

Merger Control

Fourth Edition

CONTENTS

Preface	Nigel Parr & Catherine Hammon, <i>Ashurst LLP</i>	
Albania	Renata Leka, <i>Boga & Associates</i>	1
Argentina	Julián Peña & Federico Rossi, <i>Allende & Brea</i>	8
Australia	Sharon Henrick, Wayne Leach & Michael Robert-Smith, <i>King & Wood Mallesons</i>	13
Brazil	José C. M. Berardo, Bruno B. Becker & Guilherme Morgulis, <i>BMA – Barbosa, Müssnich, Aragão</i>	24
Canada	Randall J. Hofley, Micah Wood & Kevin H. MacDonald, <i>Blake, Cassels & Graydon LLP</i>	37
Colombia	Alfonso Miranda Londoño, <i>Esguerra Barrera Arriaga S.A.</i>	45
Cyprus	Anastasio A. Antoniou & Aquilina Demetriadi, <i>Anastasio Antoniou LLC</i>	53
Denmark	Olaf Koktvedgaard & Erik Kjær-Hansen, <i>Bruun & Hjejle</i>	60
Finland	Katri Joenpolvi, Leena Lindberg & Jarno Käkälä, <i>Krogerus</i>	67
France	Pierre Zelenko & Daniel Vasbeck, <i>Linklaters LLP</i>	77
Germany	Peter Stauber, <i>Noerr LLP</i>	99
Hungary	Márton Horányi & Andrea Jádi Németh, <i>bpv JÁDI NÉMETH Attorneys at Law</i>	109
India	Farhad Sorabjee & Amitabh Kumar, <i>J. Sagar Associates</i>	119
Indonesia	Yogi Sudrajat Marsono & HMBC Rikrik Rizkiyana, <i>Assegaf Hamzah & Partners</i>	123
Israel	Dr David E. Tadmor & Shai Bakal, <i>Tadmor & Co. Yuval Levy & Co., Attorneys-at-Law</i>	130
Japan	Kentaro Hirayama, <i>Morrison Foerster / Ito & Mitomi</i>	141
Kazakhstan	Aldash Aitghanov, Nikolay Radostovets & Kuanyskh Kholdursunov, <i>JSC Center for Development and Protection of Competition Policy</i>	149
Kosovo	Sokol Elmazaj & Delvina Nallbani, <i>Boga & Associates</i>	155
Macedonia	Jasmina I. Jovanovik & Dragan Dameski, <i>Debarliev, Dameski & Kelesoska Attorneys at law</i>	160
Malta	Ron Galea Cavallazzi & Lisa Abela, <i>Camilleri Preziosi</i>	167
Morocco	Amin Hajji & Aïcha Brahma, <i>Hajji & Associés</i>	170
New Zealand	Grant David, Neil Anderson & Melissa Hay, <i>Chapman Tripp</i>	175
Norway	Jan Magne Juuhl-Langseth & Erik Martinius Klevmo, <i>Advokatfirmaet Simonsen Vogt Wiig AS</i>	182
Portugal	António Mendonça Raimundo & Sónia Gemas Donário, <i>Albuquerque & Associados</i>	194
Romania	Silviu Stoica & Mihaela Ion, <i>Popovici Nițu & Asociații</i>	201
Singapore	Kala Anandarajah, Dominique Lombardi & Tanya Tang, <i>Rajah & Tann Singapore LLP</i>	215
Spain	Jaime Folguera Crespo, Raquel Lapresta Bienz & Tomás Arranz Fernández-Bravo, <i>Uria Menéndez</i>	223
Sweden	Pontus Lindfelt, Mina Gregow & Hanna Wingren, <i>White & Case</i>	232
Switzerland	Franz Hoffet, Marcel Dietrich & Gerald Brei, <i>Homburger AG</i>	242
Turkey	Gönenç Gürkaynak & Öznur İnanlı, <i>ELIG, Attorneys-at-Law</i>	249
Ukraine	Igor Svehkar & Alexey Pustovit, <i>Asters</i>	259
United Kingdom	Nigel Parr & Emily Clark, <i>Ashurst LLP</i>	264
USA	Christopher A. Williams & Paul S. Jin, <i>Wilson Sonsini Goodrich & Rosati</i>	279

Albania

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Overview of merger control activity during the last 12 months

The Albanian Competition Authority (“ACA” or “Competition Authority”) is the authority that is engaged in the implementation of merger control legislation in Albania. ACA is composed of two separate bodies dealing respectively with the investigation and decision-making processes: i.e., the Competition Secretariat and the Competition Commission.

