

Merger Control

The international regulation of mergers and joint ventures in 64 jurisdictions worldwide

2010

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Macedonia

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The primary source of competition law in Macedonia is the Law on the Protection of Competition (LPC), published in the Official Gazette of the RM No. 04/05, 70/06 and 22/07. The LPC entered into force on 25 January 2005, taking effect from 1 January 2005. The purpose of the LPC is to ensure free competition on the domestic market to stimulate economic efficiency and consumer welfare.

In addition, the Macedonian government has adopted the following by-laws:

- the regulation on block exemptions granted to technology transfer agreements to license know-how;
- the regulation on block exemptions granted to horizontal specialisation agreements;
- the regulation on block exemptions granted to vertical agreements on exclusive rights of distribution, selective rights of distribution, exclusive rights of purchase and franchise;
- the regulation on block exemptions of horizontal research and development agreements;
- the regulation on block exemptions granted to agreements on the distribution and servicing of motor vehicles;
- the regulation on the form and content of the notification and criteria on the evaluation of concentrations;
- the regulation on block exemptions granted to agreements in the insurance sector; and
- the regulation on agreements of minor importance (Official Gazette of the Republic of Macedonia No. 91/05).

The above-mentioned by-laws regulate some specific institutions that are prescribed within the LPC to enable the proper enforcement in the practice of, as well as total harmonisation with, EU principles, especially the secondary legislation of the EU.

The body responsible for implementing the LPC is the Commission for the Protection of Competition (the Commission). The Commission is an independent state body with the status of a legal entity, and is independent in its working and decision-making within the scope of its competencies as determined by the law.

The Commission supervises the application of the provisions of the law by monitoring and analysing the conditions of the market to the extent necessary for the development of free and efficient competition, as well as conducting procedures and making decisions in accordance with the provisions of the law.

2 What kinds of mergers are caught?

The LPC's merger control rules are based on the concept of control. According to the LPC, a concentration shall be deemed to arise where a change of control on a lasting basis results from:

- the merger of two or more previously independent undertakings or parts of undertakings; or

- the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means prescribed by law, of direct or indirect control of the whole or parts of another one or more undertakings.

3 Are joint ventures caught?

The creation of a joint venture that permanently performs all the functions of an autonomous entity shall constitute a concentration according to the provisions of the LPC.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

Pursuant to the LPC, control shall be comprised of rights, contracts or any other means that either separately or in combination, and having regard to actual or legal conditions, confer the possibility of exercising decisive influence on an undertaking, in particular through:

- ownership or the right to use all or part of the assets of an undertaking; or
- rights or contracts that confer decisive influence on the composition, voting or decisions of the bodies of the undertaking.

Minority interests may fall within the definition of control if they are associated with veto rights over strategic decisions of the undertaking.

5 What are the jurisdictional thresholds?

The participants in a concentration are obliged to notify such concentration to the Commission, if:

- the collective aggregate annual turnover of all the participating undertakings, generated by sale of goods or services on the world market, exceeds the equivalent amount of €10 million, made during the business year preceding the concentration, and where at least one participant is registered in Macedonia;
- the collective aggregate annual turnover of all the participating undertakings, generated by sales of goods or services in Macedonia, exceeds the equivalent amount of €2.5 million, made during the business year preceding the concentration; or
- the participation in the market of one of the participants is more than 40 per cent or the total participation in the market is more than 60 per cent.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory and there are no exceptions provided in the law. Therefore, any merger qualifying as a concentration that meets the turnover thresholds must be filed.

- 7** Do foreign-to-foreign mergers have to be notified and is there a local effects test?

The implementation of the LPC is not limited only to practices undertaken within the territory of Macedonia, but also abroad, if they produce certain effects on the territory of Macedonia. The LPC shall be applied to all forms of prevention, restriction or distortion of competition that produce an effect on the territory of Macedonia, even when they result from acts and actions carried out or undertaken outside the territory of Macedonia.

If the thresholds are fulfilled the presumption stands that the merger produces effects in Macedonia.

Notification and clearance timetable

- 8** What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no deadline for filing the notification. The participants are obliged to notify the Commission before implementation of the concentration and following the conclusion of the merger agreement, or the announcement of a public bid for the purchase or acquisition of a controlling interest in the charter capital of the undertaking.

