specificity of the Polish commercial real estate market, NCA considered that warehouse space and industrial space are no longer interchangeable with each other, and thus cannot constitute a single relevant product market, and consequently a new segment of the commercial space rental market was identified:

the warehouse space rental market (in addition to office, retail and industrial space rental markets).

The President of UOKiK indicated that entities operating in the rental market are not only (I) owners whom themselves rent space out to third parties but also (II) entities that rent space out to third parties on behalf of the owners of warehousing space. While some entities might not be the actual owners of storage space, and as a result of pertaining circumstances – law or contractual obligations – they nevertheless control- the rental of the storage space, and should be considered the second group (II). The outsourcing of the rental management, even while preserving the warehouse owner's right to make the final decision, constitutes a delegation of responsibilities to the service provider to be performed. As a result of such delegation, the entrusted rental management owner of the warehouse space, in most cases, ceases to manage the affairs leaving decisions to the accepting service provider of rental management services, and limiting its interaction regarding the rental of the warehouse to the interaction with the rental manager, who then presents any said issues that require approval.

The President of UOKiK stressed the purpose of the management contract is to entrust the management and leasing of the property to a professional service provider. As a result, irrespective of whether the landlord has the right to the final decision to conclude the rental agreement, it must be assumed that the rental management entity has control over the rental. By managing the rental of unoccupied warehouse space, the rental manager of this space learns the market expectations of the lessors, and the market expectations of the lessees coordinates the rental prices, sets, and standardises the rental conditions, as well as knows the expected rates of the owners of the warehouse space, to which he also belongs. Ultimately, therefore, the rental manager has a great deal of economic information about the market, about the expectations of competitors in the relevant market and, as (when acting as a landlord of the space it owns) it is a direct competitor of those whose space it rents, it can coordinate its pricing behaviour as a landlord of its own and others' space. In effect, the rental management service provider becomes the entity with de facto influence over the rental of the managed property.

Given the above, the volume of space held for lease, as well as the volume of third-party space managed by the notifying party, was aggregated and qualified as de facto space rental under the notifying party's control. Despite this, the analysis provided grounds to conclude that competition will not be significantly restricted as a result of the concentration and the case was closed.

Recent Develepoments in Portugal

Margarida Matos Rosa
Former President of the Portuguese Competition Authority

The Autoridade da Concorrência[1] (AdC) has, like other competition authorities, an important role in reviewing mergers prior to their implementation. Its main goal is to ensure that mergers and the market changes they induce do not have any negative impact on competition. Portuguese Competition Law[2] has provided the main framework for governing merger control. Its rules are similar to those of the EU Merger Regulation (EUMR), with some differences such as a market share threshold, the possibility to appeal a decision to the minister of the economy, and any decision made by the media regulator that may restrict mergers.

In recent years, AdC has strived to improve the efficiency of its merger proceedings. The agency has increasingly allowed more companies to submit a simplified form, it has improved its electronic submission platform and has established several targets to reduce the number of days necessary to assess complex and non-complex mergers, as well as pre-notification assessments.

Moreover, the agency shares its concerns with other competition authorities over preserving innovation, and that includes killer acquisitions. Some members of the merger control team have integrated into the AdC digital task force, along with other antitrust team members and the chief economist's team, in order to adequately tackle digital mergers.

The agency has also opened an investigation into an antitrust after receiving merger notifications that contained strong indicia of anticompetitive behaviour.

Finally, AdC has sharpened its tools for detecting acts of gun-jumping and has sanctioned a number of firms that failed to notify properly or did not abide by the standstill obligation.

Key aspects of merger control in Portugal

Merger control in Portugal[3] is, in most of its features, similar to that of the European Union, with a number of noticeable differences detailed below. When assessing whether a merger is notifiable in Portugal, companies must consider the following:

1. There are two main criteria to take into account – annual turnover and market share[4]. The turnover thresholds are based on the combined annual turnover of the undertakings involved, while the market share thresholds consider the combined market share of the parties. In other words, mergers are notifiable if they result in:
   - An aggregate market share equal to or above 50%;
   - An aggregate market share between 30% and 50%, and individual turnover of at least two of the companies that exceed €5 million;
   - An aggregate turnover of €100 million in the country, provided that the turnover of at least two of the companies individually exceed €5 million.
2. For the sake of clarity with regards to the responsibilities surrounding the notification of a merger, companies may request a non-binding, confidential pre-notification assessment from AdC. Both substantive and procedural issues can be discussed and thus help companies eliminate any doubts about their responsibilities in a merger clearance. Over the past 10 years, AdC has received an average of 19 pre-notification requests per year. About 50% of such requests have led to notifications[5]. Pre-notification assessments take into consideration DG Competition's best practices on the conduct of EC merger proceedings.
3. Upon notification of a merger, assessment is conducted by AdC to determine its potential impact on competition in the relevant markets in Portugal. The assessment considers factors such as market structure and market concentration, competition from other firms, market power from buyers, roadblocks to entry and to expansion by competitors, and anti-competitive effects arising from the merger.
4. Most mergers need only a Phase I review, which may take up to 30 business days[6]. If concerns over competition are identified, AdC will carry out an in-depth Phase II review. In this case, AdC has a time limit of 90 business days from the date of the initial notification. During this phase, additional information may be required from the identified companies and associated third parties. Should the agency fail to issue a decision within the legal limits, the merger is

1 AdC, or Portuguese Competition Authority.
2 Chapter III of Portuguese Competition Law [in Portuguese]: https://www.concorrencia.pt/sites/default/files/documentos/Lei%20n.º%2017-2022.pdf
3 See AdC - merger control: https://www.concorrencia.pt/en/merger-control
4 The market share threshold is used also in Angola, Cape Verde, Mozambique, and Spain.
5 Over a 10-year period (2012-22), a total number of 205 pre-notification proceedings at the AdC seem to confirm the usefulness of the tool.
6 In 2022, the AdC required an average of 29 calendar days to approve a non-complex merger, compared to 33 in 2019 and approximately 39 in 2016.

considered cleared.

5. AdC may find that the proposed merger significantly reduces effective competition. In this case, companies may propose commitments to address the concerns and restore competition in the affected markets. Such commitments may satisfy AdC to clear the merger. If not, the latter can be blocked by them.
6. A merger that is blocked by AdC may be overturned and cleared by the council of ministers upon the proposal of the minister of the economy, if an underlying national interest7 exists. To that end, the minister must propose commitments that reduce the possibility that may hurt consumers.
7. All mergers involving regulated firms require an opinion from the relevant sector regulator. Such opinions are considered by AdC but these are generally non-binding. Only the media regulator can issue a binding negative decision. In such cases, the merger proceeding immediately halts and AdC does not pursue any further investigation.
8. When a company fails to notify of a merger that meets the thresholds, or if it does not wait for clearance -a situation also known as "jumping the gun"-, it can be sanctioned by AdC up to 10% of the firm's annual turnover.

Addressing failure to notify and the act of gun-jumping

Gun-jumping generally means a situation in which a merger has been implemented before notification or before the competition authority has cleared the merger. The term gun-jumping stems from athletics, it represents the start of a race, the moment (before) the start gun is fired.

Over a period of 10 years (2012-2022), AdC sanctioned seven firms who had been involved in mergers but had failed to notify prior to implementation. Six out of the seven sanctions occurred in the latter years (2017-22). During this time, the agency accentuated its efforts to detect gun-jumping cases and included this among its priorities. Overall, AdC investigated a total of 34 unnotified mergers between the years 2017-22.

As in many jurisdictions, the failure to notify a merger subject to prior review by AdC constitutes an infringement which can be sanctioned up to 10% of the said company's turnover.

Finally, to improve awareness of firms and their advisors on such illegal practices, in 2022 AdC published a Best Practices Guide on Gun-Jumping8 which has since proven beneficial to many. Some firms have come forward voluntarily in order to own up to their failure to notify and have thus benefited from settlement procedures.

Simplifying merger filings

In the pursuit for efficient merger proceedings, since 2009 AdC has favoured electronic filing. Firms and their legal advisers have responded positively to this forward move. By 2015, the rate of electronic filing reached a healthy 75%, steadily increasing up to 100% in both 2021 and 2022. Indeed, from the onset of the Covid pandemic, AdC has strongly encouraged the use of the platform and has even upgraded its own technology to accommodate this advancement. The system allows all the parties to keep their interactions electronic, including the submission of new documents, following the initial filing. It also allows all relevant parties to view each other's responses. In 2021, a similar platform was created for antitrust proceedings9.

More recently, in 2021, AdC approved new simplified merger control proceedings10. The three existing forms were reduced to two -the standard and the simplified forms- and AdC extended the applicability of the simplified form. This means that the simplified form can be used when the firms' aggregate market share does not exceed 20% in the same market, up from a 15% threshold. As a result, this means that less information needs to be entered, leading to swifter filing.

Appealing a merger

As mentioned above, a merger decision can be appealed both judicially and to the minister of the economy. In the latter case, the parties have 30 days to appeal if and when AdC block a decision. However, grounds for clearing the merger must be linked to national interest and the decision is taken by the Council of Ministers, upon the recommendation of the minister of the economy.

Since its inception in 2003, AdC has blocked a total of seven mergers. However, some high-profile mergers were withdrawn by the notifying parties given the concerns expressed by AdC. Of the seven blocked mergers, only one was overturned by the government, in 2006.

Structural remedies preferred

With regard to merger commitments, AdC guidelines are in line with EU law and practice. While some behavioural remedies may be pre-empted, recent practice has shown that

7 Such a reversion of the competition authority's decision by the minister of the economy occurred once since the institution's inception, in 2003. The merger concerned Brisa/Autoestradas do Oeste and Autoestradas do Atlântico (Ccent 2005/22) in the highways' concessions market. It was blocked by the AdC in April 2006 and approved almost 2 months later by the minister.

