

IMPORTANT ASPECTS OF CONCENTRATIONS IN REPUBLIC OF MACEDONIA

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ABSTRACT

As in other European Union Member States the Republic of Macedonia which is part of South East Europe regulates in high degree the various aspects of concentrations. Concentration as forms of merger or acquisition of business entities can appear in different forms. Depending on the mode of creation, concentrations may be horizontal and non horizontal. This paper deals with some features of non horizontal concentrations in Macedonia. Besides the meaning of concentrations, this paper reviews the ways of creating concentrations and gives concrete examples of the practice in R. of Macedonia. Further on, this paper continues with the various types of concentrations by focusing on non horizontal concentrations such as vertical concentrations or conglomerates. Because of the economic consequences that may arise from the creation of concentrations, this paper reviews the role of the competent institutions in regards to the (non) creation of concentrations.

Keywords: acquisition, concentration, conglomerate concentrations, free competition, market , merger, subjects, vertical concentrations.

1. A GENERAL OVERVIEW OF THE MEANING OF CONCENTRATIONS

Concentrations are considered as merger or acquisition of certain subjects in order to make their business more efficient. Mergers and acquisitions are considered to be status related features that vary from one another (Jashari 2009). By joining the entities, they establish a dominant position in a particular market or market share, which if abused, may violate free competition in the market, for example see Decision of the competition Authority in Kosovo (no. PA/III/08/2010 of 01.09.2010).

Legally, during the merger or acquisition of undertakings the subjects of law may or may not lose their legal independence (Jones and Sufrin 2004). In this case, the loss of the legal independence is not as important as the fact whether changes or not change the economic power of the subjects they create with the concentration. Therefore, the entities that create the concentration are obliged to inform the competent body for protection of competition, in order to verify that the concentration for which information is delivered can cause restriction or elimination of competition in the market.

1.1. Establishing concentrations

According to Article 12 of the Law on Protection of Competition in Republic of Macedonia (Official Gazette of RM nr. 4/05) concentration is considered to be created by:

- 1) Merging of two or more subjects or parts of previously independent entities, or
- 2) Acquisition of control, directly or indirectly to all or part of the subject by one or more of the subjects, from one or more subjects. The control can be achieved through the purchase of shares or assets, and implemented through the provision of the right to vote during the decision making body of the subject.

For example, according to the Decision of the Competition Authority in Republic of Macedonia (no. 07-14/3 of 21.01.2010) the concentration between QBE Holdings (UK) and QBE reinsurance (Ireland), is based on the acquisition of all shares of QBE Holdings. Similarly, according to the Decision of the Competition Authority in Republic of Albania (no.153 of 21.07.2010) Astra concentration created between Astra Albania and Eagle Investment is based on the purchase of 100% of shares by Astra Albania.

There are times when even after the merger or acquisition of control of subjects, not to be considered that a concentration is created. Concentrations as such in various countries are usually regulated by law. For example, Article 12 of the Law on protection of competition in Republic of Macedonia, (Official Gazette of RM nr. 4/05); article 10 of the Law on protection of competition in Republic of Albania, (no.9121, 2003); article 13 of the Law on protection of competition in Kosovo, (no.2010/03-L-229). In the European Union, rules regulating concentrations are known as "ECMR" or the European Community Merger Regulation (Reg.139/2004 OJ L24/1). For example the following are not considered to be concentrations:

- 1) Banks, savings and other financial institutions or insurance companies, whose activity is related to trade with securities, if they;
 - are sold within one year from the moment of their acquisition. The competent body may based on a specific request extend the term of one year, if the owner proves that due to legitimate reasons was not able to sell, and;
 - If the voting rights from these shares are not made in order to influence the competitive behavior of the enterprises on the market.
- 2) The control is done by the authorized person in the bankruptcy or liquidation of the entity and
- 3) The investment funds gain assets in the undertaking, if:
 - they perform their acquired rights primarily to preserve the full value of their investment, and
 - if it does not influence the market competitiveness.

