

## Competition Law in Macedonia in 2011–2012: New Perspectives and New Challenges

by

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## I. Introduction

Keeping in mind that competition policy is of key importance for the European Union, the Republic of Macedonia (hereafter, R.M.) has taken it upon itself to introduce and adopt a domestic competition law regime in the framework of its EU accession process.

Macedonian Constitution guarantees the freedom of trade and business as well as security and equal protection of the legal position of different entities in the market<sup>1</sup>. From a historical perspective, it should be noted that the R.M. was the first country in the Western Balkan region to sign the Stabilization and Association Agreement with the European Union in April 2001<sup>2</sup>, which entered into force in 2004. In 2005, the European Council granted Macedonia the status of an EU 'candidate country'. This status provides for a competition regime to be applied in the trade relations between the European Union and the R.M. Significant changes were made to Macedonian antitrust legislation, which was in force since January 2005, by way of the new Law on the Protection of Competition of 2010 (hereafter, LPC)<sup>3</sup>. These recent legislative reforms introduced relevant changes to the institutional structure of Macedonia's competition protection system at the same time. The purpose of the LPC is to ensure free competition in the domestic market in order to stimulate economic efficiency and consumer's welfare<sup>4</sup>.

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<sup>1</sup> Constitution of the Republic of Macedonia, Article 37.

<sup>2</sup> Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, Brussels, 26 March 2001.

<sup>3</sup> Law for the Protection of Competition, Official Gazette of the R.M., No. 145/2010.

<sup>4</sup> LPC, Article 2, Official Gazette, No. 145/2010.

## **1. Some features of competition law in the R.M. during the time period 2011–2012<sup>5</sup>**

Competition Law in the R.M. prohibits anti-competitive agreements, cartels as well the abusive conduct of undertakings that hold a dominant position. What characterizes the area of Macedonia's competition law in this period is the decisive role played in this context by the Commission for the Protection of Competition (hereafter, CPC). Three features of the CPC's work in 2011 and 2012 are noted in this article:

- conduct of administrative and misdemeanor procedures to determine the existence of offenses set out in the Law for the Protection of Competition;
- analysis of specific markets and;
- adopted recommendations and opinions.

In particular, the year 2011 is characterized by good progress, in particular with respect to mergers<sup>6</sup>. The number of decisions adopted by the CPC as well as the number of judgments rendered by the Administrative Court has increased with regard to concentrations. By contrast, the numbers are still very low in the area of cartels.

## **2. An institutional perspective: the Commission for the Protection of Competition**

The role of the Commission for the Protection of Competition is highly emphasized in Macedonia. The CPC was founded in 2005 based on the Law for the Protection of Competition of 2005<sup>7</sup>. Considering the experiences of EU Member States, the CPC is organized as an independent state authority that answers exclusively to the Parliament of the R.M. It controls the application of the Law for the Protection of Competition, the Law on State Aid Control and related by-laws. It also determines the rules and measures for the protection of competition and measures for the establishment of effective competition. The CPC is a collegial body composed of a President and four members elected by the Assembly for a period of 5 years. Pursuant to the Law on

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<sup>5</sup> Yearly report from the work of the CPC during 2011, adopted in March 2012.

<sup>6</sup> In this Article, the concept 'merger' is replaced by the broader concept known as 'concentrations' used by Law for Protection of Competition (Official Gazette No. 145/2010).

<sup>7</sup> LPC 2005, Official Gazette No. 4/05, Official Gazette No.70/60 and Official Gazette No.22/07. The very first Macedonian provisions for on competition, in particular those against monopolistic behavior are found in trade law of 1995: Law for Trade, Official Gazzette of the R.M., No. 23/95, 30/95, 43/95, 23/99 43/99.

State Aid of 2003<sup>8</sup>, the CPC gained in June 2006 the competence to supervise every form of State aid granted in the R.M. in order to ensure that market competition remains free from state intervention. In exercising its powers, the CPC must keep administrative and misdemeanor proceedings in lieu with applicable legal provisions for imposing fines as sanctions under the provisions of the law.

As mentioned, Macedonia's Parliament adopted in 2010 a set of new legislative acts concerning the work of the CPC including a new Law on the Protection of Competition (145/10) and a new Law on State Aid Control (145/10), both of which replaced previous legislation in this area. These laws are known as harmonization laws with the *acquis* of EU competition law. Unfortunately, harmonization<sup>9</sup> by way of fragmented interventions affecting specific parts of existing legislation, or dealing with chosen issues only, can sometimes make legal non-coherence deeper and separation thicker. Significant criticism followed the aforementioned harmonization laws because they were seen as a copy of past EU legislation bringing with them a lot of confusion and inconsistency to the national legal system<sup>10</sup>.

Macedonia has a small, concentrated and open economy. Geographically, the country has a territory of 25.713 km<sup>2</sup> with approximately 2 million inhabitants. In the last two decades, its economy has been characterized by a stable macroeconomic climate<sup>11</sup>. The GDP per capita remains low, amounting to only 26% of the EU-25 GDP average<sup>12</sup>. These macro-economic indicators have important consequences in relation to the structure of the domestic market. It must be stressed therefore that the land-lock position of the country, the small size of its territory and its population, as well as its low GDP per capita, which reduces per capita consumption, all lead to the conclusion that the R.M. can, from a competition law point of view, be considered a 'small concentrated economy'.

