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**An overview on control of concentrations in albania**

# **AN OVERVIEW ON CONTROL OF CONCENTRATIONS IN ALBANIA**

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## **Abstract.**

This paper aims to analyze the competition discipline on concentrations in Albania. The analyse focuses on some important aspects of the discipline such as definition of concentrations, prior notification of concentrations, the obligation for notification of simplified procedure and Competition Authority's work in the field of concentrations.

**Key words: competition, concentrations, Albania, notification, competition Authority.**

## **1. Introduction.**

Law No.9121 "On protection of competition" was designed in the spirit of the obligations that a country must fulfill to be integrated into the European Union. The Competition Protection Law has three main pillars for protecting the market against anti-competitive practices: Agreements prohibited, abuse of a dominant position and control of concentrations. These pillars are also the main Aspects of the Competition Authority Activities. This paper will analyze concentrations below. The analysis will focus on the way the rule of concentration and application of norms is applied.

More specifically concentrations are regulated by law no.9121 of 2003, by regulation on implementation of procedures of concentrations and by the Guidance on control of concentrations. Other documents and guidances also are a useful help of a guide for completing them. To control concentrations, a special unit within the Competition Authority dedicates time and human resources and annually compiles a report that shows the performance of the sector work. This sector among others is paying attention to further development of the control of concentrations policy that is deemed to contribute to promote structural economic reforms in Albania on the path of economic market. Through this policy

aims remnant of a sufficient number of undertakings, which provide an effective competition and potentially lower prices.<sup>1</sup>

## **2. Concentrations in the Albanian discipline.**

Articles 10-17 of the Law no. 9121/2003 contain concentrations discipline. For the drafting of such provisions, in the original version, was consulted the old regulation on concentrations ”Community Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations undertakings between<sup>2</sup>”. Among other sources that have served as a model a prominent position is known also to ”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 Treaty<sup>3</sup>”.

The phenomenon of concentrations is commonly distinguished from the phenomenon of prohibited agreements and abuse of dominant position because it has to deal with the conduct of undertakings and with the structure of the market. Albanian law regulates concentrations in the third part of the Law, Articles 10-17. This discipline has been completed at first, by the approval of a series of normative acts regulating and clarifying the procedures on the control of concentrations<sup>4</sup> and secondly, by the changes through Law No. 10 317 dated 16.09.2010 "On some additions and amendments to the Law Nr. 9121 dated 28. 07. 2003 "On Protection of Competition"<sup>5</sup>. In the original version, article 10 stated that there is a concentration when all cases mentioned in the provision are realised. The legislator did not refer to the "sustainable change of control" which in reality constitutes the main element in the

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<sup>1</sup> Referred to Competition Authority, *Annual Report 2006* on [www.caa.gov.al](http://www.caa.gov.al).

<sup>2</sup> Official Journal L 395 , 30.12.1989

<sup>3</sup> Official Journal L 1, 4.1.2003

<sup>4</sup> All These acts have been approved by the Competition Authority. The acts are: the Regulation on the implementation of procedures between enterprises concentration "guidance on the form of notification of concentration, two kinds of forms for notification of concentration. A simplified Instruction for horizontal concentrations; Nonhorizontale instruction on concentrations and conglomerates. Regarding their content view the content on [www.caa.gov.al](http://www.caa.gov.al)

<sup>5</sup> Published in the Official Gazette no. 135 dated 07.10.2010. This law came into force on 23. 10.2010; Also law no 9121 has been modified by Law No. 9499 dated 03-04-2006, the Official Gazette, 2006, No. 37, Page 1160, Law Nr. 9584, dated 17.7.2006, Official Gazette, 2006, No. 84, Page 2841.

definition of concentration<sup>6</sup>”. Prospects for an economic concentration is carried out in some different ways as follow a) there are at least two companies with decision-making autonomy; b) after the concentration we will not have some decision-making center, but a common center; c) the outcome of this process is a modification of the structure of the owners and management of the plants either paktes<sup>7</sup>. From a legal standpoint, the concentration represents the outcome of a process which can be achieved through a variety of instruments which are alternate between them in terms of shape, but are equivalent in terms of substance as are all able to produce a difference stable at time structure of all companies concerned. It should be noted that errors or omissions on the part of the legislator has been changed and the definition of concentration results already complete and accurate and is not limited to the forecast of a series of legal actions through which the concentration operation can be performed if establishes in compliance with article no.3 of Regulation no. 139/2004<sup>8</sup> that :“ Concentration of undertakings is related to those cases where there is a sustainable change in control resulting from (a) a merger of two or more undertakings or parts thereof that are independent from each other; (b) acquisition by one or more natural persons who simultaneously control at least one or more other undertakings, of (direct or indirect) control of one or more undertaking or parts thereof through the purchase of shares or assets, a contract or any other lawful means; (c) direct or indirect control of one or more undertaking or parts thereof; and (d) the establishment of a joint venture that does not include in its objects, or does not have as a consequence, the coordination of competitive activities between two or more independent undertakings<sup>9</sup> ....”

