

Merger Control

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

2009

Consulting editor: John Davies

Published by Global Competition Review
in association with:



Allens Arthur Robinson
Andreas Neocleous & Co LLC
Babic & Partners Law Firm
Bae, Kim & Lee LLC
Benzakour & Lahbabi Law Firm
Bowman Gilfillan
Castañeda y Asociados
Chitale & Chitale Partners
CORPUS Legal Practitioners
D'Empaire Reyna Abogados
Davis Polk & Wardwell
Djingov, Gouginski, Kyutchukov & Velichkov
Dr Dr Batliner & Dr Gasser
Drew & Napier LLC
ELIG, Attorneys-at-Law
Elvinger, Hoss & Prussen
Epstein, Chomsky, Osnat & Co
Esguerra Barrera Arriaga Asesores Jurídicos
Freshfields Bruckhaus Deringer
Gatt Frenco Tufigno Advocates
Guevara & Gutiérrez SC
Jadek & Pensa
Kļaviņš & Slaidiņš LAWIN
Konnov & Sozanovsky
Kromann Reumert
Lenz & Staehelin
Lepik & Luhaäär LAWIN
Lex Caribbean
Lideika, Petrauskas, Valiūnas ir partneriai LAWIN
LOGOS legal services
M & M Bomchil
Mannheimer Swartling Advokatbyrå
Marques Mendes & Associados
McCann FitzGerald
McMillan LLP
Mens Legis Cakmakova Advocates
Oppenheim
Panagopoulos, Vainanidis, Schina, Economou
Roschier, Attorneys Ltd
Rubin Meyer Doru & Trandafir SCA
Russell McVeagh
Salans
SimmonsCooper Partners
TozziniFreire Advogados
Wardynski & Partners
Wikborg, Rein & Co
Wolf Theiss
YangMing Partners

Macedonia

Biljana Cakmakova and Eva Veljanovska

Mens Legis Cakmakova Advocates

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 concentration. 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 exercise the right of veto over strategic decisions of the undertakings and in that manner they may assert control.

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 the Republic of Macedonia;
- the collective aggregate annual turnover of all the participating undertakings, generated by sales of goods or services in the Republic of 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 the Republic of Macedonia, but also abroad, if they produce certain effects on the territory of the Republic 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 the Republic of Macedonia, even when they result from acts and actions carried out or undertaken outside the territory of the Republic of Macedonia.

There is no special local effects test; the effects are considered if the thresholds are fulfilled.

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 denar) shall be imposed for misdemeanors, on the person responsible at the company.

A fine of €10,000 to €20,000 (in denar equivalency) shall be imposed for misdemeanors, 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 (about €100). An additional filing fee of 30,000 denars (about €500) will be charged for a decision declaring the concentration compliant with the provisions of the LPC.

- 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?

When the Commission finds that a concentration has been implemented that is in contravention of the provisions of the LPC, it may:

- ask the participants to annul the concentration, particularly by annulling the merger or disposing of all stocks or acquired assets, for the purpose of achieving restitution of the conditions existing before the concentration was implemented; and
- impose any other adequate measures for the purpose of providing that the participants will annul the concentration or will undertake any other measures for achieving restitution of the conditions that existed before concentration.

The Commission may impose interim measures for the purpose of achieving restitution of the previous conditions or maintaining the conditions of efficient competition.

- 12** What solutions (such as a local 'hold-separate' arrangement) might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

If the foreign company has a related company in Macedonia, then the Commission may impose obligations on the related company and appraisal shall be made regarding the related company.

- 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 examine the notification of the concentration and make a decision declaring that the concentration is compliant with the provisions of the LPC. The decision shall be made within 25 working days from the day of receiving the precise 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.

Substantive assessment

17 What is the substantive test for clearance?

A concentration that would significantly prevent, restrict or distort efficient competition on the market or its significant part, 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, no remedies have been required because there have been only two foreign-to-foreign mergers.

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 performs the tasks involving 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 competent court 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?

To date, there have only been two foreign-to-foreign mergers.

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.



Mens Legis Cakmakova Advocates

Eva Veljanovska

cakmakova@mlca.com.mk

8 Udarna brigade No. 43/3
1000 Skopje
Macedonia

Tel: +389 2 3115 205 / +389 2 3233 599
Fax: +389 2 3111 521
www.mlca.com.mk