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The International Comparative Legal Guide to:

Merger Control 2008

A practical insight to cross-border merger control issues

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The Albanian Competition Authority ("ACA") is responsible for applying the merger control legislation in Albania. The ACA is an independent administrative entity composed of: (i) the Competition Secretariat (the investigation body); and (ii) the Competition Commission (decision-making body).

1.2 What is the merger legislation?

Mergers in the Republic of Albania are mainly governed by:

(i) law no. 7638, dated 19.11.1992, "On commercial companies";

(ii) law no. 9121, dated 28.07.2003, "On protection of competition" ("Competition Law"); and

(iii) instructions and regulations issued by the ACA.

1.3 Is there any other relevant legislation for foreign mergers?

The legislation mentioned in question 1.2 above is applicable also to foreign mergers.

1.4 Is there any other relevant legislation for mergers in particular sectors?

Beside the Competition Law, other legislation applies to mergers in particular sectors such as:

(i) audiovisual broadcasting sector; where an entity or person may not hold more than 40% of the share capital in a national audiovisual company. An entity or person holding shares in a national audiovisual company is prohibited to acquire directly or indirectly shares of another national audiovisual company;

(ii) banking sector; where the Central Bank of Albania has the power to approve or decline any transfer of at least 10% of the bank share capital; and

(iii) insurance sector; where the Authority of Financial Supervision is the regulatory body having the power to approve or decline any transfer of at least 10% of the share capital in a the company engaged in insurance an/or reinsurance activity.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

The merger control applies to:

(a) the merger of two or more undertakings or parts of undertakings independent from each other;

(b) any transaction where one or more undertakings acquire, directly or indirectly, a controlling interest in all or parts of one or more other undertakings; and

(c) joint ventures exercising all the functions of an autonomous economic entity.

The Competition Law defines the "control" as acquisition of rights or agreements or any other means which, either separately or in combination and having regard to the factual or legal circumstances, confer the possibility of exercising decisive influence on an undertaking, in particular through:

(i) ownership or the right to use all or part of the assets of an undertaking; and

(ii) rights or contracts, which confer decisive influence on the composition, voting or decisions of the undertaking's bodies.

Based on the above definition, control includes also acquisition of a minority shareholding if it confers the possibility of exercising influence on the undertaking; the same rationale would apply to the change of control. Whilst, with regard to the interests (e.g. convertible warrants, share options and other documents entitling the holder to acquire an equity interest in the future), there is no provision or instruction of the ACA that determines whether acquisition of the rights/control should be actual or potential (i.e. even if the right is not yet exercised but is exercisable).

2.2 Are joint ventures subject to merger control?

According to the Competition Law, the establishment of joint ventures exercising all the functions of an autonomous economic entity are subject to the merger control.

2.3 What are the jurisdictional thresholds for application of merger control?

The merger control applies to mergers when all of the following turnover thresholds are met: (i) the combined worldwide turnover of all the participating undertakings exceeds 70 billion Albanian Lek (approximately, €538,461,538) or the domestic combined

turnover of all participating undertakings exceeds 800 million Albanian Leks (approximately, €6,153,846); and (ii) the domestic turnover of at least one participating undertaking exceeds 500 million Albanian Lek (approximately, €3,846,153).

In general, the aggregate turnover includes the income of the participating undertakings realised in the preceding financial year from the sale of products falling within the undertakings ordinary activities, after deduction of taxes or fees directly related to the undertakings turnover. Whilst, in cases of mergers of credit or financial institutions the turnover is the income resulting in annual or consolidated accounts deriving from interests, shares, bonds, equity interests, commissions, net profit from financial operations and other income, after deduction of taxes. For insurance undertakings, the turnover is the gross income of subscribed premiums which include all received and collected amounts as per insurance contracts as well as reinsurances premiums, after deduction of taxes.

When the merger consists of the acquisition of parts of one or more undertakings, for calculation of the seller/s turnover only the turnover corresponding to the parts which are the subject of the transaction shall be taken into account.

Specifically, when the participating undertaking is part of a group, its aggregate turnover is calculated by adding together the respective turnover of the members of the group (i.e. (i) the participating undertaking; (ii) its subsidiaries where the participating undertaking holds directly or indirectly more than half of the share capital or voting rights, or has the power to appoint more than half of the members of the supervisory board, the administrative board or other legal bodies representing the subsidiary, or has the right to manage the subsidiaries' affairs; (iii) its parent undertakings having the above said rights or powers; and (iv) the subsidiaries of its parent undertakings; those undertakings in which two or more undertakings as referred to under (i) to (iv) herein have jointly the rights or powers listed in (ii) herein).

