# CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2021

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# CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2021

# BOSNIA AND HERZEGOVINA

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## 1. What are the main competition-related pieces of legislation in Bosnia and Herzegovina?

### 1.1. Legislation

In Bosnia and Herzegovina (BiH), the main piece of competition law related regulation, the Law on Competition (*Zakon o konkurenciji - BiH Official Gazette nos. 48/05, 76/07, and 80/09*) of Bosnia and Herzegovina (Act), was enacted in 2005 and subsequently amended on two occasions, once in 2007 and a second time in 2009. Inspired primarily by EU law, in particular the Treaty on Functioning of European Union (TFEU), the Act aims at protecting fair competition from prohibited agreements between undertakings (Art. 4 of the Act), abuse of dominant market position (Art. 10 of the Act) and prohibited concentrations (Art. 13 of the Act). Following the adoption of the Act, the competition authority enacted a number of bylaws regulating in more detail different aspects of competition regulation such as procedural framework and standards for application of the Act.

In general, the competition legislation of BiH is largely in line with the rules and principles of the EU competition law regime. Furthermore, Art. 43 para 7 of the Act provides that the BiH competition authority, the BiH Competition Council, "*for the purpose of assessment of the case, may apply the practice of the European Court of Justice and the decisions European Commission*." Therefore, the Act introduced the practice of the competition authority of the EU into the local system of competition protection in BiH. Moreover, BiH signed the Stabilisation and Association Agreement (SAA) with the European Community and its member states on June 16, 2008. By signing this document, BiH has received the status of a "potential candidate" in order to achieve full membership in the EU. Thus, BiH entered into a contractual relationship with the EU and recognized the importance of the approximation of the existing BiH legislation to that of the European Community and of its effective implementation. More specifically, in the early stages of the SAA implementation, the legal approximation needs to focus on fundamental elements of the internal market acquis as well as on other trade-related areas. At a further stage, BiH will have a duty to focus on the remaining parts of the acquis.

Approximation of the domestic legislation to that of the European Union started on the date of the signing of the SAA. In other words, since the signing of the SAA, it is the legal duty of BiH institutions to ensure that its existing laws and future legislation are gradually made compatible with the union acquis. BiH institutions are equally obliged to ensure that existing and future legislation is properly implemented and enforced (these provisions are contained in the so-called "Harmonization clause" of the SAA).

The most relevant provisions for competition law are contained in Art. 71 para. 2 of the SAA, which stipulates that any practices contrary to Article 71 shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the union, in particular from former Articles 81, 82, 86, and 87 of the EC Treaty (now Articles 101, 102, 106, and 107 of the TFEU) and interpretative instruments adopted by the Community institutions, i.e the Commission or the European Court of Justice (ECJ).

Therefore, while the Act gives to the BiH competition authority only the possibility to apply the practice and decisions of the ECJ and the Commission, Article 71, para 2 of the SAA requires mandatory assessment of the case on the basis of the case-law of the ECJ and the Commission. However, it should be noted that the Act was adopted in 2005, while the obligations of BiH arising out of the SAA did not come into effect until 2008. It may therefore be concluded that the obligation to apply the practice of the EU institutions exists for the institutions of BiH when implementing competition-related regulation (The first decision of the appellate division of the Court of Bosnia and Herzegovina (Court of BiH) that confirmed the importance of taking into account the EU legal regime and practice was from March 2012 (the *ASA Auto Case*). In this decision, the Court of BiH directly referred to the practice of the EJC and the Commission. This development seems to define the position of the Court of BiH in terms of necessary reliance on EU law in order to review a domestic competition case. More precisely, the Court of BiH directly applied criteria from the Decision of the EJC dated April 29, 2004, (the *IMS Health Case*) but without directly referring to the case in question.. In practice, this is unfortunately not so frequently the case. One of the reasons could be the lack of translations of the decisions of the ECJ and Commission in one of the official languages in BiH and, so far, the training of the relevant officials in this respect has been very limited.

### 1.2. Recent changes in legislation

As already stated, the Act was adopted in 2005. The Act was amended once in 2007 and once in 2009 mainly with the purpose of extension of certain procedural deadlines and amending the national thresholds triggering merger filing requirements as well as further alignment of the Act with the relevant EU regulation. As to the regulation, there were also no significant changes over the past two years. It is, however, worth mentioning that the BiH Council of Ministers, upon a proposal of the Council, in 2018 adopted the changes to the administrative fees for procedures before the Council increasing it significantly, especially with respect to the fee for Council's decision passed upon initiation of second-phase investigation where fees were increased from BAM 25,000 (approximately EUR 12,500) to 0,03% of the total turnover of

undertakings generated in the BiH territory setting the maximum at BAM 50,000 (approximately EUR 25,000).

### 1.3. Competition Authority

The BiH competition authority, the Competition Council (Council), is an independent authority responsible for enforcement of the Act and for monitoring competition in the market. It has exclusive competence to decide on the existence of activities prohibited by competition law in the BiH market (Art. 21 of the Act). The Council is competent for enforcing competition law in the entire territory of BiH, covering its entities and autonomous district (the Federation of BiH, Republic of Srpska, as well as the Brcko District of BiH).

The Council consists of six members. The mandate of all members of the Council lasts for six years with an option to be extended for additional six years. The Council submits its annual reports to the Council of Ministers of BiH, the highest executive body in BiH.

The Council is empowered, *inter alia*, to enact secondary legislation based on the Act; to define terms contained in the Act and applicable bylaws and prescribe their application; to issue opinions and recommendations *ex officio* or upon request of governmental institutions, undertakings, and their associations; to propose and initiate amendments to the Act; to recommend to the Council of Ministers of BiH the level of administrative taxes; to issue opinions on compliance of legislative acts with the Act; and to cooperate with national competition authorities from other countries.

The Council is a member of the International Competition Network (ICN) since 2005. Through its active participation in negotiations on SAA between BiH and the European Community, the Council cooperated (and still does) with international, European, and national organizations and institutions in the area of competition, and, on that basis, it may provide and request all the data and information related to factual and legal issues, also including confidential data. The Council also concluded a number of bilateral treaties with the countries of the Balkan region concerning cooperation and exchange of relevant information and support in completion law matters. Proceedings carried out before the Council are in their nature administrative proceedings. Therefore, while the Act provides certain specific provisions to be applied in such proceedings, they should mostly follow the general regulation governing administrative proceedings before the state-level governmental institutions. When the proceedings are completed, the Council issues a final decision that may be appealed by the dissatisfied party before the Court of BiH.

## 2. What are the main concerns of the national competition authority in Bosnia and Herzegovina?

As it is the case in most jurisdictions, the Act is also traditionally concerned with the following practices, which will be addressed in detail further below:

- Anti-competitive horizontal agreements (agreements between competitors, *e.g.* cartels to fix prices, share markets, or restrict output) and anti-competitive vertical agreements (agreements between different members of the distribution chain, *e.g.* resale price maintenance);
- Abusive unilateral behavior of dominant undertakings (*e.g.* excessive and predatory pricing, refusal to deal); and
- Merger control.

## 3. Agreements

As stated previously, the Act aims at protecting fair competition from prohibited agreements between undertakings. The Act regulates that all agreements, contracts, single provision of agreements or contracts, concerted practices, explicit and tacit agreements between the undertakings shall be prohibited, as well as decisions and other acts of undertakings (agreements) the object and effect of which is to prevent, restrict or distort competition on the relevant market and in particular those related to:

**a)** direct or indirect fixing of purchase and selling prices or any other trading conditions;

**b)** limit and control of production, market, technical development, or investment;

**c)** distribution of markets or sources of supply;

**d)** application of different conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;

**e)** conclusion of agreements that force the other party to accept additional obligations which by their nature or according to commercial practice have no connection with the subject matter of such agreements.

In contrast, on the face of the text of the provision, Article 4 of the Act contains a substantial difference as opposed to Article 101 of the TFEU which does not entirely explain itself from the legislative history. While Article 101 of the TFEU prohibits agreements that have as their object or effect the prevention, restriction, or distortion of competition within the common market, Article 4 of the Act contains the same prohibition but for agreements that have aimed at and resulted in the restriction of market competition. Thus, the Act seems to impose cumulative requirements related to the prevention, restriction, or distortion of competition whereas Article

101 of the TFEU requires a harmful object or an effect on competition. This difference in wording would indeed lead to a substantially more narrow application of Article 4 Act – essentially only to hardcore cartels. As Article 101 of the TFEU, in its wide applicability, is an essential part of the internal market acquis, it appears that such wording would not be in line with the duties BiH has undertaken under the SAA. Also, if Article 4 of the Act were only to include hardcore restrictions, it is hard to conceive which purpose the block exemption regulations adapted into BiH law would serve as a block exemption regulation typically aim at offering safe-harbors for agreements that only effect, but do not have as their object a restriction of competition. We have reasons to believe that this was caused by poor translation of Article 101 of the TFEU. Regardless of the cause, the provision should be repaired at the earliest opportunity as even an interpretation that would be in line with the SAA appears to be impossible against the clear wording of Article 4 of the Act.

The Act also makes a distinction between individual exemptions and block exemptions. Until now, bylaws have been adopted in particular for horizontal agreements, i.e the agreements on research and development and specialization; vertical agreements, *i.e.* the agreements on exclusive distribution, selective distribution, exclusive purchase, and franchising; agreements on transfer of technology, license, and know-how agreements; agreements on distribution and servicing of motor vehicles and insurance agreements. Furthermore, according to Article 7 para 3 of the Act, agreements fulfilling the conditions laid down in Article 4 (3) of the Act do not need to be submitted to the Council for assessment with respect to individual exemption (self-assessment regime).

However, the applicability of a block exemption regulation may help undertakings to assess and draft agreements in order to eventually conclude as to their compatibility with Article 4 paragraph (1) of the Act. Although their effect may be withdrawn by the Council in individual cases, block exemption regulation generally provides a non-rebuttable "presumption" that conditions for exemption are met (safe-harbour).

In BiH, the hardcore restrictions essentially follow the regulation from the EU. The sanctions that may be imposed on undertakings for such restrictions are the same as in the relevant regulation applicable in the EU.

Article 4 paragraph (2) the Act holds that any agreements or decisions prohibited pursuant to Article 4 paragraph (1) shall be automatically void. In practice, this nullity sanction, which is directly applicable by civil courts just as the rest of Article 4, plays an important part in the civil enforcement of BiH competition law as it allows parties to free themselves from anti-competitive agreements by simply relying on Article 4 paragraph (1) in conjunction with Article 4 paragraph (2) of the Act.

Nullity applies as soon as the criteria of Article 4 paragraph (1) are established (*ex tunc*) and is absolute, meaning that anyone including a party to the prohibited agreement may rely on it. The consequences of nullity, including the destiny of the rest of the contract, which may or may not be severable from the part infringing Article 4 paragraph (1) of the Act, is to be assessed under civil law rules.

Finally, as is the case with the TFEU, there is no presumption of illegality if conditions are not met, meaning that an individual assessment under Article 4 paragraph (3) may still lead to a finding of compatibility with Article 4 paragraph (1) of the Act. Compared to the application of a block exemption regulation, an individual assessment under the four criteria of Article 4 paragraph (3) is a challenging endeavor that usually cannot be undertaken without the expertise of an economic expert. As is the case with Article 101 (3) of the TFEU, Article 4 paragraph (3) outlines the following four criteria and requirements a) efficiency gains, b) fair share for consumers, c) indispensability, and d) no elimination of competition.

The practice of the Council was in general quite slow over the past two years. According to the online record of decisions available at the website of the Council, the authority initiated only two *ex officio* investigations. One was ultimately halted due to failure of the authority to complete the proceedings within statutory deadlines set in the Act (*Case no. UP – 01-26-3-004-43/20*) while the second one (*Case no. UP-05-26-3-026-53/19*) resulted in a fine in the amount of BAM 12,618 (approximately EUR 6,500) while ordering the undertaking also to change its supply contracts. Analyzing the individual decisions passed by the authority, one could conclude that there were no cases of significant relevance. The authority was mainly rejecting the applications of the undertakings on various grounds primarily determining that no violation of the competition regulation was identified during the proceedings. What is however indicative is that most of the cases were filed by local businesses against the government, various government agencies, state-owned enterprises, and other government bodies including telecom incumbent operators and media. As to the industry sectors, cases were mainly related to the media and telecommunication industry, health services, postal, and utility services.

### 3.1. Leniency policy in Bosnia and Herzegovina

When adopting the set of bylaws regulating certain aspects of competition regulation in more detail in 2006, the Council also adopted the *Regulation on the Procedure for Granting the Immunity from Fines* (Leniency Policy). In order to harmonize this bylaw with the *European Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* from 2006, the Council in

2010 adopted a new bylaw on leniency policy. It regulates the procedure and conditions for granting immunity from fines or reducing the fines in cases when an undertaking participates in an agreement from Article 4 paragraph (1) of the Act. For the leniency policy to apply, an undertaking applying for immunity from fine:

**a)** must end all its activities related to alleged infringement of the Article 4 paragraph (1) of the Act at latest upon filing of the application for immunity from fine;

**b)** must not inform other parties to the agreement concerned on its application for immunity from fine;

**c)** must cooperate fully, on a continuous basis and expeditiously throughout the proceedings and provide evidence and information in its possession or under its control, including all forms of information which prove the existence of an infringement of Article 4 paragraph (1) of the Act; and

**d)** must refrain from soliciting other undertakings to participate in a cartel.

If an undertaking does not fulfill the criteria for granting the immunity for a fine, it still can apply for a reduction of the fine. In order for an undertaking to be eligible to benefit from a reduction of any fine that would otherwise have been imposed it needs to provide the Council with information that has significant added value with respect to evidence already in possession of the Council regarding the character or completeness of the evidence. It also has to terminate all further participation in alleged infringement at the latest when delivering evidence and under conditions set by the Council. The term "added value" is interpreted in a way that evidence delivered to the Council will strengthen the ability of the Council to prove infringement of Article 4. As is the case with the *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, the first company to meet these conditions is granted a reduction of the fine of between 30% to 50%, the second between 20% to 30%, and subsequent companies up to 20%.

Please note, however, that the leniency policy is rarely, almost never, applied in practice by the Council. The reasons for such lack of practice of the Council rests most likely in fact that undertakings participating in an agreement do not meet criteria set out in the relevant bylaw or that fines, as quite often argued by the Council, are already low and aimed at raising the awareness of the necessity of undertakings participating in infringement to observe competition regulation rather than sanctioning. This was also the case with the most recent decision of the Council from 2019 in *Case No. UP-03-26-2-047-26/18*, whereby the Council rejected the application of the leniency policy on this ground.

## 4. Unilateral conduct under BiH competition rules

The Act regulates that any abuse of a dominant position by one or more undertakings on the relevant market is prohibited. The Act further defines that abuse of a dominant position in particular consist in:

**a)** direct or indirect imposing of unfair purchase or selling prices or other trading conditions which restrict competition;

**b)** limiting production, markets, or technical development to the detriment of consumers;

**c)** applying dissimilar conditions to equivalent or similar transactions with other parties, thereby placing them at a competitive disadvantage;

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

In BiH, the concept of abuse of dominant position is not defined in the Act. It only provides a list of examples considered as an abuse of dominant position. These examples reflect those contained in Article 102 of the TFEU. Three groups of cases of abuse of dominant position on the market can be determined to form the list of examples listed in Art. 10 para 2 of the Act, which is not final, *i.e.* abuse by preventing competitors, abuse by exploitation of competitors, and abuse by deteriorating the structure of the market.

Moreover, in the Regulation on Dominant Position, the Council further specified that a dominant position, as a rule, is not prohibited. However, what is prohibited is the abuse of dominant position by actions of the dominant undertaking(s), "which have, as their object and effect, the exclusion or 'closure' of the market to potential competitors, *i.e.* restriction or distortion of an efficient market."

In BiH legislation, Article 9 para 1 of the Act defines a dominant position of an undertaking as being created when "due to its market power it can act considerably independently of its actual or potential competitors, customers, consumers, or suppliers, taking into account the market share of the undertaking in question, as well as market shares of its competitors, as well as legal and other entry barriers to the entry of other undertakings in the market." A presumption of dominance was introduced in the case where an undertaking was having its market share over 40% on a relevant market in BiH, thus shifting the burden of proof on the undertaking concerned to prove the absence of dominance on the market.

As is the case with Article 102 of the TFEU, the Act regulates that a dominant position may be held by one or more undertakings in the relevant market. However, the expression "one

or more undertakings" in Article 102 of the TFEU implies that a dominant position may also be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity (collective dominance), whereby three cumulative conditions must be met for finding collective dominance:

- each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy;
- the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; and
- the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardize the results expected from the common policy.

The Act, as well as the Regulation, only contain provisions determining collective dominance on the basis of market shares detained by several undertakings. More specifically, the presumption of collective dominance exists when two or three undertakings together have more than 60% or when four or five undertakings have more than 80% of the market share.

As is the case with forbidden agreements, the practice of the Council related to abuse of dominance over the past two years was not quite extensive. The Council, at least according to the online record of decisions available at the website of the BiH Competition Council, did not initiate a single *ex officio* investigation against undertakings in BiH and there was also no abuse of dominance case of significant relevance. What is also indicative when it comes to abuse of dominance cases is that most of the applications were filed by local businesses against various government agencies, state-owned enterprises, and other government bodies including telecom incumbent operators and media, which indicates that the process of market liberalization is still undergoing and there is a significant level of interference of government's, at all levels, into the market.

## 5. Merger control in Bosnia and Herzegovina

### 5.1. Introduction

Merger control is essentially and substantially governed by the Act. In addition, in accordance with the competencies delegated under the Act, the Council adopted secondary legislation in which it expanded upon certain aspects of merger control, namely:

- the *Regulation on the Form of a Merger Notification and the Criteria for evaluating a Concentration* (*Official Gazette of BiH, no. 34/10*; the Implementing Regulation); governing the required form and content of merger notifications, as well as certain procedural issues;
- the *Regulation on Defining the Relevant Market* (*Official Gazette of BiH, no. 18/06*).

### 5.2. Concept of Concentration

The Act defines a concentration in a similar formulation as in the EU merger regulation:

- a merger by absorption or a merger by the formation of a new entity;
- the acquisition of control or a controlling interest by one or more undertakings over another undertaking or a part thereof (sole control), or a group of undertakings (joint control) or a part thereof through the acquisition of a majority shareholding, or the acquisition of a majority of voting rights, or in any other way under the company laws of BiH; or
- the creation of a full-function joint venture.

Any concentration that results in a significant restriction of competition in the market of BiH may be prohibited, especially if such concentration results in the creation or strengthening of a dominant position in the market.

### 5.3. Acquisition of Control

The Act provides a rather general and broad definition of "control" without specifying any details that may lead to the existence of control within the meaning of the Act. Following the wording of the Act, "control" exists when one or more undertakings jointly have a dominant influence over another undertaking or group of undertakings, on the basis of the law, an agreement, or any other means, and considering all legal circumstances and facts.

Control is deemed to exist when one or more undertakings jointly:

- have a majority shareholding in an undertaking;
- have a majority of the voting rights; or
- have the right to appoint more than half of the management board members, the supervisory board members, or the appropriate body that manages or controls operations, or otherwise has the right to manage the operations of the undertaking.

Given this broad definition of "control," the acquisition of minority interest that enables the holder to exercise a dominant influence over an undertaking or group of undertakings is subject to the merger control regime. Pursuant to numerous official opinions and conclusions rendered by the Council (*e.g.* the *Council's Conclusion No. 01-26-1-02-5-II/11* of March 23, 2011, and the *Council Opinion No. 01-26-7-852-2-I/10* of January 18, 2011), intra-group acquisitions and restructurings are

not caught by merger control rules.

### 5.4. Jurisdictional Thresholds

According to Article 14 of the Act, the Council has to be notified of an intended concentration if, in the preceding business year, the following thresholds were met:

**(a)** the combined worldwide turnover of the undertakings concerned exceeds 100 million convertible marks (approximately EUR 50 million); and

**(b)** the individual turnover of each of at least two undertakings concerned in BIH amounts to at least 8 million convertible marks (approximately EUR 4 million); or

**(c)** the undertakings concerned together have a market share of at least 40% on the relevant market in BiH.

In practice, this means that a large number of concentrations which has been notified in the past now fall outside the scope of the merger control regime of BiH. This has already resulted in a significant decrease in the number of submitted notifications.

The Council's *Regulation on the Notification of Concentrations and the Criteria for the Assessment of Concentrations* which became effective on May 4, 2010, stipulates, *inter alia*, that if the undertakings concerned have their seats in BiH the concentration needs to be notified to the Council if the local threshold (ii) (a) or (b) is satisfied, regardless of whether the worldwide threshold (i) is also met. The Council intended to clarify the wording of the Act with this provision. However, its interpretation has led to confusion. In particular, it was unclear whether the Council is at all competent to interpret the Act in such a way in a legally binding manner and whether or not this provision may also have an impact on foreign-to-foreign mergers. Nonetheless, it has been clarified that this narrow interpretation of the jurisdictional test does not affect foreign to foreign transactions since it applies only to cases where all undertakings concerned are purely domestic undertakings (*i.e.* undertakings which have local shareholders and are not subsidiaries of foreign legal entities).

In any case, the Council enforces Article 2 of the aforementioned regulation in practice and therefore, transactions without a cross-border element only have to meet the national thresholds in order to be notifiable (*e.g. Optima Grupa/Zovko/Zovko Oil*). In return, local presence is not required for a transaction to be notifiable as long as the national thresholds are met by selling goods and/or services on the market of BiH. (*Council's Opinion No. 01-01-26-738-5-I/09* dated October 21, 2009).

### 5.5. Jurisdictional Thresholds

The aggregate turnover of the undertakings concerned is to be calculated on a worldwide consolidated basis. Turnover generated by sales between the undertakings concerned is not taken into account.

In the case of an acquisition of one or more parts of an undertaking or of a group of undertakings, irrespective of whether such parts constitute independent legal entities, only the turnover pertaining to the parts subject to the concentration is taken into account. Should there be more than one concentration of the undertakings concerned within a two-year period, they will be considered as one single transaction and it shall be deemed that the transaction occurred on the date of the occurrence of the last transaction.

### 5.6. Notification and Suspension Obligation

Transactions that fall under the concept of "concentration" as described above and which meet the jurisdictional thresholds are mandatory to be notified to the Council.

According to the Act, the council has to be notified of an intended concentration within 15 days after the signing of the respective agreement, the announcement of a public offer of shares, or acquisition of control, whichever occurs first. However, the undertakings concerned already have the option to notify the Council of the concentration once they can demonstrate their intention to undertake the concentration based on, for example, the conclusion of an agreement in principle, a memorandum of understanding, a letter of intent signed by all parties to the concentration or a public announcement of the intention to submit a purchase offer.

Failure to notify the Council of the concentration within due time may result in a fine of up to 1% of the total turnover of the undertakings concerned, realized in the business year preceding the concentration. Such fine may be imposed regardless of whether the concentration was or was not implemented at the moment when the Council learned of the concentration. Therefore, fines for a failure to notify the Council of a concentration in due time may be substantial (depending on the undertaking's turnover) and in the practice of the Council have been imposed on several occasions.

In addition, if the Council was not notified of a concentration and it later finds that such concentration had negative effects on competition in the market of BiH, the Council may order that the acquired shares and assets be sold. The Council may also restrict the voting rights of the acquiring undertaking or order the cessation of the joint venture or any other form of acquired control that the Council believes restricts competition in the market of BiH.

In practice, the Council determines fines in relation to the total annual worldwide revenue of the notifying undertakings (as in the *Optima Grupa/Zovko/Zovko Oil* case and the *Volkswagen AG/Scania AB* case). The Council's fining policy for delays in notifying transactions has proven very strict in practice. In the *Telekom Slovenia/Blic.Net* case, the Council fined Telekom Slovenia 200,000 BAM for a 10-month delay. Other examples are the *Cez/Mol/JV* case (in which the Council imposed a fine of 150,000 BAM for a 4-month delay) and the *Volkswagen AG/Scania AB* (a fine of 150,000 BAM was imposed for a 26-day delay).

As stated previously, the amendments of the Act in 2009 intended to further harmonize the competition law regime of BiH with international standards applicable in most jurisdictions in the EU. *Inter alia*, one significant improvement was related to the competence of the council to impose fines for the breach of the suspension obligation.

For instance, the Council initiated proceedings and imposed a fine on an undertaking for closing a concentration before obtaining prior clearance from the Council (*e.g.* in the *Optima Grupa/Zovko/Zovko Oil* case). The fine amounted to 200,000 BAM and was imposed on a local company engaged in the trade of petroleum and derived products derived.

Over the past two years, the Council imposed in two cases fines, one in case of failure to notify a concentration in due time and the second one for the breach of the suspension obligation.

### 5.7. Timeline

Once the Council issues a certificate of completeness, it has to decide within 30 days whether the proposed concentration raises competition law concerns in BiH. If the Council believes that the proposed concentration will not have any negative effect on competition, it will issue a clearance decision. If the Council does not issue a decision within the 30-day period, the concentration shall be deemed to be approved.

If the Council takes the view that the intended concentration could have a negative effect on competition, it may initiate a second-phase investigation. A second-phase investigation may take up to three months, meaning that the Council is obligated to issue a final decision within three months following the date on which the resolution authorizing the institution to conduct second-phase proceedings is adopted. The second-phase investigation may be extended for an additional three months if the intended concentration involves a sensitive business sector and in cases in which it is necessary to carry out additional analysis defining the state of facts and examination of evidence. If the Council initiates a second-phase investigation but does not issue a decision within the defined deadline, the concentration is deemed to be approved.

In practice, after submission of the filing, it usually takes a rather long period of time until the Council considers the filing complete and issues the certificate of completeness. Therefore, the start of the review period is usually delayed. Against that background and according to our experience it takes between two and three months from the initial submission of the filing until clearance in cases in which the Council does not initiate a second-phase investigation. If a second-phase investigation is launched, the overall proceedings until clearance may take up to eight months. The law does not provide for a formal way of speeding up the procedure.

### 5.8. Responsibility for Filing and Fees

The responsibility for notifying the Council of the acquisition of a majority shareholding or a majority of voting rights or other controlling interests rests with the acquirer. In the case of an acquisition of control based on a public offering of shares, the responsibility for filing lies with the offeror. In the case of joint ventures and in all other cases, the responsibility to notify the Council of the transaction lies with all undertakings concerned.

An initial filing fee of BAM 2,000 ( approximately EUR 1,000) is payable prior to the submission of the notification, and proof of payment must be submitted to the Council together with the notification. In addition, a fee of BAM 5,000 (approximately EUR 2,500) is payable after the Council issues a clearance decision without performing an in-depth investigation (a second-phase investigation). A fee of 0,03% of the total turnover of undertakings generated at BiH territory setting the maximum at BAM 50,000 (approximately EUR 25,000) is payable if the Council adopts its decision after an in-depth investigation. In practice, the Council will not issue its decision unless the fees are paid.

## 6. What are the consequences of a competition law infringement?

The BiH Competition Law sets out the penalty ranges for prohibited activities of the undertakings. The Council in line with Act determines the amount of the penalty considering the level of the intention of the undertaking to commit the infringement and the duration of the infringement. According to Article 49 of the Act, the amount of fine goes up to 10% of the total annual worldwide turnover of undertaking for the year preceding the infringement if an undertaking:

**a)** concludes a prohibited agreement or participates in any other way in an agreement that prevents, restricts, or distorts the competition;

**b)** abuses a dominant position;

**c)** participates in the prohibited concentration of undertakings;

**d)** fails to comply with the final and binding decisions of the Council; or

**e)** implements a concentration without a prior decision on concentration.

The Council may also impose fines on the responsible persons of the undertaking referred to above in the amount from BAM 15,000 (approximately EUR 7,500) to BAM 50,000 (approximately EUR 25,000).

Apart from this, the Council may impose fines on the undertakings not exceeding 1% of total turnover in the year preceding the infringement, if it:

**a)** fails to act in line with the Council's request and cooperate with Council by delivering incorrect or misleading information or not providing necessary information within the deadline set by the Council;

**b)** fails to notify the Council of intended concentration;

**c)** submits incorrect or misleading information in the merger control process; or

**d)** fails to act in accordance with the decision or conclusion of the Competition Council or in accordance with an order of the competent court.

The Council may impose fines on the responsible persons of the undertaking referred to above in the amount from BAM 5,000 to BAM 15,000.

The statute of limitations for imposing administrative fines and/or pursuing antitrust infringements is five years from the day on which the infringement is committed, with certain exceptions where a shorter statute of limitation is envisaged. In the case of continuing or repeated infringements, the limitation period runs from the day on which the infringement was committed for the last time. The statute of limitations for enforcement of the fines is also five years and it runs from a moment decision of the Council becomes final.

As a general rule, the decision issued by the Council has no impact on potential criminal and/or civic responsibility, decided by the competent courts. This means that there is a general liability for harm caused to third parties as a result of the infringement of the Act. When it comes to general liability for harm there are two statutes of limitations for bringing a civil case, a "subjective" statute of limitation of three years, which runs from the day when the injured party became aware both of the damage and the responsible person; and an "objective" statute of limitation of five years, which runs from the day when the damage was inflicted. After this term expires, no claim can be brought. There are, at present, no relevant precedents.

## 7. Is there any possibility for companies to obtain State Aid in Bosnia and Herzegovina? If yes, under what conditions?

### 7.1. General

The legal framework in BiH does envisage a system of state aid. BiH has adopted the *Law on the State Aid System in Bosnia and Herzegovina* (*Official Gazette of BiH no. 10/12 and 39/20*; State Aid Law) back in 2012 and adopted one amendment in 2020.

The State Aid Law is, to a certain extent, harmonized with the regulation of the European Union, nevertheless, the application of the State Aid Law in practice has been very limited which further means that there is no settled practice in the application of the State Aid Law. According to information available at the website of the State Aid Council since 2015 State Aid Council has passed merely about 30 decisions.

State aid, according to the definition provided in State Aid Law is any real or potential expenditure or minimized public revenue, existing, planned, or potential, which can be awarded or planned directly or indirectly by state aid provider, in any form, which distorts or bears the risk of distorting market competition by putting in more favorable position certain companies, production, or trade of certain products or provision of certain services, if that affects obligations of BiH related to this area.

In general, state aid can be provided based on a scheme of state aid or in cases of individual state aid, subject to a filing request for clearance.

The State Aid Law also defines *de minimis* state aid for which clearance of the State Aid Council is not required. The threshold for *de minimis* state aid are defined the same as the thresholds defined under the *Commission Regulation (EU) No 1407/2013* (the EU *De minimis* Aid Regulation), *i.e.* for single undertaking EUR 200,000 over a period of three fiscal years, and for undertakings performing road freight transport EUR 100,000 in any moment over the period of three fiscal years.

The purpose and criteria, as well as procedure of state aid clearance, is defined by decrees passed at the BiH entities level (*Decree on the Purpose, Criteria and Conditions for Granting State Aid in Federation of Bosnia and Herzegovina (Official Gazette of FBiH no. 27/18); Decree on the Manner and Procedures for Reporting State Aid in the Federation of Bosnia and Herzegovina (Official Gazette of FBiH no. 104/13); Decree on the Purpose, Criteria and Conditions for Granting State Aid in Republic of Srpska (Official Gazette of RS*

*no. 111/20); Decree on the Manner and Procedures for Reporting State Aid in the Republic of Srpska (Official Gazette of RS no. 105/13*). The entity regulation although similar is not identical. In both entities, conditions and criteria for awarding state aid are in detail provided for horizontal (*e.g.* for promotion of regional development, for helping SMEs, for research, development and innovation, *etc.*), and vertical state aid (*e.g.* for aid to certain sectors such as transportation, post services, steel production, carbon mining, *etc.*), as well as for specific instruments of the state aid such as guarantees and sale of public real estates.

Both regulations in the Federation of Bosnia and Herzegovina and Republika Srpska provide that state aid is awarded if, state aid scheme or state aid project fulfills conditions stipulated in respective entity decrees but also in Article 71 paragraph 2 of SAA between the European Community and their Member States and BiH.

As for the procedure, both in Republika Srpska and the Federation of Bosnia and Herzegovina state aid providers are obliged to file an application to respective ministries of finances (organized at the entity level) which further forwards it to the State Aid Council for clearance.

### 7.2. Major changes brought by the COVID-19 crisis in the field of state aid

As for State Aid and bearing in mind that implementation of it is quite underdeveloped, the COVID-19 crisis did not bring any major changes in this field. The BiH Governments at all levels passed certain regulations to help the local economy, not in form of state aid but rather in a form of certain tax relieves, subsidies for social contributions, deadlines for payment of such duties, *etc.*

According to available data, the State Aid Council has passed merely four decisions in 2020 and 2021. All four decisions were related to state-owned enterprises and none of it was related to consequences related to pandemic. It is also hard to say that amendments to the State Aid Law from July 2020 were driven by the COVID-19 crisis since amendments introduced missing *de minimis* state aid regulation, made clarifications to certain aspects of regulation and certain procedures (*e.g.* financing of infrastructure by public funds, the meaning of granted state aid, return of state aid and statute of limitations, *etc.*). Whether this will be changed in the upcoming period, remains to be seen.

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# CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2021

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

The most important competition-related legislation is *Act No 143/2001 Coll., on Protection of Competition*. The act deals with cartels, dominance, and merger control, both substantively and procedurally. The private enforcement directive is incorporated in *Act No 262/2017 Coll., on Damages in the Field of Competition Law. Act No 395/2009 Coll., on Significant Market Power in the Sale of Agricultural and Food Products and its Abuse* deals with specific competition aspects related to food product supply chains. State Aid aspects are primarily regulated by EU law, nonetheless, *Act No 215/2004 Coll.* deals with some procedural aspects, namely the competence of the Office for the Protection of Competition in state aid matters and the register of *de minimis* aid.

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

The Parliament of the Czech Republic is currently discussing a bill to amend *Act No. 143/2001 Coll.* This bill incorporates *Directive 2019/1* of the European Parliament and of the Council of December 11, 2018 (ENC+ Directive).

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

The Czech Office for the Protection of Competition prosecutes all types of prohibited agreements. One of its priorities is the detection and sanctioning of anti-competitive agreements in the field of public procurement (bid-rigging). According to a *Policy and Regulatory Report* analysis, the office is the 2nd most successful office in Europe in this area. The office is also very active in prosecuting RPM agreements. In the recent past, the number of cartel-related proceedings opened by the office has been between 10-15 new cases per year, whereas the aggregate amount of penalties imposed has varied from approximately CZK 100 million to CZK 2 billion annually.

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

The rules of competition protection in the Czech Republic do not deviate in any material way from the rules of other member states of the European Union, however, local rules cannot be ignored or downplayed. Especially in the case of distribution agreements and cooperation between competitors, proper competition risk-assessment, and appropriate compliance checks of case-specific facts are recommended prior to entering into a contract.

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

The Office for the Protection of Competition offers cartel participants a Leniency Program. If a competitor reports a cartel and provides the office with all the information and evidence available to the competitor, it can completely avoid sanction or achieve at least a substantial reduction in the fine. Nonetheless, in order to be granted full immunity, several conditions must be met. To name the most important full immunity conditions, the cartel participant has to provide the office with new incriminating evidence (not known to the office at the time of leniency application), actively cooperate with the office, and admit to the breach of competition rules.

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

The national legislation is based on Article 102 of the TFEU and therefore is not surprising in any way. The investigation of abuse of a dominant position is also entrusted to the Office for the Protection of Competition.

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

In a number of sectors, demonopolization and sectoral unbundling have taken place in the past. Large corporations are generally well aware of the legislation as many of them have learned their lessons in the past. Therefore, the number of dominance cases is rather low (approximately one new case opened each year) as compared to the situation in the 90s or early 2000s. Recent decisions have related mainly to resting statutory-based monopolies or oligopolies.

One example of all these might be a decision related to the practices of an authorized collective copyright manager. The case dealt with the practice of collecting royalties from hotels even when accommodation facilities were unoccupied. The Office for the Protection of Competition decided that the practice in question constituted an abuse of a dominant position.

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

The sanctions imposed are standard compared to the sanctioning systems used in other EU member states or in the Commission's decision-making. The most frequent sanctions are financial penalties (10% of the annual turnover limitation applies). The Office for the Protection of Competition also

prohibits the fulfillment of prohibited agreements or abuse of dominance in its decisions. In relation to gun-jumping in merger cases, the office can order the merging entities to cancel agreements or to divest acquired shares or companies. In the case of bid-rigging in public procurement, the office can also impose a prohibition on participation in public tenders for a period of up to three years. For many public sector suppliers, this sanction may be unacceptable from a going concern perspective. Therefore, many bid-rigging cases are resolved by settlement to avoid this penalty (in case of a settlement, the office cannot impose this sanction).

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

The Czech regulation is in many aspects very similar to the regulatory regime under the EC Merger Regulation and the rules applicable in other EU member states. There are 2 varieties of proceedings: standard and simplified (the distinction is based on a combined market share threshold on the same market). The simplified procedure is prevalent. The purpose of protecting competition in mergers is not to frustrate the business plans of companies, but to intervene only if the proposed concentration is capable of distorting competition in the market.

### 10. What is the normal merger review period?

In phase I of the standard procedure, the Office for the Protection of Competition first assesses whether the transaction falls under the notification obligation and whether it raises competition concerns. If the office does not find any such concerns, it issues an approval decision within 30 days of notification. If the office notifies the participants that the merger is likely to affect competition, it continues with a phase II in-depth investigation. The subsequent decision on the authorization or non-authorization of the merger is issued within five months of notification. In the simplified procedure, the office issues an approval decision within 20 days of notification. Nonetheless, the deadlines above are suspended if the office requires the notifying party to supply additional documents. Therefore, a careful approach and knowledge of the office's approach matters.

