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The International Comparative Legal Guide to:

Merger Control 2017

13th Edition

A practical cross-border insight into merger control issues

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EDITORIAL

Welcome to the thirteenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Four general chapters. These chapters are designed to provide readers with an overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 50 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Nigel Parr and Catherine Hammon of Ashurst LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

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

The authority with competence over merger control in Macedonia is the Commission for the Protection of Competition [*Комисија за заштита на конкуренцијата*] ("Commission"), established in 2005. The website of the Commission is accessible at www.kzk.gov.mk. The Commission, competent to enforce antitrust and merger control rules, is an independent governmental body responsible to the Macedonian Parliament.

Pursuant to publicly available information, in 2015, the Commission reviewed and unconditionally cleared 40 concentrations, and two were subject to conditions.

The Commission's decisions can be challenged before the Administrative Court of Macedonia [*Управен суд*] ("Administrative Court").

1.2 What is the merger legislation?

Merger control rules are embodied in the Law on the Protection of Competition [*Закон за заштита на конкуренцијата*] (*Official Gazette of the RM*, nos. 145/10, 136/11 and 41/14) ("Competition Act") which came into force on 13 November 2010. The Law on General Administrative Proceedings [*Закон за општата управна постапка*] (*Official Gazette of the RM*, no. 124/15) governs aspects of the proceedings before the Commission to the extent that they are not regulated by the Competition Act. The procedure before the Administrative Court is governed by the Administrative Disputes Act [*Закон за управните спорови*] (*Official Gazette of the RM*, nos. 62/06 and 150/10).

Certain aspects of merger control are further regulated by the following bylaws:

- the Ordinance on the form and contents of merger notifications and the necessary documentation submitted with the notifications (*Official Gazette of the RM*, no. 44/12) [*Уредба за формата и содржината на известувањето за концентрација и потребната документација која се поднесува заедно со известувањето*];
- the Guidelines on the manner of submitting and filing merger notifications (July 2015) [*Насоки за начинот на поднесување и пополнување на известување за концентрација*];
- the Guidelines on the concept of a concentration (March 2012) [*Насоки за поимот – концентрација*];
- the Guidelines for determining the cases in which the Commission for the Protection of Competition, when assessing concentrations, usually finds them to be in accordance with the Competition Act (August 2016) [*Насоки за уврдување на случаите во кои при оценка на концентрациите Комисијата за заштита на конуренцијата вообичаено ќе утврди дека истите се во согласност со Законот за заштита на конкуренцијата*];
- the Guidelines on the manner of preparing non-confidential versions of Commission decisions (February 2011) [*Насоки за начинот на изготвување на недоверлива верзија на решенијата на Комисијата*];
- the Guidelines on the method of setting fines pursuant to the Law on the Protection of Competition (January 2011) [*Насоки за начинот на одмерувањето на глобата изречена согласно Закон за заштита на конкуренцијата*];
- the Guidelines on defining relevant markets for the purpose of the Law on the Protection of Competition (May 2011) [*Насоки за дефинирање на релевантен пазар за целите на Закон за заштита на конкуренцијата*];
- the Guidelines on assessment of horizontal concentrations for the purpose of the Law on the Protection of Competition (April 2007) [*Насоки за оценка на хоризонталните концентрации за целите на Закон за заштита на конкуренцијата*];
- the Guidelines on assessment of vertical and conglomerate concentrations (November 2008) [*Насоки за оценка на вертикални и конгломератни концентрации*];
- the Guidelines on restrictions directly related and necessary to concentrations (November 2011) [*Насоки за ограничувањата директно поврзани и неопходни за спроведување на концентрацијата*]; and
- the Guidelines on remedies acceptable to the Commission for the Protection of Competition under chapter III of the Law on Protection of Competition (December 2009) [*Насоки за можни измени и преземање на обврски во однос на пријавените концентрации прифатливи за Комисијата за заштита на конкуренцијата согласно глава трета од Закон за заштита на конкуренцијата*].

1.3 Is there any other relevant legislation for foreign mergers?

There are no specific rules regarding foreign mergers. General merger control rules also apply to foreign mergers, provided that the respective jurisdictional thresholds are met (please see questions 2.4 and 2.6 below).

