

Merger Control

The international regulation of mergers and joint ventures in 69 jurisdictions worldwide

Consulting editor: John Davies

2012



Published by
Getting the Deal Through
in association with:

- Allens Arthur Robinson
- Anastasios Antoniou LLC
- Bae, Kim & Lee, LLC
- Borovtsov & Salei
- Bowman Giffillan
- Carey y Cía
- Castañeda y Asociados
- Chitale & Chitale Partners
- Corpus Legal Practitioners
- Coulson Harney
- Čakmakova Advocates
- D'Empaire Reyna Abogados
- Davis Polk & Wardwell LLP
- Djingov, Gouginski, Kyutchukov & Velichkov
- Dr Dr Batliner & Dr Gasser
- Drew & Napier LLC
- ELIG, Attorneys-at-Law
- Elvinger, Hoss & Prussen
- Epstein, Chomsky, Osnat & Co Law Offices
- Freshfields Bruckhaus Deringer
- GTG Advocates
- Guevara & Gutiérrez SC
- Kinstellar
- Koep & Partners
- Konnov & Sozanovsky Attorneys at Law
- Kromann Reumert
- LAWIN
- Lenz & Staehelin
- M & M Bomchil
- Mannheimer Swartling Advokatbyrå
- Marques Mendes & Associados
- Mason Hayes+Curran
- McMillan LLP
- Oppenheim
- Panagopoulos, Vainanidis, Schina, Economou
- Posse, Herrera & Ruiz Abogados
- Raidla Lejins & Norcoux
- Rizkiyana & Iswanto Antitrust and Corporate Lawyers
- Roschier, Attorneys Ltd
- Rubin Meyer Doru & Trandafir, SCA
- Russell McVeagh
- Sanguinetti Federé Abogados
- SimmonsCooper Partners
- TozziniFreire Advogados
- Weerawong, Chinnavat & Peangpanor Ltd
- Wikborg Rein
- WKB Wiercinski Kwiecinski Baehr
- Wolf Theiss
- YangMing Partners

Merger Control 2012

Consulting editor:

John Davies
Freshfields Bruckhaus Deringer

Business development managers

Alan Lee
George Ingledew
Robyn Hetherington
Dan White

Marketing managers

Ellie Notley
Sarah Walsh
Alice Hazard

Marketing assistants

William Bentley
Sarah Savage

Subscriptions manager

Nadine Radcliffe
Subscriptions@
gettingthedealthrough.com

Assistant editor

Adam Myers

Editorial assistant

Lydia Geroges

Senior production editor

Jonathan Cowie

Chief subeditor

Jonathan Allen

Subeditors

Davet Hyland
Sarah Morgan
Caroline Rawson
Joanne Morley

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Merger Control 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd
2011

No photocopying: copyright licences
do not apply.

ISSN 1365-7976

The information provided in this
publication is general and may not apply
in a specific situation. Legal advice should
always be sought before taking any legal
action based on the information provided.
This information is not intended to create,
nor does receipt of it constitute, a lawyer-
client relationship. No legal advice is being
given in the publication. The publishers
and authors accept no responsibility for
any acts or omissions contained herein.
Although the information provided is
accurate as of August 2011, be advised
that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law