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

The administrative fee associated with the filing of notification amounts to CZK 100. The payment is a prerequisite necessary for the Office for the Protection of Competition to initiate the merger review proceedings. The size of the transaction or the type of proceedings (simplified or standard) does not make a difference, the same fee applies to all.

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

There are many possibilities to apply for public-funded subsidies in the Czech Republic, namely from EU Funds such as the ERDF. More information can be found for example at https://www.dotaceeu.cz/en/home-en.

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

In order to mitigate the COVID-19 pandemic's effects, a number of new state-subsidy tools for affected subjects were created. National and EU authorities have undoubtedly made an unprecedented effort in this area. Nonetheless, it might have been difficult to navigate through the relevant subsidy rules in real-time, especially for SMEs.

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# CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2021

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

*Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition* (Hungarian Competition Act) contains most of the substantive provisions of the Hungarian competition law, including not only antitrust issues and merger control regulation but also unfair competition and competition-related consumer protection provisions. Furthermore, it contains rules relating to the Hungarian Competition Authority (*Gazdasagi Versenyhivatal*; GVH) and the relevant procedural rules applicable by the GVH and the Hungarian courts in competition-related matters.

Apart from the Hungarian Competition Act, the main Hungarian competition-related pieces of legislation are the following:

- Government Decrees on the exemption for specific groups of agreements restricting competition in relation to:
  - specialization (*No. 202/2011.*)
  - vehicle aftermarket (*No. 204/2011.*)
  - vertical agreements (*No. 205/2011.*)
  - research and development (*No. 206/2011.*)
  - technology transfer (*No. 86/1999.*)
- *Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices*
- Sectoral legislation applicable in certain sectors (*e.g.* trade, electronic communication, electricity, natural gas, public transport, medicine), including rules in relation to unilateral conduct in *e.g.* Act CLXIV of 2005 on Trade (Trade Act) or *Act XCV of 2009 on the Prohibition of Unfair Trading Practices Applied Against Suppliers Relative to the Marketing of Agricultural and Food Products* (Unfair Agricultural Trading Act).

Furthermore, as a member of the European Union, EU competition law is also directly applicable in Hungary. The GVH and the Hungarian courts must apply EU competition law in each case in which they would apply (or actually apply in parallel) national competition law to all the restrictive agreements and abuses of a dominant position that may affect trade between EU member states. In addition, depending on the turnover of the undertakings and the applicable thresholds as well as the number of the EU member states concerned, the merger control authorisation falls within the competence either of the European Commission or of the GVH acting as the national competition authority.

The main EU competition-related pieces of legislation are the following:

- *Treaty on the Functioning of the European Union* (TFEU), in particular Part III, Title VII of the TFEU
- Anti-competitive agreements, abuse of a dominant position:
  - *Council Regulation (EC) No. 1/2003* of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
  - *Commission Regulation (EC) No. 773/2004* of April 7, 2004, relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty
- Block exemption regulations:
  - specialization (*Commission Regulation (EU) No 1218/2010.*)
  - vehicle aftermarket (*Commission Regulation (EU) No 461/2010.*)
  - vertical agreements (*Commission Regulation (EU) No 330/2010.*)
  - research and development (*Commission Regulation (EU) No 1217/2010.*)
  - technology transfer (*Commission Regulation (EU) No 316/2014.*)
- Mergers of undertakings:
  - *Council Regulation (EC) No. 139/2004* of January 20, 2004, on the control of concentrations between undertakings
  - *Commission Regulation (EC) No. 802/2004* of April 21, 2004, implementing *Council Regulation (EC) No 139/2004* on the control of concentrations between undertakings

The GVH also uses soft law instruments by issuing public, non-binding documents (such as notices, communications and position statements) to describe the basic principles of the law enforcement practice of the GVH in specific questions and to outline the expected enforcement policy in general.

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

As of January 2020, the Hungarian legislator amended Section 54/A. of the Hungarian Competition Act with the purpose of aligning the provisions of the Hungarian Competition Act related to the confidential treatment of data concerning witnesses with Section 28 (1) of *Act CL of 2016 on General Public Administration Procedures*. As a result of this alignment, it became possible to require the confidential treatment of the data of witnesses *ex officio* in competition supervision proceedings (versenyfelugyeleti eljaras) if such an order has already been made in another administrative or court proceeding.

Due to the COVID-19 pandemic, by way of derogation

from the general merger notification obligation, from April 21, 2020, mergers of undertakings implemented through an equity scheme set up for that purpose, by way of financing transactions required as a result of the COVID-19 coronavirus with the involvement of a venture capital fund or private equity fund under direct or indirect majority state ownership, shall not be notified to the GVH if the venture capital fund or private equity fund under direct or indirect majority state ownership acquires control rights by self or jointly with other companies for the purpose of investment protection.

The amendment of the Trade Act effective as of December 12, 2020, concerned the HoReCa sector (hotel-restaurant-cafe). Pursuant to the amended legislation, as a general rule, exclusive contracts can no longer be concluded with the largest beverage suppliers (catering units will only be permitted to procure 80% of their products at most from the same manufacturer in each beverage category) and catering units are obliged to offer the products of at least two different manufacturers for sale to consumers in each beverage category (*e.g.* beer, soda, mineral water). The amendment of Trade Act also appointed the GVH as the competent authority to investigate any behaviours that may infringe these new legal provisions.

The amendment of the Hungarian Competition Act effective as of January 1, 2021, brought numerous notable changes to the Hungarian Competition Act.

The majority of these changes intended to ensure that the Hungarian Competition Act is fully compliant with *EU Directive 2019/1* (ECN+ Directive). These changes include – amongst others – the followings: more possibilities for the GVH to acquire evidences during on-site inspections and to order (prolong) interim measures, new rules regarding commitments (consultation obligation of the GVH with companies and other affected parties before approving commitments in antitrust proceedings initiated on an EU law basis, right to revoke a decision approving commitments in case of incorrect, incomplete or misleading information provided by the undertakings (kotelezettsegvallalas), easier mechanism for the GVH to recover fines, new rules in connection with leniency applications (*e.g.* detailed rules on the cooperation obligation of the undertakings with the GVH, possibility for the undertakings to submit a "marker" application not only for immunity but also for reduction of fines), enhanced protection of sensitive information (business secrets), enhanced cooperation between national competition authorities.

As of July 9, 2021, for the period of state of danger declared due to the COVID-19 pandemic, the Hungarian Government expanded the GVH's powers as a result of which the President of the GVH can order a so-called accelerated sector inquiry.

According to the latest notable change to the Hungarian Competition Act that came into effect as of September 30, 2021, by way of derogation from the general merger notification obligation, the parties will no longer be required to notify mergers to the GVH in the case of the investments of capital funds under majority state ownership.

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

A quite recent development is that the president of the GVH might specify the GVH's competition law enforcement priorities on annual basis. Although, these priorities are not public information but the GVH usually reveals its actual priorities which were – for example in 2018 and 2019 – amongst others the following: cartels (mainly public procurement cartels), the protection of vulnerable consumers and commercial practices in digital markets. Nevertheless, cartels, in particular, the so-called hardcore cartels are always amongst the priorities of the GVH.

Given the increased consumer interest, by 2021, it has become an objective of the GVH to effectively detect infringing behaviors associated with the COVID-19 pandemic including unfair commercial practices, vertical agreements, and abuses of dominant market position. In addition, the Hungarian competition authority pays particular attention to investigating the behavior of large technology companies, addressing possible competition concerns in the construction sector and overseeing advertisements targeted at children. Infringements against vulnerable consumer groups or consumers with special needs (the elderly, children, sick) are a constant focus of attention of the GVH.

According to the GVH's statistics, the number of investigated and closed cases in connection with restrictive agreements or conducts is usually around 10 cases per year.

The sanctioning record of the GVH is publicly available and freely searchable. Below is the total amount of fines imposed by the GVH in the last few years:

- 2016:
  - Total imposed fines: HUF 5.363 billion (approximately EUR 15 million)
  - Imposed fines in connection with restrictive agreements: HUF 4.491 billion (approximately EUR 12.5 million)
- 2017:
  - Total imposed fines: HUF 1.344 billion (approximately EUR 3,7 million)

- Imposed fines in connection with restrictive agreements: HUF 81 million (approximately EUR 225,000)

- 2018:

  - Total imposed fines: HUF 5.575 billion (approximately EUR 15.5 million)

  - Imposed fines in connection with restrictive agreements: HUF 5.013 billion (approximately EUR 14 million)

- 2019:

  - Total imposed fines: HUF 8.281 billion (approximately EUR 23 million)

  - Imposed fines in connection with restrictive agreements: HUF 3.4 billion (approximately EUR 9.5 million)

- 2019:

  - Total imposed fines: HUF 8.437 billion (approximately EUR 23.5 million)

  - Imposed fines in connection with restrictive agreements: HUF 1.075 billion (approximately EUR 3 million)

In the recent years, the GVH passed several decisions concerning restrictive agreements (cartels). Some recent and notable cartel decisions of the GVH are the following:

- Dividing the market: In 2014, the GVH found that four newspaper publisher undertakings had entered into competition restrictive agreements aimed at preventing direct entry into each other's geographical area. The GVH imposed a total fine of HUF 2.2 billion (approximately EUR 7.3 million) for the infringement. According to the decision, the existence of competition restrictive agreements was supported by the mutual non-competition clauses contained in the contracts between these newspaper publishers, which stipulated that the parties may not invade each other's county-wide/regional market. As a result of court proceeding initiated by the publishers against the GVH's decision, in 2021, the GVH recalculated the imposed fines and reduced the fines to HUF 830 million. (*Case no. Vj/23/2011. and Vj/36/2020.*)

- Price-fixing: In December 2020, the GVH found that the internal rules of the Association of Hungarian HR Consulting Agencies restricted competition among its members. The GVH imposed a fine of HUF 1 billion for the infringement. According to the decision, the organisation had been fixing minimum fees and other conditions with respect to the labor-hire and recruitment services provided by its members for a period of seven years starting in 2011. In the official press release relating to this decision, the GVH also noted that price-fixing is the most severe among restrictive market practices as it results in a direct and significant excess burden on society. (*Case no. Vj/61/2017.*)

- Bid-rigging: In January 2020, the GVH established that several undertakings producing and distributing diagnostic imaging products (MRI, CT, and X-ray equipment) had engaged in unlawful conduct related to the EU tender issued for the public procurement of diagnostic imaging equipment. The GVH imposed fines amounting to a total of EUR 4.8 million on the undertakings. Pursuant to the decision, the concerned undertakings had shared among each other the public procurement tenders. Their single and continuous anti-competitive conduct constituted one of the most serious infringements in competition law. (*Case no. VJ/19/2016.*)

- Information exchange: In January 2016, the GVH found that the Hungarian Banking Association with the collaboration of International Training Centre for Bankers Ltd. had been operating a database for 12 years in a way that was likely to restrict competition, as it had made it possible for the banks to share private, confidential and strategic data with each other. The GVH imposed a total fine of HUF 4.015 billion (approximately EUR 13 million) for the infringement. (*Case no. Vj/8/2012.*)

- Vertical anti-competitive behavior, resale price maintenance: In August 2016, the GVH imposed a fine of HUF 44 million on Pick which had determined minimum resale prices when distributing meat products processed by Pick during promotions. According to the decision, Pick was able to force the recommended consumer prices on its commercial partners by threatening them with delisting and the imposition of other sanctions. (Case no. Vj/37/2014.)

- Vertical anti-competitive behaviour, exclusive contracts: In July 2015, the GVH intervened in the structure of the Hungarian beer market. The GVH found that through exclusive contracts, Heineken, Borsodi, Dreher and Pecsi Sorfozde Zrt. together took up 43.5-44.3% of the sales of beer consumed on premises in Hungary. In addition, (along with Carlsberg) the five largest market players accounted for 82-95% of the total sales made in the so called HoReCa (Hotels, Restaurants, and Catering/Cafes) market in the period investigated. As a consequence of the exclusivity clauses, neither imports nor small breweries were able to gain market shares vis-a-vis the large beer companies. The GVH accepted the commitments offered by the undertakings according to which the largest Hungarian beer companies will decrease their respective beer sales tied by exclusive contracts. According to the *Decision no. VJ/6/2018*, Heineken failed to appropriately justify its commitment to decrease the amount of beer sold under exclusive contracts, thus the GVH imposed a fine HUF 75 million on the undertaking. (*Case no. Vj/49/2011.* and Vj/6/2018.)

- Parallel trade restriction: In December 2019, the GVH imposed fines of over EUR 1.5 million on three undertakings for restricting the distribution of alarm equipment for almost 10

years. Based on the evidences, the undertakings had prohibited the export of their products, had fixed the minimum prices of installers and thereby indirectly had fixed the resale prices, and had restricted the online sale of products by prohibiting the online publication of end-user prices. (*Case no. Vj/97/2016.*)

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

The starting point for the competition law assessment of agreements and concerted practices between undertakings is the requirement that the undertakings shall make their market decisions independently of their competitors and avoid any illegal collaboration with competitors.

The Hungarian Competition Act has extraterritorial scope which means that it is not only applied to undertakings seated in Hungary or Hungarian branches of foreign-registered companies but also to companies seated abroad if the effect of their conduct has an impact within the territory of Hungary.

The Hungarian Competition Act generally prohibits the conduct of economic activities in an unfair manner, in particular, in a manner violating or jeopardizing the lawful interests of customers, buyers and users, as well as competitors, or in a way which is in conflict with the requirements of business integrity. The infringement of the above general prohibition and certain other prohibited conducts specified in the Hungarian Competition Act (libel, breach of business secrets, boycott call, breach of industrial property rights, misleading comparative advertising, interfering with the integrity, and fairness of bidding) may serve as a basis for litigation between competitors (companies) or between companies and consumers.

Activities more prejudicial to the public interest are investigated by the GVH, *e.g.* misleading trading parties (especially consumers) in economic competition, business practices intended to unjustifiably impair the trading parties' freedom of choice, agreements restricting competition (cartels), and abuse of dominant position.

With regard to agreements restricting competition, Section 11 of Hungarian Competition Act prohibits any agreements and concerted practices between companies which are aimed at the prevention, restriction or distortion of economic competition, or which may display or in fact displays such an effect. This prohibition applies both to horizontal and vertical agreements, *e.g.*:

- fixing the purchase or sales prices, and defining other business conditions directly or indirectly;
- restricting manufacture, distribution, technical development or investment, or keeping them under control;
- dividing the sources of supply and restricting the freedom of choosing from among them, as well as excluding specific trading parties from the purchase of certain goods;
- dividing the market, excluding any party from selling, and restricting the choice of means of sales;
- preventing any party from entering the market;
- where, in respect of transactions of an identical value or of the same nature, certain partners are discriminated against, including the setting of prices, payment deadlines, discriminatory sales or purchase conditions or the employment of methods which cause disadvantage to certain business partners in the competition;
- rendering the conclusion of a contract conditional upon undertaking any commitment which, due to its nature or with regard to the usual contractual practice, do not form part of the subject of the contract.

Although, the above list does not explicitly mention certain specific types of cartel infringements (*e.g.* information-sharing), the case law considers *e.g.* the information exchange as a practice which might display anticompetitive effects or be a sign of an existing prohibited agreement. In principle, any exchange of information may be considered anti-competitive, especially if it concerns the present or future prices between competitors. The undertakings therefore should avoid sharing any confidential business information with competitors. Also, the GVH investigates the so-called hub-and-spoke arrangements which are horizontal restrictions on the supplier or retailer level (the spokes), which are implemented through vertically related players that serve as a common "hub" (*e.g.* a common manufacturer, service provider). The hub facilitates the co-ordination of competition between the spokes without direct contacts between the spokes. Based on the above, the undertakings should consider the amount of information shared with their suppliers or retailers.

The above agreements and practices are generally prohibited; however, the legislator specified some exemptions from the above general prohibition on the basis of lower threat to competition due to the minimal impact on market or if the overall effect of an agreement is more useful than the danger the agreement may pose. These exemptions are the following:

**1.** Agreements of minor importance (less than 10% (or in case of vertical agreement 15%) of cumulative market share of the undertakings), except if:

- their object is the restriction, prevention or distortion of competition, such as the fixing or coordination of purchase or selling prices or other trading conditions, the allocation of

production or sales quotas, the sharing of markets, including bid-rigging, restrictions of imports or exports (cartel), including any agreement aiming, directly or indirectly, for fixing purchase or sale prices, or concerted practices; or

- are capable to create an environment, in conjunction with other agreements of the like, whereby competition in the relevant market is substantially obstructed, restricted or distorted.

**2.** Certain groups of (vertical) agreements have been exempted from the cartel prohibition by the Government in a decree (*see answer given to Question 1 (block exemption)*).

**3.** An agreement might also be exempted if all of the following conditions are met (individual exemption):

- it contains facilities to improve the efficiency of production or distribution, or to promote technical or economic development, or the improvement of means of environmental protection or competitiveness (which means actual, objective development in the full period affected with the infringement);
- a fair part of the benefits arising from the agreement is conveyed to trading parties who are not parties to the agreement;
- the concomitant restriction or exclusion of economic competition does not exceed the extent required for attaining the economically justified common goals; and
- it does not contain facilities for the exclusion of competition in connection with a considerable part of the goods concerned.

Note: if one party to an agreement in question has a significant market power / dominant position in the relevant market, then it should also take into account the rules regarding unilateral conduct (*see answer given to Question 6*)

## 5. Does a leniency policy apply in Hungary?

The detailed rules of the Hungarian leniency policy can be found in Sections 78/A-79. of the Hungarian Competition Act. Also, there is a useful guideline issued by the GVH in its *Notice No. 14/2017* regarding leniency applications.

The leniency policy applies only to the most serious types of infringements, *i.e.* cartel infringements constituting an infringement of Section 11 of the Hungarian Competition Act or Article 101 of the TFEU or any agreement aiming, directly or indirectly, for fixing purchase or sale prices, or concerted practices.

Undertakings that disclose the above infringements to the GVH might be granted immunity from fines, their fines might be reduced, and they might gain certain other additional benefits as well. The Hungarian Competition Act strictly regulates the manner of the information and evidence disclosure and the conditions of the potential immunity or fine reduction:

- Immunity: Immunity can be only granted to the undertaking that first submits an application to that effect and supplies any evidence (i) to the GVH serving reasonable cause to request and receive a prior court order for carrying out a site search in connection with the infringement, provided that the GVH did not have enough information at the time of submission of the application serving reasonable cause to request a prior court order for carrying out the site search, or did not carry out a site search previously, or (ii) sufficient to prove the infringement, provided that the GVH did not have enough evidence at the time the evidence was provided to prove the infringement, and neither of the companies involved meets the condition set out in (i).
- Fine reduction: An undertaking participating in a restrictive agreement may apply for fine reduction if no immunity may be granted and the undertaking in question supplies any evidence relating an infringement to the GVH that is recognized considerably more valuable than any proof the GVH has in its possession at the time the evidence is provided. The rate of reduction of the fine is: between 30% to 50% in respect of the company being the first to meet the above condition, between 20% to 30% in respect of the company being the second to meet the above condition, up to 20% in respect of the company being the third or beyond to meet above condition. If an undertaking provides clear and convincing evidence in respect of a fact or circumstances of which the GVH was previously unaware and that has any direct bearing on determining the amount of the fine, and such fact or circumstance serves grounds to increase the amount of the fine to be imposed, that fact or circumstance shall be ignored when determining the amount of the fine to be imposed upon the undertaking.

Other conditions for granting immunity or fine reduction are the following: the undertaking shall (i) terminate its involvement in the infringement immediately (except if the GVH orders to maintain such involvement to the extent and in the manner deemed essential to ensure the success of the investigation); (ii) cooperate with the GVH in good faith and continuously; (iii) not, without the express consent of the GVH, disclose in any way the fact that it has submitted an application for immunity or fine reduction, including the contents of the evidence supplied in that regard; (iv) not destroy, falsify, or conceal the relevant evidence or disclose the fact of, or any of the content of, its application during the assessment of the submitted application conducted the GVH.

**Additional benefits:**

- In a civil lawsuit, any party to a restrictive agreement, whose fine was waived in the competition supervision procedure for

its active cooperation in the detection of the restrictive agreement pursuant to the leniency policy specified in the Hungarian Competition Act, shall be jointly and severally liable for damages caused solely to its own indirect and direct purchasers or suppliers and may refuse to provide compensation for the damage caused to other injured persons until the claim can be collected from any other party to the restrictive agreement.

- Participation in cartel in a public procurement or concession procedure is a criminal offense, however, employees and officials of the undertaking requesting leniency for immunity might be exempted from the punishment or their punishment might be reduced indefinitely.

- If an undertaking has been granted immunity, it shall not be excluded from the participation in a public procurement procedure as a tenderer.

The Hungarian Competition Act also contains detailed procedural rules with regard to the submission of a leniency application.

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

The unfair unilateral conducts are regulated in several Hungarian laws:

- general conducts: restrictive exclusionary market practices and exploitative strategies are regulated in Section 21 of the Hungarian Competition Act (abuse of dominant position);

- further prohibited conducts are specified in Section 7 of Trade Act regarding the relationship between traders with significant market power and their suppliers;

- further specific rules applicable to agricultural and food products are regulated in the Unfair Agricultural Trading Act.

### A. Abuse of dominant position – Hungarian Competition Act

Under the Hungarian Competition Act, the most serious unilateral conducts include restrictive exclusionary market practices and exploitative strategies. Section 21 of the Hungarian Competition Act provides only an exemplary list of these types of conducts according to which it is prohibited to abuse a dominant position, in particular:

- to fix purchase or sales prices unfairly in business relations, including where general contract terms and conditions are applied, or to stipulate unjustified advantages by any other means, or to force the acceptance of detrimental terms and conditions on the other party;

- to restrict production, distribution or technical development to the detriment of final trading parties;

- to refuse to establish or maintain business relations adequate for the nature of the transaction without any justification;

- to influence the other party's business decisions for the purpose of gaining unjustified advantages;

- to withdraw goods from general circulation or to withhold goods without justification prior to price increases or for the purpose of causing prices to rise, or by means otherwise capable of securing unjustified advantages or causing a disadvantage in competition;

- to render the supply and acceptance of goods contingent upon the supply or acceptance of other goods, or to render the conclusion of a contract conditional upon undertaking any commitment which, due to its nature or with regard to the usual contractual practice, does not form part of the subject of the contract;

- in connection with transactions of an identical value or of the same nature, to discriminate against certain business partners without due cause, including the setting of prices, payment deadlines, discriminatory sales or purchase conditions, or the employment of methods which cause disadvantage to certain business partners in the competition;

- to force competitors off the relevant market, or to use excessively low prices which are based not upon better efficiency in comparison to that of the competitors, so as to prevent competitors from entering the market;

- to hinder competitors from entering the market in any other unjust manner; or

- to create a market environment that is unreasonably disadvantageous for the competitors or to influence their business decisions for the purpose of gaining unjustified benefits.

The above types of unilateral conducts are investigated in all markets (including those markets or business relationships to which special unilateral conduct rules specified in other laws are also applicable).

It is important to note that the above unilateral conducts are investigated only if the given undertaking possesses substantial market power, in particular, if it has a monopoly position (the exact term used in the Hungarian Competition Act is the "dominant position").

An undertaking is considered to be in a dominant position if it is able to conduct its activities in a manner largely independent of other market players (customers, competitors, suppliers) without having to take into consideration their market policies in so far as to eliminate effective competition.

According to the Hungarian Competition Act, the following criteria shall, in particular, be taken into account for the assess-

ment of dominant position (in practice, however, the assessment is always specific to the market under investigation):

- the costs and risks entailed by entering into the relevant market and by exiting it, and the implementation of the technical, economic or legal background that may be required;
- the assets, financial strength and income of the company or group of companies and/or the development thereof;
- the structure of the relevant market, the ratios of market shares, the conduct of the participants of the market, and the economic influence exercised by the company or group of companies over the development of market trends.

In light of the above, there is no exact percentage of market share in the Hungarian Competition Act which could serve as a threshold for establishing the existence of a dominant position since the GVH analyses the given market on a case-by-case basis.

**B. Prohibited conducts between traders with significant market power and their suppliers – Trade Act**

Further types of prohibited unilateral conducts are specified in connection with the relationship between traders with significant market power and their suppliers in Section 7 of the Trade Act. The prohibited conducts specified in the Trade Act are the following:

- any undue discrimination against a supplier;
- undue restriction of access of a supplier to marketing channels;
- prescribing undue risk pooling contract conditions resulting in one-sided advantages to the trader as against the supplier, meaning in particular the charging of expenses serving also the business interest of the trader, such as storage, advertising, marketing, and other costs to the supplier;
- unjustified amendment of contractual conditions to the detriment of the supplier, or installing a clause permitting such possibility for the trader;
- imposing unfair conditions upon the supplier in connection with his business relations with the trader or with another trader, such as demanding the best available terms and conditions as obligatory, and enforcing such terms and conditions with retroactive effect, *i.e.* compelling the supplier to provide discounts during a specific period for a specific product only to the trader in question, or compelling the supplier to manufacture products under the trader's trade mark or brand name as a precondition for the marketing of any other product of the supplier;
- applying various charges upon the supplier, such as for services not otherwise requested by the supplier, as a precondition for being admitted to the trader's list of suppliers or products;
- asserting a threat for cancelling the contract to impel contract conditions for lopsided advantages;
- applying pressure upon a supplier to use other suppliers or the trader's own supplier;
- applying a sale price for products which are not owned by the trader below the price invoiced as contracted, not including the prices employed for the sale of products with some defect or for the sale of products inside of a seven-day period before the date of expiry of their shelf life, or the introductory prices that may be used for maximum fifteen days, or the prices employed in a clearance sale for maximum fifteen days in any seasonal campaign, any sales campaign due to changing models or profile, or due to going out of business.

Under the Trade Act, the term "significant market power" differs from the term dominant position mentioned above. Significant market power is deemed to have been assessed against a supplier if the consolidated net revenues of a company group from trading activities from the previous year is in excess of HUF 100 billion.

Even if this threshold is not met, a trader is deemed to have significant market power if the trader (or its group) enjoys or is likely to enjoy a one-sided bargaining position in connection with a supplier due to the existing market structure, restrictions in entering the market, the company's market share, financial strength and other resources, or the magnitude of the company's commercial network, the size, and location of its commercial establishments, and any other related activities.

**C. Prohibited conducts between traders and suppliers in agricultural market – Unfair Agricultural Trading Act**

Further specific rules apply to the market of agricultural and food products prescribed in the Unfair Agricultural Trading Act which are enforced by a specific agency, the Nemzeti Elelmiszerlanc-biztonsagi Hivatal (National Food Chain Safety Office). The purpose of this Act is to ensure that fair business practices are exercised between companies engaged in trading agricultural and food products and their suppliers. Some examples of the prohibited unfair practices are the following: prescribing undue risk pooling arrangements resulting in one-sided advantages to the trader as against the supplier; introducing contract terms stipulating various types of buy-back or take-back obligations; charging any fee to the supplier for being admitted to the trader's list of suppliers; charging unfair fees or forcing price reduction, contribution in discounts, *etc.* (there are more than twenty prohibited conducts listed in this Act).

It is important to note that since the above unilateral conducts

are generally prohibited therefore, the existence of the trader's significant market power is not a precondition.

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

Between 2019 and June 2021, the GVH adopted five decisions in cases related to the abuse of dominant position. The GVH closed two cases with commitments, one case was terminated in the course of the investigation, while the remaining two cases were follow-up investigations.

Amongst these cases, it is worth mentioning the case *No. Vj-43/2016* (the *Spar Case*) closed in December 2020. The GVH has found that SPAR Magyarorszag Kereskedelmi Kft. had discontinued the ex-post supplier fee, which was established in 2012, it had also introduced a new fee with an identical effect. The GVH proved that this fee, applied as a mandatory contractual term between 2014 and 2015, violated the Trade Act just as its predecessor did, meaning that the supermarket chain abused its dominant position once again. This was due to the fact that the bonus system implemented by Spar unilaterally required the payment of unwarranted fees by suppliers in order to get their products stocked on the shelves of the supermarket chain. In addition to establishing the fact of the infringement, the GVH resolved to order the company to fulfil certain commitments instead of imposing a fine.

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

The main possible legal consequences of competition law infringements are the followings:

**A.** legal consequences established by competition supervision proceedings;

**B.** legal consequences established by the court in actions initiated by the GVH;

**C.** legal consequences established by the court in actions initiated by the interested party;

**D.** legal consequences falling under the scope of criminal law.

### A. Competition supervision proceedings (public law enforcement)

The competition supervision proceeding is a public law claim enforcement form which is regulated by the Hungarian Competition Act: "[*c*]*ompetition supervision proceedings are administrative proceedings conducted to identify infringements of this Act […], and for the examination of concentration of companies in accordance with this Act, as well proceedings designated as such by specific other act.*" (Section 44 (1) of Hungarian Competition Act).

**Concerned competition law infringements**

The infringements – *inter alia* – in case of which a competition supervision proceeding might be launched:

- unfair manipulation of business decisions (Chapter III Competition Act);
- agreements restricting economic competition (Chapter IV Competition Act);
- abuse of dominant position (Chapter V Competition Act);
- concentration of companies (Chapter VI Competition Act);
- abuse of significant market power against suppliers (Section 7 of Trade Act);
- infringement of the provision according to which in connection with the supply of beer, soft drinks, fruit drinks, fruit juices, and fruit nectars, as well as mineral waters and soda water (carbonated water) no legal statement can be made suggesting that more than 80% of all procurements in a calendar year, or for a specific special event, of the product to which the statement pertains of a hospitality establishment, including sales in special events, or a place of accommodation is from the same manufacturer (Section 7/B of Trade Act).

**The main rules of the competition supervision proceedings**

The competition supervision proceeding consists of two parts: (i) examination phase and (ii) the proceedings of the competition council (*versenytanacs*).

In the examination phase the investigator shall make the decisions and shall take the actions deemed necessary. Thus, the investigator shall adopt an order to order an investigation in connection with any allegedly illegal activity falling within the competence of the Hungarian Competition Authority, where a competition supervision proceeding is required for the protection of public interest. Upon conclusion of the investigation, the investigator shall prepare a report and present it, together with the relevant documents, to the competition council.

In the proceedings of the competition council the competent competition council shall make the decisions and shall take the actions deemed necessary. After the receipt of the investigator's report, the competition council has different rights, *e.g.* it may return the documents to the investigator if the council deems certain further actions necessary or may impose provisional measures. If based on the final investigation report returning the documents to the investigator is not required or the proceedings need not be terminated, and the conduct in question cannot declared as not infringing, the competent competition council shall submit to the client its preliminary assessment relating to the case, which shall contain

the relevant facts of the case and the corroborating evidence, and an explanation of the criteria and conclusions on the basis of which the case is to be resolved, and the factors on the basis of which a fine could potentially be imposed. The client may make a statement and/or present his views concerning the preliminary assessment within the time limit prescribed by the competent competition council, with the provision that the time limit provided may not exceed thirty days if the client has previously had the opportunity to respond to the investigator's report.

In proceedings launched for the conduct of agreements restricting economic competition or that of abuse of dominant position or under Article 101 or 102 of the TFEU, if based on the final investigation report the competent competition council considers it appropriate having regard to the relevant facts of the case established and to the underlying evidence to ensure the swift and effective conclusion of the proceedings, it may request the client to indicate in writing whether he wishes to partake in the settlement procedure (egyezsegi eljaras). If the client replies to the request of the competition council and indicates his intention to participate in the settlement procedure, the competent competition council shall interview the client and shall disclose to the client the illegal conduct of which he is accused, the evidence underlying the charges and the fine that may be imposed for such infringement, showing the minimum and maximum amounts. If the client and the competition council reach a common position in respect of those factors inside a timeframe without jeopardizing the swift and effective conclusion of the proceedings, the competition council shall request the client to submit the statement within a time limit not exceeding 15 days. The statement of settlement may be withdrawn before the time of expiry of the deadline for the right to appeal, and only if the competent competition council's preliminary assessment, and/or subsequently its resolution differs on the merits from what is contained in the statement of settlement, including the case where the amount of the fine imposed exceeds the highest amount of the fine the client deems acceptable.

If with respect to a conduct investigated by competition supervision proceedings opened for the protection of public interest the client undertakes the commitment to proceed in a specific way to bring his conduct into conformity with the relevant statutory provisions, so as to ensure that the protection of public interest can be effectively implemented, the competent competition council shall have powers to adopt a resolution to compel the client in question to undertake that commitment, without adopting an opinion regarding any infringement of the law or the lack thereof. If the client has in the meantime ceased the conduct investigated, a commitment may be undertaken for compliance with transparent and verifiable codes of conduct intended to avoid any recurrence of the infringement.

In its resolution, the competent competition council shall – *inter alia* –:

- in the case of examination of concentration:
  - establish that the concentration does not significantly reduce competition in the relevant market,
  - impose a prior or subsequent condition, or an obligation in connection with the concentration of companies, or
  - prohibit the concentration;
- establish in proceedings opened because the decision adopted in the assessment of a concentration – pending before the administrative court – is based upon the misleading communication by the client of any material fact relevant to the decision, was materially based on false information, and shall withdraw the decision in consequence;
- establish that the agreement is prohibited according to the prohibition of agreements restricting economic competition (agreement that is capable to create an environment, in conjunction with other agreements of the like, whereby competition in the relevant market is substantially obstructed, restricted or distorted);
- determine that block exemption shall not apply to a specific agreement;
- establish the fact of infringement;
- order the cessation of the infringement;
- prohibit any further infringement;
- impose a fine; or
- declare a conduct to be legal.

The competent competition council may impose a fine – *inter alia* –:

- for any infringement falling within the jurisdiction of the GVH, other than those governed in Chapter VI (*i.e.* Controlling the Concentration of Companies);
- for the execution of a merger in spite of the prohibition imposed by the competent competition council by way of a resolution;
- for non-compliance with the obligation prescribed in the resolution for the concentration, or if the concentration is carried out without compliance with the condition prescribed in the competent competition council's resolution; and

it shall impose a fine on any person who:

- failed to fulfill the commitment undertaken in due time, except if competition supervision proceedings had been reopened due to the withdrawal of the resolution prescribing the

commitment; or

- failed to fulfill the obligation prescribed in its decision for the performance of a specific act or an obligation either to perform or to refrain from certain activities, and if enforcement had not been ordered.

The fine shall be a maximum of ten percent of the company's net turnover, or the net turnover of the group – of which the company penalized is identified in the decision as a member – for the financial year preceding the year when the decision was adopted. The fine imposed upon associations of companies shall be a maximum of ten percent of the previous financial year's net turnover of the member companies. In determining the maximum amount of the fine the net sales revenue shall be determined relying on the annual account or simplified annual account for the financial year immediately preceding the time when the resolution was adopted. The competent competition council shall not impose, or shall reduce the fine in respect of a company which meets the conditions of the leniency policy (*see answer given to Question 5*).

Both the resolutions adopted by the investigator and the competition council might be appealed.

**B. Proceedings of the court – actions that may be brought by the GVH (public law enforcement)**

The actions that may be launched by the GVH are public law claim enforcement forms.

**Actions against the exercise of public authority in breach of the freedom of competition**

Where the GVH in the use of its powers finds that the actions of an administrative body breach the freedom of competition, the GVH shall call upon the administrative body in question to remedy the competitive harm caused by its activity, in particular by way of reversal or withdrawal of its decision. As regards the aforesaid reversal or withdrawal of the decision, any gain obtained through the distortion of competition shall not be considered as a right acquired and exercised in good faith. If the administrative body fails to comply with the request of the GVH within thirty days, the GVH may bring administrative action against the public administration activities capable of distorting the freedom of competition. After one year following the date when the specific decision became final no action may be brought against the decision. No justification shall be accepted in the event of failure to comply with that time limit.

**Action in the public interest**

The GVH may bring civil action in the public interest on behalf of consumers against a business entity engaged in any infringement falling within the competence of the GVH, where such illegal action results in a grievance that affects a wide range of consumers that can be established relying on the circumstances of the infringement. The GVH shall be entitled to bring such action only after the opening of competition supervision proceedings in connection with the conduct in question. If the competition supervision proceedings are already in progress, the court shall grant continuance of the legal proceedings at the request of the GVH pending conclusion of the competition supervision proceedings. No action may be brought after three years following the time of commission of the infringement. Where, with respect to the consumers affected by the infringement, the legal grounds for the claim and the amount of damages demanded, or the overall contents of the claim in the case of other claims, can be clearly established irrespective of the individual circumstances of the consumers affected by the infringement, the GVH may request the court to award such claims and order the business entity in question to satisfy these claims, or failing this, to request the court to declare the infringement covering all consumers indicated in the claim. Furthermore, if the court's decision also contains a clause ordering the business entity to provide satisfaction for a specific claim, the business entity shall be required to satisfy the claim of the consumer on whose behalf the judgment was awarded.

**C. Proceedings of the court – actions may be brought by the interested party (private law enforcement)**

**Proceedings for infringements of the prohibition of unfair competition**

The conducts falling under the scope of prohibition of unfair competition (tisztessegtelen verseny tilalma) are set forth in Sections 2-7 of Hungarian Competition Act.

