

Merger Control

The international regulation of mergers and joint ventures in 73 jurisdictions worldwide

2013

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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 LPC was amended and supplemented in October 2011 (Official Gazette No. 136/2011).

In March 2012, on the basis of the LPC, the government of Republic of Macedonia adopted nine by-laws that regulate:

- detailed conditions on block exemption of certain types of contracts for research and development;
- block exemptions granted to agreements on the distribution and servicing of motor vehicles;
- block exemptions of certain types of vertical agreements;
- detailed conditions on block exemptions granted to a certain technology transfer agreements, a licence or know-how;
- detailed conditions on block exemptions granted to a certain horizontal specialisation agreements;
- on block exemption granted to a certain insurance agreements;
- detailed conditions to a minor importance agreements;
- conditions and procedure for exemption or reduction of fine; and
- form and content of notification of concentration and necessary documentation that shall be submitted along with the notification.

The new by-laws replace the eight by-laws adopted on the basis of the 2005 Law on Protection of Competition (no longer in force).

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 regards 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 who 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.

With the Guidelines of the Commission for protection of competition regarding the term concentration, adopted on 29 March 2012, the Commission provided more information and instructions as to questions when the concentration arises in accordance with article 12 of the LPC, thus specifying the types of 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 income of all the participating undertakings, generated by sale of goods or services on the world market, exceeds the equivalent amount of €10 million expressed in denar counter value, 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 expressed in denar counter value, 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.

8 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.

Notification and clearance timetable

9 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.

10 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 denar. An additional filing fee of 30,000 denar 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.

11 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 complete notification is received, the Commission has up to 25 or at most 145 business days, depending on the case, to pass its decision.

12 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.

13 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. The Commission should further prescribe the form and content of the request for exemption. The decision following the request for exemption has to be issued within 15 days by the day of receipt of the complete documentation necessary to assess the request.

14 Are there any special merger control rules applicable to public takeover bids?

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

15 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 of concentration and necessary documentation that shall be submitted along with the notification, sets out detailed rules with regard to the notification's content and format (written and electronic) 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.

16 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.

17 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

18 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.

19 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.

20 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.

21 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.

22 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

23 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 16.

24 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.

In 2010 the Commission adopted the Guidelines on possible remedies acceptable to the Commission for Protection of the Competition under chapter III, 'Control of concentrations', of the Law on Protection of Competition.

25 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.

26 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.

27 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. In November 2011 the Commission adopted the Guidelines on restrictions directly related and necessary to concentrations.

Involvement of other parties or authorities

28 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.

29 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

Update and trends

The major development in competition law in Macedonia is the Law on Amending and Supplementing of the Law on Protection of Competition adopted in October 2011 and the new by-laws, adopted in March 2012.

First, the Law on Amending and Supplementing of the Law on Protection of Competition (Official Gazette of RM No. 136/2011) applies to the legal steps that the person who submitted the notification of concentration shall undertake if the Commission shall not make a decision within the legal term of 15 days following submission of the request for exemption from the obligations that the concentration shall not be performed before its notification and clearance. In accordance with the above, if the 15-day term shall not be respected by the Commission, the person who submitted the notification of concentration and the request for exemption is entitled to take specified steps in order to obtain the decision on exemption, including finally to submit a claim to the administrative court as a final step towards achieving the rights guaranteed by law and efficiency and urgency of the procedure for issuing the decision by the Commission.

In November 2011 the Commission adopted the rule book for the form and content of the request for exemption of the suspension obligation.

However, the major update in the legislation of concentrations is the adoption of the 'Regulation on the Form and Content of the Notification of Concentration and Necessary Documentation that shall be Submitted along with the Notification' in March 2012. This Regulation is harmonised with the Regulation of the Commission (EU) No. 802/2004 dated 7 April 2004 which implemented the Council Regulation No. 139/2004 for control on the concentrations between

the undertakings OJ L 133, 30.04.2004 page 1-39, CELEX No. 32004R0802.

The major developments of the new Regulation can be summarised as follows:

- summary of the notification, which shall include: name, registered office and subject of the business activity of the participants of the concentration, the type of the concentration (for example, merger, acquisition, joint control, etc) and the relevant markets the concentration refers to. The above mentioned summary is published by the Commission on its web page and it should not contain business secrets (in accordance with article 3, paragraph 1, point 1 of the Regulation); and
- the notification for concentration should mandatorily include a statement signed by or on behalf of all members in the concentration which submit the notification, by which the person(s) submitting the notification state that pursuant to its or their opinion and belief, the information in the notification are true, correct and complete, as well as that correct and complete documents have been delivered in the original, respectively copy (copies) of the documents as required in accordance with the Law on Protection of Competition and this Regulation, as well as that all assessments are made and are best assessments of the specified indicators made by the person(s) submitting the notification, that all stated opinions are honest, as well as that the person(s) submitting the notification is/are completely familiar with the provisions of article 61 paragraph 2 of the Law on Protection of Competition (in accordance with article 3, paragraph 1, point 21 of the Regulation).

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.

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

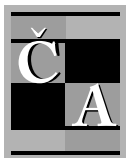
The Commission participates in the implementation of projects of international authorities and the authorities of the European Union, and cooperates with the authorities of other countries and institutions in the area of competition. The Commission has a good cooperation record, especially with the competition authorities of countries in the region, and has signed memorandums of cooperation with these countries.

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



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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 on the basis of the LPC were adopted in March 2012 and are already in force. With this set of by-laws, the competition legislation under the LPC is completed with the most important pieces of EU legislation. However, the Commission may further enact guidelines on certain aspects of the implementation of the LPC.

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