

Merger Control

The international regulation of mergers and joint ventures
in 72 jurisdictions worldwide

Consulting editor
John Davies



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GETTING THE
DEAL THROUGH 

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Merger Control 2017

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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), and was subsequently amended and supplemented in 2011 (Official Gazette No. 136/2011), in 2014 (Official Gazette No. 41/2014) and in 2016 (Official Gazette No. 53/2016).

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.

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

- Decree on the detailed conditions for block exemption of certain types of agreements for transfer of technology, licence or know-how;
- Decree on the detailed conditions for block exemption of certain types of research and development agreements;
- Decree on the conditions for block exemption of certain categories of horizontal agreements for specialisation;
- Decree on block exemption of certain categories of insurance agreements;
- Decree on block exemption of certain categories of agreements on distribution and servicing of motor vehicles;
- Decree on block exemption of certain categories of vertical agreements;
- Decree on the detailed conditions on agreements of minor importance (*de minimis*);
- Decree on the form and content of the notification for concentration and the documentation to be submitted with the notification; and
- Decree on the detailed conditions and procedure under which the Commission for Misdemeanour Matters decides on immunity and reduction of fines.

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 LPC 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 is conducted and the misdemeanour sanction is imposed by a separate Commission for Misdemeanour Matters within the Commission for the Protection of Competition.

From 2012 to the end of 2015 the Commission adopted a set of various guidelines aiming to elaborate in more details the provisions of the LPC and the Decrees, as well as to give instructions on the manner

of proceeding of the Commission and assessment of various competition issues:

- Guidelines on the term concentration (2012) – harmonised with the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings;
- Guidelines on the application of article 7, paragraph 3 of the LPC (2012) – harmonised with the Commission Notice – Guidelines on the application of article 81(3) of the Treaty (text with EEA relevance); and
- Guidelines on determining the cases in which the Commission shall pass a decision on assessment of the concentration in simplified form (2012) – harmonised with the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004 (2005/C 56/04);
- Guidelines for the method of submission and filing of notifications for concentration (2015) – harmonised with the Commission Regulation (EC) No. 802/2004 dated 21 April 2004 for implementing Council Regulation (EC) No. 139/2004 on control of concentrations between enterprises;
- Guide for detecting collusive agreements in the procedures for granting public procurement agreements (2015) – harmonised with the recommendations for prevention and avoiding of collusive tendering of international organisations, such as the OECD;
- Guidelines for assessment of horizontal concentrations for the purposes of the LPC (2015) – harmonised with the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 31, 5 February 2004, p. 5-18;
- Guidelines for assessment of vertical and conglomerate concentrations (2015) – harmonised with the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings Official Journal C 265 of 18 October 2008;
- Guidelines for possible amendments and undertaking of commitments with regard to the notified concentrations, acceptable for the Commission, according to the LPC (2015) – harmonised with the Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004;
- Guidelines for the vertical restrictions (2015) – harmonised with the Commission notice – Guidelines on Vertical Restraints, Official Journal C 130, 19 May 2010, p. 1); and
- Guidelines for the implementation of article 7 of the LPC for horizontal agreements for cooperation (2015) – harmonised with the Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (OJ C 11, 14 January 2011, p. 1-72).

2 What kinds of mergers are caught?

The LPC's merger control rules are based on the concept of change 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 What types of joint ventures are caught?

The creation of a joint venture that permanently performs all the functions of an autonomous economic entity (so-called full-function joint ventures) shall constitute a concentration according to the provisions of the LPC (ie, the acquisition of direct or indirect control).

The Guidelines on the term concentration closely defines the specific requirements under which the joint venture would be considered a concentration.