It is prohibited to:

- conduct economic activities in an unfair manner, in particular, in a manner violating or jeopardizing the lawful interests of customers, buyers and users, as well as competitors, or in a way which is in conflict with the requirements of business integrity;
- infringe upon or jeopardize the good reputation or credibility of any competitor by communicating or disseminating untrue facts, or by misrepresenting true facts with any false implication, as well as by any other practices;
- make an unfair appeal to another party which is aimed at dissolving an economic relationship maintained with a third party or at preventing the establishment of such a relationship;
- interfere with the integrity and fairness of bidding (in particular, public tender, invitation to tender), auctions, and transactions conducted on an exchange market in any way;
- launching comparative advertising provided that certain

conditions are met;

- produce, place on the market, or advertise with such distinctive appearance, packaging, or marking including the indication of origin any goods of a fungible nature or services without the express prior consent of the competitor, furthermore, use of any such name, marking, or indication of goods by which the competitor or its goods and/or services are normally recognized.

The above infringements are out of scope of the GVH and subject to private enforcement. Conducting proceedings due to the violation of the provisions of prohibition of unfair competition – the cases falling under the scope of which are listed above – shall fall within the competence of the court.

The plaintiff may demand:

- a court ruling establishing that there has been an infringement;
- to have the infringement discontinued and the perpetrator restrained from further infringement;
- that the infringer makes amends for his action by way of a statement or in another appropriate manner, and if necessary, that such amends should be given due publicity by or at the expense of the infringer;
- the termination of the injurious situation, to have the former *status quo* reinstated, and the deprivation of the goods manufactured or supplied illegally, or, if this is not possible, the destruction thereof, and the destruction of any special devices and facilities used for the manufacture or production thereof;
- compensation for damages, and restitution for any violation of his/her rights relating to personality, in accordance with the rules of civil law; and/or
- that the infringer discloses information on the parties participating in the manufacturing and marketing of the products involved in the case as well as on the business relations it has established to distribute such products.

Furthermore, in actions brought in connection with any infringement of the provisions of passing-off (the definition of which is cited above), the party affected, in addition to the above, may demand:

- restitution of the economic gains achieved through infringement;
- the seizure of the means and materials used solely or primarily for the infringement, as well as the products affected by the infringement, or having them handed over to specific persons, or recalled or withdrawn from commercial circulation, or the destruction of such goods; and
- to have the resolution disclosed at the expense of the infringer.

Legal proceedings may be brought on the grounds of conduct infringing upon the provisions of prohibition of unfair competition within six months from the infringement. No action may be brought after three years from the time of commission of the infringement or the comparative advertising.

Enforcement of civil claims before the court for compensation for harm resulting from any infringement of the provisions of Chapter IV (prohibition of agreements restricting economic competition) or Chapter V (prohibition of abuse of dominant position) of Hungarian Competition Act or Article 101 or 102 TFEU

The competition supervision proceeding of GVH initiated for the protection of public interest shall not prevent the enforcement of civil claims for any infringement of the provisions of Chapter IV or V of Hungarian Competition Act or the prohibition laid down in Article 101 or 102 of the TFEU (in this chapter hereinafter referred to as infringement of competition law).

Any person who causes damage to others by the infringement of competition law shall be liable to provide compensation in accordance with the general rules of non-contractual liability. The provisions of Act V of 2013 on the Civil Code (Civil Code) shall apply to liability for damages resulting from the infringement of competition law, subject to the exceptions set out in Chapter XIV/A of the Hungarian Competition Act.

The competence of the GVH for protection of the interests of the public shall not prevent the enforcement of civil claims for any infringement of the provisions of prohibition of the unfair manipulation of business decisions before the court.

### D. Legal consequences falling under the scope of criminal law

Section 420 of Act C of 2012 on the Criminal Code (Criminal Code) prescribes the rules applicable to the agreement in restraint of competition in public procurement and concession procedures.

According to Section 420(1) of the Criminal Code, *"[a]ny person who enters into an agreement aiming to manipulate the outcome of an open or restricted procedure held in connection with a public procurement procedure or an activity that is subject to a concession contract by fixing the prices, charges or any other term of the contract, or for the division of the market, or takes part in any other concerted practices resulting in the restraint of trade is guilty of felony punishable by imprisonment between one to five years."*

According to subsection (2) of the same section, "*[a]ny person*

*who partakes in the decision-making process of an association of companies, a public body, a grouping or similar organization, and adopting any decision that has the capacity for restraining competition aiming to manipulate the outcome of an open or restricted public procurement procedure or an activity that is subject to a concession contract shall also be punishable in accordance with Subsection (1).”*

Further subsections provide for cases, when the perpetrator shall not be prosecuted for the above actions as well as cases, when the penalty may be reduced without limitation.

Important to note, that only natural persons can be prosecuted based on the Criminal Code, however it does not mean that the connected undertaking would be free of any consequence based on the criminal law. Act CIV of 2001 on criminal measures applicable to a legal person regulates that if a company was used for criminal acts or gained any advantage due to the criminal activity, and the natural person who partakes in the criminal activity has connection to the company then the court can apply the following consequences: dissolution of the legal person or restriction of the activity of a legal person and fine.

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

If mergers or acquisitions reach a certain threshold (see below), the companies are obligated to notify the European Commission or the GVH prior to the merger. Following an economic, competition analysis these agencies may prohibit the merger or impose structural or behavioural criteria for allowing it. Until the approval, the concentration of companies cannot be carried out and *status quo* before the concentration shall apply: voting rights and the right for the appointment or delegation of executive officers acquired as a result of the concentration cannot be exercised and the previous independent business relationship should apply.

The area of mergers and acquisitions – similarly to other areas in the competition law – is regulated by both European and Hungarian law. The European Union legislation is applicable on concentrations with a “Community dimension.” A concentration has a “Community dimension” where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 billion; and (b) the aggregate community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same member state. A concentration that does not meet the thresholds laid down above has a Community dimension where: (i) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2.5 billion; (ii) in each of at least three member states, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (iii) in each of at least three member states included for the purpose of (ii), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (iv) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million unless each of the undertakings concerned achieves more than two-thirds of its aggregate community-wide turnover within one and the same member state.

In cases other than the above, the Hungarian legislation applies. In Hungary, the mergers are regulated in Chapter VI of the Hungarian Competition Act. The GVH, which is the appointed agency with regard to merger control, issued useful guidelines *e.g. Notice No. 2/2020* on certain issues of law in connection with merger proceedings applicable to mergers since January 1, 2021; *Notice No. 7/2017* in the subject of procedure initiation; *Notice No. 8/2017* on prescribing conditions and obligations in decisions.

**Meaning of concentration**

A concentration shall be deemed to arise where (a) two or more previously independent companies merge, or one merges into another, or a part of a company becomes a part of another company which is independent of the first company; (b) where a company or more companies jointly acquire the right of direct or indirect control of a previously independent company, or more, previously independent, but related companies; or (c) several independent companies jointly set up a company to be controlled by them that is capable to function in all respects as an independent company (joint venture)

Direct control means if the company holds over 50% of the shares, stocks or voting rights in the controlled company; or has the power to designate, appoint, or dismiss the majority of the executive officers of the other company; or has the power, by contract, to assert major influence over the market behaviour of the other company; or acquires the ability to assert major influence over the market behaviour of the other company.

Indirect control is also relevant according to the b point of the above term. Indirect control means that the company is part of the network of undertakings and has control over another company with direct control over other companies. The group is analysed together, therefore the degree of control can add up between the group member companies.

**The obligation of notification (threshold)**

The concentration of companies shall be notified to the GVH if the combined Hungarian net turnover of the previ-

ous financial year of all groups of companies (the acquirer or acquirers and the target) involved and the net turnover of the companies controlled jointly by members of the groups of companies involved with other companies of the previous financial year exceeded HUF 15 billion (approximately EUR 41.6 million), and among the groups of companies involved there are at least two groups with a net turnover of HUF 1 billion (approximately EUR 2,7 million) or more in the previous year together with the net turnover of companies controlled by members of the same group jointly with other companies. The HUF 1 billion threshold shall cover all concentrations that took place during the two-year period preceding the concentration between companies that used to be part of the group that lost control due to the concentration with companies of the group that acquired control, where no competition control proceedings had been opened, except if the concentration was notified and already acknowledged.

In the course of calculating the above net sales revenues, the net turnover generated in the previous business year from goods sold in the territory of Hungary shall be taken into account and the turnover between the companies of the same group concerned or between the business units thereof should be disregarded.

Specific rules apply to the calculation of the above limits for mergers including insurance companies, credit institutions, financial enterprises, or investment companies.

Mergers that fall below filing thresholds should be also reported if (i) it is not obvious that the concentration does not significantly reduce competition in the relevant market, and (ii) the combined net group turnover of all parties exceeded HUF 5 billion (approximately EUR 13,8 million) in the previous financial year.

The exemptions of the above notification obligation are the following:

- the government may declare the merger of companies of strategic importance at the national level. Such concentrations need not be notified to the GVH;
- where concentration is implemented through an equity scheme set up for that purpose, by way of financing transaction required as a result of COVID-19 coronavirus with the involvement of a venture capital fund or private equity fund under direct or indirect majority state ownership if the venture capital fund or private equity fund under direct or indirect majority state ownership acquires control rights by self or jointly with other companies for the purpose of investment protection.
- where a directly or indirectly majority state-owned venture capital fund acquires joint management rights as a result of a capital investment compliant of state aid rules in an undertaking whose net turnover did not reach HUF 1 billion in terms of the previous year's net sales (*i.e.* investment in start-ups)
- no notification is required for the temporary acquisition of control or assets by an insurance company, credit institution, financial holding company, mixed-activity holding company, investment firm, or property management organization, if such acquisition is made in preparation of resale, temporary (for maximum one year) and if the company acquiring control does not exercise its rights of control, or if such rights are exercised only to an extent that is absolutely necessary.

## 10. What is the normal merger review period?

Due to the changes in the last years, the normal merger review period in Hungary became faster and has less administrative burden connected with it. In summary, the process of the merger review consists of the following steps:

**1.** a pre-negotiation with the GVH (optional)

**2.** submission of the notification of concentration by the company

**3.** proceeding of the GVH: analysis and final decision – three possible processes:

**a.** fast-track approval (the deadline is eight days; four days is the average administrative time)

**b.** decision following a simplified analysis (the deadline is 30 days; 17 days is the average administrative time)

**c.** decision following a full analysis (deadline is four months; 71 days is the average administrative time)

**4.** a possible follow-up investigation by the GVH

**Submission of notification**

The party obligated to notify the GVH is (a) the direct participant if the concentration is realized by way of merger by formation of a new company or merger by acquisition, or by way of setting up a joint company, or (b) the party acquiring the business unit or direct control or the company having direct control thereof.

The notification of concentration shall be submitted following the time of publication of the public bid bringing about the concentration, the conclusion of the contract, or the acquisition of the right of control, whichever occurs the earliest.

The notification of concentration shall contain all the facts and data necessary for processing the notification and shall be accompanied by the documents specified in the form which is posted on the GVH's website.

Prior to the notification of concentration, the companies may enter into prior, confidential negotiations with the GVH for the purpose of clarifying the data and documents required to be enclosed with the notification of a concentration. This pre-notification negotiation is useful for the submission of a non-problematic notification which can be cleared in a fast-track proceeding, which is faster and generate less cost.

Please note, that in the case of mergers involving media companies obtaining the expert opinion of the Media Council may be necessary.

**Proceeding of the GVH**

Following the submission of notification and payment of the fee, the GVH has eight days to examine the submission and choose from the following options:

- rejection if the concentration does not reach the control threshold (see above)
- rejection if the notification is submitted early or not by the entitled person (see above) – in this case, the fee is refunded
- In straightforward, non-problematic cases the GVH closes the procedure and acknowledges the transaction by the issuance of an administrative certificate (fast-track procedure).
- In the case of transactions that require more thorough investigation, when it is not immediately apparent that the concentration does not significantly reduce competition in the relevant market, the GVH orders an examination procedure which divided into two stages: an investigation stage by the case handlers and the decision-making stage by the Competition Council. This investigation can be simplified or a full-scale investigation, which affects the deadlines.

If the above eight days-deadline is not met, the concentration may be carried out, which shall be verified by the GVH and also the fee shall be refunded.

**Decision**

The concentration shall be assessed by weighing the advantages and disadvantages resulting from the concentration. The GVH shall prohibit the concentration if, the concentration constitutes a significant impediment to competition in the relevant market, particularly in consequence of the creation or strengthening of a dominant position. If the considerable reduction of competition resulting from a concentration can be effectively prevented upon the fulfillment of prior or subsequent conditions and the company undertake these conditions the GVH have the option to make the said commitment obligatory by means of a resolution or may render the implementation of concentration subject to compliance with specific prior or subsequent conditions.

The decision of the GVH is subject to judicial review, which may be launched within 30 days of receipt of the GVH's decision.

**Follow-up investigation**

Following the final decision, follow-up investigations can be initiated by the GVH within five years of approval in case of the following cases:

- investigation whether the companies requesting approval already carried out the merger prior decision, where can the GVH issue daily-fines
- investigation whether the conditions of the approval specified by the GVH are met and in case of non-compliance can order the concentration to be terminated
- investigation if it arises that the data on which the fast-track decision or other decision based is false or deceptive. Following the investigation, GVH can revoke its decision and issue fines.

The GVH can also initiate an investigation into mergers that failed to request the necessary approval, which could result in fines.

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

The fees depend on the depth necessary to analyse the merger request prior to a decision, regarding this please see the answer given to Question 9. The fees applicable are the following:

- Fast-track review fees amount to HUF 1 million (approximately EUR 2,700) which is payable at the time of submission of a notification of concentration.
- If further, simplified analysis is required, an additional HUF 3 million (approximately EUR 8,300) must be paid.
- If further, full-scale analysis is required, an additional HUF 15 million (approximately EUR 41,600) must be paid.

If the notification of concentration covers two or more concentrations, the administrative service fee shall be payable for each concentration.

## 12. Is there any possibility for companies to obtain State Aid in Hungary? If yes, under what conditions?

Due to Hungary's accession to the European Union as of May 1, 2004, the Articles 107-109 of the TFEU *i.e.* the provisions applicable to state aid shall apply to Hungary as well. Therefore, the provisions of national law and available aids shall always comply with the relevant EU law provisions and the

case law of the CJEU developed thereon.

With respect to the fact that the EU's state aid regulation, its principles, and legal practice is applicable to Hungary as well, the Hungarian legislator has not established a detailed regulation for state aid but refers to the relevant EU legislation instead.

Companies registered and operating in Hungary may obtain state aid, however, these aids as well as the conditions applicable to their provision shall always comply with the governing EU law.

**Proceedings related to state aid in the context of EU competition law**

*Government Decree no. 37/2011.* (III. 22.) on the proceedings related to state aid in the context of EU competition law and the regional aid map (Decree) provides for the provisions applicable to the authority granting the aid and the aids provided by them, the organizations delivering the aids, the recipients of the aids, the interested parties under Article(1)(h) of *Council Regulation (EU) 2015/1589* and to the proceedings of the minister responsible for the use of EU funds related to state aid.

Annex 1 of the Decree lists each category of aid including their sub-categories as well. Annex 1 indicates 18 categories in total, out of which the 18th category is titled "Not state aid" (nem allami tamogatas). The other 17 categories include *inter alia* the horizontal objectives, regional aids, aids provided according to *Commission Regulation (EC) No. 800/2008*, and fishing.

The Decree provides for the requirements related to the transparency of the state aid and lists those elements, that shall be included in the aid plan in case of aid schemes, individual aids, and aids provided from existing aid schemes falling under the scope of notification requirement.

These elements include *inter alia*:

- the name of the provider of the aid,
- the objective of the state aid including – *inter alia* –
  - the form of the state aid,
  - the maximum amount of the state aid,
  - the beneficiaries,
  - the amount of own resources, *etc.*;
- whether the plan contains operating aids;
- the name of the appointed contact department and the contact details of the contact person with respect to the fulfilment of certain obligations;
- the planned annual average budget and the total budget of the individual aid or aid scheme.

The aid intensity of all state aid used for the same eligible costs must not exceed the amount specified in the state aid rules of the European Union.

Unless otherwise provided by the state aid rule of the European Union, an undertaking in difficulty may not receive any state aid. Section 6 of Decree provides for the rules determining when an undertaking shall be considered to be in difficulty.

Chapter Three of the Decree regulates in detail the provisions applicable to the notification of the schemes including state aid and the minister's proceedings related thereto.

The State Aid Monitoring Office (*Tamogatasokat Vizsgalo Iroda*; Office) plays an important role in the notification proceedings related to state aid. The minister carries out its duties specified in the Decree through the Office as the organisation responsible for the examination of state aid from the aspect of the EU competition law.

With respect to the above, the Office – *inter alia* –:

- examines the compatibility of draft aid schemes falling under its competence with EU state aid rules from the view of its suitability to prenotification or official notification and:
  - if the Office deems the draft aid scheme suitable, then it shall forward it to the Commission along with the summary prepared by the granting organization; or
  - if the Office establishes that the draft aid scheme may not be compatible with the EU state aid rules or it shall be amended, thus it is not suitable for prenotification to the Commission or to official notification, it shall issue a preliminary opinion to the granting organization in order to make the scheme compatible with the EU state aid rules;
- approves aid measures covered by the *de minimis* regulations or block exemption regulations and, if necessary, informs the Commission of these measures;
- authorises the introduction of the aid measure in case of aid schemes falling under the scope of block exemption regulations and notifies the Commission thereon;
- based on the information provided by the granting organizations, it prepares an annual report to the Commission pursuant to Article 21 of *Council Regulation (EC) No 659/1999* laying down detailed rules for the application of Article 93 of the EC Treaty;
- represents Hungary in proceedings before the Commission in proceedings falling under its powers, *i.e.* the Office shall coordinate the notification proceeding to the Commission and

the Office is in contact with the Commission, thus it communicates the Commission's questions as well as the answers provided;

- shall notify the granting organization of the Commission's resolution or of the fact that the Commission has established that the aid to be provided according to the notified draft aid scheme may not constitute state aid.

**Aids provided from EU funds**

The provisions applicable to the use of aids originating from certain EU funds (*e.g.* European Regional Development Fund; Cohesion Fund; Internal Security Fund; *etc.*) shall be determined for every programming period.

On May 18, 2021, *Government Decree No. 256/2021. (V. 18.)* on the use of aids from each European Union fund for the 2021-2027 programming period has been published in order to establish the detailed provisions applicable to the use of aids provided from certain EU funds. The Government Decree prescribes a number of rules in order to provide continuous compliance with the state aid rules of the European Union. For example, the compliance of the draft invitation with the state aid rules shall be reviewed or prior to adopting a decision on the provision of additional aids for cost increases it shall be reviewed whether the provision of such additional aids complies with the rules applicable to state aids.

In addition to the above referred Government Decree, *Government Decree No. 258/2021. (V. 20.)* on the rules of state aid in the context of EU competition law applicable to the use of funds allocated to the 2021-2027 programming period regulates those cases, when financing a measure that might be supported financially from an operative programme would constitute a state aid under Article 107(1) of the TFEU, then in which other form shall the aid be provided (*e.g.* as an aid provided for start-up businesses or an aid provided for a research and innovation project).

To summarize the above, Hungarian companies may obtain state aid, however, the provision of these shall be continuously in compliance with the applicable EU regulation and in order to provide this compliance, in certain cases cooperation with the European Commission or its notification is required related to state aids planned to be provided.

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

There were no developments of high importance relating the core areas of competition law. Special procedural rules were introduced on sector inquiries allowing the Competition Authority to act faster in the event of market distortion. These rules were placed out of effect as of January 1, 2022.

There is one permanent change that should be mentioned regarding the merger notification requirements: if the merger takes place by the participation of a venture capital fund or a private equity fund of which the majority of the ownership rights is directly or indirectly controlled by the state through a financing scheme set up for the purpose of COVID-19-related refinancing by which the fund itself or together with other companies acquires controlling rights with investment protection purposes, the requirement of notification does not apply.

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# CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2021

# LATVIA

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

The main competition-related legislation in Latvia is the *Competition Law of Latvia* of October 4, 2001, (Competition Law). It covers the main areas of action – prohibited agreements, abuse of dominance, merger control, and competition distortion created by public administrative bodies. There is also the *Unfair Retail Trade Practices Prohibition Law* of January 1, 2016 (replaced by the *Law on the Prohibition of Unfair Commercial Practices* as of November 1, 2021, with transition period until April 19, 2022).

In addition, there is a number of Cabinet of Ministers Regulations (secondary legislation) that contain more detailed rules related to the main areas of action of the Competition Council of Latvia (Competition Council).

### Agreements

- The *Cabinet of Ministers Regulation No.798* of September 29, 2008, on exemptions of certain horizontal cooperation agreements from the prohibition of agreements indicated in the Section 11, paragraph one of the Competition Law;
- The *Cabinet of Ministers Regulation No.797* of September 29, 2008, on exemptions of certain vertical agreements from the prohibition of agreements indicated in the Section 11, paragraph one of the Competition Law;
- The *Cabinet of Ministers Regulation No.799* of September 29, 2008, on the procedure of filing and examination of notified agreements between undertakings.

### Merger Control

- The *Cabinet of Ministers Regulation No.800* of September 29, 2008, on the procedure of filing and examination of full-form and short-form notification of a concentration between market participants (Regulation on merger procedure);
- The *Cabinet of Ministers Regulation No.362* of June 14, 2016, on the state fee for the evaluation of a concentration (Regulation on fee for merger review).

### Sanctions

- The *Cabinet of Ministers Regulation No.179* of March 29, 2016, on procedures for determining a fine for the infringements provided for in the Section 11, paragraph one, the Sections 13 and 14.1 of the Competition Law and the Sections 5, 6, 7, and 8 of the *Unfair Retail Trade Practices Prohibition Law* (Regulation on sanctions).

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

There are two recent notable updates of the Latvian competition legislation. First one relates to amendments of the Competition Law (entered into force on January 1, 2020) that prohibits public administrative bodies (and undertakings owned by these bodies) from distorting competition on Latvian market.

Three main areas covered are the following:

- Prohibition of discrimination by creating unequal competition conditions;
- Prohibition to create advantages for undertakings directly or indirectly controlled by public administrative body;
- Prohibition to implement activities, as a result of which other undertakings are forced to exit market or which burden entering or operating on the market of new (or potential) undertakings.

The first line of action is negotiation phase to ensure compliance initiated by the Competition Council. In case negotiations fail, a formal investigation procedure can be initiated and fine up to 3% of net turnover of the last financial year (but no less than EUR 250) may be imposed on undertaking owned by public administrative body.

Second update relates to the *Unfair Retail Trade Practices Prohibition Law* of January 1, 2016, that prohibits unfair trade practice throughout agricultural and food products supply chain, as well as use of procurement power by non-food product retailers towards suppliers. This law is replaced by the *Law on the Prohibition of Unfair Commercial Practices* as of November 1, 2021, (transition period until April 19, 2022).

The *Law on the Prohibition of Unfair Commercial Practices* combines both the European Parliament and the Council Directive on unfair trading practices in business-to-business relationships for agricultural and food supply chain and the clauses from soon expiring *Unfair Retail Trade Practices Prohibition Law* of January 1, 2016. Several prohibitions towards buyers are set out, amongst other, addressing unilateral making of amendments to agreements, payment requests not related to selling of goods, unjustified compensation requests.

Fines up to 0.2% of retailer's or buyer's net turnover in the last financial year, but not less than EUR 70, may be imposed by the Competition Council.

It should also be considered that major amendments are in progress related to the Competition Law. Most significant cover such areas as functional independence and financial resource increase of the Competition Council, changes in application of fines and increase of fines for some types of infringements

(*e.g.* for prohibited vertical agreements and abuse of dominance infringements up to 10%), clarified rules on cooperation between competition authorities, application of interim measures and the relevant Articles of the Treaty on the Functioning of the European Union (TFEU). Initially February 1, 2021, was the proposed date of these amendments coming into force. However, certain aspects are still under debate and there is no indication as to a final draft of amendments and an actual date of effect.

Recently, public consultations were also announced by the Competition Council as to potential amendments of the Regulation on merger procedure. Proposal includes such amendments as prolongation of initial examination of merger notification prior accepting it from five working days currently to one-month, increased amount of information requirements, especially for full-form merger notifications. Stakeholders are invited to comment and it is envisaged that proposed amendments could come into force as of March 1, 2022.

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

Prohibited agreements are stipulated in the Section 11 of the Competition Law and are considered the severest violation of competition law. The detection of such agreements is declared an operational priority of the Competition Council and there is even a specialized Prohibited Agreement Unit that tackles these types of infringements as a priority.

In relation to fines, a distinction is made between prohibited agreements at vertical or horizontal level. For prohibited vertical agreements (between undertakings that are not direct competitors), the Competition Council is entitled to impose fine of up to 5% of the net turnover of each undertaking in the latest financial year (but no less than EUR 350 each). However, for prohibited agreements between competitors (cartel members), the Competition Council is entitled to impose more severe fine – up to 10% of the net turnover of each undertaking in the latest financial year (but no less than EUR 700 each).

In relation to the sanctioning record of the Competition Council, for the past ten-year period (from 2011 to 2021) there have been 44 infringement decisions taken in total. However, in the last four years, the number of infringement decisions has significantly dropped (two decisions in 2018, one decision in 2019, no decisions in 2020, and two decisions in 2021). There are three considerably recent cases that should be mentioned.

First, on April 12, 2019 the Competition Council fined companies involved in bid-rigging on supply of nanotechnology chemicals. The investigation of this case was initiated after receiving information from the Economic Crime Combating Board of the State Police and it was concluded that seven market participants coordinated tenders in two price quotations, carried out from 2012 to 2014 with the total contract sum exceeding EUR 800,000. An interesting and uncommon aspect of this case is that prohibited agreements were detected by the Competition Council at both vertical and horizontal level.

Second, on March 11, 2021, a decision was taken and fine imposed in the amount of EUR 221,000 by the Competition Council in the amelioration sector. Undertakings were caught exchanging commercially sensitive information prior their participation in tenders and, thus, the existence of a cartel was detected in this particular business sector for the second time since 2018 by the Competition Council.

Third, one of the most prominent recent cases concerns construction sector. After initial information received from the Corruption Prevention and Combating Bureau, on July 30, 2021, the Competition Council fined 10 construction companies for colluding on public and private tenders in Latvia. During the period from 2015 to 2018, representatives of the largest construction companies in Latvia regularly (at least three times a year) met and discussed around 90 potential and ongoing procurements. Undertakings were divided into two larger groups, each covering a similar amount of procurement contracts, with the division further documented and execution monitored. The total fine imposed by the Competition Council was over EUR 16.6 million.

The impact of this decision is wide as most of the largest construction sector companies in Latvia were involved. Currently almost all undertakings have appealed this decision (with one exception – the undertaking that collaborated during investigation phase and admitted taking part in cartel activity). However, if the Competition Council decision comes into effect after a court review, a one-year long prohibition would be in place to participate in public tenders for all 10 undertakings (with the possibility to restore trust). Several projects where cartel activity took place involves the European Union distributed funds thus a potential request to the partial or full return of such funds may also follow.

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

Agreements between undertakings which have as their object or effect hindrance, restriction, or distortion of competition in the territory of Latvia, are prohibited, null, and void from the

moment of being entered into.

The Section 11 paragraph one of the Competition Law sets out the main examples of prohibited agreements that, amongst other, contain the following:

- direct or indirect price and tariff fixing, coordination of provisions for their formation;
- the restriction or control of production volumes, sales, markets, technical development, investment;
- the allocation of markets, according to territory, customers, suppliers, or other parameters; and
- the coordination of participation in tenders, except when joint tendering is publicly announced and purpose of such tender is not to hinder competition.

A distinction is made between two types of agreements, depending on level in production or distribution chain where particular undertakings operate. There are prohibited horizontal agreements (between undertakings of the same level of production or distribution) or cartels and prohibited vertical agreements (between undertakings that represent different levels of production or distribution chain, *e.g.*, manufacturer and wholesaler, or wholesaler and retailer).

The concept of a "prohibited agreement" under the Competition Law in practice is similarly applied as in the European Union under the TFEU Article 101.

## 5. Does a leniency policy apply in Latvia?

There is a leniency policy in place, according to the Competition Law Section 12. More detailed terms of participation requirements in the leniency program are indicated in the Regulation of sanctions.

The leniency program provides:

- Full exemption from a fine and an exemption from the prohibition to participate in public procurements for one year after infringement decision has come into effect (according to the Section 42 paragraph one, the Section 6 of the Public Procurement Law) for the first undertaking to submit evidence on voluntary basis;
- Partial reduction from a fine in case the undertaking does not qualify for full immunity (if the investigation has already been initiated, the undertaking is not the first one to report infringement, or it is the initiator of infringement).

The application must contain the following information, to the extent it is known to the applicant at the time of submission: members and description of the cartel, available evidence, written confirmation that all criteria are satisfied to apply for exemption or reduction of fine. Within five working days of receipt of application, the Competition Council will notify the applicant in writing as to whether the application has been accepted or rejected (providing reasons for rejection). Non-acceptance of the application does not prevent it from being resubmitted upon rectification of any deficiencies.

## 6. How is unilateral conduct treated under Latvian competition rules?

According to Section 1 paragraph one of the Competition Law, a dominant position is the economic (commercial) position in a relevant market of a market participant or several market participants if such a participant or such participants have the capacity to significantly hinder, restrict, or distort competition in any relevant market for a sufficient period of time by acting with full or partial independence from competitors, clients, suppliers, or consumers.

There are no market share thresholds or assumptions indicated in either law or any guidelines produced by the Competition Council. Thus, the concept of dominance is examined on a case-by-case basis, taking into account relevant facts of the particular case.

A dominant position itself does not constitute a violation, however, the abuse of such a position is prohibited. A non-exhaustive list of examples for exclusionary and exploitative abusive behavior is indicated in the Section 13 paragraph one of the Competition Law:

- refusal to enter into transactions or to amend provisions of transaction without objective reason, including unfair and unjustified refusal to supply;
- restriction of output or product sale, market, or technical development without objective reason;
- imposition of provisions according to which entering into, amendment, or termination of a transaction is made dependent on whether additional obligations are undertaken;
- application of unfair purchase, selling prices, or other unfair trading provisions;
- application of unequal provisions by way of creating disadvantages for some undertakings.

The concept of "abuse of dominance" under the Competition Law in practice is applied similarly as in the European Union under TFEU Article 102.

Fines can be imposed for up to 5% of the net turnover of the previous financial year of the dominant undertaking, but no less than EUR 350, according to Section 14 paragraph two of the Competition Law.

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

For the past ten-year period (from 2011 to 2021) there have been 18 infringement decisions in total taken by the Competition Council. However, in the last five-year period, the number of infringement decisions has been insignificant. There are no decisions in 2017, 2018, and 2019, one decision in 2020, and one decision in 2021. However, there are three recent cases and processes with considerable importance that should be mentioned.

First of all, on December 28, 2020, the Competition Council imposed a fine close to EUR 5.7 million on the public capital company LDZ CARGO for abusing its dominant position by placing obstacles for competitors to operate in rail freight transport market in Latvia. For example, a discriminatory pricing practice was applied to customers of competitors, and, in some instances, contracts were terminated without objective justification. This was the first abuse of dominance decision taken by the Competition Council since 2016 and first decision since 2013 where TFEU Article 102 was applied in parallel to the corresponding Section 13 of the Competition Law.

Second, a settlement was reached on July 16, 2021, with the Riga City Municipality and SIA Getlini EKO in relation to a planned monopolization of the waste management market for 20 years through a concession procedure. Fines were paid to the state budget in the amount of EUR 885,000. It should be noted that in this case, on September 9, 2019, the Competition Council adopted an interim measure decision (a rare practice of the Competition Council) imposing the obligation to immediately stop the implementation of the concession procedure (and agreement) to avoid negative consequences and retain competition on the waste management market in the Riga city territory.

Third, there was another activity in waste management sector that resulted in an infringement decision. On June 22, 2021, the Competition Council imposed fine in the amount of slightly over EUR 51,000 on Jelgava's City Municipality for abuse of a dominant position related to the municipality's actions – the illegal creation of a monopoly in the waste management market. The right to operate in the waste collection and transportation market in the Jelgava city territory was granted to the Jelgava City Municipality owned capital company Jelgavas komunalie pakalpojumi. The market was closed to competition for more than seven years, as a result.

In addition, on July 29, 2021, the Competition Council amended obligations imposed on the dominant energy market undertaking AS Latvenergo with a decision in 2009. It was identified that the energy produced by "other players" currently active on the market compared to the situation in 2009 is still relatively low when compared to AS Latvenergo. AS Latvenergo's capacity on the market in Riga City Municipality still accounts for 90% of the total volume of energy. Thus, the legal obligations were updated, stipulating that AS Latvenergo is not allowed to set prices in Riga that are below specific objectively justifiable costs. The level of such costs were identified during a consultation process with both market participant's (AS Latvenergo's competitors) and the Public Utilities Commission.

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

Financial sanctions for each type of infringement are as follows:

- Prohibited agreements – up to 5% of the net turnover in the latest financial year of each undertaking for prohibited vertical agreements; up to 10% of the net turnover of each undertaking in the latest financial year for undertakings involved in cartel activity;

- Abuse of dominance – up to 5% of the net turnover of dominant undertaking in the last financial year;

- Unfair Retail Trade Practices - up to 0.2% of retailer's or buyer's net turnover in the last financial year;

- Distortion of competition from public administrative bodies – up to 3% of net turnover of undertaking owned by a public administrative body in the last financial year;

- Un-notified mergers – up to 3% of turnover of either acquirer or merged undertaking in the previous financial year.

In addition to monetary fines, the Competition Council has additional tools that are used in the course of action.

According to the Section 8 of the Competition Law, the Competition Council may also take a decision to impose legal obligations on the undertaking, depending on the particular detected infringement type and potential remedies possible. Such an obligation may be included in the final decision (together with the detection of infringement and the imposition of a fine) or in a separate interim measure decision to avoid immediate detrimental effects on competition. A separate interim measure decision taken by the Competition Council is not common practice, however, there is one considerable recent example.

As mentioned above, after the initiation of an infringement procedure in relation to the waste management system of the Riga City Municipality, on June 14, 2019, the Competition

Council took an interim measure decision. Amongst other, it was ordered to immediately suspend the concession procedure as it affected the collection and transportation of household waste in the Riga city territory. This decision was appealed by the undertakings concerned. After a speedy court review, on October 1, 2019, the Administrative District Court of Latvia agreed with the Competition Council and the interim measure decision remained in force.

In relation to the distortion of competition from public administrative bodies, a prior potential imposition of monetary sanctions, the Competition Council carries out negotiations with respective administrative bodies or the undertaking owned by it. Only in the case in which the negation phase is unsuccessful is a formal procedure initiated, an infringement is detected, and a fine along with legal obligations are imposed.

For un-notified merger cases, in addition to the monetary fine, after an investigation into the particular case, the Competition Council may take the decision to prohibit a merger and order undertakings to de-merge.

There is also the possibility to initiate damage actions on Competition Law infringements in court. A rather unique mechanism included in the Competition Law concerning damage actions is the presumption that in case cartel activity is detected, prices have presumably raised by 10%, unless proven otherwise (the Section 21 paragraph three of the Competition Law).

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

According to Section 15 paragraph one of the Competition Law, concentration arise in any of the following situations:

- consolidation or merging of two independent undertakings to become one undertaking;
- the acquisition of control over another undertaking;
- the acquisition of control (or rights to use) assets that increase the market share of acquirer.

The concept of "concentration" under the Competition Law in practice is similarly applied as in the merger regime of the European Union. However, according to established case-law, the acquisition of assets, that do not constitute undertaking, is also considered a potentially notifiable concentration. This is in situations where particular assets increase the acquirer's market share, for example, such assets as supermarket, petrol stations, and pharmacy premises.

Turnover thresholds for mandatory notification are indicated in the Section 15 paragraph two of the Competition Law:

- Combined aggregate turnover of merging parties is at least EUR 30 million in the territory of Latvia; and
- Aggregate turnover of each of at least two merging parties is at least EUR 1.5 million in the territory of Latvia.

Ex-post control may also be initiated by the Competition Council for mergers that fall below notification thresholds 12 months from the effective date of concentration if:

- the merging parties are direct competitors and their total market share on the relevant market exceeds 40% as a result of the merger;
- there is reasonable suspicion, that dominant position in market can be created or strengthened, or competition on relevant market can be significantly decreased as a result of the merger.

To avoid legal certainty in a form of ex-post review, merging parties may:

- request a written confirmation that the Competition Council will not use its right to request a merger notification;
- submit a notification voluntarily for the Competition Council's review.

## 10. What is the normal merger review period?

Once a merger notification is submitted, within five working days the Competition Council determines as to whether a notification is deemed accepted and the investigation period starts.

In case the investigation period has started, the examination takes place as follows:

- For cases that do not raise serious concerns, a final decision usually is taken within one month (Phase I);
- For complicated cases that need an in-depth examination, a final decision may take up to four months (Phase II). The four-month deadline may be further extended by 15 business days if potential remedies need to be assessed.

To speed up the investigation process, it is possible to take several additional steps. First, approach the Competition Council prior to the official notification, using pre-notification consultation possibilities (meetings, sending draft notification

prior official notification to the Competition Council experts for comments). Second, provide additional information that might be beneficial for the Competition Council during the review process (including full-form notification in cases when short-form notification can be submitted). At the same time, the workload of the Competition Council may cause potential delays even in less complicated cases. This should be taken into account in overall transaction planning phase.