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

The Competition Act applies to mergers irrespective of the sectors to which they pertain. However, certain sectors are further subject to sector-specific regulations:

- *Banking*: Direct or indirect acquisitions of a qualified shareholding (i.e. 5%, 10%, 20%, 33%, 50% and 75%) in Macedonian banks, including acquisition on the basis of a decision of a competent body, are subject to prior approval by the National Bank of Macedonia pursuant to the Banks Act (*Official Gazette of the RM*, nos. 67/07, 90/09, 67/10, 26/13, 15/15 and 153/15).
- *Insurance*: Direct or indirect acquisitions of a qualified shareholding (i.e. 10%, 20%, 33%, 50% and 75%) in a Macedonian insurance company, including acquisition on the basis of a decision of a competent body, are subject to prior approval by the Insurance Supervision Agency pursuant to the Law on Supervision of Insurance (*Official Gazette of the RM*, nos. 27/2002, 98/2002, 79/2007, 88/2008, 67/2010, 44/2011, 112/2011, 188/2013, 30/2014, 43/2014, 112/2014 153/2015, 192/2015 and 23/2016).
- *Investment funds*: Acquisitions of a qualified shareholding (10%, 20%, 30% and 50%) require the prior approval by the Securities Commission pursuant to the Investment Funds Act (*Official Gazette of the RM*, nos. 12/09, 67/10, 24/11, 188/13, 145/15 and 23/16).
- *"Voluntary Pension Funds"*: Any acquisition of shares of a Voluntary Pension Fund in Macedonia requires the prior approval of the Agency for Supervision of Fully Funded Pension Insurance pursuant to the Law on Voluntary Fully Funded Pension Insurance (*Official Gazette of the RM*, nos. 07/08, 124/10, 17/11 and 13/13).
- *Media*: The Audio and Audio-visual Media Services Act (*Official Gazette of the RM*, nos. 184/2013, 13/2014, 44/2014, 101/2014, 132/2014 and 142/16) contains provisions stating under which circumstances a concentration in the media sector can be prohibited.
- *Electronic communication*: Pursuant to the Electronic Communications Act (*Official Gazette of the RM*, nos. 39/14, 188/2014, 44/2015 and 193/15), under certain circumstances, ownership of communications networks cannot be acquired without the approval of the Commission, by (i) operators with significant market power, (ii) persons who own more than 10% of shares in an operator with significant market power, and (iii) companies incorporated by operators with significant market power. The Commission also has an important role in relation to several other aspects of telecommunication markets of significance to merger control, such as relevant market definition.
- *Concessions*: The Concessions and Public-Private Partnership Act (*Official Gazette of the RM*, nos. 06/12, 144/2014, 33/2015,104/2015 and 215/15) explicitly provides that the change of control in concession companies is subject to approval by the concession grantor (i.e. public partner). The Public-Private Partnership Council, established pursuant to the Concession Act, keeps the register of all public-private partnership agreements.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

Pursuant to the Competition Act, a concentration shall be deemed to arise where a change of control on a lasting basis results from:

- the merger of two or more independent undertakings or parts thereof;
- the acquisition of (direct or indirect) control over (the whole or parts of) one or more undertakings, by another undertaking or a natural person controlling at least one undertaking; and
- the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

Control can be constituted by rights, agreements, or any other means which, either separately or in combination, and having regard to the actual or legal condition, confer the possibility of exercising decisive influence on an undertaking. Control can, in particular, be constituted by (i) means of ownership or rights to use all, or parts of, the assets of an undertaking, or (ii) rights or agreements which confer the possibility for exerting decisive influence over the composition, voting or decision-making of the bodies of an undertaking.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes, provided that the acquisition of a minority shareholding confers (sole or joint) *de jure* or *de facto* control over the target on the acquiring undertakings. The question of whether one exercises control over an undertaking has to be assessed on a case-by-case basis (please see question 2.1).

2.3 Are joint ventures subject to merger control?

Yes, joint ventures are subject to merger control. However, merger control rules apply only to those joint ventures which operate on a lasting basis and have all the functions of an autonomous economic entity (i.e. full-function joint ventures). If a joint venture purports to coordinate the market activities of the joint venture partners, it is not deemed a concentration and shall be assessed under rules regulating restrictive agreements.

