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Difficulties of merger control

Merger Control: Current Issues

by **Louis** and **Joseph Vogel**

Merger control is rightly regarded as an essential component of competition law. When a merger exceeds the national or European thresholds for control, it must be examined to see whether it could be detrimental to competition. While the principle of control is easy to understand, its recent implementation appears to be increasingly complex, both for businesses and for the European economy in general. In addition to a constant broadening of the scope of control with no sufficient guarantees of legal certainty, increasingly onerous control procedures could adversely impact the European economy.

I. Too broad a scope with no legal certainty for companies

A. An unduly broad scope

1. No threshold review.

In general, merger control thresholds remain fixed and are not regularly reviewed. But with inflation pushing up the turnover of businesses, more and more transactions are automatically subject to control. Merger control thresholds must be regularly reviewed.

2. Restrictive definition of relevant markets.

Generally speaking, the definition of relevant markets is becoming increasingly narrow, from both the geographical and product perspectives. Consequently, a multitude of micro-markets in which companies automatically have higher market shares need to be examined, thus extending control to sometimes insignificant transactions, with the risk of forcing companies to offer disproportionate remedies. Unfortunately, the new European notice on relevant market definition is unlikely to change this micro-segmentation of markets. Given the Europeanisation of markets, widespread competition between e-commerce and traditional distribution, and economic realities, this tendency towards extreme market segmentation urgently calls for review.

3. Excessive control of joint subsidiaries of groups.

Where a joint subsidiary is set up, threshold-crossing calculations are based on the turnover of the groups that co-control the joint subsidiary. Transactions involving non-core activities, such as the joint purchase of property generating low rental income, can therefore fall within the scope of control. Controlling this type of transaction when it relates to marginal activities should be reconsidered.

B. Lack of legal certainty

4. Below-threshold control through the reinterpretation of Article 22 of the EU Regulation.

The control thresholds in absolute value were defined to guarantee predictability and legal certainty for undertakings. Unfortunately, we have recently seen an upsurge in the number of below-threshold control mechanisms. A first step has been taken through a change of interpretation of Article 22 of the Merger Control Regulation. This referral to the European authorities initially aimed to enable the Commission to review potentially problematic mergers when many Member States had not introduced merger control. With the gradual introduction of merger control laws in virtually all Member States, the Commission has discouraged referrals under Article 22. In 2021, it made a radical change of policy with the aim of improving control of ‘killer acquisitions’, i.e. the takeover of a nascent and potentially very innovative competitor, and in general, of mergers of companies that play or are likely to play a major competitive role but fall below the turnover threshold at the time of the deal. It has therefore decided to encourage and accept referrals in cases where the requesting Member State does not initially have jurisdiction to hear the case because the national thresholds are not exceeded (Guidance on the application of the referral mechanism set out in Article 22, OJEU C 113/1 of 31 March 2021). Admittedly, the Commission and the national competition authorities (NCAs) argue that an Article 22 referral requires a request from a Member State and evidence that the transaction would affect trade between Member States and threaten to significantly affect competition within the territory of the Member State(s) making the request. But these are flimsy conditions which NCAs can easily apply, such that below-threshold referrals represent a risk, depriving businesses of the legal certainty associated with thresholds. Requests for referrals have increased. The French Competition Authority (Autorité de la concurrence - AdlC) took advantage of this new possibility by forwarding the Illumina/Grail concentration to the Commission, which it ultimately prohibited (Comm. EU, 6 Sept. 2022, case M. 10188). More recently, the Commission did not hesitate to ask Member States to submit a referral request and on 18 August 2023 accepted the requests of 15 Member States concerning Qualcomm’s proposed acquisition of the Israeli semiconductor company Autotalks. Finally, on 21 August 2023, the Commission accepted the referral by four Nordic authorities of EEX’s buyout of Nasdaq Power. While the objective is clear, the mechanism is inadequate. It completely sacrifices legal certainty and predictability for the sake of efficiency, running counter to the Western conception of the rule of law. The same result could have been achieved, while still safeguarding legal certainty for operators, by merely defining specific thresholds for ‘killer acquisitions’, similar to those adopted by Germany in 2017 based on the deal value and

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lower turnover thresholds.

5. Application of the former Continental Can case law in the Towercast case.

A second turning point came more recently with the Court of Justice's response to a preliminary question referred by the Paris Court of Appeal. The CJEU considered that a concentration which does not have a Community dimension and is below the thresholds for mandatory ex ante control laid down by national law, and which has not given rise to a referral to the European Commission pursuant to Article 22, may be analysed by a NCA as constituting an abuse of dominant position prohibited by Article 102 TFEU in the light of the structure of competition on a market with a national dimension (CJEU, 16 March 2023, Towercast, LawLex202300003720JBJ). This case law adopts the old Continental Can case law according to which under certains conditions a concentration could constitute an abuse of a dominant position. Once again, the supervisory authorities tend to play down the scope of this ex post control, which presupposes a dominant position and requires proof of abuse consisting of a significant impediment of competition. This means of ex post control is not at all satisfactory and is particularly serious as companies now risk facing severe penalties (significant financial penalties, injunctions, and even structural measures), after completing an acquisition, whereas, in principle, a concentration does not constitute an anti-competitive practice. It would be better to set specific thresholds for 'killer acquisitions', rather than increasing below-threshold controls that require complex analyses and generate uncertainty.

6. Lack of European harmonisation of the concentration concept.

In some Member States, certain simple minority equity investments could fall within the scope of merger control, making a transaction complex to analyse at the European level, with the need to consult several local law firms. A unified system would avoid this situation.

II. Control procedures with perverse effects

A. Necessary improvements for more cost-effective control

7. Timeframes.

In general, control procedures take much longer than the periods laid down by law. Prior notification has become the norm, but with no specified time limit. The procedural schedules defined by some authorities, with limits on the pre-notification duration, are a good idea and should be brought into general use. Statistics on actual pre-notification and notification periods should also be published to raise awareness and allow better assessment of the measures needed to reduce them.

8. Insufficient consideration for the future.

Although merger control is an ex ante and therefore forward-looking control, competition authorities can sometimes overlook future developments in the economic sectors concerned, particularly those subject to declining economic cycles. This hinders mergers and acquisitions, which are necessary in sectors with declining economic prospects or threatened by transfers of value due to disruptive innovations.

B. The economic effects of failing to modernise control

9. An obstacle to the reorganisation of the European economy.

Experience has shown that deals justified by the need for businesses to reorganise are prevented by the extreme segmentation of markets. The analysis can put European companies at a disadvantage in relation to competition from outside Europe.