There is no formal prohibition to complete a notified transaction before a formal clearance is received from the Competition Council (no gun-jumping prohibition). However, risks should be examined with due care (especially for more complicated cases where a Phase II investigation is initiated) as the implementation of merger without received clearance may result in fine of up to 3% of the turnover of the last financial year and a potential order to de-merge. Depending on the particular facts of the case, potential information exchange risks can also be present with fines of up to 10% of the turnover of the last financial year.

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

There are state fees applicable for notified transactions reviews:

- EUR 2,000 – in case short-form notification is submitted;
- EUR 2,000 – in case ex-post filing is requested or notification is submitted voluntarily;
- EUR 4,000 – in case aggregate turnover of merging parties in preceding financial year in Latvia has been in the range from EUR 30 million to EUR 80 million;
- EUR 8,000 – in case aggregate turnover of merging parties in preceding financial year in Latvia has been above EUR 80 million.

Payment of the state fee is an obligatory prerequisite to deem the notification formally complete and accepted by the Competition Council. Thus, payment formalities should be planned in advance.

## 12. Is there any possibility for companies to obtain State Aid in Latvia? If yes, under what conditions?

Yes, the same as elsewhere in the European Union, it is possible for companies to apply for and obtain state aid in Latvia under the various established programs (usually sectoral) with their own specific set requirements and prerequisites.

Generally, as per the *Law on Control of Aid for Commercial Activity*, all state aid programs in Latvia are under either the responsibility of the Ministry of Finance or the Ministry of Agriculture and the state institutions subordinate to respective ministries. As for funding – state aid in Latvia can be granted from the European Union funded programs, as well as state and municipal funds.

This fragmentation of responsibilities practically means that information on existing state aid programs that are open for applications is scattered across various sources. For example, the Central Finance and Contracting Agency of the Republic of Latvia usually organizes the European Union-funded schemes under the responsibility of the Ministry of Finance. While the Development Finance Institution AS Altum"(also under responsibility of the Ministry of Finance) is the institution in charge of state aid programs related to state and the European Union-funded loans (for specific purposes such as improving energy efficiency) to companies as well as natural persons. Similarly, the Rural Support Service of the Republic of Latvia administers state aid in the agriculture sector (with the following sub-sectors – agriculture and rural development, fisheries, and forestry).

It should be highlighted that due to the COVID-19 crisis the State Revenue Service as well as the Development Finance Institution AS Altum have created extensive state aid programs for companies facing difficulties. These programs range from state partly guaranteed loans to various tax "holidays" to ensure such companies with better cashflow as well as decrease possibility of potential insolvency.

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

At the beginning of the COVID-19 crisis in March 2020, the Competition Council aligned with the statement of the European Competition Network, indicating that extraordinary situations may trigger the need for companies to cooperate in order to ensure supply and fair distribution of scarce products to all consumers. Thus, actively intervening against necessary and temporary measures to avoid a shortage of supply would not have take place by the Competition Council. At the same time, it was stated that there will be no hesitance in acting towards undertakings taking advantage of the situation by cartelizing or abusing their dominant position.

Since then, there have been several public announcements by the Competition Council related to tge effect of the COVID-19 crisis on competition in some particular sectors, for example, the *Unfair Retail Trade Practices Prohibition Law*'s

application or the effect of nationally imposed restrictions for some particular sectors (*e.g.*, finances, beauty care). In a public statement on June 16, 2020, it was mentioned that, to an increasing degree, the Competition Council has been reviewing emergency tenders of medical equipment and services related to COVID-19. Unfortunately, no information is publicly available on the Competition Council's conclusions from these reviews.

A major change brought by the COVID-19 crisis is the remote contact possibilities with the Competition Council experts. Video conferencing is used instead of meetings in person.

At the same time, information to the Competition Council is provided mainly in electronic format (for example, electronically signed merger notifications with lengthy annexes). Thus, all technical details of an electronic submission of information can be priorly discussed in detail with a relevant Competition Council expert to avoid any technical or other problems during the submission procedure. It is highly likely that the electronic format of communication with the Competition Council may be there to stay.

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# CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2021

# LITHUANIA

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

The *Law on Competition* (*1999-03-23, VIII-1099*) would be the main piece of legislation. In terms of material issues, it covers all standard competition law matters (agreements, dominance, concentrations), also imposes specific restrictions upon public institutions (duty of non-discrimination and duty to ensure fair competition), prohibits unfair trading practices (divulgement of commercial secrets, misuse of trademarks and similar), regulates matters related to private claims for damages. Also, the Law on Competition sets up the institutional structure, covers enforcement, liability, and international cooperation issues.

In addition to the standard *Law on Competition*, there are also a few competition-related pieces of legislation.

The *Law on Prohibition of Unfair Practices by Retailers* (*2009-12-22, XI-626*) is a sectoral law that prohibits certain unfair trading practices by large retailers vis-a-vis suppliers, except for suppliers with an annual turnover exceeding EUR 350 million. It establishes a list of arrangements which retailers are restricted from concluding with smaller suppliers, in addition to the new law implementing the *UTP Directive*.

The *Law on Municipal Government* (*1994-07-07, I-533*) mostly deals with municipal government issues, but also contains specific provisions which require municipalities to seek permission of the Lithuanian Competition Authority if they intend to take up new economic activities or establish new entities.

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

The *Law on Competition* has been amended and entered into force as of November 2020 to transpose the *ECN+ Directive* (*Directive 2019/1 of the European Parliament and of the Council* of December 11, 2018). Although the *Law on Competition* already mostly contained provisions that were required to be transposed, there were a few additional novelties introduced even beyond the ECN+, the most significant ones being:

- additional bases under which the Lithuanian Competition Authority may suspend concentration procedures;
- amendments and clarifications regarding liability issues (conditions under which joint liability may be applied in respect of economic units, special liability mechanisms for associations and other, clarifications regarding the base);
- international cooperation issues for competition authorities.

The *Law on Prohibition of Unfair Practices by Retailers* has been amended and enters into force as of November 2021, generally expanding its coverage to include more suppliers which may enjoy its protection, allowing the Lithuanian Competition Authority to conclude dawn raids, tying fines to retailers' annual turnover (and thereby potentially increasing them substantially), and adding various other procedural enhancements. Also, the law implementing the *UTP Directive* enters into force as of November 2021.

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

Regarding horizontal cartel investigations, in practice recently the Lithuanian Competition Authority has been mostly pursuing bid-rigging arrangements in public procurement and similar procedures. However, this is merely a general tendency and there are some notable exceptions, such as involving decisions of associations, and direct price-fixing cartels.

As for vertical agreements, there has not been major activity within the last few years, although the Lithuanian Competition Authority is always on the lookout especially for resale price maintenance arrangements, and, to a lesser extent, unjustified exclusivity arrangements.

As for the sanctioning record, it must be said that it is not unusual for the Lithuanian Competition Authority to impose the maximum fine (which is at 10% of annual turnover), or at least an otherwise very substantial fine. Joint liability with other entities under the economic unity doctrine is also not uncommon.

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

Generally, the Lithuanian competition law regime does not differ much from that of most other EU jurisdictions, as both the Lithuanian Competition Authority and the national courts endeavor to keep national practices consistent with those of the European Commission and courts.

Usually, agreements entered into by international companies concerning Lithuania are vertical, such as distribution or similar supply agreements. Therefore, some caution is warranted if such agreements contain restrictions of resale prices (such as outright restrictions for the buyer to set its resale prices freely), exclusivity arrangements (single branding, exclusive distribution, or similar), also quantity-forcing arrangements (minimum purchase amounts, non-linear discounts, or similar). More often than not, such arrangements may be justified if neither counterparty's market share exceeds 30%, although some

specific arrangements are more difficult to justify, such as fixed or minimum resale price restrictions, single branding arrangements concluded for a term exceeding 5 years.

It must be additionally noted that the Lithuanian market is quite small, and the Lithuanian Competition Authority is never easily convinced of geographic market definitions which exceed the Lithuanian territory, which means that it is easier to exceed the 30% market share threshold beyond which it may be more difficult to justify vertical restraints.

## 5. Does a leniency policy apply in Lithuania?

Yes, in respect to horizontal anti-competitive agreements and vertical price-fixing agreements (however, notably, leniency does not apply to anti-competitive exclusivity or single branding arrangements, and similar).

The cumulative conditions for leniency are as follows:

- the undertaking revealed its participation in an anti-competitive agreement,
- it was the first participant to produce evidence not already possessed by the Lithuanian Competition Authority of the anticompetitive agreement sufficient to conduct dawn raids or prove the infringement,
- it ceased its participation in the infringement, unless instructed otherwise by the Lithuanian Competition Authority,
- it cooperates with the Lithuanian Competition Authority throughout the course of the investigation,
- it did not attempt to hide any evidence of the infringement or disclose its intention to apply for leniency to any other parties, and
- it was not the initiator of the anticompetitive agreement.

If certain conditions are not met, such as the undertaking being first to submit evidence, or being the initiator of the infringement, the undertaking may still receive a reduced fine if it provides additional important evidence that the Lithuanian Competition Authority did not already possess.

Contrary to certain other jurisdictions, so far the leniency procedure has not been a major source of investigations for the Lithuanian Competition Authority.

In addition, an individual whistleblower may submit evidence about a possible horizontal anti-competitive agreement or vertical price-fixing agreement to the Lithuanian Competition Authority and receive a financial award of up to EUR 100,000 provided that the conditions under the *Law on Competition* are met.

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

Generally, the Lithuanian competition law regime does not differ much from that of most other EU jurisdictions, as both the Lithuanian Competition Authority and the national courts endeavor to keep national practices consistent with those of the European Commission and courts.

Unilateral conduct may be found to be anticompetitive if performed by a dominant undertaking. Anticompetitive conduct may take the form of excessive or predatory pricing, tying and bundling, refusal to deal, margin squeeze, exclusive dealing, and others.

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

The Lithuanian Competition Authority has not identified any abuses of dominance since 2010. However, there have been numerous terminated investigations (including with commitments), so it cannot be said that abuse of dominance is ignored altogether.

That being said, it can be safe to consider that such investigations are not the main focus of the Lithuanian Competition Authority. Perhaps tellingly, the Lithuanian Competition Authority does not maintain a dedicated investigative unit within its structure for abuse of dominance cases. Previously abuse of dominance issues were dealt with by the unit responsible for merger procedures, and now this matter has been transferred to the unit which deals with investigations against anticompetitive conduct by public authorities.

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

The maximum fine imposed by the Lithuanian Competition Authority for an infringement is capped at 10% of the worldwide turnover. In case of infringement, the Lithuanian Competition Authority is also authorized to order the termination, amendment, or conclusion of contracts, and, as part of commitments offered by the infringing party, a company's reorganization or sale of the company, property, or shares. In addition, the infringement may result in personal liability of managers (a fine of EUR 14,500 and a ban on holding a managerial position for 3-5 years) and disqualification of companies from public tenders for up to 3 years.

In addition, the contracts may be declared null and void due to infringement of competition law. Private antitrust damages cases may also be initiated and the damages caused by competition law infringement may be awarded.

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

The intended merger must be notified to the Lithuanian Competition Authority prior to its implementation and its permission to implement the merger must be obtained if the combined aggregate income of the undertakings concerned in the business year preceding the concentration exceeds EUR 20 million and the aggregate income of each of at least two undertakings concerned in the business year preceding the concentration exceeds EUR 2 million.

*Ex post* concentration control is also applicable in Lithuania under certain conditions determined in the *Law on Competition*.

### 10. What is the normal merger review period?

The general term for review of a merger is four months, but this can be shorter or longer, depending on the complexity of the merger and the quality of work by the parties.

Usually, initial merger notifications are not admitted immediately, but are either discussed and reconciled with the Lithuanian Competition Authority informally or, if the submitting party opts to conduct a formal submission, the authority returns with formal requests for additional information. Either way, the pre-admission stage may take 2-4 weeks for simple mergers, or several months for complicated ones.

Simple merger filings are usually dealt with within one month after their admission.

As for more complex filings, the general term of four months can be extended by a so-called "stop-the-clock" decision. For instance, if the parties fail to provide the information requested by the Lithuanian Competition Authority during the investigation process, the authority may suspend its investigation until the information is provided. The total "stop-the-clock" term may not exceed three months. If the three-month term is exceeded, the investigation is terminated and it is considered that the notification has not been submitted.

Moreover, the Lithuanian Competition Authority can prolong the investigation period for up to one month if the undertakings which submitted the merger notification request the prolongation or if additional information is provided in less than 20 days before the end of the investigation period.

In case the merger clearance decision is subject to remedies, the Lithuanian Competition Authority can extend the merger investigation period for an additional one month based on the request of the undertakings which submitted the merger notification.

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

A filing fee of EUR 11,000 applies in 2021 (which is reviewed each year and may be changed). The fee for the examination of a request to perform individual merger actions is EUR 3,300.

### 12. Is there any possibility for companies to obtain State Aid in Lithuania? If yes, under what conditions?

European Union rules on State Aid are applicable in Lithuania. According to the provisions of the TFEU, member states, including Lithuania, have to inform the European Commission of any plan to grant the aid. Exceptions are applicable, for example, *de minimis* aid and aid granted within block exemptions do not require prior notification. The aid cannot be granted until approval from the European Commission. The European Commission is the sole competent authority to determine compliance of granted aid with the law of the European Union.

State aid to companies may be granted on the basis of approved aid schemes or individual aid projects. The aid schemes set forth the terms and conditions, as well as the forms and legal bases for granting aid to undertakings and specify the objective of the aid (*e.g.* trainings, research, and development) and its forms (*e.g.* tax advantages, guarantees). Based on the sector where the company is operating, its activities, *etc.*, the company can apply for aid under the approved aid scheme. The conditions and criteria for aid under the aid scheme differ based on the peculiarities of the aid scheme, its objective, sector, *etc.*

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

A significant number of new aid measures were introduced at the onset of the COVID-19 crisis, and the scope and scale of existing aid measures were also expanded. However, all of this was done either under the existing legal framework, or the European Commission's *Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak* (*OJ C*(2020) *1863* and further amendments). There have been no significant changes implemented under Lithuanian national competition law in connection to the COVID-19 crisis.

# CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2021

# MOLDOVA

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

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

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

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

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

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

■ Regulation on Assessment of State Aid for Postal Services No. 3/7 dated September 8, 2016;

■ Regulation on Assessment of State Aid for Culture and Heritage Conservation No. 3/8 dated September 8, 2016;

■ Regulation on Assessment of State Aid for Sport and Multifunctional Recreational Infrastructures No. 3/9 dated September 8, 2016;

■ Regulation on Assessment of State Aid for Environmental Protection No. 03 dated December 3, 2020;

■ Regulation on *De minimis* Aid No. 01 dated 06 August 2020; Regulation on Assessment of State Aid for Regional Development No. 02 dated October 15, 2020.

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

No significant changes to the competition law or the law on state aid have been introduced in the last 24 months. New regulations on *de minimis* aid, on state aid for regional development, and on state aid for environmental protection have been approved and entered into force in 2020 - 2021.

A legislation proposal, transposing the *Directive (EU) 2019/1* of the European Parliament and of the Council of December 11, 2018, to empower the competition authorities of member states to be more effective enforcers and to ensure the proper functioning of the internal market, was drafted by the authority and is going to be introduced into Parliament in the following period.

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

The main concerns of the competition council in the precedent years (2017 - 2021) in terms of agreements between undertakings related mostly to bid-rigging and hardcore cartels affecting price competition. No decision on sanctioning anti-competitive vertical agreements was issued by the competition council during the period mentioned above.

According to Articles 5 (anti-competitive agreements) and 7 (hardcore cartels) of the competition law, anti-competitive agreements are considered serious violations and fines can reach 5% of the involved undertaking's total annual turnover. Article 5 prohibits horizontal and vertical agreements among undertakings that by their object or effects prevent, restrict or distort competition on the market of the Republic of Moldova or on any part thereof.

Starting with 2017, all anticompetitive agreements examined and sanctioned by the competition council were mostly related to acts of bid-rigging infringements during public acquisition procedures (most often, tenders for construction works). The numbers of decisions issued by the competition council in 2017 – 2020 sanctioning anti-competitive agreements and fines levels are reflected below:

■ 2017: Eight cases with fines totaling MDL 4,805,022 (approximately EUR 240,251)

■ 2018: Eight cases with fines totaling MDL 10,492.896.7 (approximately EUR 524,644)

■ 2019: Two cases with fines totaling MDL 4,317,000 (approximately EUR 215,850)

■ 2020: Zero cases

One cartel decision was issued by the competition council in 2021. It represents the highest fine applied by the authority to date, for a fixed prices cartel among four distributors of fertilizers and crop protection products. The competition council fined the distributors a combined fine of MDL 91 million (about EUR 4.3 million) for operating a five-year price-fixing and information-sharing cartel. The cartel decision of the competition council was appealed by the involved undertaking. No final court decision has been issued yet.

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

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

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

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

criminal conviction has been obtained in an anti-competitive agreement case to date.

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

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

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

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

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

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

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

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

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

## 5. Does a leniency policy apply in Moldova?

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

The leniency policy is not very successful in Moldova among undertakings. From its institution by the competition law in 2012, only two leniency applications were submitted to the competition council, in 2017 and 2018, in connection with investigations concerning the conclusion of alleged anticompetitive agreements on bid-rigging by undertakings involved in public procurements.

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

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

Article 11 of the competition law prohibits the abuse of a dominant position held by one or more undertakings and provides a non-exhaustive list of potentially unlawful conduct. The single firm conduct provision in Articles 10 and 11 of the competition law is based on the same principles as Article 102 of the TFEU.

A dominant position is defined as the position of economic power which an undertaking benefits of, and which allows it to prevent effective competition on the relevant market, giving it the possibility to behave independently, to a considerable extent, of its competitors, clients, and consumers. Under Article 10 para (4) of the competition law, the presumption of dominance in Moldova is the individual share of one undertaking or cumulative shares of several undertakings exceeding 50%. The assessment of a dominant position is not based solely on the size of the undertaking and its market position. While market share is important, it does not determine on its own whether an undertaking is dominant. It will also depend on a range of factors and requires detailed legal and economic assessment.

Abuse of a dominant position represents a serious violation of competition law and may result in sanctions in the form of fines of up to 5% of the involved undertaking total annual turnover.

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

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

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

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

In 2020, the competition council also penalized an abuse on the TV advertising market of the Republic of Moldova, produced by conditional granting of additional discounts for the placement of advertising. The competition council claimed that the dominant undertaking created competitive disadvantages for TV channels and advertisers by offering discriminatory remunerations for exclusivity upon procurement of TV advertising. The imposed fine, in this case, was MDL 1.852 million.

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

An undertaking that has engaged in anti-competitive behavior by participating in an anticompetitive agreement, committing an abuse of dominant position, or failing to notify a notifiable economic concentration and so infringed the competition law may be subject to fines imposed by the competition council. The fines reflect the gravity and duration of the infringement and are calculated according to the formula provided by the competition law. The starting point for the fine is the percentage of the undertaking's annual turnover for the year precedent to the infringement decision of the competition council. This is then multiplied by the duration factor, dependent upon the number of years the infringement lasted. The fine can be increased in case of aggravating circumstances (*e.g.* repeated infringement) or decreased, in case of attenuating circumstances (*e.g.* active collaboration with the competition council during the investigation). The maximum level of fine is capped at 5% of the overall annual turnover of the undertaking.

In addition to anticompetitive practices, the competition law prohibits certain acts of unfair competition. Investigations on unfair competition are initiated by the competition council only upon complaint. In case of an infringement decision, the fine to be applied will be determined according to similar rules on fines' individualization as for anti-competitive conduct. The maximum level of fine for unfair competition is capped at 0.5% of the overall annual turnover of the undertaking.

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

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

The definition of an economic concentration follows the model of the EC regulations. The key concept to identify an economic concentration is that of acquisition of control or decisive influence.

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

**(i)** worldwide turnover of all undertakings involved exceed MDL 25 million (approximately EUR 1.25 million), and

**(ii)** each of at least two undertakings involved had a domestic turnover of at least MDL 10 million (approximately EUR 500,000).

Notifications of mergers that meet the thresholds are mandatory and a notifiable transaction must not be closed prior to obtaining the approval of the competition council. Failure to notify a transaction is considered a serious offense and sanctions may reach 5% of annual turnover.

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

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

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

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

### 10. What is the normal merger review period?

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

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

**(2)** A Phase II investigation period, lasting up to 90 working days for mergers that have raised concerns during the initial review period. At the end of the Phase II period, the competition council may issue a no-objection decision, or a decision approving the merger subject to commitments proposed by undertakings, or a decision prohibiting the transaction due to serious competition concerns. Phase II reviews are rarely used by the competition council. We also did not identify prohibition decisions in merger cases examined by the competition council from 2012 to date.

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

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

The notification of economic concentration and its review by the competition council is subject to a state fee of 0.1% of the annual turnover of all undertakings involved obtained in Moldova but may not exceed MDL 75,000 (approximately EUR 3,750). The notification fee is transferred to the budget of the competition council.

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

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

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

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

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

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

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

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

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

**c)** state aid granted to SMEs;

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

**e)** state aid granted for environmental protection;

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

**g)** state aid provided for rescuing beneficiaries in difficulty;

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

**i)** sectoral state aid; or

**j)** state aid for regional development.

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

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

The total amount of state aid granted in the Republic of Moldova, according to the latest data published by the competition council, was EUR 40.127 million, EUR 58.461 million, and EUR 96.276 million in 2017, 2018, and 2019, respectively.

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

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

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

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

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

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# CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2021

# NORTH MACEDONIA

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

Merger control and restrictive agreements and practices in North Macedonia are governed by the *Protection of Competition Act 2010* (Competition Act). The Competition Act is aligned with *Regulation (EC) 139/2004* on the control of concentrations between undertakings and Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Macedonia's obligation to align its national legislation with EU legislation derives from its status as an EU candidate country, under which the implementation of EU legislation is mandatory. The regulatory framework also comprises regulations adopted by the Macedonian Government, including block exemptions of certain types and categories of agreements, agreements of minor importance (*de minimis*), and leniency.

The *State Aid Control Act 2010* (State Aid Act) governs state aid granting and control in North Macedonia. The State Aid Act is aligned with Articles 107, 108 and 109 of the TFEU and it covers every expenditure and every reduced revenue of the state, in any form, which distorts or has the potential to distort the fair competition and trade within North Macedonia, as well as the trade between North Macedonia and EU member states by giving an economic advantage to a certain undertaking which would not be possible without the awarded state aid, or by favouring the production of certain goods or the provision of certain services.

Under the *Stabilisation and Association Agreement* concluded between the EU and North Macedonia, EU competition rules can be applied directly in North Macedonia when assessing the forms of distortion of competition that affect the trade between North Macedonia and the EU member states and when it comes to the assessment and transparency of state aid in their entirety, North Macedonia must be treated equally as the EU Member States.

The competent regulatory authority in North Macedonia for the enforcement of the Competition Act and the State Aid Act is the Commission for the Protection of Competition (Commission).

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

There were no amendments to the competition legislation in North Macedonia in the last 24 months.

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

The Commission's main concern in terms of restrictive agreements between undertakings is cartels, particularly in public procurement. The term cartel is generally used to describe an informal association or arrangement involving two or more competing companies. In a cartel, the members discuss and exchange information about their businesses or reach agreements about their future conduct, to limit competition between them and increase their own prices or profitability. Cartels are generally conducted covertly and will inevitably involve one or more of the "hardcore" restrictions of competition law: price-fixing, bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market-sharing. Therefore, they will, almost certainly, be found to negatively affect competition and have no countervailing benefits. As such, the actions of a cartel will always infringe the Competition Act and will not meet the criteria for exemption.

The Commission has a good track record in enforcing the Competition Act in relation to restrictive agreements, particularly in the electronic communications, pharmaceutical, and food and beverages sectors. In a recent case involving bid-rigging and price-fixing in the pharmaceutical sector, the Commission imposed approximately EUR 1,5 million in fines to Pharma Trade DOOEL Skopje and Dr Panovski AD Skopje. According to the Commission, the companies coordinated in the submission of the bids on the public call and did not reduce the prices offered at electronic auctions in order to distort competition by directly or indirectly fixing sales prices

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

The Competition Act automatically (*per se*) treats as null and void any agreements and practices that directly or indirectly fix purchase or sale prices or any other commercial conditions, limit or control production, markets, technical development or investment, share markets or source of supply, apply dissimilar conditions to equivalent transactions with other trading parties, placing them in a less favourable competitive position and make the conclusion of contracts conditional on the acceptance of obligations that are unrelated to the subject matter of the contract in question.

The Competition Act applies to written and oral agreements, non-binding arrangements, and other types of informal collusion. The exchange of commercially sensitive information

between competitors, without any agreement to act on it, will constitute a breach of the Competition Act. In this context, the agreements or practices do not need to be implemented or affect the market if they were intended to have an anti-competitive effect. Similarly, it does not matter if the agreement or practice was entered into with innocent intent if its effect is anti-competitive.

In general, undertakings must self-assess their agreements and practices and cannot apply for individual exemptions from the Commission. The Competition Act exempts agreements, decisions of associations of undertakings and concerted practices that contribute to the promotion of the production or distribution of goods and services, or to the promotion of technical or economic development, provided that consumers have a proportionate share of the resulting benefit, primarily if they do not impose unnecessary restrictions on the concerned undertakings, or do not allow the possibility to eliminate competition in respect of a substantial part of the products or services in question. Block exemptions apply to technology transfer, licences or know-how agreements, horizontal research and development or specialisation agreements, vertical agreements on exclusive distribution, selective distribution, exclusive purchase and franchise rights, insurance agreements, and agreements on the distribution and servicing of motor vehicles.

Apart from block exemptions, the Competition Act does not apply to agreements between undertakings that do not restrict competition to an appreciable extent, that is, do not exceed the following *de minimis* market share thresholds a combined market share of the undertakings not exceeding 15% for vertical agreements, and a combined market share of the undertakings not exceeding 10% for horizontal agreements. If it cannot be determined whether the agreement is vertical or horizontal, the *de minimis* market share threshold of 10% will apply. This exemption also applies where the market share thresholds of 5%, 10%, and 15% of the undertakings concerned have not increased by more than 2% in the last two accounting years.

Whether an agreement or practice infringes the Competition Act is determined after an investigation by the Commission. The Commission can initiate investigations into restrictive agreements or practices on its own initiative or following a request from any third party who suspects a potential infringement of the Competition Act. Third parties can file complaints to the Commission and ask for the initiation of an investigation into potentially restrictive agreements and practices. The Commission is not required to examine all complaints. It has a wide discretion to decide if an investigation is necessary, depending on the economic impact of the alleged infringement, the interests of consumers and competitors, and the gravity of the alleged infringement.

## 5. Does a leniency policy apply in North Macedonia?

The Commission can grant full immunity/leniency from fines if the undertaking is the first to cooperate and:

- It presents the Commission with evidence facilitating the initiation of infringement proceedings.
- It presents the Commission with evidence to complete pending infringement proceedings, where the infringement proceedings could not be completed without it.
- If the undertaking admits its participation in a restrictive agreement or practice but fails to meet the requirements for full immunity, the Commission can reduce the fine that would otherwise be imposed if the undertaking presents evidence that is essential to reach a final decision on potential infringement. Any reduction of the fine is conditional on the cumulative fulfilment of certain criteria. These include that the undertaking:
  - terminates its participation in the restrictive agreements or practices immediately after filing the request for immunity;
  - fully, and on a continuous basis, cooperates with the Commission and provides any required information as soon as practicable after a request;
  - does not notify the other parties to the restrictive agreement or practice that it has filed a request for immunity;
  - does not disclose the existence or the content of the request for immunity, except to foreign authorities, before filing the request for immunity;
  - does not destroy, conceal, or forge relevant evidence to establish important facts so the Commission can make a final decision.

The Commission encourages undertakings to contact the Commission as soon as possible before filing a request for immunity. The undertakings can approach the Commission directly or through legal counsel and present their case hypothetically. In addition, undertakings can file a request for immunity to the Commission via e-mail if a hard copy is submitted within three days.

Undertakings can also apply for a marker, holding their place in the queue to obtain full immunity before filing an official request for immunity. The marker is valid for a set period, but if there are strong reasons, the applicant can request an extension to the deadline to submit an application.

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

The prohibition against abuse of a dominant position is set out in the Competition Act, which stipulates that "any abuse of a dominant position in a relevant market or an essential part thereof is prohibited." There are also sector-specific regulations (outside of the Competition Law) that regulate market power, such as the concept of "significant market power" in the electronic communications sector.

The dominance standard is strictly economic. Socio-political or other non-economic factors are not considered. An undertaking has a dominant position in the relevant market if, as a potential seller or buyer of certain goods and/or services, it has no competitors in the market or has a leading position in it compared to its competitors, in particular taking into account its:

- market share and position;
- financial power;
- access to the sources of supply to the market;
- relationship with other undertakings;
- legal or factual barriers to entry of other undertakings in the market;
- ability to dictate the market conditions given its supply or demand;
- its ability to exclude other competitors from the market by targeting other undertakings.

There is a legal assumption that an undertaking has a dominant position if its share of the relevant market is more than 40% unless the undertaking proves otherwise. Also, there is an assumption that two or more legally independent undertakings share a common dominant position if they act or cooperate in the relevant market (collective dominance). Generally, the collectively dominant undertakings must either have a structural or contractual link or be active in a market that otherwise allows them to coordinate their behaviour.

Broadly, the categories of abuse can be grouped into exclusionary abuses (where a dominant undertaking strategically seeks to exclude its competitors and thereby restricts competition) or exploitative abuses (where a dominant undertaking uses its market power to extract rents from consumers).

Exclusionary abuses are by far the most common type of abuse. The Competition Act lists the following categories of behaviour as an abuse of dominance:

- Directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions.
- Limiting production, markets, or technical development to the detriment of consumers.
- Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.
- Making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.
- Unjustified refusal to trade or incitement and request from other undertakings or associations of undertakings not to buy or sell goods and/or services of a particular undertaking with the intent to harm the undertaking dishonestly.
- Unjustified refusal to allow access to another undertaking in its network or other infrastructure facilities for an appropriate fee if, without the concurrent use, the other undertaking, for legal or factual reasons, will be prevented from acting as a competitor in a particular relevant market.

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

The most notable abuse of dominance cases in North Macedonia involve the two largest local Macedonian breweries – Pivara AD Skopje and Prilepska Pivarnica AD Prilep. The Commission imposed a EUR 5.8 million fine on Pivara AD Skopje and EUR 2.7 million on Prilepska Pivarnica AD Prilep for entering into restrictive agreements with their distributors. Pivara Skopje AD entered into sales and distribution agreements containing resale price maintenance provisions, limiting the distributors to set their resale price freely. Prilepska Pivarnica AD and its authorised distributors entered into restrictive agreements with resale price maintenance provisions and non-compete obligations for an indefinite term. The Commission imposed maximal fines of 10% of the companies' revenues in 2016.

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

The Commission can impose fines on the undertakings of up to 10% of the undertaking's worldwide annual turnover. The main criteria for setting the level of the fines are the gravity of the infringement, the duration of the infringement, the level of distortion of competition and the effects of the infringement, and any mitigating or aggravating circumstances.

The Commission will typically establish the base amount of the fine and then make adjustments depending on the mitigating or aggravating circumstances. Generally, the base amount of the fine is up to 30% of the turnover of the undertakings

on the relevant market that has been affected by the restrictive agreement or practice in the last accounting year. The base amount is then multiplied by the number of years of the infringement and adjusted by considering any mitigating or aggravating circumstances.

The Commission can increase the base amount of the fine if:

- The undertakings have generated exceptionally high turnover from other activities, notwithstanding the turnover generated from the activity in the relevant market in infringement of the Competition Act, to give the fine a deterrent effect.
- The undertakings have been unjustifiably enriched as a result of the infringement, in view of the proportionality of the fine.
- The undertakings can also request a decrease of the fine based on their solvency in a specific social and economic setting. In this situation, the Commission can decrease the fine only if the undertakings concerned provide evidence that the fine might jeopardise the solvency of the undertakings and the value of their assets.

The prime mitigating circumstances that are taken into account by the Commission are that:

- The undertakings have provided evidence indicating that their involvement in the infringement is not appreciable and that it has made efforts to avoid exercising the restrictive agreement or practice in the relevant market.
- The undertakings have effectively cooperated with the Commission, regardless of a pending application for immunity (leniency).

The prime aggravating circumstances that are considered by the Commission are that the undertakings have:

- continued to act in infringement of the Competition Act or have repeated the infringement (under these circumstances, the base amount can be increased by up to 100% for each continued or repeated infringement);
- refused to cooperate or obstructed the Commission in conducting their investigation;
- led or initiated the infringement – the Commission will, in particular, take into account whether the undertaking has instigated other undertakings to take part in the infringement and/or taken any malicious measures against other undertakings to force them to commit to acts that constitute an infringement of the Competition Act.

The Criminal Law 1996 foresees criminal liability and imprisonment from one to ten years for the legal representatives (natural persons) of an undertaking that has entered into restrictive agreements or is involved in agreements or practices resulting in generating substantial profits or causing substantial damage. However, the legal representatives can be released from personal liability if they have admitted or contributed considerably to the discovery of the restrictive agreement or practice.

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

The Competition Act applies only to transactions that qualify as concentrations of capital resulting in a permanent change of control involving undertakings that meet specific turnover and market share thresholds. Under the Competition Act concentrations include transactions where:

- two or more previously independent undertakings (or parts of undertakings) merge;
- one or more undertakings acquire, directly or indirectly, control of one or more other undertakings by purchasing securities or assets, contract, or any other means;
- two or more undertakings create a "full-function" joint venture, that is, a joint venture of two or more independent undertakings that has all the features of an autonomous economic undertaking.

Control is defined as rights, contracts, or any other means that either separately, or combined, and having regard to the considerations of fact and law involved, confer the possibility of exercising a decisive influence on an undertaking. In particular, control can be exercised through the ownership or the right to use all, or part, of the assets of an undertaking or rights or contracts that confer a decisive influence on the composition, voting, or decision-making of the bodies of the undertaking.

In cases of acquisitions of minority interests, the Commission can investigate whether the acquirer can still exercise legal or de facto control over the undertaking through special rights attaching to shares or granted in shareholders' agreements, board representation, ownership, and use of assets and related commercial issues. Since there is no precise shareholding or any other test for assessing whether decisive influence over an undertaking has been obtained, the Commission decides each case on its facts.

Despite a contemplated permanent change of control and the turnover and market share thresholds requirements being met, merger clearance is not required where:

- a bank, an insurance company, or another financial institution, whose business activity includes trading securities, temporarily acquires shares for their ensuing resale within a period of a year from the date of their acquisition and provided that during this period the shareholders' rights are not exercised to

influence the competitive behaviour of that undertaking in the market;

- a person acquires control over an undertaking in the capacity of a bankruptcy or as a liquidation administrator;
- an investment fund acquires shares in an undertaking, provided that its shareholders' rights are exercised only to maintain the full value of the investment and not to influence the competitive behaviour of that undertaking in the market.

The thresholds for the application of the merger control regime are relatively low compared to other jurisdictions in Central and Eastern Europe. A notification is required where a transaction that qualifies as a concentration satisfies the following thresholds:

- The aggregate worldwide annual turnover of all the parties in the preceding accounting year exceeded EUR10 million, and at least one of the parties has a registered presence in North Macedonia.
- The aggregate annual turnover of all the parties to the concentration in North Macedonia exceeded EUR2.5 million in the preceding accounting year.
- One of the parties to the concentration has a market share in North Macedonia exceeding 40%, or the parties have a combined market share exceeding 60%.

The turnover of an undertaking is defined as the amount derived from the sale of products or the provision of services (excluding turnover taxes and rebates) in the preceding financial year. In this context, the turnover of the whole group of undertakings (to which the relevant undertaking belongs) is considered.

In a merger involving the acquisition of an undertaking, the seller's turnover is not taken into account, only the turnover of the undertaking being acquired. The turnover of joint ventures is calculated by considering the whole turnover of the parents (and their groups) intending to share control of the joint venture.

## 10. What is the normal merger review period?

The Competition Act requires the Commission to reach a (Phase I) decision on whether the merger is in compliance with the Competition Act or whether a more in-depth (Phase II) investigation is needed within 25 business days from receipt of a complete notification by the parties to the transaction. The Commission can extend this time limit to up to 35 business days if the parties to the concentration undertake commitments to ensure compliance of the merger with the Competition Act.

If the Commission launches a Phase II investigation, it must decide on the notification within 90 business days from the launch date of the investigation. The Commission can extend this time limit at any time during the Phase II investigation based on an agreement with the parties to the concentration. However, each extension cannot exceed 20 business days.

If the Commission fails to decide within the above time limits (including any extensions, if applicable), the concentration will be deemed to comply with the Competition Act. Exceptionally, the time limits can be waived where the Commission must carry out a dawn raid or obtain information about the undertakings' financial standing, business relationships, and other relevant details for its investigation from other sources (state authorities third parties and others).

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

The filing fee for making a notification to the Commission is approximately EUR 100. An additional fee of approximately EUR 500 is payable for issuing the merger clearance by the Commission. The party to the transaction responsible for making the filing to the Commission is also responsible for paying both the filing fee and the fee for issuing the merger clearance.

## 12. Is there any possibility for companies to obtain State Aid in North Macedonia? If yes, under what conditions?

Companies can obtain state aid in North Macedonia if they operate in the free economic zones, including the Technological Industrial Development Zones (TIDZs) or if their investment obtains the status of "strategic" investment.

