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## Stiff Penalties for Failing to Notify a Merger to the Bulgarian Competition Authority

*The new Protection of Competition Act levies penalties equal to 10% of annual turnover to companies who have missed notifying a merger or an acquisition*

Significantly higher sanctions under the new Bulgarian Protection of Competition Act ("**PCA**" or the "**Act**") mean that missing on the notification obligation in respect of a merger or acquisition, or closing a transaction before clearance could mean a sanction equal to 10% of annual turnover. The changes have limited the range of mergers which require notification to the Commission for the Protection of Competition ("**CPC**" or the "**Commission**"), but have raised the stakes for failing to make notification and waiting for clearance in the cases where it is required. Smaller acquisitions where the combined turnover of the target and its subsidiaries is below BGN 3 million are now exempt from clearance and notification. All other mergers and acquisitions need to be notified and cleared where the combined Bulgarian turnover of the group of the acquirer and of the group of the target exceeds BGN 25 million in the latest complete financial year.

### *1. New Merger Control Threshold*

The previous Bulgarian merger control turnover threshold, whose amount remained unchanged for more than 10 years at BGN 15 million (approximately EUR 7.6 million) of aggregate annual Bulgarian turnover, was largely criticized by merging parties for failing to provide an appropriate level of significance or a justifiable jurisdictional link to Bulgaria. This was the case, because the threshold did not require a minimum turnover of each of the merging parties, and therefore the notification obligation would formally be triggered even in cases where one of the parties had none or very little turnover in Bulgaria, provided the other party had sufficient turnover to pass the BGN 15 million mark. In spite of several limited attempts of the Supreme Administrative Court to remedy this by interpretation, the issue remained open until the adoption of the new Act.

The new Act, in addition to raising the turnover mark, requires a minimum turnover to have been achieved by each of at least two of the undertakings concerned, or by the acquired undertaking.

Where the combined aggregate Bulgarian turnover of the undertakings concerned exceeds BGN 25 million[1] in the latest complete financial year, the proposed merger must be notified to the Commission, provided it answers at least one of the following two additional criteria, namely: (i) the turnover of each of at least two of the undertakings concerned in the territory of Bulgaria during the previous financial year to exceed BGN 3 million; **or** (ii) the turnover of the target company in the

[1] approximately EUR 12,8 million;

***Speed read***

***New sanctions for failing to notify a merger or an acquisition can reach 10% of the annual turnover of the company.***

***The acquisition of smaller companies where the turnover of the target and its group does not exceed BGN 3 million do not require notification.***

***The notification obligation is triggered if the combined Bulgarian turnover of the parties exceeds BGN25 million in the latest complete financial year.***


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territory of Bulgaria to exceed BGN 3 million.

The first hypothesis triggers the notification obligation where on the side of the acquirer and on the side of the target (or on each side of the two merging parties) the economic groups have achieved *each* at least BGN 3 million of turnover, and *together* at least BGN 25 million in Bulgaria in the latest complete financial year. The second one, in fact translates into a filing obligation where the target alone or predominantly achieves the BGN 25 million threshold, even though the acquirer has not had turnover in Bulgaria or its Bulgarian turnover was below BGN 3 million in the preceding financial year.

Turnover is calculated in effect by adding to the turnover of the acquirer that of its economic group, and to the turnover of the target – the turnover of the businesses controlled by it. In an assets acquisition, where the acquired assets constitute a separate business, only the turnover attributable to that business is to be taken into account.

Intra-group reorganizations, both previously and now, remain outside the scope of merger control. However where the quality of control changes (e.g. from joint to sole control) a notification would be required provided the notification threshold is met.

***2. Changes to the Definition of a Concentration***

A merger or an acquisition, is generally referred to under Bulgarian and under EU competition law as a 'concentration'. However not every merger or acquisition would be a concentration.

Similarly with the previous law and with European law, a concentration is defined in the new PCA as a merger of two or more previously independent undertakings or the acquisition, by a person or persons, already controlling one or more undertakings, of direct or indirect control of the whole or part(s) of another undertaking.

The addition to this classic definition introduced in the new Act notes, that the operation must bring about a *lasting* change in the control of the undertakings concerned. This requirement is in line with the concept of a concentration, contained in the European Commission's Consolidated Jurisdictional Notice and with some of the previous decisional practice of the Bulgarian Commission. It does remove a degree of uncertainty that existed previously due to the lack of specific regulation, on whether certain limited pre-completion steps would, in fact, represent an accomplishment of the concentration.

