



# Merger Control

# 2017

**Sixth Edition**

Editors:

**Nigel Parr & Ross Mackenzie**

# CONTENTS

<b>Preface</b>	Nigel Parr & Ross Mackenzie, <i>Ashurst LLP</i>	
<b>General chapter</b>	<i>The economics of UK merger control: retrospect and prospect</i> Ben Forbes & Mat Hughes, <i>AlixPartners UK LLP</i>	1
<b>Country chapters</b>		
<b>Albania</b>	Anisa Rrumbullaku, <i>CR PARTNERS</i>	14
<b>Australia</b>	Sharon Henrick & Wayne Leach, <i>King &amp; Wood Mallesons</i>	19
<b>Austria</b>	Dr. Lukas Flener, <i>Fellner Wratzfeld &amp; Partner Rechtsanwälte GmbH</i>	32
<b>Brazil</b>	Leonardo Rocha e Silva & José Rubens Battazza Iasbech, <i>Pinheiro Neto Advogados</i>	38
<b>Canada</b>	Randall J. Hofley, Micah Wood & Kevin H. MacDonald, <i>Blake, Cassels &amp; Graydon LLP</i>	48
<b>Chile</b>	Ignacio Larrain Jiménez, Álvaro Espinosa Vásquez & Pascale Fouillioux Puentes, <i>Philippi Prietocarrizosa Ferrero DU &amp; Uría</i>	61
<b>China</b>	Ding Liang, <i>DeHeng Law Offices</i>	70
<b>Cyprus</b>	George Middleton & Constantina Mitsingas, <i>Chryssafinis and Polyviou LLC</i>	75
<b>European Union</b>	Peter Broadhurst, Koen Platteau & Tony Woodgate, <i>Simmons &amp; Simmons LLP</i>	79
<b>Finland</b>	Katri Joenpolvi, Leena Lindberg & Jarno Käkälä, <i>Krogerus Attorneys Ltd</i>	91
<b>France</b>	Pierre Zelenko & Rahel Wendebourg, <i>Linklaters LLP</i>	100
<b>Germany</b>	Peter Stauber & Rea Diamantatou, <i>Noerr LLP</i>	128
<b>Hong Kong</b>	Neil Carabine & James Wilkinson, <i>King &amp; Wood Mallesons</i>	140
<b>India</b>	G.R. Bhatia, Abdullah Hussain & Kanika Chaudhary Nayar, <i>Luthra &amp; Luthra Law Offices</i>	149
<b>Israel</b>	Dr. David E. Tadmor & Shai Bakal, <i>Tadmor &amp; Co. Yuval Levy &amp; Co., Attorneys-at-Law</i>	154
<b>Italy</b>	Luciano Vasques, <i>DDPV Studio Legale</i>	167
<b>Japan</b>	Masahiro Nakatsukasa, <i>Chuo Sogo Law Office, P.C.</i>	174
<b>Macedonia</b>	Jasmina I. Jovanovik & Dragan Dameski, <i>Debarliev, Dameski &amp; Kelesoska, Attorneys at Law</i>	184
<b>Malta</b>	Ron Galea Cavallazzi & Lisa Abela, <i>Camilleri Preziosi Advocates</i>	190
<b>Netherlands</b>	Fanny-Marie Brisdet & Else Marije Meinders, <i>BRISDET</i>	193
<b>Romania</b>	Silviu Stoica & Mihaela Ion, <i>Popovici Nițu Stoica &amp; Asociații</i>	197
<b>Singapore</b>	Daren Shiau & Elsa Chen, <i>Allen &amp; Gledhill LLP</i>	207
<b>South Africa</b>	Marianne Wagener and Candice Upfold, <i>Norton Rose Fulbright South Africa Inc.</i>	217
<b>Sweden</b>	Peter Forsberg & Haris Catovic, <i>Hannes Snellman Attorneys Ltd</i>	231
<b>Switzerland</b>	Franz HOFFET & Marcel Dietrich, <i>Homburger</i>	243
<b>Turkey</b>	Gönenç Gürkaynak & Öznur İnanlır, <i>ELIG, Attorneys-at-Law</i>	252
<b>Ukraine</b>	Igor Svehkar, Alexey Pustovit & Oleksandr Voznyuk, <i>Asters</i>	261
<b>United Kingdom</b>	Alan Davis & Angelique Bret, <i>Pinsent Masons LLP</i> , Bojana Ignjatovic, <i>RBB Economics</i>	266
<b>USA</b>	Christopher A. Williams, Roisin E. Comerford & Paul S. Jin, <i>Wilson Sonsini Goodrich &amp; Rosati PC</i>	277