10. A structural disadvantage to the detriment of European businesses in a context of economic rivalry with China and the United States.

In practice, Franco-French or European solutions are often disadvantaged by merger control compared with the takeover of a French or European company by a non-European firm, particularly American or Chinese, which is less present in Europe than the European bidders. The process will be longer, more complex and/or more costly for a European business than for a non-European operator with a small local footprint. As time is of the essence in business decisions, this could give non-European firms an advantage and create the need for complex means of reviewing non-European investments at the national or European level. These perverse effects must be taken into account, and measures must be adopted to limit them. Overall, merger control in Europe urgently needs to be aligned with our strategic interests, efficiency and legal certainty.

What you will find in detail in this Newletter

These concerns can be found in several jurisdictions as illustrated by the members of our network in this Competition Newsletter. If there are some positive news in the recent application of merger control in certain jurisdictions (such as the first failing firm defense approval in Greece, see the article of Marina Androulakakis and Tania Patsalia) or the changes to merger control in Ukraine that tend to limit to a certain extent an excessive application (see the article by Igor Svechkar and Pavlo Verbolyuk), the same issues of insufficient legal certainty and broad scope of control can be found in the evolution of merger control in many jurisdictions as illustrated by:

- the new power to control below-threshold transactions in Ireland (see the article writtent by Joanne Finn and Elaine Davis, A new area for Irish competition law),
- the application of the new referral practice based on article 22 EUMR in Romania (see the article of Anca Diaconu and Rares Farcas),
- the merger filing thresholds in Serbia that can be triggered even when a concentration has no connection with Serbia (see the article by Dragan Gajin),
- the practical difficulties of merger control in Spain (see the article by Rafael Allendesalazar and Beatriz Sanchez-Ortiz),
- the dispute over Non-Full-Function Joint Ventures under the Turkish Merger Control and the ambiguity linked to the notifiability analysis for transactions involving acquisition of so-called "technology undertakings" in Turkey (see the articles by Togan Turan).

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GREECE

BERNITSAS

HCC's first merger clearance decision based on the failing firm defense

by **Marina Androulakakis** and **Tania Patsalia**

By means of its decision 827/2023, the Hellenic Competition Commission (HCC) unanimously approved, in August 2023, the merger by absorption of ANEK LINES SA (ANEK), one of the oldest Greek passenger shipping companies, by Attica Group (Attica), a leader in the provision of passenger and cargo ferry services in the Eastern Mediterranean Sea. According to the press release of 7.8.2023, the HCC found that the transaction does not raise serious doubts as to its compatibility with the requirements for the functioning of competition in the relevant markets as per the provisions of the Greek Competition Act. The cleared concentration involves the markets for the provision of maritime transport services for passengers, vehicles and trucks in the Greek territory and in port pairs in both Crete and the Adriatic and the market for the provision of maritime transport services through public service contracts.

In clearing the transaction, the HCC took into account the target's status (firm in difficulty) and applied for the first time the failing firm defense. In particular, the HCC applied the three criteria of the failing firm defense, as these have been formulated by the European Commission's precedent, and considered that: (i) the target company would be forced to exit the market in the near future due to its financial distress, (ii) there was no other alternative acquisition option, less harmful to competition, other than the notified concentration, and (iii) there was no credible interest in acquiring the target's assets which, therefore, would exit the market. In approving the transaction, the HCC concluded that the competitive structure in the affected markets would not be worse as a result of the merger and, as such, was not causally related to it. This is the first failing firm defense approval decision of the HCC and, therefore, forms a significant precedent.

IRELAND

DAC BEACHCROFT

A new era for Irish competition law

by **Joanne Finn** and **Elaine Davis**

Fundamental amendments to competition law in Ireland came into force on 27 September 2023 following the enactment of the Competition (Amendment) Act 2022 (the "**Act**"). The Act belatedly implements the ECN+ Directive (the "**Directive**") and goes beyond the requirements of the Directive in certain respects. The Act increases the Irish competition regulator's, the Competition and Consumer Protection Commission ("**CCPC**"), merger control powers, strengthens enforcement mechanisms, streamlines investigation procedures and changes the penalties for breaches.

Merger Control

The Act is characterised by a significant increase in the CCPC's powers in the realm of merger control, with a more extensive and varied toolkit at its disposal. Arguably the most significant change brought about by the Act is the CCPC's new power to "call-in" below-threshold transactions. This power may be used where the CCPC considers an unnotified transaction may "*have an effect on competition in markets for goods or services in the State*". When making use of this power, the CCPC must notify the parties in writing within 60 working days after the earliest of the following dates: a) a party's intention to make a public bid, b) when the CCPC becomes aware of the parties entering into a binding agreement, or c) the transaction being put into effect. The length of the period during which the CCPC can exercise this power is undoubtedly long and will result in uncertainty, especially considering the merging parties will not have any guarantee against further interference during this period.

Another important change is the CCPC's new power to impose interim measures in respect of certain mergers and acquisitions. The interim measures envisaged may require parties to refrain from further implementing the transaction, to halt the disclosure of sensitive information, or to mitigate measures that have already been carried out. Criminal prosecution or sizeable fines can be imposed on undertakings that fail to comply with such interim measures.

Updates to the offence of "gun-jumping" have elevated the offence to a criminal one, where guilty parties can face a fine of up to €250,000, as well as an additional daily fine up to a maximum of €25,000. The extent of the CCPC's power is evidenced by their new power to undo or dissolve already completed transactions where it determines it would result in a substantial lessening of competition in the State. The CCPC may also bring summary proceedings in the District Court for failure to notify a transaction or failure to respond to a request for information ("**RFI**"), once more bypassing previous reliance on the Director of Public Prosecutions (the

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"**DPP**") to bring such proceedings. The power to issue compulsory RFIs to third parties to a notified transaction is also noteworthy, as this extension indicates the direction of travel in respect of CCPC powers.

Penalties

The Act now empowers the CCPC to issue civil administrative fines for breaches of competition law, a change that is amongst the Act's most notable. Allowing the imposition of fines of up to €10 million or 10% of an undertaking's worldwide turnover provides the CCPC with much needed flexibility and autonomy in enforcing competition law, particularly in relation to behaviours that may not attract criminal sanctions, yet still constitute infringements of competition law. It also removes the previous reliance of the competent authority on the DPP to bring criminal proceedings, sidestepping the backlog that has built up in that office and allowing for dynamic and robust competition enforcement. However, this autonomy is not unlimited, as any civil fine imposed requires prior High Court approval, a crucial safeguard in light of the Constitutional fallout to the *Zalewski* judgment.

