

Merger Control

Fourth Edition

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Kosovo

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Overview of merger control activity during the last 12 months

Kosovo Competition Authority (hereinafter referred to as the “**Authority**”) is managed by the Kosovo Competition Commission (hereinafter referred to as the “**KCC**”), which is a collegial organ composed of five (5) members. The Authority is a legal person having public authority, independent in performing its duties set out in the Competition Law (no. 03/L-229 as amended by Law no. 04/L-226, hereinafter referred to as the “**Competition Law**”). Pursuant to the provisions of the Competition Law, the President, Vice President and members of the KCC are proposed by the Government and appointed by the Assembly. The mandate of the KCC members has expired for more than a year, and is not currently functional. The Government, despite its legal obligation to propose to the Assembly for the nomination or reappointment of candidates as members of the KCC sixty (60) days prior to expiration of the term, has not yet nominated any candidates as KCC members.

In the last 12 months, the Authority has anyway received only one notification, with the objective of executing a concentration of the company Adris Group via the purchase of 100% shares in the company Croatia Osiguranje DD through state-owned capital. Due to its non-functionality, KCC was not able to render a decision.

Since the establishment of the Authority in 2008, the KCC has only in April 2013 rendered its first decision in the merger control area: to allow the concentration conducted through the acquisition of 100% of the shares by Kosovo Calik limak Energy Sh.A in the Kosovo distributor of electrical energy, Kosovo Electricity Distribution and Supply Company Sh.A.

New developments in jurisdictional assessment or procedure

The provisions of the Competition Law regarding the minimum set of criteria that must be met in order for a transaction to be qualified as a concentration which must be notified to the KCC, have remained unchanged. Pursuant to the provisions of the Competition Law, the types of transaction that are caught by merger control legislation are those that result in a concentration of enterprises. A concentration is created by establishing control through: (i) the merger of two or more independent enterprises or parts of these enterprises; and (ii) the acquisition of direct or indirect control, or influence over the activities of one or more enterprises or parts of enterprises by: (a) taking over the majority of shares or a part of them; (b) taking over the majority of voting rights; or (c) in any other way envisioned by the laws in force and other regulations.

Control is defined as the acquisition of rights, contracts or other acts through which one or more enterprises, either individually or together, taking into consideration all legal and factual circumstances, acquire the ability to achieve decisive influence over the activities of an enterprise.

With the amendments to the Competition Law in February 2014, the most significant development was the lowering of the turnover thresholds which are determined for the international market from €100m to €20m. Namely, the jurisdictional thresholds are met if:

- (i) determined incomes of all participating enterprises together, in international markets, exceed twenty (20) million euros based on financial reports of the financial year preceding the concentration year, and if at least one of the participants is located in the Republic of Kosovo; and
- (ii) general incomes of at least two (2) participants in a concentration in the Kosovo domestic market exceed three (3) million euros, based on financial reports preceding the year of concentration.

The Competition Law does not clearly specify the methodology for calculating the turnover of the participating undertakings for the purposes of this jurisdictional threshold. It only provides that income from the sale of goods or services made between undertakings that are part of a group is not taken into consideration in the calculation of the total annual turnover. If, at the time of the notification, the financial statement for the preceding year is not available, the relevant turnover will be the one achieved in the year for which the last financial statement has been prepared.

Article 66 of the Competition Law provides that the law shall be implemented in pursuance of the Directives of the EU on competition. It may be assumed that the KCC will refer to the EU laws if Competition Law lacks clarity.

The amendments to the Competition Law have prolonged the period to ninety (90) days from the previous sixty (60) days from the day of the submitted notification within which the Authority may make a decision to either (i) allow the concentration, or (ii) allow the concentration, provided that it fulfils several conditions and measures pertaining to deadlines set by the Authority which assesses the prohibited concentration.

If a concentration is executed without submitting the mandatory notification or if a company submits to the Authority incorrect or false information in the concentration assessment procedure, a punitive fine of up to 2% of the total revenue of the company in the last year for which the final report has been completed may be imposed.

If the company participates in the execution of prohibited concentrations of enterprises, the Authority may impose a fine of up to 10% of the total domestic revenue of the company during the last year for which the final report has been completed. Also, in urgent cases the Authority can make a decision on temporary measures and request the company to stop its activity when there is risk of irreparable damage to market competition. This measure shall not be longer than six months. The highest amount of a punitive fine may not exceed 10% of the total revenues realised by the company during the previous three years.

The amendments to the Competition Law have introduced liability for the persons in charge of the company if it is involved in the violations provided. Such persons can be fined in an amount of €1,000 up to €3,000.

Due to the reform of the court system (Law no. 03/L-199 “On Courts”), a Department for Administrative Cases operating in the Basic Court of Pristina for the entire territory of the Republic of Kosovo is now competent to receive suits on initiating an administrative dispute against the decisions of the Authority, which has created new challenges for judges of this court who have not dealt before with competition and anti-trust issues.

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

The Authority is still in the process of training staff to be able to apply methodologies, conduct research and carry out field investigations. Although the Authority is competent to impose fines in case an enterprise participates in the execution of prohibited concentrations, and thus may focus on a particular sector of the industry, to the best of our knowledge, there have been no investigations initiated *ex officio* by the Authority. For the time being the Authority assesses those transactions that are notified to the Authority, without focusing on any particular sector.