8 AdC (2022), Best practices guide on gun-jumping: https://www.concorrencia.pt/sites/default/files/Best%20Practices%20Guide%20on%20Gun-jumping.pdf

9 AdC (2021), press release: https://www.concorrencia.pt/en/articles/adc-launches-step-electronic-case-processing-system

10 AdC (2021), press release: https://www.concorrencia.pt/en/articles/adc-simplifies-mergers-notification

structural remedies have allowed AdC to resolve most of its concerns over proposed mergers. Some examples include the following decisions:

- Ccent 2021/36 JCDecaux/ Outdoor advertising concession in Lisbon[11], which led to a divestment in a concession award context,
- Ccent 2020/16 Pigments/Ferro assets[12], which led to a divestment and sale of the assets acquired to a third party, thus maintaining an equivalent offer structure when compared to the situation before the merger.
- Ccent 2017/39 Rubis/Repsol[13], which led to a divestment through a fix it first decision in which AdC assessed a proposed suitable buyer prior to clearance.

Annex I. Key statistics in merger control (2012-22)

Key statistics - merger control (2012 - 2022)	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Total number of decisions	59	44	39	63	63	54	48	59	50	59	62
Number of Phase II decisions	2	2	2	2	1	1	1	2	2	0	1
Number of blocked mergers	0	0	1	0	0	0	0	1	1	0	0
Number of voluntary prior assessments	2	12	33	30	20	17	12	24	17	19	19
Number of calendar days to decision (non-complex mergers)*	-	-	-	-	39	38	33	36	33	32	29
Calendar days to decision (Phase II)	-	-	-	-	-	-	-	14%	-5%	-	-21%
Number of working days in voluntary pre-notification assessment	-	-	-	-	-	-	-	-	9	19	13
Failure to notify / gun-jumping, of which:											
- new investigations	0	-	10	1	4	7	5	6	7	4	5
- sanctioning decisions	0	0	1	0	0	1	0	0	1	3	1
Notifications submitted electronically (in %)	-	-	-	75	88	88	73	83	96	100	100

11 AdC (2022), press release: https://www.concorrencia.pt/en/articles/adc-decides-not-oppose-exploration-jcdecaux-outdoor-advertising-concession-lisbon

12 AdC (2020), press release: https://www.concorrencia.pt/en/articles/adc-clears-acquisition-ferro-corporation-pigments-spain-subject-divestment-commitments

13 AdC (2018), press release: https://www.concorrencia.pt/en/articles/adc-clears-acquisition-repsols-lpg-business-madeira-and-azores-rubis-subject-conditions

Merger Control in Austria - Recent Experience With Digital Mergers

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Merger control is the third pillar of competition policy in Austria, alongside the prohibition of cartels and the abuse of dominant positions. The aim of merger control in Austria is to prevent the creation or strengthening of a dominant position or, since the last amendment of the Austrian Competition Act, a significant lessening of competition. According to the Austrian Supreme Court, a market structure with the largest possible number of 'independent' market participants and the resulting potential for competition should be maintained. Given the structural nature of merger control, only transactions that lead to a lasting change in the market structure are currently covered. The review is an ex ante assessment.

Application of Merger Control in Austria

Acquisitions between undertakings that constitute a merger pursuant to Section 7 and 9 Austrian Cartel Act and exceed certain turnover thresholds or transaction values must be notified with the Austrian Federal Competition Authority (AFCA).[1]

On the one hand, there are turnover-based thresholds in Austrian merger control. According to Section 9(1) Austrian Cartel Act, acquisitions must be notified with the AFCA if (in the last financial year prior to concentration)

- the undertakings concerned achieved a total worldwide turnover of more than €300 million;
- a total domestic turnover of more than €30 million, of which at least two undertakings each achieved a turnover of more than €1 million; and
- at least two undertakings each achieved a worldwide turnover of more than €5 million.

On the other hand, a transaction value threshold was introduced into the Austrian merger control regime in 2017, in addition to the turnover-based thresholds in Section 9(4) of the Cartel Act. Thus, the envisaged acquisition is also subject to notification with the AFCA if (in the last financial year prior to concentration)

- the undertakings concerned achieved a total worldwide turnover of more than € 300 million;
- the undertakings concerned achieved a domestic turnover of more than € 15 million;
- the value of the transaction amounts to more than € 200 million; and
- the undertaking to be acquired has significant activities in Austria (local nexus).

This legislative measure was mainly prompted by cases in the digital sector. However, Section 9(4) Austrian Cartel Act applies to all sectors. The transaction-based value threshold is subsidiary to the turnover-based thresholds in Section 9 (1) Austrian Cartel Act. The AFCA, together with the German Bundeskartellamt, has published guidelines on transaction value thresholds for the notification of merger projects. These guidelines provide comprehensive assistance, in particular with regard to elements such as 'value of the transaction' and 'significant domestic activities' and is available on AFCA's website.

Facebook/Giphy - Case example from Austria

a. **Background**

Giphy is a US provider of a searchable GIF library, whose GIFs and stickers can be accessed via Application Programming Interface (API) on many of the most popular social media platforms. Meta Platforms (formerly Facebook) acquired Giphy in May 2020. The transaction was at the time not notified in Austria.

b. **Acting prematurely?**

However, the value of the transaction exceeded €200 million. Apparently, there was also a sufficient local nexus in Austria, especially due to the relatively high indirect use of Giphy. Needless to say, the turnover of the undertakings concerned was well above the thresholds of €300 million worldwide and €15 million in Austria. Against this background, the transaction was notifiable to the AFCA in Austria pursuant to Section 9(4) Austrian Cartel Act. The AFCA therefore requested the Austrian Cartel Court to impose a fine on the acquirer (settled case). The Austrian Cartel Court imposed accordingly

1 And additionally, that the merger does not fall within the scope of the EU Merger Regulation (one-stop-shop principle, with the exception of media mergers in Austria).

a fine of €9.6 million on Facebook/Meta in July 2021. This is by now the highest fine imposed for gun jumping in Austria.

c. **Merger assessment in Phase 1**

Facebook/Meta subsequently notified the acquisition of Giphy with the AFCA. During the four-week Phase 1 review of the transaction, the AFCA gathered extensive information and received feedback from numerous market participants. The AFCA concluded that the transaction raised competition concerns and would strengthen the dominant position of Facebook/Meta. In particular, significant competition concerns were raised in relation to the restriction of non-discriminatory access to Giphy for other online services, the acquisition of competitively sensitive information about competing online services through the interface to the Giphy library built into many applications, and the foreclosure of potential competition from Giphy for advertisers. The AFCA therefore required an in-depth investigation by the Austrian Cartel Court (Phase 2) in August 2021.

The acquisition of Giphy by Facebook/Meta also raised competition concerns in the UK and was investigated by the CMA.

d. **Merger assessment in Phase 2**

The Austrian Cartel Court largely agreed with the AFCA and found that the transaction would strengthen Facebook's/Meta's market position. It was concluded that Meta held a dominant position in the market for social media (social networks such as Facebook as well as instant messaging services such as WhatsApp). Meta had high market shares and benefited from relatively high barriers to entry (including direct and indirect network effects). The Austrian Cartel Court also confirmed Facebook's/Meta's dominant position on the Austrian online advertising market. This was irrespective of whether search-related online advertising providers, such as Google, are also included in the relevant market. The Austrian Cartel Court also identified barriers to growth in the online advertising market (e.g., due to access to end-user data, which enables targeted advertising). The Austrian Cartel Court also followed the AFCA's argument that Facebook's/Meta's competitors would risk losing access to Giphy's services or receiving lower quality access after the merger. Facebook/Meta would thus have been able to improve its market position in both social media and online advertising in an anti-competitive manner. Although the arguments put forward by the AFCA were to a large extent accepted, the Austrian Cartel Court did not follow the AFCA regarding to the theory of horizontal harm.

In the view of the Austrian Cartel Court, clearance could only be granted subject to conditions. Among other things, the conditions require Facebook/Meta to provide non-discriminatory access to Giphy's GIF library for competing social media platforms (for a period of five years) and to provide alternative GIF libraries with access to Giphy's GIF library via API access, subject to certain conditions, to enable the emergence of an additional GIF provider alongside Giphy (Meta) and Tenor (Google) (for a period of seven years). The conditions are in force from the date of finalisation of all domestic and foreign merger control proceedings and are monitored by a trustee.

e. **Proceedings before the Austrian Supreme Court**

The AFCA has appealed against the decision of the Austrian Cartel Court due to certain discrepancies in the decision in March 2022. In addition to procedural aspects, the appeal to the Austrian Supreme Court focused mainly on the review of the full effectiveness of the conditions, the review of the first instance decision with regard to the sufficient consideration of the development without the merger and thus the question of which comparative scenario should be assumed in the analysis, and the review of the decision of the Austrian Cartel Court with regard to the sufficient consideration of the change in the market structure of GIF libraries.

As a result, the Supreme Court dismissed the AFCA's appeal in June 2022 and upheld the first instance decision.

In the UK, the CMA ultimately blocked the transaction in October 2022 and required Facebook/Meta to divest Giphy to a suitable buyer.

Conclusion

The case illustrates the challenges that can arise in relation to mergers in the digital sector. This concerns, on the one hand, the scope of application of merger control and, on the other hand, the substantive assessment. In this sense, a flexible legal framework seems necessary, which can also cover dynamic markets appropriately in merger control. In addition, international cooperation, especially in the CMA case, has once again proved to be of great importance. In May 2023, the governments ministerial conference decided that competition law should be strengthened[2], particularly merger control and the instrument of sector inquiries. This decision comes at a time where Austria struggles with inflation and sharp price increases in some areas.

2 Government ministerial conference, Anti-inflation package, available at (German only) https://www.ris.bka.gv.at/Dokumente/Mrp/MRP_20230510_58/010_000.pdf.