It should be underlined that in case where the participating undertaking is part of a group, the Competition Law excludes from the calculation of the turnover the sale of products performed between undertakings that are part of the group.

2.4 Does merger control apply in the absence of a substantive overlap?

The merger control applies also in absence of a substantive overlap.

2.5 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign to foreign" transactions) would be caught by your merger control legislation?

The Albanian Competition Law applies to "foreign to foreign" transactions carried out from undertakings whose activity has an impact/influence in the Albanian market. However, the concept of "impact/influence" has not been further defined from the Albanian competition regulatory framework. In practice, although the undertakings participating in the merger may not have any local physical presence (branch, subsidiary or assets), but are present in Albania indirectly (imports/sales through distributorship agreements), the ACA considers the merger subject to the control provided that the notification thresholds are met.

2.6 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

We do not identify any provision that may override the operation of the thresholds.

2.7 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The Competition Law does not provide for any general principle specific to identification of the constitution of transaction in case it takes place in various stages. However, when establishing the rules on calculation of turnover in case of mergers consisting of acquisition of parts of undertakings, the Competition Law establishes that series of these transactions performed between the same parties within a two-year period are assessed as a single transaction. In order to define the two-year period, reference is made to the last transaction date.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

When the notification thresholds are met, the mergers must be notified to the ACA within one week after the conclusion of the merger agreement, or the acquisition of a controlling interest, or the announcement of the public offer.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

The Competition Law provides for an exception from the obtaining of the ACA clearance when the financial institutions, credit or insurance companies acquire shares in other undertakings for the purpose of resealing, provided that they do not exercise voting rights related to the acquired shares and that the resale occurs within one year from the acquisition.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

Failure to notify the merger or to obtain clearance is considered a serious infringement to the Competition Law and is subject to fines imposed by the ACA, which varies from 2% to 10% of the total turnover of the preceding financial year of each of the undertakings subject to the notification requirement. In fixing the amount of the fine, it should be considered both to the gravity and the duration of the infringement. When it is possible to calculate or estimate objectively the illegal profits of undertakings acquired infringing the Competition Law, such a profit constitutes the minimal amount of the fine.

There is one case where the ACA has imposed fines to a foreign undertaking acquiring a shareholding in an Albanian undertaking for failure to notify the merger within the required deadline.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

It is not possible to carve out local completion of a merger to avoid

delaying global completion.

3.5 At what stage in the transaction timetable can the notification be filed?

The Competition Law provides that the merger should be notified within one week from the signature of the merger agreement or of the control acquisition or from the announcement of the public offer.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The Competition Law defines the procedure for assessment of mergers from the ACA into: (i) preliminary proceedings; and (ii) in-depth proceedings.

During the preliminary proceeding, the ACA shall examine the notification in order to find whether the transaction "reveals any sign that it would create or strengthen a dominant position". Whilst when pursuing the in-depth proceedings, the ACA must assess whether the transaction creates or strengthens a dominant position of the undertakings in the market.

During the preliminary phase, the ACA shall decide whether: (i) to initiate an in-depth procedure; or (ii) to give clearance of the merger, within two months after the confirmation of notification receipt (i.e. the period of two months shall begin on the working day following the confirmation of the ACA on the notification receipt or, if the information to be supplied with the notification is incomplete, on the day following the receipt of the complete information).

This period is extended by 2 weeks ("Extension Period") in case the said signs are revealed but the ACA has granted a conditional clearance and if the concerned undertakings, not later than one month after notification, commit themselves to take measures to eliminate the signs of creating or strengthening a dominant position.

In case an in-depth proceeding is initiated, the ACA shall have three months, starting from the commencement of the proceeding, to declare by means of a decision if the merger (transaction) is prohibited, fully cleared or cleared by conditions and obligations. In the event of a "clearance with conditions and obligations", the period of three months shall be extended up to one month, if the participating undertakings, no later than two months from the date of commencement of in-depth procedure, commit themselves to take measures to eliminate creation or strengthening of the dominant position.

If the ACA does not decide within the set deadlines (either for the preliminary phase or the in-depth phase), the Competition Law provides for the "silent-is-consent-rule", unless the ACA extends or suspends the above mentioned time limits.

