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STATE INTERVENTION IN MERGERS AND ACQUISITIONS

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INTRODUCTION

Mergers and acquisitions (M&A) of legal entities have a big impact not only on those entities but on the market as a whole and on its participants. The effects of M&A extend on the social and economic life of a country, thus becoming an issue of public and not only of private interest, where state intervention is highly desirable.

One of the aspects of state intervention is in the employment matters where the rights of employees of the merging entities are involved. The states provide for specific protection to the employees for maintaining their employment rights and being protected against termination of those rights. For example, guarantees are provided for ensuring that the merger of entities shall not be a ground for rescinding the employment contract unless there is reduction in the number of employees and/or of the staff positions.

While intervention in the mentioned field of legal relations can take different forms and be addressed to different aspects of social and economic life, the aim of this paper is quite narrow. It is meant to discuss the problems associated with the effects of M&As of private entities on the economic competition in states and the ways by which the states tackle those threats. Competition is considered to be the main factor contributing to the progress in the economy and business relations and in development of innovative technologies. Mergers and acquisitions have their impact on the competitive situation. Such impact can be both positive and negative. Day by day the processes of M&As become more and more intense and change the level of competition in different markets. As a result of M&As the market share of economic entities changes, new subjects arise which occupy the most part of the market (dominating entities), economic entities cause the division of other entities to reduce their share in the market. Thus, for the purpose of ensuring and protecting the natural competition, the state, using certain instruments, interferes with market relations.

In light of the noted significance of protection of economic competition for countries, the purpose of this paper is to answer to the following main question: How to reduce the negative impact of M&As on the economic competition in the Republic of Armenia?

For the purpose of answering to this question 2 main aspects shall be considered:

1) What are the possible damages caused by M&As on the economic development of a country and how such risk can be addressed? The discussion will be held from the perspective of both economic entities and the state.

2) What is the current status of merger control in the Republic of Armenia (RA)? Since the antitrust law in the Republic of Armenia is quite new and under construction, the main objective

shall be to identify the shortcomings and gaps and its practical implementation. The RA Law "On Protection of Economic Competition" and the relevant decisions of the RA State Commission for the Protection of Economic Competition will be in the spotlight. The effectiveness of the work of the Commission and its decisions is also questionable. However, the purpose of this work is not only to outline problems, but also to search for and to come up with recommendations for its improvement. Hence, analytical discussion, using the method of documentary analysis, will be held on the advantages and deficiencies in the regulation and practice trying to suggest possible solutions to the problems.

This research paper consists of an introduction, two chapters, a conclusion and a bibliography. This **Introduction** succinctly describes the background of states' intervention in mergers and acquisitions of economic entities and reveals the significance of this study. **Chapter 1** elaborates on the impact of mergers on the competitive environment in the markets and the paramount need for having comprehensive antitrust regulations in place in order to ensure the economic growth of a country. **Chapter 2** focuses on the current situation in the Republic of Armenia regarding the state intervention in M&As of economic entities. **Conclusion** highlights the main outcomes of the research and summarizes our recommendations for tackling the problems of antitrust regulation in the field of M&As.

CHAPTER 1

Definition of M&As and Competition.

Mergers and acquisitions generally occur when two or more independent legal entities unite. M&A is a common term that includes a number of different transactions. The European Union Merger Regulation (the EUMR)[1] uses the term "concentrations". Broadly, there is a concentration where two or more previously independent undertakings merge their businesses, where there is a change in control of an undertaking (sole or joint control of an undertaking being acquired by another undertaking or undertakings), or where a full-function joint venture is created.[2]

The motives for and advantages of M&As are numerous. The market for corporate control plays an important role in disciplining the management of companies and driving economic efficiency.[3] Besides, it provides an opportunity to sell the business and realize capital profits from it. A merger is also an escape mechanism when there is an inevitable risk of the liquidation of the company. Cross-border mergers play an essential role in the process of global economic integration and are positively associated with growth. In the modern market economy economic entities use the toolkit of mergers and acquisitions more and more often for their own development and economic growth. Studies show that the process of M&As is carried on in all industries without exceptions.

On the other hand mergers may usually have a damaging effect on competition. Most commonly competition can be characterized as a "conflict" between the participants of the free market for the best conditions for production and sale of goods. Competition is the economic law of the market economy. In his 1776 The Wealth of Nations, Adam Smith described it as the exercise of allocating productive resources to their most highly valued uses and encouraging efficiency.[4] Competition is characterized as the efforts of two or more persons acting independently of one another to attract third party customers by offering more favorable conditions for purchasing goods.[5]

Damaging Effect of M&As on Competition.