Business

Research

Introduction Michael Han, Maria Trabucchi and Alexander Viktorov <i>Freshfields Bruckhaus Deringer</i>	3
Timelines Michael Bo Jaspers and Joanna Goyder <i>Freshfields Bruckhaus Deringer</i>	8
Acknowledgements	22
Albania Guenter Bauer, Denis Selimi and Paul Hesse <i>Wolf Theiss</i>	24
Argentina Marcelo den Toom <i>M & M Bomchil</i>	29
Australia David Brewster and Carolyn Oddie <i>Allens Arthur Robinson</i>	36
Austria Axel Reidlinger and Maria Dreher <i>Freshfields Bruckhaus Deringer</i>	44
Belarus Maryna Dymovich and Yury Samkov <i>Borovtsov & Salei</i>	50
Belgium Laurent Garzaniti, Thomas Janssens and Tone Oeyen <i>Freshfields Bruckhaus Deringer</i>	55
Bolivia Ramiro Guevara and Jorge Luis Inchauste <i>Guevara & Gutiérrez SC</i>	60
Bosnia & Herzegovina Guenter Bauer, Sead Mijlkovic and Paul Hesse <i>Wolf Theiss</i>	64
Brazil Jose Regazzini, Marcelo Calliari, Daniel Andreoli and Joana Cianfarani <i>TozziniFreire Advogados</i>	70
Bulgaria Nikolai Gouginski, Miglena Ivanova and Vassia Nikolovska <i>Djingov, Gouginski, Kyutchukov & Velichkov</i>	75
Canada Neil Campbell, James Musgrove and Mark Opashinov <i>McMillan LLP</i>	82
Chile Claudio Lizana and Juan Turner <i>Carey y Cia</i>	89
China Michael Han, Nicholas French and Margaret Wang <i>Freshfields Bruckhaus Deringer</i>	95
Colombia Claudia Montoya and Jorge Jaeckel <i>Posse, Herrera & Ruiz Abogados</i>	100
Croatia Guenter Bauer, Paul Hesse and Danijel Pribanić <i>Wolf Theiss</i>	105
Cyprus Anastasios A Antoniou <i>Anastasios Antoniou LLC</i>	111
Czech Republic Tomáš Ůhula <i>Kinstellar</i>	116
Denmark Morten Kofmann, Jens Munk Plum and Erik Bertelsen <i>Kromann Reumert</i>	121
Estonia Tanel Kalas and Tiit Iverson <i>Raidla Lejins & Norcoux</i>	125
European Union John Davies, Rafique Bachour and Anna Biganzoli <i>Freshfields Bruckhaus Deringer</i>	131
Faroe Islands Morten Kofmann, Jens Munk Plum and Erik Bertelsen <i>Kromann Reumert</i>	142
Finland Christian Wik and Niko Hukkinen <i>Roschier, Attorneys Ltd</i>	145
France Jérôme Philippe and Jean-Nicholas Maillard <i>Freshfields Bruckhaus Deringer</i>	150
Germany Helmut Bergmann and Frank Röhling <i>Freshfields Bruckhaus Deringer</i>	157
Greece Aida Economou <i>Panagopoulos, Vainanidis, Schina, Economou</i>	170
Hong Kong Nicholas French, Michael Han and Margaret Wang <i>Freshfields Bruckhaus Deringer</i>	175
Hungary Gábor Fejes and Zoltán Marosi <i>Oppenheim</i>	181
India Suchitra Chitale <i>Chitale & Chitale Partners</i>	187
Indonesia HMBC Rikrik Rizkiyana, Albert Boy Situmorang and Wisnu Wardhana <i>Rizkiyana & Iswanto Antitrust and Corporate Lawyers</i>	191
Ireland Tony Burke, John Kettle and Niall Collins <i>Mason Hayes+Curran</i>	196
Israel Eytan Epstein, Mazor Matzkevich and Shiran Shabtai <i>Epstein, Chomsky, Osnat & Co Law Offices</i>	202
Italy Gian Luca Zampa <i>Freshfields Bruckhaus Deringer</i>	209
Japan Akinori Uesugi and Kaori Yamada <i>Freshfields Bruckhaus Deringer</i>	219
Kenya Richard Harney and Kenneth Njuguna <i>Coulson Harney</i>	227
Korea Seong-Un Yun and Sanghoon Shin <i>Bae, Kim & Lee, LLC</i>	232
Latvia Liga Merwin and Martins Gailis <i>LAWIN</i>	237
Liechtenstein Helene Rebholz and Benedikt Koenig <i>Dr Dr Batliner & Dr Gasser</i>	243
Lithuania Marius Juonyis <i>LAWIN</i>	247
Luxembourg Léon Gloden <i>Elvinger, Hoss & Prussen</i>	253
Macedonia Vesna Gavriloska and Maja Jakimovska <i>Čakmakova Advocates</i>	256
Malta Ian Gauci and Karl Sammut <i>GTG Advocates</i>	262
Mexico Gabriel Castañeda <i>Castañeda y Asociados</i>	269
Namibia Peter Frank Koep and Hugo Meyer van den Berg <i>Koep & Partners</i>	274
Netherlands Winfred Knibbeler and Peter Schepens <i>Freshfields Bruckhaus Deringer</i>	278
New Zealand Andrew Peterson, Sarah Keene and Troy Pilkington <i>Russell McVeagh</i>	284
Nigeria Babatunde Irukera and Ikem Isiekwena <i>SimmonsCooper Partners</i>	292
Norway Mads Magnussen and Simen M Klevstrand <i>Wikborg Rein</i>	298
Poland Aleksander Stawicki and Bartosz Turno <i>KWB Wiercinski Kwiecinski Baehr</i>	303
Portugal Mário Marques Mendes and Pedro Vilarinho Pires <i>Marques Mendes & Associados</i>	309
Romania Anca Iulia Cimpeanu <i>Rubin Meyer Doru & Trandafir, SCA</i>	316
Russia Alexander Viktorov <i>Freshfields Bruckhaus Deringer</i>	322
Saudi Arabia Fares Al-Hejailan, Rafique Bachour and Hani Nassef <i>Freshfields Bruckhaus Deringer</i>	327
Serbia Guenter Bauer, Beba Miletic and Maja Stankovic <i>Wolf Theiss</i>	332
Singapore Lim Chong Kin and Ng Ee-Kia <i>Drew & Napier LLC</i>	338
Slovakia Guenter Bauer, Zuzana Slávková and Paul Hesse <i>Wolf Theiss</i>	346
Slovenia Guenter Bauer, Paul Hesse and Klemen Radosavljevic <i>Wolf Theiss</i>	351
South Africa Robert Legh and Tamara Dini <i>Bowman Gilfillan</i>	357
Spain Francisco Cantos, Álvaro Iza and Enrique Carrera <i>Freshfields Bruckhaus Deringer</i>	367
Sweden Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg <i>Mannheimer Swartling Advokatbyrå</i>	373
Switzerland Marcel Meinhardt, Benoît Merkt and Astrid Waser <i>Lenz & Staehelin</i>	378
Taiwan Mark Ohlson and Charles Hwang <i>YangMing Partners</i>	383
Thailand Chatri Trakulmanenate and Kallaya Laohaganniyom <i>Weerawong, Chinnavat & Peangpanor Ltd</i>	390
Turkey Gönenc Gürkaynak <i>ELIG, Attorneys-at-Law</i>	394
Ukraine Alexey Ivanov and Sergey Glushchenko <i>Konnov & Sozanovsky Attorneys at Law</i>	401
United Kingdom Alex Potter, Alison Jones and Martin McElwee <i>Freshfields Bruckhaus Deringer</i>	406
United States Ronan P Harty <i>Davis Polk & Wardwell LLP</i>	415
Uruguay Alberto J Foderé and Rodrigo Díaz <i>Sanguinetti Foderé Abogados</i>	424
Venezuela José H Frías <i>D'Empaire Reyna Abogados</i>	429
Zambia Charles Mkokweza, Mabvuto Sakala and Sharon Sakuwaha <i>Corpus Legal Practitioners</i>	433
The New ICN Agenda John Fingleton <i>Chair of the steering group of the ICN</i>	437
Quick Reference Tables	439

