UDC: 339.137.2(497.17)
339.146.4(4)
COBISS.SR-ID 171330313
doi: https://doi.org/10.61837/mbuir030125077p

Review scientific paper

Received: 16. 04. 2024.
Accepted: 13. 05. 2025.

UNDERSTANDING MERGER CONTROL IN MACEDONIAN COMPETITION LAW

Kristijan J. PANEV

Faculty of Law, Goce Delcev University, Stip, Macedonia
kristijan.panev@ugd.edu.mk
https://orcid.org/0009-0001-5418-5923

Abstract: *This article explores the close relationship between Macedonian competition law and EU regulations, with a focus on concentration as a critical aspect of competition policy. Originating from strategic aspirations for EU membership, Macedonian competition law is deeply influenced by EU standards, particularly regarding merger control, which is seen as a key element of competition law.*

Both Macedonian and EU competition laws prioritize preventive measures to prevent harmful mergers and acquisitions between enterprises seeking market dominance. Such dominance concentrates market power, which, if abused, can impede effective competition, innovation, and harm consumer welfare through higher prices, lower quality, and limited choices.

Given the limited discussion on market concentrations in North Macedonia, this article aims to shed light on the competition policy related to preventing harmful concentrations. Using descriptive and analytical legal research methods, it examines mergers and acquisitions in the Macedonian market, legal obligations in cases of market competition disturbances, and evaluates the effectiveness of the control mechanisms. It also analyzes the operations of the Macedonian Competition Authority regarding market concentrations, focusing on the notification processes and challenges faced.

Through a comprehensive analysis, this paper contributes to a deeper understanding of concentration control mechanisms in the Macedonian competition law and provides insights into broader competition policy dynamics, offering valuable implications for policymakers, legal practitioners, and scholars.

Keywords: *mergers, concentration, competition, market, control*

1. INTRODUCTION

Competition law in North Macedonia is a concept that is evolving. Starting from the strategic determination for full membership in the European Union, the development of the Macedonian competition law is heavily influenced by the EU competition law. As one of the three pillars of competition law, merger control is significant in competition policy. Following the institutional framework of the European Commission in the field of competition policy, the Commission for Protection of Competition was established as an independent state body in North Macedonia, responsible for protecting effective competition, including merger control.

The decisions of the Commission for Protection of Competition can be subject to review by the Administrative Court.

Similarly, as in the EU competition law, merger control is primarily seen as a preventive measure, aimed at preventing harmful concentrations between companies seeking to establish a dominant position in the market. The dominant market position concentrates on market power that, if abused, can have harmful and disruptive consequences on effective market competition. This creates harmful consequences for other companies operating in the same market, reducing their incentive for competition and innovation. It also creates harmful consequences for consumers, such as higher prices, lower quality, and limited choice of goods and services in the market. Therefore, the merger control system is primarily designed to act preventively, so that competition protection authorities can timely prevent potential harmful effects of market power concentration. The Macedonian Competition Authority, following the example of the European Commission, can conduct investigations in specific sectors of industry, and a wide range of tools and methods for conducting investigations, which will result in an assessment of the effect of potential mergers and acquisitions. The procedural aspects of competition law are particularly important for merger control, and their consistent compliance is imperative for timely merger control. Therefore, the firmness in the Competition Authority's decisions for non-compliance with the competition law procedures is an important part of the competition policy. Bypassing procedural aspects undermines the entire merger control system.

2. MERGERS AND ACQUISITIONS IN THE CONTEXT OF THE COMPETITION

In economic terms, concentration represents the degree to which a market is controlled by one of several entities. Concentration measures the degree of market domination by one or more legal entities in a specific market.[1]

Legally speaking, concentration is linked to control or the power of decision-making in a specific legal entity. The term '*concentration*' refers to the concentration or centralization of power in one entity, regardless of whether it is a natural or legal person, which allows for dominant control over decision-making and management. The Competition Protection Law stipulates that concentration arises from a change in control on a long-term basis, resulting in a permanent change in the structure of a specific market entity. There are several possibilities for how a concentration arises. Firstly, concentration may occur based on the merger of two or more independent enterprises or parts of enterprises. The second possibility may be a result of acquiring direct or indirect control over the whole or parts of one or more enterprises, by one or more individuals who already control at least one enterprise. The third possibility may be a result of acquiring direct or indirect control over two or more independent enterprises or parts of enterprises, by one or more enterprises, through the purchase of securities, property, by agreement, or by other means.[2]

Consequently, the legal basis for the evolution of a concentration can be found in the Company Law[3] that regulates the possibility for status changes, including norms for governance, decision-making, and control over companies. One of the legal methods for the evolution of concentration is through merger and/or acquisition.[4] An acquisition evolves when one or more companies join another existing company, without undergoing a process of liquidation. Consequently, all assets and liabilities of the joining company are transferred to the acquiring company in exchange

[1] See more: The Economic Times: What is 'Market Concentration', available online at: https://economictimes.indiatimes.com/definition/market-concentration

[2] Article 12, Law on the Protection of Competition (Official Gazette of the Republic of Macedonia no. 145/2010; 136/2011; 41/2014: 53/2016 and 83/2018)

[3] Law on Commercial Companies (Official Gazette of the Republic of Macedonia no. 28/04, 84/05, 25/07, 87/08, 42/10, 48/10, 24/11, 166/12, 70/13, 119/13, 120/13, 187/13, 38/14, 41/14, 138/14, 88/15, 192/15, 6/16, 30/16, 61/16, 64/18 and 120/18 and Official Gazette of the Republic of North Macedonia no. 290/20, 215/21 and 99/22)

[4] Article 517, Law on Commercial Companies

for shares or stocks in the acquiring company. On the other hand, a merger results in the establishment of a new company because of the merger of two or more companies, without conducting a process of liquidation. Similarly, all assets and liabilities of the merging companies are transferred to the beneficiary company in exchange for shares or stocks in the new company – beneficiary.

