



PalArch's Journal of Archaeology
of Egypt / Egyptology

MERGER AND ACQUISITION CONTROL OF ALBANIAN COMPETITION AUTHORITY

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MERGER AND ACQUISITION CONTROL OF ALBANIAN COMPETITION AUTHORITY, ¹Assoc. Prof. Dr. Endri PAPAJORGJI, ²Assoc. Prof. Dr. Rezarta TAHIRAJ --Palarch's Journal Of Archaeology Of Egypt/Egyptology 17(11). ISSN 1567-214x

Abstract

Albanian Law no. 9121 dated 28.7.2003 "On Protection of Competition"¹ has established the institution responsible for the protection of competition, which is the Competition Authority, It is a permanent collegial body that bases its work on three main pillars, which are: ²

- Prohibited agreements (cartels);
- Abuse of dominant position;
- Mergers or acquisitions of enterprises;

Other competencies include consumer protection as well as the assessment of various normative acts that may affect competition. This institution consists of the Competition Commission and the Secretariat. In the EU, merger and acquisitions are not regulated by EU primary law, but by secondary law, and in particular by the Merger Control Regulation No. 139/2004³ which provides for the control of the competition of mergers of enterprises if they are of great importance to the EU and Regulation No. 1/2003, which regulates the use and application of EU cartel law.⁴ The Albanian Law "On Protection of Competition" includes both EU Regulations in Articles 10-17 (Papajorgji, 2016). In this sense main objective of this manuscript is the analysis of merger and acquisition control of undertakings in Albanian competition law based in judicial practice.

Keywords: Merger, Acquisition, Albania, EU, Competition Law.

INTRODUCTION

Competition law is an economic and legal field that applies to undertakings dealing with economic activities, regardless of the establishment of legal status. While in the US,

¹ This law was amended in 2006 and 2010.

² Albania has unified its competition practice with EU's practice and especially with Articles 101, 102, 107 of the Lisbon Treaty.

³ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EU Treaty.

competition law exists and is known as terminology and has been part of legislation since 1890 (Sherman's Law), in the EU, it has become part of the EU's founding treaties since 1957 with the Treaty of Rome (Papajorgji, 2012). The "culture of competition" was born at that time in EU member states, which traditionally favored cartel agreements, state aid and the promotion of national products (Streinz, 2014). Albania as an official EU candidate has implemented the EU competition policy since 2003. Based on Article 10 paragraph 1 of the Law on "Protection of Competition" from 2003, merger is understood in the cases where a steady change of control is caused, as a result of:

- *the merger of two or more undertakings or parts of undertakings independent from one another;*
- *the benefit of direct or indirect control by one or more natural persons who simultaneously have control of at least one other undertaking or of one or more undertakings, over one or more undertakings, or part of them the latter, through the purchase of shares, quotas or assets, the contract or any other lawful means;*
- *direct or indirect control over one or more undertakings or part of the latter.*

A merger is not considered in the case of the establishment of a joint venture, if the coordination of competition is the object or consequence between two or more independent undertakings. In this case the establishment of a joint undertaking is estimated based on article 4 of this law.⁵

On the other hand, "merger" is also not considered in the cases of the purchase of shares of an enterprise by financial institutions, credit and insurance institutions, for resale, as long as they do not exercise the voting rights for the shares they own and provided that the resale of the shares can be implemented within one year of purchase.⁶

The controlling role of the EU Commission is played by the Competition Authority in Albania, which obliges enterprises to obtain authorization if, in the last financial year prior to the merger:

- *Turnover of all participating enterprises together in the international market is more than ALL 7 billion and turnover of at least one participating enterprise in the domestic market is more than ALL 200 million.*
- *Turnover of all participating enterprises together in the domestic market is more than ALL 400 million and turnover of at least one participating enterprise in the domestic market is more than ALL 200 million.*⁷

Regarding the deadlines, the merging undertakings must notify within 30 days of the conclusion of the merger agreement, the acquisition of control or the establishment of a joint venture, with the characteristics provided for in point 3 of Article 10 of the law, and by publication of a public offer for purchase or exchange.⁸ In the context of the evaluation of mergers, the Commission may take into account the economic efficiencies that may derive from the merger if all the following conditions are met:

- *the efficiencies in question contribute to enhancing consumer welfare or, at the very least, neutralize the potential adverse effects that the merger could bring;*

⁵ Article 10 point 3 of the law on „Protection of competition“.

⁶ Article 11 of the law on „Protection of competition“.

⁷ Article 12 of the law on „Protection of competition“.

⁸ Article 14 of the law on „Protection of competition“.

- *economic efficiencies are or will be the result of the merger under consideration and, for their creation, there are no less anticompetitive alternatives than the merger in question;*
- *economic efficiencies must be verifiable.*

On the other hand, the Commission in exceptional cases, may not withhold mergers where one of the participating undertakings seriously risks going bankrupt and there is no other less anticompetitive option than to realize the merger if:⁹

- *the enterprise is in such a situation that, without this merger, it must exit the market in the near future;*
- *there is no possibility for reorganization of the activity of this enterprise.*

Articles 15, 16 and 17 respectively regulate the calculation of turnover, the turnover of participating undertakings belonging to a group, and the turnover of credit institutions and other financial institutions and insurance undertakings.