On a separate yet related note, the Act considerably increases the fines that may be imposed by the Courts in criminal proceedings on the back of competition law infringements. From a previous maximum fine of €5 million or 10% of annual turnover, the Act now sets out a maximum fine of €50 million or 20% of an undertaking's turnover in the preceding financial year. The magnitude of this increase is more than a mere reflection of inflationary trends over a 20 year period, but instead signals a willingness by the legislature to crack down on serious competition law infringements.

Investigation

The Act introduces a number of reforms giving additional investigative mechanisms to the CCPC. New surveillance options are available to the CCPC, subject to judicial authorisation, that will allow it to monitor and record suspected participants in hardcore cartels. The previous statutory time limit of 6 years for initiating legal proceedings has been removed, which will greatly aid the CCPC in investigating and prosecuting competition law infringements, especially ones that cover a broad time frame.

Directly reflecting the provisions of ECN+, the Act also introduces a graduated leniency programme, allowing the CCPC to grant immunity from, as well as a reduction of, any administrative financial sanctions to an undertaking that provides evidence of an infringement. If an undertaking fails to qualify for full immunity, leniency is available to reduce a financial sanction. A number of conditions must be fulfilled to qualify for leniency, including that the evidence offered provides "*significant added value*" to the evidence already in the authority's possession. This programme should give the CCPC additional leverage in the investigation process. The CCPC has published various new guidance documents on its website, including on the interaction between the cartel immunity programme ("*CIP*") and the administrative leniency policy ("**ALP**") to provide undertakings with guidance on how the CCPC will deal with situations when applications are made to it under both the CIP and the ALP.

Enforcement Procedures

In addition to the enhanced penalties for infringement, the Act details new procedures for enforcement. Following an investigation and prior to a fine being imposed, the CCPC may issue a Statement of Objections (an "**SO**") to outline its initial views of the alleged breach and provide an opportunity to the undertaking to submit a written response. The CCPC may choose to continue or close the investigation on the foot of the SO, but the process also provides the opportunity to agree legally binding commitments with the undertaking(s) in question, or to refer the matter to an adjudication officer ("**AO**").

The position of an AO is another innovation of the Act. The primary purpose of this role is to seek to come to a conclusion, on the balance of probabilities, whether or not there has been a breach of competition law. In coming to this conclusion, AOs can arrange for further submissions or hearings and are empowered with the same privileges, powers and rights of a High Court judge in civil proceedings. This new process is inherently adversarial and is likely to lead to more extensive use of legal resources.

Among the most important powers available to an AO is the imposition of periodic penalty payments. During investigations, an AO may order these payments to compel an undertaking to comply with an authorised search, to provide complete and correct information or to attend an interview or hearing. These payments shall not exceed 5% of the average daily worldwide total turnover of the relevant undertaking in the preceding financial year. These payments that can be levied during the course of an investigation speaks to the comprehensive manner in which enforcement has been enhanced.

Conclusion

Assessing the changes brought about by the Act it can be argued that a new era of competition law enforcement is upon us. This is particularly the case in light of the recent scrutiny of transactions by the CCPC, with a marked increase in Phase 2 mergers and the blocking of Uniphar's acquisition of NaviCorp last year – the first transaction to be blocked by the CCPC. The commencement of these provisions and the exercise of these powers could result in a flurry of competition law activity over the coming months and years. Considering the changes outlined above, increased vigilance by market actors is wise, as well as an abundance of caution when deciding whether to notify a transaction to the CCPC.

For further information and guidance on the impact of the Competition (Amendment) Act 2022, please contact the Joanne Finn, Partner or Elaine Davis, Senior Associate – Barrister in the EU, Competition and Regulated Markets team at DAC Beachcroft Dublin.

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ROMANIA

Legal & Tax

Substituting one gap (in fundamental rights) for another (in enforcement)? article 22 EUMR saga and the position of the Romanian Competition Council within it

by **Anca Diaconu** and **Rares Farcas**

Background

By now, the facts of *Illumina/Grail* (and inevitably EU Commission's new practice with respect to referrals based on article 22 EUMR) are well known in competition law circles. Suffice it to restate here that the case concerned a transaction where the Target had no turnover in the EU and which, by way of consequence, did not fulfil national or EUMR notification thresholds.

Even so, the Commission accepted a referral request under article 22 EUMR (also on account that Grail's importance for competition was not reflected in its turnover) and assessed the merger - which was subsequently prohibited. This marked a watershed in Commission's practice. The application against Commission's decision was rejected by the General Court and an appeal is pending.

Concerns

This did not emerge in a vacuum – as the world evolves, competition authorities also feel compelled to do so in order to adapt the enforcement to the new economic/ social realities. And considering that (EU) legislative amendment is often fraught with hurdles, regulators have turned to more inventive fixes to the novel problems. The examples are manyfold, from revisiting the Continental Can caselaw to updating relevant guidelines/ guidance. Thus, the Commission's new approach sits within the constellation of instruments to fill regulatory gaps.

While this may constitute a legitimate objective, the new approach has sparked intense debates as to its legality, with stakeholders and commentators raising concerns pertaining to the principle of legal certainty, rights of defense, subsidiarity, proportionality, also claiming the erosion of the "one-stop-shop" principle.

National responses

Against this backdrop, questions arise as to the manner in which national competition authorities in general (and the Romanian Competition Council in particular) would position themselves should the CJUE decide to uphold Commission's new practice. After all, as the Commission itself states, it is up to the competent authorities of a Member State to decide whether they wish to make the request. Will they accept the invitation launched by the Commission or will they adhere to the more conservative approach (no referral absent competence to review under national law) – and if so, would they do it in a binding and transparent manner?

Whilst certain competition authorities have already taken the view that they can only refer transactions that are notifiable under their national law to begin with, the practice following Illumina/Grail, albeit scarce, seems to indicate that some others (including the Romanian Competition Council) might be willing to go along with the Commission and endorse its new practice.

Several aspects are indicative in this regard:

- In *Illumina/Grail*, not only did five competition authorities (Belgian, Greek, Icelandic, Dutch and Norwegian) request to join the referral request initially submitted by the French Competition Authority (despite court challenges by Illumina in France and the Netherlands), but several others were involved in discussions leading to the shift in practice (though certain jurisdictions reportedly opposed it).