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<sup>8</sup> Law on State aid, Official Gazette of the R.M., No.24/03, 70/06 and 55/07.

<sup>9</sup> M. Boodman, 'The Myth of Harmonization of Laws' (1990) *International Congress of Comparative Law Montreal* 126–130; H.P Glenn, 'Harmonization of law, foreign and private international law' (1993) 1 *ERPL*, 47–57.

<sup>10</sup> R. Karova, M. Botta, 'Five Years Enforcement of the Competition Law in the Republic of Macedonia – Time for an Assessment' (2010) 2 *Mediterranean Competition bulletin* 59–60.

<sup>11</sup> Macedonian State Statistical Office (2013), data available at <http://www.stat.gov.mk>. See also: 20 години Независна Македонија, Република Македонија, Државен завод за статистика, 20 years of independent Macedonia, Republic of Macedonia, State Statistical Office, 2011, p. 28–29.

<sup>12</sup> [http://ec.europa.eu/enlargement/candidatecountries/the\\_former\\_yugoslav\\_republic\\_of\\_macedonia/economic\\_profile\\_en.htm](http://ec.europa.eu/enlargement/candidatecountries/the_former_yugoslav_republic_of_macedonia/economic_profile_en.htm) (23.9.2010).

## II. Legal framework on competition law in the R.M.

### 1. The Law on the Protection of Competition

The Law on the Protection of Competition of 2005 was in force until 13 January 2010.<sup>13</sup> The new LPC (No. 145/10) was adopted in 2010 and is fully compliant with European competition provisions, in particular with Articles 101, 102, 106 and 107 TFEU. The LPC was subsequently amended in 2011<sup>14</sup> with respect to its provisions relating to the principle that ‘silence is consent’.<sup>15</sup> These changes should contribute to a faster and more efficient fulfillment of the rights of both citizens (consumers) and business.

#### 1.1. By-laws to the Law for the Protection of Competitor

A number of by-laws related to the Law for the Protection of Competition were adopted in 2005 on the basis of the LPC of 2005. They are in force still, even after the adoption of the new LPC of 2010, and the adoption of several new regulations based on the latter. It needs to be noted that the 2005 by-laws were introduced in order to link them with current regulations of 2011 and 2012. They include:

1. Regulation on the block exemption granted to vertical agreements on exclusive distribution right, selective distribution right, exclusive purchase right and franchise
2. Regulation on the block exemption granted to horizontal R&D agreements
3. Regulation on the block exemption granted to horizontal specialization agreements
4. Regulation on the block exemption granted to technology transfer, license or know-how agreements
5. Regulation on the block exemption granted to agreements on distribution and servicing of motor vehicles
6. Regulation on the block exemption granted to agreements in the insurance sector
7. Regulation on agreements of minor importance

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<sup>13</sup> LPC, Official Gazette of the R.M., No. 04/05, 70/60 and 22/07.

<sup>14</sup> LPC, Official Gazette of the R.M., No. 136/11 which further harmonized the LPC 2010 with the Law on General Administrative Procedure, Official Gazette of the R.M., 38/05, 110/08 and 51/1.

<sup>15</sup> 2011 report from the work of the CPC, published March 2012.

8. Regulation on the form and content of the notification and criteria on the evaluation of concentrations<sup>16</sup>.

## 1.2. New draft Regulations

In 2011, the Commission for the Protection of Competition prepared nine draft regulations arising from the LPC to be adopted by the government of Macedonia. A wide-spread consultation process was conducted covering all interested stakeholders, such as State Ministries, the Institute of Industrial Property, the National Bureau of Insurance Supervision, and the Union of Chambers of Commerce of Macedonia. The aim of these Regulations was said to be the achievement of a higher degree of harmonization with European *acquis*. They include:

1. Regulation for similar terms on the block exemption granted to technology transfer agreements, license or know-how transposing EU Regulation 772/2004;<sup>17</sup>
2. Regulation for similar terms on the block exemption granted to R&D agreements transposing EU Regulation 1217/2010;<sup>18</sup>
3. Regulation for similar terms on the block exemption granted to horizontal specialization agreements transposing EU Regulation 1218/2010;<sup>19</sup>
4. Regulation on the block exemption granted to insurance agreements transposing EU Regulation 267/2010;<sup>20</sup>
5. Regulation on the block exemption granted to agreements on distribution and servicing of motor vehicles transposing EU Regulation 461/2010;<sup>21</sup>

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<sup>16</sup> All these Regulations are published in the Official Gazette of the R.M. no. 91/05.

<sup>17</sup> Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

<sup>18</sup> Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements.

<sup>19</sup> Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements.

<sup>20</sup> Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) TFEU to certain categories of agreements, decisions and concerted practices in the insurance sector.

<sup>21</sup> Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices in the motor vehicle sector.

6. Regulation on the block exemption granted to vertical agreements transposing EU Regulation 330/2010;<sup>22</sup>
7. Regulation on the form and the content of the notification and the necessary documents and criteria on the evaluation of concentrations transposing EU Regulation 802/2004;<sup>23</sup>
8. Regulation for similar terms on agreements of minor importance transposing EU measure;<sup>24</sup>
9. Regulation for similar terms and procedure under which the Commission on misdemeanor decides to release or reduce the fine, transposing EU measure.<sup>25</sup>

The Macedonian government adopted all the above measures in 2012<sup>26</sup> stressing that they contribute towards a higher degree of harmonization of Macedonia's legislation with European *acquis*.

