



Merger Control

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Contributing Editors:
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Albania

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Overview of merger control activity during the last 12 months

According to the Annual Report of the Albanian Competition Authority (“ACA”) for 2017,¹ ACA has reviewed 22 merger filings, out of which, 16 underwent merger control review procedures and six were not reviewed at all due to the notified transaction not constituting a notifiable merger in the meaning of the Competition Law (No 9121 dated 28 March 2003), or the turnover thresholds not being met.

The number of notified merger notifications in 2017 was similar to that of 2016 (21 merger filings), which is partly due to limited M&A activity in the Albanian market. Overall, out of 47 decisions taken by ACA in 2017, only 16 were related to merger control decisions – mainly in the financial, telecommunications and retail markets.

According to the Annual Report, the average timeframe for the review of a notification was 24 days, quite shorter than the average review period in previous years, thus significantly reducing the notifying parties’ waiting period after the signing of a transaction. In this respect, ACA relied on its instruction, “On simplified procedures for the treatment of certain concentrations”, which instruction is fully approximated with the *Commission Notice* of 5 December 2013 on a *simplified procedure* for treatment of certain concentrations under Council Regulation (EC) No 139/2004.

Out of the reviewed merger notifications, 10 were foreign-to-foreign transactions meeting the turnover thresholds of the Competition Law, and only six were related to domestic M&A activity.

The key legislative development of 2017 was the approval by ACA at the end of 2017 of a Regulation “On categories of technology transfer agreements”, which Regulation approximates the Commission’s Regulation No 316/2014 dated 21 March 2014, “On enforcement of Article 101(3) of the Treaty on the Functioning of EU on Categories of Technology Transfer Agreements”.

New developments in jurisdictional assessment or procedure

There have been no changes to merger control procedures during the last year, thus the jurisdictional test for the assessment of mergers and procedures remains the same. As a rule, 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.

The 2016 instruction, "On simplified procedures for the review of some concentrations", based on which certain non-issue concentrations are subject to a shortened review timeframe of 25 days, finally started to show its positive effects, since most of the non-issue-notified transactions appear to have been cleared within less than a month.

However, while the review period is a maximum of 25 days for non-issue transactions, parties will still have to wait one or two weeks for the review timeframe clock to start ticking, as the Authority generally requires a few days to assess whether a notified transaction meets the jurisdictional test, or if a notified transaction is complete in terms of documents and information required.

According to the instruction, the notifying parties must submit a 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. Official translation of the foreign language documents is required (apart from translation of annual reports in the English language), even when the transaction is clearly a non-issue one and notified only due to the turnover figures of the parties in Albania.

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 engage in the same business activity for the same product and market;
- (b) an acquisition between undertakings if both of 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%;
 - 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%;
 - 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-party-comment phase. It may also select not to apply the simplified review period in those cases when clearly there are no market overlaps, but the markets concerned are deemed to be ‘neighbouring markets’.

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

During 2017, ACA received in total 22 merger filings. While 16 were cleared without conditions within the Phase I review process, no jurisdiction was asserted by the Authority on the remaining filings, mainly based on the turnover thresholds not being met.

Out of the 16 merger control filings that were reviewed, 10 were foreign-to-foreign transactions with one or both parties having presence or sales in Albania, and six were domestic transactions in key industry sectors such as telecommunications and insurance.

The most important merger transaction reviewed concerned the transfer of spectrum frequencies, licensed to the last entered and smallest mobile operator in Albania, i.e. Plus Communications respectively to Vodafone Albania and Telecom Albania. The Authority authorised this transaction despite market concentration from 4 to 3 mobile companies, mainly due to financial issues of the seller which had suffered considerable losses during the past. Further, the Authority invoked Article 13(3) of the Competition Law, which provides that a concentration may be authorised even when it results in the strengthening of the market share of the notifying undertakings, if a party to the transaction is at serious risk of going bankrupt and being unable to restructure its activity, or it must exit the market in the near future. In this case, the Authority recommended to the regulator of electronic communications in Albania to conduct a market analysis of the remaining market players to assess the *Operators with Significant Market Power* (three in total after the concentration) and impose obligations accordingly.

Other industry sectors reviewed in the context of merger notifications included the life insurance, banking and retail markets.

Reference to the 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

The instructions of 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. 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 the HHI after the concentration will be under 1800. The noted market shares and HHI thresholds only serve as an indicator of the absence of competition concerns, but they do not give rise to a legal presumption that the merger does not pose any competition issue. In specific circumstances, ACA can also investigate transactions that,

post-closing, would result in market shares and HHI below the above-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 (2015) has not been tested yet 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 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 Authority is currently in the process of reviewing the Competition Law. According to its Annual Report for 2017, it has already conducted a comparative analysis of the existing legal framework with that of some EU countries, and assessed issues resulting from enforcement of the law in practice. It is expected that the Authority will soon start an EBRD-assisted project which aims to: (i) strengthen the skills and competencies of Authority officials and case handlers through competition law enforcement training and upgraded skills in econometric analysis; (ii) strengthen the Authority’s competition advocacy role; and (iii) complete the approximation of competition legislation to the EU *acquis*.

* * *

Endnote

1. http://www.caa.gov.al/uploads/publications/Raporti_Vjetor_2017_i_AK.pdf.

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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 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 2018* acknowledges her as a Leading Lawyer in the Corporate/Commercial field for Albania. Her clients in competition matters include Daimler, BMW, Vodafone Albania, National Bank of Greece, etc.

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