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

Under the Competition Act, a concentration has to be notified if any of the following thresholds are met:

- the combined worldwide annual turnover of the undertakings concerned in the year preceding the concentration is at least EUR 10 million, whereby at least one of the undertakings is registered in the Republic of Macedonia;
- the combined national annual turnover of all the participants to the concentration in the year preceding the concentration is at least EUR 2.5 million; or
- the market share of the one of the participants is at least 40% or the combined market share of all the participants is at least 60% in the year preceding the concentration.

The Competition Act defines participants to the concentration as (i) the merging undertakings in the case of a merger of two or more previously independent undertakings or parts thereof, or (ii) the persons or undertakings acquiring control of the whole or parts of one or more other undertakings, as well as the undertakings or parts thereof over which control is acquired. No physical presence in Macedonia is required for a filing obligation to arise as long as the thresholds are met through cross-border sales.

Turnover means all revenues generated from the sale of products or provision of services in the ordinary course of business of an undertaking in the year preceding the concentration, after deduction of sales rebates (discounts), value added tax, and other taxes directly related to revenues. The turnover of the undertaking concerned comprises the total turnover of the group it belongs to, i.e. its subsidiaries, mother undertakings, its mother undertakings' subsidiaries, and any other undertakings controlled within the meaning of the Competition Act. Revenues achieved by intra-group sales shall not be taken into account. If control is acquired over a part of an undertaking, only revenues achieved by that part shall be taken into account. The turnover generated in conducting regular business activity shall be taken into account when calculating the turnover of banks and other financial institutions. As regards insurance companies, the turnover is calculated with respect to the value of gross premiums in the year preceding the concentration.

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

Yes, Macedonian merger control rules also apply in the absence of a substantive overlap. The only criterion for the applicability of merger control rules is the fulfilment of one of the turnover thresholds outlined in question 2.4 above.

2.6 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?

Any foreign-to-foreign merger is subject to merger control in Macedonia if the jurisdictional thresholds are met. The Commission has not yet adopted any guidelines which would exempt certain foreign-to-foreign mergers and has not expressly recognised a domestic effect doctrine, although there is a placeholder in the Competition Act providing that the Competition Act applies to all forms of distortion of competition that have an effect in Macedonia, even if they result from acts carried out outside of Macedonia.

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

There are no mechanisms which provide for the jurisdictional thresholds to be overridden. However, the applicability of the sector-specific regulations outlined in question 1.4 does not require the turnover thresholds stipulated in the Competition Act to be met. Direct or indirect acquisitions of qualified shareholdings in certain sectors, in principle, require approval of the competent regulator irrespective of the turnovers of the parties to the concentration. However, if the jurisdictional thresholds are exceeded, merger clearance is also required in addition to the approval of the sector-specific regulator.

2.8 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?

In practice, when an acquisition of a stake in the target company is performed in several stages, merger control is triggered at the moment of the acquisition of the shares that allow decisive influence to be exercised over the target's business activities, i.e. when an acquirer has established control over the target. Two or more transactions between the same undertakings realised in a period of fewer than two years shall be deemed as one concentration that occurred on the date of the last of such consecutive transactions.

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?

Notification is compulsory when the thresholds set by the Competition Act are met (please see question 2.4 above), save for certain exceptions (please see question 3.2 below). A concentration has to be notified prior to the implementation of the transaction and following: (i) the conclusion of an agreement; (ii) the announcement of a public bid; or (iii) the acquisition of control.

There is no deadline for notification, but a concentration has to be notified (and cleared) before it is implemented. On the other hand, a merger notification can be submitted as soon as the parties are able to demonstrate their serious intent to enter into a transaction agreement or, in the case of a public bid, when the intention of participation has been publicly stated.