The creation of a joint investment known as joint venture (Jashari 2007), which has the purpose or effect the coordination of competitive behavior of undertakings that remain independent, is not considered as concentration while may be considered as prohibited or permitted agreement. During the assessment, the body will take into account, if:

- 1) two or more entities, participating in joint investment, continuously, in a considerable extent maintain the activities on the same market as a joint investment in the market or on the market that is at higher or lower level of the joint investment market or at the neighbor market which is closely connected with this market;

2) the coordination, which is a direct consequence of the creation of joint investment, enables participants to eliminate competition for the core part of products or services.

1.2. The role of the competent authorities to assess the concentrations

After establishing a concentration, according to Article 15 on the Law on protection of competition in Macedonia, the participants have a legal obligation to inform the competent body about the established concentration. After informing the body that the concentration was created, it is evaluated by the competent body in order to determine whether the same are in compliance or not with the legal provisions. In Macedonia in the period 2000 - 2005, the assessment of concentrations was done in some cases, out of which in three cases the initiating procedures to assess the concentration were made ex officio, and in five cases at the request of interested persons. The number of concentrations is increasingly growing in Macedonia. For example, according to the Information of the Commission on competition protection (Information 2006) in Macedonia seven requests for assessment of concentrations are submitted. Accordingly, the same Commission (Information 2010) has registered the submission of 22 requests for assessment of concentrations out of which in 18 cases it was concluded that the concentrations were in accordance with legal provisions. In Albania, the Commission on competition protection of Albania (Information 2010) registered the submission of six requests for evaluation of concentrations. In assessing the concentration the public body especially takes into account:

1) The market structure, existing or future competitors in the market, supply and market supply opportunities, costs, risks, appropriate technological conditions, economic and legal to enter and exit the market, the potential consequences of the concentration to the competition in the market. The case CETELCE / telemed Telecom, presented in the restructured form within the group CETEL which includes also Albtelecom, did not cause any effect on the structure of the telecommunications market, and therefore it is not considered a concentration;

2) the position and participation in the market, economic and financial power, the action of the subjects, the internal and external advantages of the participants vis-a-vi competitors, as well as possible changes in the performance of the participants after the concentration operation. The case of the acquisition of 7.78% of the stock market Albania Intesa San Paolo Bank owned by European Bank for Reconstruction and Development by Intesa San Paolo, is not considered a concentration, since this transaction does not change the structure of control within the subject Intesa San Paolo Bank Albania;

3) the effects of concentration on other subjects, especially considering the favorable conditions for consumers, and other purposes and consequences of concentration, such as lowering the price of goods and services, more efficient distribution, reduction of the transport costs, distribution and other costs, specialization of production, and other favorable conditions arising from concentration. For instance, merging entities Unique Group Austria Sigal and Sigal Holding, did not cause any effect regarding other subjects. Therefore, the Competition Authority (Information 2010) has come to a conclusion that in this case a concentration doesn't exist.

1.3. Permitted and prohibited concentrations

Not all concentrations are prohibited. Therefore, if the concentration does not significantly impede, restrict or distort the effectiveness of the whole market or its essential part and which are in accordance with legal provisions, are considered permitted. In assessing these concentrations, the

competent body first of all assesses the existence of a dominant position. If the estimate concludes that there is such a situation, then assesses the impact of the concentration on the competition. For

example, Decision of the Competition Authority in Macedonia, (no.03-325/3 of 30.11.2006) stated that the concentration between "Investbanka" and the "Macedonian savings" generating as a result of the merger of these two entities, can not cause restriction of competition in the market. The concentration created between the "Volkswagen" and "Man SE" in the territory of the Republic of Albania on the basis of buying 53.7% of shares, does not distort competition or part of it on the market as a result of its dominant position, according to the Decision of the Competition Authority of Albania (no.195 of 22.07.2011).

According to the Decision of the Competition Authority (no.07-177/7 of 06.10.2006), the concentration between "On net" and the Slovenian Company "Telekom Slovenia" created under the contract for the transfer of parts, it can not cause restriction of competition in the market, by strengthening the dominant position in the market. Concentration between Nestle SA and Centro Union based on the contract of purchase, can not distort or harm the competition in the market or its share, Decision of the Competition Authority (no.08-65 of 08.08.2011).