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[1] Reg. 139|2004 [2004] OJ L24/1 (the EUMR)
[2] EUMR Art. 3
[3] R.S. Ruback and M.C. Jensen, *The Market for Corporate Control: The Scientific Evidence* (1983) 11 J of Financial Economics 5
[4] Adam Smith, *The Wealth of Nations* (1776)
[5] Chevalier F., *Unfair Competition, Industrial Property in Asia and the Pacific* (1988, N 22), 41

There is a danger that undertakings may wish to merge in order to achieve or to strengthen their market power. Even if dominance or the acquisition of market power is not the motive for a merger, it may be its effect.[6]

The impact of M&As on the competitive environment shall be discussed according to the types of M&As. In this respect three types can theoretically be differentiated: horizontal - in the same product market, vertical - in different interrelated product markets and mixed - in different product markets.

As a rule the effect of a horizontal M&A on the market is greater than in case of other types of M&As. As a result of M&As carried out between competing entities acting in the same product market the volume of sales and purchases of the entities in that market changes. Moreover, as a result of these changes dominating entities may emerge.

In case of a vertical M&A an entity operating in one product market can expand the scope of its economic activity passing from sale market to purchase market and vice versa. The impact on the competitive environment will be reflected in the way that the entity having dominating position in the sale market in case of merging with the entity operating in its purchase market will gain the opportunity to operate in two interrelated markets simultaneously – in the market where the entity is the seller and the one for which it is only considered as a provider and does not directly carry out economic activity before the merger.

In case of mixed a M&A the economic entities change the field of their business activity or add other fields to it, which are not connected to the activity carried out by them in any economic chain. For instance, an entity operating in the market of mineral water can merge into an entity operating in construction sector. Such merger will influence the competitive environment only in as much as that after the liquidation of the merging entity the sales volume of the other entities in the mineral water market will change. However, a case is also possible that in the result of mergers or acquisitions of entities operating in markets not connected with each other one entity acquires new production capacities and expands its sales volumes. In the example given above as a result of merger of the entity operating in mineral water market with the one in the construction market the emerged entity doing business in mineral water sales sector can acquire buildings from the other entity, in the result of which it will expand the production and sales of mineral water.

The task of the competition authorities is consequently to identify and to prohibit those mergers which have such an adverse impact on competition that any benefits resulting from them are outweighed. A further issue is whether, and if so when, public interest (or non-competition)

[6] Alison Jones and Brenda Sufrin, *EU Competition Law* (6th ed. 2016), 1088

factors should be relevant to the assessment of a merger and permitted to override the competition law assessment.[7]

State Intervention in M&As.

For the purpose of effective implementation of the policy of protecting and guaranteeing competition the institute of merger control is defined in most of the jurisdictions throughout the world. It aims to bring under state regulation the actions of economic entities, which have or may have certain, sometimes significant influence on competition. Antitrust policies are derived from the belief that any large company, in order to grow, may have restrained the trade of its competitors and once a company is large, its sheer size may harm the smaller competitors. Hence antitrust regulators focus more on M&As.

The regulations prohibit mergers and acquisitions which would significantly reduce competition in the market, for example if they would create dominant companies that are likely to raise prices for consumers. Competition policy is a vital part of the market of each modern country. Its aim is to provide the citizens with better quality goods and services at lower prices. Competition policy is about applying rules to make sure companies compete fairly with each other. This encourages enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality. These are the reasons why the countries fight anticompetitive behavior, review mergers and state aid and encourage liberalization.

The existence of a comprehensive and detailed regulation for the protection of economic competition during M&As is a sheer necessity for every country. Competition is the main driving force of the economy, the lack of which will definitely hinder the growth. Thus the states shall ensure that no transaction or other acts of economic entities fall outside of the regulation framework creating loopholes and jeopardizing the competition and ultimately, the economy.

On the other side, difficulties arise for business entities in connection with vague and incomplete regulation both before making a decision on M&A and after having put it into effect. The uncertainty about the situation, threat to the business, delays in the implementation of tasks are all unavoidable. Most importantly, factors determining whether a country is attractive to investors include the existence of barriers to market entry by foreign investors, as well as the ease of doing business, including in terms of antimonopoly control over mergers, acquisitions, and acquisitions of control over domestic economic undertakings. The investors might be reluctant to enter the market because of the uncertainty, feeling unsecured from possible violations of their

[7] Alison Jones and Brenda Sufrin, *EU Competition Law* (6th ed. 2016), 1085

rights. Or the Commission might just deny their entry without weighty arguments, and there would be no grounds to protect the rights of the investors. This might lead to a complete chaos significantly affecting the interests of the businesses and, in the long run, the interests of the state as well.

In the next chapter we are going to discuss in detail the system of merger control in the Republic of Armenia.

CHAPTER 2

Overview of the RA Concentration Regulation.

Since declaring its independence in 1991, Armenia has been consistently implementing economic reform policy in an effort to establish and develop a sound market-based economy. One of the major directions of reform policy adopted by the Government of Armenia has been an integration into the world economy and further development of economic relations with foreign countries.