As such, before reaching the preliminary conclusion that the concentration could be the subject of a referral, the Commission had exchanges with the German, Austrian, Slovenian and Swedish competition authorities, in order to clarify their potential competence to examine that concentration.

- In *Qualcomm/Autotalks*, no less than 15 EU Member States (including Romania) submitted requests pursuant to article 22 EUMR, despite the proposed acquisition (i) not reaching the notification thresholds set out in the EUMR, and (ii) not being notifiable in any Member State; and
- Most recently, in *EEX/Nasdaq Power* the Commission has accepted the requests submitted by three EU Member States and one EFTA Member State under the same conditions.

Conclusion

Stakeholders and enforcers alike will undoubtedly keep a close eye for the CJEU's judgment. Should the Court fail to stave off concerns (primarily that the referral mechanism as understood and applied since *Illumina/Grail* has the potential to become a monument of legal uncertainty), it should be up for the Commission to (i) act with restraint in asserting jurisdiction and (ii) flesh out the exceptional conditions under which it will act – as the current wording of the guidance has been criticized as insufficient for legal certainty purposes.

The responsibility and related risks are even higher considering that NCAs (including the Romanian Competition Council) have appeared willing to hop on the train of referrals. While the trend is clear, competition authorities and the CJEU should not sacrifice paramount principles in the pursuit of ever stronger enforcement of competition rules.

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SERBIA

Merger Control: A View from Serbia

by **Dragan Gajin**

To those engaged in international transactions, Serbia is well known as a merger control jurisdiction. And this is not because Serbian companies are that active in cross-border deals. Rather, it is due to the country's merger filing thresholds, which can be triggered even when a concentration has no connection with Serbia.

Serbian merger filing thresholds: Target's local presence not required

The main reason for the wide net of the Serbian merger control regime is the way the merger filing thresholds are set in the Serbian Competition Act. Specifically, to trigger the filing obligation in Serbia, it is sufficient that the combined global turnover of the parties in the last year exceeded EUR 100 million and that at least one party to the transaction had a Serbian turnover of more than EUR 10 million in the same period. Now, let's take a look at this threshold more closely.

For the first prong of the test to be exceeded, the parties to the transaction must generate more than EUR 100 million on the world market. While this amount is by no means negligible, it is also easily reached by any multinational company, as well as by a major company in any bigger market.

As for the second prong, it is exceeded whenever at least one party to the transaction has a Serbian turnover of EUR 10 million. This is important – it can be any party to the transaction that exceeds the threshold, i.e., the filing obligation can be triggered by the acquirer's turnover alone. The target does not have to have any turnover in Serbia – or anywhere else, for that matter.

View of the Serbian competition authority: If the thresholds are exceeded, you have to file

With such low statutory filing thresholds, one may wonder whether the Serbian competition authority has developed any doctrine which would give the thresholds a more reasonable reading. And the answer is – no.

According to the standpoint of the Serbian competition authority, if a concentration exceeds the turnover thresholds laid down in the Competition Act, it triggers the merger filing obligation – even if the target is not at all present on the Serbian market. If the target is not present in Serbia, that just means it will be easier for such transaction to satisfy the conditions for clearance, the authority reckons.

As a result of such approach, there has been a proliferation of merger filings in Serbia – each year, around 150 transactions are filed to the Serbian competition authority. Out of that number, around a half are transactions in which the target did not have any local presence in Serbia. That is a stunning number – it means at least a half of the enforcement activities of the Serbian competition authority on the merger control front should not have taken place at all, as the transaction cannot harm competition in Serbia.

Additional pain and one upside: Merger filing fee and clearance time

It is not only that the Serbian merger control net is too wide, but it also comes with a hefty price – if you file a transaction in Serbia, you have to pay a filing fee in the amount of EUR 25,000. So, when acquiring a target that is not present in Serbia, not only that you must file a transaction with no local nexus, but you also need to finance the local competition authority in the process.

And, finally, one bright spot – the Serbian competition authority is very efficient and deals with no-issue transactions fast. On average, you can expect to have your transaction cleared within a month of the filing date. Which is much more expedient than some other competition authorities in the region and helps a lot when planning the closing date.

Current filing thresholds are here to stay – so what can you do?

There is no indication that the current filing thresholds in Serbia are about to change – there is no legislative reform on the horizon and the competition authority is not showing any sign it will change its formalistic approach to what is written in the kaw. So, as someone whose transaction triggers the Serbian merger filing obligation, what can you do?

Of course, the first option is to file, as many do. As mentioned above, each year there are around 150 merger filings in Serbia. This is the no-risk option.

Or, you may decide not to file, and take a risk. Which is probably what at least some companies are doing, or the number of filings would be much higher than 150 annually. At the end of the day, it is for each company to decide how strictly it will follow the rules – and bear the consequences of its decisions.

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SPAIN

The most critical practical difficulties of merger control in Spain

MLAB Abogados

by **Rafael Allendesalazar** and **Beatriz Sánchez-Ortiz**

The Spanish merger control regime is set out in the Spanish Competition Act (Law 15/2007, of 3 July 2007, on the Defence of Competition) and its implementing Regulation (Royal Decree 261/2008, of 22 February 2008, approving the Competition Implementing Regulation). Article 8(1) of the Spanish Competition Act provides for two non-cumulative thresholds. Concentrations that meet either of the following thresholds must be notified to the Spanish competition authority (the CNMC) prior to their implementation: (i) **market share threshold**: that, as a result of the transaction, 30% or more of the relevant product market in Spain, or a relevant geographical market within Spain, is acquired or increased; however, if the turnover of the target in the previous accounting year does not exceed €10 million, that market share threshold is increased to 50%; and (ii) **turnover in Spain**: that the aggregated turnover in Spain of the parties to the concentration exceeds €240 million in the previous accounting year, if at least two of the parties to the concentration each have an individual turnover in Spain exceeding €60 million.