The occurrence of status changes must be registered in the Trade Register, which *de jure* results in a shift in the control of the company and power concentration. Such a type of concentration can be easily determined. However, the change in control can occur *de facto*, without legally resulting in a merger or acquisition that is registered in the Trade Register. For example, two or more companies can retain their legal entity as separate, independent legal entities, but agree to common economic management or a dual listing structure.[5] In addition, companies can have an agreement where they define a joint assumption of risk, profit, and loss. These agreements can lead to a factual merger of the companies (or specific parts of the companies), i.e., consolidation of control over the companies. Similarly, a *de facto* merger can also occur through cross-shareholding or partnerships between two or more different companies that form an economic dominance of the market. This type of concentration is much more difficult to establish.

In the context of market concentration, a significant economic avenue through which such concentration manifests is related to the notion of control over an entity, indicating a concentration of power in a certain number of individuals. Within this framework, the term 'individual' is used to explain the concept of control, encompassing both natural and legal persons, covering public and private entities.

There are various modalities for the acquisition of *de facto* control over a company. Initially, control may be attained by an individual possessing exclusive or joint control over another company. Alternatively, control may be established by multiple individuals, each possessing single or joint control over a distinct company. If these individuals engage in economic activities in their own capacity and/or exercise control over another company, it is usually considered that permanent changes in control over the affected company occur. It is commonly understood that considerable changes in control over the affected entity significantly affect its structure and management.

Another way to gain control arises when a specific natural or legal person, according to contractual arrangements, acquires rights that grant decision-making power or control over the company. Such contracts may involve a transfer of ownership rights or rights to use the company's property, yet may also encompass contracts transferring decision-making rights and substantive control over the company. Nonetheless, *de facto* control may also occur when a particular individual lacks formal decision-making rights but possesses the authority to exercise such rights. For instance, one person may appear to hold rights but is merely a channel for assuming control, while the true exercise of control lies with someone else behind the scenes. Another scenario involves a particular company exerting control, often through its majority shareholders or those with exclusive rights among its shareholders or partners. The rationale underlying such examples rests on the premise that these individuals have actual control over the company, which in turn exercises control over another company due to their decision-making power.

Furthermore, a third way of acquiring control can also be through investment funds because usually, the control over the fund, even though it is a separate legal entity, is held by the investment company that established it; instances where the fund *per se* exercises control are not frequent. In addition, the acquisition of shares or interests may be complemented by many contractual arrangements considering management, decision-making, and property usage within a particular company.[6]

[5] Guidelines for the concept of concentration: 1) Merger of independent enterprises, p.4

[6] For instance, in the case of Electrabel, the company has entered into a shareholder voting agreement with the

Crucial to the analysis of concentration in terms of market competition is the notion of effective control. The actual exercise of such control of the subsequent influence derived from its procession is irrelevant; what is important is the moment at which the potential for such control materializes.

3. NOTIFICATION FOR MERGERS AND ACQUISITIONS

Any merger and/or acquisition that meets the conditions under the Law for the protection of competition must be subject to notification to the Competition Authority. Following the EU regulation, the Macedonian legislator also provides certain annual income thresholds for the participants in the merger, whereby they can be met alternatively or cumulatively.

According to the Macedonian Law for the protection of competition, companies must notify the Competition authorities if:

1) The total annual revenue of all companies included in the merger, achieved by selling goods and/or services on the world market, exceeds 10 million euros, referring to the business year preceding the merger, given that at least one of the participants in the merger is registered in North Macedonia, and/or
2) The total annual revenue of all companies included in the merger, achieved by selling goods and/or services on the domestic market in North Macedonia, exceeds the amount of 2.5 million euros, referring to the business year preceding the merger, and/or
3) The market share of one of the participants in the merger is more than 40%, or the total market share of all participants in the merger is more than 60%, referring to the business year preceding the merger.[7]

If a particular merger meets the conditions mentioned above, then the participants in the merger are obliged to notify the intent for the merger before its actual implementation, immediately after the conclusion of the merger agreement or publishing the public offer to buy or acquire a majority stake in the company. The same obligation is made by participants in the merger on the EU market. Acting in good faith, the participants in a merger can notify the Competition Authority that they intend to finalize a merger agreement. Similarly, if it is a public offer scenario, they can publicly announce their intention to participate in the bidding process, especially if this participation would potentially lead to a merger that requires notification to the Competition Authority.[8] Essentially, this is about being transparent and proactive in informing the relevant regulatory body, i.e., the Competition Authority, about their merger plans or participation in a bidding process that could result in a merger subject to mandatory regulatory notification.

The obligation to submit a notification in the case of acquiring sole control applies to the individual (natural person or company) who acquires control over the whole or part of one or more companies. In the case of a merger or joint control, the obligation to submit a notification is jointly held by all the participants in the merger.

The notification is made in the form prescribed by the Government of North Macedonia to all mergers affecting the domestic market, while using the form attached to the applicable EU Regulation for mergers affecting the EU market.

In terms of deadlines, i.e., the timing when the notification for a merger must be submitted, neither domestic legislation nor the EU Regulation provides specific deadlines by which the notification is to be submitted. However, to ensure compliance and allow the competent Competition Authority enough time to assess the merger before it is implemented, participants typically submit a notification well in advance of their planned implementation period.

second largest shareholder in the company it is acquiring, whereby they have agreed to vote in a way that ensures that two of the three members of the board of directors are representatives of Electrable – this gives him actual control over the steering. See more: Case No COMP/M.4994 - ELECTRABEL / COMPAGNIE NATIONALE DU RHONE

[7] Article 14 from the Law on Protection of Competition, Supra Note 2

[8] Article 15, Ibid

It is important to mention that there are no fees associated with submitting a notice to the competition authorities.

Interestingly, there is a developed practice within the EU connected with a so-called "prior notification" or consultation with the Competition Authority, which is not a legal obligation, but it is considered a good practice.[9] This involves participants consulting with the Competition Authority before formally submitting a notification. It helps to reduce the risk of incomplete notification and facilitates the assessment process. The Macedonian Competition Authority also finds the "prior notification" beneficial, particularly in defining relevant markets and determining the necessary information for the notification.

The annual reports of the Macedonian Competition Authority show a positive trend in increasing the number of notifications for concentration throughout the years. There was a slight drop in 2019 and 2020, with 9 fewer notifications compared to the previous year, and a record number of 97 notifications in 2022. However, although the numbers show a trend of linear quantitative increase in submitted notifications, the number of cases that were subject to examination by the competition authority remains low.

The graphic below shows a review of the submitted notifications that were subject to examination by the Macedonian Competition Authority.