### 1.3. Adoption of three new Guidelines

In 2011, the Commission for the Protection of Competition carried out a broad consultation process with relevant stakeholders that resulted in the formulation and adoption of three new Guidelines regarding the application of the LPC. They include:

1. Guidelines on the manner of the preparation of a non-final version of a decisions of the CPC (February 2011), consistent with the guidelines of DG Comp on market share;
2. Guidelines on defining the relevant market for the purposes of the LPC<sup>27</sup> harmonized with Commission Notice on the definition of relevant market<sup>28</sup>;

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<sup>22</sup> Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices.

<sup>23</sup> Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

<sup>24</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*).

<sup>25</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases.

<sup>26</sup> More exactly, on 23 March 2013, but having effect from 2012.

<sup>27</sup> Official Gazette of the R.M. no.145/10, the Guidelines on defining the relevant market are fully harmonized with Commission notice on the definition of the Relevant Market for the purposes of Community competition law, Official Journal C 372, 09.12.1997, p. 5.

<sup>28</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law.

3. Guidelines on restrictions, related directly and seen as necessary to the implementation of a concentration<sup>29</sup>, harmonized with EU measures on restrictions directly related and necessary to concentrations<sup>30</sup>.

In 2012, the CPC adopted three additional guidelines concerning the application of the LPC:

1. Guidelines for the application of Article 7(3) LPC (March 2012); these guidelines are consistent with the European Commission guidelines on the application of Article 81(3) of the Treaty;<sup>31</sup>
2. Guidelines on the term 'concentration' (March 2012); these guidelines are consistent with Guidelines on the control of concentrations between undertakings;<sup>32</sup>
3. Guidelines for the determination of cases where the CPC delivers a decision in an abbreviated form (June 2012); these guidelines are consistent with the European Commission Notice on simplified procedure for treatment of certain concentrations.<sup>33</sup>

## **2. Administrative and misdemeanor proceedings conducted before the Commission for the Protection of Competition**

In accordance with the Law for the Protection of Competition, procedures on anticompetitive agreements, abuses of a dominant position or control of concentrations were, until November 2010, primarily conducted as administrative proceedings before the Commission for the Protection of Competition. If the latter determined, during its administrative proceedings, that a prohibited agreement or abuse had taken place, it would then after the completion of the administrative proceedings conduct misdemeanor proceedings for the same case. With the adoption of the new Law on the Protection of Competition of 2010 (No. 145/10 with amendments No. 136/11), assessing agreements between undertakings and the prevention and elimination of abuse are both assessed in misdemeanor procedures only.

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<sup>29</sup> Formulated by the CPC, in accordance with Art. 28(3) LPC in connection to Art. 25 LPC 145/10 I 136/11, during a meeting held on 26 November 2011; they comply with the Official Journal 56, 5.3.2005 pages 24-31, Celex52005XC0305(02).

<sup>30</sup> Commission Notice on restrictions directly related and necessary to concentrations.

<sup>31</sup> Communication from the Commission, Notice — Guidelines on the application of Article 81(3) of the Treaty.

<sup>32</sup> Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings.

<sup>33</sup> Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004Text with EEA relevance.

### III. Assessment of agreements concluded between undertakings

In accordance with the Law on the Protection of Competition, all agreements concluded between undertakings, decisions taken by their associations and concerted practices which have as their object or effect the distortion of competition, are prohibited by law. Article 7 LPC enumerates prohibited practices as those that:

1. directly or indirectly fix purchase or selling prices or any other trading conditions;
2. limit or control production, markets, technical development or investments;
3. share markets or sources of supply;
4. apply dissimilar conditions to equivalent or similar transactions with other trading parties, thereby placing them at a competitive disadvantage;
5. make the established agreements subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements.

The aforementioned prohibition shall not apply to agreements, decisions of associations of undertakings and concerted practices which contribute to the promotion of the production or distribution of goods and services or to the promotion of technical or economic progress. This is so provided that consumers receive a proportionate share of the resulting benefits and that the practices do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives. The given practice can also not afford such undertakings the possibility to eliminate competition with respect to a substantial part of the products or services in question.

As an exception, and when necessary to protect the public interest related to the application of Article 7 LPC, Commission for the Protection of Competition may, acting on its own initiative, established by means of a decision that this article is not applicable to an agreement, a decision of an association of undertakings or a concerted practice because the conditions of Article 7(1) LPC are not fulfilled or because the conditions of Article 7(3) LPC are satisfied.

The CPC initiated in 2011 one *ex officio* procedure and conducted two misdemeanor proceedings for the existence of a prohibited agreement. The latter include:

1. Decision no. 08-5 of 04 July 2011 on the existence of a prohibited agreement in an *ex officio* procedure against Macedonia's National Federation of Agencies for Temporal Employment, as well as other

temporal employment agencies such as *Partner*, *Next Level*, *Lizing*, *ESL*, *Trenkvalder*, *DEKRA employment*, *CLR Ltd* and *Aksios Vardar*. The decision determined that the above mentioned undertakings have signed a prohibited agreement and/or engaged in a concerted practice the purpose of which was the prevention, restriction or distortion of competition in the market for the provision of employment mediation services in the territory of the R.M.. During a meeting of the Federation, the parties jointly agreed upon a recommended minimum fee to be charges by the Federation's members to employers. By doing so, they indirectly fixed the prices of employment mediation services provided by these agencies. Therefore, they committed a violation of Article 7(1(1)) LPC. The decision of the CPC was appealed initiating an administrative dispute before the Administrative Court<sup>34</sup>.