The full-functionality criterion envisages the application of the LPC for the creation of joint ventures by the parties, irrespective of whether the relevant joint venture is created as a 'greenfield operation' and whether the parties contribute assets to the joint venture that were previously in individual ownership. In these circumstances, the joint venture must fulfil the full-functionality criterion in order to constitute a concentration. Even though a joint venture may be a full-functioning undertaking and thus economically autonomous from an operational perspective, that does not mean that it enjoys autonomy as regards the adoption of its strategic decisions or on the contrary the jointly controlled undertaking could never be considered as a full-functioning joint venture and therefore the condition, under which the joint venture would constitute a concentration under the provisions of the LPC, would never be met. Hence, for the application of the full-functionality criterion it is sufficient for the joint venture to be autonomous in an operational respect.

The full-functionality in fact means that a joint venture must operate on the market, performing functions that are normally carried out by the undertakings operating on the same market. For that purpose, the joint venture must have a management dedicated to its daily operations and access to sufficient resources including finance, personnel and assets (tangible and intangible) in order to perform its business activities on a permanent basis within the framework determined in the joint venture agreement.

The Guidelines on the term concentration outlines more specific directions with respect to the situations that would be considered when examining the notification of concentration in cases involving joint ventures (for example the sufficient resources to operate independently on a market, the activities outside the specific function of the ruling (parent) undertakings, sale and purchase relations with the ruling (parent) undertakings, sustainable operations (operations on a lasting basis), changes in the activities of the joint venture).

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 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 regarding the term concentration, 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 for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

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 denars 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 denars 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.

The LPC does not specify any conditions under which the Commission would be competent to investigate transactions falling below the above-mentioned thresholds.

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 or market share 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 carried out or undertaken outside the territory of Macedonia.

If the thresholds are fulfilled the presumption stands that a foreign-to-foreign merger produces effects in Macedonia, and it has to be notified 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; the general rules shall apply.

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. As a rule, 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.

The competition authority in Macedonia has had a track record of sanctioning the undertakings for failure to notify the concentration when the jurisdictional thresholds were met (even for foreign-to-foreign mergers).

10 Who is responsible for filing and are filing fees required?

Merging undertakings or acquirers of joint control are obliged to submit a joint notification of the concentration arising as a result of a merger or of a concentration resulting from the acquisition of a joint control.

In all other cases the notification shall be filed by person or undertaking that acquires control of the whole or part of one or more other undertakings.

The initial filing fee is set at a fixed amount of 6,000 denars and is payable with filing. An additional filing fee of 30,000 denars will be charged for a decision declaring the concentration compliant with the provisions of the LPC, and is 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 LPC 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 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 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

If the undertaking does not file a notification on concentration in cases of foreign-to-foreign mergers that fall under the provisions of the LPC, the Commission for Misdemeanour Matters shall impose 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 on the legal person a temporary ban on the performance of specific activity for three to 30 days, and to the natural person a ban on the performance of an occupation, activity or duty for three to 15 days.

The Commission for Misdemeanour Matters imposed fines in several cases involving closing before clearance in foreign-to-foreign mergers.

14 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 imposing of conditions and obligations in order to ensure an effective competition. The exemption may be applied for and granted at any time, that is, prior to filing of 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 prescribed a special form of request for exemption, regulating in general manner its content; however, details of the documents to be enclosed to the request are not provided. The decision following the request for exemption has to be issued within 15 days of the day of receipt of the complete documentation necessary to assess the request.

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

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

16 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 reports 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. As of August 2016, the Commission will ex officio obtain the financial reports and registration documents for the participants in the concentration registered in Macedonia.

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. Inter alia, the notification on concentration should contain the following information: a short resume on the notification - without any confidential information (to be published on the Commission's website), exact data on the participants in the concentration (name, address, business activity, annual income gained on a group level in the business year preceding the concentration - worldwide and on the Macedonian market, calculated under article 16 of the LPC), detailed description and legal basis of the concentration, relevant markets and market shares of the participants in the concentration and their main competitors, etc.

The notification for concentration should mandatorily include a statement signed by or on behalf of the notifying party relating to the accuracy of the data, information and documents enclosed to the notification, and its awareness for the consequences of submitting false or misleading data to the Commission (in this case a misdemeanour fine could be imposed on the notifying party of up to 1 per cent of the value of its total annual turnover, calculated under article 16 of the LPC).