Referring to the qualitative work of the Macedonian Competition Authority, that is, the outcome of the assessment of notified mergers and acquisitions, in 22 cases, it determines that the merger does not fall under the provisions of the competition law, i.e., there is no jurisdiction

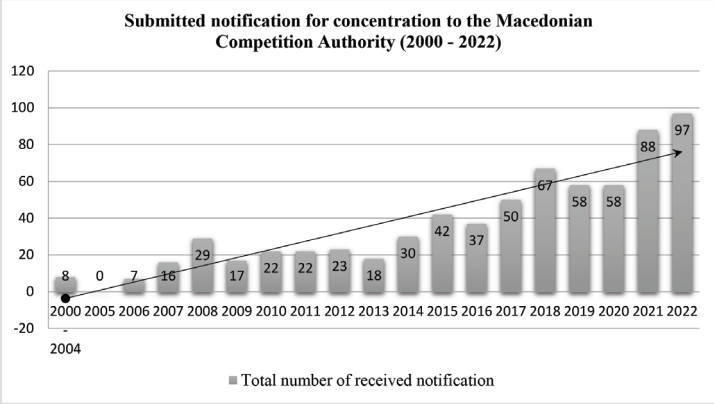

Chart 1: Total number of annual notifications to the Commission for the protection of competition (2000–2022)

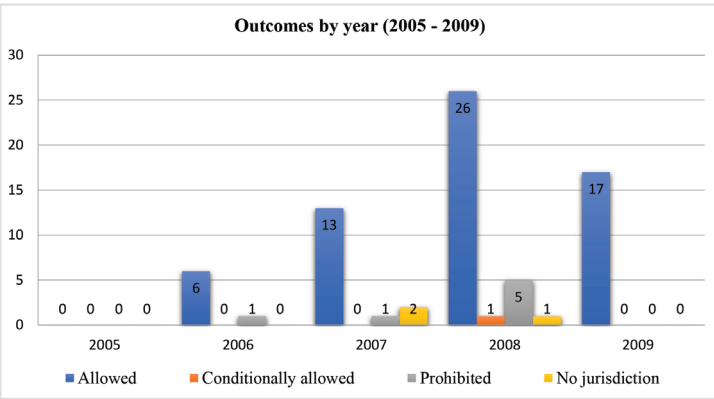

Chart 2: Outcomes by year (2005–2009)

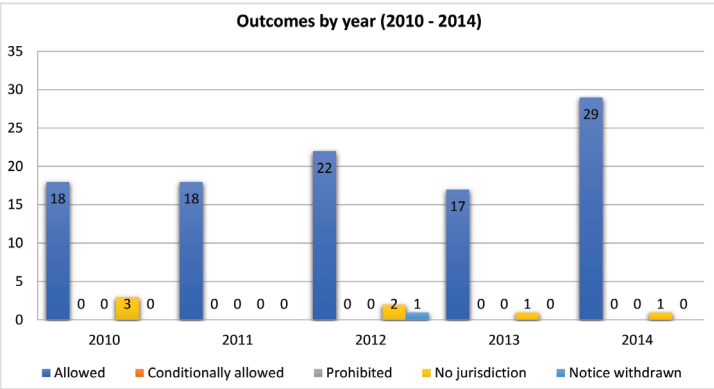

Chart 3: Outcomes by year (2010–2014)

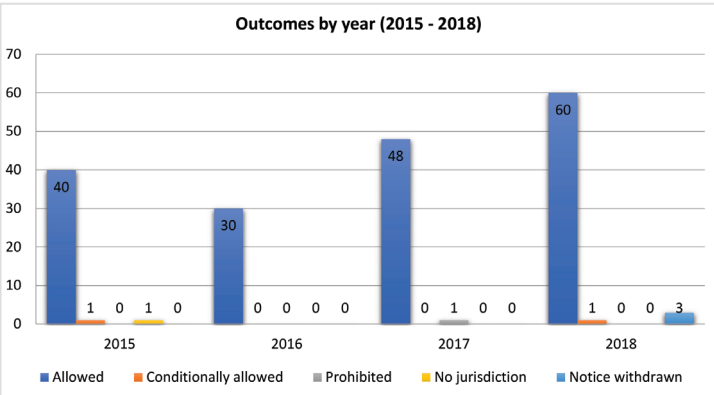

Chart 4: Outcomes by year (2015–2018)

[9] For instance, in Electrabel's case, the company itself addressed the EU Commission for an opinion regarding a potential concentration that might be subject to mandatory notification. In its final decision imposing a fine for Electrabel, the EU Commission considered this fact as a mitigating circumstance in measuring the fine.

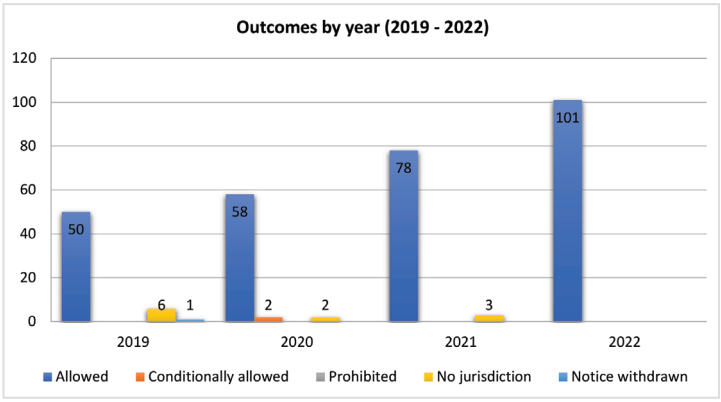

Chart 5: Outcomes by year (2019–2022)

for their assessment, while in 5 cases, the notification was withdrawn. Referring to the mergers that were subject to evaluation, most of them resulted in a positive outcome, i.e., the Competition Authority decided that the merger or acquisition was permissible and did not damage effective competition on the market.

The graphics below show the data for the submitted notification to the Macedonian Competition Authority and the outcomes by each year.