The Government of Armenia is confident that these objectives may be achieved through liberalization of trade and investment policy. It is apparent that within the framework of the ongoing process of globalization and international integration, it is impracticable for a country to conduct an isolated economic policy. Consequently, Armenia desires to build mutually beneficial economic co-operation and to participate actively in the process of integration into the world economic system.[8]

One of the major steps on this path was suppression of anticompetitive practices in the country and establishment of merger control system. The legal basis for state's intervention in mergers and acquisitions is defined by the Constitution of the Republic of Armenia. Article 11 declares that the basis of the economic order of the Republic of Armenia is the social market economy, which is based on private ownership, freedom of economic activity, free economic competition and is directed towards general economic well-being and social justice through state policy. Article 59 further guarantees that everyone shall have the right to engage in economic, including entrepreneurial activities… Abuse of monopolistic or dominant position in the market, bad-faith competition and anti-competitive agreements shall be prohibited. Restriction of competition, possible types of monopoly, and their permitted sizes may be prescribed only by law with the aim of protecting public interests.[9]

Article 12 of the Civil Code of the Republic of Armenia, which is the main legal act regulating the rights and obligations of persons in civil law relations in Armenia, provides that restriction of competition by the way of exercising civil rights is prohibited.[10]

The Law of the Republic of Armenia "On Protection of Economic Competition"[11] (hereinafter also - the "Law") is the main legal basis for regulation of the economic competition

[8] Davit Harutyunyan and Karine Poladyan, *Armenia (Republic of Armenia),* Merger Control Worldwide 59 (2d ed. 2014)
[9] RA Constitution art. 11, 59
[10] RA Civil Code art. 12
[11] RA Law "On Protection of Economic Competition"

matters in Armenia, which is also regulating the relations with respect to mergers and acquisitions of economic entities ("concentrations"). Armenia has no separate law on merger regulation, so all procedures concerning merger control are regulated by the Law. The adoption of the Law on 6th of November 2000 was one of the main achievements of economic reform in Armenia. It provides a first fundamental regulatory framework for competition assessment of economic entities in product markets. Being a general law for the economic competition, it regulates the procedure in compliance with the principles of fair competition. It prohibits concerted practices, abuse of a dominant position, regulates mergers, and deals with unfair competition and consumer protection issues.

Article 1 of the Law stipulates that the purpose of the law is to protect and promote the economic competition, to ensure an appropriate environment for fair competition, the development of businesses and protection of consumer rights in the Republic of Armenia. The legal definition of competition is provided in the Law under part 1 of Article 4: “Competition – economic activities toward ensuring conditions as favourable as possible for the sale or purchase of the goods, which objectively limit the possibility of each economic entity to have a unilateral effect on general conditions of the commodity circulation in the market”.

The protection of economic competition in Armenia is entrusted by the Law to the State Commission for the Protection of Economic Competition of the Republic of Armenia (hereinafter also - "the Commission").

One of the most notable recent developments in this sector was the adoption by the National Assembly of the Republic of Armenia of the Law “On Supplementing and Amending the RA Law “On Protection of Economic Competition”” on 23.03.2018. The new changes became effective from 08.04.2018 and introduced a large package of improvements to the legal regulation of economic competition in Armenia, and concentration, in particular. This was the first major reform with this regard since 2011, and it announces the readiness of the state bodies to bring the law into line with the evolving market economy in Armenia.

However, even after this reform there are still a number of problematic formulations and gaps in the Law that might affect the free and competitive market. Below we are going to describe the legal regulation of concentration under the RA Law “On protection of Economic Competition”, identify its benefits and shortcomings, as well as propose solutions for its further development.

RA Concentration Regulation. Shortcoming. Recommendations.

The regulation of concentration issues is prescribed in Chapter 4 of the Law under Articles 8, 9 and 10. However, the Law does not define the concept of concentration, but only lists the forms of its expression. In this regard it should be noted that for example the law of the Russian Federation "On Protection of Competition"[12] defines the essence of concentration institute. In particular, according to Article 4 of the said law economic concentration is the transactions, other actions or behaviour of economic entities affecting the competitive environment.

Pursuant to Article 8, part 1 of the Law certain types of acts are considered as concentration. The list of such acts is exhaustive and can conditionally be divided into three groups:

1) the amalgamations and mergers of economic entities registered in the Republic of Armenia,

2) acquisition by one economic entity of the assets or shares of another economic entity registered in the Republic of Armenia, which either per se or together with other assets or shares already held by the acquiring entity constitute 20% or more of the assets or charter capital of that economic entity,

3) any transaction, undertaking, reorganization or behavior of economic entities as a result of which one economic entity shall directly or indirectly influence the decision-making or competitiveness of another economic entity or may directly or indirectly influence the decision-making or competitiveness of another.