Although the market share threshold has been criticised for the uncertainty that it creates, it is a better proxy to screen cases that could eventually pose competition concerns than the turnover threshold. At EU level, it also plays a prominent role, for instance when deciding which categories of cases can benefit from simplified treatment. The market share threshold is responsible for approximately 70% of the transactions that are notified in Spain. In this respect, **potential acquirers face not only the difficulty of determining market share, but also the fact that the CNMC tends to define relevant markets narrowly.**

This trend on the part of the competition authority results in the need to notify minor transactions if they affect relevant markets that are defined very narrowly, either from a product perspective or geographically. It has also resulted in a significant **increase in the number of gun-jumping cases** over the last few years in Spain. In three decisions of June 2022, the CNMC fined three funeral parlours for failing to notify the acquisitions of three companies operating in the funeral sector. The CNMC noted that the transactions exceeded the market share threshold as the geographic market for funeral services was circumscribed to each municipality where funeral homes were acquired. Similarly, in a decision of December 2022 concerning the telecoms sector, the CNMC fined Xfera, part of the MásMóvil group, for failing to notify the acquisition of Alma Telecom. The CNMC considered that operators have a monopoly in the separate relevant product market for fixed voice termination services concerning phone numbers assigned to that operator. This implies, in practice, that any acquisition of a telecoms operator with assigned numbering triggers the merger control fling obligation. These decisions underline the importance for potential acquirers to be extremely diligent when assessing whether a transaction is notifiable in Spain, especially in certain areas or sectors, such as the funeral and telecoms sectors, where the CNMC has defined the markets particularly narrowly. This uncertainty can be mitigated as the Spanish Competition Act provides that **parties to a transaction may consult the CNMC on whether (i) it is to be considered a concentration, or (ii) it meets the notification thresholds.** The duration of this consultation procedure can depend on the complexity of the case, and on whether the parties require a formal response or not.

On the other hand, the publication by the European Commission (EC) of its *Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation* (EC's Guidance) in March 2021 and its landmark decision in Illumina/Grail (confirmed by the General Court on 13 July 2022) opened the door for Member States to refer concentrations to the EC even if they do not meet the national filing thresholds. **Until recently, it was considered that the CNMC could not refer to the EC concentrations that did not meet either of the two national thresholds** as (i) Article 9(1) of the Spanish Competition Act provided that the CNMC had exclusive jurisdiction to review concentrations that meet the notification thresholds, which meant a *contrario sensu* that the CNMC did not have jurisdiction to review concentrations that fall below the notification thresholds; and (ii) Article 57(1)(d), which grants the CNMC the power to refer a merger to the EC based on Article 22 EUMR, specified that it could do so after the concentration had been notified. In 2021 and 2022, the Spanish competition authority referred to the EC 10 and 3 cases respectively, as it considered that the potential transactions affected trade between Member States and competition in one Member State. All these transactions had been notified in Spain because they met the 30% market share threshold.

In August 2023, however, **the CNMC**, together with the national competition authorities (NCAs) of Belgium, France, Italy, the Netherlands, Poland and Sweden, **submitted a referral request to the EC pursuant to Article 22 EUMR to examine the proposed acquisition of Autotalks by Qualcomm.** This transaction did not reach the notification thresholds set out in the EUMR and had not been notified in any Member State, but it was considered by these NCAs as likely to affect trade within the single market and to significantly affect competition within the territory of the Member States making the request. The CNMC seems now to consider, following the EC's Guidance on Article 22 EUMR, and particularly after the judgment of the General Court in Case T-227/21 *Illumina v Commission*, that Article 22 EUMR provides sufficient ground to refer transactions that do not reach the thresholds of the Spanish Competition Act. However, **it remains to be seen whether the Spanish courts will accept this inter-**

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pretation, which is contrary to the wording of the Spanish Competition Act.

As to the duration of the procedure, practitioners complain that the pre-notification process sometimes takes too long, although once notified, **most of transactions are authorised within a month in Phase I**, as less than 5% of all transactions notified go to Phase II.

Furthermore, **it is not unusual for parties to a transaction to face certain delays in the Spanish merger procedure.** The referral of Article 22 EUMR, for instance, entails a significant delay as it stops the clock –*i.e.* the national deadlines are suspended– until the jurisdiction that will examine the transaction is decided. Moreover, **the CNMC can stop the clock if it requests supplementary information from the parties or conducts a market test to ascertain the opinion of competitors and customers affected by the transaction.** In practice, these requests for information can cause considerable delays in the procedures, which end up being solved in periods longer than those established by law.

In this respect, it is worth noting that Royal Decree-Law 5/2023 has recently introduced some **changes to the Spanish Competition Act in relation to the time limits for merger clearance:** (i) the **time limit for Phase I in the case of Short Form CO transactions has been reduced from one month to 15 days**, provided that the transaction has been pre-notified. (ii) In contrast, the maximum time limit for **Phase II merger analysis has been increased from two to three months.** (iii) Finally, the three-month period previously available to the CNMC to solve formal **prior consultations** to determine whether a merger meets any of the notification thresholds has been **reduced from three months to one month.** Thus, while changes (i) and (iii) have been welcomed by companies insofar as they make transactions more expeditious, change (ii) represents a significant extension of the time limit which, together with the CNMC's power to suspend the deadline in certain circumstances, may lead to important delays in the approval and subsequent implementation of transactions that raise competition concerns.

A particularity –which may turn into a difficulty– of **the Spanish merger control** regime is that it **provides for the possibility not only for the merging parties to offer commitments** where a transaction raises competition concerns, **but also for the CNMC itself to unilaterally impose conditions to the transaction** (Article 59(1) of the Spanish Competition Act). This implies that the CNMC may impose conditions that have not been previously offered by the parties to the transaction, with the consequent problem that this may pose if it sets conditions that are difficult in practice to fulfil. The imposition of these conditions is envisaged, in principle, for those cases where the parties do not offer commitments or where the commitments offered are deemed inadequate or insufficient to solve the competition concerns identified by the CNMC.

Until 2021, the CNMC had made very limited use of this possibility, showing a clear preference for the consensual alternative. However, **in July and December 2021, the competition authority subjected the authorisation of two concentrations concerning the markets for funeral services and for daily press distribution to the fulfilment of certain conditions.** Parties to a transaction must therefore bear in mind that the CNMC may unilaterally impose conditions that have not been previously offered by them. **To reduce the risk of the CNMC imposing conditions and, at the same time, to avoid delays in the merger procedure, it is advisable to make use of the pre-notification phase provided for in Article 55(2) of the Spanish Competition Act.** In doing so, companies have the opportunity to present their transaction by submitting a draft notification form and to seek the CNMC's views. In contrast to the formal notification, pre-notification is not subject to any deadline.