In addition to the compulsory data, the Commission may require the submission of all other data considered necessary for the evaluation of the concentration. In particular, this would take place in cases of horizontal relations (where two or more of the participants in the concentration are engaged in business activities related with the same market of goods and geographical market) or vertical relations (when one or more of the participants in the concentration are engaged in business activities on the market of goods that is upstream or downstream in relation to the market of goods in which any other participant in the concentration participates) between the participants in the concentration, provided that in cases of horizontal relations their mutual market share is higher than 15 per cent, and in cases of vertical relations their individual or mutual market shares are equal to or higher than 25 per cent.

The Guidelines for submission and filing of the notification for concentration prescribe the form and content of the introductory (first) page of the notification for concentration, which is of a very general nature. In addition, the Guidelines provide some more technical details about the form, content and technical description of the elements of the notification of concentration (all mandatory data to be provided on separate sheet of paper, to include description of the circumstances related to the concentration, or to indicate and elaborate that such information is not relevant for the assessment of the concentration, to provide a detailed list of all enclosures, etc).

17 What is the statutory timetable for clearance? Can it be speeded up?

Once the Commission receives all the data and documents, it shall issue a certificate of completeness and start to examine the notification of the concentration. Within 25 working days 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 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.

Between July 2014 and May 2015 all of the Commission's decisions were adopted within the prescribed term of 25 days as of the day of receipt of complete notification. There has been only one case in which the Commission decided to initiate an investigation of the concentration. This was because, upon receipt of the notification, the Commission ascertained that the filed notification falls under the provisions of the LPC and that it may have as its effect significant impediment of the effective competition on the market or a substantial part thereof (article 15, article 17 and article 19, paragraph 1, point 3 of the LPC). In June and July 2015 the concerned undertakings filed commitments to the Commission for the purpose of enabling the Commission to determine whether the concentration is in compliance with the LPC. On 8 July 2015, the Commission approved the proposed merger conditionally.

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

The Commission shall examine the notification once it is received, and decide:

- that the notified concentration does not fall under the provisions of the LPC;
- to declare the concentration as compliant with the provisions of the LPC if:
 - 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 (significant impediment of effective competition);
 - the participants, after the notification is filed, have modified the concentration, and the Commission finds that as result of those changes the concentration shall no longer have as its effect significant impediment to effective competition; or
 - to initiate an in-depth procedure if it finds that the concentration notified falls under the provisions of the LPC and may have as its effect the significant impediment of effective competition. No appeal or legal action on instituting an administrative dispute is allowed against this procedural order.

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;
- 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; any breach of the commitment attached to the decision declaring the concentration as compliant with LPC is justified reason the Commission to revoke such decision; 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.

Substantive assessment

19 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.

20 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.

21 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.

22 To what extent are non-competition issues relevant in the review process?

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

23 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

24 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 the LPC);
- been implemented contrary to the conditions and commitments 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

Update and trends

The recent 2016 amendment of the LPC provides that as of August 2016, the Commission will ex officio obtain the financial reports and registration documents for the participants in the concentration registered in Macedonia; the parties will no longer need to enclose those documents (referring to Macedonian entities) to the notification. However, this would not prevent the parties from obtaining those documents themselves for the purposes of preparation of the notification.

In February 2015 the Commission initiated an investigation into a horizontal concentration in the telecommunications market, upon receipt of a merger notification. During the procedure the parties filed initial and amended commitments to the Commission in order to make the concentration in compliance with the LPC. On 8 July 2015, the Commission conditionally approved the merger (case Up No. 08-1 from 2015).