2. Decision no. 8-158/5 of 12 September 2011 on the existence of a prohibited agreement in *ex officio* proceedings against *Avto Moto Sojuz* (Macedonia's Drivers Union) and the Auto-school center *Boro Petrusevski* Skopje. It was determined therein that the aforementioned entities concluded a prohibited agreement and/or engaged in a concerted practice whereby their adopted decisions/price lists (establishing prices for technical inspections of motor vehicles and trailers), had been earlier mutually agreed upon. The parties had thus directly fixed the selling price for the service known as 'technical inspection of motor vehicles and trailers in the territory of the R.M.' with the aim of preventing, restricting or distorting competition in the relevant service market, which have violated Article 7(1(1)) LPC.

In 2012, the CPC adopted two decisions in administrative proceedings that determined the existence of a prohibited agreement:

1. Decision no. 08-1 of 09 January 2012 on the existence of a prohibited agreement in proceedings initiated *ex officio* against *Digi Plus Multimedia Ltd* Skopje and *Discovery Communications Europe Ltd* UK. It was determined therein that the parties concluded on 9 November 2009 a contract incorporating discriminatory provisions (parties apply dissimilar conditions to equivalent or similar legal transactions with other trading parties) which put other trading partners at a competitive disadvantage. The practice concerned the market of documentary/ educational channels with a Macedonian translation broadcast in the R.M.. They have thus been found to have committed a violation of Article 7(1(4)) LPC.
2. Decision no. 08-1 of 24 February 2012 on the existence of a prohibited agreement in *ex officio* proceedings against *Digi Plus Multimedia Ltd*

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<sup>34</sup> For more details see [http://www.kzk.gov.mk/eng/zapis\\_decision.asp?id=20](http://www.kzk.gov.mk/eng/zapis_decision.asp?id=20).

Skopje and *Fox International CHANNELS EOOD* Bulgaria. The decision determined that the parties concluded on 28 October 2009 a contract on the terms of channel distribution, the purpose or effect of which was to distort competition. The agreement contained two provisions whereby the contracting parties were to apply discriminatory terms for the same or similar legal matters with other trading parties. The practice had therefore put the latter at a competitive disadvantage on the market for movie channels with a Macedonian translation broadcast in the R.M.. By so doing, the aforementioned entities have violated Article 7(1(4)) LPC (Official Gazette of the R.M. No. 04/05, 70/06 and 22/07).

The CPC's Commission deciding on Offences<sup>35</sup>, initiated *ex officio* 6 misdemeanor procedures in 2012 for determining the existence of a prohibited agreement but, ultimately, adopted only 3 decisions in misdemeanor proceedings that determine the existence of a prohibited agreement:

- Decision No. 09-7/4 of 29 February 2012 on the existence of a prohibited agreement in proceedings initiated *ex officio* against five driving schools which participated (1 March 2006 to 31 December 2010) in a price fixing agreement for candidate training services taking the B Category driving exam in the Municipality of Strumica.
- Decision No. 09-12/41 of 10 May 2012 on the existence of a prohibited agreement in proceedings initiated *ex officio* against *Alkaloid Cons import-export Ltd* and “*Dr. Panovski*” joint stock companies. The decision determined that the above wholesalers engaged in tender rigging as companies that engage in the trading of medicine in the R.M.. The agreement concerned tenders undertaken by the PHI University Clinic for Radiotherapy and Oncology, Skopje and the PHI Clinical Hospital ‘DR Trifun Panovski’ Bitola in 2008, 2010 and 2011. The participants were found to have deliberately replaced free market competition by their practical cooperation meant to restrict competition by direct or indirect price fixing.
- Decision No. 09-17/21 of 04 October 2012 on the existence of a prohibited agreement in proceedings initiated *ex officio* against, once again, *Alkaloid Cons import-export Ltd* and ‘*Dr. Panovski*’. It was found that the aforementioned wholesalers engaged in a concerted practice and coordinated their drug distribution activities in the R.M. in tenders undertaken in 2011 by the PHI University Clinic for Radiotherapy and Oncology, Skopje; the PHI Pediatric Clinic Skopje; the PHI University Clinic of Hematology, Skopje; and the PHI Clinical Hospital ‘DR.Trifun Panovski’ Bitola. As such, they substituted effective competition in the relevant market by way of their concertation. They intended to distort competition through the

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<sup>35</sup> The Commission deciding on Offences functions within the CPC.

direct or indirect fixing of selling prices etc. They thus violated Article 59(1(1)) in connection with Article 7(1) LPC and Article 27(1) LPC (Official Gazette No. 62/06 51/11).

## **IV. Abuse of a Dominant Position**

### **1. Introduction**

The Law for the Protection of Competition prohibits any abuse of a dominant position by one or more undertakings on the relevant market or its essential part. Provisions on dominant market position and distortion of competition are contained in Chapter Two of this act including, most importantly, Articles 10 and 11 which deal with abuse of dominant position. The applicable relevant geographical market is delineated as the territory of the R.M. or a substantial part thereof, depending on the nature of the product involved. It should be noted that holding a dominant position is not prohibited per se in Macedonian law – the ban only concerns cases where the abuse is evidenced in accordance with the prescribed law.