Macedonia

Vesna Gavriloska and Maja Jakimovska

Čakmakova Advocates

Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

Due to the obligations undertaken with the Stabilisation and Association Agreement between the Republic of Macedonia and the European Communities and their Member States and the ongoing process of harmonisation of the Macedonian legislation with the EU acquis, the new Law on Protection of Competition (LPC) entered into force on 13 November 2010 (Official Gazette of the RM No. 145/10). The purpose of the LPC as a primary source of competition law in Macedonia is to ensure free competition on the domestic market to stimulate economic efficiency and consumer welfare.

The following by-laws (even though adopted on the basis of the 2005 LPC, which is no longer in force), provide further regulation of the competition area in Macedonia:

- on block exemptions granted to technology transfer agreements to license know-how;
- on block exemptions granted to horizontal specialisation agreements;
- on block exemptions granted to vertical agreements on exclusive rights of distribution, selective rights of distribution, exclusive rights of purchase and franchise;
- on block exemptions of horizontal research and development agreements;
- on block exemptions granted to agreements on the distribution and servicing of motor vehicles;
- on the form and content of the notification and criteria on the evaluation of concentrations;
- on block exemptions granted to agreements in the insurance sector; and
- 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.

The misdemeanour procedure in front of the Commission for Protection of Competition is conducted and the misdemeanour sanction is imposed by the Commission for misdemeanour matters.

2 What kinds of mergers are caught?

The LPC's merger control rules are based on the concept of control. 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 of direct or indirect control of the whole or parts of one or more other undertakings 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 means of an agreement or in other manner stipulated by law.

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 (ie, the acquisition of direct or indirect control).

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

Pursuant to the LPC, control shall comprise rights, contracts or any other means that either separately or in combination, and having regard to the factual 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.