The Labor Turn in United States Merger Law

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One of the biggest shifts in United States antitrust law and policy has been a recent focus on anticompetitive conduct that harms labor markets and employees. This change has affected U.S. merger policy as well as conduct cases and added a new set of issues and concerns in addition to more traditional theories of consumer harm. Gone are days where employee layoffs or wage suppression count as procompetitive efficiencies, potentially justifying merger posing harms to consumers. This short articles describes how these trends play out in current U.S. merger policy in labor markets and in related Sherman and Clayton Act cases and investigations.

Harms to Labor Markets as Violations of Section 7 of the Clayton Act

Section 7 of the Clayton Act prohibits mergers and acquisition which may tend to substantially lessen competition or tend to create a monopoly.[1] Such potential harmful effects in either consumer, supplier, or labor markets are enough to prohibit a merger or acquisition. In the past, U.S. antitrust enforcers tended to focus nearly exclusively on potential effects in consumer (or at least purchaser) markets, rather than labor (or other suppliers) markets.

Under current policy, such potential effects in labor markets are unlawful anticompetitive effects in their own rights, justifying second requests and potential enforcement actions. This is a significant shift where assertions of merger based efficiencies and savings based on cuts in jobs or wages are now more of a confession, rather than a possible defense.

This fundamental change is based on newer research that points to greater monopsony and buyer power in geographically narrow labor markets then previously understood.[2] Both the Chair of the Federal Trade Commission and the head of the Antitrust Division of the Justice Department have highlight the increased interest in labor market issues in merger investigations and litigation in several recent speeches.[3] The agencies now routinely request documents regarding the potential effect of the transaction on employees in second requests to the merging parties and there is greater cooperation between the competition agencies and the National Labor Relations Board is reviewing transactions with potential harmful effects on labor.[4]

The Antitrust Division successfully challenged a proposed merger in the publishing industry on the grounds that the transaction "would likely result in substantial harm to authors of anticipated top-selling books." The complaint further alleged that the proposed transaction would "likely cause author income to be less than it would be otherwise" and "make it harder for authors to earn a living by writing books." The trial featured testimony from best-selling author Stephen King and resulted in a court verdict enjoining the transaction which was then abandoned by the parties without further appeal.[5]

Labor market issues will be an important part of new horizontal merger guidelines being drafted jointly by the FTC and the Antitrust Division with the assistance of legal and economic experts who focus on labor antitrust issues. In 2022, the agencies announced the launch of this project stating that "the agencies seek input on how to address the issue of buyer power in more detail in the guidelines. Labor markets are a key example of buyer power, and the agencies seek information regarding how the guidelines should analyze labor mar-

1 15 U.S.C. § 18.

2 Eric Posner, How Antitrust Failed Workers (2021); John Kwoka, Controlling Mergers and Market Power: A Program for Reviving Antitrust in America (2020); Suresh Naidu, Eric A. Posner & Glen Weyl, Antitrust Remedies for Labor Market Power, 132 Harv. L. Rev. 536 (2018); Hiba Hafiz, The Law of Geographic Labor Market Inequality, 172 U. Penn. L. Rev. (forthcoming 2023).

3 See, e.g., Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement, Docket No. FTC-2022-003, Jan. 18, 2022, https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf.;
Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section, Washington, DC, January 24, 2022,
https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york.

4 Dan Papscun & Robert Iafolla, Labor Violations to Receive New Merger Scrutiny Via Agency Pact, Jan. 22, 2022,
https://news.bloomberglaw.com/antitrust/labor-violations-to-receive-new-merger-scrutiny-via-agency-pact

5 Justice Department Obtains Permanent Injunction Blocking Penguin Random House's Proposed Acquisition of Simon & Schuster, October 31, 2022, https://www.justice.gov/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed.

ket effects of mergers."[6] The new merger guidelines also are expected to propose greater use of presumptions that certain transactions are anticompetitive, threats to potential and nascent competition, monopsony power more generally, and the unique characteristics of digital markets.[7] The draft versions of these new guidelines are anticipated to be released for public comment sometime in the summer of 2023.

Labor Antitrust Issues Beyond Mergers and Acquisitions

These developments in the merger area are consistent with a broader emphasis on how antitrust enforcement can be used to prevent harm in labor markets more broadly. As far back as 2001, private plaintiffs were successful in challenging an information exchange among competitors of salaries in the engineering industry that had the effect of depressing professional salaries.[8]

The Antitrust Division began enforcement efforts against no-poach agreements between competitors in 2010 with a civil consent decree barring such agreement in the high tech and entertainment sectors in Silicon Valley.[9] The FTC and Antitrust Division then issued joint antitrust guidelines for human resource professionals highlighting the risks of such agreements.[10] These initiatives were followed by a new Justice Department policy statement that any future no-poach or wage fixing agreements would be deemed per se unreasonable agreements under Section 1 and prosecuted criminally going forward.[11] The Justice Department has brought several such criminal no-poach and wage fixing cases, with some guilty pleas, but limited success at trial.

The Federal Trade Commission has used its civil powers under Section 5 of the Federal Trade Commission Act prohibiting unfair methods of methods to attack noncompete clauses in employment contracts, a different issue in labor antitrust. Following the issuance of a new policy statement in 2022 defining the scope of the prohibition on unfair methods of competition to include harms to workers and labor markets,[12] the FTC announced the entry of consent decrees in three cases barring the use of noncompete clauses in the glass container and employment agency industries.[13] The FTC has further issued a subsequent draft rule that categorically would prohibit the use of noncompete clauses in business subject to FTC jurisdiction except when ancillary to the sale of a business or the formation/dissolution of a partnership or similar entity.[14]

Conclusion

The turn to using antitrust law to prevent harm to labor markets is in full swing in the United States. This is a welcome turn from the early days of the Sherman Act in the late 19th century when the antitrust laws were too often used to harm the interests of unions and labor, rather than protect employees from the misuse of monopsony power and collusion by employers. There is still much work to be done, including defining how such labor market concerns will be addressed in concrete terms in the new draft merger guidelines and how the US courts will decide such matters in actual litigation. However, the United States is not alone in this efforts, with Canada, the United Kingdom, and other jurisdictions considering how best to incorporate potential harms to labor markets into their competition laws as well.

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6 Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers, January 18, 2022, https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal.
7 Id.
8 Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001).
9 Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements, September 24, 2010, https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.
10 Antitrust Guidance for Human Resource Professionals, U.S. Dep't of Justice, Antitrust Division & Federal Trade Commission, Oct. 2016, https://www.justice.gov/atr/file/903511/download.
11 No-Poach Approach, Antitrust Division, U.S. Dep't of Justice, https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach.
12 Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202, November 10, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf
13 FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers, January 4, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers.
14 FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, Jan. 5, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

NEWS FROM THE REGION

Synergising National and International Expertise in Competition Policymaking – the Case-study of the OECD and the Republic of Uzbekistan

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Foreword

Designing an effective national competition policy is a demanding process. To support domestic markets and facilitate economic growth,[2] this policy must consider multiple variables, including the country's economic characteristics, legal and institutional setup, and international trade/business relations.[3]

Proper consideration of these variables requires extensive resources and expertise rarely available in jurisdictions with novel competition regimes.[4] Consequently, these jurisdictions require a synergy between domestic know-how (a deep understanding of national markets/institutions) and international expertise (a thorough knowledge of universal and essential aspects for effective competition policymaking). Such synergy better balances internal market needs and external obligations, leading to more effective competition policymaking. This point is illustrated below by overviewing the prelude, drafting, content and effects of the recent (2022) OECD report on Uzbekistan's competition law and policy.[5]

Prelude – Uzbekistan's Competition Policymaking between 1992-2022

Uzbekistan adopted its first competition legislation in 1992.[6] Like other formerly regulated economies,[7] this legislation - alongside its implementing body - underwent several rounds of substantial changes between the late 1990s and early 2010s.[8] The frequency (and occasional inconsistency) of these changes complicated their implementation. Consequently, by the mid-2010s, national competition law and policy required a significant overhaul to effectively support the development of the national economy.

Uzbekistan started such an overhaul in 2017. First, a four-year National Strategy of Development (NSD 2017) envisaged wide-scale economic reforms, including enhancing competitiveness on domestic markets.[9] The adoption of the NSD 2017 was followed by the establishment of a new, independent competition enforcer – Competition Promotion and Consumer Protection Committee (CPCPC) – in 2019.[10] Finally, a four-year competition action plan (2020-2024)[11] envisioned comprehensive amendments to relevant domestic legislation.[12] Uzbekistan began to draft these amendments in 2021 and actively searched for 'outsider' expertise to ensure their alignment with the best international practices.

1 The opinions expressed in this article are the author's own and do not necessarily reflect those of her employer
2 OECD (2014), Factsheet on How Competition Policy Affects Macro-Economic Outcomes, 2-5, http://www.oecd.org/daf/competition/2014-competition-factsheet-iv-en.pdf.
3 Gal, M. and Fox, E. (2014), Drafting Competition Law for Developing Jurisdictions: Learning from Experience, NYU Law and Economics Research Paper No 14-11, 9-18, https://ssrn.com/abstract=2425329.
4 Jenny, F (2016), "The institutional design of Competition Authorities: Debates and Trends", 42-47, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2894893
5 OECD (2022), An Introduction to Competition Law and Policy in Uzbekistan, https://www.oecd.org/daf/competition/an-introduction-to-competition-law-and-policy-in-uzbekistan.pdf.
6 https://antimon.gov.uz/en/about-the-committee/committee-history/.
7 OECD (2022), fn 5, 11.
8 Ibid, 11-12.
9 http://tashkenttimes.uz/national/541-uzbekistan-s-development-strategy-for-2017-2021-has-been-adopted-following-discussion.
10 Originally Anti-monopoly Committee of the Republic of Uzbekistan, the Committee was renamed by the Presidential Decree No PD-269 (2022) "On measures to implement administrative reforms in the new Uzbekistan", https://lex.uz/en/docs/6324798.
11 Presidential Decree No PD-6019 (2020) "On additional measures to further develop the competitive environment and reduce government involvement in the economy", https://lex.uz/docs/4887659.
12 OECD (2022), fn 5, 13.

