THE MERGER CONTROL REVIEW

NINTH EDITION

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, most recently in South America, have added pre-merger notification regimes. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well. Also, the book now includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, and high technology and media in key jurisdictions to provide a more in-depth discussion of recent developments. Finally, the book includes a chapter on the economic analysis applied to merger review.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan prior to, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 36 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency

this year. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has recently amended its law to ensure that it has the opportunity to review transactions in which the parties' turnover do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Please note that the actual monetary threshold levels can vary in specific jurisdictions over time. There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there similarly is no 'local' effects required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, the competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings

within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia, and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

In addition, other jurisdictions have joined the European Commission (EC) and the United States in focusing on interim conduct of the transaction parties, commonly referred to as 'gun jumping'. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information prior to approval appears to be considered an element of gun jumping. And the fines that are being imposed has increased. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japan Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Some jurisdictions even within the EC remain that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose

to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm in large cross-border transactions raising competition concerns for the United States, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation was very evident this year. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United

States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico).

Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2018

Chapter 25

MACEDONIA

Tatjana Popovski-Buloski[1]

I INTRODUCTION

Merger control supervision is delegated by virtue of law to the Commission for Protection of Competition (the Commission). The Commission is an independent autonomous state authority with the capacity of a legal entity.[2] It consists of a president, four members and an expert department.

The Commission:

a determines rules and measures for the protection of competition and measures for the establishment of effective competition;

b gives its opinion on draft laws and other acts that regulate issues related to economic activity, which may influence competition in the market;

c either upon a request from Parliament, the government, other state authorities or undertakings, or *ex officio*, the Commission shall provide expert opinions regarding issues in the areas of competition policy, protection of competition in the market and the awarding of state aid; and

d cooperates with other state authorities regarding issues related to the protection of competition, and exchanges any necessary data and information for such purpose.

The Commission is also in charge of international cooperation related to the implementation of Macedonia's international obligations, and participates in the implementation of projects in cooperation with both international authorities and the authorities of the European Union.

In cases of merger control, a system of pre-merger notification applies.

It should be noted that the Law on Protection of Competition (the Law) also applies to foreign-to-foreign transactions if any of the thresholds stated below are met.[3]

Under the Law, a pre-merger notification must be submitted if any of the following thresholds are met:[4]

a the joint aggregate turnover of all participants in the concentration generated by selling goods or services, or both, on the world market exceeds €10 million in equivalent denar value according to the exchange rate valid on the day of preparing the annual accounts

1 Tatjana Popovski-Buloski is a partner at Polenak Law Firm.

2 Articles 26 to 29 of the Law on Protection of Competition. The Law on Protection of Competition was published in Official Gazette of the Republic of Macedonia No.145/2010, and subsequent changes and amendments in Nos. 136/2011, 41/2014 and 53/2016.

3 Article 3 of the Law on Protection of Competition.

4 Article 14(1) of the Law on Protection of Competition.

and gained in the business year preceding the concentration, and where at least one participant is registered in Macedonia (i.e., has a legal presence in Macedonia either directly or through a subsidiary);

b the joint aggregate turnover of all participants in the concentration generated by selling goods or services, or both, in Macedonia exceeds €2.5 million in equivalent denar value according to the exchange rate valid on the day of preparing the annual accounts and gained in the business year preceding the concentration; or

c the market share of one of the participants in the concentration is more than 40 per cent, or the aggregate market share of the participants in the concentration is more than 60 per cent in the year preceding the concentration.

The aggregate turnover consists of the revenues from the sale of goods produced during the regular operation of an undertaking, as well as the revenues from services that the undertaking provides within its regular operations, after deducting sales rebates, value added tax and other public taxes directly related to the turnover. If one of the participants is an associated undertaking, then the aggregate turnover on the level of a group of undertakings will be taken into consideration, but revenues generated from the sale of goods or the provision of services, or both, among such undertakings shall not be taken into consideration.[5]

In the case of an asset deal, regardless of whether the parts are established as separate legal entities, only the revenue from the assets subject to acquisition shall be taken into consideration when calculating the turnover generated by the undertaking selling such assets.

Two or more transactions carried out between the same entities or undertakings during a two-year period shall be deemed as one and the same concentration performed on the date of the last transaction.

The aggregate turnover of banks, saving houses and other financial institutions shall be determined according to the aggregate turnover generated from their day-to-day operations; in the case of insurance companies, the aggregate turnover shall be determined according to the value of the gross calculated premiums of the participants for the business year preceding the concentration.

The Law does not set a specific term for filing a notification, but provides that the participants in the concentration shall be obliged to submit a notification to the Commission prior to its implementation and following the conclusion of the merger agreement: that is, the announcement of a public bid for the purchase or acquisition of a majority participation in the basic capital of an undertaking.