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

The following acquisitions of control shall not be deemed a concentration, and therefore no merger control shall be required:

- a bank, an insurance company or another financial institution, whose business activity includes trading securities, temporarily acquires shares for their subsequent resale within a period of one year from the date of their acquisition (subject to a possible extension), and provided that during this period, the shareholders' rights are not used to influence the competitive behaviour of that undertaking in the market;
- control over an undertaking is acquired by a person in the capacity of a bankruptcy or liquidation receiver; and
- an investment fund acquires shares in an undertaking, provided that its shareholders' rights are used only to maintain the full value of the investment and not to influence the competitive behaviour of that undertaking in the market.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

The undertakings concerned are under an obligation to notify the Commission of a concentration and to suspend its implementation until clearance is issued or until the appropriate waiting period has elapsed. Implementation of a concentration without prior clearance

may lead to fines of up to 10% of the total annual turnover of the undertaking(s) that had the obligation to notify the concentration.

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

Participants to a concentration are under the obligation to suspend the implementation of a transaction until clearance is issued. Carve-out arrangements have not yet been tested with the Commission. It is likely that the Commission will initially take a conservative approach to carve-out mechanisms. One of the carve-out structures that might be permitted is to make use of the financial institution exception (see above question 3.2) by engaging a bank as an interim buyer of shares of the group company concerned.

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

Parties to a transaction may notify it to the Commission as soon as they can demonstrate their serious intent to enter into an agreement, e.g. by signing a letter of intent, publicising their intent to make an offer, or by any other way which precedes any of the triggering events (please see question 3.1 above).

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?

Under the Competition Act, the Commission is obliged to decide within 25 business days from the receipt of a complete merger notification whether to clear the transaction in Phase I proceedings or to initiate investigation proceedings (Phase II). In order for a merger notification to be deemed complete, it has to satisfy the conditions prescribed by the Competition Act and the applicable Ordinance and Guidelines, in regard to both required content and manner of submission.

Phase I proceedings are initiated if it can be reasonably expected that the proposed concentration will not have as its effect a significant impediment of effective competition, with more detailed rules provided for in the Guidelines for determining the cases in which the Commission for the Protection of Competition when assessing concentrations usually finds them to be in accordance with the Competition Act.

If the Commission does not make a decision (either to clear the concentration in summary proceedings or open investigation proceedings) within 25 business days, the concentration is deemed cleared. However, should the Commission decide to open investigation proceedings, it has to decide ultimately whether to clear or prohibit the transaction within 90 business days from the date of initiating investigative proceedings. Some of the set-out deadlines can be extended if commitments (remedies) are offered by the parties to remove possible competition concerns, or in agreement with the parties, as the case may be.

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 undertakings concerned are under the obligation to suspend the implementation of the transaction until clearance is issued or until the applicable waiting periods have ended.

However, the suspension obligation shall not prevent the implementation of a public bid for purchase of securities or a series of transactions in securities, including those convertible into other securities admitted to trading on a market in accordance with the law, given that the following conditions are met: (i) the concentration has been notified to the Commission without delay; (ii) the acquirer of securities does not exercise the voting rights attached to the securities in question, or does so only to the extent necessary to maintain the full value of its investment; and (iii) the implementation is based on a procedural order for exemption from the obligation of suspension issued by the Commission.

In addition, the Competition Act provides the possibility for the applicant to submit a request for exemption from the suspension obligation. When deciding upon this request, which must be justified by the applicant, the Commission shall, *inter alia*, take into account the effects of the suspension of the concentration on one or more undertakings concerned or on third parties, as well as possible adverse effects on competition caused by the concentration. This exemption may be subject to conditions and obligations in order to ensure effective competition. The exemption may be applied for and granted at any time.

A breach of the suspension clause is subject to fines of up to 10% of the total annual turnover, while the Commission may also impose any measure it deems necessary to restore effective competition. The Commission is further entitled to prohibit an undertaking or a natural person from performing certain business activities.

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

Save for the Competition Act, the form and contents of merger notifications is regulated by the Ordinance on the form and contents of merger notifications and the necessary documentation submitted with the notifications (*Official Gazette of the RM*, no. 44/12), and by the Guidelines on the manner of submitting and filing merger notifications (July 2015).

