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**Agenda Item 3b. Challenges faced by young and small
competition agencies in the design of merger control**

Contribution by
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Challenges in designing the merger control regime by the Albanian Competition Authority

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Introduction

In the “National Competition Policy” Document, it is clearly stated that:

“Concentration control policy should firmly help to foster and promote developments in Albania’s structural and economic reforms towards the consolidation of the economic market.[...] Only a concentration control policy can provide for a sufficient number of undertakings to remain operating in the market, thus providing an effective competition[...].”¹

Law no. 9121/2003 “On Competition Protection”² (hereinafter Law no.9121/2003), as amended in 2010³, has provided a clearer legal arrangement regarding the concept of concentrations.

These changes present a new test for concentrations assessment – test on – the “significant restriction to effective competition”.

Based on this test, since 2010, the Albanian Competition Authority (hereinafter ACA) implements new analyzes and, in particular, genuine economic analysis when reviewing merger control procedures for concentrations assessment.

The review of the law and the implementation of the new assessment test have led ACA, that when considering a concentration control procedure, to evaluate not only the aspects of creating or strengthening the dominant position of an enterprise as a result of concentration but to assess the change in the market structure brought from this concentration, the type of concentration and the relevant market, the impact on the competition in the market, potential benefits to consumers, etc. – thus, carefully analyze whether this concentration will significantly hinder effective competition in the market.

On the other hand, through secondary legal framework, procedural aspects of Authority’s activity have been regulated in a detailed manner, when considering merger assessments, by regulating the parties’ right to prior consultation with the Authority, proceeding with the concentration notice, as well as with the necessary additional documentation that the parties submit to ACA.

¹ *National Competition Policy*. 2nd edition, Albanian Competition Authority, Tirana, 2015, p.24-25.

² Law *On competition protection*, no.9121 signed 28 July 2003 [2003] OJ no.71.

³ Law *On some additions and amendments in law no.9121, of 28.07.2003 “On competition protection”*, no. 10317 signed 16 July 2010. [2010] OJ no.135.

1. *Ex-ante* merger control system

Albania has adapted the *ex-ante* assessment system of concentrations, where the parties involved in a financial transaction **voluntarily** notify ACA.

Following this concept, the party submitting the merger notification, also has the burden of proof, meaning – such party is obliged to submit to ACA: “[...] all the necessary evidence and data that support its claims”.⁴

However, the presence of this system does not rule out the action mainly by the Competition Commission (hereinafter CC), which, when noting that the concentration of the undertakings was committed in breach of the obligation to notify, decides to initiate an *ex-post* evaluation on its own initiative – initiating concentration control proceedings.⁵

The CC’s *ex-post* decision in this case is accompanied by the imposition of an administrative sanction – fine – up to 10% of the turnover of the previous financial year for the parties that have violated the rule.⁶

Moreover, the law does not prevent the concentration being notified to ACA even after it has been realized, in this case the CC will make a decision on whether it will allow this concentration, after analyzing it, accompanied by a fine – up to 1% of the turnover of the previous financial year, for the parties / party that have violated the rule.⁷

2. Applicable criteria for the concentration assessments.

Based on the legal framework, two are the main applicable criteria that must appear cumulatively in order to deal with a concentration: (1) a steady change in control of the capital (ownership) of an undertaking, or its decision-making; and (2) the threshold of the previous year’s turnover.

A consistent change of control comes as a result of⁸:

- a. The merger of two or more undertakings or parts of undertakings independent of one another;
- b. The acquisition of direct or indirect control by one or more persons who at the same time have control of at least one other undertaking or one or more undertakings over one or more undertakings, or a part of the latter, through the purchase of shares, quotas or assets, contracts or any other lawful means;
- c. Direct or indirect control over one or more undertakings or part of the latter.