The first two types of concentration in the first group are more or less clear. The definitions of amalgamation and merger of economic entities are provided in the RA Law "On Joint-Stock Companies"[13]. However, it's worth mentioning that the definitions of amalgamation and merger are not provided in the RA Civil Code or the RA Law "On Limited Liability Companies" or in any other law, thus leaving the question open whether the definition in the Law "On Joint Stock Companies" is applicable to the other legal forms available for economic entities other than joint-stock companies. According to the RA Law "On Joint-Stock Companies" amalgamation is the creation of a new company that will obtain the rights and responsibilities of two or more companies, while the latter terminate (Article 19, part 1). On the other hand, merger is the termination of one or several companies the rights and responsibilities of which are transferred to another company (Article 20, part 1). For the purposes of this paper both types of reorganization will be referred to as mergers, taking into account the irrelevance of their differences for the discussion of merger control. Moreover, in the international practice the differentiation between mergers and amalgamations is hardly common.

[12] RF Law "On Protection of Competition" art. 4
[13] RA Law "On Joint-Stock Companies"

Another type of concentration in the second group is described as acquisition of assets of one economic entity by another if their value per se or together with the value of assets already possessed by the acquirer constitutes 20% or more of assets of such economic entity. First of all a question arises regarding the term "assets", which is not defined in the Law. But by its Decision N 22-N as of February 19, 2018 the Commission issued an official clarification mentioning that for the meaning of Article 8, part 1, point 3) of the Law in considering the value of assets, the Commission shall base on the value of all the assets reflected in the accounting documents of the economic entities determined in accordance with the legal acts and standards on accounting.

Furthermore, the law used to contain no stipulation as how the value of an asset is going to be calculated for the purposes of this provision. However, this omission was recently supplemented by the definition of "value of an asset" in Article 4 of the Law defining it as the balance sheet value of an asset.

Another question with this regard is to what the law refers by saying "together with the value of assets already possessed by the acquirer". Does it mean the value of assets acquired by the acquiring entity from the other entity in question in the past? But if yes, how can those assets be identified? What is the period during which those assets need to have been acquired? The Commission has recently answered to all of these questions in its Decision N 21-N as of February 19, 2018. Accordingly, the Commission decided that the acquisition by one economic entity (entity acquiring the assets) of the assets of another economic entity (entity selling the assets), the value of which amounts to 20% or more of the value of assets of the selling economic entity, may be made both through one or through different transactions concluded within different timeframes. Moreover, the Law does not envisage a limitation of time for such transactions. The assets previously acquired by the acquiring economic entity from the selling economic entity, but no linger belonging to the acquiring economic entity are not included in the calculation of the value of the acquiring economic entity's assets in the meaning of Article 8, part 1, point 3) of the Law. Furthermore, for the purposes of the calculation only the value of assets acquired from the selling economic entity is counted. Other assets acquired by the acquiring economic entity from other economic entities or other existing assets are not counted.

The second concentration type in this group is acquisition of a share of one economic entity by another if its value per se or together with the value of the share already possessed by the acquirer constitutes 20% or more of the charter capital of such economic entity. At the first sight this provision might seem complete and straightforward. Nonetheless, when looking closer, it's not hard to notice an evident risk of an avoidance mechanism to be used in this case. In particular, the possibility is open to acquire for example 15% of the shares of the target company, then to

create a wholly owned subsidiary which would acquire another 15% of the shares. In such case the acquiring entity will factually own 30% of shares of the target without complying with antitrust regulations. For the prevention of such situations we would recommend to introduce the notion of interrelated persons in the Law, exhaustively listing the cases when two or more entities might be considered as interrelated. Such regulation is in place for mergers and acquisitions in financial sector, about which we are going to talk later in this Chapter.

The final third group of concentration is described in the law as any transaction, undertaking, reorganization or behaviour of economic entities as a result of which one economic entity shall directly or indirectly influence the decision-making or competitiveness of another economic entity or may directly or indirectly influence the decision-making or competitiveness of someone else. This type is the most vague and disputable one. Both the terms "influence the decision-making" and "influence competitiveness" lack any definition and are open to broad interpretation. For the avoidance of doubt we believe it is preferable to have at least some general description of what cases might count under these terms. Again, such an attempt has been made in the financial sector. Besides, the Article uses two different terms "another economic entity" and "someone else", and also uses "shall … influence" and "may… influence" for each case. This wording gives no clue to who might count under "someone else", and if it is not the same entity as "another economic entity", why we would take into account a third person. We believe that only the two economic entities considered as participants to this concentration shall be taken into account and the influence that "can" be exercised shall suffice.

The Article further goes on to define the participants of each type of concentration. Accordingly, the participants to the concentration are:

- In the event of merger: the economic entities that merge,
- In the event of acquisition of assets: the selling and acquiring economic entities,
- In the event of acquisition of shares: the acquiring economic entity and the entity the shares of which are being acquired,
- In the event of the third type of concentration: the economic entities involved in the legal relation.

This is important to understand who shall bear the notification obligation stipulated by the law and the responsibility for violating it. The notification requirement is discussed below in this Chapter.