The merger notification shall be submitted in Macedonian. In general, all documents in a foreign language shall be submitted notarised and, where necessary, super-legalised, coupled with corresponding translations into Macedonian by a sworn court interpreter. Should it deem the merger notification incomplete, the Commission is empowered to request any other documents and information it considers relevant for the assessment of the intended concentration.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

Only one form of merger notification is prescribed, regardless of whether it is requested and/or whether the Commission will decide in summary (Phase I) or investigation (Phase II) proceedings (please see question 3.6). The only way to speed up the clearance timetable is to supply the Commission with a notification that is as detailed as possible, in accordance with relevant rules applicable to the content of notifications.

Pursuant to relevant Guidelines for determining the cases in which the Commission for the Protection of Competition, when assessing concentrations, usually finds them to be in accordance with the Competition Act (i.e. decisions in Phase I), the Commission will do so when it can be reasonably expected that the notified concentration will not lead to a significant impediment of effective competition, which it will assess pursuant to the criteria set out in the Guidelines

(e.g. market shares below certain thresholds, move from joint to sole control, etc.).

3.10 Who is responsible for making the notification?

Acquisitions of joint control need to be notified by the undertakings acquiring joint control. In all other cases, the notification shall be filed by the undertaking acquiring control of (whole or part of) one or more undertakings.

The clearance and notification fees are regulated by the Law on Administrative Fees (*Official Gazette of the RM*, nos. 17/1993, 20/1996, 7/1998, 13/2001, 24/2003, 19/2004, 61/2004, 95/2005, 7/2006, 70/2006, 92/2007, 88/2008, 130/2008, 6/2010, 145/2010; 17/2011, 84/2012, 192/15 and 23/16), which provides for a filing fee of approximately EUR 100 and a clearance fee of approximately EUR 500. Evidence of the paid filing fee shall be submitted together with the notification. The clearance fee shall be paid within eight days following the delivery of the clearance (decision).

3.11 Are there any fees in relation to merger control?

See question 3.10.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

Pursuant to applicable rules, two situations need to be distinguished in cases of public bids for joint stock companies listed in Macedonia. The first situation concerns all public bids, irrespective of the jurisdictional thresholds being satisfied. Pursuant to the provisions of the Law on Takeover of Joint Stock Companies (*Official Gazette of the RM*, nos. 69/13, 188/13 and 166/2014), undertakings that make a public offer must inform the Commission of the public offer irrespective of the turnover thresholds. Moreover, they need to provide the Commission with the prospect of a public bid, as well as to keep the Commission informed about all aspects of the public bid procedure. Failure to comply with these provisions may result in a EUR 2,000–4,000 fine for the undertaking concerned and a EUR 500–1,000 fine for the responsible person within the undertaking.

The second situation concerns concentrations brought about via public bids that do satisfy the jurisdictional thresholds, whereby such a concentration needs to be notified to the Commission (in the form of a merger notification) for assessment and approval.

Further, the Competition Act provides an exemption from the suspension obligation in cases where a concentration is brought about via a public bid. Namely, the suspension obligation shall not prevent the implementation of a public bid for purchase of securities or series of transactions in securities, including those convertible into other securities admitted to trading on a market in accordance with the law, given that the following conditions are met: (i) the concentration has been notified to the Commission without delay; (ii) the acquirer of securities does not exercise the voting rights attached to the securities in question, or does so only to the extent necessary to maintain the full value of its investment; and (iii) the implementation is based on a procedural order for exemption from the obligation of suspension issued by the Commission.

3.13 Will the notification be published?

A summary of the notification is published on the Commission's website, containing (i) the names of the undertakings concerned, (ii) a brief description of the undertakings' business activities, and (iii) the form of the concentration. Furthermore, the Commission's decisions shall be published in the *Official Gazette of the RM* and on the Commission's website (excluding all the information deemed as business or professional secrets in the sense of the Competition Act and the respective bylaws).

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 question at the heart of the substantive test is whether a concentration shall cause a significant impediment of effective competition on the market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

When assessing a concentration, the Commission will, in particular, take into account: (i) the need to maintain and develop effective competition on the market or a substantial part of it, especially in terms of the structure of all markets concerned and the actual or potential competition from undertakings located within and outside Macedonia; and (ii) as well as various factors and, in particular, 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 and/or services, the interest of the consumers and the technological and economic development, provided that this benefits, and the concentration does not form an obstacle to, competition.