### **2. Legal framework on the abuse of a dominant position**

The LPC envisages six situations amounting to an abuse of a dominant position when two or more undertakings:

- are directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- are limiting production, markets or technical development to the prejudice of consumers;
- are applying different conditions to equivalent (or similar) legal transactions with other trading partners, thereby placing the latter at a competitive disadvantage;
- are making the conclusion of agreements subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements;
- unjustifiably refuse to deal or encourage and request other undertakings or their associations not to purchase or sell goods and/or services to/from a certain undertaking, with the intention to harm that undertaking in a dishonest manner;

- unjustifiably refuse to allow others access to the dominant undertaking's network or other infrastructure facilities (despite adequate remuneration) provided that without such access the requesting entity becomes unable to operate as a competitor on the relevant market as a result of existing legal or factual reasons<sup>36</sup>.

### 3. Case law regarding the abuse of a dominant position

The Commission for the Protection of Competitions initiated three misdemeanor procedures in 2011 and rendered five misdemeanor decisions imposing fines for the abuse of a dominant position. The latter include:

1. Decision no. 09-13/3 of 4 March 2011 in proceedings initiated *ex officio* against *ONE* under Article 47(1)(2) LPC. The case concerned the abuse of a dominant position held by the telecoms operator ONE, Skopje on the market for call termination on ONE's public mobile communication network. ONE directly imposed in the territory of the R.M. unfair selling prices to those of its subscribers who have activated 'voice mail' (starting from the moment of establishing the call, i.e. from the moment of the activation of the IVR for leaving messages, where the voice message was part of the service and was subject to the interval that has been charged). The CPC fined the offender 249,000 EUR.
2. Decision no. 09-15/8 of 16 March 2011 in proceedings initiated *ex officio* against *EVN* for the violation of Article 47(1)(2) LPC as an undertaking with a dominant position in the market for the supply of electricity to consumers in the territory of the R.M.. The company was found to have abused its position during the period of time between 27 May 2006 and 28 February 2008 by imposing unfair trading conditions (monthly bills for electricity included an administrative fee in the fixed amount of 0,097560 cents). The CPC fined EVN 498,000 EUR.
3. Decision no. 09-5/5 of 21 April 2011 in proceeding initiated *ex officio* against *Makedonski Telekom JSC*, Skopje for an offence under Article 47(1)(2) LPC in relation with Article 14(2) LPC of 2005<sup>37</sup>. The CPC found that *Makedonski Telekom JSC*, an enterprise which held a dominant position in the market of fixed public telephone networks and services in the territory of the R.M., has abused its position between 1 July 2006 and 28 February 2007 by directly imposing unfair trading conditions on the territory of the R.M. Detailed monthly bills provided to its subscribers contained a special fee to cover the costs of preparing the bill in a fixed

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<sup>36</sup> Article 11 LPC.

<sup>37</sup> Law for protection of Competition, Official Gazette of RM, No. 4/05, Article 14.

- amount of 0,097560 cents for minimum package subscribers; 0,406504 cents for residential customers; and 0,813008 cents for business users. The CPC fined the offender 998,000 EUR.
4. Decision no. 09-1/13 of 24 June 2011 in a procedure initiated upon the request of a Public Utilities Entity (hereafter, PUE) *Komunalec Pehcevo* against the PUE '*Usluga*' *Berovo* for the latter's offense under Article 59(1)(2) LPC. This case dealt with the abuse of dominance with respect to the supply of drinking water to two villages (Umlena and Robovo) in the period of time between 1 October 2006 and 2 September 2009. The offender delivered to the PUE *Komunalec Pehcevo* m<sup>3</sup> of drinking water charging the latter retail rather than wholesale prices. This was seen as a direct imposition of unfair selling prices which is prohibited by Article 11(2)(1) PC. The CPC imposed a fine of 975,6097561 EUR.
  5. Decision no. 09-3/11 of 26 September 2011 against PUE *Ohridskikomunalec* for the violation of Article 59(1(4)) LPC related to Article 11(2)(1) LPC. The offender, which held a dominant position in the market for the management of a cemetery in the Municipality of Ohrid, abused its position between 25 May 2010 and 4 January 2011 by directly imposing unfair trading terms. The dominant company unjustifiably imposed, an additional charge of 615,000 EUR per month for maintaining public hygiene of the overall infrastructure, which the funeral services operator uses when performing a funeral. CPC fined the offender 1 951,2195 EUR.

The difference between a dominant position of one company and concentrations lies with the number of undertakings. While, in the above case the abuse was exercised by a single entity, presented below are cases where the infringement of competition rules derived from multiple companies.

In 2012, the CPC adopted only 1 decision in administrative proceedings establishing the existence of an abuse of a dominant position:

1. Decision no. 08-358/2 of 05 December 2012 based upon a request for the initiation of Procedure No.17 -35 /1 of 12 March 2003, submitted to the Macedonian Office of Monopoly by *Fokusnet LLC*, Stip against *Macedonian Telekom AD*, Skopje. The request concerned abuses of dominance under Article 25(8(1)) of the Act against limiting Competition (Official Gazette No. 80/99, 29/02 and 37/04). The decision acknowledged and determined that the offender held a dominant market position as the incumbent operator in the R.M. Between 01 September 2001 and 18 December 2002, the incumbents was found to have jeopardized the competitive opportunities of Fokusnet LLC in a certain geographic area (including city of Veles etc), hampering the latter's provision of public telecommunications services. The decision was appealed to the Administrative Court of Macedonia; proceedings are ongoing.