Under the Commission's previous practice, the relevant markets affected with the merger were defined as the national territory of Macedonia, and specifically: (i) providing of fixed telecommunication services to end customers, (ii) providing of mobile telecommunication services to end customers, (iii) call ending in the fixed and mobile network, (iv) international roaming, (v) providing services of broadband internet access to end customers, (vi) providing services of transfer of

audio and visual contents to end customers, and (vii) wholesale market of access to public mobile communication networks and services of starting a call in public mobile communication networks; in geographic terms – the market was defined as the national territory of Macedonia. Both the markets under point (ii) and (vi) were additionally analysed by the Commission due to the conclusion that the concentration will significantly distort the competition on these markets.

The concentration finally resulted in: the merger of two of three competing mobile operators in Macedonia (that own their own network); and the merger of two of four major competing operators in Macedonia that offer services of transfer of audio and visual contents to end customers, broadband internet and fixed telephony; as a result, the number of competitors in both markets has decreased, plus control is acquired over a competitor with alternative technology.

Fulfilment of the commitments is ongoing and is to be monitored by a trustee proposed by the parties and appointed by the Commission. The commitments were consisted of other structural remedies such as granting access to the key infrastructure, networks, key technology, including patents, know-how or other intellectual property rights, and essential inputs, with the main purpose to enable access of new competitors on the market.

restore effective competition on the relevant market. In this procedure, the Commission is not bound by the time limits outlined in question 17.

25 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 LPC. 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 LPC.

In December 2015 the Commission adopted the new Guidelines for possible amendments and undertaking of commitments with regard to the notified concentrations, acceptable for the Commission, according to the LPC.

26 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.

Under the Guidelines mentioned in point 25 above, the parties may modify the concentration in order to eliminate the competition concerns and obtain clearance of the concentration. Such modifications have to be fully implemented in advance of a clearance decision.

However, it is more common that the parties submit commitments (adequate to eliminate the competition concerns and to ensure competitive market structures) with a view to rendering the concentration compliant with the LPC, and that those commitments are implemented following clearance.

The commitments could include the following.

Divestiture

Sale of a business unit (assets or part of the business) to a suitable purchaser – which is used to eliminate competition concerns resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns.

The divestiture has to be completed within a fixed time period agreed between the parties and the Commission – period for entering into a final agreement ('first divestiture period' – to take around six months, and 'trustee divestiture period' – to take additional three months), and a further period for the closing of the transaction (to take three months). The deadline for the divestiture shall normally start on the day of the adoption of the Commission decision. These periods may be modified on a case-by-case basis.

Removing links between the parties and competitors

In cases where these links contribute to the competition concerns raised by the merger (such as divestiture of a minority shareholding in a joint venture, or waiving of rights linked to minority stakes in a competitor, comprehensively and in a permanent way, or termination of agreements with companies supplying the same products or providing the same services).

Other structural remedies

Other structural remedies such as granting access to the key infrastructure, networks, key technology, including patents, know-how or other intellectual property rights, and essential inputs on non-discriminating terms – which may be suitable to resolve all types of concerns if those remedies are equivalent to divestitures in their effects.

Commitments

Commitments are possible relating to the future behaviour of the undertaking after the concentration, which may be acceptable only in very specific circumstances (such as change of long-term exclusive contracts, other non-divestiture remedies – such as promises by the parties to abstain from certain commercial behaviour, eg, bundling products, only in cases of conglomerate structures).

The parties have to submit enough information relevant for assessment of the commitments. The Commission may grant waivers or accept modifications or substitutions of the commitments only in exceptional circumstances. This will very rarely be relevant for divestiture commitments.

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

To date, there has been one foreign-to-foreign merger with remedies imposed, which have been duly fulfilled by the merging parties. On 8 July 2015, the Commission conditionally approved another merger; fulfilment of the commitments is ongoing.

28 In what circumstances will the clearance decision cover related arrangements?

If the concentration is approved, it is considered that the clearance decision includes the ancillary restrictions. The Guidelines on restrictions directly related and necessary to concentrations from 2011 sets out principles for assessing whether and to what extent the most common types of agreements (non-competition clauses, licence agreements, purchase and supply obligations) are deemed to be ancillary restraints. It introduces the principle of self-assessment of the ancillary restrictions; however, the parties may request from the Commission to provide its opinion on the residual character of the restrictions with regard to specific novel or unresolved issues giving rise to genuine uncertainty, when such case is not already covered with the Guidelines. The provisions of article 7 (regulating prohibited agreements, decisions and concerted practices) and article 11 of LPC (regulating abuse of dominant position) shall apply to restrictions that cannot be regarded as ancillary restrictions.