TIDZs are intended for highly productive clean manufacturing activities and the development of new technologies. Investors in TIDZs are entitled to personal and corporate income tax exemption for the first 10 years. Investors are exempt from payment of value-added tax and customs duties for goods, raw materials, equipment, and machines. Moreover, up to EUR 500,000 can be granted as an incentive towards building costs depending on the value of the investment and the number of employees. Land in a TIDZ in North Macedonia is available under a long-term lease for a period of up to 99 years. Other benefits include completed infrastructure that enables free connection to natural gas, water, electricity, and access to a main international road network. Investors are also exempt from paying a fee for the preparation of the construction site.

The status of "strategic" investment is awarded to investment projects of at least EUR 100 million on the territory of at least two or more municipalities, at least EUR 50 million in the municipalities with its seat in a city, municipalities in the City

of Skopje, and the City of Skopje, or at least EUR 30 million in municipalities with a seat in a village. Additionally, an investment must be in one of the following sectors: energy, transport, telecommunication, tourism, manufacturing, agriculture and food, forester and water economy, health, industrial and technological parks, wastewater and waste management, sport, science, and education, but the status may also be granted in any other sector if the investment exceeds EUR 150 million. The selection of investors is based on an open tender. Once proposals are received, negotiations between the Government and an investor commence towards concluding a special investment project contract. It sets out special conditions and preferential treatment accorded to an investor.

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

Severely hit by the COVID-19 crisis, the Macedonian economy slipped into a recession in 2020 and a gradual recovery set in as of spring 2021. Estimates indicate that over 82% of companies in North Macedonia were negatively affected by the COVID-19 crisis. The Macedonian Government implemented a number of measures to counter the financial impact of the COVID-19 crisis, including subsidies for employees' salaries in affected sectors, interest-free loans for micro, small and medium-sized enterprises, a decrease of interest rates, freezing of prices of essential food products, abolishing customs fees for critical products (wheat products, sunflower oil, sugar, sanitary products, masks, sanitary and medical uniforms, and others), as well as all customs fees for the import of protective medical equipment such as face masks, gloves and disinfection products and others. These measures will likely be abolished once the COVID-19 crisis is under full control by the Government.

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# CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2021

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

The main local competition law norms are:

- *Competition Law No. 21/1996* (Competition Law) stands at the core of competition legislation. Articles 101 and 102 of the *Treaty on the Functioning of the European Union* (TFEU) are applied directly. This is the core antitrust legal enactment in Romania.
- *Law no. 11/1991* on unfair competition.

Such norms are completed and further explained based on norms issued by the Romanian Competition Council (RCC) and have the role to clarify and ensure the proper application of the Competition Law. EU guidelines and regulations on competition are also applicable in Romania.

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

Relatively recently two important pieces of legislation came into force:

- *GEO 170/2020 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*. The norm sets forth an extensive procedure with regards to claims for damages resulting from a breach of competition norms.
- *GEO 23/2021 on measures for the implementation of EU Regulation 2019 /1150 on promoting fairness and transparency for business users of online intermediation services*. The RCC is the designated competent authority for ensuring compliance with the provisions of the regulation.

Another important recent amendment of secondary legislation consists in ensuring the proportionality of the fine by offering a deduction from the level of the fine that can go to up to 90% if the turnover on the relevant market related to the infringement is very low.

In the near future, it is expected that *Law no. 11/1991* on unfair competition will be amended and two EU Directives to be transposed:

1. *Directive no. 2019/ 633* on unfair trading practices in business-to-business relationships in the agricultural and food supply chain; and
2. *Directive 2019/1* of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

Additionally, a government emergency ordinance regarding the implementation measures of the *EU Regulation no. 2019/452* establishing a framework for screening of foreign direct investments into the Union (FDI Regulation) is under its way to be adopted. However, an FDI screening procedure already existed in Romania prior to the issuance of the FDI Regulation.

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

Considering the sanctioning record of the RCC, it is safe to say that, for the competition authority, cartels (*i.e.* agreements between competitors aimed at distorting market competition) are the main target, as recent practice includes a growing number of cartel cases and the authors of the infringements are being severely sanctioned by high administrative fines.

The main focus is on cases relating to exchanges of sensitive commercial information, bid-rigging, and market sharing.

As a matter of novelty, the RCC started developing case-law on the concept of facilitator. In this context, even the organizer of a tender could risk being sanctioned for anticompetitive practices if it would support a transfer of sensitive information between the members of a cartel participating in the tender. Associations are also key candidates for the facilitator role in cases involving the illicit transfer of commercially sensitive information.

Also, the RCC has been showing a predilection for reaching a settlement with the parties involved in investigations, consisting of a reduction in the fine in exchange for an admission of guilt.

A selection of relatively recent sanctions applied by the RCC would include:

1. Cases of cartel

- 2021: Six companies offering catering services inside the Henri Coanda Bucharest International Airport were sanctioned with a fine amounting to approximately EUR 1.4 million for price-fixing.
- 2020: The Association of Romanian Financial Companies (ALB) and its members were sanctioned with a fine amounting to approximately EUR 8.5 million for participating in an exchange of commercially sensitive information.
- 2020: Two manufacturers of agricultural equipment and their dealers were sanctioned with fines totaling EUR 26.5 million for price-fixing. Although, in a supplier-reseller relation, the market relations were actually qualified by the RCC

as being horizontal at least in the case of one of the suppliers and its dealers.

■ 2020: 31 companies operating in the Romanian wood trading market were sanctioned with fines amounting to EUR 26.6 million for coordinating their behavior by exchanging commercially sensitive information, as well as the commercial strategy of participation in certain tenders or the conduct for bidding/not bidding for certain forest plots.

■ 2020: The Confederation of Romanian Authorized Operators and Carriers (COTAR) and 18 undertakings active in the passenger transport market were sanctioned for concluding an agreement to limit/suspend public road passenger transport. The total fines reached approximately EUR 1 million.

■ 2020: Four companies were sanctioned for bid-rigging on the market of vertical and horizontal road signs/marking with a total fine of approximately EUR 667,000. The case included a component of transfer of sensitive commercial information.

■ 2020: Five companies were sanctioned with fines amounting to approximately EUR 468,000 for rigging the bid for roads rehabilitation.

■ 2019: 13 companies and one association were sanctioned for concerted practices consisting of fixing minimum prices on the market for package holidays and transfer of sensitive commercial information. The total fines amounted to EUR 2.45 million.

■ 2018: Nine MTPL insurance companies and one association were sanctioned with fines totaling EUR 53 million for price (increase) signaling.

■ 2017: Five companies were sanctioned for market sharing arrangements on the electric meters sale market. The practices were identified to have occurred during public tenders organized by operators of power distribution networks. An element of novelty was that one tender organizer was sanctioned as the facilitator of the practice by supporting an illicit exchange of information. The total fines, in this case, reached approximately EUR 16 million.

■ 2017: 33 companies and four associations were sanctioned for fixing minimum prices on the market for security services. The total fines amounted to EUR 5 million.

**1.** Vertical agreements

■ 2019: Three companies active on the food retail market and four of their suppliers were sanctioned with a total fine of EUR 18.8 million for price-fixing in promotions.

■ 2018: The RCC sanctioned one manufacturer and its 11 distributors active on the market for the production, distribution, and sale of car batteries for vertical price-fixing arrangements. The fines amounted to EUR 731,492.

■ 2017: One manufacturer and seven distributors active on the car battery market were sanctioned with total fines amounting to EUR 120,000 for price-fixing.

■ 2016: The RCC sanctioned various vertical price-fixing arrangements on the decorative coating/painting sector. The fines applied amounted to EUR 314,000.

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

Article 5 of the Competition Law, in line with Article 101 of the TFEU, prohibits any explicit or tacit agreements between undertakings or associations of undertakings, any decisions of associations, or any concerted practices between them, pursuing among others (i) price-fixing, (ii) customers or markets allocation, or (iii) bid-rigging. Such agreements include cartels and anticompetitive vertical agreements.

Cartels are illegal secret agreements or concerted practices between competitors intended to fix prices, restrict supply, and/or divide up markets (tacitly agreed practices included) and they could be in the form of: price-fixing arrangements, restrictions on sales or production capacities, sharing geographic markets or customers, collusion on the other commercial conditions for the sale of products or services, bid-rigging.

For infringements consisting of vertical agreements, severe sanctions apply, as well. The following types of agreements are qualified as hardcore vertical restrictions, being consequently banned irrespective of the parties' market share: (i) resale price-fixing (setting a fixed or minimum resale price), (ii) market or clientele allocation, and (iii) parallel trade restrictions.

Other restrictions included in vertical agreements might be exempted (*e.g.* exclusive or selective distribution systems), either by the application of the *EU Regulation No. 330/2010*, which is directly applicable or following an individual examination under Article 101(3) of the TFEU undertaken on a case-by-case basis. In the context of an individual exemption, a balance between the negative effects of the vertical agreements (*e.g.* raising the artificial market entry barriers, restriction on inter-brand and intra-brand competition, *etc.*) and the expected positive effects (*e.g.* product quality improvement, investments for entering new markets, better distribution services, *etc.*) must be proved.

## 5. Does a leniency policy apply in Romania?

Companies who voluntarily disclose information and provide evidence on the existence of a breach of Article 5(1) of Competition Law and Article 101(1) of the TFEU may benefit from different types of incentives, *i.e.* exemptions, reductions of the fine.

In contrast with EU policy, where leniency is granted only in cases involving cartels, the RCC broadened the scope of the leniency policy and opened the procedure also for cases of hardcore vertical anti-competitive agreements. The leniency regime does not apply to agreements or practices which may be exempted under Article 101(3) of the TFEU.

The first leniency case finalized by the RCC (in 2010) was a local cartel formed by the taxi drivers in the Timis county. Years later, in 2014, the competition authority granted immunity in a case relating to an oil and gas drilling services cartel. Since then, the RCC is encouraging applications for leniency in some other notable cases including leniency granted in the electrical meters bid-rigging case (2017), the MTLP insurance cartel (2018), sanctions applied for practices on the financial leasing market (2020).

Some of the most important conditions to be met for the full immunity benefit are: (i) the company must be the first to inform the competition authority of the practice by providing sufficient information to allow RCC to open an investigation or perform an inspection at the premises of the companies allegedly involved in the anticompetitive practice; (ii) at the time the proof was provided to the RCC, the authority did not have sufficient evidence to establish the infringement; (iii) the company must also fully cooperate with the RCC throughout the procedure, bring forth all the proof it has in its possession, put an end to the anti-competitive practice, *etc.*

Companies that do not qualify for full immunity may benefit from a reduction of the fine if they provide evidence that constitutes "significant added value" to that already in the RCC's possession and if they have ceased involvement in the anticompetitive practice. The reduction, in this case, may vary from 20% to 50%. The reduction may be mixed with reductions applied for settlement.

Although it is not part of the leniency program, a mention should be made that the RCC started operating an online platform (https://report.whistleb.com/ro/consiliulconcurentei) where any person or company may anonymously provide information to the authority in connection with anti-competitive practices.

## 6. How is unilateral conduct treated under Romanian competition rules?

Unilateral conduct is relevant if a company holds a dominant position, and it abuses such a position to its own advantage and to the detriment of other market players and consumers. In this context, dominant players could be sanctioned for breaching the antitrust rules set out in Article 6 of the Competition Law and Article 102 of the TFEU.

Dominance is traditionally defined as the ability of a company to act to a large extent independently from its competitors (actual and potential) and its clients in that particular market. However, under the provision of Article 6 of the Competition Law, firms that hold more than 40% market share on the relevant market are presumed to be dominant (rebuttable presumption). Besides the market share, other factors may be taken into account when assessing dominance, such as the structure of the relevant market, position of the main competitors, entry barriers, or specific advantages enjoyed by a company. However, above the 40% threshold, it is for the party reaching such a market share to demonstrate that it does not have a dominant position.

Holding a dominant position is not prohibited but abusing that position of power falls within the scope of the antitrust rules.

Sanctionable abusive behavior by a dominant company may consist of: (i) exploitative practices by abusing market power in trading relationships with customers or suppliers (*e.g.* unfair purchase or selling prices, tying arrangements, price discrimination) and (ii) exclusionary practices, *i.e.* abusing market power with an aim to harm competitors (*e.g.* refusal to deal, predatory pricing, *etc.*).

Article 6 of the Competition Law, mirroring the provisions of Article 102 of the TFEU, provides a non-exhaustive list of practices that are deemed as abuse of a dominant position:

- imposing, directly or indirectly, of selling or purchasing prices or other inequitable contractual clauses;
- limiting production, distribution, or technological development to the prejudice of consumers;
- applying to commercial partners dissimilar conditions for equivalent performances, to the effect of creating disadvantages in the competitive position of some of them (discrimination); and
- conditioning the conclusion of certain contracts on the commercial partner's acceptance of clauses stipulating supplementary performances which, neither by their nature nor according to commercial practices, have any connection with the object of such contracts (known as tying and bundling).

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

The most recent cases of abuse instrumented by the RCC include:

- Delgaz Grid SA, a member of E.ON group, was sanctioned with a fine of approximately EUR 6.1 million for abuse of dominant position on the market of services related to natural gas distribution, respectively on the market of verification and technical revision of Natural Gas Utilization Installations in the distribution area of Delgaz Grid SA.

- Dante International (Emag online platform) was sanctioned for abuse of a dominant position on the market for intermediation services through online platforms. The fine was approximately EUR 6.7 million, with the RCC further imposing a series of corrective measures.

Other notable cases of abuse include:

- The natural gas distributor, Premier Energy, formally the successor of Gaz Sud SA, was sanctioned with a fine of approximately EUR 1.3 million for imposing discriminatory tariffs, also paying damages to the victims of infringements in a total value of RON 88,347.74.

- Orange was sanctioned for having abused its dominant position on the SMS bulk termination market in relation to an SMS bulk and payment services independent provider.

- Orange and Vodafone were sanctioned with fines of approximately EUR 34.8 million and EUR 28.3 million, respectively, for the restriction of access to essential facilities.

- The national post-office operator, Posta Romana, was sanctioned with a fine of approximately EUR 24.06 million for discrimination.

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

For a breach of competition norms, the RCC may apply sanctions up to 10% of worldwide turnover obtained by the company in question in the year prior to the issuance of the sanctioning decision. The fine shall not be lower than 0.5% of the turnover achieved in Romania in the year prior to the issuance of the sanctioning decision.

In addition, the author of the anticompetitive practice could face further measures, such as corrective measures imposed by the RCC, invalidation of contract terms, damage claims submitted by third parties affected by the violation.

Criminal liability may be also engaged against managers, legal representatives, any other person in a management position of a company who intentionally conceived or organized one of the prohibited practices under Article 5 of the Competition Law.

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

The merger of two or more previously independent parties or the direct or indirect change of control through share capital/assets acquisition, by contract or by other means qualifies as an economic concentration and may trigger a notification obligation in Romania.

The competence for the review of transactions is divided between the European Commission and the competition authorities, the commission excluding local competence in case of community dimension transactions as provided under *EU Merger Regulation No. 139/2004*.

In absence of community dimension, a transaction falls under the RCC competence in case the following turnover thresholds are met by reference to the year preceding the proposed transaction (cumulative conditions):

**1.** The total worldwide turnover of: (i) each undertaking/person holding control in the target post-transaction together with its respective group, but minus the target (as well as any other companies directly or indirectly controlled by the target), as the target is not double-counted; plus (ii) the target (and any companies directly or indirectly controlled by the target) exceeds the RON equivalent of EUR 10 million; and

**2.** The Romanian turnover of each of at least two of the parties described above (notably, each undertaking/person holding control in the target post-transaction together with its respective group (representing two or more parties depending on the number of independent controlling shareholders), the target and any companies directly or indirectly controlled by the target) exceeds the RON equivalent of EUR 4 million.

The concept of parties concerned includes also group structures, thus it is not limited to the signing parties of the transaction documents.

If the threshold conditions are met, the transaction may not be implemented (a *standstill obligation*) prior to obtaining the merger clearance. Implementation of the transaction in the absence of such prior authorization may be sanctioned with an administrative fine of up to 10% of the turnover obtained in the year preceding the issuance of the sanctioning decision.

In case the transaction occurs in the following key sectors, a prior review from state defense perspective (FDI screening) must be performed before the Superior Committee of State Defence (SCSD): (i) security of citizens and collectivities; (ii)

security of borders; (iii) energy; (iv) transportation; (v) security of vital resource supply systems; (vi) critical infrastructure; (vii) IT and communications; (viii) financial, fiscal, banking, insurance activities; (ix) arms, ammunition, explosives, toxic substances; (x) industrial security; (xi) the protection against disasters; (xii) the protection of agriculture and of the environment; (xiii) privatizations). The SCSD reviews risks from a state defense perspective.

Pursuant to the issuance of *EU Regulation no. 452/2019* establishing a framework for screening of foreign direct investment into the EU, a new FDI screening norm and procedure is expected.

## 10. What is the normal merger review period?

Once a merger notification is submitted, the RCC has a period of 20 calendar days in which to request additional information from the parties. There is no limit to the number of requests for information.

A maximum period of 45 calendar days for the issuance of the decision (either authorizing it or opening an in-depth investigation) shall run from the date on which the authority considers that it has all the information to issue the decision (effective date), respectively from the date of the last answer to the clarifying questions raised.

The merger review and clearance process may thus take up to 60-90 days, depending on the complexity of the transaction and market impact.

In case the RCC opens an in-depth investigation (second phase), it has a maximum five-month term after the notification becomes effective until the competition agency should issue a decision on the case (authorization, conditional authorization, or refusal).

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

In the context of submitting a merger notification for the prior approval of the transaction by the RCC, it is mandatory for the notifying party to pay a filing fee of RON 4,775, the equivalent of approximately EUR 960.

Apart from the filing fee, the notifying party shall pay a merger authorization/clearance fee as follows:

- if the transaction is authorized by the competition authority, the parties will pay a clearance fee ranging from EUR 10,000 up to EUR 25,000 depending on the turnover achieved by the target in Romania;
- in case the notified transaction triggered the second phase assessment, meaning that the RCC opened a merger investigation, the authorization fee is set from EUR 25,001 to EUR 50,000, also depending on the turnover achieved by the target in Romania.

## 12. Is there any possibility for companies to obtain State Aid in Romania? If yes, under what conditions?

Companies can obtain aid in the form of grants, subsidized public loans, tax advantages, *etc.* if they fulfill the criteria established in valid state aid schemes. Individual aid may also be available subject to separate individual authorization from the European Commission.

In a nutshell, the EU state aid principles apply equally in Romania. The European Commission has sole competence in state aid matters, while the RCC acts as a contact body in the relations between the Commission and Romanian public authorities, other state aid providers, and beneficiaries involved in state aid procedures. The RCC also provides specialized assistance to ensure the fulfillment of Romania's obligations in the state aid field, being involved also in the process of drafting normative acts or administrative measures enacting state aid.

Information on state aid schemes may be found at www.ajutordestat.ro (a website developed by the RCC). Aid approved for Romania is sorted on the website by aid authorized by the commission (including individual aid for companies located in Romania), aid issued under the EU exemption regulation for schemes, or *de minimis* aid.

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

In the context of the COVID-19 health crisis, multiple stated aid schemes were adopted, such as individual aid for airlines and regional airports, state aid scheme to support SMEs, state aid for undertakings in the field of tourism, catering, event organization, *etc.*

It may be expected that the EU trend on COVID-19 support measures will be followed to the extent funds may be made available to offer support through state aid.

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# CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2021

# RUSSIA

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

Russia's primary piece of competition-related legislation is *Federal Law No. 135-FZ of July 26, 2006 On Protection of Competition* (Competition Law). The Competition Law is the core of competition regulation in Russia, covering all of the key aspects in the field: (i) merger control; (ii) abuse of dominance; (iii) anti-competitive agreements; (iv) concerted practices; (v) coordination of economic activities; and (vi) unfair competition.

Apart from the Competition Law, the following acts dealing with foreign investment and natural monopolies are important components of competition-related regulation in Russia:

### 1.1 Key Federal Laws

**(a)** *Federal Law No. 57-FZ of April 29, 2008 On the Procedure for Making Foreign Investments in Companies of Strategic Importance for National Defence and State Security* (Strategic Investment Law) and *Federal Law No. 160-FZ of July 9, 1999 On Foreign Investment in the Russian Federation* (Foreign Investment Law). These laws regulate two separate clearance regimes for, respectively, foreign investments in Russian strategic industries and investments made by public foreign investors.

**(b)** *Federal Law No. 147-FZ of August 17, 1995 On Natural Monopolies*, which defines 'natural monopoly' and lists the economic areas that are natural monopolies. This law sets down obligations for natural monopoly entities, provides for price regulation, and so on.

### 1.2 Codes Setting Up The Framework for Sanctions

**(a)** The *Administrative Offenses Code* sets out the sanctions for competition law violations; and

**(b)** the *Criminal Code* regulates criminal liability, which is, however, only applicable in relation to cartels.

### 1.3 Orders and Decrees from the Federal Antimonopoly Service of Russia – Detailed Regulation in Particular Areas

**(a)** Order of the Federal Antimonopoly Service of Russia (FAS) No. 129 dated April 17, 2008, On Approval of the Form for Providing Information to the Antimonopoly Authority When Submitting the Applications and Notifications Referred to in Articles 27-31 of the Federal Law On Protection of Competition (as amended);

**(b)** Order of the FAS No. 293 dated November 20, 2006, On Approval of the Form for Providing the List of Persons That Belong to a Group (as amended);

**(c)** Decree of the Russian Federation Government No. 334 dated May 30, 2007, On Setting Thresholds for Antimonopoly Control Over Leasing Companies (as amended);

**(d)** Decree of the Russian Federation Government No. 1072 dated October 18, 2014, On Setting Thresholds for Antimonopoly Control Over Credit Institutions Supervised by the Central Bank of Russia (as amended);

### 1.4 Official Guidance from the Supreme Court and the FAS

**(a)** Decree of the Plenum of the Supreme Court of the Russian Federation No. 2 of March 4, 2021, On Certain Issues Arising in the Courts' Application of Competition Law;

**(b)** Digest of Case Law from Antitrust Cases and Related Administrative Cases, approved by the Presidium of the Supreme Court on March 16, 2016; and

**(c)** FAS Guidance No. 16 of June 11, 2021, On Certain Aspects of Merger Control Regulation.

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

The FAS and its decisions drive legal and business developments in the field of competition. The last couple of years have seen a number of changes to practice – most of which have been driven by the regulator. There is a general trend of bringing competition regulation closer to the European Union model, despite numerous Russian specifics.

Below we summarise recent regulatory developments, although the overall antitrust framework has not changed in recent years. For international companies, the practical relevance of these recent changes is generally limited.

### 2.1 Compliance Act

*Federal Law No. 33-FZ* of March 1, 2020, On Amendments to the Competition Law (the Compliance Act) came into force on March 12, 2020. It aims to improve antitrust compliance by regulating internal compliance policies.

The law defines "antimonopoly compliance" as a system of legal and organizational measures aimed at ensuring that companies comply with competition legislation and at preventing competition offenses.

According to the Compliance Act, to be effective, an antitrust compliance policy must set out risk assessment procedures, mitigation measures, and procedures for making all employees aware of the policy. As to form, the policy must be in Russian and published on the corporation's website. Notably, the policy can either be adopted by the Russian corporation itself or introduced by another entity in its group, such as the global parent corporation.

Adoption of an antitrust compliance policy is voluntary. A corporation can voluntarily submit its policy to the FAS for review, which can provide a certain level of comfort. The FAS reviews the document within 30 days and provides a report as to whether the policy complies with the law.

It is important to note that the original idea was that having a functioning antitrust compliance policy in place would be treated as a mitigating factor when calculating fines, and the FAS included provisions to that effect in the first draft of the Compliance Act. Those provisions were then omitted by the Russian government, then raised again before parliament, which eventually decided not to enshrine the mitigation provisions in the final version of the Compliance Act. This took away a key incentive for companies to implement such policies, calling into question the practical value of the Compliance Act: the legal status of an antimonopoly compliance policy is the same whether it has been approved by the FAS or not.

Although obtaining FAS approval is not essential and only provides limited benefits, it is a step that might be seen as a sign of respect for the regulator and it does enable the corporation concerned to cite its policy should the need arise. Igor Artemiev, the former head of the FAS, has emphasized that the FAS has not given up on the idea of introducing more concrete legal benefits and the authority continues to lobby for statutory amendments to this end. In addition to a potential reduction of fines, the FAS is considering the possibility of completely releasing companies from liability if they have duly implemented a legally adequate policy.

### 2.2 Official Guidance Published by the Supreme Court and the FAS

In the summer of 2021, the FAS issued two sets of guidelines concerning merger control and antimonopoly compliance, which clarify numerous issues, although there was no general change of approach and the clarifications contained no major surprises.

- The merger control guidance describes, in particular, the regulator's approach to: clearing joint venture agreements; antitrust assessments of non-compete agreements; circumstances where the acquisition of negative control would require merger control clearance; and intragroup transactions that are not subject to merger control.

- The antitrust compliance guideline gives more detailed comments on the antimonopoly compliance program and particularly aims to introduce an exclusion of administrative liability for violating entities who have in place effective antimonopoly compliance policies that have been approved by the FAS. This provision in the guideline sounds like an attempt to introduce the more solid legal benefits that were originally discussed by the community.

In addition to this FAS guidance, on March 4, 2021, the Plenum of the Supreme Court of the Russian Federation issued its Decree No. 2 On Certain Issues Arising in Connection with the Courts' Application of the Competition Legislation. This guidance is aimed at making court practice more uniform when it comes to applying the Competition Law.

The Supreme Court addresses specific questions across all areas of antitrust regulation: (i) abuse of dominance; (ii) anti-competitive agreements and concerted practices; (iii) unfair competition; (iv) antitrust violations by public authorities; (v) public procurement; (vi) the powers of the antitrust authority; (vii) contesting antitrust authority acts or decisions; and (viii) private antitrust enforcement. The decree is meant to make practice consistent among market players, the state courts, and the FAS and its offices across Russia.

### 2.3 Fifth Antimonopoly Package Bill

The Fifth Antimonopoly Package is a set of draft amendments to federal laws which aims to introduce specific restrictions for IT companies. The rapid development of IT technologies has drawn particular focus from the FAS over the last five years, during which the FAS has launched a number of antitrust investigations against leading IT companies (*e.g.* Google, Apple, Lenovo, and Microsoft). Some of these cases have followed similar ones commenced by other regulators in Europe and Asia.

In particular, the bill envisages:

- prohibiting various forms of abuse by digital giants – the bill defines new dominance criteria for IT companies;

- introducing the "network effect" concept, which would mean that a product's consumer value would depend upon the number of consumers – this concept would apply when analyzing competition in a particular market, where transactions between seller and buyer are made using software on the web; and

- introducing restrictions on software owners if (i) the network effect from the use of their software "*makes it possible to exert a decisive influence on the general conditions for the circulation of goods*" and/or (ii) the software owner has more than 35% of the market for the services in question, and the owner's revenue from this activity exceeds RUB 400 million (approximately EUR 4.8 million) per annum.

The draft law is currently being discussed by the Russian Government. The FAS is keen to submit the finalized bill to the State Duma for further scrutiny so that it can be enacted into law in the course of 2022.

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

### 3.1 Anticompetitive Agreements

The general approach to horizontal and vertical agreements between undertakings is similar to what holds true in Western Europe. The prohibitions under Russian law are very similar to the European Union rules.

**(a)** Cartels

Cartels are agreements between competitors that lead or could lead to:

- prices (tariffs), discounts, mark-ups (surcharges), and/or additions to prices being set, fixed, and/or maintained;
- prices at tenders being increased, reduced, or maintained;
- the market being divided up by territory or according to the volume of sales or purchases, or the range of sellers or buyers;
- production of the goods in question being reduced or stopped; and
- refusals to contract with particular sellers or buyers (customers).

These agreements are *per se* prohibited by the Competition Law, so the mere fact of joining or creating a cartel is sufficient to establish a competition law violation and the FAS does not need to prove that the agreement has had a negative impact.

**(b)** Vertical Agreements Anti-competitive Per Se

Vertical agreements *are* anticompetitive per se if their clauses lead or could lead to:

- resale price-fixing/maintenance (save for setting a maximum resale price); and/or
- the buyer being contractually restrained from selling the products of the seller's competitors unless the buyer undertakes to distribute the seller's products under the seller's/manufacturer's trademark or other means of individuation.

**(c)** Other Anti-competitive Agreements

If neither of the above criteria is met, an agreement can still be declared anti-competitive by the regulator if it impedes or could impede effective competition in Russia. In particular, the law outlines the following scenarios in which effective competition would be likely to be impeded:

- the agreement creates unfavorable contract conditions for a counterparty;
- the agreement sets different prices for the same goods without any economic or technical justification;
- the agreement creates barriers to market entry or exit for other entities;
- the agreement sets conditions for joining a professional or other association.

The burden of proof is on the FAS – *i.e.* these agreements are deemed legal until the FAS proves that they impede or could impede effective competition in Russia.

**(d)** Safe Harbor Exemption

Vertical agreements between companies (except vertical agreements between financial organizations, which are subject to specific regulation) are permitted if each party to the agreement has a market share of less than 20%.

Franchising agreements are outside the scope of the Competition Law's restrictions on vertical agreements.

### 3.2 Share Acquisitions and Joint Ventures

**(a)** Mergers & acquisitions: As elsewhere in the world, the competition regulator in Russia has a strong focus on merger control, and the relevance of the foreign investment and strategic investment regimes has been increasing significantly in recent years.

**(b)** Joint ventures: Joint venture agreements often fall under the merger control/foreign investment/strategic investment regimes. There is no concept of full-function joint ventures in Russia.

Please refer to section 9 for more details on the clearance rules applicable to both of the above types of agreement.

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

Please see questions 3 and 9.

## 5. Does a leniency policy apply in Russia?

### 5.1 General

A leniency program for competition law violations has been in force in Russia since 2008. It covers all forms of anti-competitive agreements and concerted actions. No other violations are eligible for the leniency program.

The program provides immunity or partial exemption from administrative liability and – subject to certain conditions – immunity from criminal liability for a cartel.

Applicants who have facilitated or initiated anticompetitive agreements are not eligible for leniency.

According to the statistics collected by the FAS, the number of leniency applications has been increasing over the past few years. The FAS states that it received 222 applications for leniency in 2020, 147 in 2019, and 97 in 2018. However, in practice leniency applications are rare due to numerous regulatory and practical uncertainties.

### 5.2 Leniency with Respect to Administrative Liability

**(a)** The first applicant for leniency can receive full immunity, contingent upon the following criteria being met (Leniency Criteria):

- The applicant provides documents/information that are sufficient to identify the violation. The information/documents are deemed sufficient if they answer the following questions: (i) who committed the offense? (ii) what was the offense? (iii) when was the offense committed? and (iv) why was the offense committed? All of these must be answered and, if they are not, the FAS deems the disclosure insufficient.
- The information provided was not already known to the FAS.
- The applicant has voluntarily stopped perpetuating the violation.

**(b)** Second and third applicants cannot count on full immunity but can benefit from receiving the lowest possible statutory fine for the violation in question. The FAS can reduce the fine even further if the infringing company's financial condition is poor and it meets any of the following criteria:

- the company's revenue has consistently gone down over the last three or more years;
- the company has negative operational capital;
- the company has long-outstanding accounts payable; or
- proceedings are underway for the company's bankruptcy.

The absolute minimum fine possible is half the lowest statutory fine for the Competition Law violation in question.

The second and third applicants can count on the reduced fine if they meet the Leniency Criteria.

**(c)** It is still an open question as to whether company managers can apply for leniency. The law says that only parties to the anticompetitive agreements can be eligible for leniency. As managers are not formally parties to such agreements, the leniency program would not apply to them at first glance.

However, according to the regulator, a manager of a violating company who was party to the anti-competitive agreement and who applied for leniency would be exempted from administrative liability provided that the company met all of the Leniency Criteria.

### 5.3 Leniency with Respect to Criminal Liability

Cartels are subject to criminal liability. All other anticompetitive agreements are subject to administrative penalties only, *i.e.* there is no risk of criminal prosecution.

Immunity from criminal liability is possible for the first applicant who:

- provides actively valuable statements that help in the investigation of the cartel;
- has compensated the damage or otherwise repaired the harm caused by the cartel; and
- has not committed any other criminal offenses.

Although employees and managers cannot submit their own applications for leniency in respect of administrative liability, they can do so when it comes to criminal liability.

There are no specific leniency options for second and third applicants. The criminal sanctions for them might be mitigated if the investigating body decides that the information they have disclosed is helpful in the criminal case.

## 6. How is unilateral conduct treated under Russian competition rules?

From a legislative perspective, the Russian rules on abuse of dominance are almost identical to the European Union rules. In addition, there is a special Russian concept concerning the illegal coordination of downstream markets. Finally, unfair competition is regulated in the framework of the general competition rules.

### 6.1 Abuse of Dominance

**(a)** The Russian dominance concept can be summarized as follows:

- Entities with a market share of less than 35% cannot be deemed dominant, except in exceptional circumstances of collective dominance.
- There is a rebuttable presumption of dominance if the undertaking in question has a market share of 50% or more. The FAS may, however, conclude that although the company does have more than 50% of the relevant market it still does not dominate that market.
- Finally, an undertaking can be deemed dominant if it has a market share of 35% to 50% if (i) there is little fluctuation in the shares of the relevant market, and (ii) the undertaking's

share makes it difficult for other players to enter the market.

**(b)** Dominance is deemed abusive when it results or could result in (a) the prevention, elimination, or restriction of competition; or (b) the infringement of business-related rights of other undertakings or an indefinite range of consumers.

Similar to other jurisdictions, the law sets out a non-exhaustive list of abusive practices:

**(i)** the setting or maintenance of monopolistically high or low prices;

**(ii)** the recall of products, if this leads to an increase in prices for such products;

**(iii)** high-pressure selling on terms that either (a) are unfavorable to the other party, or (b) lie outside the subject matter of the agreement;

**(iv)** a decrease in production for no technical or economic reason;

**(v)** the setting of different prices for the same product for no technical or economic reason;

**(vi)** discrimination; and

**(vii)** the creation of barriers to market access for other potential players.

### 6.2 Coordination of Economic Activities

The coordination of economic activities is a specific Russian concept and means a situation in which a person (a business entity or an individual) instructs other business entities as to how they should run their business. Such coordination can relate to an entire business or only to certain lines of a business. Coordination typically arises with respect to downstream markets, *e.g.* where a manufacturer interferes with the resale of products by indirect distributors.

Risks arise from the coordination of economic activities if: (a) the coordinating entity/person is not in the same group as the business entities whose activities are being coordinated; (b) there are two or more undertakings whose activities are being coordinated; and (c) the coordinating entity/person has no presence on the market where it is coordinating other undertakings' activities.

The coordination of economic activities has much in common with the vertical agreements described in section 3. However, it applies in situations where the restriction in question is outside the actual contractual relationship.

### 6.3 Unfair Competition

It is a peculiarity of Russian competition law that unfair competition falls within the competence of the FAS. There is no exhaustive list of activities that can raise unfair competition concerns, but the Competition Law does outline seven main types of unfair competition:

- the distribution of false or incorrect information that can inflict losses upon an entity and/or harm its business;
- the provision of misleading information in respect of the nature, manner, and place of production, consumer characteristics, quality or quantity, or the manufacturer of goods;
- improper comparisons between goods produced by one entity and goods produced or sold by other entities;
- the unfair acquisition and use of exclusive rights to the means of individuation of a legal entity, goods, works, or services;
- the sale, exchange, or other release into circulation of goods in breach of intellectual property rights, except for the means by which a competitor is identified;
- the creation of confusion with a competitor's business or product; and
- the unlawful receipt, use, and disclosure of commercial secrets or other information protected by law.

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

The FAS has reviewed several abuse of dominance cases in the last two years. Similar to other jurisdictions, many abuse cases involve major IT companies. Below we mention three recent cases, although the level of the fines was modest compared to other jurisdictions.

**(a)** Booking.com

In 2020, a non-commercial organization called Opora Russia, which supports small and medium enterprises, lodged a complaint with the FAS against Booking.com B.V., which operates the booking.com hotel aggregator platform. Opora Russia claimed that Booking.com was abusing its dominant position by stopping hotels/guesthouses/apartments/*etc.* from showing their lowest prices on websites other than booking.com (including their own websites).

The FAS agreed with Opora Russia and found that Booking.com's most-favored nation provision was abusive.

In August 2021, the FAS imposed a fine of approximately EUR 15 million on Booking.com.

**(b)** Apple

In 2019, Kaspersky Lab filed a complaint accusing Apple of abusive behavior on the market for mobile devices with iOS. In particular, Kaspersky Lab claimed that Apple used its dominant position to create a competitive advantage for its own Screen Time application and reduce the functionality of parental control applications developed by third parties. The FAS ruled against Apple and imposed a fine of approximately EUR 12 million.

Apple is currently challenging the decision in court.

In September 2021, the FAS issued an unrelated warning letter, asking Apple Inc. to remove anti-steering clauses from contracts with third-party developers. In particular, the FAS is arguing that Apple abuses its dominant market position by preventing app developers from directing users away from Apple's in-app payment system and towards potentially cheaper ways of paying for products and other features embedded in their apps. Apple has not fulfilled the requirements of the warning letter, so in October 2021 the FAS opened a formal dominance case against Apple.