It is noteworthy that the Competition Law does not provide for different approaches for specific sectors. In addition to Competition Law provisions that are applicable to all undertakings, mergers in some sectors are conditioned by prior notifications or approvals (i.e. mergers in the banking and insurance sector, energy sector, or telecommunications sector). When such mergers are to take place, notification or approvals should be made to, or obtained by, the relevant authorities, such as the Central Bank of Kosovo, the Energy Regulatory Office, or the Regulatory Authority of Electronic and Postal Communications.

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

Subject to article 19 (2) of the Competition Law, the Authority shall confirm the effect of a concentration on market competition and possible obstacles to enter the market, especially when the concentration creates a new dominant position or strengthens an existing dominant position. Upon the assessment of the concentration effects, the Authority confirms in particular:

- (i) the structure of the relevant market, and existing competitors or possible future competitors in the relevant market in the territory of the Republic of Kosovo or outside its territory; structure and selection of the market offer and demand and their trends, prices, risks; economic and judicial and other obstacles to enter or exit the market;
- (ii) position, market participation and economic and financial power of the enterprise in the relevant market; level of competitive capability of participants in the concentration; possible changes of their business and alternative supply sources for buyers arising as a result of concentration; and
- (iii) concentration effects on other enterprises or on consumers, short distribution routes, reduction of transportation costs, specialisation in the production process, technological innovations, reduction of production or service costs, as well as other advantages resulting from execution of the concentration.

However, as we mentioned earlier, the Authority is inexperienced and there is still no developed technique or methodology regarding analysis of merger effects.

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

The investigative process in Kosovo is not formally divided into stages.

Based on the provisions of the Competition Law, the preparation process includes the gathering of all information that needs to be submitted along with the notification, which include *inter alia* the legal basis of the concentration (e.g. concentration agreement, agreement or relevant decision of the enterprise body), basic annual financial statement for

the previous year (e.g. balance sheet, income or losses, accounting and financial statements) and other documents that are required by the administrative instruction 06/2012.

If the Authority does not issue a conclusion to commence the procedure for the assessment of a concentration within thirty (30) days upon receiving the notification and accompanying documents, the concentration is deemed permissible.

If the Authority, based on submitted evidence on the notification on the objective for execution of the concentration, assesses that execution of the concentration may significantly affect trade competition on the relevant market, especially if a new dominating position is created with the concentration or the existing dominating position of participants in a concentration strengthens, the Authority issues a conclusion for beginning the assessment procedure to allow the concentration. Within a period of ninety (90) days upon issuance of a conclusion, during which it investigates and assesses the concentration, the Authority issues a decision either to: (i) approve the concentration; (ii) approve the concentration with conditions and obligations; or (iii) prohibit the concentration.

The Competition Law provides the possibility of remedies in the assessment procedure phase if the Authority ascertains that the concentration may be allowed only by meeting several conditions and measures. In this case, the enterprise is obliged to propose appropriate measures and conditions that should eliminate negative effects of the subject of concentration. Such measures and conditions may be submitted earlier on by the enterprise or they may be included in the notification on the objective for execution of the concentration. The Authority may completely or partially accept measures, conditions and terms proposed by the enterprise if it ascertains that those are sufficient to solve negative effects of the concentration on market competition.

If the Authority does not accept or only partially accepts measures, conditions and terms proposed by the participants in the concentration, it is authorised to specify other measures for monitoring activities and/or structural measures and conditions and terms for their fulfilment.

In that case, the Authority may issue a decision which assesses the allowed concentration, provided that it fulfils several conditions and measures pertaining to deadlines set by the Authority. If participants in the concentration do not fulfil the conditions and measures within the deadlines set in the decision, then depending on the assessment of the non-compliance, the Authority shall annul or change the decision for allowing a conditional concentration.

Key policy developments

The latest developments have been adopted through amendments to the Competition Law dated 13 February 2014. In addition to the lowering of the cumulative turnover threshold, the market presence in order for an enterprise to be considered as an enterprise with dominant position has been lowered from forty per cent (40%) to twenty-five per cent (25%). However, these amendments have not affected the number of notifications or the activity of the Authority.

The Authority has not made public the intention to introduce new policies or secondary legislation.

Reform proposals

There have been no reform proposals.

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Sokol joined Boga & Associates in 1996. He is a partner of the firm and Country Manager for Kosovo.

He has extensive expertise in project finance, concession law, privatisations, telecommunication, corporate law, construction and real estate, energy and public utilities, taxation laws, litigation, competition law, environment protection law, etc. He is continuously involved in providing legal advice to numerous project financing transactions, mainly on concessions and privatisations with a focus on energy and infrastructure, both in Albania and Kosovo.

He has also conducted a broad range of legal due diligences for international clients who are considering investing in Albania or Kosovo in the fields of industry, telecommunications, banking, real estate, etc.

He is an authorised trademark attorney and has expertise in trademark filing strategy and trademark prosecution, including IP and litigation issues.

Sokol graduated in Law at Tirana University, Albania (1996). Sokol is fluent in English and Italian and is admitted to practise law in Albania and Kosovo.

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Her practice is mainly focused on providing legal advice to clients on a wide range of corporate, business and banking matters. She also provides assistance in advising investors on a number of transactions, including mergers and acquisitions, and privatisations.

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