The concentration which significantly impedes, restricts or distorts the effective competition or its essential part on the market as a result of the creation or strengthening of a dominant position of given participants is not in accordance with law. The concentration between "Alkaloid" and "Zegin" which bought 25% of this entity is estimated to be in violation of legal provisions and in this case as a result of this, the concentration may restrict or prohibit effective competition in the market, due to the strengthening of dominant position of the entities that comprise this concentration. Because of this, by a decision of the Commission (no.07-204/134 of 30.11.2006) "Zegin" was ordered not to exercise the administrative rights deriving from the acquired share and ordered "Zegin" to sell its stakes acquired by the achieved concentration. According to Decision of the Competition Authority (no.07-226/2 of 28.07.2006) the concentration between the German company "STADA" and the Serbian company, "Hemofarm" was created under the public offer to purchase the shares. The concentration between "Elektroekonomi" and the Austrian company "EVN" was based on the contract for acquisition of shares, (Decision no.07-92/10 of 27.04.2006)¹; The concentration between "Teteks Bank" and the "Bank of Tetovo" according to their union, (Decision no.03-66/6 of 27.04.2006)²; The concentration between Greek Company "COSMOTE" and another company, "COSMOTE" based on a contract for purchase of shares, (Decision no.03-145/4 of 03.07.2006).³ The concentration between "Tikkurila" and "Zorka Colour" was created under contract for purchase of shares (Decision no.08-63 of 17.06.2011).⁴

2. TYPES OF CONCENTRATIONS

From the many types of concentrations, very important concentrations are the so-called non-horizontal mergers arising from the adhesion of active entities in different relevant markets.

These concentrations can be found in the form of vertical concentrations and conglomerates. Vertical concentrations and conglomerates (Bishop and Walker 2002; Guidelines Albania 2008/c 265/07; Mallor and Barnes, 1998), varying from horizontal concentration (Cerovac 2005; Jones and Sufrin 2004), have no significant impact on eliminating the competition, unless, as the result of their

concentration, a dominant position of one of the entities is created. There are several ways how the non-horizontal concentrations can effectively harm the competition creating various kinds of effects

such as non-coordinated and coordinated effects. Non-coordinated effects may arise in cases where non-horizontal concentration cause the subject's inability to have access to raw materials, to enter the market, by which his competitive ability is going to be reduced. According to the abovementioned, it can be concluded that in these cases through the creation of a concentration the exclusion of competitors might be affected by limiting their access to customers and to limit their so-called main inputs (in this case by limiting access to products or services which could be supplied in the absence of concentration, and thus increasing the costs of the competitors). These effects cause market exclusion of subjects, which by harming and restricting access of entities or of their products in a market thus harming or restricting their competitive ability. The coordinated effects arise in cases where the concentrations change the character of competition in a way that a subject who has not previously coordinated their behavior, could now work on a coordinated way, by price increase or otherwise to harm effective competition.

According to what has been said until now, we can summarize that, non-horizontal concentration, are less likely to limit effective competition than horizontal concentration because:

a) First, unlike horizontal concentrations, these concentrations do not eliminate competition between the participating entities of a concentration in the same market, and

b) Secondly, vertical concentrations and conglomerates provide real opportunities for efficiency. A characteristic of these concentrations is also the implementation of business activities or products belonging to subjects being involved in a concentration in a particular market. The integration of business activities within an entity, as occurs in horizontal concentration, can cause completely non-competitive effects.