**(c)** Yandex

In early 2021, several companies lodged a complaint with the FAS about Yandex, which operates Russia's largest search engine, alleging that the company discriminates against third-party services in favor of its own, and specifically that Yandex prioritizes its own services over third-party services in search results generated through the Yandex platform.

The FAS reviewed the complaint and in March 2021 issued a warning letter to Yandex. Yandex disagreed with the warning letter, and the FAS opened formal proceedings, which are ongoing.

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

Sanctions for competition law violations are equally applicable to Russian and non-Russian entities. The actual risk of sanctions depends on the specific circumstances. The overview below is a general guide only.

First of all, the FAS can issue a mandatory order obliging the parties to cease a restrictive practice, *e.g.* by amending their agreement and/or their contracts with local distributors.

The FAS can also impose fines and other sanctions. Sanctions are administrative in nature, not criminal:

**(a)** Company fines: There are turnover-pegged fines for abuse of dominance and anti-competitive agreements. Such fines are in the range of 1-15% of the violating entity's turnover on the relevant market in Russia for dominance and cartel cases and the illegal use of IP where this constitutes unfair competition, and 1-5% for restrictive vertical agreements and other anti-competitive agreements. This means that a violating company can be fined based on its Russian annual turnover generated on the market concerned for the last calendar year.

When calculating fines, the FAS applies the following principles:

- The above percentages relate to the turnover generated by the company on the affected market, *i.e.* it does not matter whether or how much turnover is generated in any other markets on which the company is active.
- The FAS rarely defines the affected market as going beyond the territory of the Russian Federation when calculating fines.
- Fines are calculated on the basis of the turnover generated by the specific entity against which the case was opened, *i.e.* the global turnover generated by other group members is not taken into account.
- When setting a specific fine within the above corridors, the FAS takes any mitigating and/or aggravating circumstances into account.

Should the FAS hold that *e.g.* the agreement has led or could lead to the restriction of competition at public tenders (price maintenance or a price increase), the applicable administrative fine would be up to 50% of the tender's starting price.

Companies that are held liable for unfair competition (other than the illegal use of IP) face relatively minor fixed fines of up to approximately EUR 6,000.

**(b)** Management's personal liability: The FAS has the power to impose administrative fines on the individuals responsible for an antitrust violation. In practice, the FAS tends to fine the legal entity; fines imposed on individuals are less common, although possible. The level of such fines is minimal, approximately EUR 600, although fines can have broader consequences for managers, *e.g.* in the context of work permit regulation, visas, *etc.*

The law also provides that responsible officers can be disqualified for a period of up to three years for abuse of dominance, tender violations, or the illegal use of IP constituting unfair competition, and for a period of up to one year for restrictive vertical arrangements. In practice, however, disqualification is applied only rarely and in exceptional circumstances.

**(c)** Civil liability: A company that violates the antitrust rules can be held liable under civil law. In practice, such cases are relatively rare, although the FAS does tend to encourage claims

for civil damages.

**(d)** Procedural aspects: In certain cases, before initiating abuse of dominance proceedings, the FAS is required to issue a warning letter to the company in question, giving it an opportunity to respond and/or adjust its market behavior. Such cases include unjustified refusals to supply and the imposition of disadvantageous conditions. This means that the violating company would normally be given an opportunity/time to adjust the terms of agreements that have been found to be anticompetitive or contracts with local distributors about which the FAS has raised concerns. The violating company will also be able to present its arguments to prove that the agreement cannot actually lead to a restriction of competition and/or should be deemed permissible under Russian law (because it benefits customers or for other reasons).

That said, a prior warning letter is not necessary for all types of alleged violations and the FAS can initiate antitrust proceedings without issuing a warning letter. Therefore, it is difficult to predict in a given case whether the FAS will issue a warning letter or immediately open a formal case. In other words, when making its risk assessment, the violating company should not rely on any presumed obligation on the part of the FAS to first send a warning letter before commencing formal proceedings.

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

Basically, there are three regimes that might apply to an M&A transaction with a potential impact on the Russian market: (a) the merger control regime; (b) the foreign investments regime; and (c) the strategic investments regime.

### 9.1 Merger Control Regime

#### General

Russia's merger control rules are largely similar to the regimes in other jurisdictions. The merger control rules include a set of notification requirements that distinguish and apply to three broad categories of transactions:

- Acquisition by way of acquiring shares, assets, or other controlling rights in relation to a Russian commercial organization or financial institution, or to a non-Russian target entity that satisfies the local presence test. Cross-border M&A transactions with a Russian element typically fall within the first category of transactions. They tend to involve a direct acquisition of shares in a Russian target or the acquisition of a non-Russian target that either controls a Russian legal entity or has substantial sales in Russia.
- The establishment, merger, or accession of Russian companies under the Russian corporate restructuring rules. The practical significance of this second category is very limited.
- Execution of joint venture agreements between competitors. This third category was introduced in 2016, and its importance has increased over the past five years.

#### Clearance of M&A transactions

The following types of acquisitions in the first category are subject to merger control by the FAS. Special rules exist for acquisitions involving financial institutions.

Acquisition of control over a Russian company:

**(a)** Direct acquisition of shares in a Russian company. Clearance is required once any of the following ownership thresholds is exceeded: 25%, 50%, and 75% of voting shares in a Russian joint-stock company or 1/3, 50%, and 2/3 of voting shares in a Russian limited liability company. The acquisition of shares by founders in the course of establishing a company is not subject to merger control.

**(b)** Acquisition of rights enabling the terms on which a Russian company conducts its business to be determined (the acquisition of control over a Russian company's foreign parent company generally falls within this category) and/or enabling the functions of a management company to be carried out in respect of a Russian company.

Acquisition of control over a foreign company with significant turnover in Russia (see the Foreign-to-foreign M&As section below for details):

**(c)** Acquisition of more than 50% of voting shares in the foreign company.

**(d)** Acquisition of rights enabling the terms on which the foreign company conducts its business to be determined or enabling the functions of a management company to be carried out.

Acquisition of assets located in Russia:

**(e)** Acquisition of production and/or intangible assets located in Russia, where the book value of the assets being transferred exceeds 20% of the book value of the transferor's total production and intangible assets.

Such acquisitions are also subject to merger control review if implemented through several interrelated transactions. There is a statutory exemption from this rule for transfers of land plots and real estate assets that are not used for industrial purposes.

Thresholds:

The acquisitions referred to above are subject to pre-completion notification and their performance must be suspended pending FAS clearance if:

- the combined book value of the assets of the acquiring group and the target group (or of the group disposing of assets, as the case may be) exceeds RUB 7 billion (approximately EUR 85 million) and, concurrently, the book value of the assets of the target group exceeds RUB 400 million (approximately EUR 5 million); or

- the combined turnover of the acquiring group and the target group (the group disposing of assets) exceeds RUB 10 billion (approximately EUR 120 million) and, concurrently, the book value of the assets of the target group exceeds RUB 400 million (approximately EUR 5 million).

Foreign-to-foreign transactions:

Foreign-to-foreign transactions fall under the Russian merger control rules where the target group includes (i) Russian entities or (ii) entities that directly or indirectly control Russian entities or (iii) entities that own substantial assets located in Russia or (iv) entities with a turnover exceeding RUB 1 billion (approximately EUR 12 million) from operations in Russia during the year preceding the transaction.

There is no statutory guidance for calculating the threshold referred to in item (iv) above. Historically, the understanding has been that the threshold should be assessed for each non-Russian company individually. However, according to FAS guidance, the threshold should be calculated on an aggregated basis, *i.e.* for all non-Russian companies within the target group.

**Joint Ventures**

Two types of joint ventures are distinguished: joint ventures between competitors, and all other joint ventures.

**(f)** The establishment of any joint venture may require (i) clearance of the joint venture agreement itself and/or (ii) general merger clearance (see section above for details). In other words, the creation of a joint venture is treated as an acquisition of shares, assets or rights by the newly created joint venture from its founders. Consequently, joint ventures do not normally require clearance under the general rules if (i) no legal entity is formed or (ii) the new entity is funded solely by cash contributions.

**(g)** The situation is different, however, when a joint venture is formed between competitors. Such joint ventures are always subject to mandatory merger clearance, irrespective of their corporate nature.

**(h)** According to the FAS guidelines, an agreement may be classed as a joint venture agreement if it provides that the parties (i) combine their resources or make mutual investments aimed at achieving the joint venture's goals and (ii) jointly bear the risks associated with the joint venture's business. Therefore, potentially, any agreement providing for cooperation between the parties in order to conduct business in Russia may be subject to clearance, including cooperation agreements and shareholders agreements.

That said, SHAs that regulate purely corporate matters are unlikely to be subject to clearance, unless they in some way relate to the parties' market activities (*e.g.* if the SHA includes a non-compete clause).

It is important to note that joint venture agreements are subject to pre-completion notification irrespective of whether the entity in question is a fully functioning joint venture.

**(i)** The law does not provide any clear criteria for determining whether a joint venture agreement is Russia-related. According to the FAS's guidance, a joint venture agreement should be deemed to be related to Russia if any one of the following conditions is met:

- the JV entity is/will be registered in Russia; or

- the JV entity has/will have a Russian subsidiary; or

- the JV entity has been/will be established to conduct business in Russia (*e.g.* business involving direct supplies to Russia).

This list of criteria is not exhaustive but it does cover the vast majority of cases in which a joint venture agreement may be subject to prior clearance.

**(j)** Neither does the Competition Law give a specific definition of "competitors." It is therefore not clear whether joint ventures between potential competitors are subject to clearance. The FAS tends to interpret the relevant provisions of the Competition Law quite broadly and, according to the FAS's guidance on the Competition Law, joint ventures between potential competitors do require merger clearance. Hence, prior clearance might be required for the execution of a joint venture agreement between parties that have not been active in Russia prior to the establishment of the joint venture.

It is therefore advisable to assume that notice must be given of the conclusion of any Russia-related joint venture agreement, including joint ventures that involve a new market entry.

That said, there have been cases where the FAS has ruled that the establishment of a joint venture as an alliance between companies that are not direct competitors (*i.e.* that do not act

on the same markets but on adjacent markets) is not subject to clearance but, to date, these cases have been few and far between.

**(k)** For the sake of completeness, joint venture agreements, shareholders' agreements, and other agreements concerning the creation of joint ventures that could potentially restrict competition in Russia can be voluntarily submitted to the FAS prior to their implementation, in order to obtain clearance or an individual exemption. If a joint venture agreement does not trigger the mandatory clearance process (*e.g.* the financial thresholds are not met), the parties can still opt to follow the voluntary clearance procedure in order to rule out the antitrust risks attendant upon the various restrictive arrangements that JVAs often include (*e.g.* non-compete clauses). The procedure here is comparable to the European Commission's former "Form AB procedure."

**Penalties**

Failure to obtain prior clearance is punishable with a relatively small administrative fine ranging from RUB 300,000 to 500,000 (approximately EUR 3,600 to 6,000) for each application or target, depending on the approach taken by the FAS. The fine is imposed against the applicant (the direct acquirer of control).

Further, a transaction consummated without clearance may be invalidated (a company established without clearance may be liquidated and merged companies may be demerged) by the Russian courts upon an application by the FAS. The transaction may be declared invalid on Russian territory by the Russian state court if the FAS proves that the transaction (company establishment/merger) restricts or could lead to the restriction of competition in Russia.

If an applicant submits incomplete or misleading information in its application, this constitutes an administrative offense, which is punishable with a relatively small fine for the applicant of approximately EUR 6,000.

In addition, the corporate officers of an applicant that has failed to submit the requisite notification can be fined approximately EUR 300. Whilst this sanction has rarely been used, we do note an increasing tendency for the competition authority to seek to apply it alongside the fines imposed on the companies themselves. Fines can also have broader consequences, particularly for company officers who are foreign nationals.

### 9.2 Public Foreign Investment Regime

The public foreign investment regime applies to public foreign investors only. This regime is triggered when a governmental or international organization or any of their subsidiaries (including subsidiaries incorporated in the Russian Federation) (Public Foreign Investors) contemplate the direct or indirect acquisition of either (i) 25% or more of shares in a Russian entity or (ii) any veto power in relation to a Russian entity.

Prior clearance under the foreign investment regime is required for acquisitions by foreign state-controlled entities of (i) more than 25% of the voting shares in a Russian legal entity or (ii) any veto power in relation to a Russian legal entity. If the clearance requirement under the Foreign Investment Law is triggered, the foreign investor must submit a pre-completion filing to the FAS.

Transactions that do not involve Russian legal entities, *i.e.* where the target group has no (direct or indirect) Russian subsidiaries, are beyond the scope of the foreign investment regime. This means that it does not matter whether the foreign company in question has significant turnover and/or representative offices/branches in Russia; neither factor creates a sufficient local nexus for the transaction to fall under Russia's foreign investment rules.

It is important to note that no separate filing under the foreign investment regime is required if the transaction is submitted for clearance under the strategic investment regime as described below.

Penalties for failing to obtain prior clearance under the foreign investment regime are the same as for breaching the strategic investment rules.

### 9.3 Strategic Investment Regime

**(a)** Applicability

The strategic investment rules are found mainly in the Strategic Investment Law. They apply to all types of foreign investors: individuals (including Russian nationals with dual citizenship); legal entities (including Russian companies under foreign control); groups that include a foreign investor (Foreign Investors); and, in particular, Public Foreign Investors, that enter into transactions involving (directly or indirectly) significant assets of or shares in a Strategic Entity (as defined below), and/or certain controlling and veto rights in relation to a Strategic Entity.

The provisions of the Strategic Investment Law apply only to transactions for the transfer of shares in or assets of Strategic Entities. They do not apply to situations where an existing (non-strategic) legal entity controlled by a Foreign Investor commences operations that are strategic in nature (although there may be exceptions, such as certain PPP projects, which can, arguably, fall within the scope of the Strategic Investment Law).

**(b)** Strategic Entities

A strategic entity is defined by the Strategic Investment Law as an entity incorporated in the Russian Federation that carries on at least one activity of strategic importance (Strategic Entity). Article 6 of the Strategic Investment Law lists 46 types of activity that are deemed to be of strategic importance. These can broadly be divided into four categories:

- Natural Resources: this category includes activity affecting geophysical processes, geological exploration, and the development of natural resources, in cases where the natural resources in question are located in a subsoil block that is deemed to be "of federal importance;"
- Media: this includes television and radio broadcasting, and certain printing and publishing activities;
- Defense and sensitive businesses: this includes activity connected with weapons and military equipment, radioactive materials, space, aviation, encryption and security assessment, and surveillance of infrastructure and means of transportation;
- Activities of natural monopolies: this includes the activities of not only certain communications and railway companies (which have a dominant position on the Russian market) but also various natural monopolies.

Any involvement by a Russian entity in an activity of strategic importance is sufficient for that entity to be deemed a Strategic Entity, irrespective of whether the activity in question is its core business. An entity can also be deemed a Strategic Entity if it merely holds a license for a strategic activity, even if it does not actually engage in that activity. Additionally, according to recent FAS practice, any entity engaging in activity that is not strategic *per se* but is necessary to facilitate a strategic activity can also be deemed a Strategic Entity.

The Strategic Investment Law establishes special rules for foreign investment in a subsoil strategic entity, which is defined as a Strategic Entity that conducts a geological study, and/or the analysis and recovery of subsoil resources from a "subsoil block of federal importance."

A subsoil block may be deemed to be of federal importance if it meets any one of the following criteria:

- it contains deposits of uranium, extra-pure quartz, yttrium rare earth elements, nickel, cobalt, tantalum, niobium, beryllium or lithium, primary deposits of diamonds, or primary (metalliferous) deposits of platinum metals, with reserves recorded in the State Balance of Mineral Reserves;
- it is within the territory of the Russian Federation and contains (according to the State Balance of Mineral Reserves):
  - more than 70 million tonnes of recoverable oil reserves;
  - more than 50 billion cubic meters of natural gas reserves;
  - more than 50 tonnes of lode gold reserves;
  - more than 500,000 tonnes of copper reserves;
- it is located in inland or territorial waters or on the continental shelf of the Russian Federation; and
- its use necessitates the use of land within designated defense or security zones of the Russian Federation.

**(c)** Transactions that Trigger the Strategic Investment Regime

Prior Approval with Respect to a Foreign Investor:

Prior approval is required for transactions that would allow a Foreign Investor:

- to control a Strategic Entity or a Subsoil Strategic Entity (see the Definition of "control" section below); or
- to acquire any additional shares in a Subsoil Strategic Entity, where the Foreign Investor holds 25% to 75% of the shares in the Subsoil Strategic Entity prior to the transaction (except in cases where the Foreign Investor's shareholding will not increase following the transaction); or
- to acquire fixed assets of a Strategic Entity or a Subsoil Strategic Entity that are worth 25% or more of the book value of the entity's total assets.

If a Foreign Investor acquires control over a Strategic Entity or a Subsoil Strategic Entity because of changes in the shareholding structure, without a transaction being concluded or new shares acquired (*e.g.* as a result of shares being redeemed), the Foreign Investor should submit an application for clearance of the acquisition of control within three months of the date of the acquisition.

Prior Approval with Respect to a Public Foreign Investor:

A special regime with lower filing thresholds (compared to the general regime for Foreign Investors) applies to investments by Public Foreign Investors.

A Public Foreign Investor must obtain prior approval for the following transactions:

- direct or indirect acquisition of more than 5% of shares in a Subsoil Strategic Entity;
- direct or indirect acquisition of more than 25% of shares in or any veto power in relation to a Strategic Entity.

The above requirements do not apply to transactions involving

certain international financial organizations, such as the European Bank for Reconstruction and Development, the Multilateral Investment Guarantee Agency, the International Development Association, and the International Finance Corporation. The Russian government keeps a list of such organizations; there are currently 14 of them.

Prior Approval at the Russian Prime Minister's Request:

The Chairman of the Governmental Commission for Control over Foreign Investment in the Russian Federation (Commission) is entitled to issue *ad hoc* resolutions requiring that prior approval be obtained under the strategic investment regime for a given transaction if the chairman deems it necessary in the interests of national defense and state security.

The law is broadly worded, suggesting that such resolutions can be issued in relation to virtually any transaction by a Foreign Investor involving any Russian entity, whether strategic or not.

Definition of Control:

The Strategic Investment Law contains a unique and complex concept of "control." It stipulates that a Foreign Investor is deemed to exercise control over a Strategic Entity or Subsoil Strategic Entity if the Foreign Investor directly or indirectly:

- holds:
  - more than 50% of the voting shares in the Strategic Entity; or
  - 25% or more of the voting shares in the Subsoil Strategic Entity; or
- has the right to appoint:
  - more than 50% of the members of the board of directors, management board, or other management body of the Strategic Entity; or
  - 25% or more of the members of the board of directors, management board, or other management body of the Subsoil Strategic Entity; or
- has the right to appoint what is called the "single-person executive body" (*e.g.* the CEO) of the Strategic Entity/Subsoil Strategic Entity (as the case may be); or
- is entitled to determine the decisions taken by the Strategic Entity/Subsoil Strategic Entity (as the case may be), including, without limitation,
  - on the basis of an agreement; or
  - by virtue of being a management company of the Strategic Entity/Subsoil Strategic Entity; or
  - due to a shareholding structure that gives the Foreign Investor, although it owns less than 50% of the Strategic Entity, the power to determine the decisions of the Strategic Entity (*e.g.* where the stake held by each of the other shareholders is smaller than the Foreign Investor's stake).

**(d)** Post-Completion Notifications

The following transactions may be concluded without prior approval but do require a post-completion notice to be submitted within 45 calendar days of the date they are concluded:

- acquisition by a Foreign Investor of 5% or more of the shares in a Strategic Entity or Subsoil Strategic Entity; and
- acquisition by a Public Foreign Investor of 5% or more of the shares in a Strategic Entity.

In addition, the Foreign Investor or Public Foreign Investor, as the case may be, must submit a post-completion closing notice for any transaction previously approved through the prior-approval process. This notice should also be submitted within 45 calendar days of the closing date.

**(e)** Pre-Completion Notice

The law says that a Foreign Investor contemplating the acquisition of shares in a Strategic Entity/Subsoil Strategic Entity must disclose its beneficiaries to the FAS where such disclosure could affect the decision as to whether the contemplated transaction requires prior clearance.

This applies to cases in which a Foreign Investor (but *not* a Public Foreign Investor) intends to acquire 25% to 50% of a Strategic Entity or 5% to 25% of a Subsoil Strategic Entity. In such cases, the Foreign Investor should disclose its beneficiaries to the FAS at least 30 calendar days prior to the closing date. The Foreign Investor should ensure that the information disclosed remains true and accurate as of the closing date.

**(f)** Penalties

Transactions that need prior approval under the strategic investment regime but are closed in breach of that regime are null and void. The consequences of invalidity established by the general provisions of Russian civil law apply to such transactions, including the obligation that each party returns to the other all property and/or money transferred under the transaction.

If for any reason the civil-law consequences of the transaction's invalidity cannot be applied, the Russian courts have the power to strip the shares acquired by the investor of all voting rights (such shares are not counted when determining whether there is a quorum at shareholders' meetings).

The same penalty (deprivation of voting rights) applies (i) if a transaction is cleared conditionally but the Foreign Investor/Public Foreign Investor fails to comply with the conditions imposed, and (ii) for failure to submit a post-completion notice.

Another penalty available to the courts is to invalidate shareholders' decisions, decisions of management bodies, and/or contracts made by the relevant Strategic Entity/Subsoil Strategic Entity following the transaction that was closed in breach of the Strategic Investment Law.

Failure to obtain prior approval may also give rise to administrative penalties, although the fines are quite low. The Russian Administrative Offenses Code establishes fines of up to EUR 12,000 for legal entities and up to EUR 600 for their responsible officers. Similar fines may be imposed for the submission of filings containing incorrect information.

## 10. What is the normal merger review period?

### 10.1 Merger control regime

The review period under the merger control regime is 30 calendar days (Phase I), which may be extended by two months (Phase II). In addition, preparing a merger control filing for a non-Russian applicant normally takes approximately three to five weeks (due to apostilles, translations, couriering, *etc.*).

The law does not provide a list of grounds for an extension. Rather, the FAS can put the review into Phase II on its own, with no obligation for it to provide the parties with the rationale underlying this. Normally, the process can be extended into Phase II if the case team needs to clear up additional questions about the filing. In such cases, they either issue a request for the parties to provide additional information or gather the outstanding data from their internal sources and other state regulators.

In the vast majority of cases, no-issue deals get cleared by the FAS within Phase I. There are normally no major delays. That said, unlike in many other jurisdictions, in Russia, there is no automatic clearance upon expiry of Phase I, so an extension into Phase II can never be ruled out. FAS case teams often have very high workloads and they might issue additional requests in order to gain time. It is also common in private equity deals for the FAS to ask additional questions about the investor level.

This does not mean that the FAS always exhausts all of the additional two months. It occasionally does happen – particularly if there are indeed substantive competition issues – but the FAS often has the merger control clearance decision ready within the first two or three weeks of Phase II.

In exceptional situations, the review period can be extended if the FAS decides to impose conditions precedent to the closing. In such rare cases, the initial 30-day period can be extended by up to nine months. Once the FAS is provided with evidence that the conditions have been satisfied, it has 30 calendar days to decide whether to accept them and grant clearance. If the parties have not fulfilled the conditions by the end of the extended review period, clearance of the transaction is denied.

Further, if the transaction is subject to both merger clearance and strategic investment/foreign investment clearance, the merger control review is suspended indefinitely pending the strategic investment/foreign investment clearance.

The FAS can return a pre-completion notification within the first 10 calendar days following its submission if it is found to be incomplete. Once the 10-day period has elapsed, the notification can (normally) be assumed to have been accepted by the FAS.

Under the Russian merger control rules, there is an obligation to suspend implementation of a transaction until pre-closing clearance has been obtained from the FAS.

### 10.2 Public foreign investment regime

The Foreign Investment Law is vague when it comes to review timing. It can be argued that the review period is 14 calendar days, but in practice, the FAS typically takes one month to review a filing.

### 10.3 Strategic investment regime

The timeline for review under the strategic investment regime differs significantly from merger control and public foreign investment review. The duration of strategic investment reviews sometimes creates a serious obstacle to the completion of global transactions.

The Strategic Investment Law distinguishes the following three major stages of the application review process:

- The preliminary review of the application by the FAS (up to 14 calendar days). The FAS checks whether the application and supporting documents have been submitted in full and in the format prescribed by the Strategic Investment Law. It also checks whether the transaction is subject to review under the strategic investments regime;
- The analysis of the impact of the transaction by the FAS, the FSB, and other governmental bodies (approximately one to two months). The FAS sends the application to the FSB and other governmental bodies and works with them in order that they can issue opinions on the impact of the transaction;
- The Commission's review of the application and decision on the application (approximately two to five months, sometimes

longer). In practice, the Commission meets intermittently (two to four times a year).

The Commission may impose certain conditions for an applicant with respect to the strategic company prior to clearance. If the applicant accepts the conditions, a formal agreement is negotiated and concluded between the applicant and the FAS within 30 days of the Commission's decision to impose the conditions.

Formally, the application review process must be completed within three months from the date the FAS registers the application. In exceptional cases, the Commission extends that period by a further three months. In practice, the entire review process can take more than six months, partly due to the fact that the Commission only sits two to four times a year.

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

### 11.1 Merger Control Regime

The filing fee is nominal: a fixed amount of approximately EUR 500, which must be paid prior to submission of the notification.

There have been instances in which the FAS has charged the filing fee for each step of a notified transaction, arguing that each step needed a separate approval.

There are no fees for post-transfer notifications.

### 11.2 Strategic Investment and Public Foreign Investment Regimes

The strategic investment and foreign investment regimes do not include any filing fees.

## 12. Is there any possibility for companies to obtain State Aid in Russia? If yes, under what conditions?

### 12.1 General Background

The Competition Law contains a separate chapter dealing with state aid. State aid plays an important role for many businesses. However, in practice, state aid procedures are very different from those commonly found in the European Union. For international companies, the state aid rules and procedures set out in the Competition Law are of limited practical relevance.

"State aid" means the provision of certain privileges to one undertaking over other market players by state or municipal authorities. Those authorities affect this by providing property, rights, preferences, or guarantees, thereby making the conditions for doing business more favorable for the aided company.

### 12.2 Procedure for Getting State Aid

State (or municipal) aid is granted subject to preliminary written approval from the FAS and where the aid is requested for one of the designated purposes listed in the Competition Law:

- ensuring vital services for the population in Arctic regions and equivalent areas;
- developing science and education;
- conducting fundamental scientific research;
- protecting the environment;
- developing and conserving cultural heritage;
- developing sports and physical culture;
- agricultural production;
- national defense and security;
- rendering social services for the people;
- health and labor protection; and
- supporting small or medium businesses.

The rules for state aid distinguish themselves from all of the other regimes discussed in this guide by the fact that responsibility for applying for clearance from the FAS lies with the authority that intends to grant the aid. The application normally includes a set of supporting documents showing, amongst other things, what the aid is wanted for and how much is sought and listing the beneficiary's activities over the two years preceding the date of the FAS application.

The FAS reviews then either approves or rejects the application. Approval can be unconditional or subject to particular restrictions, such as, for example: (i) a deadline by which the state aid must be used, (ii) the range of persons to whom the state aid may be given, (iii) a cap on the amount of aid, (iv) the scope or purposes of the aid, and/or (v) other restrictions that might affect competition.

### 12.3 Review Period

The FAS reviews the application within one month of the date that a complete filing is submitted, with an option to extend the review period by two months if the FAS believes that the state (municipal) aid might impede effective competition.

As under the merger control rules, the FAS can return a filing within the first 10 calendar days following submission if it is found to be incomplete. Once the 10-day period has elapsed, the notification can (normally) be assumed to have been accepted by the FAS.

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

When the pandemic struck the economy, the FAS – like many state bodies in Russia and abroad – implemented a number of measures to reduce the administrative burden on business. These changes were positively met by both the business community and the general public.

**(a)** Merger Control Unaffected

Russian merger control reviews were largely unaffected by the pandemic and mostly continued without delay. The FAS procedure for acceptance of notifications and supporting documentation was simplified. Case handlers have primarily been working from home, but have been reachable and cooperative.

**(b)** Flexible Approach by the Regulator to Investigations

The FAS has shown a great deal of flexibility in the context of antitrust investigations, procedures, and enforcement. For example, it has:

- moved antitrust case hearings online;
- recognized the pandemic and lockdowns as force majeure events in contractual matters;
- allowed deferrals and installments for antitrust fines; and
- stopped conducting dawn raids for the duration of COVID-19 lockdowns.

One can expect that the regulator will continue and develop some of these practices in the post-pandemic world (*e.g.* online case hearings) but most of the measures the FAS took were bespoke, *i.e.* unique to the COVID-19 situation, so they will likely be discontinued once things have returned to normal.

**(c)** Focus on Pricing Cases

Similar to regulators in other jurisdictions, the FAS has switched its focus to analyzing markets for socially important goods, essential goods, medicines, and other products that are in high demand. The FAS regional offices monitor prices and the presence, shortage, or absence of goods on a daily basis. A special hotline has been set up for companies and consumers to report product shortages and possible violations of competition law.

A significant number of cases have been initiated against companies that are alleged to have increased prices excessively. Such cases were dealt with under the abuse of dominance and cartel rules.

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# CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2021

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

The main competition-related pieces of legislation are:

- The Constitution of the Republic of Serbia (*Ustav Republike Srbije Official Gazette of the RS, no. 98/2006*), which guarantees equal legal status to participants on the market. Article 84 prescribes that acts that are contrary to the law and restrict free competition by creating or abusing monopolistic or dominant positions are strictly prohibited;
- The Law on Protection of Competition (*Zakon o zastiti konkurencije Official Gazette of the RS, no. 51/2009 and 95/2013*) (the Law);
- The Law on General Administrative Procedure (*Zakon o opstem upravnom postupku Official Gazette of the RS, no. 18/2016 and 95/2018* (Authentic Interpretation)). In the procedure before the Commission for the Protection of Competition (the Commission), the general administrative procedure is applied unless otherwise provided by Law.

In addition, the following secondary acts of legislation are relevant:

- The Regulation on the Content And Manner of Submitting Notification on Concentration (*Uredba o sadrzini i nacinu podnosenja prijave koncentracije Official Gazette of the RS, no. 5, January 25, 2016*);
- The Regulation on Criteria for Setting the Amount Payable on the Basis of Measure for Protection of Competition and Sanctions for Procedural Breaches, Manner and Terms for Payment Thereof and Conditions for Determination of Respective Measures (*Uredba o kriterijumima za odredivanje visine iznosa koji se placa na osnovu mere zastite konkurencije i procesnog penala, nacinu i rokovima placanja i uslovima za odredjivanje tih mera Official Gazette of the RS, no. 50/2010, July 23, 2010*);
- The Regulation on the Conditions for Relief from Commitment Payment from Measure for Protection of Competition (*Uredba o uslovima za oslobadanje obaveze placanja novcanog iznosa mere zastite konkurencije Official Gazette of the RS, no. 50/2010, July 23, 2010*);
- The Regulation on Agreements on Specialization Between Undertakings Operating on the Same Level of Production or Distribution Chain Exempted from Prohibition (*Uredba o sporazumima o specijalizaciji izmedu ucesnika na trzistu koji posluju na istom nivou proizvodnje ili distribucije koji se izuzimaju od zabrane Official Gazette of the RS, no. 11/2010, March 5, 2010*);
- The Regulation on Agreements Between Undertakings Operating at the Different Level of Production or Distribution Chain Exempted from Prohibition (*Uredba o sporazumima izmedu ucesnika na trzistu koji posluju na razlicitom nivou proizvodnje ili distribucije koji se izuzimaju od zabrane Official Gazette of the RS, no. 11/2010, March 5, 2010*);
- The Regulation on Research and Development Agreements Between Undertakings Operating on the Same Level of Production or Distribution (*Uredba o sporazumima o istrazivanju i razvoju izmedu ucesnika na trzistu koji posluju na istom nivou proizvodnje ili distribucije koji se izuzimaju od zabrane Official Gazette of the RS, no. 11/2010, March 5, 2010*);
- The Regulation on the Content of Request for Individual Exemption of Restrictive Agreements from Prohibition (*Uredba o sadrzini zahteva za pojedinacno izuzece restriktivnih sporazuma od zabrane Official Gazette of the RS, no. 107/2009*); and
- The Regulation on the Criteria for Defining the Relevant Market (*Uredba o kriterijumima za odredjivanje relevantnog trzista Official Gazette of the RS, no. 89/2009, November 2, 2009*).

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

The Commission is mostly concerned with horizontal and vertical agreements containing hardcore restrictions (*e.g.* price-fixing and market sharing agreements), as well as with unreported mergers, and finally, with the creation and abuse of dominant positions.

In accordance with the information published in the latest Annual Report (2019), the Commission has worked on 23 breach of competition cases initiated *ex officio*, out of which 21 were transferred from the previous year and only two were initiated in 2019. 13 cases were transferred to 2020, eight were terminated or canceled, and two ended in the imposition of relevant fines (one for conclusion of a prohibited restrictive agreement and one for abuse of dominant position).

In 2018, the Commission worked on 27 breach of competition cases initiated *ex officio*, out of which eight were transferred from the previous year and 19 were initiated in 2018. Four were terminated or canceled and three ended in the imposition of relevant fines (two for the conclusion of a prohibited restrictive agreement and one for abuse of dominant position).

On September 14, 2021 the Commission reached the conclusion instituting proceedings *ex officio* against undertakings Atlantic Grupa from the Republic of Croatia, Atlantic Brands DOO, and Strauss Adriatic from the Republic of Serbia. Proceedings were instituted *ex officio* to investigate infringements to establish the existence of a restrictive agreement.

In another case, in September 2021, the Commission found out and initiated proceedings about a merger of two compa-

nies which was created by the acquisition of control on the part of Mat – Real Estate doo over the company Akcionarsko drustvo za proizvodnju radijatora, kotlova i usluznog liva radijator, Beograd – Stari Grad – in bankruptcy.

Decisions reached by the Commission are publicly available at the following web site: https://www.kzk.gov.rs/en/odluke.

## 3. Which competition law requirements should companies consider when entering into agreements concerning their activities on the Serbian territory?

Companies entering the Serbian market need to consider the same, or at least very similar, competition law requirements as they would when entering any EU jurisdiction. This is due to the fact that the relevant rules in Serbia are largely transcribed from the relevant EU rules (except for the EU-wide context). To provide a few examples, companies should conduct basic research regarding:

**1)** the potential definition of relevant product market(s) where they intend to be active;

**2)** the market shares of potential business partners on such relevant product markets;

**3)** their own market share upon entering the market;

**4)** the pros and cons of potential exclusivity arrangements (*e.g.* exclusive purchase, sale, distribution, *etc.*); and

**5)** the level of scrutiny that a particular product market is subjected to by the Commission in accordance with its previous practice.

## 4. Does a leniency policy apply in the Republic of Serbia?

Yes, there is a leniency policy applicable in Serbia specifically when it comes to restrictive agreements, as envisaged by Article 69 of the Law and the relevant secondary acts of legislation and the Commission's instructions. Under this regime, participants in a prohibited restrictive agreement may be fully or partially exempted from paying a fine. A party to a restrictive agreement who first notifies the Commission of the existence of an agreement or provides evidence on the basis of which the Commission initiates or terminates proceedings in connection with a restrictive agreement may enjoy full immunity from payment of a fine. Relief from the commitment to pay a monetary sum shall be implemented conditioned that the Commission, at the moment of submission of the evidence, had no knowledge of the existence of an agreement or, if it had the knowledge, it did not have enough evidence to enact a conclusion on institution of proceedings. For the agreement participant, who fails to fulfill conditions for full exemption from the fine, the amount of the fine may be reduced, conditioned on the delivery of evidence submitted to the Commission during the procedure that was not available at the time. Provisions of Article 69 do not apply to an agreement participant who initiated the conclusion of the agreement.

## 5. How is unilateral conduct treated under the Serbian competition rules?

The competition-infringing unilateral conduct falls under the rules on abuse of a dominant position in the market, which is explicitly prohibited.

The following are listed as examples of abuse of a dominant position under the Law – practices which:

**1)** directly or indirectly impose unfair purchasing or selling prices or other unfair business conditions;

**2)** limit production, markets, or technical development;

**3)** apply dissimilar business conditions to equivalent operations with respect to a variety of undertakings, by which some undertakings are placed in unfavorable position compared to competitors;

**4)** conditions the conclusion of an agreement with the acceptance of supplementary obligations by the other party, that given their nature or trading customs are not related to the subject of agreement.

The Commission carries the burden of proving the existence of a dominant position on the relevant market.

## 6. Are there any recent local abuse cases of relevance?

The Commission publishes all the decisions made about mergers & acquisitions, competition infringements (restrictive agreements, abuse of dominant position, administrative measures, market tests), and individually exempted agreements on its website: http://www.kzk.gov.rs/en.

On December 24, 2020, the Commission reached the decision on measures for the protection of competition in reassessment proceedings brought *ex officio* against undertaking Nis-ekspres doo. The Commission established that the undertaking Nis-ekspres doo abused its dominance by imposing unfair trading terms as the managing authority of the bus station in the city of Nis, resulting in discrimination of users by charging different prices for the provision of identical services of entering on the bus station platform.

## 7. What are the consequences of a competition law infringement?

The procedure for investigating infringements of competition is to be initiated *ex officio* when the Commission learns on the basis of submitted initiatives, and otherwise available information that there are plausible indications of infringement, as well as in the case of an investigation of a concentration.