2022 Report on Competition Law and Policy

1. **Collaboration between OECD and Uzbekistan during the Report-Building Stage**

The above-described developments coincided with the launching of a three-year project, "Fair Market Conditions for Competitiveness in Six OECD partner countries".[13] Considering the desire for broader market-related changes and the immediate necessity for international expertise, Uzbekistan was designated as a project beneficiary.

The report-building process involved three interdependent aspects:

- Critical analysis of Uzbekistan's competition legislation;
- Benchmarking enforcement/institutional data against 73 jurisdictions within OECD's CompStat database; and
- In-depth conversations with national experts, including CPCPC staff, other government bodies engaged in economic policymaking, academics and legal practitioners.[14]

Such collaboration enabled OECD experts to acquire valuable insights, including placing Uzbekistan's competition law and policy in a broader national economic vision and institutional aspects affecting its implementation. These insights informed the report that paid close attention to the characteristics of domestic markets/institutions while elaborating on effective ways of improving competition policy.

2. **Principal Findings and Recommendations**

The report identified significant improvements in Uzbekistan's competition law and policy after establishing an independent competition enforcer – CPCPC.[15] Meanwhile, it issued 13 recommendations to support alignment with the best international practices, divided into four principal areas: competition policy, institutional design, legal framework/enforcement, and international cooperation.

2.1. Competition Policy

The report observed multiple and partially clashing competition policy goals. It also identified two trends jeopardising policy effectiveness: focus on outcome-oriented goals (such as price reduction) over process-oriented ones (such as safeguarding competitive process) and intense pursuit of other policy considerations via competition enforcement.[16] Consequently, the report recommended clarifying and prioritising these goals to avoid enforcement inconsistencies.[17]

2.2. Institutional Design

The report maintained a twofold focus while assessing national institutions. First, it analysed the effectiveness of the principal enforcer (CPCPC). Second, it examined a broader administrative framework for competition policy implementation.

The CPCPC analysis revealed four principal shortcomings: a single-handed dependency of its chairperson's appointment and dismissal to the president of Uzbekistan; a broad mandate (including multiple non-competition functions) in the face of the staff shortage; low security of budgetary funding; and insufficient independence to engage with other state bodies pro-actively.[18] Consequently, the report recommended:

- Establishing a fixed term for the chairperson's appointment, alongside objective, transparent, and qualitative criteria for the appointment and early dismissal;
- Ensuring sufficient separation of CPCPC's competition and non-competition functions;
- Providing budgetary stability to ensure, inter alia, retainment of qualified staff over a prolonged period via competitive salaries; and
- Guaranteeing better government responsiveness to CPCPC's recommendations on competitive neutrality and the competition impact assessment of economic legislation.[19]

Examination of the broader administrative framework led to two key findings: undesirably extensive role of the president/government in drafting by-laws and soft law measures on competition enforcement and under-preparation of Uzbek judiciary to analyse complex economic evidence in competition cases.[20] Two additional recommendations addressed these issues, encouraging more freedom for the CPCPC in legislative drafting and training for judges in competition economics.[21]

2.3. Legal Framework/Enforcement

The report highlighted high annual numbers of antitrust and merger cases handled by the CPCPC. However, it also concluded that these numbers, combined with the limited enforcement powers, meant that the enforcer had to follow a quantity-over-quality approach in case-handing. Considering this shortcoming, the report addressed both substantive and procedural provisions of case handling. It observed:

- An unsatisfactory definition of anti-competitive agreements and a broad list of exemptions encompassing even hardcore cartels;
- Problems of assessing dominance solely based on market shares and keeping a formal registry of monopolies/dominant undertakings;
- Weak priority setting, investigative and fining powers that prevented effective antitrust enforcement;

13 https://www.oecd.org/global-relations/fair-market-conditions/; the project was financed by the Siemens Integrity Initiative.
14 For the detailed methodology and list of contributors, see OECD (2022), fn 5, 4 and 16-17.
15 Ibid, 14.
16 Ibid, 17-19.
17 Ibid, 52.
18 Ibid, 19-28.
19 Ibid, pp. 52-53, 55.
20 Ibid, 28-33.
21 Ibid, 53-54.

- The lack of clarity of definition and the substantive test for mergers; and
- Extremely short time limits that disabled complex substantive assessments in both antitrust and merger assessments. [22]

The findings were followed by four recommendations that advocated for a stricter approach for hardcore cartels, introducing a case-by-case and more comprehensive approach to defining dominance, clarifying concepts in merger control, and ensuring a proper procedural framework for competition enforcement.[23]

2.4. International Cooperation

The report observed two trends: low level of bilateral cooperation and infrequent engagement in/learning from multilateral forums such as ICN. The final two recommendations encouraged Uzbekistan to address these shortcomings to ensure constant adherence to the best international practices.[24]

Aftermath of the report

Published in June 2022,[25] the report supported ongoing governmental deliberations on the draft law on competition. It was followed by several significant developments, including introducing a stricter antitrust fining system in September 2022[26] and restructuring the CPCPC from January 2023 to help delineate competition and non-competition tasks within the enforcer.[27]

The Parliament of Uzbekistan approved the new law on competition in March 2023.[28] The law contains multiple amendments recommended by the OECD, including a stricter approach to hardcore cartels, renewed parameters for defining dominance, and improved enforcement and merger assessment powers.[29]

Concluding Thoughts – Way Forward

Despite multiple relevant reforms, Uzbekistan has a long way to go to achieve the effectiveness of its competition law and policy. The following three points are of particular significance:

- **Prioritisation of competition policy goals.** Despite the 2023 restructuring, the enforcer still deals with multiple non-competition mandates. While competition and non-competition staff are delineated better, the CPCPC needs to consider various policy goals in competition enforcement. Hence, it remains to be seen whether the current organisational structure will allow for optimal allocation of time and resources to 'core' competition goals/tasks.
- **Proper operational independence of the CPCPC.** The presidential influence remains strong in the by-law and soft law-making. For example, the discussed post-report fining and enforcer-restructuring changes happened via Presidential Decrees. Similarly, it is unclear whether nowadays the government bodies consider the CPCPC's legislative impact assessment more vigorously. These two shortcomings are hard to overcome as they require amendments in the broader institutional structure of the country (a strong presidential republic with relatively centralised governance). However, operational independence is also a key to effective enforcement. Hence, Uzbekistan should find a way to further empower CPCPC alongside respecting the integrity of its national institutional setup.
- **Competition enforcement with enhanced powers.** Prolonged deadlines and increased investigation/merger appraisal powers enable the enforcer to prioritise cases and adopt a quality-over-quantity approach in case handling. It is yet to be seen how the CPCPC will meet this challenge which, if successfully overcome, could lead to more effective competition protection.

Despite these challenges, the overall picture looks positive. The recent developments clarify that while Uzbekistan utilises international expertise, it does so step-by-step, with a keen awareness of its national economic and institutional environment. As mentioned in the foreword, such a synergic approach is the best way to establish an effective competition framework. Hopefully, Uzbekistan will consistently follow this approach in the future.

22 Ibid, 34-48.
23 Ibid, 54-55.
24 Ibid, 33, 53 and 55.
25 https://www.oecd.org/competition/an-introduction-to-competition-law-and-policy-in-uzbekistan.htm.
26 Presidential Decree No PD-101 (2022), "On Additional Reforms to Create Conditions for Stable Economic Growth by Improving Business Environment and Developing Private Sector", para 5, https://lex.uz/en/docs/6359076.
27 See fn 10 and https://antimon.gov.uz/en/about-the-committee/committee-structure/.
28 As of 18 June 2023, the law still awaits the presidential signature.
29 https://www.uzdaily.uz/en/post/79586; https://antimon.gov.uz/en/expected-changes-and-innovations-in-the-law-on-competition/.

ERA Conference in Hungary

On 22-23 June 2023, the European Academy of Law (Europäische Rechtsakademie; ERA), one of the most renowned legal training institutions in the international platform, held a two-day training course in Budapest called "Dawn Raids in Practice: Advance Competition Law Training", in cooperation with the Hungarian Competition Authority (GVH).

The two-day training course provided a comprehensive overview of the conduct of dawn raids by the European Commission and national competition authorities in the light of the Charter of Fundamental Rights of the EU and the case law of the CJEU and of the ECtHR.

In his opening speech, László Bak, Deputy President General of the Hungarian Competition Authority, welcomed the participants before highlighting how "The success of a complex procedure that can take years can hinge on a single piece of evidence. It is therefore very important that all parties involved, authorities, lawyers, and businesses, are aware of their rights and obligations during raids. Even without malice, participants may hinder the detection of cartels through ignorance or superficial knowledge of the law, making it more difficult for the authorities to ensure fair competition. This is why it is so important to share experiences and keep knowledge up to date at international level."

During the training, participants deepened their knowledge of what a dawn raid looks like in practice, of what powers investigators have and of the limits the courts' case law places on them. The training covered all stages of the dawn raids by top experts of competition law. Márk Pánczél, Member of the Competition Council of the Hungarian Competition Authority, emphasized that significant developments are taking place concerning inspections, as the methods of cartel detection are expanding, the bar for an inspection is getting higher and obstruction is becoming more costly. In his presentation, Vivien Terrien, Legal Secretary, General Court of the European Union, focused on the main issues related to the preparation and initiation of inspections.

Fiona Carlin, Partner, European Competition & Regulatory Affairs, Baker & McKenzie, talked about the importance of the preparation for dawn raids from a company perspective, while Anna Fekete, Senior Case Handler, Antitrust Section, Hungarian Competition Authority, highlighted the roles of the participants in the inspection from the authority's perspective. Both emphasized the importance of an effective communications strategy and relationship building for all the participants involved in the inspection.

Hubert Beuve-Méry, Senior Expert, Directorate COMP.G - Cartels, DG Competition, European Commission, drew attention to issues related to digital evidence gathering and LPP. Finally, Stanislas Martin, General Rapporteur (Head of Investigations Unit), French Competition Authority, lectured on the legal issues that ensue from inspections; he talked about continued inspection, grounds for challenging the inspection, and ex-post judicial review.