In 2012, the CPC's Commission for Offences led 4 misdemeanor procedures for the existence of an abuse of a dominant position and brought forth one criminal procedure that found an abuse of dominance:

1. Decision No. PP. 09-3 of 14 August 2012 in proceedings initiated upon request of *ECO CLUB LTD Bitola* (an enterprise engaged in the collection and transport of hazardous waste), against the Public Enterprise *Komunalec Bitola*. It was determined therein that the latter held a dominant position in the market for the disposal of municipal non-hazardous waste in the territory of the city of Bitola and surrounding areas, which according to the principle of proximity set in the Law on Waste Management (Official Gazette of the R.M. No. 68/04, 107/07 and 143/08) gravitate towards Bitola. Regarding the disposal of municipal hazardous waste, the offender was the sole company managing the landfill Meglenci, the only site in the specified geographical market. It abused its position between 12 November 2011 and 12 December 2011 by unjustifiably refusing access to this site to ECO CLUB LTD Bitola. The offender committed a violation of Article 59(1(2)) of the Law on Competition – Abuse of a dominant position within the meaning of Article 11(2(6)) of this Act. The offender was sentenced to a fine of 1951, 219 EUR to be paid within a specified period of time.

## V. Concentrations

### 1. Introduction

The third chapter of the Law on the Protection of Competition is dedicated to concentrations<sup>38</sup>. Under Article 12 LPC, a concentration shall be deemed to arise where a change of control on a lasting basis results from:

- the merger of two or more previously independent undertakings or parts of undertakings, or
- acquisition of direct or indirect control of the whole or parts of one or more other undertakings by
  - one or more persons already controlling at least one undertaking, or
  - one or more undertakings,

whether by purchase of securities or assets, by means of an agreement or in other manner stipulated by law.

Concentrations, be it via mergers or acquisitions, are meant to improve the effectiveness of the participants' business. By joining, they might, however,

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<sup>38</sup> Articles 12-25 LPC.

establish a dominant position in a particular market – its abuse may in turn violate competition. From a legal point of view, the participants of a merger or acquisition may, or may not, lose their legal independence. However, the loss of legal independence is not as important as the fact whether their economic power will change as a result of the concentration. Participants are thus obliged to notify the relevant competition body of the planned operation for the latter to verify whether the notified concentration can restrict or eliminate market competition or whether it is within the permitted parameters.

## 2. Legal framework on concentrations

In accordance with the LPC, those intending to participate in a concentration are obliged to send a notification to Macedonia's Commission for the Protection of Competitions if a change of control is to occur. A notification must take place if the following conditions are met:

1. the aggregate turnover of all participants, generated by the sale of goods and/or services in the world market, amounts to at least 10 million ERU (equivalent in MKD according to the exchange rate of the day when the annual account was compiled), realized in the business year preceding the concentration; provided that at least one participant is registered in the R.M., and/or
2. the aggregate turnover of all participants, generated by the sale of goods and/or services in the R.M., amounts to at least 2.5 million ERU (equivalent in MKD according to the exchange rate of the day when the annual account was compiled), realized in the business year preceding the concentration, and/or
3. The market share of one of the participants amounts to more than 40%, or the total market share of all participants amounts to more than 60% in the year preceding the concentration.

The CPC received 22 notifications in 2011 and adopted 18 decisions concerning concentrations, all of which determined that the operations were in compliance with the LPC. They will thus only be introduced briefly in this paper.

## 3. Case law regarding concentrations

Decision no. 08-74 of 13 October 2011, the concentration between *Acibadem Saglik Hizmetleri Tidzaret* on the one hand, and *Clinical Hospital SISTINA*, Skopje and *Association of Commerce and services for medical equipment Acibadem Sistina Medical Company Ltd.*, Skopje on the other hand. Although

it was said to fall under the provisions of the LPC, the operation was deemed to not result in a significant prevention, restriction or distortion of effective competition in the market or its significant part, particularly as a result of the creation or strengthening of a dominant position of the participants. It was in accordance with the Article 19(1(2)) LPC;

Decision no. 08-68 of 28 September 2011 pursuant to Articles 28 and 19 LPC and following the notification of a concentration between China's *Wolong Holding Group Co. Ltd.* on one hand, and *ATB Austria Antriebstechnik Aktiengesellschaft* on the other side. Notification lodged by Wolong Holding Group Co. Ltd.;

Case no. 08-41 of 26 January 2011 regarding the concentration between *Silgan Holdings Inc.* (USA) and *Drisht for Manufacture of tin containers and Trade Vogel and Noot Beijing Ltd.* based in Bitola, Macedonia. The participants were active in the market of metal cans and cans made of white sheet. The CPC found that although the concentration did fall under the provisions of the LPC, it would not notably prevent, restrict or distort effective competition in the market or its substantial part;

Case no. 08-42 of 26 January 2011 on the concentration between *GOFI-group of finance and investment SA* (Switzerland), *Euronetkom LLC* (Kosovo) and *Euronetkom* (Albania);

Case no. 09-76 of 6 December 2011 on the concentration between *Coca Cola Beverages holdings II BV* (Netherlands) and *Brau Union AG* (Austria) on the one side, and the Skopje brewery *Joint Share Company* (Macedonia), on the other side;

Case no. 08-78 of 12 September 2011 on the concentration between *EVN Macedonia Elektrostpanstvo*, a Macedonian stock company for the distribution of electricity on the one hand and *sovtverskiAlbnor Company Ltd.*, a Macedonian producer of electricity and computer services, on the other side. The participants were active in the electricity market.