***3. New Phase 1 and Phase 2 Deadlines***

Where a concentration needs to be notified, an initial accelerated merger review proceeding will apply to all cases. It is generally called a 'Phase 1 proceeding', because in certain cases it may be followed by an extended (Phase 2) investigation, where there are doubts that the merger or acquisition may damage competition.

A Phase 1 merger proceeding must complete within 25 business days, following initiation of proceedings. Proceedings are to be initiated within 3 business days following submission of the notification, provided the notification is declared complete. If the notification is declared incomplete, the proceedings will start after any deficiencies are rectified.

The deadline will be prolonged by 10 business days, where the parties have offered remedies (called "proposals to amend the concentration"). The parties may request an extension of the original timeframe by 10 business days to allow them to prepare the remedies offer itself.

The deadline to complete an in-depth (Phase 2) proceeding has been increased to 4 months from the publication of the decision to open in-depth investigation proceedings in the Electronic Register kept by CPC. The term can be prolonged by an additional 25 business days in complex cases, and by a further 15 business days if remedies are offered, as of the day the Commission receives complete information concerning the remedies offered.

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***Only a lasting change of control qualifies as a concentration for competition law purposes.***

***New deadlines can extend the period of review of a notified transaction.***

***The obligation to suspend the merger until a clearance is received will not apply to acquisitions resulting from a tender offer or normal stock exchange dealing, provided voting rights are not exercised to govern the target .***

***4. The Suspension Obligation***

In spite of the general expectation that there would be a change in regulation of the suspension obligation of the parties in notifiable mergers (the obligation not to complete the transaction before clearance is issued), a lot of the old problems with the formulation of this obligation remain.

In the first instance, a provision which existed in the earlier drafts of the Bill that would have allowed the Commission to waive the suspension obligation in respect of particular cases, did not find its way into the Act.

The suspension requirement remains worded in the same vague and general manner, as in the previous Act, prohibiting all legal and factual actions related to the proposed concentration, before a clearance decision by the Commission is issued.

The new definition does provide an exemption, but only in respect of a tender offer, or a series of transactions in regulated markets, where stocks are acquired from different sellers, provided the Commission has been notified in advance in a timely manner and provided the acquirer does not exercise the voting rights attached to the securities, except to the extent necessary to preserve the value of the investment made.

***5. Dawn Raids***

The new PCA, in contrast to the old one, gives to the CPC the power to make surprise inspections (if necessary with the assistance of the police) in companies, search and seize company documents, comupter systems, information carriers, and take oral statements in order to establish a violation of the merger control rules. For more information about dawn raids, please see item 3.6. of our Note on the anti-turst aspects of the new PCA.

***6. Sanctions***

The Commission may impose a monetary sanction in the amount of up to 10 per cent of the total turnover for the preceding finance year, of an undertaking where:

- A concentration is completed without a prior notification;
- A concentration is completed under conditions and in a manner that differs from the ones notified to the Commission and on the basis of which its clearance decision was issued, including upon failure to honour commitments and obligations imposed;
- The concentration is completed in violation of an express prohibition of the Commission;
- The concentration is completed in violation of the general suspension obligation, that applies prior to a clearance decision.

In addition, the Commission is entitled to impose a sanction to the amount of up to one per cent of the total turnover for the preceding financial year in cases of:

- Failure to cooperate with the investigation;
- Delay in the provision of information or the provision of incomplete, incorrect, untrue or misleading information;
- Failure to notify the Commission of the performance of its decision in the term specified in it (if the decision provides for such an obligation).

The Commission may also impose periodic sanctions of 5 per cent of the average daily total turnover for the preceding financial year for each day of failure to comply with conditions and obligations attached to a Commission's decision, and up to 1 per cent of the average daily total turnover for the preceding financial year for each day of failure to provide complete, true and non-misleading information.

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***The CPC can make searches and seizures where it suspects that companies have missed to notify a merger or acquisition.***

***Missing to notify a merger or acquisition, closing before receiving clearance, or failing to honor conditions and obligations imposed, could bring a fine of up to 10% of annual turnover.***

***Failure to cooperate in an investigation can cause sanctions of up to 1% of annual turnover.***

***Continued failure to unwind a merger completed without clearance, or to honor conditions and obligations imposed, are sanctioned by fines of up to 5% of the daily turnover per each day.***

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