The sessions did not only focus on the main issues that might occur at different stages of the inspection, but the participants were also able to acquire new skills in practice through a simulated dawn raid conducted by Peter Citron, Professional Support Counsel. Through the workshop exercises, the participants also got practical advice on how to solve the most common problems and conflicts that arise during raids.

The participants, who had travelled from a number of countries for the Budapest seminar, were able to get acquainted better at the seminar dinner where invaluable discussions on dawn raids ensued.

GVH Conference on Sustainability and Competition Law - Main Takeaways

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The question of how competition law enforcement should treat the co-operation of competitors seeking more sustainable business practices while also restricting competition has been topical in recent years, especially in Europe. Indeed, the OECD held several best practices roundtables on green considerations,[2] and the European Commission dedicated a chapter of its renewed horizontal guidelines to sustainability agreements.[3]

The Hungarian Competition Authority (GVH)[4] joined these efforts in 2021 by surveying competition agencies and non-governmental advisors of the International Competition Network (ICN) as its special project for the 2021 ICN Annual Conference, held in Budapest.[5] Its main results were presented in several previous RCC Newsletters.[6]

The most recent GVH contribution was its conference focusing on economic aspects and the Hungarian experience.[7] The purpose of the event was two-fold: first, to present international best practices of economic analysis to the Hungarian audience, and second, to explore and better understand the state of affairs in Hungary. Accordingly, it was composed of two panel discussions: the Economists' Panel and a Practitioners' Panel.

As Csaba Rigó, President of the GVH, noted in his opening remarks,[8] a key question is how to compare sustainability benefits with competitive effects. This – among other issues – was addressed by the presentation of Paul de Bilj, Chief Economist of the Dutch Authority for Consumers and Markets (ACM), arguably the most experienced competition authority in the field. He presented Chicken of tomorrow, a case involving industry-wide co-operation of poultry farmers, chicken meat processors and supermarkets in the Netherlands, setting higher animal welfare standards in farming and production, but also making "regular" chicken meat unavailable in Dutch supermarkets.[9]

1 Csaba Kovács is Deputy Head of the Competition Economics and Market Research Section of the GVH. The views expressed here are those of the author and do not necessarily represent the official position of the GVH.
E.g., Environmental Considerations in Competition Enforcement, 01/12/2021.

2 E.g., Environmental Considerations in Competition Enforcement, 01/12/2021.
https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement.htm

3 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01).
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2023.259.01.0001.01.ENG&toc=OJ%3AC%3A2023%3A259%3ATOC
There are also draft guidelines concerning agricultural products under consultation:
DRAFT Guidelines on the application of the derogation from Article 101 TFEU for sustainability agreements of agricultural producers pursuant to Article 210(a) of Regulation 1308/2013.
https://competition-policy.ec.europa.eu/public-consultations/2023-sustainability-agreements-agriculture_en

4 In Hungarian: Gazdasági Versenyhivatal (GVH).

5 The survey report, including all of its annexes as well as the transcript of the accompanying panel discussion are available on the website of the GVH.
https://www.gvh.hu/en/gvh/Conference/icn-2021-annual-conference/special-project-for-the-2021-icn-annual-conference-sustainable-development-and-competition-law

6 Csaba Kovács: Special project: sustainable development and competition enforcement, Competition Policy in Eastern Europe and Central Asia, OECD-GVH Regional Centre for Competition in Budapest (Hungary) Newsletter No. 18, January 2022, p 55.
https://oecdgvh.hu/pfile/file?path=/contents/about/newsletters/Issue_No_18_January_2022_focus-on-market-studies---competition-policy-in-eastern-europe-and-central-asia&inline=true
Nasli Aouka: Sustainable Development and Competition Law: GVH Special Project, Regional Co-operation for More Effective Competition Policy, Competition Policy in Eastern Europe and Central Asia, OECD-GVH Regional Centre for Competition in Budapest, Hungary Special Edition Newsletter No. 20, September 2022, pp. 33-34.
https://oecdgvh.hu/pfile/file?path=/contents/about/newsletters/Newsletter_20_Special_Edition_Regional_co-operation_for_more_effective_competition_policy.pdf1&inline=true

7 Green Considerations in the Application of Competition Law, 07/06/2023, Budapest.
https://www.gvh.hu/en/gvh/Conference/green-considerations-in-the-application-of-competition-law/green-considerations-in-the-application-of-competition-law

8 https://www.gvh.hu/pfile/file?path=/en/gvh/Conference/green-considerations-in-the-application-of-competition-law/2023_06_07_Miniconf_-_Opening_Remarks.pdf1&inline=true

9 Fun fact: The catchy phrase of "Chicken of tomorrow" and competition were interrelated well before 21th century Netherlands. "Chicken of tomorrow" originally was the name of contests organised by the US Department of Agriculture after World War II to develop cheaper and more meaty chicken (Maryn Mckenna: The Surprising Origin of Chicken as a Dietary Staple, National Geographic 01/05/2018). https://www.nationalgeographic.com/environment/article/poultry-food-production-agriculture-mckenna

In its analysis, the ACM used a willingness to pay (WTP) approach to translate the benefits of improved animal welfare into consumer welfare, which made the comparison with the expected price increase possible. In a similar vein, WTP can be used to interpret sustainability benefits in a way that is meaningful in welfare analysis to determine whether an agreement has net benefits to consumers. The quantification of WTP is usually based on carefully designed consumer surveys.

Panagiotis Fotis, Commissioner of the Hellenic Competition Commission (HCC) also touched upon WTP, as it is discussed extensively in the Technical Report on Sustainability and Competition[10] which was jointly published by the ACM and the HCC in 2021. He also talked about another initiative of the HCC: its full ex-ante evaluation mechanism for sustainability agreements, called Sandbox platform,[11] aimed at providing legal certainty for parties of sustainability agreements without encouraging disproportionate restrictions of competition.

It has been subject to heated debate in Europe as to whether consumers should be fully compensated for the competitive harm they suffer from a restrictive agreement to fulfil the fair share criterion,[12] and whether only benefits that realized on the relevant market should count (given that sustainability agreements may have significant benefits that are realized elsewhere, such as in the case of reducing CO2 emissions, affecting the atmosphere of our planet).

Pierre Régibeau, Chief Economist of DG Competition addressed this issue, among others, when he discussed certain analytical aspects of sustainability agreements. He explained that the reluctance to accept less than full compensation for consumers who are affected by the restriction is based on legal tradition rather than economics. Still, the principle that buyers should not end up worse off as a result of the agreement is sensible in his view. One reason is that otherwise allowing the co-operation is tantamount to an environmental tax, which falls outside the mandate of competition law.

In his opening remarks, President Rigó pointed out that despite its activity in the field, the GVH has so far not encountered a single genuine sustainability agreement. The second panel, composed of experienced Hungarian practitioners, was keen to explore what has been going on in the field in Hungary, beyond the realms of the GVH, such as advisory activities or compliance efforts. Are sustainability agreements an area of interest to Hungarian businesses and law firms? Is anything happening, such as preparations and self-evaluation under Article 101 TFEU and its equivalent of Hungarian competition law?

Instead of individual presentations, this panel had a conversation with the participation of Aranka Nagy, Senior Associate at CMS Hungary, Álmos Papp, Attorney-at-Law at Bán, S. Szabó & Partners, and Iván Sólyom, Partner at Lakatos, Köves and Partners Law Firm, all involved in the preparation of the Hungarian national report on sustainability and competition for the 2022 Annual Congress of the International League of Competition Lawyers (LIDC).[13]

As it turned out, there is not much to report on, other than that law firms follow EU developments and keep their eyes open. Hungary is not alone in failing to impress sustainability agreement enthusiasts. ACM Chair, Martijn Snoep said recently in a podcast that he expected more business initiatives in the Netherlands after publishing guidance and making informal consultations possible.[14] Only one initiative involved a trade-off between competition and sustainability.

Have sustainability agreements been over-hyped? That is

10 https://www.epant.gr/en/enimerosi/publications/research-publications/item/1284-technical-report-on-sustainability-and-competition.html
11 https://sandbox.epant.gr/en/
12 The second condition of Article 103 (3) TFEU.
13 https://link.springer.com/book/9783031448683
14 @Echelle: Sustainability and Competition Law, with Martijn Snoep, Published on 06/12/2022. https://www.autoritedelaconcurrence.fr/en/video/echelle-sustainability-and-competition-law-martijn-snoep

possible. Other explanations are possible too, as our panellists argued. Comparison with the area of false green marketing claims – which also falls into GVH jurisdiction in Hungary – was telling. Green claims sell products and services, so they attract business attention; avoiding deception in marketing is an issue by default, so businesses are open to legal advice to get it right. Restrictive agreements, on the other hand, are associated with grave risk and secrecy in Hungarian business thinking, perhaps entailing restraint rather than action. Businesses also seem to be less interested in or aware of opportunities related to sustainability agreements.

The notion that more legal certainty through guidance might encourage businesses to engage in green co-operations was raised as well. According to panel members, not only original guidance can be useful – solutions developed elsewhere could be copied or referred to. The current GVH position, as President Rigó declared in his opening remarks, is that the new EU horizontal guidelines also provide sufficient guidance for Hungary for now. Nevertheless, our panellists apparently would prefer a more formal and binding reference.

The other side of the coin is that no panellist hinted on any concrete initiative which was killed by legal uncertainty, and we heard nothing from the panel that would indicate the existence of a drive towards sustainability agreements in Hungary that could be jeopardised by the lack of GVH guidance.

Open discussions were illuminating too. For example, a member of the audience noted that green marketing and sustainability agreements may connect in the future in Hungary, when businesses co-operate to establish green labels to advertise them (and hopefully to create the more sustainable products and processes those labels represent). Such developments would spark interest in sustainability agreements. The dialogue and networking continued during coffee breaks and even after the formal program had ended.