2.1 Vertical concentrations

Vertical concentrations are the concentrations among subjects working at various levels of chain supply (Jones and Sufrin 2004). For example: when a subject as the manufacturer of certain products will join any entity that makes the distribution of these products which as an entity is at lower level of hierarchy. For example this can be found in the case of concentration between "Tikurila Oij" (with its primary activity being the production of colors) and "Zorka Colour" (with primary activity trade with color). This type of concentration can cause both coordinated and non coordinated effects. When it comes to the non-coordinated effects, then it is considered that the concentration leads to exclusion of potential or actual competitors in offer or markets by reducing the ability of entities to compete. One such exception may hinder the expansion of competitors or prevent their entry into the market or exit from the market. Under this, it is clearly stated that there are two types of exceptions:

a) first of all, when a concentration affects the rising cost of competitors in the market by limiting their entry into that market (excluding inputs). this is achieved when the concentration created by limiting access of products or services to the market increases the spending costs in the market. In this situation benefits the concentration which is created by rising prices at the expense of consumers. Excluding of the inputs can be done in different ways. The established concentration may decide not to cooperate with its associated competitors in vertical relationships. Another form of exclusion may be the limitations of the offerers to increase prices at the expense of competitors.

b) second, when a concentration is expected to exclude competitors in the market by limiting the entry of a sufficient number of customers (excluding customers). Exclusion of clients can happen when an offerer is going to be integrated with another offerer in the market and because of this concentration may exclude the entry of potential clients or prospective competitors in the market

place by reducing their ability to compete. Hence the creation of concentration should be examined by the competent body among others, whether the concentration has the ability for exclusion from market entry, by reducing purchases from competitors, the exemption would have a harmful effect on consumers in the market, etc.. Exclusion of customers can be done in different forms. Thus, for example the concentration can provide all required products, thus stopping purchases from its competitors. Because of this possibility the competent authority should consider alternatives for the competitors to sell their products on the market.

2.2 Conglomerate concentrations

Conglomerate Concentrations (mixed conglomerates) are concentrations among subjects that are in mutual relation that is neither purely horizontal (as competitors in the same relevant market) nor vertical (supplier and buyer) (Albania Guideline 2005; Horizontal Merger Guidelines 2004). In this case it comes to concentration arising from entities that deal with various activities from different areas and different markets. In most cases, these concentrations appear in the expression by a fusion (union) between entities that are active in different markets and deal with the manufacture of products that buyers purchase primarily for the same purpose. As usual these concentrations are created using the connections, the joint sales or other exclusionary practices.

Binding and common sale as such are considered common practices without anticompetitive circumstances. The subjects are related or participate in joint sales in order to provide their buyers better products or offers. However, in certain cases these practices can cause reduction of capacity, or tendency of existing or potential competitors to compete. All this could as a result affect an increase in price. Although it is established that these concentrations do not cause competition problems, in some cases they could affect competition. Thus the legislator has explicitly defined the possibility that the Commission assess the effects of anti-competition.

During evaluation of these concentrations, the Commission primarily should assess that the subject after the concentration will be able to exclude its competitors and will have an economic motive to do that. And last that this exemption will give harmful effects to customers or not. The fastest way to exclude competitors is by conditioning sales of certain products on the market. This is accomplished by the practice of grouped and conditional sales. The practice of grouped sales refers to used methods by concentrations on the products provided and price determination. In this regard we distinguish pure and mixed practices. In the first case the products are sold only in fixed proportions. In the second case the products can be sold alone, but the price amount of each product taken separately is greater than the price of the products together.

The practice of conditional sales refers to situations where customers that buy a product from a manufacturer will be required to also purchase another product. This conditioning can be based on contractual or technical basis. For example if a product is designed in such a way that works only on a specific product and not the alternative product offered by competitors. The contractual conditioning requires that the client who buys the product will only be buying the product and not alternative products offered by competitors.

Conglomerate concentrations, in some cases may facilitate the anti-competitive coordination in the market. One of the ways in which a concentration may have such an effect is by reducing the number of competitors to the extent that tacit coordination is a real possibility.

CONCLUSION

In open market conditions, the efforts undertaken by business entities to ensure a safer and more useful position in a particular market are a considered normal. Efforts of business entities should always be performed within the foreseen legal framework and thus by increasing production, reducing costs, improving product and service quality and several other advantages create conditions for economic development. In some instances the tendency to operate outside the legal rules may cause hyper production of goods or products thus distorting the market. Entities operating in the market in the process of achieving their goals very often can undertake actions with a tendency to limit or exclude certain actions of other entities in the market. These efforts are always regarded unfair.

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