⁴ Article 4 of the Regulation *On the implementation of concentration proceedings on undertakings*

⁵ Article 59, Law *On competition protection*

⁶ Article 74, point 1/ d) Law *On competition protection*

See, Decision no 265, signed 5 February 2013 of Albanian Commission of Competition Authority

⁷ Article 73, point 1/ dh) Law *On competition protection*

See, Decision no 265, signed 5 February 2013 of Albanian Commission of Competition Authority

⁸ Article 10 of Law no.9121/2003 *On competition protection*

The required turnover threshold is a necessary condition for notification of the concentration, which is adapted to the economic structure of the market in Albania, but has also taken into consideration the current experience of the assessment of the concentrations in Albania.

The total turnover formula is calculated from the amount received by the participating undertakings from the sale of the products throughout the ordinary course of business during the previous financial year, after this amount is deducted from the taxes, fees and other charges directly related to the turnover of the undertakings.

Thus, concentrations of undertakings are reported to ACA to obtain authorization, if, in the last financial year, prior to the merger, the turnover threshold is such⁹:

- a. The turnover of all participating undertakings together in the international market is more than 7 billion ALL (about 51 425 213 Euro) and the turnover of at least one participating undertaking in the domestic market is more than 200 million ALL (about 1 469 291 Euro).
- b. The turnover of all participating undertakings together in the domestic market is more than 400 million ALL (about 2 938 583 Euro) and the turnover of at least one participating undertakings in the domestic market is more than 200 million ALL (about 1 469 291 Euro).

The fulfillment of these two conditions by the parties that carry out a transaction will lead to prior notification to ACA.

2.1 The nature of the decisions of the Competition Commission

The decision of the Competition Commission is closely related to the nature of the transaction that has occurred between the parties if: (1) they or not; (2) shows signs of significant restriction of competition in the market.

The Competition Commission states in its decision making that:

- a. The notified transaction is not a concentration;
- b. The notified transaction constitutes concentration and is authorized as such;
- c. The notified transaction shows signs of a significant restriction of competition in the market or part of it, in particular as a result of the creation / strengthening of the dominant position, and establishes the initiation of the in-depth investigation procedure;
- d. The notified transaction shows signs of a significant restriction of competition in the market, or part of it, in particular as a result of the creation / strengthening of the dominant position, and places the concentration authorization with remedies.

⁹ Article 12, point 1 of Law no.9121/2003 *On competition protection*

3. Applicable principles during the concentration control procedures

In its activity for evaluating a transaction as a concentration ACA respects the legal principles set forth in Law no. 9121/2003 on ACA's activity, as well as in bylaws, which are:

1. Deadline and form of notice;
2. Transaction analysis period;
3. Right to access;
4. Transparency of the process.

3.1 Deadline and form of notice

Pursuant to Article 12, point 2 of the Law no. 9121/2003 should be notified within 30 days from the date of the conclusion of the merger, acquisition of control or the creation of a joint venture. The legal framework also provides the parties with the right to prior consultation with ACA before notifying.¹⁰

The notification is made through a 'Simplified Form' when the concentration does not show any competition problems in the relevant market.

When the notified concentration will bring obvious restrictions on competition in the relevant market, the parties must complete the 'Full Form'.

Both the 'Simplified Form' and the 'Full Form' should include the following data: (i) brief summaries of the participants in the concentration; (ii) the form of concentration (merger / control acquisition / creation of a joint venture); (iii) areas of activity of the parties; (iv) the markets in which the concentration will have an impact (noting the affected markets); And, (v) the strategic and economic justification of the concentration.

The notification form is also accompanied by the relevant documentation showing the form of concentration, as well as the latest annual accounts for the parties to the concentration.

3.2 Transaction analysis period

Upon notification of the concentration, the ACA Secretariat shall inform CC in writing of the commencement of the concentration control procedure.

Within a period of 2 months from the date of receipt of the notification, the Secretariat shall analyze the concentration and if it does not show any significant signs of restriction of competition in the market, or in part thereof, pass it for the CC, which decides on the acceptance of the concentration. This is known as the preliminary approval procedure for a concentration.