Another particularity of the Spanish merger control regime is the fact that, **where the CNMC prohibits a concentration or authorises it subject to commitments or conditions** –but not when it is unconditionally cleared–, **the Ministry of Economy may refer, within 15 days from receipt of the CNMC's decision, the transaction to the Council of Ministers**, who then has one month to decide whether to modify the CNMC's decision and authorise the transaction, with or without conditions. Thus, such decisions by the CNMC are not final at least until the initial 15-days delay has expired. However, in practice this power of the Council of Ministers has only been exercised once in 2012, in a case where the conditions imposed by the CNMC were modified in favour of the parties in a concentration in the audiovisual sector.

The decision of the CNMC may be appealed to the Hight Court. If the Council of Ministers decides to intervene, its decision can only be appealed before the Supreme Court.

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TURKEY

Paksoy

The Dispute over Non-Full-Function Joint Ventures under the Turkish Merger Control: The 2022 Juki Decision and its Implications

by **Togan Turan**

Introduction

In the realm of competition law, defining the boundaries and intricacies of joint ventures remains a significant challenge for regulators worldwide. More particularly, the distinction between full-function and non-full-function joint ventures has been a subject of extensive debate, as it carries important implications for businesses, especially from a merger control perspective.

A pivotal decision has recently elevated the debate in terms of non-function joint ventures and their notification obligations to competition authorities. As the Turkish Competition Authority ("**TCA**" or "**Authority**") rendered its landmark Juki decision[1], numerous observers promptly identified the divergences with the European Court of Justice's Austria Asphalt decision[2]. This article aims to delve deep into the intricate details of both verdicts, aiming to provide a comprehensive understanding of how the TCA's interpretation has potentially deviated from the established European approach, introducing a unique path for future considerations in Türkiye.

The Turkish Competition Board's Approach to Full Functionality

Before delving into the specifics of the Juki decision, it is essential to first understand the Turkish Competition Board's (the "**Board**") stance on full functionality, with a closer examination of the prevailing regulatory framework.

In accordance with the Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control (the "**Guidelines**"), the Board employs a comprehensive and multifaceted approach to assess the full functionality of joint ventures. The key criteria, explained in the Guidelines, revolve around whether the joint venture operates on a market and performs the functions typically associated with an autonomous business entity. Specifically, the Board analyses the following characteristics in a fully-functional joint venture; (i) sufficient resources to operate independently, (ii) making activities beyond one specific function for the parents, (iii) independence from the parent companies in sale and purchase activities, (iv) purchases from the parent companies, (v) operation on a lasting basis. Accordingly, factors such as joint venture's activities beyond a specific project, its access to resources including finance, staff, and assets, and its duration are mainly analysed to decide on its full-functionality. If a joint venture is not intended to operate indefinitely on the market, it may then signal its non-full-functionality. Furthermore, dependencies, such as significant purchase or sales agreements with parent companies, could also indicate a lack of full functionality. By integrating these criteria, the Board ensures a comprehensive analysis, taking into consideration the diverse characteristics of modern business partnerships.

The 2022 Juki Decision by the Turkish Competition Board

The Board's Juki decision in 2022 has complicated this landscape on the joint ventures. By explicitly stating that non-full-function joint ventures could, under specific circumstances, be subject to the Board's approval, it has signalled a more strict approach.

The case centred on the proposed joint venture between Juki Corporation ("**Juki**") and Mitsubishi Electric Corporation ("**Melco**") involving Juki TechnoSolutlon Corporation ("**Juki Techno**"). In the transaction, Melco -the sole controller of the target business before the transaction- remained as a controlling parent post-transaction and Juki acquired joint control over Juki Techno. Prior to the transaction, Melco was active in the lockstitch sewing machines market but it was stated that post transaction it was planned that Melco would exit the lockstitch sewing machines market post-transaction and with Juki Techno becoming the exclusive supplier of products to Juki. The Board considered this as a structural change in the market and concluded that the transaction was subject to clearance in Türkiye without applying the full functionality criterion to the joint venture.

This decision demonstrates the most recent approach on the matter by establishing that as long as a structural change as a result of the transaction is observed in the market, the Board would not seek the full-functionality criterion in case of the establishment of "a joint venture over an existing undertaking". Historically, the primary focus was on full-function joint ventures due to their operational independence and significant market presence. However, the Juki decision indicates a recognition that even non-full-function joint ventures, which might not be independent entities in their entirety, may be still subject to clearance from the Board.

A Deeper Look at the Austria Asphalt Decision

In order to understand the EU merger control's approach on this matter, it is crucial to examine the Austria Asphalt decision. Prior to the Court of Justice of the European Union ("**ECJ**") decision, there was somewhat legal uncertainty regarding whether joint ventures were only notifiable if they satisfy the full-functionality criteria.

In the case of Austria Asphalt v Bundeskartellanwalt, the ECJ ruled that the creation of a joint venture using a company previously solely controlled by one parent did not fall under EU merger control, unless the joint venture operates as an independent entity on the market, termed as "full-function". A "full-function" joint venture was defined as a company that can operate independently on the market, having sufficient assets, personnel, and financial resources to perform its business without strong dependence on its parent companies. Joint ventures which merely handle specific roles of a parent company, such as production or distribution, were not considered to be full-function.

In this transaction, an asphalt plant in Austria that belonged exclusively

1 The Board's decision numbered 22-04/57-26 and dated 19.01.2022.

2 Case C-248/16 - Austria Asphalt

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to one construction company and was intended to be turned into a joint venture between two construction firms. However, this plant did not meet the full-functionality criteria, as its primary business was supplying to its parent company, without any significant market presence elsewhere. The ECJ clarified that EU Merger Regulation (the "**EUMR**") only applies when the joint venture is full-function, as such when the joint venture can cause genuine structural change in the market. Consequently, the non- full-functional joint ventures would not be subject to merger control clearance.

Implications of the Juki Decision on Turkish Competition Law

The Juki decision, when viewed together with the Austria Asphalt decision, presents a shift in Turkish merger control regime. It demonstrates that the Board would not seek the full-functionality criterion for the notification requirement in case of an establishment of "a joint venture over an existing undertaking", as long as it leads to a structural change in the market. Practitioners have concluded that with the Juki decision, full-functionality criterion has been narrowed down to the transactions concerning only the establishment of green-field joint ventures, rather than the existing joint ventures.

In conclusion, it can be said that the Juko decision has cast a new light on the alignment between the Board and the ECJ. Contrary to the established precedent set by the ECJ, the Board's decision has introduced a level of uncertainty regarding the notification obligations for non-full function joint ventures. Historically, the Board has been observed to closely align its evaluations with the perspectives and rulings of European Commission. This deviation raises questions about potential shifts in regulatory interpretations and their implications for future joint ventures in Türkiye as well as the number of notified joint ventures that were not initially designed to be full-functional.