Analyzing the statistical data, it is relevant to question the effectiveness of the investigation and examination by the Macedonian Competition Authority. Considering that it banned only 8 concentrations and imposed obligations on a total of 5 cases, it is relevant to question the operation and effectiveness of the merger control in the market of North Macedonia. One of the indicators revealed by the data is that the Macedonian Competition Authority very rarely decides to conduct a detailed investigation, and even more rarely imposes additional conditions for the eligibility of the mergers. This practice of the competition authority does not certainly contribute to strengthening its role in merger control and protection of competition on the North Macedonian market, which is noted as a main remark in the report of the EU Commission several years in a row.[10]

4. ACCURATE AND COMPREHENSIVE DATA

When submitting a notification for a merger, the participants in the merger are required to provide accurate and comprehensive data relevant to the merger assessment. The notification itself will not be considered complete if the information and data are not fully accurate and comprehensive. There is a possibility that the notification will be deemed incomplete if the information provided in the notification form is not entirely accurate and comprehensive. Therefore, it is crucial for those who submit a notification to ensure the accuracy and relevance of the contacts provided to customers, suppliers, and competitors. Failure to provide accurate or complete data can result in significant delays in the process or even lead to a rejection of the notification due to incompleteness. Furthermore, the obligation to supply accurate and complete information extends beyond the notification itself to all data and information requested by the Competition Authority, including research or data requests in legal proceedings.

Submitting accurate and comprehensive data to the Competition Authority assessing a merger is essential for ensuring a fair, transparent, and effective review process to protect competition. Accurate data enables the Competition Authority to conduct a thorough analysis of the possible impact on competition within a relevant market. A failure to conduct such analysis may lead to an oversight of the real impact that such a merger may cause on the market, i.e., market concentration or potential anticompetitive behavior, which will disturb the effective market competition. Additionally, accurate and comprehensive data helps the Competition Authority to evaluate whether a merger is likely to be beneficial for consumers or to disturb the competition, thus making a well-informed decision to approve, reject, or conditionally approve the merger. Finally, data accuracy is also important for the potential merger participants because it reduces the likelihood of delays in the merger

[10] Panev K.: Merger Control as a mechanism for protection of competition, August 2019

review process, but also ensures legal compliance, which is important because failure to do so, may result in legal penalties, fines, rejection of the notification, or even prohibition of the merger. Inaccurate and incomplete data may even be a reason for the annulment of an approval decision if such data has a decisive impact on the decision.[11] In addition, submitting inaccurate and incomplete data may also be considered an offense that may lead to a fine of up to 1% of the total revenue in the last business year.[12] Similarly, the EU Regulation has the same approach, transposed into the Macedonian legislation.[13]

The Macedonian Competition Authority has a modest practice in sanctioning infringements for delivering inaccurate and incomplete information by companies engaged in mergers. Namely, from 2007, when it assumed authority for misdemeanors in competition, until the end of 2018, the Competition Authority initiated a total of seven (7) proceedings against companies and only four (4) proceedings against responsible natural persons for providing incomplete or inaccurate data regarding potential mergers. One of those proceedings was against the Institute of Accountants of the Republic of Macedonia (ICOS), which incurred a fine of 307.500 Macedonian denars. The decision was the subject of an administrative dispute.[14] The limited practice of the Competition Authority may be a result of the lack of offenses concerning incomplete or inaccurate data, which is not very likely, or due to the lenient stance of the Competition Authority related to this practice.

On the other hand, there is an evolving trend in the EU Commission's practice regarding the submission of inaccurate and incomplete information by companies. Although the EU Commission did not have a strict policy on the matter previously, it has become notably more proactive in sanctioning such behavior in the last decade. For instance, in 2017, the EU Commission imposed a fine of 110 million euros on Facebook for providing incomplete and misleading information during the review process of Facebook's acquisition of WhatsApp.[15] This was the first decision and a milestone in the EU Commission's practice of this type. Before this, decisions concerning this type of offense, which were not that common, were typically made based on the Regulation from 1989, following the rules applicable at that time.

Namely, the notification submitted by Facebook indicated that it could not establish a dependable automated matching system between Facebook's and WhatsApp's users' accounts. This statement was provided in both the notification form and in response to information requested from the Commission. However, in August 2016, WhatsApp announced updates to its terms of service and privacy policy, which indicated the potential linking of WhatsApp users' phone numbers with the identities of Facebook users. Consequently, the EU Commission, even though it approved the acquisition, found out that a technical possibility of automatically matching the identities of Facebook and WhatsApp users already existed in 2014 and that Facebook's staff were aware of such a possibility, thus imposing a fine for providing inaccurate and misleading information. Commissioner Margrethe Vestager said: "*Today's decision sends a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information. Furthermore, it imposes a proportionate and deterrent fine on Facebook. The Commission must be able to take*

[11] Article 21 paragraph 1, p.1 from the Law on Protection of Competition, Supra Note 2

[12] Article 61 of the Law on Protection of Competition stipulates that the Competition Authority can impose a fine in the amount of 1% of the value of the total annual income, achieved in the last year, if the company submits incorrect, incomplete or data that can mislead the CPC or the Commission for decision-making after a misdemeanor

[13] Article 14, paragraph 1, p.1, Council Regulation (EC) No.139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Official Journal of the European Union L 24/1, 29.01.2004).

[14] See more: Decision PP.09-10/6 from 16.11.2018.

[15] EC, Press Release: Mergers: Commission fines Facebook 110 million euros for providing misleading information about WhatsApp takeover, 18 May 2017, Brussels, available online at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369

decisions about mergers' effects on competition in full knowledge of accurate facts."[16]

This position of sanctioning such behavior of the companies, the EU Commission has confirmed in its preliminary conclusion to the German companies Merck KGaA и Sigma-Aldrich for providing inaccurate and incomplete information.[17] The trend continues with the Decision from April 8th, 2019, when the Commission imposed a fine of 52 million euros on *General Electric* for submitting incorrect information regarding the acquisition of LA Wind. Commissioner Margrethe **Vestager** then said: *"Our merger assessment and decision-making can only be as good as the information that we obtain to support it. Accurate information is essential for the Commission to make competition decisions in full knowledge of the facts. The fine imposed today on General Electric is proof that the Commission takes breaches of the obligation for companies to provide us with correct information very seriously."*[18]

5. GUN JUMPING

All participants in a merger that falls within the scope of the Law for the Protection of Competition are obliged to submit a notification to the Competition Authority.[19] According to the applicable rules, the participants in a merger must submit a notification for the merger before its actual implementation. In addition, there is a prohibitive legal norm prohibiting acting towards an effective implementation of the merger before the Competition Authority reviews the process and issues a decision.[20] Namely, the prohibition for taking actions towards effective implementation of a merger is extended not only before the notification to the Competition Authority but also in the period after the notification is submitted until the Competition Authority issues a decision that the merger complies with the competition rules and does not disturb the free market. These rules are fully harmonized with the EU Regulation, in particular articles 4 and 7 that regulate the obligations of the participants in the mergers within the EU. Notably, this approach imposes a positive obligation for the participants to notify the merger before its actual implementation, but also a negative obligation to refrain from implementing the merger before the Competition Authority decides on the matter, or at least before the deadline for issuing such a decision is passed.