The timeframe is suspended when:

a. Information required by the ACA from one of the notifying undertakings or other interested parties, has not been provided or is incomplete within the term assigned by the ACA.

b. Information required by the ACA from a third party is not complete or has not been provided within the term assigned by the ACA, due to one of the notifying undertakings or any other involved party.

c. One of the notifying undertakings or involved parties has refused to be subdued to inspections that are considered necessary by the ACA or to cooperate on carrying out an investigation.

d. The notifying undertakings have failed to inform the ACA on the change of facts contained in the Notification Form.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

The Competition Law provides for a prohibition on giving effect to the merger before filing the notification or obtaining clearance from the ACA, or before satisfaction of the conditions under which the clearance is granted.

However, the ACA may decide derogation from the said prohibition. Derogation may be granted when supported from important reasons, in particular, to prevent serious and not repairable damages to a participating undertaking or to a third party and taking into account the threat to competition implied by the merger.

Legal and contractual transactions undertaken before the clearance is obtained shall be of no effect. Completion of the merger before clearance of the ACA constitutes infringement of the law and therefore subject to fines described in question 3.3 herein above.

Further, if a merger is prohibited after completion, or if a merger has been carried out although prohibited, or without entirely fulfilling the conditions attached to the clearance decision, the ACA may impose the participating undertakings to take the necessary steps to restore the former situation, i.e. the conditions of effective competition, in particular by separating the undertakings merged or rescinding the participations or acquired assets. The ACA may require the participating undertakings to propose measures within a set deadline, aiming to re-establish effective competition.

3.8 Where notification is required, is there a prescribed format?

The notification is filed through the filling of a standard format called "Form of Notification of Mergers". Such form should be filled-in in Albanian but the ACA may authorise the notifying undertaking to submit the form in English (when the notifying party is a non resident or has no office in Albania). The form is to be filed with the ACA in 3 copies where at least one of the copies should be in original or notarised form.

The notification shall indicate the form of the merger and the following information regarding any participating undertaking:

(i) name and place of business or registered seat of the undertakings;

(ii) type of business of the undertakings;

(iii) turnover in domestic market and worldwide of the undertakings;

(iv) market shares of the undertaking, including the methods for their calculation or estimation;

(v) in case of an acquisition of share capital, size of the interest acquired by any undertaking and of the total interest held in this undertaking; and

(vi) the name of the person authorised to represent the undertaking during the merger assessment procedures.

Filings have to be supported with documents related to the merger and identification of the undertakings such as copy of the merger agreement or public offer, approval of the merger from the managing bodies of the undertakings, financial statements and balance sheets of the last financial year of the undertakings and documents identifying the registration of the undertakings with the National Chamber of Commerce or Commercial Register.

These documents may be submitted in English and must be notarised and legalised. It should be noted that usually the ACA requests such documents to be translated into Albanian.

In order to avoid delays in the merger assessment proceedings, pre-notification meetings with the ACA officers may be organised for consulting information that might be requested to be filled-in in the notification form and supporting documents. Such meetings become necessary when considering that the procedure of merger assessment and commencement of the timeframe for adoption of the ACA decision is connected to the filing of a complete notification.

3.9 Is there a short form or accelerated procedure for any types of mergers?

The Competition Law and Instruction of the ACA "On the Form of Notification of Mergers and Possibility of a Simplified Notification" provides for a short form of mergers notification when it appears sufficient to the ACA for assessing whether the merger would give rise to competition issues. The notification of the merger will be made through the same standard form but some of the Sections will not be necessary to be filled-in.

3.10 Who is responsible for making the notification and are there any filing fees?

The notification of the merger should be made by:

(i) undertakings parties to the merger jointly, in the case of a merger, or those undertakings acquiring joint control as the case may be;

(ii) the undertaking acquiring the controlling interest; and

(iii) the undertaking offering to acquire the other undertaking in case of a public offer of acquisition.

The notifying party must pay a notification filing fee amounting to 15,000 Lek (approximately EUR 125). The payment statement of this fee should be submitted to the ACA at the moment of filing the notification.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The substantive test used from the ACA in its assessment of the merger is the single or collective dominant position test. Concretely, during the preliminary proceeding, the ACA shall examine the notification in order to find whether the transaction/merger "reveals signs that it would create or strengthen a dominant position", whilst in the in-depth proceedings, the ACA must assess whether the transaction/merger creates or strengthens a dominant position of the undertakings in the market.

It should be mentioned that the mergers creating or strengthening a dominant position are prohibited, except when an undertaking risks seriously a failure and there is no less anti-competitive alternative than the merger, if (i) this undertaking is in such a situation that without the merger it would exit the market in the near future, and (ii) there are no serious prospects of re-organising the activity of the same undertaking.

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

The ACA is required to publish new notifications in the Official Bulletin of the ACA. Actually, such publications occur through the website of the ACA.