Control is acquired by persons or undertakings that are holders of the rights or have acquired the rights under the contracts referred to above, or that still have the power to exercise such rights under the contracts even though such persons or undertakings have not been holders of such rights or have not acquired the rights under the contracts.

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 income 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 income 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 market share of one of the participants exceeds 40 per cent or the total market share of the participants in the concentration exceeds 60 per cent in the year preceding the concentration.

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 income of the undertaking made in the business year preceding the year when the misdemeanour was committed. In addition to the fine, the Commission for misdemeanour matters may impose to the legal person a temporary ban on the performance of specific activity in duration of three to 30 days, and to the natural person – a ban on the performance of an occupation, activity or duty in duration of three to 15 days.

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:

- merging undertakings; and
- persons or undertakings that acquire control of the whole or part of one or more other undertakings, as well as the undertakings or parts thereof over which control is acquired.

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 either before its notification to the Commission or after the submission of the notification until

a decision is made declaring the concentration compliant with the law or before the expiry of the legal terms in which the Commission should pass the decision. 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 if the concentration has been notified to the Commission without delay, and the acquirer of securities does not exercise the voting rights attached to the securities in question, or does so only to the extent which is necessary to maintain the full value of its investment and based on a Commission’s procedural order (decision) for exemption.

After the notification is received, the Commission has up to 25 or at most 145 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 18 of the LPC, than such undertakings are committing a serious 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 in which the concentration was performed. So far, there have been no such cases and no such fines have been imposed by the Commission.

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 Commission (article 18 of the LPC).

The Commission may, upon a reasoned request by the participants in a concentration, adopt a decision to allow an exemption from the obligations that the concentration shall not be performed before its notification and clearance. In deciding upon the request for exemption, the Commission shall, inter alia, take into account the effects of the suspension of the concentration on one or more undertakings concerned by the concentration or on a third party, as well the threat to the competition posed by the concentration. This exemption may be subject to conditions and obligations in order to ensure conditions for effective competition. The exemption may be applied for and granted at any time, that is, prior to the notification or following the transaction that refers to the 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.

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?

The LPC does not prescribe special form for submission of the notification. The LPC only stipulates that the notification of the concentration must include an original of the legal act which is the basis for the creation of the concentration or a verified transcript thereof; financial report of the participants regarding the business year preceding the concentration in the original or a verified transcript thereof; certificate from the trade register or other register of legal persons containing the basic information on the undertaking, the registered office and the scope of operation of the participants in the original or a verified transcript thereof and data regarding the market shares of the participants, as well as the shares of their competitors.

However, the Regulation on the form and content of the notification and criteria for the evaluation of concentrations sets out detailed rules with regard to the notification's content and format as well as additional 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 the case of acquiring shares in or part 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. Within 25 working days as of the day of receipt of the complete notification the Commission shall make the decision on the compatibility of the merger with the LPC, or it shall make a procedural order on initiating an in-depth procedure if it finds that the notified concentration falls under the provisions of the LPC, but might not be compliant with the LPC.

This term may be extended up to 35 working days if the participants in the concentration undertake commitments in relation to the Commission with a view to rendering the concentration compliant with the LPC.

If an in-depth procedure has been initiated, the decision appraising the concentration has to be passed within 90 working days from the date of initiating the procedure. At any time following the initiation of the procedure the time limits may be extended by the Commission in agreement with the participants in the concentration and the total duration of each extension may not exceed 20 working days.

If the Commission has not adopted a decision within the prescribed deadlines, the concentration shall be considered to be compliant with the provisions of the LPC.

By exception, the time limits stipulated with the LPC shall not be binding on the Commission when, as a result of circumstances for which one of the participants is responsible, the Commission had to request ex officio from the undertakings to submit necessary data regarding their economic-financial standing, their business relations, data regarding their statutes and decisions, and the number and identity of the persons affected by such decisions, as well as other necessary data, or if the Commission had to perform other relevant actions by inspection.

The procedure cannot be speeded up.

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

The Commission shall examine the notification as of the day it is received, and if:

- it determines that the notified concentration does not fall under the provisions of the LPC, it shall adopt a decision thereof;
- it finds that the concentration notified, although falling under the provisions of the LPC, shall not have as its effect significant impediment of effective competition on the market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, it shall adopt a decision declaring that the concentration is compliant with the provisions of the LPC; or
- it finds that the concentration notified falls under the provisions of the LPC and may have as its effect significant impediment of effective competition on the market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, the Commission shall issue a procedural order for the initiation of in-depth procedure. No appeal or legal action on instituting an administrative dispute is allowed against this procedural order.