The obligation to notify and suspend, or refrain from taking action to implement the merger, is based on the system of merger control, both domestically and within the EU. This is because these legal obligations empower competition authorities to conduct *ex ante* control of all concentrations that may affect market competition. Such designed legal provisions sustain existing competitive conditions while the Competition Authority evaluates the effects of a potential merger.[21] This prior control is a crucial safeguard protecting free competition, ultimately shielding consumers from any damage to free and effective competition that may result from anti-competitive, unlawful mergers. One of the mechanisms for combating the anti-competitive conduct of market participants is the possibility for the Competition Authority to impose significant fines, up to 10% of the total annual turnover of the affected participants in the merger, in case of breaches of the notification or suspension obligation. A similar provision is contained in the legislation of North Macedonia[22] and the EU Regulation. [23]

Unauthorized coordination among participants in a merger before its implementation, as well as breaches of notification and/or suspension obligations through premature actions

[16] Ibid

[17] Press Release: Mergers: Commission alleges Merck and Sigma-Aldrich, General Electric, and Canon breached EU merger procedural rules. IP/17/1924, Brussels, 06.07.2017

[18] See more: Press Release: Mergers: Commission fines General Electric €52 million for providing incorrect information in LM Wind takeover. IP/19/2049, Brussels, 08.04.2019

[19] Article 15 of the Law on Protection of Competition, Supra Note 2

[20] Article 18, Ibid

[21] Similar: Hull D., Gordley C. (Van Bael&Bellis (Brussels)): Gun jumping in Europe: An overview of EU and National Case Law, Concurrences, N°85642, e-Competitions, Antitrust Case Laws e-Bulletin, www.concurrences.com

[22] Article 60 of the Law on Protection of Competition, Supra Note 2

[23] Article 14 para.2, EC Merger Regulation, Supra Note 13

to implement the merger, are known as "gun jumping."

The legal system of North Macedonia and the practice of the Competition Authority have not yet established an appropriate term corresponding to "gun jumping", which is quite a technical term stemming from the competition law and practice in general. However, the gun-jumping scenarios are also known in the competition practice in North Macedonia. It has broad connotations and includes two main aspects: substantive and procedural.

The substantive aspect refers to the preliminary coordination among the actors in the merger, which occurs before the actual merger takes place. Typically, this involves unauthorized joint behavior among the actors, such as sharing confidential competitive information. It may include price fixing, geographic or product market allocation, customer allocation, investment limitations, or other agreements restricting trade or investment, as well as plans regarding products, distributors, or employees, e.g., appointment of new directors, etc. In certain cases, the exchange of detailed information deemed sensitive and confidential concerning competitors in the market may also be subject to preliminary coordination.[24]

However, sharing such information is often part of the analyses and negotiations conducted by the actors in a merger before concluding the merger agreements, and sometimes it is necessary to disclose such business information. Therefore, defining what constitutes anti-competitive conduct as preliminary coordination is a complex task because many forms of coordination among the actors in a merger, before the actual merger occurs, are reasonable and necessary during merger negotiations, acquisitions, or other forms of concentration. The process of thorough analysis involves the exchange of certain information, and competition authorities recognize that thorough analysis and reasonable steps taken during the process are essential parts of any merger. Therefore, distinguishing what is reasonable and lawfully permissible information to share during negotiations, from preliminary coordination among the actors in a merger, is often a challenging task for competition authorities, requiring special attention and in-depth analyses. However, this does not mean that the actors in a merger should act as a single entity, under the assumption that the merger will occur after the conclusion of the merger agreement. The tendency of the merger actors to align their motives increases the risk of breaching the competition rules and obligations.

What the actors in a merger must consider is the fact that taking actions for preliminary coordination and entering into contractual arrangements before the merger is approved, bears the risk of being sanctioned by the competition authorities, even if the merger may not fall under the scope of mandatory notification, or even if it turns out to be permissible. For instance, in the case of *Smithfield Foods and Premium Standard Firms*, the Competition Authority in the USA and the companies included in the merger made a 900.000 USD settlement for practicing ownership rights before the actual merger occurred, although the US Competition Authority decided that the merger was allowed and did not have negative consequences for the competition on the market.[25]

The procedural aspect of gun-jumping refers to breaching the notification obligation or the suspension obligation. The first one may occur when the actors in a merger fail to fulfill the obligation to notify the competition authority before the merger takes place. The second part, i.e., breaching the suspension obligation, occurs when the actors in a merger start taking actions to execute the merger after submitting the notification, but before receiving a decision on the permissibility of the merger by the competition authority. Such actions constitute a violation of the obligations under Article 15 and Article 18 of the Law on Protection of Competition of North Macedonia. Similarly,

[24] Gun jumping, produced in partnership with Stephane Dionnet and Pauline Giroux of Skadden Arps Slate Meagher&Flom LPP, LexisNexis, March 2017

[25] United States v Smithfield Foods and Premium Standard Farms 1:10-CV-00120 (DDC Jan 21, 2010)

such actions would be in breach of Article 4 and Article 7 of the EU Regulation, when it comes to a merger within the EU market.[26]