The participants may notify the Commission regarding their serious intention to conclude an agreement (including, but not limited to, a letter of intent, term sheet or similar) or, in the case of a public bid, when they have publicly stated their intention to participate therein, provided that such agreement would result in the creation of a concentration in accordance with the law.

Creation of a joint venture that carries out the activities of an autonomous economic entity on a long-term basis shall also be deemed to be a concentration.

The Commission shall especially take into consideration the following with regard to a concentration:[6]

5 Article 16 of the Law on Protection of Competition.

6 Article 17 of the Law on Protection of Competition.

a the need to maintain and develop effective competition on the market or a substantial part of the market, especially in terms of the structure of all markets concerned and the existence of competitors or potential future competitors having a head office both in and outside Macedonia; and

b the market position of the undertakings concerned and their economic and financial power, the market supply and the alternatives available to suppliers and users for the purpose of market supply, as well as their access to the supply (i.e., the markets, legal and other barriers to enter into and exit from the market, supply and demand trends for the relevant goods or services, the interests of consumers and any technological and economic developments), provided that the concentration is of benefit to consumers and does not represent an obstacle for the development of competition.

The Law excludes certain transactions from the definition of a concentration. Namely, a concentration of undertakings shall not be deemed to arise where:

a banks, saving houses and other financial institutions or insurance companies whose day-to-day activities include legal activities and trading with securities temporarily acquire securities with an intention to resell them within a period of one year as of the moment of their acquisition, and provided that the voting rights arising from those securities are not exercised with the intention of influencing the competitive behaviour of the undertaking on the market. On a special request, the Commission may extend this one-year period, provided that the acquirer proves that it could not sell the securities due to justified reasons. No appeal or lawsuit for the initiation of an administrative dispute shall be allowed against this conclusion;

b control is conducted by a representative of the company under a bankruptcy procedure or liquidation procedure at undertakings established outside Macedonia by persons performing a corresponding function in accordance with the legislation under which the undertaking has been established; or

c the investment funds acquire capital interest in undertakings, provided that they exercise the acquired rights only with the aim of maintaining the full value of their investment and provided that they do not influence the competitive behaviour of the undertaking on the market.

The Law provides for misdemeanour liability in cases of implementation of a concentration prior to a clearance decision being obtained or in cases of failure to notify. In such cases, the party that was required to submit the notification may be punished by the Commission with a monetary fine of up to 10 per cent of its worldwide turnover.

II YEAR IN REVIEW

In 2017, there were no changes to the relevant legal framework.

Pursuant to the Commission's annual report on its activities for 2017, the increasing trend of submission of notifications regarding foreign-to-foreign transactions is continuing as a result of relatively low thresholds for notifying.

III THE MERGER CONTROL REGIME

The merger control regime is established on the principle of pre-merger notification. Therefore, no concentration that meets any of the thresholds set by the Law may be implemented before it is approved by the Commission, or before the relevant deadlines for the Commission to issue a decision have passed.

The Commission should decide upon a notification within 25 business days from the date of receipt of a complete notification (Phase I). Phase I may be extended for an additional 10 working days if the notified concentration is to be cleared subject to conditions and if the parties are willing to undertake commitments.

In the case of a disputable concentration, the Commission will open an in-depth assessment of a concentration (Phase II). This applies in cases where a concentration may significantly prevent, restrict or distort competition. The term for a Phase II investigation is 90 working days from the day of initiation of an in-depth assessment. The Commission is obliged to either clear a concentration conditionally or unconditionally, or prohibit the concentration. This investigation term can be extended to 105 working days.

Each of the above deadlines can be extended for up to an additional 20 working days by the Commission with the agreement of the participants in the concentration.

However, the statutory deadlines are not binding on the Commission when, as a result of circumstances for which one of the participants is responsible, the Commission has to request additional information or conduct inspections.

If the Commission does not make any decision within the set deadlines in any of the phases, the concentration is considered to be compliant with the law.

A concentration cannot be conducted prior to the submission of a notification to the Commission or, following the submission of a notification, until a decision is adopted that the concentration is in accordance with the Law or the participants have undertaken relevant commitments accepted by the Commission, or if the Commission fails to meet the deadline for clearance of a transaction within the statutory deadlines.

However, there will be no suspension of a public bid for the purchase of securities or a series of transactions of securities, including ones that are convertible into other securities intended for trading on the market in accordance with the law, if a notification is submitted without any delay to the Commission; and the acquirer of the securities does not exercise the voting rights on the basis of these securities, or does so only to the extent necessary for maintaining the full value of its investment, and on the basis of a decision for exemption from the obligations.