When assessing a concentration brought about by a joint venture, the Commission shall, in particular, take into account whether: (i) the parties to the joint venture continue to retain, to a significant extent, activities on the same market as the joint venture or on the market which is downstream or upstream from that of the joint venture or on a neighbouring market closely related to the market of the joint venture; or (ii) the coordination, which arises as a direct effect of the creation of the joint venture, affords the parties to the joint venture the possibility of eliminating competition in respect of a substantial part of the goods and/or services in question.

Issues surrounding the substantive assessment of concentrations are further dealt with in the Guidelines on assessment of horizontal concentrations for the purpose of the Law on the Protection of Competition (April 2007) and the Guidelines on assessment of vertical and conglomerate concentrations (November 2008).

4.2 To what extent are efficiency considerations taken into account?

The Competition Act states that its purpose is to ensure free competition on the domestic market in order to stimulate economic efficiency and consumer welfare. Efficiency considerations are dealt with in various bylaws and, in particular, the Guidelines on assessment of horizontal concentrations for the purpose of the Law on the Protection of Competition (April 2007) and the Guidelines on assessment of vertical and conglomerate concentrations (November 2008). As stated in the Guidelines, in its assessment, the Commission will consider both the possible anticompetitive effects arising from the concentration and the possible pro-competitive effects stemming from substantiated efficiencies (benefitting

consumers), so as to assess the likelihood that efficiencies would act as a factor counteracting the harmful effects on competition which might otherwise result from a concentration. However, to the best of our knowledge, significant attempts to substantiate and/or quantify efficiencies have not yet been undertaken by the Commission when dealing with particular cases.

4.3 Are non-competition issues taken into account in assessing the merger?

No. The Competition Act and applicable bylaws are not concerned with non-competition issues, nor are they given a prominent role in merger analysis, although they may be reflected upon by the Commission in the course of review.

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

Decisions rendered by the Commission and rulings of the courts shall be published in the *Official Gazette of the RM* and on the web page of the Commission. The published text shall include the names of the parties and the main content of the decision. According to the Competition Act, the Commission is also obliged to publish certain information on all notified filings on its website. Such information shall include the names of the parties, a brief description of the undertakings' business activities, and the form of the concentration. These publicity requirements allow third parties to be informed on the development of the proceedings and to submit their comments, opinions and remarks regarding the concentration under review. All data regarded as business or professional secrets, in terms of the Competition Act, shall not be published.

4.5 What information gathering powers does the merger authority enjoy in relation to the scrutiny of a merger?

Pursuant to the Competition Act, the Commission may utilise a range of information-gathering powers. The Commission is entitled to request from the parties to the concentration certain documents and data relating to their financial standing and business relations, as well as other data it deems necessary for the assessment of the concentration. The Commission could also have recourse to other information-gathering tools at its disposal, although their application could possibly be expected in some limited situations, e.g. inspecting business premises, business records and other documents, copying or scanning business documents, sealing business premises and documents and taking statements from representatives and employees of the parties to the concentration.

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

Pursuant to the Competition Act and the Guidelines on the manner of preparing non-confidential versions of Commission decisions (February 2011), the applicant is entitled to request that certain information be treated as confidential information. Namely, before publishing a merger control decision, the Commission shall deliver it to the applicant with a request that it designates confidential information which should not be contained in the published decision. The applicant is required to respond to the request within eight days after receiving the decision (i.e. a copy of the decision with clearly marked data considered to be confidential information); failure to respond shall be deemed as confirmation that no confidential information is contained in the decision, which will be published in full. The answer also has to be substantiated and justified.

The Competition Act imposes an obligation on the Commission's personnel to keep as confidential all data determined as business or professional secrets by the law or marked as such by the parties. The personnel are also bound by this duty to keep such data confidential for five years upon the termination of their working relationship with the Commission.

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

5.1 How does the regulatory process end?

Pursuant to the Competition Act, after reviewing the concentration, the Commission may:

- clear the concentration unconditionally;
- clear the concentration subject to conditions; or
- prohibit the concentration.