# Albania

Anisa Rrumbullaku  
CR PARTNERS

## Overview of merger control activity during the last 12 months

According to the latest annual report<sup>1</sup> of the Albanian Competition Authority (“ACA”), the Authority during 2016 has kept itself busy mainly with cartel and abuse of dominance investigations, none of which were, however, concluded with fines for the investigated parties. Merger control activity did not increase compared to the previous year, generally reflecting the limited M&A activity in Albania during 2016. In fact, only 12 of 53 decisions taken by the Competition Commission concerned merger control cases.

During 2016, the Authority received in total 21 merger control notifications, out of which 12 were cleared during a Phase I review process without conditions. With respect to all other filings, the Authority decided that the transactions were not subject to merger control procedures either due to the transaction not constituting a concentration in the meaning of the Competition Law (no. 9121 dated 28.03.2003), or the turnover thresholds not being met. Cartel and abuse of dominance investigations were focused in the banking and insurance market, healthcare products market, collection and sale of unprocessed tobacco, public procurement, agro-industry and fuel supply of national airport aircraft.

Key legislative developments in 2016 consisted in approval by the Authority of:

- Instruction on simplified procedures for the review of certain concentrations<sup>2</sup> (see below).
- Regulation on Commitment Procedures which provides the Competition Commission with the possibility to conclude investigations by means of a “commitment decision”, in which the commitments voluntarily offered by the undertaking under an investigation for breaches of Article 4 (Prohibited Agreements) or Article 9 (Abuse of Dominance) of the Competition Law, are rendered binding on it and the Authority will render that there are no grounds for further action by it.

## New developments in jurisdictional assessment or procedure

No changes were made to the Competition Law regarding merger control procedures, thus the jurisdictional test for the assessment of mergers remains the same. The Competition Authority will assert its jurisdiction over any domestic, foreign-to-foreign or foreign-to-domestic transaction resulting in a qualitative change of control, provided that the following turnover thresholds are met in respect of undertakings concerned for the previous financial year:

- the parties’ worldwide combined turnover is more than approx. €51m and at least one of the parties has achieved a local turnover of more than approx. €1.4m; **or**

- the parties' domestic combined turnover is more than approx. €2.8m and at least one of the parties has achieved a domestic turnover of more than approx. €1.4m.

It is noteworthy that on 8 June 2016, the ACA adopted the much-welcomed instruction, "On simplified procedures for the review of certain concentrations",<sup>3</sup> based on which certain non-issue concentrations can be subject to a Phase I shortened review timeframe of 25 days, starting from the date of confirmation of receipt of complete notification by the Authority.

The new instruction does not, however, address the issue of timing required by the Authority to assess whether a merger notification file is complete. Hence, while the review timeframe for non-issue transactions is significantly shortened from 60 to 25 days, delays may still be faced during the interim phase from the filing date until confirmation in writing of receipt of a complete notification. Generally, the Authority will not take more than two weeks to confirm receipt of a complete notification in relation to non-issue transactions.

The new instruction does not bring any change to the documents and information required for non-issue transactions that can be subject to a simplified review process. As previously, the notifying parties must submit the usual Simplified Notification Form which is similar to the Short Form CO for the notification of a concentration pursuant to Regulation (EC) no. 139/2004, and several accompanying documents such as the transaction agreement, power of attorney, financial statements, group chart and diagrams, commercial registry excerpts, etc.