Namely, on the request of a party that has submitted a notification, the Commission may decide to allow an exemption from the suspension obligation. The request must be elaborated. When deciding upon such request for exemption, the Commission shall, *inter alia*, take into consideration the effects of the suspension of a concentration over one or more undertakings, participants or over a third party, as well the threat to competition caused by the concentration.

The exemption may be conditioned by requirements and obligations imposed for the purpose of ensuring effective competition. Such exemption may be required and allowed at any time, either prior to a notification or following a transaction by public bid for the purchase of securities or a series of transactions of securities.

Regarding examination of the case files, Article 56 of the Law provides that only the parties to the procedure before the Commission shall have the right to examine the case files and to make, at their own expense, transcriptions or copies of the whole case or certain documents. Therefore, the Law does not grant third parties the right to examine the files.

A request for examination should be in made in written form. The President of the Commission should approve such request through a separate administrative act (conclusion). In the conclusion, the President shall determine the date and hour of the examination, which should be performed within a period of 15 calendar days as of the date of receipt of the request for the examination of the files.

In accordance with the Law, the participants in the procedure shall not be entitled to perform an examination, transcription or copy of the draft decisions of the Commission, the minutes, or audio and audio-visual recordings of Commission sessions, any internal instructions and comments about the case, any correspondence between the Commission and the European Commission or the other institutions of the European Union, or other documents that constitute a business or official secret.

'Business secrets' shall in particular mean something that, by law or other regulations, is determined to be a business secret; and that constitutes a business secret when the Commission accepts such classification.

The Commission shall accept the classification of data as a business secret provided that the data have economic or market value, and their disclosure or use may lead to the economic advantage of the other undertakings.

The following criteria shall in particular apply to the evaluation of the data:

a the extent to which the data is known outside the undertaking;

b the extent to which measures for the protection of data secrecy have been taken in the undertaking; and

c the value of the data for the undertaking and its competitors.

The following, as a rule, shall not be deemed a business secret in terms of the provisions of the Law:

a publicly available data: that is, data that are publicly announced on the basis of another regulation or decision of the managing bodies of the undertaking;

b data older than five years, regardless of whether they have been considered a business secret in the past;

c the revenues contained in the undertaking's annual financial and statistical reports that do not constitute a business secret because they have been publicly announced; and

d any data and documents being of decisive importance for the decisions of the Commission.

When submitting data classified as a business secret, the undertaking shall be obliged to justify such classification of the data as a business secret by giving objective reasons.

No legal remedy is allowed against a conclusion to reject the request for examination of the acts and files.

The Law allows for interested parties to provide their comments, opinions and remarks in relation to a concentration within the time period determined by the Commission, which is usually 10 calendar days from the day of announcement of the summary of a notification

on the Commission's website. However, it does not provide third parties with a right to challenge a Commission's decision on a concentration; only the parties to the procedure may challenge the Commission's decision on a merger.

The Commission's decisions are final. Lawsuits to initiate an administrative dispute before an administrative court must be submitted within a period of 30 calendar days from the date of receipt of the decision, but such suit shall not postpone the enforcement of the decision.

Mergers are supervised only by the Commission; no other authority may conduct a concurrent review of a merger.

Decisions of the Commission may be subject to a review by the Administrative Court. However, such judicial review does not suspend the enforceability of the Commission's decision.

IV OTHER STRATEGIC CONSIDERATIONS

Based on current experience, in cases of multijurisdictional merger transactions and notifications that may involve the Macedonian market, it is important to note that prior research of the fulfilment of the relevant thresholds should be undertaken. This is especially important due to the formality of the thresholds, the absence of the possibility of a self-assessment of the competitive influence of a certain transaction if the formal thresholds are met, the relatively low values of the turnovers set as thresholds and the market size.

V OUTLOOK & CONCLUSIONS

The Macedonian merger control regime may be considered to be complete and detailed. The law and related by-laws and guidelines follow the relevant rules of the European Union and European Commission. With regard to mergers, notwithstanding that Macedonian practice is still developing, the Commission has established relevant practices in almost all important areas, including in the imposition and practical implementation of behavioural remedies. Therefore, in our view, the coming year will bring further practical experience and improvements in the overall practical development of our merger regime environment, not only with regard to the Commission's actions, but also with the expert contribution of notifying parties and their counsel.

Appendix 1

ABOUT THE AUTHORS

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Tatjana Popovski-Buloski is a founding partner at Polenak Law Firm. She specialises in competition law, corporate law, mergers and acquisitions and litigation. In relation to competition law, she advises and represents clients with regard to the implementation of merger control proceedings at the Macedonian Commission for Protection of Competition that involve domestic or multi-jurisdictional transactions, and proceedings related to abuse of dominant positions. Her experience also involves compliance systems, the contractual aspects of competition and antitrust law, licensing agreements, distribution agreements and cartels in different industries, including telecommunications, energy, construction, pharmaceuticals and aviation.

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