In the original version of the law no. 9121<sup>10</sup> it referred to "middle ENTERPRISE concentrations that create or strengthen a dominant position by one or more undertakings". One observes that the text of this provision is based on the European Regulation 4064/89.

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<sup>6</sup> An enterprise is considered autonomous economic entity when carrying out an economic activity carried out in the sense of putting in place all the typical business functions of a given business activity as the other operators active on the same market, and independently by companies founders, in the sense that the joint venture does not depend so prevalent by the contribution of its parents. *Commission Notice on the concept of joint ventures performing all the functions of an autonomous economic entity*, OJ 98, C 66, par. 01.

<sup>7</sup> Ricolfi, *Le concentrazioni*, in N. Abriani , G. Cottino , M. Ricolfi, *Il Diritto industriale*, Cedam, Padova 2001, p. 809.

<sup>8</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 *on the control of concentrations between undertakings* OJ L 24, 29.1.2004, p. 1–22

<sup>9</sup> See full text of article no. 3, Council Regulation no.139/2004.

<sup>10</sup> Before changes throw law No. 10 317 date 16.09.2010.

The text of the same article is different, after the emendaments. The new disposition is inspired by EU regulation no.139/2004: “The Commission shall prohibit concentrations that significantly restrain effective competition on the market or in a part thereof, in particular as a result of creation or strengthening of a dominant position”.

The new criteria adopted integrates the abuse of a dominant position criteria with the aim, in particular, to evaluate the possible consequences of concentrations on oligoploistic markets. Regulation no. 139/2004 takes in consideration that, in some circumstances, concentrations that cause the elimination of important competitive constraints mutually exercised by the merging parties, as well as a reduction of competitive pressure on the remaining competitors, even in the absence of a likelihood of coordination between the members of the oligopoly, result can significant impend the effective competition<sup>11</sup>. This aspect was not taken into consideration either by the requirement of Regulation 4064/89, nor the Community case-law expressly interpreted Regulation 4064/89 so as to impose the obligation to declare incompatible with the common market concentrations that gave rise to such non-coordinated effects. Similarly, the Albanian Commission did not carry out a broad interpretation of the provision on prohibiting mergers. Now the article has been modified in compliance with Council Regulation no. 139/2004 .

## **2.1. Prior notification of concentrations.**

The concentration falls in the scope of Competition Authority review where it is notified that the Authority set for authorization only if the conditions laid down in Article 12 (1) of the Law are satisfied. Concentration are notified through authorization by the Authority if, in the previous financial year preceding the concentration: (a) the combined worldwide turnover of all participating undertakings is more than 7 billion and the domestic turnover of at least one participating undertaking is more than 200 million; (b) the combined domestic turnover of all participating undertakings is more than 400 million and the domestic turnover of at least one participating undertaking is more than 200 million. Any concentration meeting the above

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<sup>11</sup> See **Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings** OJ L 24, 29.1.2004, p. 1–22

mentioned conditions (article 12 (1) of the Law) has to be notified within 30 days from conclusion of the merger or control acquisition agreement or the joint venture agreement<sup>12</sup>.

Expressed in euro (reference exchange rate 1 EUR / RSD 140), the thresholds under the applicable law would be:

- The turnover of all the undertakings concerned together, the international market is more than 50 million euros, turnover of at least one of the undertakings participating in the domestic market is more than 1,428,571 euros, and the turnover of all participating undertakings along the domestic market is more than 2,857,143 euros.

By comparison, in the context of this paper, the threshold Albanian legislation with the thresholds set in the EU member states (beyond EEA) (see Chapter 3), noted that Albania has rapids at similar levels to those economies small states, such as Latvia, Lithuania, Malta, Estonia, Cyprus.

It is worth noting that the concept of concentration, or the obligation to notify all of the concentration control procedure stipulated in the Law 9121, dated 28.7.2003 "On Protection of Competition", it is the same as that laid down by European legislation. In this context, and in pursuance of the obligation set forth in Article 84 of the law, it is the:

- a. "Regulation for the implementation of procedures concentration of enterprises"
- b. Guidelines on the form of notification of a concentration and the concentration notification form, which was made available to parties who have the obligation to notify the concentration. Above bylaws are in conform with European legislation for this purpose<sup>13</sup>.