The CPC adopted 22 concentration decisions in 2012. Not unlike in 2011, all cases were found to fall under the provisions of the LPC but would not result in a significant prevention, restriction or distortion of effective competition in the market or its substantial part, especially as a result of the creation or strengthening of a dominant position of the participants. They include:

Decision no. 08-82 of 10 January 2012 on the concentration between *Metinvest BV* (Netherlands) on the one hand and, on the other hand: *Brandfeld Fajmens Ltd.* (Cyprus), *Vernan Servisis Ltd.* (Cyprus); *Lasartiko Holdings Ltd.* (Cyprus); *Stransten Holdings Ltd.* (Cyprus); *Investments Ltd Rojver.* (Cyprus); *Sitler Management Ltd.* (Cyprus); and *Barlenko Ltd.* (Cyprus);

Case no. 08-81 of 23 January 2012 on the concentration between Macedonian companies *NEAR LLC* and *Third Macedonian Brigade* on the one side, and

*ANI CABLE CAT Ltd.* on the other side. Merging parties were active in the market providing transmission services of audio – visual content to end users;

Case no. 08-89 of 23 January 2012 on the concentration between Open Joint Stock Company *Silovi Machines – ZTL, LMZ, Elektrosila, Energomashekспорт* (Russia) on the one side, and Open Joint Stock Company *Energomashinostroitelnij Allianz* (Russia) on the other. Merging parties were active in the market for the production and wholesale of boilers for power generation in power plants.

Case no. 08-87 of 7 February 2012 on the concentration between the physical person *BLAGOY Mehandziski* (R.M.) on the one hand, and *Zegin LLC* (R.M.) on the other side. Participants were active in the wholesale market of pharmaceutical products.

## VI. State aid

### 1. Legal framework

The legislation on State aid currently in force<sup>39</sup> is the Law on State Aid Control (hereafter, LSAC) which entered into force in 2010<sup>40</sup>. The act regulates: forms of State aid, general conditions and rules for notifying State aid as well as its assessment and monitoring. The objective of the LSAC is to establish a legislative framework for notification, approval, granting and monitoring of State aid in order to implement the principles of market economy, providing free competition and fulfilling the obligations undertaken by the R.M. through ratified international treaties containing provisions on State aid<sup>41</sup>.

According to Article 2 LSAC, the legislation is applicable to any form of subsidy granted by State aid providers, irrelevant of whether it is granted under an aid scheme or as an individual measure. The LSAC is applicable provided the aid may affect the trade inside the R.M.; trade between the R.M. and the European Union; or trade between the R.M. and other countries which together with the R.M. are parties to ratified international agreements containing provisions on State aid<sup>42</sup>. Article 2 LSAC states also that the provision will not be applicable to State aid granted in the agriculture and

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<sup>39</sup> Law on State Aid, Official Gazette of the R.M., 24/03, 70/06 and 55/07 are no longer in force.

<sup>40</sup> Law on State Aid Control, Official Gazette of the R.M.145/10 which replaces the Law on State Aid, Official Gazette of RM, 24/03, 70/06 and 55/07.

<sup>41</sup> Article 2 LSAC.

<sup>42</sup> Article 3 LSAC.

fisheries sectors<sup>43</sup>. Importantly, the last paragraph of Article 2 states that during the assessment of the forms of State aid that may affect the trading relations between the R.M. and the EU, in accordance with Article 69 of the Stabilization and Association Agreement, the criteria arising from the proper application of EU State aid rules shall be applied accordingly. Based on a governmental report, the participation of State aid in Macedonia's 2011 GDP was 0,19%; the total amount awarded in 2011 was 13, 002888992 euro.

The LSAC is characterized by the fact that it simplifies relevant administrative procedure. The year 2011 can be noted for the increase in the number of State aid decisions issued in Macedonia due to the need to improve the qualification of the given aid.

### 1. By-laws

On 15 December 2003, the Macedonian Government adopted as set of by-laws to the Law on State Aid of 2003 including: Regulation on establishing conditions and procedures for granting regional aid<sup>44</sup> (under Article 6(4) of the Law on State Aid of 2003); Regulation on the forms and procedure of notification to the state aid commission and for assessment of state aid<sup>45</sup> (under Article 11(2) of the State Aid Law of 2003); and Regulation on establishing conditions and procedure for granting aid for rescue and restructuring of firms in difficulty<sup>46</sup> (under Article 8 of the State Aid Law of 2003).

Pursuant to Article 5(2) and in accordance with Article 5(1(b)) of the Law on State Aid of 2003<sup>47</sup>, the Government adopted also on 27 December 2007 a Regulation on establishing conditions and procedure for granting horizontal Aid<sup>48</sup>.

A number of additional regulations were issued in 2008 and 2009. They formed one of the bases for the Macedonian Parliament to adopt the new Law on State Aid Control of 2010.

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<sup>43</sup> Article 3(2) LSAC.

<sup>44</sup> Regulation on establishing conditions and procedures for granting regional aid, Official Gazette of the R.M. No. 15/12/2003.