TURKEY

Paksoy

The Ambiguity of the Novel Technology Undertaking Concept

by **Togan Turan**

On 4 March 2022, the Turkish Competition Authority ("**TCA**" or "**Authority**") amended the main legislation of the Turkish merger control regime *i.e.*, Communiqué No. 2010/4 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board ("**Communiqué No. 2010/4**") with Communiqué No. 2022/2 ("**Amendment Communiqué**") and increased the turnover thresholds regulated under Communiqué No. 2010/4 sought for a mandatory merger control filing in Turkey. The TCA also introduced a brand new concept with the Amendment Communiqué and brought exceptional rules for the notifiability analysis for transactions involving acquisitions of so-called "*technology undertakings*".

The definition of technology undertakings in the Amendment Communiqué is quite broad and includes undertakings and assets active in the following sectors: (i) digital platforms, (ii) software and gaming software, (iii) financial technologies, (iv) biotechnology, (v) pharmacology, (vi) agrochemicals and (vii) health technologies. If the target of a transaction has activities which may be included in the said fields, and is also active or have R&D activities in the Turkish geographic market, or provides services to customers in Turkey, then the target is deemed as a technology undertaking, and the notifiability analysis of the relevant transaction is conducted accordingly (i.e. the TRY 250 million turnover threshold sought for the target becomes inapplicable).

The technology undertaking was essentially introduced to detect killer acquisitions, however, the definition is too extensive and that it fails to serve the objective of the amendment. Indeed, the legislation covers a total of 8 industries and will capture a significant number of companies. Due to the increasing use of technology in almost all aspects of modern business, most companies predictably become technology-oriented in the course of their business and fall within the concept regardless of them falling with the scope of killer acquisitions.

Understanding Technology Undertakings: Case Law

The ambiguity on this matter is further triggered from the lack of any secondary legislation or guidelines that regulate the details of the this exception. Therefore, it is fairly expected for the Turkish Competition Board ("**TCB**") to set the practice by way of its case law. While the TCB's published reasoned decisions on the matter are still quite limited, they provide helpful insight to the disputable topic on what kinds of activities are deemed to fall under the technology undertaking definition.

- In its first ever decision involving a technology undertaking[1], the TCB found that the targets' activities in digital workspace solutions and infrastructure and analytics software services are caught by the technol-

1 *Citrix&TIBO/Elliot/Vista* decision dated 12.05.2022 and numbered 22-21/344-149.

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ogy undertaking definition. In fact, companies operating in the software sector are the ones, which were considered as a technology undertaking by the Board the most[2]. For example in *Mandiant/Google*[3], the TCB rendered that provision of corporate cybersecurity consultancy, would fall under the technology undertaking definition due to its software related activities. Similarly, in *EBRD/Invent*[4], the Target was considered as a technology undertaking as its business activities globally and in the Turkish market were focused on providing customers with cloud-based software and inventory and price optimization solutions. Interestingly, in *Cinven/IFGL*[5], the TCB considered activities of provision of savings and investment products through life insurance packages to individual investors through a local broker, within the scope of the technology undertaking definition. The decision is especially noteworthy given that (i) although insurance sector is not necessarily one of the exempted sectors, the target was deemed as a technology undertaking as it provides services to its customers with digital access via digital platforms, and (ii) although the target's activities in the relevant sectors are quite limited — there are approximately 230 registered users in Turkey who have access to and use these digital platforms, the TCB did not recognized this as a determining factor in its decision-making process. More recently, in *Elon Musk/Twitter*[6], Twitter, which was defined as a digital platform within the framework of its activities in the fields of social networking, online advertising and provision of data licensing services, was considered as a technology undertaking. This case is particularly interesting because the TCB decided to impose an administrative fine on Elon Musk on the basis that the acquisition was not filed to the Authority, even though Twitter was a technology undertaking and the acquisition was indeed subject to the Board's approval.

- Pharmacology is following the software sector when it comes to technology undertakings[7]. Indeed, in *Astorg/Corden*[8], the TCB assessed that the target, which produces APIs (Active Pharmaceutical Ingredients) and ready to-use drugs on behalf of pharmaceutical companies, would be a technology undertaking due its activities in the field of pharmacology. More recently, in Werfen/IVD[9], the Board considered the Target as a technology undertaking operating in the pharmacology and/or health technologies sectors, given that it provided (i) serology-based reagents, equipment and molecular products to ensure patient-donor compatibility and provide accurate pre-transfusion test results in an efficient and effective manner, and (ii) products used to determine the most appropriate routes for organ or bone marrow transplantation and to monitor possible organ/tissue incompatibility after transplantation.

- Companies working in the financial technology sector is also a notable sector in terms of technology undertakings[10]. Remarkably, *Berkshire/Alleghany*[11], despite the fact that Alleghany's activities in the financial technology sector take place outside of Turkey and its activities in Turkey are irrelevant to the regulated sectors in the Amendment Communiqué, the TCB concluded that Alleghany should be deemed as a technology undertaking as its activities outside of Turkey are caught by the technology undertaking definition and it fulfils the criteria of having a presence in the Turkish geographic market. More recently, in *Turan Teknoloji/Birlesik Ödeme*[12], the Board stated that since the target was developing a digital finance application for international money transfers, it operated in the field of financial technologies and therefore qualified as a technology undertaking.

- It is also noteworthy that in *Affidevia/Groupe Bruxelles*[13], the target's diagnostic imaging activities were considered to be caught by the technology undertaking definition in terms of biotechnology. This yet appears to be the Board's only decision involving a technology undertaking working in the biotechnology sector.

Conclusion

All in all, all these reasoned decisions shed some light on the newly introduced concept. However, there is still certain ambiguity surrounding the application of the technology undertaking exception, which alarms the need for more guidance from the TCA in order to minimize the legal uncertainties and avoid potential gun-jumping issues.

2 *Providence/Airties* decision dated 02.06.2022 and numbered 22-25/403-167; *Oplog/Espro* decision dated 08.08.2022 and numbered 22-35/543-219; *Klaravik/Castic* decision dated 08.09.2022 and numbered 22-41/582-242; *Softline/Macronet* decision dated 03.11.2022 and numbered 22-50/733-305; *Open Text/Micro Focus* decision dated 10.11.2022 and numbered 22-51/745-309; *Iron Mountain/CBK* dated 23.11.2022 and numbered 22-52/788-324; *Mitsubishi/HERE* decision dated 01.12.2022 and numbered 22-53/796-326; *Playtika/ACE* decision dated 08.12.2022 and numbered 22-54/823-336; *Cascade/Nitro* decision dated 05.01.2023 and numbered 23-01/22-9; *TCI Kabin/Cornea* dated 12.01.2023 and numbered 23-03/35-15; *Altor&Marlin/Meltwater* dated 30.03.2023 and numbered 23-16/276-95.