## **2.2. The obligation for notification of simplified procedure.**

In cases of concentrations that do not cause changes in the structure of the relevant market, the notifying party fills simplified notification form. All this procedure begins with a request from the notifying party, where it argues that in relation with the concentration realized there

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<sup>12</sup> Law no. 9121, article no.12.

<sup>13</sup> For an explicit analyse visit the Competition Authority of Albania. URL: [www.caa.gov.al/merger](http://www.caa.gov.al/merger).

is no consequence to increase or creation of the position of the unit after the concentration. This happens in cases where the transaction is a change of ownership, which does not cause change within the entity subject of the transaction, but also in the relevant market sector. Despite this, it is the Competition Authority (Secretariat) that decides about the notification of parties to use or not the simplified notification form.<sup>14</sup>

### **2.3. Phases of concentration evaluation.**

"The procedure of control a concentration lasts 5 months and is divided into two phases:

- pre-trial phase (2 months)
- depth procedure phase (3 months)

At a concentration notification procedure, the Competition Authority invites third parties who thinks that might be affected directly or indirectly by this concentration.

Indepth procedures opened only in cases where the concentration of realized and announced shows signs of restriction significantly competition in the market or a part thereof, in particular as a result of the creation or strengthening of a dominant position and the procedure begins by Commission decision."<sup>15</sup>

Compared with the same procedures foreseen in the EU Merger Regulation, there is change in the pre-trial phase in Albania which is longer than in the EU, while in-depth procedure does not change.

### **2.4. Competition Authority works on concentrations.**

"The Competition Authority is a public body, independent in performing its duties. The Authority started its activity in the 1 March 2004 under law no. 9121 dated 28.07.2003 "On Protection of Competition".

The Competition Authority is charged by law to initiate preliminary investigation proceedings on his own initiative. As part of the work to ensure free and effective competition in the market, pursuant to the Law "On Protection of Competition", the Competition Authority operates in the field of concentrations. This activity is conducted

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<sup>14</sup> The above quoted from page of the Competition Authority of Albania. URL: [www.caa.gov.al/merger](http://www.caa.gov.al/merger).

<sup>15</sup> The above quoted from page of the Competition Authority of Albania. URL: [www.caa.gov.al/merger](http://www.caa.gov.al/merger).

within the Sector Merger it is part of the Authority. The institution's mission is to serve as a promoter and advocate of competition and consumer interests.<sup>16</sup>

By controlling the concentration, the Competition Authority prohibits those mergers that threaten to create or strengthen a dominant position by one or more undertakings, significantly limiting the effective market competition.

For guiding the work of the Competition Authority regarding the review of mergers, it is drafted and adopted a directive which provides rules "to be applied in assessing and reviewing the reports of concentrations in accordance with the provisions of the Law No.9121, dated 28.07.2013 "on protection of competition" and the legal framework of the competition of Authority about concentrations ". Through this guidance for enterprises it will be possible to create concentrations faster, despite contacts with the Authority. Also in the instruction provided and presented concepts on the basis of the Authority, as the concept of concentration, the merger of the companies, establishing joint ventures with full functions (full function joint ventures), the companies involved and the concept of calculating through out, which is mentioning that according to the Merger Regulation EU.<sup>17</sup>

### **3. Competition Authority activity on concentrations in 2015.**

During year 2015, the Albanian competition authority has reviewed 11 concentration cases. The concentrations were reviewed from the perspective of creating or strengthening a dominant position of the concentrated undertakings, and in terms of any positive impact on the market from the perspective of consumers and increased market efficiency, in full compliance with the legislation in force and the EU Directives<sup>18</sup>. In all these cases the Competition Authority stated that the transaction did not indicate any signs of competition restriction in the market or a part thereof due to established or strengthened dominant position. So, in its first decision on concentrations in 2015, the Competition Commission authorized the concentration through acquisition of partial control of Archer Daniles Midland by Olam International Limited<sup>19</sup>. In this case there was an acquisition of (direct or indirect)

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<sup>16</sup> The above adapted from Competition Authority of Albania. URL: <http://www.caa.gov.al/about/mission>.