According to the new instruction, only the following transactions are entitled to a simplified review process:

- (a) an acquisition between undertakings on the condition that none of the participating undertakings shall be engaged in the same business activity for the same product and market;
- (b) an acquisition between undertakings if both the following conditions are simultaneously met:
  - the combined market share of all the parties dealing with the same business activity in the same product or geographic market (horizontal relationship) is less than 15%; and
  - individual or combined market shares of all parties in the concentration dealing with business activities in a product market which is an upstream or downstream market of a product market in which any other party in the concentration is engaged (vertical relationship) is less than 25%;
- (c) an acquisition where both the following conditions are met:
  - the combined market share of all the parties in the concentration being in a horizontal relationship is less than 50%; and
  - the delta of HHI resulting from the concentration is under 150;
- (d) a joint venture between two or more undertakings, on the condition that the joint venture does not or will not conduct activities in the Republic of Albania and provided that the turnover of the joint venture or contributing members of the joint venture is less than 300 million ALL (approx. €2.2 million) in the domestic market, or the total value of assets transferred to the joint venture is less than 300 million ALL in the Republic of Albania at the time of the notification; or
- (e) an acquisition where one party acquires sole control over an undertaking where it already has joint control.

The Competition Authority may always opt to apply the standard Phase I and Phase II

review timeframes if it judges that the concentration deserves closer investigation, or if third parties submit written concerns regarding the notification concentration during the third parties' comments phase. It may also opt not to apply the simplified review period in those cases where clearly there are no market overlaps but the markets concerned are deemed to be 'neighbouring markets'.

The new instruction does not address the question of whether a merger filing eligible for simplified procedures can be submitted on the bases of a letter of intent or memorandum of understanding. In a few cases, the Authority has maintained the position that, while a notification can be accepted and considered complete even on bases of a LoI or MoU, the final decision will be issued by the Competition Commission only upon the final binding transaction agreement being signed and submitted by the parties to the Authority during the review process.

### **Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.**

During the last year, the ACA received 21 merger filings in total. While 12 were cleared without conditions within a Phase I review process, no jurisdiction was asserted by the Authority on the remaining filings, mainly based on the turnover thresholds not being met. In a few exceptional cases, the ACA has waived in writing the merger filing obligation in respect of foreign-to-foreign transactions on bases of the 'effects doctrine'. The prevailing position of the ACA, however, is that its jurisdiction will be asserted, including over foreign-to-foreign transactions with no local nexus to the domestic market if the turnover thresholds are met.

Out of the 12 merger control filings that were reviewed, seven were foreign-to-foreign transactions with one or both parties having presence or sales in Albania, including the notable AB InBev and SABMiller megabrew merger that was cleared by the Commission without conditions at the beginning of last year.

Other industry sectors reviewed include the hydrocarbons market, the airport industry, banking sector, insurance, games of chance and food industry.

Reference to European Commission decisions by both competition law practitioners and the Competition Commission is common practice, hence the ACA will, as a rule, accept any proposed definition of the relevant market that relies on EU precedents to the extent the proposed markets display similar features in Albania.

### **Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers**

Instructions of the ACA on horizontal and non-horizontal/conglomerate mergers provide guidance on the appraisal techniques used by the Commission to assess proposed mergers.

According to these instructions, in principle, vertical or conglomerate concentrations are likely to attract less attention. The ACA shall most probably not investigate non-horizontal mergers when market shares of the new entity in each relevant market post-merger will be below 25%, and HHI after concentration will be under 1800. The noted market shares and HHI thresholds only serve as an indicator of absence of competition concerns; they do not give rise to a legal presumption that the merger does not pose any competition issue. In specific circumstances, the ACA can also investigate transactions that post-closing result in market shares and HHI below above the noted thresholds.

Notifications from undertakings that have been subject to abuse of dominance investigations will be scrutinised by the Authority even where vertical or conglomerate mergers are concerned.

Horizontal mergers will always attract investigation from the ACA, especially if the combined market share of the undertakings concerned post-acquisition will be above 15%.