Article 8 defines three types of concentration:

- Horizontal concentration - in the same product market,

- Vertical concentration - in different interrelated product markets,
- Mixed concentration - in different product markets.

However, classifying horizontal, vertical and mixed types of concentration, the legislator uses the notion "in the product market(s)". The "product market" is defined by the Law as the field of circulation of a product and its mutually substitutable products in a certain territory, the boundaries whereof are determined upon the economic and other opportunities and expediency for the acquisition of a product by a buyer in a relevant territory and the absence of such opportunities and expediency outside its boundaries. The product market is characterized by its product type and geographical borders, the composition and volume of its subjects. "Product type boundary of product market" means the integrity of a given product and its mutually substitutable products as defined by the decision of the Commission. "Geographic boundary of product market" means a certain geographic territory (including road, air, water and overland route, etc.) as determined by the decision of the Commission, within which it is economically possible and expedient for the buyer to acquire the given product and its mutually substitutable products, and such possibility and expedience is not available beyond the given territory. The geographic boundary of a product market may cover the entire territory of the Republic of Armenia or part thereof, or the territory of the Republic of Armenia (or part thereof) **together with** the territory of another state (or part thereof).[14]

Previously, when defining the types of concentration Article 8, part 7 of the Law used the words "concentration made between economic entities operating in a product market", which left a number of entities outside of the regulation framework. The recent amendments to the Law changed the wording to "concentration made in a product market" with the view to tackle the problem. However, in our opinion the amendments are absolutely unsuccessful. The thing is that the real problem was not as much in the wording of Article 8 part 7, but in that of the definition of "geographic boundary of a product market" given in Article 4, part 1, which defines the boundary either wholly within the territory of Armenia or within the territories of both Armenia and another state. Such restriction is totally understandable as the state has to have at least some connection with the transaction to be able to regulate it. With this regard specific provisions should be implemented in the law to enable Armenia to control the M&As taking place outside of the product market definition given in the Law but having an impact on the economic competition in Armenia.

[14] RA Law "On Protection of Economic Competition" art. 4 (1)

In the current version of the law it is not clear whether an acquisition taking place between a foreign entity wholly operating outside the territory of Armenia and a domestic entity operating in Armenia can be considered to be carried out in a (same or different) product market. Whereas, in a hypothetical example when such foreign entity owns 100% shares in an entity operating in Armenia and acquires the shares in another Armenian entity having significant position in the given product market, the newly created entity might gain a dominant position in that market, thus obviously affecting the economic competition in Armenia.

By its Decision N 560-N as of November 23, 2011 the Commission has officially clarified that the expression "operating in product market" used in part 7 of Article 8 of the Law includes having a shareholding in the charter capital of an economic entity operating in the territory of the Republic of Armenia and its product market by a foreign entity not operating in the territory of the Republic of Armenia and its product market.

This official clarification, however, was issued in relation to the previous wording of the law and might raise doubts whether it can be effective with regard to the new wording or not. Besides, it resolves the issue only in part, leaving out the situations when the foreign entity does not have any shareholding in a domestic entity.

The law also expressly excludes concentrations between economic entities not registered in the Republic of Armenia. But again, in a hypothetical example where both of these economic entities have a shareholding in different domestic entities operating in the same product market, the concentration might well distort the competition in the Republic of Armenia.

Further, the issue of the notion "economic entity" arises. The law defines it as a license fee payer, an individual entrepreneur, a legal entity, other organisation, its representative, representation or branch, a group of persons. In case of concentration provided for in this Law, a natural person shall also be considered as an economic entity.

With this regard it's worth mentioning the Decision of the Commission N 579-N dated 09.12.2011, which clarifies the status of the State and state bodies (public authorities) as possible participants of the concentration transactions. The Commission hereby excludes the State and state bodies from the context of concentration matters and states that any kind of transaction between the State and state bodies with the economic entities shall not be regarded as a concentration. The Commission interprets that in the meaning of the Law the terms "Economic entity" and "State body" are separate and independent terms and one of them does not include the other. For the purposes of Article 8 of the Law, the participants to the concentration may be economic entities only.

Article 9 of the Law stipulates the cases when the economic entity needs to notify the Commission about the concentration, or as the Law puts it, declare the concentration. With this regard first of all the timing of such declaration needs to be discussed. According to the Law concentration of economic entities shall be subject to declaration before putting it into effect. Decision N 478-N of the Commission as of 16 December, 2016 provides that the concentration of economic entities is considered to be effective from the moment of:

1. In case of merger - state registration on termination of the activity of the merged economic entity (entities),
2. In case of amalgamation – state registration of the economic entity emerged in the result of the amalgamation,
3. In case of acquisition of assets or shares – signing of the transaction of acquisition of assets or shares, and in cases prescribed by the law – from the moment of registration of rights arising therefrom.