The conclusion on the initiation of the procedure passed by the President of the Commission must contain a description of the action or the provisions of the law which might present the infringement of competition, the legal basis and reasons to initiate the procedure, as well as an invitation to all natural and legal persons to send the Commission the documents and other relevant information they may have.

If the Commission finds that there has been a competition infringement, it will determine an administrative measure in the form of an obligation to pay a fine. A pecuniary fine of up to 10% of the total annual income earned in the territory of the Republic of Serbia will be imposed on an undertaking if it:

**1)** abuses a dominant position on relevant market;

**2)** concludes or implements a prohibited restrictive agreement or a restrictive agreement which was not exempted under Article 60 of the Law;

**3)** does not perform or execute protective measures or the measure of de-concentration (de-merger);

**4)** implements a concentration that was not approved or does not obey an order to halt the concentration.

The Commission can also impose a measure of elimination of the competition infringement, such as *e.g.* preventing the probable occurrence of the same or similar infringement, by giving orders to undertake certain behavior or prohibit certain behavior (behavioral measures).

The decision on the competition infringement as well as the order on initiation of the *ex officio* procedure would be published in the Official Gazette of the Republic of Serbia and on the Commission's website. The order to initiate the procedure would not be published if the President of the Commission assesses that the course of events in the procedure might be jeopardized due to its publication.

## 8. Is there any competition law requirement in case of mergers & acquisitions occurring or impacting the Serbian market?

Yes, there is, arguably even in cases that do not impact the Serbian market.

Namely, the concentration of undertakings occurs in the following cases:

**1)** mergers and other statutory changes in which a merger of undertakings occurs, within the meaning of the law governing the status of companies;

**2)** acquisition of direct or indirect control, by one or more undertakings over another or more undertakings or over part or parts of other undertakings, who may represent an independent business entity;

**3)** joint venture of two or more undertakings in order to create a new undertaking or to gain joint control over an existing undertaking that operates on a long-term basis and has all functions of an independent undertaking.

Concentrations of undertakings are permitted, unless they significantly restrict, distort. or prevent competition in the market of the Republic of Serbia or its part, and especially if that restriction, distortion, or prevention is the result of creating or strengthening of a dominant position.

The permissibility of concentration of undertakings is determined in relation to:

**1)** the structure of the relevant market;

**2)** the actual and potential competitors;

**3)** the market position of participants in concentration and their economic and financial power;

**4)** the possibility of the choice of suppliers and customers;

**5)** the legal and other barriers to entry on the relevant market;

**6)** the level of competitiveness of participants in concentration;

**7)** the supply and demand trends of the relevant goods or services;

**8)** the technical and economic development trends;

**9)** the interests of consumers.

It should be noted that, due to the manner in which the relevant financial thresholds are set up, any concentration engaged in by an entity that achieves over EUR 100 million worldwide and over EUR 10 million in Serbia becomes notifiable in Serbia. This is the reason why many foreign to foreign transactions are notified in Serbia and it has been the target of significant criticism from the professional community.

### 9. What is the normal merger review period?

The Law explicitly provides that the Commission is to issue a Phase I clearance decision, or a decision to commence a Phase II investigation, within one calendar month of the date of filing a complete notification (complete with all information and supporting documentation including translation of documentation into the Serbian language). The one-month period starts running from the first calendar day following the submission of a complete notification.

In practice, the case handlers sometimes extend this deadline by requiring additional information to be submitted by the parties and therefore "stopping the clock" (*i.e.* indicating that the notification was not complete as submitted).

The Commission issues the clearance in Phase I if the concentration does not lead to the "creation or strengthening of a dominant position."

A concentration is deemed to be cleared if the Commission fails to deliver a decision within one month following the submission of a complete merger notification (four months if *ex officio* investigation proceedings are opened).

The Commission is obliged to issue the decision in Phase II within 4 months from the date of issuing the conclusion on the commencement of Phase II. The 4 month period starts running from the first calendar day following the date of issuance.

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

There is an initial filing fee of 0.03% of the global annual turnover of all parties to the concentration (but this cannot exceed EUR 25,000). However, the final fee amount depends on the outcome of the case:

**(i)** if the notification is dismissed (for formal reasons), the fee will amount to EUR 500;

**(ii)** if the notification is withdrawn, the fee will amount to EUR 900;

**(iii)** if the concentration is cleared in Phase I, the fee will amount to 0.03% of the global annual turnover of all parties to concentration (but cannot exceed EUR 25,000);

**(iv)** if the concentration is cleared in Phase II, the fee will amount to 0.07% of the global annual turnover of all parties to concentration (but cannot exceed EUR 50,000); and

**(v)** if the concentration is prohibited, the fee will amount to EUR 1,200.

The fee must be submitted with the application and, if the outcome is (i), (ii), or (v), the Commission will transfer any overpayment back to the parties.

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

Companies do have the possibility to obtain state aid under certain circumstances.

Categories of state aid that can be granted under the *Law on State Aid Control (Zakon o kontroli drzavne pomoci "Official Gazette of RS", no. 73/2019*) and the Regulation on Rules for State Aid Granting (*Uredba o pravilima za dodelu drzavne pomoci Official Gazette of RS, no. 13/2010, 100/2011, 91/2012, 37/2013, 97/2013, 119/14, 23/2021 – other law, 23/2021-I – other law, 62/2021 – other law, 62/2021-I – other law, and 62/2021-II – other law*) include:

- regional operating state aid;
- horizontal state aid for environmental protection;
- sectoral state aid; and
- state aid for providing services of general economic interest.

Specific types of sectoral state aid for which special grant rules are defined in this Regulation include:

**1)** the steel sector;

**2)** the coal sector; and

**3)** the transport sector.

Depending on the sector in which state aid is provided, the conditions for obtaining it are different. For example, regional state aid is granted to stimulate economic development in less developed areas, primarily those in which the standard of living is extremely low, or in which there is high unemployment.

Regional state aid for operations can also be granted for covering operating expenditures, but only if the following conditions are cumulatively fulfilled:

**1)** state aid contributes to equal regional development;

**2)** state aid is proportionate to the difficulties that need to be removed; and

**3)** state aid is time-limited and diminishing over time.

State aid for environmental protection can be granted for removing or preventing harm to the environment or natural resources created by the beneficiary's activities, for removing

risks of such harms, or for higher efficiency in exploiting natural resources, including energy efficiency measures and the use of renewable energy sources.

State aid for environmental protection can be granted to enterprises in all sectors, save for the transport sector in the area of infrastructure relating to air, road, and railway traffic, as well as inland navigation.

The conditions for obtaining state aid are defined in the *Regulation on Rules for State Aid Granting*.

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

During the COVID-19 crisis and the state of emergency, the Regulation on the Application of Deadlines in Administrative Proceedings (*Uredba o primeni rokova u upravnim postupcima za vreme vanrednog stanja Službeni glasnik RS br. 041/2020*) entered into force on March 24, 2020, and provided for the extension of deadlines in administrative proceedings during the state of emergency. Noting the fact that the state of emergency was lifted on May 6, 2020, the application of deadlines in administrative proceedings under this regulation ceased to apply on the same date.

The deadlines expired during the state of emergency or deadlines expiring in the period from March 24-May 6, 2020, were to be considered expired upon the expiration of 30 days from the day of the abolition of the state of emergency (*i.e.* on June 5, 2020). This relates to deadlines prescribed by the law for filing merger notifications and requests for individual exemption or deadlines for taking administrative actions, closing of administrative procedures (for example, decisions in merger cases), and deciding on the declared judicial remedies.

It follows from the above that no major (permanent) changes in this area of law occurred as a result of the pandemic.

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# CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2021

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

Competition law in the Republic of Slovenia is primarily regulated by the *Prevention of Restriction of Competition Act* (ZPOmK-1), along with the directly effective and applicable European Union laws. Two competition law implementing acts are in effect, namely (i) *Decree on the procedure for granting immunity from, and reduction of, fines for offenders who are parties to cartels*, and (ii) *Decree on the concentration of companies notification form*. Additionally, the Criminal Code prescribes a criminal offense of illegal restriction of competition. Furthermore, certain sector-specific acts also include provisions concerning competition, such as the *Mass Media Act*, which especially provides for certain additional restrictions regarding concentrations, and the *Agriculture Act*, which provides for specific regulation of both material and procedural aspects (including certain fines/consequences) of certain prohibited acts for undertakings with substantial market power.

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

There have not been any notable updates in the competition legislation in the Republic of Slovenia within the last 24 months. Regardless, in February, the Ministry of Economic Development and Technology proposed a new *Prevention of Restriction of Competition Act* (ZPOmK-2), which is currently in interdepartmental coordination, with no specific set deadlines for its adoption. The proposed act *inter alia* envisions a new joint procedure for the imposition of penalties on legal entities breach competition rules and provides for transposition of the provisions of *Directive (EU) 2019/1* of the European Parliament and of the Council of December 11, 2018, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

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

The Slovenian Competition Protection Agency (*Javna agencija Republike Slovenije za varstvo konkurence*; CPA) considers as its priority the most serious violations stemming from the anti-competitive agreements. No further division that would indicate a higher priority of certain specific issues was indicated by the CPA in its publicly available communications.

Fines for competition law infringements in the Republic of Slovenia are set in the misdemeanor procedure, which is usually conducted as a follow-on procedure to administrative proceedings, in which a competition infringement is identified and any remedies set. The competition law proceeding is thus two-fold and consists of separate administrative and misdemeanor proceedings. The sanctioning record of the CPA is difficult to assess since case law is limited. The majority of recent proceedings concerning potential anti-competitive agreements ended already in the administrative proceeding with the adoption of a commitment decision. Therefore, no decision in misdemeanor proceeding was issued in those instances. According to publicly available information, the last decision with which the CPA imposed a fine in a misdemeanor proceeding for an anti-competitive agreement was issued in December 2018. With that decision, the CPA granted for the first time full immunity from fines to the leniency applicant (including to the responsible individual). Nevertheless, the procedure was subsequently stopped by the court since the prosecution was considered to be time-barred.

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

The CPA regularly studies and follows the recent practice of the European Commission and the Courts of the European Union, along with their guidelines. The competition law requirements when entering the agreements on Slovenian territory are therefore in the majority of instances the same or at least very similar to those developed within the European Union. Consequently, the requirements and prohibitions set and developed in European Union law are thus applicable and should be considered.

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

Leniency policy in the Republic of Slovenia is applicable and is modeled on the European Commission's leniency policy. It is regulated by the *Prevention of Restriction of Competition Act* (ZPOmK-1) and the *Decree on the procedure for granting immunity from, and reduction of, fines for offenders who are parties to cartels*. The CPA acknowledges the potential of leniency policy for the purpose of detection of cartels and considers the raising of awareness regarding leniency proceeding as one of its priorities.

## 6. How is unilateral conduct treated under Slovenian competition rules?

Under Slovenian competition rules, unilateral conduct is regulated with a prohibition of abuse of dominant position, which is modeled on the prohibition under Article 102 TFEU. Dominant position is defined as an ability of an undertaking

to act to a significant degree independently of its competitors, clients, or consumers. Furthermore, a dominant position is presumed in cases of market share of an undertaking in the territory of the Republic of Slovenia above 40% or, in the case of joint dominance, a market share of more than 60%. Abuse is not defined in the ZPOmK-1, but only a non-exhaustive list of examples is noted, such as in the event of a dominant undertaking (i) directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions, (ii) limiting production, markets or technical development to the prejudice of consumers, (iii) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or (iv) making the conclusion of contracts subject to the acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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

There have not been any recent local abuse cases of relevance, with the majority of proceedings in recent years ending with a commitment decision. The latest commenced procedure by the CPA (date of commencement July 13, 2017) concerned the alleged abuse of Renault Nissan Slovenija, d.o.o., wherein the company allegedly discriminated between authorized and unauthorized mechanics in regard to the access to the technical information and technical trainings for Renault brand cars and thus placed unauthorized mechanics in a competitive disadvantage. The latest decision by the CPA (date of decision December 24, 2020) concerned the alleged abuse of the Panteon Group d.o.o., which allegedly occurred due to the company's refusal or inadmissible conditioning of a transfer of technical information, required for the establishment of interconnections between the company's network and the network of the competitor, to that competitor acting as a provider of electronic data exchange services, with which effective competition was allegedly restricted. Both cases ended with a commitment decision. Based on the publicly available information, the most recent case of alleged abuse, which is not yet closed, concerns the conduct of Pro Plus d.o.o. in the field of distribution of audio-visual content. That case started on February 1, 2017, with no further publicly available information.

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

The competition law system in the Republic of Slovenia consists of separate administrative and misdemeanor proceedings, with consequences varying depending on the procedure at hand. In the administrative procedure, the CPA can order the undertaking to stop with the infringement and may also impose on the undertaking certain measures, which it deems suitable to remedy the infringement and its consequences, such as the sale of activity, transfer of intellectual property rights, *etc.* The CPA can also find the anti-competitive conduct to be null and void. Additionally, the CPA may *inter alia* in certain instances revoke certain decisions, such as the commitment decision, or the decision on the compatibility of concentration, and commence with the proceeding.

Fines for competition law infringements are set in the misdemeanor procedure, which is usually conducted as a follow-on procedure to administrative proceedings. The CPA can impose a fine of up to 10% of the undertaking's annual turnover in the preceding business year for the restrictive conduct (anti-competitive agreements, abuse of dominant position, violation of commitment decision, *etc.*) and up to 10% of the annual turnover of undertakings concerned along with their related entities in the preceding business year for concentration-related violations (failure to notify or suspend transactions pending clearance, violation of decision on incompatibility of concentration, *etc.*). The responsible person may be subject to a fine from EUR 5,000 to EUR 30,000.

The limitation period is five years from the occurrence of a violation of competition law, but in any case, the procedure for the imposition of fines is not allowed to be started after ten years from the occurrence of the breach.

Undertakings and the responsible persons may additionally be held criminally liable for the criminal offense of illegal restriction of competition pursuant to Article 225 of the *Criminal Code*, with the prison sentence envisioned in a span from 6 months to 5 years. In that regard, the *Liability of Legal Persons for Criminal Offences Act* provides for certain penalties for legal entities for the violation of the above-mentioned criminal offense. The penalties are in particular the (i) penalty payment of at least EUR 50,000 or at most the amount of two hundred times the resulted damage or unlawfully acquired proceeds, obtained with a criminal offense; (ii) confiscation of assets of legal person (instead of penalty payment); and (iii) cessation (start of liquidation proceedings) of the legal entity, if the business/activity of the legal person was in total or to a large extent used for the execution of criminal offenses (instead of penalty payment). Furthermore, for a certain period of time, a prohibition to conduct certain business activities of the legal entity and a prohibition of disposal with the company's securities may also be imposed, while any monetary benefit obtained with or due to the criminal offense can be taken.

Additionally, note that the undertakings may also be subject to a private damages proceeding.

## 9. Is there any competition law requirement in case of mergers & acquisitions occurring or im-

### pacting the Slovenian market?

Mergers & acquisitions need to be notified to the CPA in the event that both legal and economic conditions are fulfilled. The legal condition is fulfilled in the event of a change of control on a lasting basis over an undertaking. This could occur due to (i) the merger of two or more previously independent undertakings or part of undertakings, (ii) the acquisition of direct or indirect control over the whole or parts of one or more other undertakings, or (iii) the establishment of a full-function joint venture. As part of the economic condition, the following merger control thresholds for the obligation to notify the merger to the CPA currently apply:

**(i)** joint annual turnover on the Slovenian market in the business year prior to the merger of all the undertakings concerned jointly must be above EUR 35 million, and

**(ii)** either:

- annual turnover on the Slovenian market in the business year prior to the merger of the target is at least EUR 1 million, or
- in cases of joint ventures annual turnover on the Slovenian market in the business year prior to the merger of at least two undertakings concerned is above EUR 1 million (at least two parties must each individually achieve a turnover of EUR 1 million in Slovenia for this threshold to be met).

With a requirement that annual turnover in the Slovenian market is the only relevant turnover for the establishment of a merger control threshold and especially with a requirement that the target must have an annual turnover in Slovenia, merger control is limited to mergers having a possible effect on the Slovenian market.

If EU thresholds are met, a merger does not have to be notified to the CPA but should be notified to the European Commission only.

In addition, companies must inform the CPA of the mergers in which, the above stated, thresholds are not met, but undertakings concerned have a joint market share on the relevant market in Slovenia above 60%. In this case, the CPA can, at its sole discretion, decide within 15 days from receiving such information to ask the companies to notify such mergers. Following such a request from the CPA, notification is mandatory and the same rules as for the other notified mergers apply. There is, however, no implication for parties that do not approach the CPA in such circumstances (although where the CPA requires a notification, this request must be complied with).

In cases where the jurisdictional thresholds are met, notification is mandatory, and a stand-still obligation applies until a final decision by the CPA. Furthermore, a stand-still obligation applies to the mergers, which do not reach annual turnover thresholds, if the CPA requires parties to notify a merger due to high market shares (see above), from the day when parties are informed about the CPA's request to notify. Notifying parties can, however, ask the CPA to allow them to exercise rights from the merger if this is required to safeguard the value of the intended investment or for the performance of services in the public interest.

### 10. What is the normal merger review period?

ZPOmK-1 provides only an indicative and non-mandatory timeline regarding the merger review. The review period, therefore, varies depending on the potential contentiousness of the notified merger, with the indicative timeline being the following.

The deadline for filing a notifiable transaction is 30 days after the conclusion of the contract, the announcement of the public bid, or the acquisition of a controlling interest, whichever is first. In cases where the CPA requires parties to notify a merger due to their high market shares, a 30-day deadline for filling notification starts to run from the day when parties are informed about the CPA's request to notify.

For a review of the merger by the CPA, there is only an indicative timetable, which is not binding for the CPA. Within 25 business days from the receipt of the complete notification the CPA should issue:

**(i)** a decision finding that the notified merger is not notifiable,

**(ii)** a decision clearing the notified merger (first phase decision), or

**(iii)** an order commencing a second-phase review.

In cases where the notifying parties offer remedies in the first phase, the deadline for issuing a first phase clearance decision or commencement of a second phase is prolonged for an additional 15 business days.

In a second phase review, the CPA should issue a decision clearing or banning the merger within 60 business days from the issuing of an order on the commencement of the second phase review. In cases where the notifying parties offer remedies in the second phase, the deadline for issuing a decision is prolonged for an additional 15 business days.

Note that "business days" excludes any days when the CPA does not work, namely weekends and public holidays. The deadline runs from the day after the day on which a full and complete notification is received by the CPA. The CPA how-

ever is not obliged to issue a confirmation of completeness, so it is difficult to assess when the indicative timeline would start to run.

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

For the purpose of merger review, an administrative fee in the amount of EUR 2,000, determined by the *Administrative Fees Act*, is payable.

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

State Aid may be obtained in the Republic in Slovenia, under the conditions prescribed by the *Treaty on the Functioning of the European Union* (Articles 107, 108, and 109).

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

The COVID-19 measures that concerned the CPA were primarily focused on procedural aspects, *i.e.* the deadlines and method of submissions. These changes are no longer in place. Nevertheless, during the COVID-19 lockdown(s), the CPA changed its approach regarding communication, with more communication occurring via electronic messages as well as meetings taking place online. This practice has so far stuck and is still present.

There were no changes with respect to the application of substantive rules or evaluation of cases by the CPA.

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# CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2021

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

The basis of Turkish competition law practices is *Act No. 4054 on the Protection of Competition* and secondary legislation prepared based on this act. The main provisions of competition law in Turkey are Articles 4, 5, 6, and 7 of *Act No. 4054*. Articles 4, 5, and 6 of the Law regulate the horizontal and vertical agreements between undertakings and the exemption regime. In addition to these, Article 7 determines the rules regarding mergers and acquisitions. Accordingly, agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion, or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited (Article 4). Additionally, the abuse by one or more undertakings of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or concerted practices is illegal and prohibited (Article 6). In addition to these two articles, it is illegal and prohibited for one or more undertakings to merge, or for an undertaking or a person to acquire – except by inheritance – assets, or all or part of the partnership shares, or instruments conferring administrative rights over another undertaking, where these would result in a significant lessening of effective competition within a market for goods or services in the entirety or a portion of the country, particularly in the form of creating or strengthening a dominant position (Article 7).

The powers of the Turkish Competition Board are designed in Articles 14 and 15 of *Act No. 4054*, the jurisdiction of the authority geographically in Article 2, and administrative fines in Articles 16 and 17. Accordingly, the Turkish Competition Authority (TCA) has a broad power to request all kinds of information and documents from undertakings and to carry out on-site inspections. The geographical scope of the TCA has been determined as the borders of the Republic of Turkey. On the other hand, administrative fines vary depending on the type, gravity, and duration of the violation but are determined as 10% of the annual turnover of the undertakings at most.

Secondary legislation has been prepared in line with the above introductory provisions of Act No. 4054. This secondary legislation is divided into communiques, regulations, and guidelines. In this context, the secondary legislation in force, prepared in line with Act No. 4054, consists of the following communiques, regulations, and guides:

**Communiques:**

- *Communique On Agreements, Concerted Practices and Decisions And Practices Of Associations Of Undertakings That Do Not Significantly Restrict Competition (Communique No: 2021/3)*
- *Communique on the Commitments to Be Offered in Preliminary Inquiries And Investigations Concerning Agreements, Concerted Practices And Decisions Restricting Competition, And Abuse Of Dominant Position (Communique No: 2021/2)*
- *Communique on the Increase of The Lower Thresholds for Administrative Fines Specified in Paragraph 1, Article 16 Of the Act No 4054 On The Protection Of Competition, To Be Valid Until 31/12/2020*
- *Communique On the Payments to Be Made by Joint-Stock and Limited Companies Pursuant to the Act No 4054 (Communique No: 2017/4)*
- *Block Exemption Communique on Vertical Agreements in The Motor Vehicles Sector (COMMUNIQUE NO. 2017/3)*
- *Block Exemption Communique on Research and Development Agreements (Communique No: 2016/5)*
- *Block Exemption Communique on Specialization Agreements (Communique No: 2013/3)*
- *Communique On the Procedures and Principles To Be Pursued In Pre-Notifications And Authorization Applications To Be Filed With The Competition Authority In Order For Acquisitions Via Privatization To Become Legally Valid (Communique No: 2013/2)*
- *Communique on the Application Procedure for Infringements of Competition (Communique no 2012/2)*
- *Communique Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board, No:2010/4*
- *Communique on the Regulation of the Right of Access to the File and Protection of Trade Secrets (Communique No: 2010/3)*
- *Communique on Hearings Held vis-a-vis the Competition Board Communique No: 2010/2*
- *Block Exemption Communique in Relation to the Insurance Sector (Communique No: 2008/3)*
- *Block Exemption Communique on Technology Transfer Agreements (Communique No: 2008/2)*
- *Block Exemption Communique on Vertical Agreements (Communique No: 2002/2)*
- *Communique on the Conclusion of the Organization of the Competition Authority (Communique No. 1997/5)*

**Regulations:**

- *Regulation on the Settlement Procedure*
- *Regulation on Promotion and Title Change of Competition Authority Employee*
- *Regulation on Competition Authority Professional Employee*
- *Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position*
- *Regulation on Active Cooperation for Detecting Cartels (Active Cooperation/Leniency Regulation)*
- *Regulation on Competition Authority Disciplinary Supervisors*
- *Competition Authority Budget and Accounting Regulation*
- *Competition Authority Tender Regulation*
- *Regulation on the Working Procedures and Principles of the Competition Authority*

**Guidelines:**

- *Guidelines on the Examination of Digital Data during On-Site Inspections*
- *Guidelines On Vertical Agreements*
- *Competition Assessment Guidelines*
- *Guidelines Explaining the Block Exemption Communique on Vertical Agreements in the Motor Vehicles Sector,*
- *Guidelines on the Application of Articles 4 and 5 of the Act no 4054 on the Protection of Competition to Technology Transfer Agreements*
- *Guidelines On the Explanation of The Regulation On Active Cooperation For Detecting Cartels*
- *Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position*
- *Guidelines on the General Principles of Exemption*
- *Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control*
- *Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions*
- *Guidelines on the Assessment of Horizontal Mergers and Acquisitions*
- *Guidelines on Horizontal Cooperation Agreements*
- *Guidelines on Remedies That are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions*
- *Guidelines On Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions*
- *Guidelines on the Voluntary Notification of Agreements, Concerted Practices and Decisions of Associations of Undertakings*
- *Guidelines on the Definition of Relevant Market*
- *Guidelines on Certain Subcontracting Agreements Between Non-Competitors*

In Turkish competition law, *Act No. 5236 on Misdemeanors* is taken as a basis for the statute of limitations. Accordingly, the statute of limitations for competition law investigations is eight years. Any anti-competitive practice that has taken place in the last eight years can be audited and penalized by the TCA.

Due to the proximity of competition investigations to criminal law investigations, in line with the approach of the European Union Court of Justice, competition investigations in Turkey should also act in accordance with the basic principles of criminal law (presumption of innocence, the principle of legality in crime and punishment, *etc.*) Decisions taken by TCA as a result of an investigation to the contrary may be subject to annulment in the administrative jurisdiction in this context.

Finally, since the decisions taken by TCA are subject to judicial review and fall within the administrative jurisdiction, *Act No. 2577 on the Administrative Jurisdiction Procedures*, which regulates the procedures for appealing the decisions taken by the competition authority to the courts, gains importance in the judicial dimension of competition law. Appeals to the courts and higher courts against the decisions of the competition authority must be made in accordance with the rules outlined in this law.

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

The long-lasting bill of *Law on The Act on the Protection of Competition* (The Competition Act) was ratified by the Turkish Parliament on June 16, 2020. This amendment is the most extensive reform of the antitrust enforcement system since the enactment of the Competition Act in 1994. The most significant changes are explained below:

**a)** Legal Uncertainties Regarding the Exemption Regime Has Been Clarified:

The exemption regime had already been changed in the 2005 amendment and the application for exemption has become optional since then. The current amendment aims to reinforce and clarify that the official application is optional and that undertakings do have the option of submitting an application when they are not clear about the legality of conduct or when they seek legal certainty.

Accordingly, the first paragraph of Article 5, which defines the exemption regime in Act No. 4054, has been changed with the following paragraph having been added to the article after the first paragraph.

*"In case all the terms listed below exist, agreements, concerted practices between undertakings, and decisions of associations of undertakings are exempt from the application of the provisions of Article 4:*

**a)** *Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,*

**b)** *Benefitting the consumer from the abovementioned,*

**c)** *Not eliminating competition in a significant part of the relevant market,*

**d)** *Not limiting competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b).*

*The undertakings or associations of undertakings may apply to the Authority to determine by the Board that the agreement, concerted action or decisions of associations of undertakings under the Article 4 meets the exemption conditions."*

This new design of the article clarifies the "optionality" of exemption application and legal uncertainties are eliminated.

**b)** Test Change in the Merger-Acquisition Control

So far, the TCA has been carrying out merger control based on the dominance test. The current amendment introduces the "significant impediment of effective competition test" (SIEC test) to the merger control regime and a hybrid model is being built. Article 7 of the act that defines the merger control is amended to:

*"Merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking-except by way of inheritance-of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, which would result in significant lessening of competition, especially create or strengthen a dominant position of one or more undertakings, in a market for goods or services within the whole or a part of the country, is illegal and prohibited."*

Accordingly, more prohibition decisions are expected in merger cases.

**c)** Structural Measures for Termination of the Violation:

Article 9 of the act contains provisions for the termination of the violation and interim measures. The current design of the article allows the authority to impose behavioral measures along with the final violation decision. The current amendment empowers the authority to impose structural measures when necessary to terminate a violation. Accordingly, the first paragraph of Article 9 of the act has been changed to:

*"If the Board determines that the article 4, 6 or 7 of the Act has been violated upon notice, complaint or the request of the Ministry or ex officio, notifies the relevant undertakings or associations of undertakings about the behaviors that must be followed or avoided for the establishment of competition, and/or structural measures in the form of transferring certain activities or partnership shares or assets. Behavioral and structural measures should be proportionate with the violation and necessary for the effective termination of the violation. Structural measures may applied only in cases where the behavioral measures introduced earlier do not yield results. If it is determined by the final decision that the behavioral measures do not yield results, at least 6 months are given to the relevant undertakings or associations of undertakings to comply with the structural measure."*

Thus, it has been clarified that in cases where the competition authority detects violations, it may take structural measures as well as behavioral measures.

**d)** Dawn Raid Powers Regarding Digital Documents of Digital Media

Paragraph (a) Article 15 of the act has been changed to:

*"May examine its Notebooks, any data and documents kept in the physical and electronic media and information systems, and take their copies and physical samples."*

Accordingly, The TCA's dawn raid powers regarding electronic data and digital media have been clarified.

**e)** *De Minimis* Application

*De Minimis* has been introduced to the act as such:

*"The Board, except for hardcore violations such as price determination, territory or customer sharing, and restriction of supply among competitors based on criteria such as market share and turnover, may not initiate an investigation against the decisions and actions of the associations of undertakings, agreements, and concerted practices that do not significantly restrict competition in the market. The procedures and principles regarding the implementation of this paragraph are determined by the communique issued by the Board."*

With the implementation of this practice, the competition authority has been granted discretion not to open an investigation in violations other than certain types of severe violations.

**f)** Settlement and Commitment

The title of Article 43 of the act has been changed to "Starting an Investigation, Commitment and Settlement" and the following paragraphs have been added to it:

*"A commitment may be submitted by the relevant undertakings or associations of undertakings to eliminate the competition concerns that arise under Article 4 or 6 during a preliminary investigation or investigation in progress. If the Board considers that the competition concerns can be resolved through these commitments, it may be decided not to open an investigation or to terminate the investigation by making these commitments binding for the relevant undertakings or associations of undertakings. Commitment are not accepted for hardcore violations such as price determination, territory or customer sharing or restriction of supply among competitors. The procedures and principles regarding the implementation of this paragraph are determined by the communique issued by the Board.*

*After the Board makes a decision according to the third paragraph of this Article, it may initiate an investigation in the following cases:*

**a)** *There is a substantial change in any element that constitutes the basis for decision.*

**b)** *The related undertakings or associations of undertakings violate the commitments.*

**c)** *The decision has been based on incomplete, incorrect or misleading information provided by the parties.*

*After the investigation is initiated, the Board may initiate the procedure of settlement, at the request of those concerned or ex officio, taking into account the procedural benefits arising from the rapid completion of the investigation process and differences of opinion regarding the existence or scope of the violation. The Board may reconcile with undertakings or associations of undertakings that have undertaken an investigation and accepted the existence and scope of the violation before the notification of the investigation report.*

*As a result of the settlement procedure, up to twenty-five percent reduction in administrative fines can be applied. The reduction in administrative fines in accordance with this article does not prevent the reduction under the sixth paragraph of article 17 of the Law of Misdemeanor.*

*The Board gives the parties a certain time to submit a declaration of settlement, through which they accept the violation and explain the scope of the violation. Notifications made after the given period are not considered. The investigation is ended with a final decision involving a violation decision and the administrative fine.*

*In the event that the process results in settlement, the administrative fines and the matters included in the settlement text cannot be the subject of case by the parties.*

*Other procedures and principles regarding reconciliation are determined by the regulation issued by the Board."*

Settlement and commitment institutions will ensure the procedural economy in the investigations carried out and reestablish competition in the markets as early as possible.

Within the framework of the above-mentioned amendment, (i) "Regulation on the Settlement Procedure", (ii) "Communique On Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings That Do Not Significantly Restrict Competition", and (iii) "Communique On The Commitments To Be Offered in Preliminary Inquiries And Investigations Concerning Agreements, Concerted Practices And Decisions Restricting Competition, and Abuse Of Dominant Position" have been prepared and entered into force in Turkey.

In addition, pursuant to the amendment of the Turkish Competition Law, the *Guideline on Examining Digital Data During On-Site Inspection* has been published on October 8, 2020. Accordingly,

- TCA inspectors are authorized to examine information systems such as servers, desktops/laptops, portable devices, and storage devices such as CD, DVD, USB, external hard disks, backup records, or/and cloud services. During the inspection, forensic tools can be used to search and copy digital data and retrieve deleted data in order to ensure that the authenticity and integrity of the data;
- mobile communication devices (mobile phones, tablets, *etc.*) are subject to inspection. Case officers shall conduct a quick review on each device and determine whether it is completely personal or include business. Any device that is found to be completely personal, is not inspected in detail. If deemed necessary any personal data can be copied to storage devices and taken;
- case officers are authorized to make examinations in digital environments containing all kinds of data belonging to the undertaking. During the examination, it is the responsibility of the undertaking to prevent any interference with the data and the environment where the data is kept. The undertaking is obliged to provide full and active support on matters requested by the inspectors;
- if deemed necessary by the inspectors, the copies of the digital data shall be partially or completely copied to separate data storage devices using forensic tools and "hash" values. Hash is a mathematical computation method used to verify the integrity of digital files;
- as a rule, the examination should be completed at the premises of undertaking. However, if it is deemed necessary, case officers may decide to continue the examination in the forensic laboratory of the authority. In this case data is recorded in three separate data collectors and one is left to the undertaking;
- in any case, the analysis of digital data obtained from mobile phones is completed at the undertaking's premises; and

■ in the event that the digital data obtained throughout the inspection contains trade secrets, the Communique on the Regulation of the Right to Access to the File and Protection of Trade Secretes will be operative.

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

The main concerns of the Competition Authority in terms of horizontal agreements can be listed as follows:

**a)** In Terms of Standardization Agreements Between Competitors

■ First, if undertakings were to engage in anti-competitive discussions in the context of standard-setting, this could reduce or eliminate price competition in the markets concerned, thereby facilitating a collusive outcome in the market.

■ Second, standards that set detailed technical specifications for a product or service may limit technical development and innovation. In addition, standards that require the exclusive use of a particular technology for a standard or which force the members of the standard-setting organization to exclusively use a particular standard, may lead to the same effect. The risk of limiting innovation is increased if one or more undertakings are excluded from the standard-setting process without an objective reason.

■ Standardization agreements may lead to restrictive effects on competition by preventing certain undertakings from obtaining effective access to the results of the standard-setting process, that is to say, to the technical specifications and/or to the intellectual property rights essential for the implementation of the standard. In case an undertaking's access to the results of the standard is either completely prevented or is tied to prohibitive or discriminatory terms, there is a risk of creating restrictive effects on competition

**b)** In Terms of Exchange of Information Between Competitors

■ The exchange of competition-sensitive information can result in restrictive effects on competition by artificially increasing transparency in the market, thereby facilitating coordination of competitive behavior between undertakings. This can occur through different channels.

■ Information exchange may lead to undertakings arriving at common and collusive expectations concerning the uncertainties in the market. Thus, undertakings can then reach a common understanding in order to coordinate their competitive behavior, without an explicit agreement. Information exchange in this way may lead to a collusive outcome in the market. Exchange of information about the plans of the undertakings concerning future conduct is the most convenient means of such an understanding.

■ Through the use of a monitoring mechanism, information exchange can render the market transparent and allow a collusive outcome in the market or improve the sustainability of such conduct (internal stability) by making it easier for undertakings to identify any practice of their competitors that is in violation of an anti-competitive agreement between them and to retaliate against such practices. Such a monitoring mechanism may be created by the exchange of current or historical data.

■ Information exchange can lead to the exclusion of competitors who are not parties to the agreement (external stability) by improving the sustainability of collusive outcomes. When the market becomes sufficiently transparent due to exchanges of information, undertakings parties to the agreement can be informed on when and how potential competitors will enter the market, target the new entrants, and, as addressed in the next section, foreclose the market to potential competitors.

**c)** In Terms of Research and Development Agreements

■ R&D cooperation can restrict competition in various ways. First, it may reduce or slow down innovation, leading to fewer or lower quality products coming to the market.

■ Secondly, R&D cooperation may lead to increasing prices by significantly reducing competition between the undertakings which are not parties to the agreement in product or technology markets, or by making coordination of competitive conduct in those markets possible.

■ Also, R&D cooperation may lead to market foreclosure for competitors. However, a market foreclosure effect may only arise if at least one of the parties holds, if not a dominant position, significant market power concerning a key technology and derives exclusive benefits from the results of the R&D efforts of the parties.

**d)** In Terms of Production Agreements

■ Production agreements, and in particular production joint ventures, may cause a restriction of competition by leading the parties to align output volumes, product quality, product price, and other competitively important parameters. This may happen even if the parties market the products independently.

■ Production agreements may lead to higher prices or reduced output, product quality, product variety, or innovation, that is to say, to a collusive outcome, as a result of the parties' coordinating their competitive behavior as suppliers.

■ Production agreements may furthermore lead to the foreclosure of related markets to other undertakings. For instance,

by gaining enough market power, parties engaging in joint production activities in the upstream market may be able to raise the price of a key component for a downstream market, and thus they could use the joint production activity to raise the costs of their competitors downstream and, ultimately, force these competitors off the market. This, as a result, could have adverse effects on the consumers by allowing the parties to increase their market power downstream and to sustain prices above the competitive level, or through other ways.

**e)** In Terms of Joint Purchasing Agreements

- Joint purchasing arrangements may lead to restrictive effects on competition in the purchasing and/or downstream selling markets, such as an increase in product prices, reduction in output, product quality and variety or innovation, market allocation, or foreclosure of the market to other possible purchasers.

- If downstream competitors purchase a significant part of their products together, the incentive for price competition on the selling markets may be considerably reduced.

