

CEZ Bulgaria not for sale?

CEZ Bulgaria is not for sale. This seems to be the (hidden) conclusion when reading the decision of the Bulgarian competition authority (the "CPC") prohibiting the acquisition of CEZ Group's entire assets in Bulgaria by Eurohold Bulgaria AD. The regulator's prohibition decision came after a fast-track in-depth proceeding (phase II), which ended only 14 days after it was formally opened.

This is the second unsuccessful attempt in a little over a year to sell the Bulgarian assets of the Czech utility CEZ. Previously, on 19 July 2018, the CPC prohibited the sale of CEZ to Bulgarian company Inercom, which maintains three solar power stations in the country. The family-owned business recorded total turnover of BGN 50m, or EUR 25m, for 2017 and had only negligent horizontal overlaps with the activities of CEZ. Still, within the phase I proceeding, the CPC concluded that the concentration is of strategic importance for the country, with potential effects having a direct impact on national security: "The existence of significant vertical effects will lead to a significant advantage for the merging parties over their competitors, which would impede effective competition on the analysed markets." The controversial decision is riddled with flaws to its legal and economic argumentation. Moreover, it is questionable whether it was validly issued, since a prohibition decision is not among the types of decisions that the CPC can issue within the preliminary investigation phase (under Bulgarian competition law, prohibition decisions can be issued only after a phase II proceeding).

Another merger control proceeding for the acquisition of CEZ Group's assets in Bulgaria opened on 3 October 2019. This time the purchaser was Eurohold Bulgaria AD. Only seven days later, on 10 October, the CPC initiated in-depth proceedings (phase II). Fourteen days afterwards, the CPC prohibited the concentration due to its "conglomerate" effect and the significant combined resources of the acquirer's and the target's groups.

The second CPC prohibition decision leads to some interesting (if not alarming) conclusions about the merger control practice in Bulgaria:

Horizontal overlap is not necessarily needed to justify a prohibition decision

CEZ Group's holdings in Bulgaria currently include a power utility company, a power supplier, a licensed electricity trader, a solar park and a biomass-fired power plant. Eurohold Bulgaria and its subsidiaries, in turn, are active in insurance, leasing, car sales, asset management and investment services. In its legal analysis, the CPC confirmed that there are no horizontal overlaps on any market between the acquirer's and the target's group. Nevertheless, since the target's group consists of vertically integrated companies, this would potentially give an "additional advantage [to] the new combined group". Hence, "based on the entire analysis it can be concluded that taking into account the vertically integrated group of CEZ, the combination of the experience, the economic resources and the market positions of the concerned undertakings in the electricity and insurance sectors create prerequisites for the notified transaction to lead to the establishment or strengthening of the market position of the combined group. The presence of conglomerate effects would lead to significant advantages of the concerned undertakings to their competitors, which, in turn, would distort effective competition".

Terms are "instructive" = procedural steps are "instructive"?

Next, in its constant practice, the CPC has always stated that the terms under the Competition Protection Act (the "CPA") are instructive. In other words, if the law provides for certain terms in which the regulator must act, the CPC can deviate from this term, since it is only "instructive". While this is justifiable when the term is extended beyond the statutory term, which basically gives the CPC more time to assess a transaction, it comes as a surprise when due to the "instructive" character of the term some statutory procedural steps are skipped entirely.

In particular, under the CPA, within 30 days as of the opening of the in-depth proceeding (phase II), each "interested party may submit information or an opinion as to the effect of the concentration on the relevant market". Next, after the expiry of this 30-day term, if the CPC believes that the transaction may distort effective competition, it will adopt a ruling to submit the statement of objections to the parties. The parties then have 14 days to submit their observations and evidence.

Indeed, the CPA also states explicitly that the phase II proceeding is completed within up to four months and by issuing the prohibition decision within 14 days as of the formal opening of phase II, the CPC has complied with the law. Still, since some of the procedural steps have been skipped, it seems that the CPC's interpretation as regards the procedural steps under the law is that they are also "instructive" (i.e. not obligatory). This is surprising, since it seems obvious that the whole idea of in-depth, phase II proceedings is to collect various (and sufficient) evidence and opinions, which could serve as the basis for a reasoned decision.

As expected, the prohibition decision is already appealed by Eurohold Bulgaria before the Administrative court in Sofia (the previous prohibition decision is also currently appealed by Intercom).

The decision reminds us of the famous saying: Everything that happens once can never happen twice. But everything that happens twice will surely happen a third time. It remains to be seen whether the CPC would disprove it when another purchaser tries to purchase the Bulgarian assets of CEZ.