The Article further provides the cases when the concentration is subject to declaration and the Commission provides the thresholds in the same decision cited above. Accordingly, those are the cases when:

- In horizontal concentration, in the financial year preceding the concentration the joint value of the participants' assets was at least 1 billion and 500 million AMD or the value of assets of at least one participant was at least 1 billion AMD;
- In horizontal concentration, in the financial year preceding the concentration the joint value of the participants' income was at least 3 billion AMD or the value of income of at least one participant was at least 2 billion AMD;
- In vertical or mixed concentration, in the financial year preceding the concentration the joint value of the participants' assets was at least 3 billion AMD or the value of assets of at least one participant was at least 2 billion AMD;
- In vertical or mixed concentration, in the financial year preceding the concentration the joint value of the participants' income was at least 4 billion AMD or the value of incomer of at least one participant was at least 3 billion AMD;
- Any of the participants of concentration has a dominant position in any of the product markets.

Article 9, part 1, point 1) of the Law uses the words "in the financial year preceding its creation", where it is not clear to what the word "creation" refers to. Probably the legislator should have written "in the financial year preceding the transaction" as it is in the cited decision

of the Commission. But another problem arises in case the entities or one of them started its operation in the financial year of the concentration. The Law answers this question in part 2, point 2) of the discussed Article by adding that "If any of the concentration participants has started its activity in the given year, its financial statements and audit opinions thereon shall be submitted as of the end of the month preceding the declaration". It is recommended to add such wording in part 1 of Article 9 as well.

Part 2, point 2) of the said Article further goes on to state that in the cases provided for by the Commission's decision, the economic entity may also submit a financial report as of another date. The decision in this regard has not been issued yet.

In the Decision N 341-N, dated 19.08.2011, the issue of concentrations where one of the participants to the transaction is an individual was discussed by the Commission. In determining whether the concentration is subject to declaration Article 9 of the Law considers the participant's joint value of assets or income of the preceding year. As long as an individual is concerned, there is no possibility for those types of calculations or considerations. Subsequently, the Commission clarified that in cases where one or more participants of concentration are individuals, the calculations will be made only for the participants which are not individuals.

The Commission has also issued a decision related to calculation of the value (size) of assets and income as well as the dominant position of the economic entity in the product market. The N 294-N Decision dated 27.07.2012, provides that the calculation of the joint value (size) of the assets or income of the participants of the concentration or the value (size) of the assets or income of one of the participants for the purposes of concentration shall take into account the value (size) of the assets or income reflected in the accounting documentation of the participant(s) which is determined in accordance with legal acts related to accounting, as well as accounting standards. For the purposes of participation in concentration the dominant position of the economic entity in the product market may not necessarily be acknowledged as such by the Commission prior to the concentration transaction, in order for the economic entity to bear a clear responsibility for a prior declaration of the concentration, in case the assets thresholds provided by the Law are met.

The Law further provides, in Article 10, that the concentration which is subject to declaration is permitted or banned on the basis of the Commission's decision, which may also contain binding terms and obligations for the participant (participants) of the concentration.

When evaluating the concentration subject to declaration the Commission takes into account the circumstances impeding the economic competition, including resulting in a dominant position or in strengthening of a dominant position or deteriorating competitive conditions. The

Commission also permits a concentration subject to declaration, when the economic entity proves that in the result of such concentration competitive conditions shall be endured in the product market.

It is prohibited to put a concentration subject to declaration into effect:

- Before the Commission issues a decision (non-declared concentration),
- In case the Commission has issued a decision banning the concentration (banned concentration).

Failing to comply with the requirements of the concentration declaration implies certain legal consequences. Particularly, putting into effect a concentration banned by the Commission's decision shall be subject to liquidation (termination, cease) by the decision of the Commission in accordance with the law.

This provision is highly controversial. If the termination of acquisition of assets or shares can somehow be regarded as clear (though lots of issues also might arise in these cases, which however are not subject to discussion in this paper), the same cannot be said about mergers. How can a merger be liquidated when the merging entity has already terminated its existence?

The notions "impeding the economic competition" and "deteriorating competitive conditions" are also rather vague, endowing the Commission with almost unlimited discretion. The problems with the powers of the Commission are discussed later in this Chapter.

The discussion above regarding the shortcomings and gaps in the Law mainly regulating the issue of concentration in the Republic of Armenia renders it clear that there are numerous ways for economic entities to escape the requirement of the Law and thus to distort the economic competition in the country. Above all that the Law also provides for a legitimate way to skip the need for concentration declaration.

According to Clause 9 of Procedure "On declaring the concentration of economic entities" approved by Decision № 478-N "On determining the value (size) of assets and revenue(s) of the participant (participants) of concentrations subject to declaration; the order of declaration of concentration of economic entities and the form of declaration": the transactions (acts) stipulated by points 1),2),3),4),5) of part 1 of Article 8 of the Law shall not be considered to be a concentration by implication of the Law, if those were made between the persons included in the group of persons provided for by Law.