- In case the parties have a significant degree of market power on the purchasing market (buying power), there is a risk that they may force suppliers to reduce the variety or quality of products they produce. This situation may bring about certain restrictive effects, such as reduction in quality, lessening of innovation efforts, or ultimately sub-optimal amount of supply.

- Buying power of the parties to the joint purchasing arrangement could be used to foreclose competing purchasers by limiting their access to efficient suppliers. This is more likely where there are a limited number of suppliers and there are barriers to entry on the supply side of the upstream market.

- In general, however, joint purchasing arrangements are less likely to give rise to competition concerns if the parties do not have market power in the selling markets.

**f)** In Terms of Commercialization Agreements

- Commercialization agreements can lead to restrictions of competition in several ways. First of all, commercialization agreements may lead to price-fixing.

- Secondly, in commercialization agreements, the parties may restrict supply by determining the production volume to be put on the market.

- Thirdly, commercialization agreements may become a means for dividing the markets or allocating customers, for example in cases where the parties' production facilities are located in different geographic markets or when the agreements are reciprocal.

- Finally, such agreements may also result in a collusive outcome by leading to an exchange of competitively sensitive information related to subjects falling within or outside the scope of the cooperation or by leading to a commonality of costs.

Recent Investigation for Horizontal Infringements:

Due to the exchange rate fluctuations in Turkey and the effects of the COVID-19 pandemic on the markets, the TCA has recently focused on three industries: (I) FMCG retailing, (ii) animal feed, and (iii) fertilizer sectors. The authority conducts investigations on horizontal issues, such as hub & spoke applications in the FMCG retailing sector and information exchange applications in the animal feed and fertilizer sector. None of these investigations have yet been concluded.

In addition to the main concerns of the TCA in terms of the agreements mentioned above, one of the horizontal agreements that the authority has given more importance to and started investigations in the last period are no-poaching and wage-fixing agreements made in the field of human resources. TCA is expected to issue a guideline in this area.

In terms of sanctions as the last point, TCA has carried out many investigations and penalty decisions regarding horizontal agreements that are found to restrict competition. In addition to the administrative fines, the authority has the power to take behavioral and structural measures. Although behavioral measures are frequently used, the number of decisions that contain structural measures is very limited.

The number of horizontal infringement decisions taken by the TCA in recent years is as follows:

- First 6 months of 2021: 12
- 2020: 31
- 2019: 23
- 2018: 36
- 2017: 35
- 2016: 26
- 2015: 32
- 2014: 67
- 2013: 71

## 4. Which competition law requirements should companies consider when entering into agreements concerning their activities on Turkey's territory?

In Turkey, competition law rules are set in *Act No. 4054 on the Protection of Competition*. Similar to global practice, there are three main rules regarding the anti-competitive behavior of undertakings and in addition to that one exemption method is arranged under Turkish competition law. These rules will be explained with their purposes below.

■ Agreements, Concerted Practices, and Decisions Limiting Competition (Article 4):

Article 4 prohibits agreements and practices between undertakings that have the effect to prevent, restrict, or distort competition. According to the article, the term agreement is used to refer to all kinds of compromise or accord to which the parties feel bound, even if these do not meet the validity conditions set in civil law and it is not important whether the agreement is written or oral. Even if the existence of an agreement between the parties cannot be established, direct or indirect relations between undertakings that replace their own independent activities and ensure coordination and practical cooperation are prohibited if they lead to the same result. Thus, it is intended to prevent the undertakings from legitimizing acts limiting competition via fraud against the law. Most of the time, in order to deal with their common problems, undertakings form associations among themselves that may or may not have a legal personality. These associations can take decisions that serve to generate more earnings for their members by preventing competition between the members. Such behaviors are also prohibited.

Vertical or horizontal agreements can restrict competition. It is accepted that horizontal agreements have competition distorting effects *per se* since they are between competitors.

In a legal regime where agreements restricting competition are prohibited, these agreements are generally made in secret and proving their existence is quite difficult, sometimes even impossible. For this reason, in some cases, it can be accepted that undertakings are engaged in a concerted practice. Thus, the burden of proof for not being engaged in concerted practice has been passed to the relevant undertakings and the intent was to prevent that the act becomes unworkable due to the difficulty of proof.

■ Exemption (Article 5):

Implementation of the prohibition of Article 4 in an absolute manner may have some unwanted consequences. Hence, if the beneficial effects caused are greater than the harmful effects, agreements restricting competition can be exempted from the prohibition of Article 4. For such an exemption to be granted, four conditions listed in the article must exist at the same time. First, the agreement or concerted practice or decisions of an association of undertakings limiting competition must have positive effects on the economy. In case these positive effects are not reflected on the consumer and stay as firm profits, the exemption will not be implemented. The fact that the consumer receives a just share of the benefit created also reveals the social side of competition law. Also, if less limitation on competition can be sufficient to achieve these beneficial effects, the litigious agreements will not benefit from the exemption. Only those competition limitations which are necessary and compulsory for achieving the beneficial effect will be granted an exemption. It is such that, with these limitations, competition must not be eliminated in a significant part of the relevant product market.

Exemption decisions will be made for certain periods and these decisions will be renewable if the specified conditions exist. Thus, the board will be given the opportunity to monitor the changes that may emerge or the developments that may cause a restriction in competition within the relevant market, after the exemption decision has been taken.

Also, the chance to be granted a block exemption is given to the groups of agreements that carry the conditions. Thus, both a legal certainty is secured for these agreements and the beneficial effects of these agreements are brought into the economy.

Besides the block exemption, an individual exemption mechanism also exists. Undertakings can carry out a self-assessment and if their agreement fulfills the requirements, their agreement will be considered valid.

■ Abuse of Dominant Position (Article 6):

In terms of competition law, an undertaking's growth through its own internal dynamics and obtaining a dominant position in various sectors is not an objectionable situation. On the other hand, it is prohibited for undertakings that obtain a dominant position in a market to abuse their position to restrict, prevent, or distort competition in Turkey, or use their position in a way that would cause these effects.

In some cases, the undertaking may gain a dominant position because of the protections provided by law. Especially industrial and trade property rights grant such protection. The use of these rights must in no way serve the purpose of eliminating competition. Most encountered abuse cases in practice are as follows:

**a)** preventing, directly or indirectly, another undertaking from entering the area of commercial activity, or actions aimed at complicating the activities of competitors in the market;

**b)** making direct or indirect discrimination between purchasers with equal status by offering different terms for the same and equal rights, obligations, and acts;

**c)** purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price;

**d)** conducts which aim to distort competitive conditions in another market for goods or services by means of exploiting financial, technological, and commercial advantages created by dominance in a particular market; or

**e)** restricting production, marketing, or technical development to the prejudice of consumers.

- Mergers or Acquisition (Article 7):

According to Article 7 of the act, any merger or acquisition that would result in a significant lessening of effective competition within a market for goods or services in the entirety or a portion of the country, particularly in the form of creating or strengthening a dominant position, is prohibited.

Accordingly, parties to a merger should submit an application to the TCA for authorization, if (i) the total turnovers of the transaction parties in Turkey exceed TRY 100 million, and turnovers of at least two of the transaction parties in Turkey each exceed TRY 30 million, (ii) The asset or activity subject to an acquisition, and at least one of the parties of the transaction in merger transactions have a turnover in Turkey exceeding TRY 30 million and the other party of the transactions has a global turnover exceeding TRY 500 million.

## 5. Does a leniency policy apply in Turkey?

There is a leniency procedure under Turkish competition law. Any leniency application must be submitted before the settlement application. If both leniency and settlement applications are accepted, the parties may benefit from both discounts. With the leniency procedure, a full immunity or reduction from the penalty may be granted if the undertaking meets the conditions.

Under Turkish competition law, the leniency procedure is only applicable to cartels. A cartel is defined, according to the *Directive on Active Cooperation to Uncover Cartels* dated February 15, 2009, as:

- price determination,
- sharing of customers, suppliers, regions, or trade channels,
- limiting the amount of supply or setting quotas, and
- agreements that restrict competition and/or concerted actions, regarding consensual action in tenders,

between competitors.

The TCA expects that:

- a list of the products affected by the cartel subject to the application, the duration of the cartel, the names of the undertakings that are parties to the cartel, the dates and locations of the negotiations related to the cartel, the participants, and the information and documents owned about the cartel must be submitted;
- information and documents regarding the cartel subject to the application should not be concealed or destroyed;
- unless otherwise stated by the unit in charge that it would make it difficult to uncover the cartel, being a party to the cartel subject to application is terminated;
- unless otherwise specified by the unit in charge, the application is kept confidential until the notification of the investigation report; and
- active cooperation continues until the final decision of the Board after the completion of the investigation.

Finally, another necessary condition for not imposing a fine by making use of full immunity is that the undertaking applying for leniency should not have forced other undertakings to form the cartel.

In order to be considered for a full immunity:

- First, before the board decides to conduct a preliminary investigation, it is regulated that, independently from other undertakings that are parties to the cartel, the first undertaking fulfilling the conditions or the first manager or employee who filed an application independent of the undertaking would not be fined (managers and employees of the undertaking can also file a leniency application).
- The second possibility envisaged to benefit from full immunity is that the application is made within the time frame determined as "from the preliminary investigation decision to the notification of the investigation report." However, in this case, there should not be a leniency application made before the board's preliminary research decision. If there is such an application, only that applicant will benefit from full immunity. In this second possibility, the board does not have sufficient evidence to prove the cartel, and the information and documents to be submitted in the application must be concluded that the violation exists. In this case, it is possible to say that the board has a discretionary power to grant full immunity. In this way, it aims to prevent cartel members from waiting

for an investigation to begin in order to apply for the leniency program.

From the board's decision to conduct a preliminary investigation to the notification of the investigation report, undertakings that present information and documents specified in the directive and fulfill the conditions but fail to benefit from the regulation on non-penalty mentioned above, independently of their competitors, will benefit from a fine reduction.

In this scope:

- The penalty to be imposed on the first undertaking is reduced between one-third and a half of the total fine. In this case, the penalties to be imposed on the managers and employees who accept the violation of the attempt and actively cooperate are also reduced or penalties may not be imposed on the condition that they are not less than one-third.
- The penalty to be imposed on the second undertaking is reduced between a quarter and one-third. In this case, the penalties to be imposed on the managers and employees who accept the violation of the attempt and actively cooperate are also reduced or penalties may not be imposed on the condition that they are not less than one quarter.
- The penalties to be imposed on other undertakings are reduced between one-sixth and one-quarter. In this case, the penalties to be imposed on the managers and employees who accept the violation of the attempt and actively cooperate are also reduced or penalties may not be imposed on the condition that they are not less than one-sixth.
- Finally, if, as a result of the evidence presented, the fines increase due to the prolongation of the violation period or similar reasons, the first undertaking presenting the relevant evidence and the managers and employees who accepted the violation of this undertaking and actively cooperated will not be affected by this increase.

The requirements expected from the parties and the process in the leniency process are similar whereas full immunity from the fine is possible for the first comer in the leniency mechanism. The rest of the lenient undertakings may be eligible for discounts. The penalty to be imposed on the second undertaking is reduced between one quarter and one third. The penalties to be imposed on other undertakings are reduced between one-sixth and one-quarter.

## 6. How is unilateral conduct treated under Turkish competition rules?

Article 6 of *Act No. 4054* prohibits one or more undertakings from abusing their dominant position in the goods or services market. The purpose of this regulation is to limit the competitive power of one or more undertakings that have the power to determine the economic parameters such as price, supply, production, and distribution amount by acting independently from the customers of the competitors in the market. Meaning that the aim is to prevent a monopoly situation that will occur with non-competitive practices in the markets.

The law does not prohibit being in a dominant position or taking a dominant position, but the abuse of this situation that limits competition. In this context, it is of great importance to determine the dominant position.

In the determination of the dominant position, factors such as market share, barriers to entry to the market, vertical integrity, substitutability of the product, and the nature of the product are taken into consideration. It is evaluated whether it can move or not. In determining the dominant position, factors such as market share, barriers entry to the market, vertical integrity, substitutability of the product, and the quality of the product are taken into account, and it is evaluated whether an undertaking (or association of undertaking) can act independently from its competitors and customers.

Some examples of abuse are given by the law. In this context, making the activities of a rival undertaking difficult, preventing an undertaking to enter the market, applying different conditions to the buyers in an equal situation, and stipulating the purchase of a good with another good, are considered as abuse of dominant position. However, it should be noted that cases of abuse are not limited to the examples mentioned above. For example, applying an excessively high selling price can also be considered as an abuse of a dominant position.

According to several TCA decisions, administrative fines are imposed on undertakings that abuse their dominant position.

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

In the last 5 years, remarkable decisions about the abuse of dominant position have been made by the TCA. To understand practice in Turkey, these significant decisions should be mentioned briefly:

**1.** The Google Cases: Google was fined several times due to abusing dominant positions in different markets. (Google Shopping Case, Google Adwords Case, Google Android Case, *etc.*)

**2.** The Mey Icki / Diageo Cases: the TCA imposed fines several times due to the exclusion of competitors from the market through target rebates.

**3.** The YemekSepeti / Deliveryhero Cases: YemekSepeti was fined due to Most Favorite Customer (MFC) clauses. In 2020, the TCA launched an investigation mainly based on narrow MFC clauses and the TCA didn't impose a fine due to Yemek-

Sepeti's commitments.

**4.** The Booking Case: Booking.com was fined by the TCA since it had MFC clauses in its agreements due to the "The best price guarantee" application.

**5.** The U.N. Ro-Ro Case: U.N. Ro-Ro was fined due to excluding competitors by predatory pricing.

**6.** The Sahibinden.com Case: the TCA imposed a fine on Sahibinden.com because of excessive pricing.

In 2020, the TCA made a total of 43 decisions (7 decisions are evaluated with article 4) for abuse of dominant position. In the first 6 months of 2021, the number of abuse decisions is 21, and 3 of them were evaluated under the scope of Article 4.

Recent significant abuse of dominant position cases are summarized below:

**1.** *The Port Decision* (Dated November 11, 2020, and Numbered 20-48/666-291): In this case, it was confirmed that the undertaking had a dominant position in relevant markets (container handling services market and bulk solid cargo handling services market). In these markets, the undertaking abused its dominant position by applying excessive prices. As a result, the undertaking was fined approximately TRY 12 million.

**2.** *The Ciceksepeti Commitment Decision* (Dated April 8, 2021, and Numbered 21-20/250-106): The TCA launched an investigation against Ciceksepeti due to the claims of violation of Articles 4 and 6. During the investigation, Ciceksepeti submitted commitments and the TCA evaluated that these commitments were insufficient. Ciceksepeti revised its commitments and submitted them for the second time. Hence, it was decided that the second commitment package will be sufficient for the removal of the competition concerns and the investigation was therefore closed.

**3.** *The Turkish Airlines Commitment Decision* (Dated March 11, 2021, and Numbered 21-13/169-73): The main subject of the investigation was the temporary warehouse/warehouse services offered at bonded airports. In this context, it has been concluded that the "warehouse change fee" in the tariffs, which can be referred to by different names, restricts the transit of imported goods to a competitor and/or alternative warehouses. The TCA has decided to close its investigation.

**4.** *The Google Adwords Decision* (Dated November 12, 2020, and Numbered 20-49/675-295): The TCA has imposed an approximately TRY 196 million fine to Google for complicating the activities of organic results, that are non-revenue for Google, in the content services market by placing text ads which are nondescript as ads at the top of the general search results intensive.

**5.** *The Unilever Decision*(Dated March 18, 2021, and Numbered 21-15/190-80): Unilever has fined approximately TRY 480 million for abusing its dominant position. The TCA has evaluated that Unilever has a dominant position in the industrial ice cream market, impulse ice cream market, and take-home ice cream market. The main actions that caused abuse of dominant positions are listed below:

**a.** A discount system

**b.** A non-compete obligation which was prohibited within a former TCA decision

**c.** An exclusivity clause in the loan agreements that regulate the use of freezers belonging to Unilever

Besides an administrative fine, the TCA determined several obligations regarding freezer regulation.

**6.** *The Trendyol/Alibaba* Case (Dated September 30, 2021, and Numbered 21-46/669-334): the TCA initiated an investigation against Trendyol and imposed interim measures to terminate leveraging the shopping units under its control by using algorithms.

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

The substantive penalties for violations of competition are regulated in Article 16 of *Act No. 4054*. An administrative fine of up to 10 percent of the annual gross income generated at the end of the fiscal year preceding the decision date, and up to five percent of the fine imposed on the employees of the undertaking or association of undertakings that are found to have a decisive effect on the violation. The following aggravating/mitigating factors are taken into account in the appraisal of the penalty:

- the recurrence of the violation,
- the duration of the violation,
- the market power of undertaking or associations of undertakings,
- the decisive effect of the undertaking or associations of undertakings in the realization of the violation,
- whether undertaking or associations of undertakings comply with the commitments given,
- whether undertaking or associations of undertakings assist in the investigation, and
- the weight of the actual or potential damage.

It should be noted that the above-mentioned penalties may not be imposed or the fines may be reduced, taking into account the nature, effectiveness, and timing of the cooperation, to undertaking or associations of undertakings and their em-

ployees, who actively cooperate with the institution within the framework of the repentance program in order to reveal the violation of the law.

*Act No. 4054* does not only contain penalties to be applied to competition law infringements. In this context, it envisages fines in case of preventing on-site inspections, which is one of the most important tools in revealing competition violations. Considering that it will be difficult to obtain information and documents regarding the violation in the ongoing process if an on-site investigation is prevented, the fine to be applied in this case has been determined to be a deterrent, at the level of five per thousand of the annual gross income of the undertaking at the end of the previous financial year.

In cases where mergers and acquisitions subject to permission are carried out without permission, false or misleading information is provided in exemption/negative clearance applications, and the information requested in accordance with the law is not provided fully and accurately, an administrative penalty of one-thousandth of the annual gross income generated at the end of the previous fiscal year is in accordance with the Law.

Finally, another type of punishment brought by *Act No. 4054* is temporary fines. These fines are penalties given for each day in case of occurrence of the situations listed in Article 17 of the law. They were regulated as fixed penalties in the first version of the law. Later, these penalties were made proportional to the gross income of the undertakings or associations of undertakings, in order to ensure deterrence and the application of penalties commensurate with the power of the undertaking.

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

As mentioned in the second question, Article 7 on mergers and acquisitions has been amended last year. With the amendment made in the first paragraph of Article 7 of the law, instead of gaining dominance or strengthening the dominant position as a prohibition condition in the evaluation of the merits of mergers and acquisitions, a hybrid model was adopted and the test of "significant reduction of effective competition" was implemented. Together with this, a new era has begun in which a prohibition is possible due to the effects in the market in terms of mergers and acquisitions, where a dominant position could not be reached. The new version of the first paragraph of the article with the amendment is as follows:

*"The merger of one or more undertakings to result in a significant reduction in the effective competition in any market for goods or services in the whole or part of the country, primarily by creating a dominant position or strengthening an existing dominant position, or any undertaking or person in to take over the assets of another undertaking, or all or part of the partnership shares, or the tools that give him/her the right to have a right in management, except for inheritance is illegal and prohibited."*

Based on this amendment, in particular, but not limited to in a way that creates a dominant position or strengthens the dominant positions of more than one undertaking, mergers and acquisitions that have the possibility to significantly decrease competition in the market, are prohibited under Article 7 of the Turkish Competition Act. The details of the merger control regime in Turkey are specified under *The Communique on Mergers & Acquisitions that Require Permission from The Competition Board.* (Communique).

According to the Communique when there is a permanent change in control either by a merger of two or more undertakings or acquisition of direct or indirect control of all or part of one or more undertakings by one or more undertakings or persons by means of the purchase of shares or assets, contract or any other means and if the transaction is above the turnover thresholds given in Communique, then the transaction needs to be notified to the TCA in order to be evaluated whether the said transaction will adversely affect competition on the market or not.

When the turnover thresholds in the Communique are examined, it is seen that a dual evaluation has been made:

- if the transaction parties have TRY 100 million Turkey turnover in total and TRY 30 million Turkey turnover of at least two of the transaction parties separately, OR,
- in acquisition transactions, the turnover of the asset or activity, in merger transactions, the Turkey turnover of at least one of the transaction parties exceeds TRY 30 million and the world turnover of at least one of the other transaction parties exceeds TRY 500 million,

then these transactions need to be notified to the Authority in order to be granted permission.

If the effect of the transaction does not mitigate competition, then the authority will approve the transaction. In order for a merger or acquisition that involves at least one of the turnover thresholds given in Communique to be legally valid, it needs permission from the authority.

## 10. What is the normal merger review period?

Merger or acquisition agreements that fall within the scope of Article 7 of the Turkish Competition Act and exceed the turnover thresholds within the scope of the Communique, the Board must make a preliminary examination within fifteen days from the date of notification and decide whether it has given permission for the transaction or that the transaction

should be taken into final examination and notify the parties. However, when the authority requests information from the undertaking while the investigation continues, the fifteen-day examination period starts again after the reply letter of the undertaking is submitted to the institution's records. In this case, it can be said that the first phase merger review period takes approximately one-two months in practice.

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

No fee is charged by the TCA for mergers and acquisitions that are subject to the examination.

### 12. Is there any possibility for companies to obtain State Aid in Turkey? If yes, under what conditions?

In Turkey, companies can obtain State Aid. However, there is no control for State Aid in terms of competition law.

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

Foremost there is no major legislative change in competition law that came with the COVID-19 crisis in Turkey. Besides that, several preliminary investigations and investigations were launched for specific sectors such as FMCG, healthcare, *etc.*, due to the concerns that increased with the COVID-19 crisis. During the COVID-19 crisis the following developments occurred:

- The TCA initiated an examination over food price increases in the COVID-19 period based on the observations that food prices and fresh fruit and vegetable prices in particular are rising excessively. The authority announced that the highest possible available in the legislation will be applied to individuals and institutions engaged in anti-competitive actions in this period.
- The TCA President issued a press statement that the people and institutions that caused the increase of prices and supply shortages, especially in the food market, during this harsh period will be punished severely under *Act No. 4054*.
- The oral hearings are to be held online for a long period of time. During the COVID-19 crisis, several oral hearings were held online and with third parties participating online.
- As part of COVID-19 measures, the TCA announced that all applications, petitions, and document submissions to the authority, should be made online.
- The TCA initiated an investigation against 29 companies that operate in beauty/hygiene/health, food, and chain retailing sectors.

To sum up, while there were no major legislative changes in this field during the COVID-19 crisis, the TCA is on the alert for several markets for now. The expectation is that this approach would probably not stick.

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# CEE LEGAL MATTERS COMPARATIVE LEGAL GUIDE: COMPETITION 2021

# UKRAINE

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

The main competition-related pieces of legislation in Ukraine are, among others, as follows:

- the Constitution of Ukraine;
- the Civil Code of Ukraine;
- the Commercial Code of Ukraine;
- the Law of Ukraine *On Antimonopoly Committee of Ukraine* (the AMC Law);
- the Law of Ukraine *On Protection of Economic Competition* (the Competition Law);
- the Law of Ukraine *On Protection against Unfair Competition*;
- the Law of Ukraine *On State Aid* (the State Aid Law);
- the Law of Ukraine *On Public Procurement* (the Public Procurement Law);
- the *Regulation on the procedure for filing applications with the Antimonopoly Committee of Ukraine* (the AMC) *for obtaining its prior approval of the concentration of undertakings* (the Merger Regulation);
- the *Regulation on the procedure for filing applications with the AMC for obtaining its prior approval for the concerted practices of undertakings*;
- the *Procedure for filing of applications with the AMC for release from liability for violation of Ukrainian competition law* (the Leniency Regulation);
- the *Methodology for assessment of the monopoly (dominant) position of undertakings on the market*;
- the *Guidelines on applicability of the Ukrainian merger control rules to joint ventures* (the Joint Ventures Guidelines);
- the *Guidelines on application of the State Aid Law*;
- the *Guidelines on application of the SSNIP test*; and
- the *Guidelines on calculation of fines for Ukrainian competition law violations* (the Fines Guidelines).

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

### Antitrust amnesty

On July 21, 2021, the Law of Ukraine *On Amendments to Tax Code of Ukraine and Other Laws of Ukraine on Stimulating De-Shadowing of Income and Improving Tax Culture of Citizens by Introducing One-Time (Special) Voluntary Disclosure by Individuals of Their Assets and Payment to Budget of One-Time Duty* (the Tax Amnesty Law) came into force.

Besides the release from liability for tax infringements, the Tax Amnesty Law contains provisions that allow individuals to benefit from reduced liability for infringements of the Ukrainian merger control rules.

Particularly, an individual that completed a transaction without obtaining prior approval of the AMC, if such approval was required, would be subject to an approximately EUR 650 fixed fine. In contrast, the statutory maximum fine for the failure to comply with the Ukrainian merger control rules is 5% of a group's turnover.

To benefit from the reduced antitrust liability, individuals should meet the following requirements:

- submit the special returns declaration and pay the special duty;
- a concentration should have taken place before December 31, 2020;
- a concentration did not lead to monopolization or substantial restriction of competition on the relevant market; and
- file a merger control notification by October 1, 2022.

The antitrust amnesty is available only from October 1, 2021, to October 1, 2022.

### Joint ventures

On September 30, 2019, the AMC adopted the *Joint Ventures Guidelines*. Under them, the establishment of a joint venture constitutes a concentration and may require the AMC's prior approval, if such a joint venture:

- is a newly created and jointly controlled undertaking;
- is a fully-functioning undertaking;
- will operate on a lasting basis (normally exceeds three years); and
- will not be used for coordination of competitive behavior between the co-founders and/or among the co-founders and the joint venture itself.

### SSNIP test

On July 20, 2020, the AMC adopted the *Guidelines on application of the small but significant and non-transitory increase in price* (SSNIP) test, which may be used as one of the tools for the definition of relevant markets in merger control cases.

### Antitrust Law Reform

The Parliament of Ukraine is planning to implement a comprehensive reform of Ukrainian competition law. The draft law of Ukraine *On Amendments to Certain Laws of Ukraine in Relation to Competition Law Reform* (the Reform Law) significantly revises

merger control thresholds, introduces settlement procedures, improves the existing leniency policy, and makes other changes.

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

### Anticompetitive Concerted Practices

The main concern of the AMC is that, in some cases, agreements can be viewed as anticompetitive concerted practices which have led or may lead to the prevention, elimination, or restriction of competition. In general, the Competition Law prohibits the implementation of anti-competitive concerted practices, unless the AMC has approved them.

At the same time, Ukrainian competition law distinguishes between different types of concerted practices (vertical, horizontal, conglomerate, mixed) and sets general requirements for their exemption from prior approval by the AMC. This ensures that transactions with no or limited effect on the Ukrainian competition environment remain under the AMC's radar.

### Sanctioning Record of the AMC

In 2020, anticompetitive concerted practices constituted 54% of all the violations suspended by the AMC and this number is constantly increasing. At the same time, 96.7% of all anti-competitive concerted practices took place during the public procurement procedures.

The AMC imposed fines for anticompetitive concerted practices in the total amount of EUR 22.8 million. However, the undertakings challenged the fines of the AMC and almost 150 decisions were successfully overruled.

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

Companies may consider applying the following framework.

First, companies should assess whether their agreement can be considered as concerted practices.

Second, companies should (1) define the relevant market in which concerted practices are to take place and (2) identify their respective market shares.

Third, companies should assess which type of concerted practices they intend to implement – for example – horizontal or vertical, *etc.*

Fourth, companies should comprehensively check whether provisions of the agreement can have a potential negative impact on the Ukrainian competition environment.

Finally, companies should check whether any of the general exemptions provided by the Ukrainian competition law may apply to them and their agreement, allowing them to implement the concerted practices without prior approval by the AMC.

For example, the parties usually can implement horizontal concerted practices, if none of them is a dominant undertaking and their combined market share in the relevant market does not reach 15%.

Similarly, in the case of vertical concerted practices, the parties may envisage vertical restraints in the agreement, if, for example, their combined market share is less than 30% of the relevant market and the restraint itself is not hardcore (*e.g.*, resale price maintenance, restriction of active sales, restriction of cross-supplies, *etc.*).

If following the initial assessment it is evident that proposed concerted practices do not fall under any of the applicable exemptions, the parties may apply to the AMC for individual antitrust clearance. The parties would have to show that the proposed concerted practices outweigh potential anticompetitive effects by, for example, enhancing the production of goods, promoting technical or economic development, *etc.*

## 5. Does a leniency policy apply in Ukraine?

Yes, the AMC introduced the leniency policy to detect existing cartels back in 2012. The Leniency Regulation sets out a detailed procedure for those who wish to benefit from the leniency policy.

Under the Leniency Regulation, an undertaking involved in cartel activities may apply for total immunity from fines for anticompetitive concerted practices by self-reporting and handing over evidence of cartel activities to the AMC.

The leniency policy is available under the following conditions:

- the applicant should be the first one to disclose the information on cartel activities;
- the information must be significant enough for the AMC to investigate the infringement;
- the disclosure must be done voluntarily;
- the applicant must provide sufficient evidence regarding the infringement;
- the applicant has to take effective measures to cease its cartel activities; and

- the applicant must not be a ringleader.

Even though leniency policies are efficient in fighting cartels in other jurisdictions, it is still fairly unpopular in Ukraine. Up to date, to the best of our knowledge, there were only three applications submitted to the AMC. However, it is expected that this will change following the adoption of the Reform Law, which is supposed to improve the existing regulatory framework.

## 6. How is unilateral conduct treated under Ukraine competition rules?

The Competition Law does not prohibit the holding of a dominant position, however, the abuse of dominance is illegal. In general, a dominant undertaking abuses its market power if its action or failure to act causes or may cause the prevention, elimination, or restriction of competition or discrimination of other undertakings. A dominant undertaking abusing its market power may be subject to fines and/or compulsory divestment.

Under the Competition Law, an undertaking is dominant, if:

- it has no competitors; or
- it does not face significant competitive pressure due to competitors' restricted access to raw materials, distribution channels, market barriers, *etc.*

The Competition Law provides for a rebuttable presumption that an undertaking holds a dominant position if its market share in a given market exceeds 35% unless such an undertaking proves that there is significant competition in the market. In some cases, an undertaking holding a market share of less than 35% can be viewed as dominant as well.

The Competition Law also provides for the collective dominance concept. Several undertakings are considered as collectively dominant, if:

- up to three undertakings hold 50% market share; or
- up to five undertakings hold 70% market share.

In such a case, each undertaking is deemed to hold a dominant position in a relevant market.

As mentioned previously, holding a dominant position is not illegal. However, abusive practices are prohibited. The Competition Law provides a non-exhaustive list of examples of abusive behavior such as:

- price gauging;
- the application of different prices or other conditions to equivalent transactions without objectively justified reasons;
- making entry into an agreement conditional upon acceptance of additional obligations by the counterparty, which by their nature or according to commercial practice, do not relate to the subject matter of the agreement;
- the limitation of production, markets, or technological development, which harms or may harm other undertakings, buyers, or sellers; and
- the refusal to purchase or sell goods in the absence of other alternatives, *etc.*

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

Yes, there are. Investigation of abuse cases is one of the priorities of the AMC.

In 2020, the AMC terminated 227 such violations with fines imposed in the total amount of EUR 23.75 million. Here are a few examples of the most significant cases.

*Abuse of dominance by the DTEK Group*

The AMC found that certain undertakings of the DTEK Group – the leader in Ukraine's energy sector – abused its dominant position in different segments of the Ukrainian electricity market. According to the AMC's findings, the violation took place in a special region of Ukraine where the DTEK Group holds a 90% market share in the market for electricity production. The DTEK Group abused its dominant position by (1) reducing the production of electricity, (2) setting inflated and economically unreasonable prices for electricity, and (3) restricting imports of electricity from Slovakia. In total, the AMC fined the DTEK Group in the amount of EUR 9.1 million.

However, the DTEK Group filed an appeal seeking to invalidate the AMC's decision.

*Abuse of dominance by LLC Zeonbud*

The AMC found that between 2011-2019 LLC Zeonbud – a provider of digital terrestrial television – had been abusing its dominant position by setting its fees for telecommunication services without any calculations or economic rationale. In addition, LLC Zeonbud reduced its fees by providing discounts to broadcasting companies without any economic rationale. Therefore, different broadcasting companies were paying different fees (from zero to 100%) for the same services.

The AMC ordered LLC Zeonbud to stop the violation and imposed a fine in the amount of EUR 80,000.

LLC Zeonbud has successfully challenged the decision of the AMC in court.

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

In most cases, the AMC would impose a fine on an infringing undertaking. The amount of the fine depends on the type of infringement. For example:

- for the infringement of the Ukrainian merger control rules, the maximum fine can reach 5% of the undertaking's worldwide turnover for the last financial year; and
- for implementation of anticompetitive concerted practices or abuse of dominance, the maximum fine can reach 10% of the undertaking's worldwide turnover for the last financial year.

Penalties are usually imposed on the undertaking that infringed Ukrainian competition law. However, the Competition Law allows the AMC to impose a fine on the group of undertakings under certain circumstances.

When calculating the amount of a fine, the AMC usually follows its nonbinding Fines Guidelines which makes the fine determination process more transparent for undertakings. Also, the Fines Guidelines provide for mitigating factors that the AMC may take into account when calculating the amount of fine. In some cases, the amount of a fine can be decreased by up to 50%.

In addition to the financial penalties in abuse cases, the AMC may order for compulsory divestment of the dominant undertaking.

Other consequences include third-party damages claims, reputational issues, and increased scrutiny from the AMC in the future.

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

Under the Competition Law, the following transactions are considered as concentrations and may be subject to prior merger control clearance before they can be completed:

- the merger of undertakings or takeover of one undertaking by another;
- the acquisition of direct or indirect control over an undertaking (including through acquisition or lease of assets, the appointment of management, negative control, *etc.*);
- the establishment by two or more undertakings of a joint venture that will conduct its business activity independently on a lasting basis provided that such an establishment will not result in the coordination of competitive behavior between the founders or among them and the newly established undertaking; and
- the direct or indirect acquisition of shares in an undertaking, if such an acquisition leads to reaching or exceeding 25% or 50% of the votes in the highest governing body of the undertaking.

The provided transactions are subject to the prior merger control clearance if:

- the aggregate worldwide value of assets or turnover of the parties to the transaction exceeds EUR 30 million, and the value of Ukrainian assets or turnover of each of at least two parties to the transaction exceeds EUR 4 million; or
- the aggregate value of Ukrainian assets or turnover of the target company or at least one of the founders of the joint venture exceeds EUR 8 million, and the worldwide turnover of at least one other party to the transaction exceeds EUR 150 million.

In either case, all thresholds are calculated on a group-level basis (taking into account the relations of control). All figures are taken for the last financial year immediately preceding the year of the transaction.

## 10. What is the normal merger review period?

The normal review procedure consists of:

- a 15 calendar day preview period, in which the AMC decides whether a notification meets formal requirements of the Merger Regulation and accepts the notification for a substantive appraisal (Phase I) or returns it to the applicants;
- a 30 calendar day review period (Phase I), in which the AMC conducts a substantive appraisal of a concentration and issues merger control clearance if the concentration does not pose any competition concerns.

If during the Phase I review the AMC finds that there are potential grounds for prohibition of a concentration, the AMC will initiate an in-depth review of the concentration (Phase II). The Phase II review procedure should not exceed 135 calendar days from the date when the AMC receives all documents and information requested from the parties.

The Competition Law also provides for a fast-track review procedure, which takes up to 25 calendar days.

The fast-track review procedure is available for transactions where:

- only one party is active in Ukraine;
- the parties' combined market shares do not exceed 15% on horizontal markets; or
- the parties' combined market shares do not exceed 20% on vertical markets.

A transaction cleared by the AMC must be completed within one year from the date of issuance of the approval unless the approval states otherwise.

The AMC approves the concentration if it does not lead to the monopolization or a substantial restriction of competition in the relevant market or a significant part thereof.

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

Yes, there are. The filing fees are as follows:

- UAH 20 400 (approximately EUR 660) for a review of merger control notification; and
- UAH 10 200 (approximately EUR 335) for a review of concerted practices notification.

### 12. Is there any possibility for companies to obtain State Aid in Ukraine? If yes, under what conditions?

Yes, companies may obtain state aid in Ukraine, even though the State Aid Law sets out a general principle of incompatibility of state aid with competition.

In general, the AMC may declare state aid measures compatible with competition, if such measures:

- promote the social and economic development of regions with low living standards or high unemployment rates;
- support the implementation of national development programs or solve social and economic problems at a national scale;
- support certain types of business activities or economic sectors, or undertakings in certain economic zones, provided that this would not contradict international agreements to which Ukraine is a party; and
- support creative industries, tourism, the preservation of cultural heritage, provided that the impact on competition is insignificant.

At the same time, the State Aid Law does not apply to state aid measures provided in the following sectors:

- agricultural production and fishing;
- production of weapons and military equipment for the Armed Forces of Ukraine and other military formations, *etc.*;
- investments in infrastructure under public procurement procedures;
- provision of services of general economic interest (*e.g.*, the provision of electricity and natural gas, utilities services, *etc.*);
- projects by the Ukrainian Cultural Foundation, Ukrainian Book Institute, and Ukrainian Youth Fund; and
- state promotion of the management companies, founders, and participants of industrial parks.

Otherwise, before state support can be granted to an undertaking, a state authority (grantor) needs to notify the AMC of its intent to grant such support. Following a review of the notification, the AMC declares that the state support is compatible with competition if there are no grounds for ruling otherwise.

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

In general, there were no major changes. The AMC continues to function and enforce Ukrainian competition law normally despite the COVID-19 crisis.

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