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

Should the Commission consider that a concentration significantly impedes effective competition, the parties may seek to modify the concentration in order to resolve competition concerns and thereby receive clearance of the merger. Rules regulating merger remedies are set out in the Competition Act and expanded upon in the Guidelines on remedies acceptable to the Commission for the Protection of Competition under chapter III of the Law on Protection of Competition (December 2009).

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

To the best of our knowledge, no (foreign-to-foreign) concentration has yet been approved subject to conditions.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The parties to a concentration may offer to *modify the concentration* from the outset of the merger review process. Should that be the case, the deadline for Phase I is 35 business days instead of the regular 25 business days (please see question 3.6). Such modifications may be fully implemented in advance of a clearance decision.

However, it is more common for the parties to submit *commitments*. Parties can submit proposals for commitments to the Commission on an informal basis, even before notification. Proposals submitted by the parties in accordance with these requirements will be assessed by the Commission. The Commission will consult third parties, and it may also, if appropriate, consult the competent national regulatory authorities. In addition, in cases involving a geographical market that is wider than the Republic of Macedonia or where, for reasons related to the viability of the business, the scope of the business to be divested is wider than the territory of Republic of Macedonia, the non-confidential version of the proposed remedies may also be discussed with competition authorities within

the framework of the bilateral cooperation agreements with these countries. Commitments proposed to the Commission in Phase II must be submitted to the Commission within no more than 65 working days from the date on which proceedings are initiated.

The Commission may accept commitments in either phase of the procedure. However, given the fact that an in-depth market investigation is only carried out in Phase II, commitments submitted to the Commission in Phase I must be sufficient to clearly rule out "serious doubts" that the concentration may significantly impede effective competition.

The Commission has to make a clearance decision as soon as the serious doubts are removed as a result of commitments submitted by the parties. This rule applies to commitments proposed in Phase II proceedings before the Commission issues a Statement of Objection. If the Commission reaches the preliminary view that the merger would lead to a significant impediment to effective competition and issues a Statement of Objection, the commitments must be sufficient to eliminate such a significant impediment to effective competition.

If, however, the parties do not validly propose remedies adequate to eliminate the competition concerns, the only option for the Commission is to adopt a prohibition decision.

5.5 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?

Pursuant to the Guidelines on remedies acceptable to the Commission for the Protection of Competition under chapter III of the Law on Protection of Competition, where a proposed concentration threatens to significantly impede effective competition, the most effective way to maintain effective competition, apart from prohibition, is to create conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture of the merging parties. Divestiture commitments may also be used for removing links between the parties and competitors in cases where these links contribute to the competition concerns raised by the merger. Whilst being the preferred remedy, divestitures or the removal of links with competitors are not the only possible remedy to eliminate certain competition concerns. However, divestitures are the benchmark for other remedies in terms of effectiveness and efficiency. Therefore, the Commission may accept other types of commitments, but only in circumstances where the other remedies proposed are at least equivalent in their effects to a divestiture.

As a matter of principle, the divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and that is divested as a going concern. For the business to be viable, it may also be necessary to include activities which are related to markets where the Commission did not identify competition concerns, if this is required to create an effective competitor in the affected markets. The business has to include all the assets which contribute to its current operation or which are necessary to ensure its viability and competitiveness, and all personnel which are currently employed or which are necessary to ensure the business's viability and competitiveness. In order to maintain the structural effect of a remedy, the commitments have to foresee that the merged entity cannot subsequently acquire influence over the whole or parts of the divested business. The commitments will normally have to foresee that no re-acquisition of material influence is possible for a significant period, generally of 10 years.

The intended effect of the divestiture will only be achieved if and once the business is transferred to a suitable purchaser in whose hands it will become an active competitive force in the market. The standard purchaser requirements are the following:

- the purchaser is required to be independent of and unconnected to the parties;
- the purchaser must possess the financial resources, proven relevant expertise, and the incentive and ability to maintain and develop the divested business as a viable and active competitive force in competition with the parties and other competitors; and
- the acquisition of the business by a proposed purchaser must neither be likely to create new competition problems nor give rise to a risk that the implementation of the commitments will be delayed.