<sup>17</sup> Adapted from Access: Instruction "on the control of concentrations between undertakings" [http://www.caa.gov.al/uploads/laws/Udhezim\\_Per\\_Kontrollin\\_e\\_Perqendrimet.pdf](http://www.caa.gov.al/uploads/laws/Udhezim_Per_Kontrollin_e_Perqendrimet.pdf)

<sup>18</sup> See the Annual Report 2015 of Competition Authority, on [www.caa.gov.al](http://www.caa.gov.al)

<sup>19</sup> See Competition Commission Decision No. 354 of 19 March 2015, [www.caa.gov.al](http://www.caa.gov.al)



control of one or more undertakings or parts thereof. In its second decision the Competition Commission authorized the concentration through acquisition of control of 76% of the shareholder capital of the Sicred Pension Fund Management Company, opened by Sicred sh.a., by Credins Bank sh.a.<sup>20</sup>. In this case there was an acquisition of (direct or indirect) control of one or more undertakings or parts thereof. Then the Commission authorized the concentration through acquisition of control by Tranzit sh.p.k. of 100% of the share capital of Credit Agricole Albania Bank SH.A., opened by IUB Holding<sup>21</sup>. In this case there was an acquisition of (direct or indirect) control of one or more undertakings or parts thereof.

Competition Commission Decision no. 370 of 21 July 2015 authorized the concentration through acquisition of single control of Alcatel – Lucent by Nokia Corporation. The relevant market in the transaction was that of equipment and electronic and telecommunication parts and related professional service solutions. In this case there was an acquisition of (direct or indirect) control of one or more undertakings or parts thereof

Competition Commission Decision no. 372 of 4 September 2015 authorized concentration through acquisition of control by Raiffeisen Leasing SH.A. of the finance lease portfolio of Tirana Leasing SH.A. In this case there was an acquisition of (direct or indirect) control of one or more undertakings or parts thereof.

Competition Commission Decision no. 375 of 8 October 2015 authorized the concentration through acquisition of control of Cogemat S.p.A. by SNAI S.p.A. In this case there was an acquisition of (direct or indirect) control of one or more undertakings or parts thereof.

The Competition Commission authorized the first concentration through merger by acquisition of Credins Leasing SH.A. by Banka Credins SH.A on the the financial lease market<sup>22</sup>. In this case there was a merger of two or more undertakings or parts thereof that are independent from each other.

Competition Commission Decision no. 384 of 3 December 2015 authorized the concentration through acquisition of control of Air Liquide Hungary, Gaztermelo Kft by Messer Hungarogaz Kft. In this case there was an acquisition of (direct or indirect) control of one or more undertakings or parts thereof.

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<sup>20</sup> See Competition Commission Decision No. 357 of 2 April 2015. [www.caa.gov.al](http://www.caa.gov.al)

<sup>21</sup> See Competition Commission Decision no. 365 of 4 June 2015. [www.caa.gov.al](http://www.caa.gov.al)

<sup>22</sup> See Competition Commission Decision no. 378 of 2 November 2015, [www.caa.gov.al](http://www.caa.gov.al)

Competition Commission Decision no. 393 of 29 December 2015 authorized the concentration through acquisition of joint control of Costa Edutainment s.p.a. by companies Venice European Investment S.p.a and Priora S.r.l. In this case there was an acquisition of (direct or indirect) control of one or more undertakings or parts thereof.

Competition Commission Decision no. 394 of 29 December 2015 authorized the concentration through acquisition of control of Kastrati SH.A. by Auto Star Albania SH.A. In this case there was an acquisition of (direct or indirect) control of one or more undertakings or parts thereof.

And there was also only one case that demonstrated sustainable change in control due to the formation of a joint venture performing all the functions of an autonomous economic entity, resulting from the concentrations that the Competition Commission authorized in 2015. The creation of a joint venture represents the last hypothesis taken into consideration by article no. 10 of law no.9121. The joint ventures have a hybrid character which comes from their network of structural profiles - concentrativi and behavioral profiles - cooperative. With the establishment of a joint undertaking the parent companies create a new economic entity which may give, integrating, resources and / or activities; it is evaluable aspects, under anti-trust, in terms of market power concentration. The Joint Undertaking joint control could then be converging, at least partially, the interests and the economic objectives of its parents, possibly weakening the incentives to compete in the markets in which the latter continue to operate as independent companies outside Dell' joint undertaking. These relations should be assessed on the basis of agreements between independent enterprises. In 2015 Competition Authority authorized the concentration through establishment of an independent joint venture by undertakings Magyar Telekom Nyrt and MET Holding AG<sup>23</sup>. The transaction did not indicate any signs of competition restriction in the market or a part thereof due to established or strengthened dominant position.

#### **4. Conclusions.**

Merger control represents an important pillar of competition law and policy. As we mentioned in the text of this article, articles on concentration were written in 2003 based on

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<sup>23</sup> Competition Commission Decision no. 364 of 27 May 2015.

Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings. Articles containing concentrations discipline are Articles 10-17 of law no. 9121 year 2003. The need for an improvement of the discipline in line with the domestic reality and in compliance with European discipline brought to the revision of law no.9121 by law No. 10 317 date 16.09.2010. The result of the revision, as analysed in this paper, is a modern discipline of concentrations and an effective policy of competition.

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