The prohibition of gun-jumping in a certain way freezes the *status quo* while the competition authority assesses the implications of the merger on the market competition. Even though the competition authority considers that the actors in a merger necessarily conduct prior analysis, negotiations, and plans; they must remain independent competitors in the market. For instance, they must not act as a single entity on the market or take actions for the actual execution of the merger until they receive the decision from the competition authority. Such a prohibition is simply procedural, meaning that it does not require the actors in a merger to necessarily be direct competitors or the actual implementation of the merger to have effects on the market competition. Consequently, even if the merger does not have effects on the free market competition, gun-jumping remains a violation and may be the subject of a fine by the competition authorities. Some examples of gun-jumping include prematurely transferring ownership rights from the joining company to the acquiring company, thereby creating the possibility of direct control over assets, business scope, or management; use of resources and assets of the joining company by the acquiring company; takeover of equipment, customer and supplier lists, employee transfers, etc.[27]

The competition regulation of North Macedonia is fully aligned with the EU acquis regarding the examination and detection of gun-jumping. Consequently, the Competition Authority has the authority and a variety of mechanisms to effectively secure evidence and gather data relevant to the investigation of possible gun-jumping. For instance, it has the power to enter business premises, including the land and vehicles of the actors in the merger, to analyze and copy business books, documents, and items, to seal the business premises, and to examine authorized persons and employees.[28] Furthermore, the Competition Authority has the authority to issue interim measures if needed to protect effective competition in the market.

However, the practice of the North Macedonian Competition Authority shows that sanctioning these types of violations has been very limited throughout the years. From 2007 to 2018, the Competition Authority initiated proceedings and imposed penalties referring to gun-jumping only in seven (7) cases. The total amount of fines in these seven cases was 3.202.127 Macedonian denars, which is approximately 50.000 euros.

[26] When it comes to a merger within the EU market, it is important to note that even if a merger does not meet the threshold prescribed and it is not a subject of notification before the EU Commission, it can still be subject to notification according to the domestic legislation of the EU member states.

[27] Panev K., Supra Note 10, pp.92-94.

[28] Article 40 and 41 from the Law on Protection of Competition, Supra Note 2

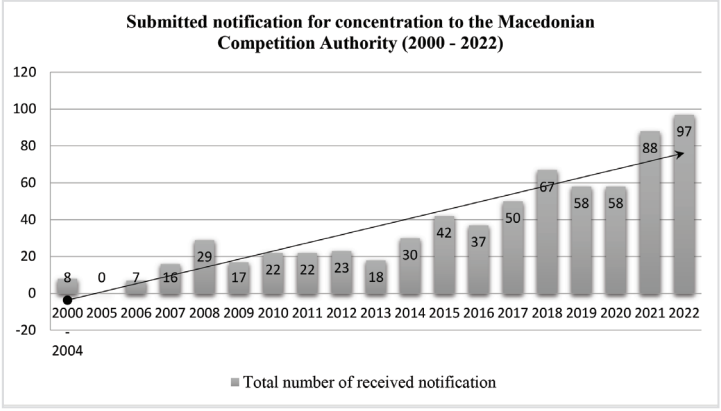

Chart 6: Fines imposed by year, not adjusted to Administrative Court decisions (2007–2018)

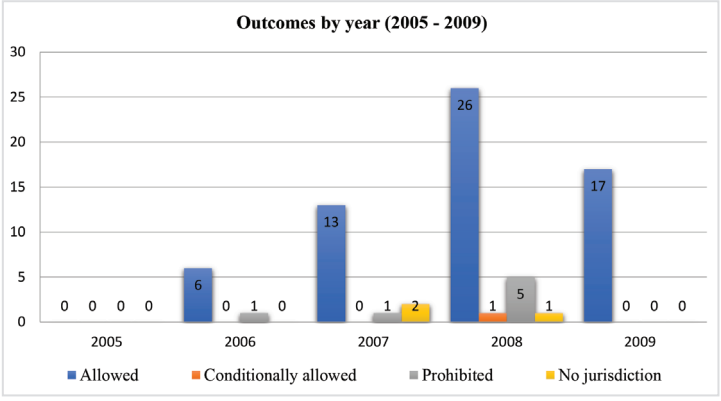

Chart 7: Total amount of fines by year, not adjusted to Administrative Court decisions (2007-2018)

The highest individual fine overall was issued at the beginning of 2007, with a fine of 1.774.136 Macedonian denars, which is approximately 29.000 euros.[29] However, the fine represented only 0.11% of the total annual revenue of the company, which is far below the potential fine of up to 10% for non-compliance with the obligation to notify the Competition Authority of possible concentration.

[29] Source: Annual Reports for the work of the Macedonian Competition Authority (2005 – 2018)

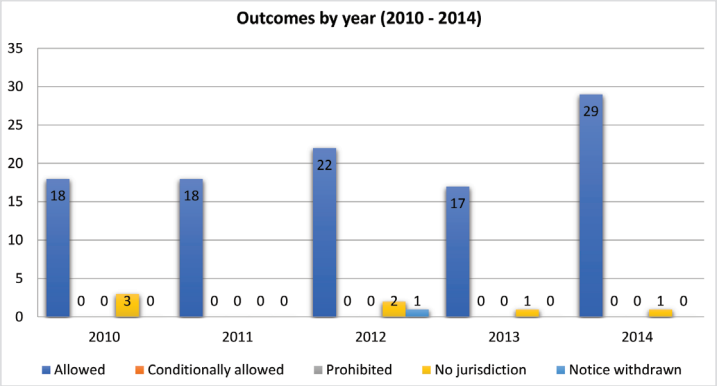

Chart 8: Total amount of fines by year, before and after adjustment to Administrative Court decisions (2007 - 2018)

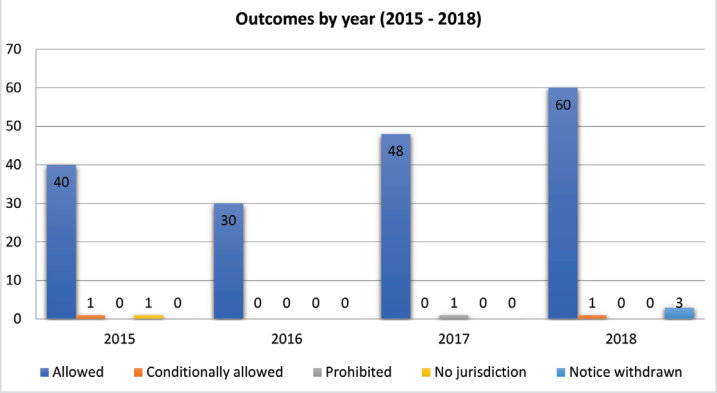

Chart 9: Total amount of fines in %, not adjusted to Administrative Court decisions (2007 - 2018)