This means that the economic entities can escape the requirement of declaring the concentration in case there exists an actual interconnection or control between them and they meet certain criteria prescribed by Article 4.1 of the Law for being considered "group of persons". This

procedure appears to be quite effective if more than one concentration transaction is envisaged within a particular group of persons.

The Law also provides for administrative responsibility of economic entities in case of violations of the Law (Article 36). Accordingly, for putting into effect a concentration banned by the decision of the Commission a fine is imposed in the amount of up to 10% of the proceeds of the economic entity for the year proceeding the violation. In case in the preceding year the economic entity has conducted its activities for a period of less than 12 months, the size of the penalty stipulated for the mentioned violation shall amount up to 10% of proceeds for the term proceeding the violation but not more than 12 months. The size of the penalty for failing to declare the concentration amounts up to 5 million AMD.

In our opinion the limitation of responsibility for up to 10% of proceeds or 5 million AMD is not justified and may sometimes be very inconsistent with the harm caused by a banned or non-declared concentration to the economic competition of the country.

The Law has also put forward measures to protect the rights of consumers and businesses suffered as a result of anti-competitive conduct. Article 38 of the Law stipulates that the damages caused to other economic entities or persons due to the acts (inaction) of an economic entity constituting an infringement of the provisions of the Law shall be compensated by the infringing entity in compliance with the procedure provided for by the law.

Specific Issues. Financial Sector.

The legal regulation of the financial sector in Armenia is in many cases carried out separately from the other sectors. The reason for this is the vital nature of financial institutions for the economy of Armenia and the higher risks associated with its regulation. The regulation of merger control in this sector is not an exception. Specific rules are in place for stricter and more efficient control, which however act in line with the general regulations presented above.

One of the most important decisions of the Commission is N 343-N, dated 28.12.2010, which is related to the banks as participants of concentration transactions. The decision was issued as a clarification for the situation where the bank as a creditor after non-performance of the loan agreement by the borrower had foreclosed the collateral and became the owner of 100 % shares of the economic entity. The Commission clarified that such types of transactions constitute concentration and should be declared to the Commission in accordance with the Law. For the purposes of the Law, banks are also considered economic entities and the Law does not provide special regimes for any kind of economic entities, therefore the banks are also required to submit prior declarations in cases of their participation in economic concentrations.

Part 2 of Article 35 of the RA Law "On Banks and Banking"[15] stipulates that without permission of the Central Bank, banks may not perform transactions or operations resulting in:

- acquisition of 4.99% and above participation in the statutory fund of any other person,
- acquisition of equity interests in the statutory fund of one person, exceeding 15% of the bank's total capital,
- acquisition of equity interests in the statutory funds of other persons, exceeding in total 35% of the bank's total capital.

Based on this provision on 04.04.2013 the Chairman of the Central Bank of Armenia sent an explanatory note to all the financial organizations in Armenia clarifying that during the on-going supervision the Central Bank of Armenia constantly monitors possible cases of anti-competitive arrangements, abuse of monopoly or dominant position, unfair competition between financial organizations, and within the competence prescribed to it under the law takes steps to prevent, detect and, where appropriate, use sanctions. The issue of ensuring free economic competition, including acquiring dominating position, monopoly as well as concentration, is also mandatorily observed for such processes as:

- The process of granting preliminary consent to the acquisition of significant participation in the statutory capital of financial organizations,
- The process of granting preliminary consent to the execution of agreements of merger of financial organizations,
- The process of granting consents for change of the type of the financial organizations and other similar consents.

The explanation further goes on stating that the provision of the above-mentioned consents means that the Central Bank, as a regulatory and supervisory body, has, among other things, evaluated and concluded that the transaction underlying the consent does not create a restriction to free economic competition and/ or, as a result of the transaction the financial institution and its affiliated and/ or cooperating parties do not acquire such a dominant position in the relevant market which will result in breakdown of normal development of the financial system and free economic competition.

This explanation has caused confusion among the financial organizations leading to believe that the prior consent of the Central Bank actually substitutes the concentration declaration before the Commission. However, the Law stipulates no exclusion for banks in terms of declaration,

[15] RA Law "On Banks and Banking" art 35 (2)

which means that the Central Bank consent should be obtained only in addition to the requirement for declaration of concentration (in case the thresholds are met).

The Commission.

Merger control is conducted either by specific merger control bodies or by general antitrust bodies. The State Commission for the Protection of Economic Competition of the Republic of Armenia was established on 13 January 2001 pursuant to Article 17 of the Law with the general objective to protect and promote economic competition and ensure a competitive environment for businesses in Armenia. It is the body implementing the state's policy for maintaining competition instruments aligned with market developments, as well as promoting a competition culture in the Republic of Armenia. The Commission acts independently of other state authorities in carrying out its objectives. It pursues an enforcement of competition rules in the areas of antitrust and cartels, mergers and state aid by following both economic and legal approach to the assessment of competition issues.