On 30 April 2015, the Parliament of Albania passed a resolution on the “Assessment of the activity of the Competition Authority for year 2014”. This resolution acknowledges ACA’s work in raising awareness and increasing public trust towards ACA’s work in protecting competition; increasing market interventions and expanding market types; consolidating the institution of competition; and completing and improving the regulatory and legal framework.

According to the data from the Competition Authority, the objectives for 2014 were:

- Treatment of the cases reviewed with professionalism and objectivity.
- Increase of efficiency through investigative procedures.
- Profile consolidation as an independent and professional institution.
- Growth and strengthening of all administrative resources.
- Harmonisation of the legal and regulatory framework, as well as initiating the review of the National Competition Policy.

The activity of the Competition Authority is mainly focused on identifying and investigating anticompetitive practices, such as prohibited agreements and abuse of dominant position on the market; *ex-post* evaluation of exclusive rights; keeping the process of concentration of market structures under control; as well as evaluating the legal acts which have an impact regarding market competition.

Over the past year¹, 42 decisions were taken by the Competition Commission, of which:

- two commercial entities were fined;
- one decision had as its object the conditions and obligations of the parties;
- three cases were investigated for abuse of dominant position;
- seven cases were investigated for a prohibited agreement;
- eight decisions concerned authorisation of a concentration;
- four decisions regarded recommendations to public institutions for legal acts;
- one decision was made to exclude an agreement from the prohibition; and
- other decisions were of a procedural nature.

In 2014 the number of decisions increased in areas dealing particularly with abuse of dominant position in the market, as well as prohibited agreements. In all the cases investigated for prohibited agreements, the Competition Secretariat has carried out

inspections in the form of *dawn raids*, quick inspections. Also during this year the recommendations to public institutions increased.

The increase by more than double of complaints addressed to the Competition Authority in 2014 (33 in total) represents a significant development in terms of developing a competition culture and advocacy. Practices of developed countries and the European Union suggest that the majority of investigative procedures (over 90%) start on the basis of complaints and applications for leniency by enterprises.

One of the main challenges for the Competition Authority is to increase awareness among the business community to use the penalty relief program, as this instrument is used mainly to detect prohibited cartels and agreements between enterprises.

For the year 2014, a significant reduction in fines was observed. The Competition Authority imposed only two fines, amounting to €1,428.00, versus six fines, at a total amount of €44,140.00 imposed during 2013.

Finally, in 2014 the Competition Authority implemented an evaluation process of the policy's content and implementation, and of competition law, conducted by UNCTAD's competition experts. This evaluation process was voluntarily requested by the Competition Authority to identify the standard of basic law enforcement and competition policy; the quality of the secondary legislation; and practices of competition followed by the Albanian institutions, by comparing them to best practices and European Standards.

The recommendations of the evaluation process, which have been addressed to the Competition Authority, will be part of the priorities of its activity for 2015.

New developments in jurisdictional assessment or procedure

Over the past year there have been no changes to the primary legislation, but in view of the harmonisation of Albanian legislation with the National Plan for European Integration, 2014-2020, two sub legal acts were approved: (i) the Regulation "On categories of agreements and concerted practices in the sector of maritime goods"²; and (ii) the Instruction "On the assessment of a dominant position"³, aiming at consolidation of enforcement practices of the Competition Law.

One of the aspects of the activity of the Competition Authority has been the evaluation of granted concessions, which was an *ex-post* assessment focused on the *ex-ante* evaluation that should have been performed before granting these concessions. This was a result of a resolution passed by the Albanian Parliament on the "Assessment of the activity of the Competition Authority for year 2013", which ruled on the legal assessment of competition restrictions for concessionary services, mainly awarded as exclusive or special rights.

This evaluation process is considered to be an instrument to increase and strengthen advocacy; the necessity of meeting the legal obligations of the legislative and executive institutions; and to obtain the opinion of the Competition Authority before issuing exclusive rights, and therefore before signing the respective agreements.