Involvement of other parties or authorities

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

After the short resume of the notification of the concentration (which includes the name, headquarters and subject of activity of the participants in the concentration, the type of concentration – whether it is a merger, or acquiring a joint control, etc) 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. Their input will be adequately assessed by the Commission and addressed in the decision upon the notified concentration.

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

The participants in the concentration should clearly mark all the confidential data in the notification. However, the Commission shall accept the classification of data as a business secret if it concerns data that have 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.

The participants in the concentration should take particular care of the fact that the short resume of the notification of concentration should not contain any confidential data and business secrets, as it is published on the Commission's website, and is a forum for interested parties to provide their comments, opinions and remarks.

After adopting a decision on concentration, the Commission delivers the decision to the notifying party, asking it to clearly mark all confidential data.

The non-confidential versions of the decisions of the Commission and the Commission for Misdemeanour Matters are 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 are published only on the Commission's website.

The president, and the members of the Commission and its employees, as well as the president and the members of the Commission for Misdemeanour Matters are obliged 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.

31 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. In practice the cooperation between the Commission and the other competition authorities consists mainly of sharing their respective experience. The Commission is not allowed to share any confidential information related to any ongoing or finished cases.

In November 2012, in Vienna, an Energy Community Competition Network within the frameworks of the Energy Community was established with the execution of the Joint Declaration on Cooperation between the Competition Authorities of the Contracting Parties and the Energy Community Secretariat. The competition authorities of Albania, Bosnia and Herzegovina, Croatia, Macedonia, Moldova, Montenegro, Kosovo, Serbia and Ukraine, signatories of the Agreement for the Establishment of the Energy Community, the competition authorities of Armenia and Georgia, as member observers, the Energy Community Secretariat and the competition authorities of Austria – all signers to the Declaration jointly agreed for the establishment of the Energy Community Competition Network for the purpose of protection of competition.

In April 2016 the Commission signed a memorandum on mutual understanding and cooperation with the competition authority of Serbia; it is expected that such memorandum will also be concluded with the competition authority of Turkey.

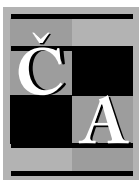
In February 2005, the OECD Regional Centre for Competition (RCC) in Budapest was formed. The RCC organises seminars and training for the employees of the competition authorities of south-eastern European countries. The employees from the Commission participate regularly in these events. They are very useful tools for exchange of information and for gaining experience with other competition authorities. In 2014, the RCC and the Commission organised a 'Seminar for cartels in public procurements'.

Judicial review

32 What are the opportunities for appeal or judicial review?

Participants in the procedure are entitled to lodge lawsuits with the Administrative Court of Macedonia against decisions of the Commission adopted during the administrative procedure as well as against decisions of the Commission for 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.



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

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

A lawsuit can be lodged with the Administrative Court against decisions of the Commission for Misdemeanour Matters 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

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

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

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 a misdemeanour, and it shall also impose certain fines as sanctions for such behaviour. It is expected that the structure of the LPC shall expedite the enforcement and the system of sanctioning LPC violations, as it will 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.

On 8 July 2015, the Commission conditionally approved a merger; fulfilment of the commitments is ongoing.

35 Are there current proposals to change the legislation?

At present there are no proposals for adoption of regulations or for any changes (amendment and supplement of the current regulation) pending. The new by-laws on the basis of the LPC were adopted in March 2012 and are in force. With this set of by-laws, competition legislation under the LPC is up to date with the most important parts of EU legislation. The Commission regularly adopts and publishes on its website specific guidelines on various competition issues.

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