If the participants, after the notification is filed, modify the concentration and the Commission finds that due to those changes the concentration shall no longer have as its effect significant impediment of effective competition on the market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, it shall adopt a decision stating that the concentration does not fall under the provisions of the LPC.

During the in-depth procedure the following steps may occur:

- the Commission may decide to adopt a decision declaring that the concentration is compliant with the provisions of the LPC, if after the notification is filed or after the performed concentration modifications by its participants, the Commission finds that the concentration shall not have as its effect significant impediment of effective competition on the market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position;
- the participants in the concentration may enter into commitments with the Commission with a view to rendering the concentration compliant with the provisions of the LPC. In this case the Commission may adopt a decision declaring that the concentration is compliant with the provisions of the LPC and in the same decision shall determine the conditions and impose obligations intended to insure that the participants act in line with the commitments undertaken with the Commission; or
- the Commission may adopt a decision declaring that the concentration is not compliant with the provisions of the LPC if it finds that the concentration shall have as its effect a significant impediment of effective competition on the market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

Substantive assessment

17 What is the substantive test for clearance?

A concentration that significantly impedes the effective competition on the market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position of its participants, is not in compliance with the provisions of the LPC.

18 Is there a special substantive test for joint ventures?

To the extent that the creation of a joint venture constituting a concentration has as its object or effect the coordination of the competitive behaviour of undertakings – part of the joint venture that remain legally independent, such coordination shall be appraised according to the criteria applicable to the prohibited agreements, decisions and concerted practices as well as the exemptions thereof.

In making such appraisal, the Commission in particular shall take into account whether the parties to the joint venture continue to retain, to a significant extent, the activities on the same market as the joint venture or on the market that is downstream or upstream from that of the joint venture or on a neighbouring market closely related to the market of the joint venture; and the coordination that arises as a direct effect from the creation of the joint venture affords the parties in the joint venture the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

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

The Commission shall investigate whether the concentration shall significantly impede the effective competition on the market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position of its participants.

In making the appraisal of the concentration, the Commission especially takes into account:

- the need to maintain and develop effective competition on the market or in a substantial part of it, especially in terms of the structure of all markets concerned and the actual or potential competition from undertakings located in Macedonia and outside Macedonia; and
- the market position of the undertakings concerned and their economic and financial power, the supply and alternatives available to suppliers and users, as well as their access to the supplies or markets, any legal or other barriers to entry on and exit from the market, the supply and demand trends for the relevant goods or services, the interest of the consumers and the technological and economic development, provided this is benefit for the consumers and the concentration does not form an obstacle to competition development.

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?

Interim measures for restoring or maintaining effective competition may be imposed when the concentration has:

- been implemented before filing the notification and its clearance (as compliant with LPC);
- been implemented contrary to the conditions and obligations attached to the decision for its clearance; and
- already been implemented and declared not compliant with the provisions of the LPC.

The Commission has the power to annul its decision for clearance of the concentration and to declare that the concentration is not compliant with the LPC, and, if necessary, impose measures and obligations to restore effective competition on the relevant market. In this procedure, the Commission is not bound by the time limits outlined in question 15.

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.

After the notification is filed, the participants may enter into commitments (divestiture or behavioural remedies) with the Commission with a view to rendering the concentration compliant with the provisions of the Law. In its decision the Commission shall attach conditions and impose obligations intended to insure that the participants act in line with the commitments entered into with the Commission, with a view to rendering the concentration compliant with the provisions of the Law.

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

There are no strict provisions in the LPC 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?

After the notification of the concentration is published on the website of the Commission, all interested parties (including the customers and competitors) can provide their comments, opinions and remarks regarding the concentration concerned within the deadline stipulated by the Commission.

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 and the Commission for misdemeanour matters shall be published in the Official Gazette of the Republic of Macedonia and on the website of the Commission. The judgments, that is, the decisions of the court shall also be published on the Commission's website. The notifications of the concentrations are also posted on the website of the Commission by stating the names of the participants, seat, basic business activities of the participants and the form of the concentration. All data regarded as business or professional secrets, within the meaning stipulated in the LPC, shall not be published.