¹⁰ Article 6 of the Regulation On *the implementation of concentration proceedings on undertakings*

When the concentration shows significant signs of competition restriction in the market, within 3 months, the Secretariat analyzes the concentration, and passes it for review to the Competition Commission, which decides on the: initiation of the in-depth investigation procedure.¹¹

3.3 Right to access of the parties

The notified concentration is published in advance on the ACA website www.aca.gov.al and is accompanied by the data on the participating parties, their country of origin, the form of concentration, the sector of the economy involved, and the ACC invitation for the interested parties to express comments regarding the concentration within a reasonable time.

Prior to the adoption of a decision, CC both in the case of the preliminary concentration procedure and in the case of the in-depth investigation procedure, pursuant to article 39 of Law No. 9121/2003, if necessary, entitles the parties to be heard. The basic principle underlying CC's decision is – “The Commission bases its decision only on the claims for which the parties have been given the opportunity to express upon”.

Also, third parties, which may be consumers, union representatives, other competitors etc., are granted the right to express their opinions and be heard.¹²

3.4 Transparency of the process

ACA is open in exercising its activity ACC, which means that its decision-making, even in the case of a concentration procedure, it reviews facts and evidences on which the decision is based upon.

Each decision is published on the official website www.aca.gov.al and is accessible to everyone.¹³

4. Statistics on concentration control decisions during 2004 -2017

Since 2004 (the year in which ACA has started its activity) ACA has issued more than 100 decisions pertaining to concentration control procedures, which have been authorized by the Competition Commission.

The markets where these authorizations were granted are: retail market (cigarette market, food industry, hygiene products etc.) financial market, construction sector, air transport, fuel market, lottery etc.

¹¹ Article 56, point 1, b) of Law On *competition protection*

¹² Article 19, point 2 of the Regulation On *the implementation of concentration proceedings on undertakings*

¹³ *Op.cit.* note 1, p.20

In the activity of ACC in these 13 years, no decisions have been made, which refer to what is called phase II - the in-depth investigation, and there were no decisions with remedies.¹⁴

It's worth mentioning that during its practice in merger control, ACA has assessed cases of transactions (*foreign to foreign*) where notifying parties were foreign-owned undertakings, but at least one of the participating undertakings had a branch, a distributor or indirectly had a turnover in trading their products in the territory of the Republic of Albania.

During the years **2012-2016**, 53 cases of concentrations have been notified and have undergone the merger control procedure; 35 of which constituted in structure market changes of foreign undertakings (*foreign to foreign*), consequences of whose activity affects the Albanian market, and 18 cases constituted in concentrations which directly involved Albanian undertakings which operate in Albania.¹⁵

During 2016 CC has authorized 12 cases of concentrations, 8 of which constituted in structure market changes of foreign undertakings (*foreign to foreign*)¹⁶ consequences of whose activity affects the Albanian market and 4 cases constituted in concentrations which directly involved Albanian undertakings which operate in Albania.¹⁷

During 2017 until June 2017, CC has authorized 6 cases of concentrations, 5 of which constituted in structure market changes of foreign undertakings (*foreign to foreign*)¹⁸ consequences of whose activity affects the Albanian market and 1 case constituted in a concentration which directly involved Albanian undertakings which operate in Albania.¹⁹

¹⁴ Article 61 of Law no.9121/2003 *On competition protection*

¹⁵ Available at www.aca.gov.al

¹⁶ (1) SABMiller Plc. / Anheuser Busch InBev ; (2) Geo-Jade Petroleum Corporation / Bankers Petroleum Ltd., Alberta Ltd; (3) Tirana International Airport sh.p.k. / Keen Dynamics Limited; (4) Asahi Group Holdings Ltd / SABMiller Plc; (5) Veneto Banca s.p.a. / Quaestio Capital Management SGR s.p.a / Atlante; (6) A4 Holding s.p.a. / Albertis Infraestructuras s.a; (7) Novamatic Gaming Industries GmbH /Albanisch Osterreichische Holding Gesellschaft m.b.h.; (8) GMBF Investment S.a.r.l. / NV Biscuits Delacre SA dhe United Biscuits Industries SAS; available at www.aca.gov.al