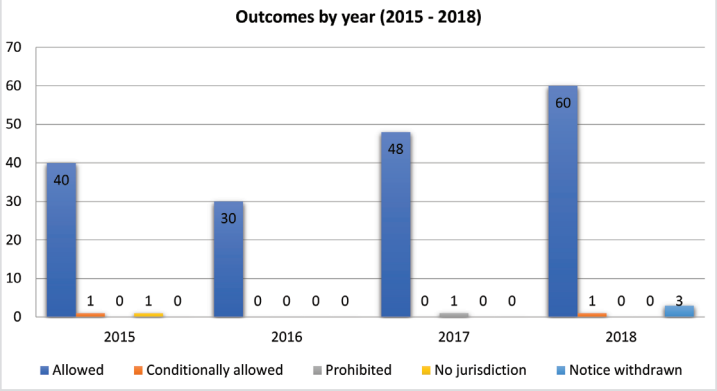

Chart 10: Total amount of fines in %, adjusted to Administrative Court decisions (2007 - 2018)

In fact, the first fine of 10% of the revenue was imposed in 2018, but not in a case related to mergers.[30]

The graphics below show the total number of fines throughout the years, taking into consideration the numbers before and after administrative disputes. Considering the data, it is relevant to conclude that the Macedonian Competition Authority has pursued a relatively lenient policy in terms of gun-jumping behavior.

6. CONCLUSION

In recent years, merger control has been increasing both in the North Macedonian market and the market of the European Union. North Macedonia's competition policy continuously follows the guidelines and trends set out by the European Commission. Consequently, the number of mergers and acquisitions that are subject to evaluation by the North Macedonian Competition Authority is growing each year, with 97 documented notifications in 2022.

However, there is a notable difference between the practice of the North Macedonian Competition Authority and the EU Commission regarding the gun-jumping violation. While the European Commission has taken a rigorous approach to imposing significant fines[31], the North Macedonian Competition Authority has pursued a lenient approach towards sanctioning gun-jumping behavior. The idea of more strict sanctions for such violations within the European Union is aimed not only at retribution for the committed

[30] Panev K., Supra Note 10, pp.144-149.

[31] In an interview in 2017, Johannes Laitenberger, Director-General for Competition at the European Commission commented on gun-jumping as behavior that undermines procedural fairness of the merger evaluation; thus, the European Commission has initiated a serious approach against it. See more: The Antitrust Source: Interview with Johannes Laitenberger, Director-General for Competition, European Commission, June 2017, www.antiturstsource.com

gun-jumping violation but also at prevention and a deterrence effect.

Another trend relates to the competition authorities' approach to innovations and new technologies when assessing concentrations. Concentrations in sectors involving innovations and new technologies pose a real challenge for competition authorities. For example, in resolving the Dow Chemical and DuPont concentration in March 2017, the European Commission requested redirection of global research and development by the company, because the development of specific products had the potential to reduce competition for pesticide innovations on a broader scale.[32] Also worth mentioning is the increasing cooperation between the European Competition Network and the competition authorities.

Finally, there is a different pattern toward the use of the leniency policy as a mechanism for combating antitrust practices and unauthorized market behavior. Although leniency as a concept is recognized in both the North Macedonian and EU competition policy, such a program has not been effectively developed in the Macedonian competition practice. On the other hand, the European Union encourages national competition authorities to introduce and develop their individual leniency policies. The efficiency of a leniency program is emphasized in the Report on the 10 Years of Implementation of the EC Merger Regulation, highlighting the need for alignment of such policies among EU member states.[33] In addition, related to the leniency policy, there is a reasonable expectation for alignment of the policy to protect employees from individual liability if they participate in the leniency program. Such a policy exists only in a few member countries of the European Union, which highlights the need for alignment within the whole Union.[34]

[32] See more about the comments on the case by the Director-General for Competition, European Commission in the Interview for Antitrust Source, ibid.

[33] Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspective, COM (2014) 453, Brussels, 2014; point 39-40

[34] Ibid, point 41-42

REFERENCES

a) Books and articles:

[1] Gun jumping, produced in partnership with Stephane Dionnet and Pauline Giroux of Skadden Arps Slate Meagher&Flom LPP, LexisNexis, March 2017.

[2] Directorate-General for Competition (2002): Glossary of terms used in EU competition policy, Antitrust and control of concentrations, Brussels.

[3] Elliott P. and Van Acker J., Van Bael & Bellis: Merger Control in the EU: overview, Practical Law, https://uk.practicallaw.thomsonreuters.com

[4] Eftimova V. (2006): Competition Regimes in the World – A Civil Society Report. 84, Macedonia, 440.

[5] Zimmer D. (2009): Efficiency in merger law: appropriateness of efficiency analysis in ex-ante assessment? Economic Theory and Competition Law. Cheltenham, United Kingdom, 206.

[6] J. Gerber D. (2009): Competition law and the institutional embeddedness of economics. Economic Theory and Competition Law. Cheltenham, United Kingdom, 20.

[7] Karova R. и Botta M. (2010): Five Years Enforcement of the Competition Law in the Republic of Macedonia – Time for an Assessment. Mediterranean Competition Bulletin, 56.

[8] Laitenberger J., Director-General for Competition, European Commission (2017): Enforcing EU competition law – recent developments and a glance to the future, CMS EU Competition Conference, Brussels, 19 October 2017.

[9] M. Dabbah M. (2010): International and comparative competition law, Cambridge University Press, United Kingdom.

[10] Modrall J. (2017): The EU gets tough on gun jumping. The M&A Lawyer, September 2017.

[11] Panev K.: Merger Control as a mechanism for protection of competition, August 2019

[12] Pepeljugovski V. (2009): Pravo na konkurencija – Antimonopolsko parvo. FON University, Skopje.

[13] Pecotić Kaufman J. i Slijepčević S. (2010): Koncentracije poduzetnika i mjerodavno tržište: Pravni i ekonomski aspekti. Zbornik Pravnog fakulteta u Zagrebu. Vol. 60 No 5, 2010.

[14] Slaugter and May (2018): The EU Merger Regulation. An overview of the European merger control rules, January 2018.