During 2014 eight concentrations were authorised which did not present a dominant position on the market. A concentration procedure was suspended, since there was a lack of information on the matter, and the subject was fined. Seven other practices have not been subject to authorisation, because they did not meet the criteria set out by the applicable law.

During 2014, the Competition Authority conducted several monitoring actions regarding complaints, at the initiative of the Authority, primarily in the cement market, tobacco and

its derivate, liquefied natural gas (LNG), and sunflower oil, and conducted a market survey regarding excisable products.

The process of judicial review of decisions of the Competition Commission moved to a new stage in 2014, as the Administrative Court started operating, and it is this court that deals with the appeal of any decisions of the Competition Commission. Judicial proceedings are expedited since they have been sent to the Administrative Court, while there was a transitional period of the passage of Civil Court cases to the Administrative Court, followed by long proceedings in cases in the Supreme Court. As regards official Competition Authority statistics during 2014, the latter has been dealing with eight court cases in front of the Administrative Court of First Instance. The Competition Authority won three out of five reviewed cases, and the remaining three cases are scheduled for examination by the court during 2015.

Eight cases were sent for examination in the Administrative Court of Appeal, four of which were examined, and only one was successful for the Competition Authority. The remaining cases are set to be examined during this year. In 2014 the Administrative Council of the Supreme Court examined 11 cases, with only one appeal rejected by the Supreme Court, confirming in this way the decision of the Competition Commission.

* * *

The spotlight of the Competition Authority for the year 2015 will be to improve the legal and regulatory framework through the development of regulations or their amendments, aiming at increasing the degree of alignment with EU directives and standards, as well as with international competition principles. The need for further improvements in the field of competition legislation has been identified, which is reflected also in the national plan for European integration. A secondary legal framework of the Competition Authority for 2015 will be complemented by two other legal acts, specifically with the Instruction “On the assessment of vertical restraints”, and the Instruction “On measures taken by the Commission in cases of concentrations”.

Cooperation with the judicial system. In connection with the cooperation between the Competition Authority and the judicial system, which is the institution that reviews the Competition Authority’s decisions, there is the need to implement possible training sessions for Administrative Court judges, for more objective judgments.

The Competition Law provides for communication and exchange of information between the Competition Authority 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 guarantees as in Albania. Furthermore, based on the principle of reciprocity, the Competition Authority may conduct investigations upon the request of the foreign competition authority, except when such investigation and/or provision of information or documents requested from the foreign competition authority are to the detriment of the Republic of Albania sovereignty, security, essential economic interests or public order.

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

In 2014 the Competition Authority continued with the examination of cases from 2013 in the following markets: insurance market of motor vehicles; retail phone market; fuel production

market; and the import and wholesale of fuel. Also, based on complaints from market operators, investigation procedures were carried out in markets such as: maritime transport of passengers and vehicles; public procurement market of physical security services in the district of Dibra; import and wholesale of packaged tobacco; the public procurement market regarding the construction of Tirana outer by-pass road; market purchase of electricity in order to cover losses from TSO (OSHE); and in the retail mobile phone market, a new procedure was opened.

In all cases investigated for prohibited agreement issues, the Competition Secretariat has carried out inspections in the form of *dawn raids* at the same time in all enterprises, and conducted investigation of documents in electronic form, carried out by two well-trained inspectors. In order to have real impact on the intervened market, in terms of the long-lasting legal proceedings giving priority to the interventions of regulator actors, the decisions of the Competition Commission during 2014 were mainly decisions regarding regulatory action in important market and economy sectors, seeking to create proper economic freedom and effective competition in the market.

During 2014 the Competition Authority investigated major sectors, especially those that were of public importance. The fuel market⁴ was investigated, in the form of in-depth investigation of import-production and the wholesale of fuel to enterprises that operate in the market. The Competition Authority came to the conclusion that during its investigations it did not find sufficient evidence to prove the existence of prohibited agreements or abuse of collective dominance between the enterprises subject to investigation. However, during 2014 an assessment of this inquiry showed operational problems in terms of quality and price in the market.

As for the year 2014, the Competition Authority started to work with an agenda of priority sectors, while it is expected that the trend of complaints will continue at least at the same rate. The main sectors are: electronic communications; energy and gas; agriculture; and banking. In 2015 the Competition Authority performed the monitoring of the market for the production and sale of eggs, and decided to open a preliminary investigation procedure. Also, it will continue monitoring the import of gas and the wholesale gas market, because of the dominance that one company has in this market.