<sup>45</sup> Regulation on the forms and procedure of notification to the state aid commission and for assessment of state aid, Official Gazette of the R.M. No. 15/12/2003.

<sup>46</sup> Regulation on establishing conditions and procedure for granting aid for rescue and restructuring of firms in difficulty, Official Gazette of the R.M. No. 15/12/2003.

<sup>47</sup> Law on State Aid, Official Gazette of the R.M., 24/03; 70/06; and 55/07.

<sup>48</sup> Regulation on establishing conditions and procedure for granting horizontal Aid, Official Gazette of the R.M. No. 157 (27th December 2007).

## 2. Case law in the area of State Aid

The Commission for the Protection of Competition adopted two decisions in 2011 that determined that the notified measures did not constitute State aid within the meaning of the Law on State Aid Control:

- Decision no. 10-43 of February 2011 on the use of budgetary funds by the Macedonian Bank for Support and Development for credit servicing due to interest costs arising from a governmental decision (Official Gazette No. 103/10), and
- Decision no. 10-64 of June 2011 on the award of state guarantees to *JSC MEPSO* in order for it to gain a loan from international financial institutions. It was determined therein that the state guarantee did not constitute state aid under Article 5(1) LSAC because it did not distort market competition.

Mentioned must also be a case where the CPC decided that the notification duty should only apply to existing, and continuing aid granted prior to the entry into force of the Law on State Aid of 2003.

With the Decision no. 10-209/12 of 27 August 2008, the CPC initiated a formal investigation of an individual aid granted by the Ministry of Transport and Communication to *Ramstore Makedonija DOO*, Skopje. The aid took the form of a contract signed on 12 December 2003 (No. 16-11096) for the transfer of State owned land with the surface of 19866m<sup>2</sup>. The CPC concluded that the Ministry was a State aid provider and *Ramstore Makedonija DOO* was a recipient of the aid. Assessing the aid itself, the CPC concluded that the day of the conclusion of the contract (12 December 2003) was simultaneously the date of the provision and termination of the provision of the aid. According to Article 2 of the Regulation on the Forms and Procedure of the Notification to the State Aid Commission and for Assessment of State aid<sup>49</sup>, only existing and continuing aid granted prior to the entry into force of the Law on State Aid of 2003, but not prior to the entry into force of the Stabilization and Association Agreement and the Interim Agreement on Trade and Trade related Matters, should be notified to the CPC. This is the case for individual aid not bound by the obligation to submit a notification for existing aid, foreseen in Article 2 of the Regulation on the Forms and Procedure of the Notification to the State Aid Commission and for Assessment of State aid. The CPC concluded that the Law of 2003 cannot apply to this aid because while the latter was granted before the legislation came into force on 01 January 2004, the aid was discontinued after that date. Incidentally, the CPC decision can be appealed to the administrative court within 30 days from the day of receiving this decision.

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<sup>49</sup> Official Gazette of Republic of Macedonia, No. 81/03.

Research on State aid granted in the R.M. in 2012 shows that it is largely awarded to support projects that have direct impact on the national economy via the promotion of economic development in geographic areas where the standard of living is extremely low, or areas characterized by high unemployment. On the one hand, it is State assistance for regional development which supports foreign investment in the R.M. On the other, through different development programs, especially those undertaken by the Ministry of Economy, the government uses the mechanism of State support and assistance to participate in the development of cluster association, the implementation of industrial policy or the support and development of SMEs. The government uses State aid also to assist the country's various areas in the framework of its Operational Plan and active employment measures for 2012–2013 implemented by the Ministry of Labor and Social Policy.

## **VII. Other issues related to competition law in the R.M. (sector analysis)**

### **1. Analysis of the market for advertising in electronic media (TV)**

In 2011, the Commission for the Protection of Competition has launched for the first time a market enquiry directed at television advertising (covering in particular the period of time when political parties are advertising their programs). It is worth mentioning that the CPC has a duty to cooperate with other (non-governmental and governmental) bodies on matters relating to the protection of competition. In 2012, it introduced the results of its successful cooperation with the European Commission, the Agency for Electronic Communications, Bureau of Public Procurement etc.

### **2. Analysis of the banking sector**

The CPC has a yearly duty to monitor and analyze the conditions of competition in the banking sector. The CPC has initiated procedures on agreements, decision of associations of undertakings or concerted practice as well as on the abuse of dominance in this sector. It also received a number of notifications of concentrations in accordance with the provisions of the LPC. With respect to the latter, the CPC found in 2012 that the notified concentrations were consistent with Macedonian competition law – although falling under the provisions of the LPC, they did not notably prevent, restrict

or distort effective competition in the market or its significant part, especially as a result of the creation or strengthening of a dominant position of the participants. Incidentally, two out of the three concentrations concluded through direct acquisition of control by a foreign bank of another foreign bank, were achieved through a merger or acquisition of two domestic banks.

## **VIII. Conclusion**

Competition protection is a legal issue that has been subject to constant amendments at the EU level. Hence, the monitoring and adjusting of respective national legislation is a continuous process and the main task of Macedonia's Commission for the Protection of Competition. The responsibility for an effective implementation of harmonized competition law is currently shared between the CPC and the Administrative Court. Both institutions continue to carry out tasks meant to enable Macedonia to become a full member of the EU, keeping in mind that competition protection is of vital importance in this context.