It is worth noting that all the points that were made during the conference remained within the existing general analytical framework. This is consistent with the view, also found by the aforementioned 2021 GVH survey, that green considerations have a meaningful role to play in competition law enforcement, but only without paradigmatic changes.

This event was primarily designed for a domestic audience, such as local lawyers and economists. Nonetheless, it also benefited from the presence of international participants, and some ideas prompted by the Hungarian circumstances may be relevant to other jurisdictions, including RCC beneficiaries.

Conference Report

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8th Šoljan Competition Law and Policy Conference held in Dubrovnik in, May 2023

The 8th Competition Law and Policy Conference in Memory of Prof. Vedran Šoljan - 'Goals of Competition Law and the Changing World' was held in Dubrovnik, Croatia from 25–27 May 2023. This three-day event was organised by the University of Zagreb-Faculty of Economics and Business (EFZG), the Croatian Competition Agency (AZTN), the Croatian Competition Law and Policy Association (HDPPTN), and the European Documentation Centre EFZG (EDC-KDC).

The conference was supported by the Academic Society for Competition Law (ASCOLA), ASCOLA Southeast Europe Chapter, ASCOLA Central Europe Chapter, the Centre for Antitrust and Regulatory Studies at the University of Warsaw, the ELI Croatian Hub, and the OECD-GVH Regional Centre for Competition in Budapest.

The conference was sponsored by Atlantic Grupa, BMWC, and DTB Law Firms (silver sponsors) and by KP&S Law Firm, Liszt & Partners Law Firm, Ericsson Nikola Tesla, Croatia osiguranje, ana Jadrolinija (bronze sponsors).

The Organizing and Programme Committee was chaired by Jasminka Pecotic Kaufman, founder of the Šoljan conference series and professor at the University of Zagreb. Members of the Organizing and Programme Committee included Vlatka Butorac Malnar, president of the HDPPTN and professor at the University of Rijeka, Dubrava Aksamovic, Secretary General of the HDPPTN and professor at the University of Osijek, Sinisa Petrovic, vice president of the HDPPT and professor at the University of Zagreb, and Alexandr Svetlicinii, co-director of the ASCOLA Southeast Europe Chapter and professor at the University of Macau.

The conference was held in honour of the memory of the late Professor Vedran Šoljan (1962–2008), one of Croatia's competition law pioneers. It traditionally offers a platform for discussion about recent developments in EU territory and national competition law. It has a particular focus on Central and East Europe (CEE) as well as Southeast Europe (SEE).

This year's agenda included topics such as the goals of competition law, institutional resilience and competition authorities, judicial review, private enforcement of competition law by consumers, and abuse of dominance. In addition, compliance workshops addressed practical issues in drafting competition law complaints, challenging infringement decisions, and drafting antitrust damages claims.

A Pre-conference Workshop was held to discuss 'Researching and Publishing in Competition Law', led by Professor Spencer Weber Waller (Loyola University Chicago).

The conference was opened by Professor Pecotic Kaufman, Chair of the Organizing Committee; Professor Butorac Malnar, president of the HDPPTN; Professor Mira Oraic, all of whom greeted the participants in the name of the EFZG Dean, Professor Sanja Sever Malis; Mirta Kapural, president of the AZTN; and Maria Pilar Canedo, Commissioner at the CNMC, head of the OECD-GVH Regional Centre for Competition.

A keynote speech on the topic of antitrust goals was given by Professor Spencer Weber Waller, Loyola University Chicago, who was visiting Croatia as a Fulbright Specialist at the time.

Following the keynote speech, a roundtable discussion ensued on the goals of competition law, and was moderated by Professor Pecotic Kaufman. The panelists included Oles Andriychuk, Newcastle University, Malgorzata Kozak, University of Utrecht, Marek Martyniszyn, Queen's University Belfast, and Giorgio Monti, University of Tilburg.

To get day two of the conference underway, the panel discussed Competition Authorities and Institutional Resilience . The panel, moderated by Professor Petrovic, included Mirta Kapural, president of the Croatian Competition Council, Margarida Matos Rosa, former president of the Portuguese Competition Authority, Andrej Matvoz, head of the Slovenian Competition Authority, Kamil Nejezchleb, Vice-chairman of the Czech Competition Authority, and Nebojsa Jovovic, director of the Montenegrin Competition Authority.

The next panel centered on collective consumer antitrust redress, and was moderated by Professor Ana Vlahek, University of Ljubljana. Professor Miguel Sousa Ferro, University of Lisbon, presented his study on collective consumer redress in Europe, pointing to the inefficiencies of most existing systems and identifying features which are likely to produce more favourable results. Professor Butorac Malnar discussed 'the myth' of collective consumer antitrust redress in Croatia, and focused on incasso-cession as currently the only available procedural tool that may act as a substitute to collective redress. Professor Lena Hornkohl, University of Vienna, focused on the concept of fair funds as practiced in US law and its transposability to consumer private enforcement in the EU. Mariya Serafimova from the Court of Justice of the EU analysed the power of courts to estimate harm and the impact of disclosure under the recent CJEU case law. Zoltan Marosi, DLA Piper Budapest, focused on examples of consumer compensation by the GVH in Hungary, the pros and cons of a "public redistribution" method and its applicability in the field of antitrust.

Then followed a roundtable on judicial review in Central and Eastern Europe, moderated by Professor Aksamovic. The panelists included Maciej Bernatt, University of Warsaw, Ondrej Blazo, Comenius University Bratislava, Jasminka Pecotic, University of Zagreb, Alexandr Svetlicinii, University of Macau, and Ana Vlahek, University of Ljubljana. In this panel, main features and challenges related to judicial review in Poland, Slovakia, Croatia, Bulgaria and Slovenia were discussed.

The next panel, Rethinking Article 102 TFEU, was moderated by Professor Butorac Malnar, with the participation of four panellists, Professor Giorgio Monti, University of Tilburg, Assimakis Komninos, White&Case, Brussels, Massimiliano Kadar, DG COMP and Renato Ferrandi, Italian Competition Authority. The first item on the agenda for the panel was dedicated to reviewing Article 102 at the EU level starting with an overview of the Article 102 package of 27 March 2023. This was followed by a discussion on the recent CJEU case law and the shift in the applicable legal standard. The discussion thus moved on to the consequences of the legal standard transition to the effects–based approach and the expectations of the Policy Brief, and the initiative for new guidelines on exclusionary abuse. Expressing their somewhat diverging views, the panellists debated the risk of under enforcement of Art 102 and how to possibly administrate the effects-based approach.

The third day was devoted to the competition compliance workshops. The first one dealt with the drafting a complaint to the competition authority. Professor Pecotic Kaufman and Mario Krka, DTBK covered a cartel-type situation, Marijana Liszt, Liszt & Partners and Mario Krka looked at examples of vertical restraints, while Professor Vlatka Butorac Malnar and Martina Prpic, KPS presented an abuse of dominance case.

The second workshop, led by Marijana Liszt and Professor Dubravka Aksamovic, was devoted to 'Challenging an Infringement Decision before the Court'.

The third and final workshop on how to draft an antitrust damages claim was led by Professor Sinisa Petrovic and Mislav Bradvica, BMWC.

For more information on the 2023 conference, as well as the earlier editions of this conference please visit https//pptn.net.efzg.hr.

NEWS FROM THE OECD

The Competition Committee (CC), Working Party 2 (WP2) and Working Party 3 (WP3) held meetings between 12-16 June

Ori Schwartz
Head of Competition Division, OECD

Antonio Capobianco
Deputy Head, Competition Division, OECD

Working Party 2 focused on Competitive Neutrality Toolkit (WP2).

The Secretariat presented the complete draft of the Competitive Neutrality Toolkit in support of the implementation of the 2021 Recommendation on Competitive Neutrality. The key OECD divisions tasked with policy issues (SOEs governance and trade), provided an overview and updates on their work.

Working Party 3 debated the potential revision of the 2005 Merger review Recommendation (WP3).

The members discussed a potential revision of the 2005 recommendation to determine the merits of a more comprehensive recommendation, one that keeps pace with recent developments in merger review.

The following topics on Policy were discussed:

Roundtable on Assessing and communicating the benefits of competition interventions (WP2). The roundtable was organised in two main parts. The first covered the wide range of communication tools used by competition authorities, including annual reports to Parliament, press releases and interviews with the media that target multiple audiences. Several competition authorities also conducted surveys to evaluate the awareness of competition law. Survey results are often used to assess the impact of communication campaigns. Lastly, several authorities detailed their efforts to communicate more efficiently with lawmakers and to encourage pro-competitive reforms. The second part of the roundtable focussed on impact assessment the input from which revealed that a growing number of authorities use a strategy similar to the one recommended in the OECD guide published in 2014.

Presentations on trials and experiments in competition and regulation (WP2). External experts and selected delegations provided examples, such as the use of trials in abuse of dominance cases that provide evidence of alleged harm or lack of harm (Spotify, Google) and also in testing remedies (Amazon Marketplace) and experimenting in a merger in the digital sector in Japan.

Roundtable on Future of leniency programmes (WP3). In light of the decline in the number of leniency applications and despite a recent resurge of applications in some jurisdictions, delegates discussed the effectiveness of their leniency policy, their recent amendments and complementary detection methods that they have introduced or reformed to increase the likelihood of detection and therefore the incentives to apply for leniency. Delegates pointed to several possible reasons to explain the decline, in particular recently introduced private enforcement, and the complexity of cartels and leniency applications (especially concerning international cartels).

Hearing on the relationship between competition and innovation (CC). A panel of experts presented their views, the most recent developments, and insights into the relationship between competition and innovation from a theoretical perspective. The panel discussed how competition affects innovation, how innovation can also shape competition and the relationship between competition and other drivers of innovation. On the latter, it concluded that other drivers of innovation such as firm size, the role of government policies and financing of innovation also impact the studied relationship significantly. The hearing then raised considerations on the implications of the relationship between competition and innovation on competition enforcement and policy. From the discussion, it was clear that although there is no consensus on the relationship between both variables, as it depends on multiple considerations, the way competition authorities perceived it has had an impact on their competition policy and on how they consider innovation in their enforcement procedures. For that, the Competition Committee will hold a dedicated roundtable in the next meeting where competition authorities will be sharing their experiences from their enforcement perspective.