### **Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation**

The Instruction on Remedies approved in October 2015 has not been yet tested in practice. It relies on the Commission Notice on Remedies Acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

The Instruction on Remedies provides that remedies may be offered by the undertakings concerned in any phase of the merger review procedure. During Phase I, remedies should be offered within one month from the confirmation of receipt of a complete notification. During Phase II, remedies should be offered within two months from the decision of the Competition Authority to open an in-depth investigation.

The Competition Authority may clear the notified transaction within Phase I, i.e. without opening the in-depth investigation only if proposed remedies will be deemed sufficient for the elimination of serious anti-competitive ‘concerns’. On the other hand, remedies following the opening of Phase II should be able to address not only ‘concerns’ but also anti-competitive ‘effects’ of the proposed concentration.

Preferred remedies are of a structural nature (i.e. sale of asset or business). Behavioural remedies shall be accepted by ACA only in exceptional circumstances.

### **Key policy developments and reform proposals**

The end of 2016 coincided with the mandate of the previous chairman of the Competition Commission coming to an end after 10 consecutive years. With a new chairman taking over the Authority’s leadership, it is expected that significant reforms will be conducted during the second half of 2017 and early 2018 which will focus on strengthening the ACA’s capacity in advisory, review and enforcement procedures.

Noteworthy priorities of the 2017–2018 agenda, according to the annual report of the Authority, include several amendments to the Competition Law, and secondary legislation aiming at full approximation with the EU *acquis* on competition.

A new draft regulation on agreements for technology transfer is currently in the pipeline and expected to be approved soon.

\* \* \*

### **Endnotes**

1. <http://www.caa.gov.al/uploads/publications/RaportiVjetor2016.pdf>.
2. [http://www.caa.gov.al/uploads/laws/udhezim\\_proced.\\_te\\_thjeshtuara\\_per\\_perqendrimet\\_final.pdf](http://www.caa.gov.al/uploads/laws/udhezim_proced._te_thjeshtuara_per_perqendrimet_final.pdf).
3. [http://www.caa.gov.al/uploads/laws/Rregullorja\\_Mbi\\_procedurat\\_e\\_angazhimeve.pdf](http://www.caa.gov.al/uploads/laws/Rregullorja_Mbi_procedurat_e_angazhimeve.pdf).

**Anisa Rrumbullaku LL.M.****Tel: +355 4 222 8181 / Email: [a.rrumbullaku@crpartners.al](mailto:a.rrumbullaku@crpartners.al)**

Anisa Rrumbullaku is Partner covering the Corporate and Competition practice of the firm. She is specialised in all aspects of competition practice, i.e. merger control, abuse of dominance, prohibited agreements, individual exemption filings, and has also participated as a speaker regarding merger control procedures in workshops organised by the Albanian Competition Authority. Before co-founding CR PARTNERS, she worked for another Albanian leading law firm where she was partner in charge of the M&A/competition practice, providing clients with legal advice across all sectors on M&As, contracts, PPPs, merger control, abuse of dominance and assisting them in dawn raids conducted by the competition authority. *Chambers Global* 2017 acknowledges Anisa as a Leading Lawyer in the Corporate/Commercial field for Albania. She graduated with Honours from the Tirana Law Faculty (2004) and holds an LL.M. (*cum laude*) in Business and Trade Law from Erasmus University of Rotterdam (2007).

## CR PARTNERS

Rr. Ibrahim Rugova, Sky Towers, Suite 5/2, Tirana, Albania  
Tel: +355 4 222 8181 / URL: [www.crparkers.al](http://www.crparkers.al)

[www.globallegalinsights.com](http://www.globallegalinsights.com)

Other titles in the **Global Legal Insights** series include:

- **Banking Regulation**
- **Bribery & Corruption**
- **Cartels**
- **Commercial Real Estate**
- **Corporate Tax**
- **Employment & Labour Law**
- **Energy**
- **Fund Finance**
- **Initial Public Offerings**
- **International Arbitration**
- **Litigation & Dispute Resolution**
- **Mergers & Acquisitions**



Strategic partner