The president, members of the Commission and employees are obliged, for misdemeanour matters, to keep business or professional secrets regardless of how they have been learnt. The obligation to keep business or professional secrets lasts for five years as of the termination of the employment with the Commission or after the expiry of the term of office of the president or the Commission member. The above persons may not give public statements that could harm the reputation of the undertaking or statements on the measures they have undertaken or the procedures they have initiated while performing the activities under their competence until they are final, unless it regards the announcement of general information.

The parties in the procedure shall not be entitled to inspect, transcribe or copy any documents that are a business or professional secret within the definition under the LPC.

The Commission shall accept the classification of data as a business secret if it concerns data that has economic or market value and whose discovery or use may lead to economic advantage of other undertakings. When submitting data classified as a business secret, the undertaking is obliged to justify such determination by indicating objective reasons.

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

The Commission participates in the implementation of projects of international authorities and the authorities of the European Union,

Update and trends

Crucial legislative developments in Macedonia refer to the newly enacted Law on the Protection of Competition and Law on State Aid Control, which entered into force in November 2010.

The basic aim of the new Law on the Protection of Competition was further harmonisation of the national competition legislation with the EU legislation (articles 101, 102 and 106 of the Treaty on the Functioning of the European Union, Regulation 1/2003, Regulation 773/2004 and Regulation 139/2004), as well as improvement of the efficiency of the procedure conducted by the national Commission on protection of the competition. The new Law is in compliance with the obligations undertaken by the Republic of Macedonia with the Stabilisation and Association Agreement.

In general, the law is harmonised with the above-mentioned EU legislation (and particularly with article 101, article 102 and article 106 paragraphs 1 and 2 of the Treaty on the Functioning of the European Union); partial harmonisation refers to the EU secondary legislation with mandatory character (due to procedural specifics that are immanent to the Macedonian legislation), provided that complete harmonisation shall be achieved after the adoption of the national by-laws, and finally after the accession of Macedonia to EU.

The jurisdictional thresholds for concentrations are adjusted to the specific conditions and particularities of the Macedonian economy, and therefore they differ from the EU Regulation 139/2004.

One of the novelties of the law is that the participants in the misdemeanor procedure are entitled to be notified before passing the decision on existence or non-existence of misdemeanor and are entitled to provide their written respond, comments and propose evidences to the Commission (preliminary notification for the facts determined – before the hearing shall be appointed; and final notification on the facts determined – before passing the final decision, that includes the type and amount of the sanction imposed). Also, the person against whom a procedure has been initiated may offer to the Commission undertaking of specific commitments by which the distortion of the competition caused by actions or failure to take action by that person shall be overcome. Another legal novelty are the behavioural and structural measures that may be imposed by the Commission (in shortened proceedings, following the decision by which it was determined that a misdemeanor was performed) for the purpose of eliminating the harmful effects from the distortion of competition that have arisen by means of the misdemeanor. However, in all three cases the procedure is adjusted to the specifics of the national legal system, and therefore slightly differs from the EU legislation.

The law introduced the possibility in urgent matters (when there is a risk of serious and irreparable damage to the competition), for the Commission ex officio to order interim measures to the undertaking (based on its initial information – prima facie as to the existence of a misdemeanor).

Specific rules have been prescribed for the first time regarding imposing a fine to associations of undertakings, determination of the fine, and leniency programme in the detection and sanctioning of the

most difficult violations of the legal provisions. These provisions fully comply with the EU rules.

In expectation of the new by-laws to be adopted by November 2011 (especially the conditions and procedure applicable to leniency), the existing by-laws shall continue to apply. In the meantime, the Commission issued several guidelines for practical implementation of the law by the Commission:

- Guidelines on defining relevant market for the purposes of the Law on Protection of Competition – May 2011 (the purpose of which is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of the Law on Protection of Competition; the Guidelines are fully harmonised with the European Commission's notice on the definition of the Relevant Market for the purposes of Community competition law, Official Journal C 372, 09.12.1997, p. 5);
- Guidelines for the manner of preparation of non-confidential version of the decisions of the Commission (decisions that do not contain data qualified as business secret) – February 2011;
- Guidelines for the manner of determination of the fine imposed in accordance with the Law on Protection of Competition – December 2010 (as basic point in defining the fine, the Commission considers the value of the sale of products and services to which the misdemeanor refers, as well as the duration of the misdemeanor; provided that the imposed fine should reflect the time period for which the undertaking participated in the misdemeanor; respectively, the amount of the fine shall include a specific sum, notwithstanding the duration of the misdemeanor, for the purpose to achieve the deterring effect of the fine).