MERGER CONTROL IN PRACTICE

As we discussed earlier (Articles 10-17) are the legal basis for merger and acquisition control. To increase the efficiency of law enforcement in this area, good work has been made in identifying sale/purchase of shares transactions, which should be made public in the National Center of Registration (NCR). During 2008 the Competition Authority evaluated 13 decisions related to the control of mergers through the sale/purchase of shares of different companies.¹⁰ During 2010, the Competition Authority made 7 decisions containing the authorization of mergers or the sale and purchase of shares,¹¹ while in 2011 there was an increase in the number of mergers notified to the Competition Authority with 10 cases of change of control over enterprises mainly in insurance markets, banking services and the auto market.¹²

According to the Competition Authority's 2012-2013 annual report, there were 4 cases of exercising control over the sale/purchase of shares transactions with the initiative of the Competition Authority, two of which were mergers with a control change. Enterprises that gained control and violated the law by failing to notify within one month were penalized with minimal fines (three cases of failure to timely disclose transactions).¹³

The first decision in the field of mergers in Albania was Decision no. 38, dated 16.05.2006 "On the imposition of a fine on Çalik Seker Konsorsiyum Yatirim A.S". Pursuant to Articles 24, letters d, 12 and 74, letter d, of Law No. 9121, dated 28.07.2003 "On Protection of Competition", the Competition Commission, in its meeting of 16.05.2006, considered the announcement of the merger of National Commercial Bank and Çalik Seker Konsorsiyum Yatirim AS. During this meeting, the Competition Commission found that the agreement concluded between the parties as well as the Supplementary Agreements and

⁹ Article 13 point 3 of the law on „Protection of competition“.

¹⁰ Yearly Report of the Competition Authority 2008-2009 (2009) 8.

¹¹ Yearly Report of the Competition Authority 2010 (2010) 7.

¹² Yearly Report of the Competition Authority 2011 (2012) 7.

¹³ Yearly Report of the Competition Authority 2012-2013 (2013) 28.

finally the Minutes of the Extraordinary Meeting of the National Commercial Bank's Shareholders on 19.12.2005 were falsely notified.

For these reasons, the Competition Commission, based on Articles 24, letter d, 12, and 74, point 1 letter ç of Law no. 9121, dated 28.07.2003, "On Protection of Competition, decided:

- *The imposition of a fine for failing to timely notify the merger by Çalik Seker Konsorsiyum Yatirim AS at the amount of 2% of the annual turnover of 2004 (ALL 545,789,711), which constitutes 60% of the above amount (327,473. 827 lek).*

Another decision in the field of mergers is no. 213 dated 24.1.2012, which has resulted in not establishing and strengthening the dominant position of the companies in the construction market and respectively E. Sh.pk and E. Sh.pk in EIG Ltd. and consequently has been authorized by Competition Commission.

Decision no. 227, dated 28.6.2012, has been approved by the Competition Commission pursuant to Articles 10-17 of the Law on Protection of Competition in the Motorcycle Market and the Acquisition of 100% of shares from Audi AG to Ducati Motor Holdings SpA, because this transaction did not bring any overlap of the activity of the participating parties at the horizontal level nor did it result in affected markets and no impact on the internal market.¹⁴

In the context of merger control it is worth noting decision no. 7938, dated 22.9.2.2008 of the Tirana District Court, with the plaintiff ProCredit Holding AG seeking the abrogation of Competition Commission Decision No. 63, dated 03.12.2007 "On imposing a fine on ProCredit Holding AG". The Tirana District Court dismissed the claim of the ProCredit Holding AG, leaving the Competition Commission's decision in force, arguing that:

"Plaintiff has conducted a merger procedure for which the Competition Authority has been notified late. For this reason the respondent has decided to fine the plaintiff for violating Article 12/2 of the Law on „Protection of Competition“, since the date of calculation of the deadline for notification of the Competition Authority will start from the date of signature of the agreement and not by its effective implementation. The court also states that the examination of all the information and documentation submitted showed that the information related to the date of signing the agreement was incorrect and incomplete creating a discrepancy with the request for notification of concentration set out in Article 12, paragraph 2. of Law 9121 "On Protection of Competition". The court also states that the disclosure of inaccurate, incomplete information is considered a minor violation, as defined in Article 73, paragraph 1, letters a and b of Law No. 9121 dated 28.7.2003 "On Protection of Competition".

This decision was also upheld by the court of appeal and the high court.

CONCLUSIONS

¹⁴ Yearly Report of the Competition Authority 2012-2013 (2013) 28 v.

This manuscript showed that the Albanian Competition Authority is implementing the EU *acquis* in the field of Merger and Acquisition control, which is vital for Albania's EU integration road. While it can be stated that more work should be done in identifying and sanctioning the undertakings that abuse with the dominant position in the Albanian market through their merger or acquisition. In the first years of the establishment of EU, even the EU Commission had difficulties in imposing fines, but over time and with the aim of creating a common EU economic market, the fines for merger and acquisition control increased. Under the conditions where competition law in Albania is being consolidated, especially in the field of merger and acquisition control, this manuscript will serve as a promoter for a debate between law scholars, public servants in order to establish a consolidated and unified practice.

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