5.6 Can the parties complete the merger before the remedies have been complied with?

Whilst commitments have to be offered by the parties, the Commission will ensure the enforceability of commitments by making the authorisation of the merger subject to compliance with the commitments. Generally, parties may complete the merger before a remedy has been complied with. However, this will depend on the nature of the remedy and negotiations conducted with the Commission. The Commission may, however, request that the parties do not implement the merger before they have complied with the divestment. An example for this would be an "upfront buyer" requirement, where the parties have to present to the Commission an agreement with a purchaser for the divested business before they implement the transaction.

5.7 How are any negotiated remedies enforced?

Should a concentration be implemented contrary to the obligations and/or conditions of a conditional clearance, the Commission may:

- revoke conditional clearance, while in doing so it will (i) revoke the decision declaring that the concentration is compliant with the Competition Act, (ii) declare that the concentration is not compliant with the provisions of the Competition Act, and (iii) if necessary, impose measures and obligations to restore effective competition on the relevant market;
- impose interim measures necessary for restoring or maintaining effective competition, or measures for reinstatement of effective competition; or
- impose fines on the parties to the concentration of up 10% of the total annual turnover.

Where a condition is breached, e.g. a business is not divested in the timeframe foreseen in the commitments or is afterwards re-acquired, the clearance decision is no longer applicable.

5.8 Will a clearance decision cover ancillary restrictions?

The Competition Act expressly provides that a decision whereby the Commission determines that a particular concentration is in compliance with the provisions of the Competition Act shall also be considered to cover the restrictions which are directly related and indispensable for the implementation of the concentration. Further details concerning ancillary restrictions are dealt with in the Guidelines on restrictions directly related and necessary to concentrations (November 2011).

5.9 Can a decision on merger clearance be appealed?

Merger control decisions of the Commission can be appealed before the Administrative Court of Macedonia. The appeal has to be submitted within a period of 30 days from the date of receiving the decision.

The Competition Act does not set out the circle of persons that can challenge a merger control decision. According to the Administrative Disputes Act, the following persons are entitled to bring an appeal: (i) the parties to the transaction; (ii) an interested third party or public body if it can be the holder of any right deriving from the decision; and (iii) the competent authority in cases where the decision infringes the law.

5.10 What is the time limit for any appeal?

An appeal has to be submitted within a period of 30 days from the date of receiving the decision subject to the appeal.

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

Fines for competition law violations, including those for merger control, are imposed in misdemeanour proceedings by the Commission. Misdemeanour proceedings for (i) failure to notify a concentration pursuant to the provisions of the Competition Act, (ii) failure to suspend the concentration until clearance, (iii) failure to comply with the terms and conditions of a conditional clearance, and (iv) performing a prohibited concentration, cannot be initiated after five years as of the date on which the violation occurred. Misdemeanour proceedings for notifying a transaction based on false and/or inaccurate data, or for violating procedural orders of the Commission, cannot be initiated after three years. An imposed sanction cannot be enforced after two years have elapsed as of the date on which the Commission's decision becomes effective.

The absolute statute of limitations is set at two times the time limit for initiating misdemeanour proceedings and enforcing fines, respectively.

6 Miscellaneous

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

The Commission is a member of the International Competition Network, and it participates in the OECD Competition Committee. The Commission cooperates with the Competition Directorate General of the EU Commission as well as with foreign competition authorities, which include the German *Bundeskartellamt* and competition authorities in Serbia, Bulgaria, Croatia, Bosnia & Herzegovina and Albania. In 2012, it became a member of the international competition network established within the Energy Community by signing a Declaration together with the competition bodies from Member States and the Energy Community Secretariat. Furthermore, during the first Sofia Competition Forum meeting in 2012, the Commission signed the Sofia Statement (together with Albania, Bosnia & Herzegovina, Bulgaria, Montenegro, Croatia, Kosovo, Macedonia and Serbia) expressing its willingness to deepen and strengthen the regional cooperation and maintain regular contact in the framework of the initiative.

6.2 Are there any proposals for reform of the merger control regime in your jurisdiction?

There are currently no proposals to reform the merger control regime in Macedonia.

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

These answers are up to date as of 26 September 2016.

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