Failure to notify is a misdemeanour penalised by a fine amounting to up to 10 per cent of the value of the aggregate annual turnover of the undertaking made in the business year preceding the year when the misdemeanour was committed.

A fine of €2,000 to €10,000 (in equivalent denar) shall be imposed for misdemeanours on the person responsible at the company.

A fine of €10,000 to €20,000 (in equivalent denar) shall be imposed for misdemeanours on an individual (natural person) who according to the provisions of the law has the capacity of an undertaking.

- 9** Who is responsible for filing and are filing fees required?

The following participants in a concentration are obliged to notify a concentration to the Commission:

- the undertakings participating in the concentration;
- persons or undertakings that acquire control; or
- persons or undertakings that acquire control of the whole or part of one or more undertakings.

The initial filing fee is set at a fixed amount of 6,000 denars. An additional filing fee of 30,000 denars will be charged for a decision declaring the concentration compliant with the provisions of the LPC. These are payable after the concentration has been appraised by the Commission.

- 10** What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The concentration shall not be performed before its notification or until a decision is made. This shall not prevent the implementation of a public bid for the purchase of securities or a series of securities transactions, including those convertible into other securities for the purpose of trading on the market.

After the notification is received, the Commission has up to 25 or 90 days, depending on the case, to pass its decision.

- 11** What are the possible sanctions involved in closing before clearance and are they applied in practice?

If the undertakings do not comply with the suspension obligation as stipulated in article 21 of the LPC, than such undertakings are committing a misdemeanour and can be fined with up to 10 per cent of the value of the total annual income of the undertaking realised in the business year preceding the year of the misdemeanour. So far,

there have been no such cases and no such fines have been imposed by the CPC.

- 12** What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

All mergers (not only foreign-to-foreign) that fulfil the thresholds can apply for an exemption from the suspension obligation by submitting a justified written request, which is subject to approval by the CPC (article 21 of the LPC).

- 13** Are there any special merger control rules applicable to public takeover bids?

There are no special merger control rules applicable to public takeover bids.

- 14** What is the level of detail required in the preparation of a filing?

There is no special form for submission of the notification, but there is a 'Regulation on the form and content of the notification and criteria for the evaluation of concentrations', by which detailed rules are set forth as regards the notification's content and format as well as enclosures.

In addition to the compulsory data, the Commission may require the submission of all other data considered necessary for the evaluation of the concentration.

Special provisions are set out in case of acquiring shares in or parts of banks, savings houses and other financial institutions, as well as insurance undertakings.

- 15** What is the timetable for clearance and can it be speeded up?

The day after the Commission receives all data and documents, it shall start to examine the notification of the concentration. The decision on the compatibility of the merger with the LPC shall be made within 25 working days from the day of receiving the notification. This term may be extended to 35 working days.

If the Commission finds that the notified concentration falls under the provisions of the LPC, but might not be compliant with the LPC, it shall make a decision on initiating an in-depth procedure. In this case, the Commission must pass a decision appraising the concentration within 90 working days from the date of initiation of the procedure. This term may be extended to 105 working days.

The procedure cannot be speeded up.

- 16** What are the typical steps and different phases of the investigation?

The day that the Commission receives all data and documents shall be considered as the day of receipt of the notification and the Commission issues a special receipt to the notifying party. The Commission shall examine the notification of concentration and shall make a decision within 25 days declaring that the concentration is compliant with the provisions of the LPC.

If the Commission finds that the notified concentration falls under the provisions of the LPC and, as a result, may significantly prevent, restrict or distort efficient competition in the market or a significant part of it, in particular as a result of the creation or strengthening of a dominant position by the participants, it shall make a decision on initiating an in-depth procedure. The procedure before the Commission shall be carried out pursuant to the Law on General Administrative Procedures, unless otherwise stipulated in this Law. The Commission may request from the undertakings or associations of undertakings data related to their economic and financial situation and their business relations and connections, as well as data regarding their statutes and decisions and the number and identity of the members affected by such decisions. The procedure ends with the passing of a decision, within 90 days.

Update and trends

Following Deutsche Telekom's (DT) acquisition of shares in Greek operator OTE, DT acquired roughly a 25 per cent stake in OTE, which have given rise to competition concerns in Macedonia, since both DT and OTE own subsidiaries in Macedonia. DT already owned the leading operator T-Mobile Macedonia through Magyar Telekom, which together control around 90 per cent of the mobile market, and also owns the country's leading fixed line operator T-Home.