The new Law on State Aid Control provides further harmonisation of the national legislation with the EU legislation in the field of state aid control as well as with the EU competition legislation (articles 107 and 106 of the Treaty on the Functioning of the European Union, and the Regulation 659/199), and improvement of the procedural efficiency of the national Commission on protection of the competition.

From June 2010 to June 2011 several concentrations were notified to the Commission and all have been cleared as in compliance with the law. No specific court decisions referring to merger control and concentrations were passed.

The decisions of the Commission by which it was determined there had been abuse of dominant position by the undertakings mainly on the relevant market of telecommunication services and the energy services became final and absolute in the second half of 2010. Based on that, the Commission on misdemeanor matters in the first half of 2011 imposed fines against the undertakings for such activities that were found as misdemeanors; the decision on fines shall become final and absolute after the completion of the administrative disputes before the Administrative Court and the Higher Administrative Court.

and cooperates with the authorities 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 has signed memorandums of cooperation with these countries.

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

There are no special provisions on foreign investments or on special sectors in the LPC.

Judicial review

31 What are the opportunities for appeal or judicial review?

Participants in the procedure are entitled to lodge lawsuit with the Administrative Court of Macedonia against decisions of the Commission adopted in administrative procedure as well as against decisions of the Commission on misdemeanour matters.

The Law on Administrative Disputes applies to disputes initiated in accordance with the above. As of 1 July 2011, decisions of the Administrative Court can be appealed to the Higher Administrative Court. The Supreme Court shall decide on extraordinary legal remedies against decisions of the Higher Administrative Court.

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

Against decisions of the Commission adopted in administrative procedures, a lawsuit can be lodged with the Administrative Court within 30 days of receiving the decision, not deferring the enforcement.

Against decisions of the Commission for misdemeanour matters, a lawsuit can be lodged with the Administrative Court within eight days of receiving the decision and the same shall defer the enforcement of the decision.

Decisions of the Administrative Court can be appealed to the Higher Administrative Court within 15 days of receiving the decision of the Administrative Court.

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 Commission's merger decisions have been complied with.

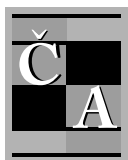
34 What are the current enforcement concerns of the authorities?

The newly enacted LPC introduced misdemeanour procedures in which the Commission for misdemeanour matters shall simultaneously determine the existence of violation of the LPC, the existence

of misdemeanour, and it shall also impose certain fines as sanctions for such behaviour. It is expected that this structure of the LPC shall expedite the enforcement and the system of sanctioning the LPC violations, since it would no longer be necessary for the violation to be initially determined in an administrative procedure, which would then be followed by a separate misdemeanour procedure.

35 Are there current proposals to change the legislation?

The new by-laws should be adopted by November 2011. The existing by-laws shall continue to apply until the entry into force of the new by-laws.



ČAKMAKOVA
ADVOCATES

Vesna Gavriloska
Maja Jakimovska

v.gavriloska@mlca.com.mk
maja.jakimovska@mlca.com.mk

8-ma Udarna Brigada 43/3
1000 Skopje
Macedonia

Tel: +389 2 3115 205 / 3233 599 / 3233 699
Fax: +389 2 3111 521
www.cakmakova.com



Annual volumes published on:

Air Transport	Life Sciences
Anti-Corruption Regulation	Merger Control
Arbitration	Mergers & Acquisitions
Banking Regulation	Mining
Cartel Regulation	Oil Regulation
Climate Regulation	Patents
Construction	Pharmaceutical Antitrust
Copyright	Private Antitrust Litigation
Corporate Governance	Private Equity
Dispute Resolution	Product Liability
Dominance	Product Recall
e-Commerce	Project Finance
Electricity Regulation	Public Procurement
Enforcement of Foreign Judgments	Real Estate
Environment	Restructuring & Insolvency
Foreign Direct Investment	Right of Publicity
Franchise	Securities Finance
Gas Regulation	Shipping
Insurance & Reinsurance	Tax on Inbound Investment
Intellectual Property & Antitrust	Telecoms and Media
Labour & Employment	Trademarks
Licensing	Vertical Agreements

**For more information or to
purchase books, please visit:
www.GettingTheDealThrough.com**



The Official Research Partner of
the International Bar Association



Strategic research partners of
the ABA International section