Roundtable on Algorithmic Competition (CC). The roundtable discussed: (i) algorithmic theories of harm and example cases; (ii) whether existing competition law is sufficient enough to address algorithmic theories of harm and potential remedies; and (iii) how competition authorities can investigate algorithms. The discussion highlighted the range of methods available to investigate algorithms, as well as the breadth of evidence that an authority could consider. The most relevant technique will be case-specific. An authority will not always need to adopt sophisticated technical approaches, and simpler methods or evidence may be sufficient in some cases. There have still been relatively few relevant cases, and authorities have faced several practical challenges when investigating an algorithms. Authorities are steadily developing in-house technical knowledge and sharing experiences to overcome these challenges."

Roundtable on The Consumer Welfare Standard - Advantages and Disadvantages contrasted with Alternative Standards (CC). The Roundtable discussed the importance of standards given their interaction with the objectives of competition law and evidentiary thresholds, before considering the merits of different standards. There differing opinions on the importance of standards, although it was widely accepted that they interact closely with the evidentiary threshold However, not everyone agreed on the most appropriate standards for competition law, nor with the standards of various attributes used across jurisdictions. The discussion noted that standards need to take into account the wider societal context, and that this may lead to different choices, depending upon how a jurisdiction merits their variable attributes.

Roundtable on Competition in the Circular Economy (CC). The roundtable studied the relationship between competition and circular economy. The discussion highlighted that, since both competition and the circular economy encourage resource efficiency and maximizing the value of inputs and raw materials, the goals of competition policy and of circularity are able to prop each other up in several ways. Competition authorities can prohibit initiatives and behaviours that negatively impact competition and circularity. They can prohibit mergers with anticompetitive effects that also hinder or slow down the move to circularity or the development of circular economy innovations. Competition policy can also proactively support the circular economy through various advocacy efforts, such as opinions to Government in strategic sectors. In addition to several experts, the session benefitted from a presentation by ENV colleague and Circular Economy Lead, Peter Börkey.

Roundtable on Theories of Potential Damage for Digital Mergers (CC). This roundtable discussed the theories of harm currently used in the analyses of digital mergers, the potential need to develop new theories, and the challenges that this may present for competition authorities, including with respect to their ability to meet legal tests and standards of proof. Contributions from delegates indicated that many jurisdictions have already sought to fine-tune theories of harm to better reflect the specific characteristics of digital markets, including to account for network effects, harms to innovation and privacy, and the potential for mergers to entrench ecosystems. Some delegates indicated their intention to move further in this direction, including through the revision of merger guidelines, while others distinctly encouraged caution and a need to first identify a clear enforcement gap.

INSIDE A COMPETITION AUTHORITY: MONTENEGRO

Agency Questionnaire

The Institution

The Chairperson

Dragan Damjanović (April 2022-April 2026)

Finished primary and secondary school in Podgorica. Completed his basic management studies at the Faculty of Business Management in Bar, earning the title of manager in financial operations (Bachelor). Completed his specialist post-graduate studies at the Faculty of Economics, University of Montenegro in Podgorica, where he obtained the title of Management - specialist degree (spec.App).

He gained work experience in the NGO sector, Tax Administration and the Ministry of Finance of Montenegro. With the transfer of state aid control tasks from the Ministry of Finance to the Agency for the Protection of Competition on 1 January 2019, work engagements continued at the Agency for the Protection of Competition in the State Aid Control Sector. In 2021, he was assigned to the position of Head of the Department for State Aid Prior Control and Reporting.

By the decision of the Government of Montenegro from November 2022, he was appointed as the head of the negotiation group chapter 8 - Competition.

The members of the Board

Plana Karadžić (April 2022-April 2026)

Finished elementary school and high school in Podgorica. At the Faculty of Law in Podgorica, in 2010, completed basic academic studies, as well as post-graduate specialist academic studies - majoring in Constitutional, Legal - Political. On 29 November 2013, sitting before the Examination Commission of the Ministry of Justice, she passed the bar exam thereafter, she also passed the bar exam before the Commission of the Lawyer Chamber of Montenegro.

Started employment at the law office Dragoljub Đukanović in Podgorica, as an intern, after which she practiced law independently, until she was elected as a member of the Council of the Agency for the Protection of Competition.

Lepa Aleksić (April 2022-April 2026)

Graduated from the Faculty of Law in Titograd in 1982. Started working at the Republican Secretariat for Finance in 1985, in the Department for Normative Legal and General Affairs. From 1989 to 2011, she worked in the Ministry of Finance (Cadastre and State Property Administration) in the Department for Property Legal Affairs - second instance procedure. She moved to the Directorate for Competition Protection in 2011. From April 2016, assigned to the position of Head of the Department for the Protection of Competition on Regulated Markets in the Sector of Electronic Communications, Information Technology and Media Market. Member of the Negotiating Group for Chapter (8) - Protection of competition, since the founding of the group. Acting Director of the Agency for the Protection of Competition from 2018-2022.

Head of Staff

Nebojša Jovović (November 2022-November 2027)

He completed his basic and specialist academic studies at the Mediterranean University in Podgorica. He obtained the title of Master of Economic Sciences in 2014 at the Faculty of Economics of the University of Montenegro in Podgorica. He completed his doctoral academic studies at the Belgrade Banking Academy - Faculty of Banking, Insurance and Finance, where he defended his doctoral dissertation in 2022 on the topic “Limitations of market competition in the countries of Southeast Europe”.

After completing his basic academic studies, he began working as an economic-financial analyst and consultant on several projects. In 2017, he began employment at the Agency for the Protection of Competition in the Sector for determining prohibited agreements, abuse of a dominant position, assessment of concentrations, individual exemptions, and sector analyses. In the period from 2019 to 2020, he worked in the Department for Control of State Aid - Department for Direct Control, after which he was engaged in the Department for Analysis of Market Competition in the Agency until his election as Acting Director in April 2022. In parallel with his professional career, he also developed an academic career. Since 2018, he has been working as a teaching assistant.

Appointment system for the Chairperson and other key roles

The President and one member of the Council are appointed by the Government on the proposal of the state administration body responsible for economic affairs (Ministry of Economic Development and Tourism), while the other member of the Council is appointed by the Government of Montenegro on the proposal of the state administration body responsible for state aid affairs (Ministry of Finance). The President and members of the Council are appointed for a period of four years and may be reappointed. The President and the members of the carry out their duties at the Agency professionally. The President and the members of the Council cannot partake in parliamentary or otherwise public matters, nor are they allowed to participate in any other kind of professional activity. The Council of APC appoints and dismisses the director of

APC. The recruitment procedure is carried out by the Human Resources Administration.

The purpose is to shortlist the three most-promising candidates, though the list may include more candidates if they are equally qualified.

Once all the interviews have been conducted, the most suitable candidates are chosen, and the reasons for their selection are provided.

At this point, the Director then independently chooses who to hire.

Decision-making on competition cases

Final decisions on competition cases are made by the APC Council are based on a majority vote in the APC Council at the proposal of the director of APC. Council has three members.

Agency competences in competition

- ✓ Antitrust (agreements and abuses of dominance)
- ✓ Mergers and acquisitions
- ✓ Advocacy to other public bodies
- ✓ Market studies
- ✓ State aid

Other (specify) International cooperation.

Relevant competition legislation.

APC acts and enforces the Law on the Protection of Competition and by-laws , and which correspond fully with the EU competition law.

Other competences

One of the main responsibilities of the APC centres around active participation in the negotiation process on EU accession in Chapter 8 – Competition (two subchapters: Competition policy and State aid).

In addition to the ability to carry out its duties to protect competition, APC also actively assists state aid control.

Other APC responsibilities include determining competition research methods, a constant monitoring and analysis of competition conditions on the market and the markets of individual economic sectors, . APC also gives its opinions on the application of regulations of competition protection and state aid, it prepares the professional basis for the drafting of laws and by-laws in the field of competition protection and state aid, etc.

Number of personnel working for the authority

APC has two sectors, they are:

✓ Sector for the Protection of Competition, with four Departments:

1. Department for Assessment of Concentrations and Individual Exemptions, with one Head of Department and three employees,
2. Department for Determining Prohibited Agreements, with one Head of Department and 1 one employee, associate?
3. Department for Determining the Abuse of a Dominant Position with one Head of Department and two employees,
4. Department for Sectoral Analysis, with one Head of Department and two employees.

✓ Sector for State Aid Control, with two departments:

1. Department for Ex-Ante Control, with Head of Department and two employees,
2. Department for Ex-Post Control, with three 3 employees.

APC also has a Service for General Affairs and Finances, with one Head of Service and six employees.

Currently, the number of personnel at APC stands at 36.

Number of personnel working on competition

✓ Sector for the Protection of Competition, with four Departments:

1. Department for Assessment of Concentrations and Individual Exemptions, with Head of Department and three employees,
2. Department for Determining Prohibited Agreements, with Head of Department and one employee,
3. Department for Determining the Abuse of a Dominant Position, with Head of Department and two employees,
4. Department for Sectoral Analysis with Head of Department and two employees.

For case handlers/managers, please complete the following table.

Competence	Number of case handlers/managers
Antitrust	5
Mergers and acquisitions	4
Market studies	3
Advocacy to other public bodies	employees from all departments participate in preparation of the advocacy initiative, depends on specific questions from various fields.
State aid	6
Other	-
TOTAL	**18**

Accountability

The Agency answers to (or, reports to) the Government.

By the end of the first quarter of each year, APC is obligated to provide the Government with a work report of the previous year. It concentrates on the execution of laws and other associated regulations, data on the realisation of APC goals, an updated assessment of the current situation and measures taken to improve matters and a financial report.