[15] The Antitrust Source (2017): Interview with Johannes Laitenberger, Director-General for Competition, European Commission, June 2017, преземено на 22.06.2019, www.antiturstsource.com

[16] The European Competition Network (2005): What It Is and Where It's Going, The Antitrust Source, July 2005.

[17] The Economic Times: Definition of "Market Concentration", https://economictimes.indiatimes.com/definition/market-concentration

[18] Hull D., Gordley C. (Van Bael&Bellis (Brussels)): Gun jumping in Europe: An overview of EU and National Case Law, Concurrences, N⁰85642, e-Competitions, Antitrust Case Laws e-Bulletin, www.concurrences.com

b) Laws, Regulations, and Guidelines:

[1] Law on Protection of Competition (Official Gazette of the Republic of Macedonia no. 145/2010; 136/2011; 41/2014: 53/2016 and 83/2018)

[2] Law on Commercial Companies (Official Gazette of the Republic of Macedonia no. 28/04, 84/05, 25/07, 87/08, 42/10, 48/10, 24/11, 166/12, 70/13, 119/13, 120/13, 187/13, 38/14, 41/14, 138/14, 88/15, 192/15, 6/16, 30/16, 61/16, 64/18 and 120/18 and Official Gazette of the Republic of North Macedonia no. 290/20, 215/21 and 99/22)

[3] Regulation on the format and content of the concentration report and the necessary documentation submitted together with the survey (Official Gazette of the Republic of Macedonia No. 44/12 of 30.03.2012).

[4] Regulation on closer conditions for the release or reduction of the fine and the procedure under which the Commission for Decision-by-Violation decides on the release or reduction of the fine (Official Gazette of the Republic of Macedonia 41/12 of 26.03.2012).

[5] Treaty on the Functioning of the European Union (Official Journal of European Union C 326/47, 26.10.2012).

[6] The Treaty Establishing the European Community (Official Journal of the European Communities C 325/01, 24.12.2002).

[7] Council Regulation (EC) No.139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Official Journal of the European Union L 24/1, 29.01.2004).

[8] Competition Commission: Guidelines for determining cases where, when assessing concentrations, the Concentration Protection Commission will usually determine that they comply with the Competition Protection Act, 31.06.2016.

[9] Competition Commission: Guidelines for assessing horizontal concentrations for the purpose of the Competition Protection Act, 28.12.2015.

[10] Competition Commission: Guidelines for the assessment of vertical and conglomerate concentrations, 28.12.2015.

[11] Commission Competition: Guidelines for term – concentration, 29.03.2012.

c) Reports and Press-Releases:

[1] Annual Reports on the Work of the Commission for Protection of Competition 2005 - 2022

[2] European Commission (2014): Communication from the Commission to the European Parliament and Council: Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspective, COM (2014) 453, Brussels.

[3] European Commission – Press Release: Mergers: Commission fines General Electric €52 million for providing incorrect information in LM Wind takeover. IP/19/2049, Brussels, 08.04.2019.

[4] European Commission - Press Release: Mergers: Commission alleges Altice breached EU rules by early implementation of PT Portugal acquisition. IP/17/1368, Brussels, 18.05.2017.

[5] European Commission – Press Release: Mergers: Commission alleges Merck and Sigma-Aldrich, General Electric, and Canon breached EU merger procedural rules. IP/17/1924, Brussels, 06.07.2017.

[6] European Commission – Press Release: Mergers: Commission approves acquisition of salmon processor Morpol by salmon farmer Marine Harvest, subject to conditions. IP/13/896, Brussels, 30.09.2013.

[7] European Commission – Press Release: Commission adopts new leniency policy for companies which gave information on cartels, IP/02/247, Brussels, 13.02.2002.

d) Court cases and decisions:

[1] Case T-201/04 - Microsoft v.Commission, 17.09.2007

[2] Case No. COMP/M.7217 - Facebook/WhatsApp, 03.10.2014

[3] Case No. COMP/M.4994 - Electrabel/Campagnie Nationale du Rhone, 10.06.2009

[4] Case No COMP/M.7184 - Marine Harvest/Morpol, 23.07.2014

[5] United States v Smithfield Foods and Premium Standard Farms 1:10-CV-00120 (DDC Jan 21, 2010)

[6] Decision PP.No.09-10/6 од 16.11.2018

RAZUMEVANJE KONTROLE KONCENTRACIJE U MAKEDONSKOM KONKURENTSKOM PRAVU

Rezime: *Ovaj članak istražuje blisku vezu između makedonskog zakona o konkurenciji i propisa EU, s fokusom na koncentraciju kao ključni aspekt politike konkurencije. Proistekao iz strateških težnji za članstvo u EU, makedonski zakon o konkurenciji je duboko pod uticajem standarda EU, posebno u pogledu kontrole koncentracija, koja se smatra ključnim elementom zakona o konkurenciji. i makedonski i zakoni o konkurenciji EU daju prioritet preventivnim merama za sprečavanje štetnih spajanja i akvizicija između preduzeća koja žele dominaciju na tržištu. Takva dominacija koncentriše tržišnu moć, koja, ako se zloupotrebi, može ometati efikasnu konkurenciju i inovacije, i štetiti dobrobiti potrošača kroz više cene, niži kvalitet i ograničen izbor. S obzirom na ograničenu diskusiju o koncentracijama na tržištu u Severnoj Makedoniji, ovaj članak ima za cilj da osvetli politiku konkurencije u vezi sa sprečavanjem štetnih koncentracija. Koristeći deskriptivne i analitičke metode pravnog istraživanja, ispituje spajanja i akvizicije na makedonskom tržištu, pravne obaveze u slučajevima poremećaja konkurencije na tržištu i procenjuje efikasnost kontrolnih mehanizama. Takođe analizira delovanje makedonskog organa za zaštitu konkurencije u vezi sa koncentracijama na tržištu, fokusirajući se na procese obaveštavanja i izazove sa kojima se suočava.*

Kroz sveobuhvatnu analizu, ovaj rad doprinosi dubljem razumevanju mehanizama kontrole koncentracije u makedonskom pravu konkurencije i pruža uvid u širu dinamiku politike konkurencije, nudeći vredne implikacije za kreatore politike, pravnike i naučnike.

Ključne reči: *spajanja, koncentracija, konkurencija, tržište, kontrola*