After notification to the Commission for Protection of Competition (CPC), the Commission decided to impose certain conditions and obligations, the fulfilment of which would ensure that the concentration shall not significantly prevent, restrict or distort the effective competition on the market or a significant part thereof, in particular as a result of the creation or strengthening of

a dominant position of the participants in the concentration and would be in compliance with the provisions of the Law on Protection of Competition. This was the first time the CPC decided to impose conditions and obligations on an undertaking regarding concentration.

Following the performed analysis and evaluation of the conditions and obligations in accordance with the provisions of the Law on Protection of Competition, and with respect to the proposed acquisition of direct control over OTE SA by Deutsche Telekom AG, the Commission established that their complete fulfilment in the specified manner and in within the deadlines set in the conditions and obligations, would render the concentration in question in compliance with the provisions of the Law.

Substantive assessment

17 What is the substantive test for clearance?

A concentration that would significantly prevent, restrict or distort efficient competition in the market or in a significant part of it, in particular as a result of the creation or strengthening of a dominant position by the participants, is not in compliance with the provisions of the LPC.

18 Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures.

19 What are the 'theories of harm' that the authorities will investigate?

A concentration that would significantly prevent, restrict or distort efficient competition on the market or a significant part thereof, in particular as a result of the creation or strengthening of a dominant position by the participants, is not in compliance with the provisions of the LPC and would require investigation.

20 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

Non-competition issues are not reviewed by the Commission; they are reviewed by other competent state bodies.

21 To what extent does the authority take into account economic efficiencies in the review process?

The Commission will take into account economic efficiencies to the extent that the parties are able to offer a defence that the efficiency gains will benefit consumers.

Remedies and ancillary restraints

22 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Commission may annul the concentration or may impose any other adequate measure for the purpose of providing that the participants will annul the concentration or will undertake any other measures to achieve restitution of the previous conditions in the market.

23 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, it is possible to remedy competition issues.

24 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are no strict provisions in the Law related to the basic conditions and timing issues applicable to a divestment or other remedies; the situation is appraised by the Commission on a case-by-case basis.

25 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To date, there has been only one foreign-to-foreign merger with remedies imposed, which have been duly fulfilled by the merging parties.

26 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

If the concentration is approved, it is considered that the ancillary restrictions are included.

Involvement of other parties or authorities

27 Are customers and competitors involved in the review process and what rights do complainants have?

The customers and competitors have the right only to express their opinion regarding the concentration.

28 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The decisions of the Commission shall be published in the Official Gazette of the Republic of Macedonia and on the website of the Commission. On the website of the Commission, the notification of a concentration falling under the provisions of the Law is published by stating the names of the participants, country of origin, form of the concentration and the relevant market for goods.

The president, the members of the Commission and the employees are obliged to keep professional secrets, regardless of the manner in which they have discovered business secrets, and have an obligation to keep professional secrets that continues to apply after the termination of employment with the Commission.

29 Do the authorities cooperate with antitrust authorities in other jurisdictions?

According to the Law, the Commission is involved in international cooperation and cooperates with the bodies of other countries and institutions in the area of competition.

The commission has a good cooperation record, especially with the competition authorities of countries in the region, and is in the process of signing memorandums of cooperation with these countries.

30 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no such provisions.

Judicial review

31 What are the opportunities for appeal or judicial review?

Participants in the procedure are entitled to lodge complaints with the Administrative Court of RM against decisions of the Commission adopted in administrative as well as in misdemeanour procedures.

The Law on Administrative Disputes applies to disputes initiated in accordance with the above.

32 What is the usual time frame for appeal or judicial review?

Against decisions of the Commission adopted in administrative procedures, a complaint can be lodged with the competent court within 30 days of receiving the decision.

Against decisions of the Commission adopted in misdemeanour procedures, a complaint can be lodged with the competent court within eight days of receiving the decision.

Enforcement practice and future developments

33 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

So far, all the CPC's merger decisions have been complied with.

34 What are the current enforcement concerns of the authorities?

Following the modifications to the LPC regarding thresholds, the main concerns in respect of the filing of notices have been addressed.

35 Are there current proposals to change the legislation?

Due to some new laws passed in Macedonia, the LPC must be amended so that this law will be in accordance with the Macedonian legislation. Also, in order to be harmonised with the EU legislation there is a need for certain guidelines to be passed and the existing ones to be amended.



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