The Regulation of the ACA "On Implementation of Merger Procedures" provides that third interested parties (e.g. consumers, suppliers, competitors of the participating undertakings) have the right to be heard on the merger and present their views and comments, either in writing or by attending a hearing.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The ACA may impose fines to the notifying undertakings not exceeding 1% of total turnover of the preceding financial year, in case they refuse to provide information or the said information is incomplete or misleading.

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

According to the Instruction of the ACA "On the Form of Notification of Mergers and Possibility of a Simplified Notification", when the parties believe that their interests would be harmed if any of the information they are asked to provide the ACA with or were to be published or otherwise divulged to other parties, they may submit this information separately with each page clearly marked "Business Secrets". The parties should also submit the reasons why this information must not be divulged or published.

In the case of mergers or joint acquisitions, or in other cases where the notification is completed by more than one of the parties, business secrets may be submitted under separate cover, and referred to in the notification as an annex. All such annexes must be included in the submission in order for a notification to be considered complete.

Further, the Competition Law provides that the members of the ACA Commission and all ACA Secretariat employees, or the other persons authorised by the ACA Commission to apply this Law shall be subject to professional secrecy and shall not divulge to any person or authority whatsoever confidential information acquired owing to their duties, save in the event that they are to testify before a court. This is even after the termination of the duty.

Secretariat publications shall not contain information constituting commercial secrets.

Furthermore, the publication of the notification is limited to indication of name, registered office, economic activity of the participating undertakings and a short description of the merger as well as the term within which the third parties may express their opinion.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The regulatory process ends upon the decision of the ACA (which is an administrative act) either to:

- give clearance of the merger (by imposing or not conditions and obligations); or
- prohibit the merger.

The decision of the ACA is published in the Official Bulletin of ACA (website).

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Where competition issues are identified it is possible to negotiate remedies with the ACA, since the Competition Law requires the ACA to give the opportunity to the undertakings to participate in the process of determining the remedies (conditions and obligations of the clearance).

The remedies proposed or decided may have a behavioural or structural nature, such as sale of parts of undertakings, or of any kind of participation in the undertaking activity, termination of contractual relationship, obligation to act or not to act in a certain way or any other remedy enabling the elimination of anti-competitive effects of the merger.

5.3 At what stage in the process can the negotiation of remedies be commenced?

During the preliminary phase, undertakings should be presented to the ACA no later than one month after the receipt of the notification and no later than two months after the initiation of the in-depth phase.

In case of submission of undertakings during the preliminary phase, the timeframe for adopting a decision from the ACA is extended by 2 weeks; when proposed during the in-depth phase the period of three months shall be extended up to one month.

5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The Competition Law is relatively new and the ACA has started to operate only few years ago and no standard approach to the terms and conditions to be applied to the divestment has been adopted so far.

5.5 Can the parties complete the merger before the remedies have been complied?

The parties may not complete the merger before the remedies have been complied except when the ACA has granted derogation from this prohibition.

5.6 How are any negotiated remedies enforced?

In case of failure to comply with the remedies negotiated, the ACA may apply the following sanctions:

- impose fines; and
- revoke the decision authorising the merger.

The enforcement of the said sanctions is carried out from the tax police.

5.7 Will a clearance decision cover ancillary restrictions?

The restrictions directly related and necessary to the implementation of the merger will be covered by the decision clearing the merger if they are mentioned in the notification.

5.8 Can a decision on merger clearance be appealed?

The decisions taken from the ACA are considered administrative acts and subject to appeal lodged with the Tirana District Court. In case the challenged decision of the ACA consists of the clearance of a merger, the appeal does not suspend the effects of the clearance.

5.9 Is there a time limit for enforcement of merger control legislation?

Although the Competition Law entitles the ACA to begin upon its own initiative the procedures for assessment of the merger in case the merger is completed without notification, there are no specific provisions limiting the time for the ACA to undertake such procedure.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The Competition Law provides for communication and exchange of information between the ACA and foreign competition authorities when bilateral or multilateral agreements have been entered into for such purpose. Such exchange of information is based on the principle of reciprocity and compliance of the foreign authority with trade secrecy rules having the same guaranties as in Albania.

Furthermore, based on the principle of reciprocity, the ACA may conduct investigations upon request of the foreign competition authority, except when such investigation and/or provision of information or documents requested from the foreign competition authority are in detriment to the Republic of Albania sovereignty, security, essential economic interests or public order.

6.2 Please identify the date as at which your answers are up to date.

12 September 2007.

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