With regard to mergers and acquisitions two main powers of the Commission shall be considered: a) to comment on the issues related to the laws on the protection of economic protection (Article 19, part 1, point g)) and b) to adopt decisions with regard to concentrations (Article 19, part 1, point a)).

The Commission plays a significant role in terms of improving the field of competition regulation and particularly the concentration regulation in the Republic of Armenia. Since its creation the Commission has issued a few official interpretations, which aim to provide clarifications on concentration matters. However, most of the clarifications of the Commission can be found in reply letters to individual enquiries and concentration declarations with regard to specific transactions. We have sited a number of clarifications of the Commission above in this chapter when conducting analysis of the Law. Most of these clarifications concerned specific transactions between economic entities. Nevertheless, the Law also provides for the obligation of the Commission in keeping commercial, banking or official secrets, according to which the Commission is not entitled to publish or otherwise disseminate the confidential and official information received during the performance of its official duties[16]. Such liability makes it obvious that the rights of the Commission to publish all its clarifications are strictly restricted. This point is confirmed by the very limited number of publicly available decisions of the Commission. It becomes even more evident when considering the fact that the Commission has

[16] RA Law "On Protection of Economic Competition" art. 33

stopped publishing its decisions (a few of those) on its official website after the year 2013[17]. The most disturbing thing in this situation is that in a lot of cases the interpretations issued by the Commission are not a mere clarification of the legal norms contained in the Law, but are impositions of rights and obligations on economic entities. Such provisions, some examples of which are brought above in this chapter, should be stipulated by the Law rather than in the decisions of the Commission. This reality raises questions regarding the lawfulness and accessibility of the rights and obligations of persons.

Taking into account the problems mentioned, we would like to make the following recommendation: All the decisions of the Commission, whether official interpretations or other decisions which might have a general application for all of the participants of concentration should be published on the official website of the Commission after barring the information comprising commercial, banking or official secret or other confidential information. Moreover, we suggest to incorporate such interpretations in the main Law with reasonable frequency, for example once a year.

Another major authority of the Commission is to issue decisions allowing or prohibiting a concentration. As already noted a concentration subject to declaration can be put into effect only after receiving the consent of the Commission. However, the Law provides for no certain procedures, terms or criteria for adopting such decisions. What happens to be even more important, the grounds for rejecting concentration are not stipulated. This might lead to a subjective decision making on part of the Commission, concentration transactions can be artificially rejected, or, on the contrary, consented when there is all the evidence that it can restrain the competition in the market.

To reduce the risk of subjectivity and uncertainty it is highly recommended that the Commission adopts specific rules and regulations providing detailed mechanisms and conditions for issuance of decisions, as well as envisaging an exhaustive list of the grounds for rejection of concentration transactions. Comprehensive recommendations regarding concentration declarations directed to economic entities are also desirable. Such rules, regulations and recommendations should be clear, public, easily accessible by everyone. These measures are intended to minimise the discretionary powers of the Commission for the purpose of ensuring lawfulness, predictability and better protection of the interests of economic entities. In the meantime, they can also be preferable for the Commission itself making the decision making process easier, faster and more standardized.

[17] RA State Commission for the Protection of Economic Competition, Decisions of the Commission, http://www.competition.am/index.php?menu=149&lng=1.

Notably, the powers of the Commission to carry out the aforementioned acts are stipulated by the Law, but have never come into life. Thus, according to point a), part 1 of Article 19 of the Law, the Commission is entitled to approve advisory instructions, other documents on the application of provisions of the Law by state bodies and their officials, as well as by economic entities. Furthermore, point g) grants the Commission the right to adopt relevant procedures connected with … concentrations…

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CONCLUSION

For the assessment of mergers and acquisitions' impact on competitive environment states conduct supervision. The laws establish certain legal rules to ensure the protection of competition from possible negative changes taking place as a result of M&As.

Since the entering into force of the RA Law "On Protection of Economic Competition" the merger control system in the Republic of Armenia flourished thus promoting the state policy of establishing a free market economy. Though the further developments in this field had since slowed down, 2018 has embarked as a breakthrough inducing hopes for imminent rapid growth. Not only an extensive reform was introduced in the law and a number of important official clarifications were adopted by the Commission, but also a new political party came to power as a result of a revolution in the country with full determination to establish a totally free and competitive market.

In light of the new developments it becomes even more vital to raise the existing problems in the regulation and practice of merger control and seek their soonest solution. As a conclusion of the analysis conducted in this paper the main drawbacks that in our opinion need to be addressed are the definition of geographical limits of the antitrust regulation and the risk of different avoidance mechanisms that might be used by the economic entities to circumvent antitrust regulations. Finally, the decision-making processes of the RA State Commission for the Protection of Economic Competition should be improved.

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