Insurance market. After the closure of this investigation, the companies implemented the terms and obligations imposed by the Competition Authority in its decision concerning the provision of insurance services according to the requirements of the insured, the obligation to comply with agreements with more than one broker, and the printing and marketing of insurance policies with the logo of each company. As regards the *Bonus Malus* system and the obligation for the payment of damages from the insurer directly, the intervention of the Financial Supervisory Authority is needed, and the adoption of bylaws by the institution according to recommendations made by the Competition Authority.

*Mobile phone market*⁵. The Electronic and Postal Communication Authority (EPCA or AKEP) is the entity that regulates the activity of documentation in Albania. Following the recommendations of the Competition Commission, measures are being taken for more effective regulation of this market using all legal instruments, primarily related to the reduction of termination fees for the series outside the network, reducing tariff differences within and outside the network, not only the normal fees but also optional packages, reviewing call termination tariffs in mobile connections to make cost recovery as low as possible.

*Electricity market*⁶. After reviewing the report on monitoring the market for electricity import by CEZ SHA for the purposes of covering losses, and the relevant report of the

Competition Authority, the Competition Commission has made a series of recommendations to the Energy Regulatory Entity (ERE), which aim to promote participation in the procedures of purchasing power, to ensure equal treatment and non-discrimination for all participants in the process of buying energy, so as to ensure public confidence and transparency.

Key economic appraisal techniques applied, e.g. as regards unilateral effects and coordinated effects, and the assessment of vertical and conglomerate mergers

The substantive test used by the Competition Authority in its assessment of the merger is the significant restriction of competition in the market or a part of it, especially as a result of the creation or strengthening of the single or collective dominant position.

Specifically, during the **preliminary proceeding**, the Competition Authority shall examine the notification in order to ascertain whether the transaction/merger “reveals signs that it would significantly restrict the competition in the market or a part of it, especially as a result of the creation or strengthening of the dominant position”; whilst in the **in-depth proceedings**, the Competition Authority must assess whether the transaction/merger significantly restricts the said competition.

It should be mentioned that mergers significantly restricting competition over the market are prohibited, except when an undertaking seriously risks 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, or (ii) there is no serious prospect of re-organising the activity of the same undertaking.

The Competition Commission, in assessing mergers, may take into account economic efficiency that can be derived from the merger, if the economic efficiency: contributes to the welfare of consumers or at least neutralises the possible negative effects that could be caused by the merger; is or will be the result of this merger and there are no alternative ways which are less anti-competitive for its creation than the given concentration; and is verifiable.

When an undertaking seriously risks failure and there is no less anti-competitive alternative than the merger, the Competition Authority may decide to approve 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.

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

Based on the information from the Competition Authority, no second stage investigations took place during 2014.

Key policy developments

There have been no key policy developments regarding the new assessment guidelines for the past 12 months. The guidelines on the assessment of horizontal agreements were approved by Competition Authority in 2013 with the Decision no. 295, dated 14.11.2013⁷. The guidelines are in line with the Treaty on the Functioning of the European Union on horizontal co-operation agreements (2011/c 11/01).

The current Albanian secondary legislation provides that the concentrations shall be examined by the Competition Authority essentially from a procedural point of view. The

guidelines introduce and explain substantive legal ideas. They explain and distinguish the concepts of (i) control, (ii) change of control on a lasting basis, (iii) interrelated transactions, (iv) internal restructuring, (v) sole and joint control, (vi) net turnover and financial accounts, and (vii) the attribution of turnover (whether geographically or otherwise).

Reform proposals

Currently there are no published reform proposals in Albania in the field of mergers.

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Endnotes

1. http://www.caa.gov.al/uploads/news/Fjala_e_Kryetares_ne_Kuvend.pdf.
2. <http://www.caa.gov.al/laws/read/id/69>.
3. <http://www.caa.gov.al/laws/read/id/77>.
4. <http://www.caa.gov.al/decisions/read/id/546>.
5. http://www.caa.gov.al/uploads/news/Njoftim_per_mediat_VKK-_vodafone.pdf.
6. http://www.caa.gov.al/uploads/decisions/Decision_334.pdf.
7. http://www.caa.gov.al/uploads/laws/Udhezim_Per_vleresimin_e_marreshjeve_horizontale.pdf.

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