Based on the data received from the state aid provider, the Agency prepares an annual report on the state aid granted for the previous year, which it submits to the Government and Parliament by the end of the second quarter of the year.

Antitrust enforcement over the last 24 months

Dawn raids

Five dawn raids, as follow:

- 1 dawn raid in the procedure to determine the prohibited agreement on the market of oil and oil derivatives,
- 1 dawn raid in the procedure to determine the prohibited agreement in the veterinary services market
- 3 dawn raids in the procedure to determine the prohibited agreement on the public procurement market.

Main cases

APC has worked on establishing a prohibited agreement on the market for the provision of veterinary services in Montenegro.

In procedure is the case for establishing a prohibited agreement on the retail market of oil derivatives, which had arisen due to concerted practices between the two largest competitors.

APC opened a new bid rigging case on the public procurement market,in response to the manipulation of three different bids made by three direct competitors whose intent was to increase the prices for their services.

Judicial review over the last 24 months

APC had no judgments by the Supreme Administrative Court in the reporting period.

Outcome of the initial judicial review by the Courts

Entirely favourable judgements (decision entirely upheld)	**2**
Favourable judgements but for the fines	/
Partially favourable judgements	/
Negative judgements (decisions overturned)	/
TOTAL	**2**

Main sentences

APC initiated two proceedings to determine the violation of competition, to which the two independent parties filed two lawsuits with the Administrative Court. The Administrative Court rejected these two lawsuits and sided in favour of APC.

Merger review over the last 24 months

Number of cases

Blocked merger filings	/
Mergers resolved with remedies	**1**
Mergers abandoned by the parties	**2**
Unconditionally cleared mergers	133
Other (specify)	**1 merger case rejected for failing to fulfil conditions**
TOTAL CHALLENGED MERGERS	**137**

Main cases

The procedure of one of the most noteworthy cases surrounding the retailing market of food products in Montenegro was carried out as per required. APC rules of conduct were adhered to accordingly.

Advocacy over the last 24 months

Main initiatives

APC has presented six Competition advocacy initiatives to: Ministry of Education, Ministry of Capital Investments, Environmental Protection Fund, Ministry of Ecology, Spatial Planning and Urbanism, Energy Regulatory Agency and to a local self- governing body.

Results

APC competition advocacy initiatives are normally presented to public bodies for evaluation.

These initiates debate/challenge the merits of competition protection and its regulations.

Market studies over the last 24 months

Main initiatives

In the last two years, APC has conducted two major analyses, namely:

- Analysis of retail and wholesale of food products
- Analysis of oil and oil derivatives.

In preparation for these two analyses, two smaller-scale analyses were undertaken to assist the procedures conducted by APC.

Interview with Mr Dragan Damjanović, President of the Council of Agency for Protection of Competition

Dragan Damjanović (April 2022 – April 2026)

Finished primary and secondary school in Podgorica. Successfully completed basic management studies at the Faculty of Business Management in Bar, earning the title of Manager of Financial Operations (Bachelor). Completed his specialist post-graduate studies at the Faculty of Economics, University of Montenegro in Podgorica, where he was afforded the title of Management – Honour's degree (spec.App).

Gained work experience in the NGO sector, Tax Administration, and the Ministry of Finance of Montenegro. With the transfer of state aid control tasks from the Ministry of Finance to the Agency for the Protection of Competition on 1 January 2019, his work engagements continued at the Agency for the Protection of Competition in the State Aid Control Sector. In 2021, he was assigned the position of Head of the Department for State Aid Prior Control and Reporting.

By decree of the Government of Montenegro, he was appointed as the head of the negotiation group chapter 8 –Competition in November 2022.

What are the main challenges that your authority is facing? What are your priorities for the near future?

The key challenge that our agency and our jurisdiction is currently dealing with is the need to reinforce and further enhance the administrative capacities, so we are in a stronger position to carry out our duties successfully and in a timely manner. Since I became President of the Council, we have taken on eight new employees, and this year at least six of them will be assigned to smooth running of the competition and state supported sectors. Through memorandums of cooperation with the Faculty of Law and Economics of the University of Montenegro, we are planning on two Master's students joining our ranks by the end of the year; they will join interns with a credible chance of finding permanent employment with us.

In accordance with one of the most important recommendations of the European Commission, all capacities of the Agency seek to ensure complete financial independence as a limiting factor for the further development of the APC in line with the practices of the national competition bodies of the member states. In coordination with our counterparts from the Ministry of Economic Development, and in accordance with the available resources available in terms of expert support, full attention will be devoted to drafting the Law on Amendments to the Law on the Protection of Competition by the end of 2023. This aims to enforce the penal code in the competition sector and the competence of the Agency, and thereby be a guarantor of the sustainability and bolster the control of the Agency in the competition sector.

What are the points of strength and of weakness of your authority?

Despite limited administrative capacities, the Agency has assembled teams capable of conducting dawn raids effectively; we regard this as, a vital cog for dealing with violations in the market. At the end of last month, the Agency divided its officers into three teams who carried out three separate dawn raids, all of which were in connection with specific violations of provisions made for tourists. Inspections were carried out in accordance with the rules applicable on the EU market.

The competence of the Department for Sectoral Analysis represents an area that needs to be further improved as a basis for identifying illegal practices in the market. In accordance with the current trends in the systems of the competent authorities of the member countries, the immediate future will focus on the transformation of the sector dealing with competition policy, where importance will be placed on the introduction of the chief economist and a team of people who will deal with all the details of how companies on the market conduct themselves. The transformation of the Department for Sectoral Analysis will represent the basis for identifying and penalising illegal practices carried out by those responsible.

Over the last two years, what decisions has your authority made that you are particularly most pride of? And which cases could have been conducted more efficiently?

In 2023, the Agency for the Protection of Competition conditionally approved the implementation of the concentration and the due diligence procedure. This is in relation to the acquisition of control by the Commercial Company for Trade and Services, "Mercator-CG" doo - Podgorica (Mercator CG) surrounding the retail business, "Franca Marketi" doo Bijelo Polje (Franca). When determining the relevant market on which the concentration will affect, the Agency determines the market for retail trade of food products in local shops with mainly food, drinks, and tobacco in Montenegro as the recognised product market.

By assessing the effects of the concentration on the wider relevant market, the Agency has determined that the implementation of the concentration in question does not lead to a significant prevention, limitation or distortion of effective competition, but determines that the less-recognised market - the market of retail trade of food products in such shops with predominantly food, drinks and tobacco in the Municipality of Plužine and the Municipality of Kolašin, Mercator-CG will fulfil the condition for the legal assumption of a dominant position, after implementation.

The Agency approved conditionally the implementation of the concentration of market participants on hearing how Mercator-CG was going to deal with those who violate the proposed guidelines.

How familiar is your country with the level of competiton? What policies do you have in place to tackle problems with competition?
Is competition compliance a significant concern for businesses?

The amount of knowledge our decision-makers have about the basic principles of competition is still rather modest.

Previously, via numerous media appearances, managers of the Agency had emphasised key obligations and identified potential violations on the market to hopefully prevent any illegal competition practices. Also, through the support of the project"Increasing the capacity of institutions harmonizing and implementing of EU acquis in the area of Competitiveness and Innovation" which was financed through IPA in 2020, the development of a Communication Strategy got underway, with the aim to raise participants' awareness of illegalities, as well as some other points of interest.

If you could make one major change to the national competition law tomorrow, what would it be?

The amendment would definitely be the introduction of fixed penalty policy within the competence of the Agency. With the fact that the preparatory actions in the form of communication with the Ministry of Justice have already been carried out, we are working on providing expert support through projects financed by the EU. Certainly, in 2024, we expect the adoption of the Law on Amendments to the Law on Protection of Competition, when the legal framework will allow the Agency to directly impose fines for violations on the market in the competition. By doing this, we will solve one of the key challenges that the accession negotiations put before the Agency, and commits to handling recommendations, and thereby we will ensure the conditions of this requirement to be evaluated as an advancement in the process of the Montenegro accession to the EU.

Do you find that international and regional cooperation is helpful? Is it working well?

I sincerely believe that regional integration processes contribute to a speedier fulfilment of obligations from the European agenda when they are inclusive and based on equal requirements for all participants. I am sure that what makes regional integration a potentially success story is not the previous achievements in that area on the European agenda, but the real will of the countries of the Western Balkans to become part of the EU family. I believe that the Montenegro position as a country that is the leader of the Western Balkans in the EU accession process, should play a proactive role on the regional level through deepening regional integration in competition.

In addition to the regional component, APC is dedicated to developing bilateral relations with national competition authorities of EU member states. We see bilateral cooperation as a useful instrument for fulfilling the recommendations of the European Commission through a more flexible framework for creating the necessary training for employees of the Agency. In addition, this type of cooperation provides direct insight into the procedures and ways of resolving complex cases of competition on the Single European Market. APC has just signed a Memorandum of Cooperation with their counterparts from the Bundeskartellamt and have provided expert support and training throughout 2023. Notwithstanding, the plan is to sign a Memorandum on cooperation with GVH, which seeks to harmonise cooperation between the two institutions on a bilateral level in accordance with the needs of APC and the resources of GVH. Communication with Spanish, Italian and Estonian colleagues has already been established.

What do you think about the OECD-GVH Regional Centre for Competition? In what ways could they improve the package?

In the context of European integration and regional processes started between WB6, I consider the GVH role as important in terms of transferring practical knowledge and experience that are needed every day in complex cases of infringements in competition in the Single European Market. In RCC, we have a reliable partner who focuses on the needs of partner institutions to ensure European standards in competition sector are met. I believe that the cooperation so far is very positive and employees at the Agency are delighted to participate in RCC trainings.

With a view to implementing the recommendations from the 2022 Report on Montenegro, it would be extremely advantageous to organize training sessions dedicated to the implementation of dawn raids. This should also include judges and prosecutors from the Montenegrin judicial system based in workshops dedicated to building judicial practice surrounding this matter.

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