3 *Mandiant/Google* decision dated 09.06.2022 and numbered 22-26/425-174.

4 *EBRD/Invent* decision dated 10.11.2022 and numbered 22-51/744-308.

5 *Cinven/IFGL* decision dated 18.05.2022 and numbered 22-23/372-157.

6 *Elon Musk/Twitter* decision dated 02.03.2023 and numbered 23-12/197-66.

7 *CD&R/TPG/Covetrus* decision dated 07.07.2022 and numbered 22-32/512-209; AmerisourceBergen/Pharmalex decision dated 23.11.2022 and numbered 22-52/775-319.

8 *Astorg/Corden* decision dated 02.06.2022 and numbered 22-25/398-164.

9 *Werfen/IVD* decision dated 22.11.2022 and numbered 22-56/874-360.

10 *Re-Pie/Hızlıpara* decision dated 08.12.2022 and numbered 22-54/842-347; Hedef/Vepara decision dated 01.12.2022 and numbered 22-53/816-335.

11 *Berkshire/Alleghany* decision dated 15.09.2022 and numbered 22-42/625-261.

12 *Turan Teknoloji/Birlesik Ödeme* dated 29.12.2022 and numbered 22-57/900-370.

13 *Affidevia/Groupe Bruxelles* decision dated 16.06.2022 and numbered 22-27/431-176.

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ASTERS

Changes to Merger Control Regime in Ukraine

by **Igor Svechkar** and **Pavlo Verbolyuk**

Ukraine has a merger control regime in place for more than two decades. It has substantially evolved over time, with the most important changes adopted in 2016, when the new filing thresholds were introduced. While these changes have substantially decreased the number of deals requiring filing in Ukraine and fixed some other issues, there remained a room for further improvement. In August 2023, the Ukrainian Parliament has adopted the most extensive set of amendments to the competition law since 2016 (the Reform). They will come into force on 1 January 2024 and should further modify the merger control rules. The most important changes are outlined below.

Filing Thresholds

Currently, the concentration requires clearance if either of the following thresholds is met in the financial year preceding the closing:

• Threshold 1. The combined worldwide assets or turnover of the parties exceeds EUR 30 mil and the Ukrainian assets or turnover of each of at least two parties exceeds EUR 4 mil;

• Threshold 2. The Ukrainian assets or turnover of the target or of at least one of the founders of a joint venture exceeds EUR 8 mil and worldwide turnover of at least one other party exceeds EUR 150 mil.

While Threshold 1 remains unchanged, the Reform remodels Threshold 2, pursuant to which a transaction will require clearance if "*the Ukrainian assets or turnover of one party exceeds EUR 8 mil and worldwide turnover of at least one other party exceeds EUR 150 mil*". I.e., the local threshold of EUR 8m should not necessarily be exceeded by the target but may instead be exceeded by any party to the transaction (e.g., the purchaser). As such, while under the current rules the transactions where the local threshold of EUR 8 mil is met by the purchaser and the global threshold of EUR 150 mil is met by the target are not subject to clearance, they will become notifiable starting from 2024.

Another important change brough by the Reform concerns accounting of the assets and turnover of the seller that ceases control over the target post transaction. Under the current rules, the figures of such seller need to be attributed to the ones of the target for the purposes of threshold calculation. The Reform partially resolves this issue and says that assets and turnover of the seller do not need to be counted towards the target, provided that the target does not have any assets in Ukraine, is not active in Ukraine and has not been during the two preceding financial years.

Notifiability of Joint Ventures

Under the current law, establishment of the joint venture may require merger clearance if such joint venture will independently pursue business activity on a lasting basis and its establishment does not result in the coordination of competitive behavior either of its parents or of the new undertaking on the one hand, and its parents on the other. For a long time, this rule was interpreted quite broadly and almost all joint ventures were cleared as mergers.

In 2019, the AMC adopted a guideline, which, among others, said that only full-functional joint ventures should require merger clearance. Though, this guideline was recommendatory in nature, while the law, which has a higher legal force, still leaved some ambiguity in this issue.

The Reform is aimed to fix this, as it specifically clarifies in the law that only full-functional joint ventures should be cleared as mergers, while non-full-functional ones may still require clearance under a different (antitrust) procedure.

Notifiability of Minority Acquisitions

Currently, the acquisition of shares conferring 25% or more of votes in an undertaking presents a concentration and may require a merger clearance. As such, even acquisitions of non-controlling stakes may be technically notifiable.

The Reform allows saying that acquisitions of non-controlling stakes should not require clearance. Though, the relevant provisions are not perfectly clear and also allow an adverse interpretation, where minority acquisitions are still notifiable. This will need to be clarified by the authority in the future.

Changes to Procedure

Under the current law, as interpreted by the authority, the merger notification may be reviewed under simplified 25-day procedure if, among others, the market shares of the parties on all markets (i.e., even non-relevant ones) is below 15%. In other cases, the authority applies standard 45-day procedure.

According to the Reform, the simplified procedure applies if the market share on the relevant market is below 15% and on the vertically related ones is below 20%. This gives chance for more transactions to benefit from the simplified review.

Other Changes

Other notable changes include the following:

• the filing fee increases from approx. EUR 500 to approx. EUR 1,100 per notifiable event;

• the authority will be able to enforce the collection of fine for merger control (or other) violation, if such fine is not voluntary paid by the offender within two months;

• a new exemption for banks is introduced, whereby the acquisition by the bank of the shares/assets as a result of enforcement of the pledge (mortgage) does not qualify as a concentration if further resale of such shares/assets is made within a one-year period (extendable) and provided that the bank does not exercise voting rights attached to shares/conduct business with the assets in the meantime;

• the notion of assets (business), the acquisition of which qualifies as a concentration, is clarified and extended, now catching a wider range of tangible and intangible assets, including stocks and raw materials, debts, IP rights, etc.

The Reform presents a step forward for the local merger control regime, as it clarifies some critical issues from the past and aims to make the whole process akin to the one in EU. Though, Ukraine will likely remain in the list of usual filing jurisdictions for large global transactions.