¹⁷ Annual Report (2016), available at www.aca.gov.al

¹⁸ (1) SABMiller Plc. / Anheuser Busch InBev ; (2) Geo-Jade Petroleum Corporation / Bankers Petroleum Ltd., Alberta Ltd; (3) Tirana International Airport sh.p.k. / Keen Dynamics Limited; (4) Asahi Group Holdings Ltd / SABMiller Plc; (5) Veneto Banca s.p.a. / Quaestio Capital Management SGR s.p.a / Atlante; (6) A4 Holding s.p.a. / Albertis Infraestructuras s.a; (7) Novamatic Gaming Industries GmbH /Albanisch Osterreichische Holding Gesellschaft m.b.h.; (8) GMBF Investment S.a.r.l. / NV Biscuits Delacre SA dhe United Biscuits Industries SAS; available at www.aca.gov.al

¹⁹ *Op.Cit.*note 19

Table 1:

Authorized concentration control cases, divided according to markets and years (2012- 2016) specifying target undertakings and notifying parties

No.	Product market	No. of authorizations 2012 - 2016	Foreign companies	Local companies
1	Construction	6	3	3
2	Gaming, electronic casinos	3	1	2
3	Automotive products and parts sales	2	1	1
4	Hospitality services and tourism	1		1
5	AudioVisual Media	1	1	
6	Retail sales (tobacco, food, cosmetics, etc)	13	12	1
7	Corporate and personl banking services (Financial Services)	11	5	6
8	Fuels	5	4	1
9	Mineral ore	2	1	1
10	Air travel infrastructure	3	3	
11	Energy	3	2	1
12	Telecommunications	1		1
13	Maritime transport, containers	1	1	
14	Electronic products and IT solutions	1	1	
Total		53	35	18

Table 2:

Summary of authorized concentration control cases classified according to markets and while specifying whether the undertakings are Albanian or foreign

No.	Product Market	2012		2013		2014		2015		2016		TOTAL
		local	foreign	local	foreign	local	foreign	local	foreign	local	foreign	
1	Construction	1		1				2		1	1	6
2	Gaming, electronic casinos	1		1								3
3	Automotive products and parts sales		1					1				2
4	Hospitality services and tourism	1										1
5	AudioVisual Media		1									1
6	Retail sales (tobacco, food, cosmetics, etc)		2		4		2		1	1	3	13
8	Corporate and personl banking services (Financial Services)		2			1	1	3	1	2	1	11
9	Fuels			1			1		2		1	5
10	Mineral ore			1			1					2
11	Air travel infrastructure				2						1	3
13	Energy				2	1						3
14	Telecommunications			1								1
16	Maritime transport, containers						1					1
17	Electronic products and IT solutions								1			1

Table 3:

Authorized concentrations for 2016

Financial Market	[REDACTED]	4
Construction	[REDACTED]	3
Air Transport Infrastructure	[REDACTED]	2
Gaming, electronic casinos	[REDACTED]	1
Fuels	[REDACTED]	1

5. ACA's challenges regarding concentration authorizations

- Training and preparation of the ACA's staff in conducting sound economic and econometric analyzes that will allow ACA to pass the second stage – conduct a thorough investigation procedure when the notified concentration is accompanied by a noticeable signs of restricting competition in the market, or in a part of the market, as a result of the creation / strengthening of a dominant position.
- The realization of an investigative procedure, where the CC decides on remedies that are proportionate with the anti-competitive consequences of the concentration.
- Post the analysis of authorized concentration, by ACA over the years for those concentrations that have brought obvious signs of restricting competition to the market or a part of the market, as a result of the creation / strengthening of the dominant position.

Conclusions

- A comprehensive and clear legal framework that today allows ACA/CC to apply well accepted standards in decision making and investigating procedures in order to authorize or not a concentration.
- Respecting and implementation of this legal framework had allowed the CC to reach correct decision making regarding concentration authorizations.
- ACA is a new authority, with a 13-year lifespan facing a transition economy where certain transactions require a more detailed economic and strategic analysis to allow CC that in its decision making procedure to reach stage two- in-depth investigation, and decision with remedies.