Albania

Denis Selimi and Guenter Bauer
Wolf Theiss

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The legal basis for regulating merger control in Albania is found mainly in Law No. 9,121 on the protection of competition dated 28 July 2003 (the Competition Act), published in Official Gazette No. 71 of 2003, which aims to protect free and effective competition. The Competition Act has been amended by Law No. 10,317 dated 16 September 2010, published in Official Gazette No. 135 on 7 October 2010. The amendments became effective as of 23 October 2010.

The Competition Authority (the Authority), with the Competition Commission as its decision-making body, is principally responsible for the enforcement of the Competition Act.

Scope of legislation

2 | What kinds of mergers are caught?

Under the Competition Act, any of the following causing a lasting change of control would constitute a merger:

- the merger of two or more undertakings, or parts of undertakings, which previously were independent of each other;
- any transaction in which an individual having control over an undertaking, or one or more undertakings, acquires, directly or indirectly, a controlling interest in all or parts of one or more undertakings; or
- the establishment of a new joint company acting as an independent economic unit.

3 | What types of joint ventures are caught?

The establishment of joint ventures is caught by the Albanian merger control rules if the new joint venture company will be acting in the market on a lasting basis as an independent economic unit.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

Pursuant to the Competition Act, control may be acquired by rights, contracts or other means that, either separately or in combination, on a legal or factual basis, confer the possibility of exerting decisive influence on the activities of an undertaking, in particular by means of:

- ownership or the right to use all or part of the assets of an undertaking; or
- rights or contracts that allow the holder to decisively influence the composition, voting, or decision-making of the corporate governance bodies of an undertaking.

Control may also be exercised by a minority shareholder if the shareholding to be acquired confers the possibility of exercising decisive influence on an undertaking in the ways described above. However, Albanian merger control is only applicable in cases of an acquisition of joint or sole control. An acquisition of non-controlling minority participations in an undertaking and other interests less than control do not fall within the scope of Albanian merger control.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A merger will be subject to Albanian merger control law and has to be notified to the Authority if the undertakings concerned generated the following turnover in the business year preceding the concentration:

- combined worldwide turnover of more than 7 billion leks and domestic turnover of at least one of the undertakings concerned of at least 200 million leks; or
- combined domestic turnover of more than 400 million leks and domestic turnover of at least one of the undertakings concerned of at least 200 million leks.

The turnover to take into account is income generated by an undertaking's ordinary activities, after deduction of taxes or fees directly related to income. There are rules specific to credit or financial institutions. If an undertaking is part of a group, the group's overall external turnover needs to be taken into account.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The notification of a merger to the Authority is mandatory if the turnover threshold criteria are met.

The Competition Act provides for an exception to the application of the Albanian merger control regime where financial, credit or insurance institutions acquire shares in undertakings for the purpose of resale, provided that the acquirer does not exercise the voting rights related to the acquired shares and the resale occurs within one year of the acquisition.

7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers must be notified and clearance by the Authority is required, even in cases where the undertakings involved in the merger are domiciled abroad, provided that the notification thresholds set out above are met.

The Competition Act expressly states that it applies to all undertakings, whether domestic or foreign, whose activities have a direct or indirect effect on the Albanian market. The Competition Act does not define the concept of effect. In practice, the Authority generally considers that a merger has an effect on the Albanian market even where the undertakings concerned do not have a direct presence in Albania (through subsidiaries or branch offices) or when the undertakings concerned are indirectly active in Albania (through imports or sales to independent local distributors) and thereby meet the turnover threshold test.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no specific rules on foreign investments.

Approval or at least a notification of acquisitions of interests above or below certain thresholds is required for the energy, banking and the insurance sectors, or with regard to public companies.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Notifiable concentrations must be notified within 30 days of the date the merger agreement, or the agreement pursuant to which a controlling interest is acquired, is entered into, or from the date of publication of the public offer to purchase or exchange shares.

If the undertakings that are required to notify the merger fail to duly file within the set deadline (late filing), the Authority may impose fines of up to 1 per cent of their annual turnover generated in the last completed business year. In the past, the Authority has imposed a fine on a foreign company for failure to file in time with respect to a merger that consisted of the acquisition of an Albanian company.

In recent cases, the Authority has accepted a (short) notification letter to meet the filing deadline, provided that a regular notification of the concentration was then submitted within a certain period of time allowed by the Authority.

10 Which parties are responsible for filing and are filing fees required?

The obligation to file the notification with the Authority rests with the merging parties and the undertaking acquiring a controlling interest in (the whole or part of) one or more other undertakings.

Upon receipt of the notification, the Authority confirms the completeness of the filing with a written certificate. If the Authority considers the notification to be incomplete, it will require the submission of any additional information that it deems necessary to review the notification within a certain period.

The Authority has issued a regulation according to which the following fees are due:

- merger filing fee: 7,500 leks or 15,000 leks, depending on whether or not the domestic turnover of the acquirer exceeds 1 billion leks;
- authorisation of a temporary implementation of a merger: 150,000 leks or 300,000 leks, depending on whether or not the domestic turnover of the acquirer exceeds 1 billion leks; and
- approval of a merger: 250,000 leks or 500,000 leks, depending on whether or not the domestic turnover of the acquirer exceeds 1 billion leks.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Mergers that meet the notification threshold criteria and thus require notification to the Authority must not be implemented prior to clearance by the Authority (suspension obligation).

The Authority assesses notified concentrations either in preliminary proceedings (Phase I) or in an in-depth investigation (Phase II).

Phase I proceedings apply to mergers that will probably not lead to a substantial lessening of competition in the relevant market or part of it. In preliminary proceedings, the Authority has to decide on the merger within two months of the working day following the confirmation of receipt of a complete notification. In June 2016, the Authority introduced fast-track proceedings for certain types of concentrations that do not raise competition concerns. These fast-track proceedings enable the Authority to clear straightforward concentrations within 25 days of the working day following the confirmation of receipt of a complete notification.

If, however, in the course of the proceedings, the Authority believes that the notified transaction raises competition law concerns, it may decide to initiate Phase II investigations, or to authorise the merger only under certain conditions. To that end, the parties may suggest (within one month of the notification) certain measures to the Authority to mitigate the possible negative effects of the merger on the market. If the parties offer commitments to the Authority, the time limit is extended by two weeks. If a decision is not issued by the Authority within two months (plus the extended term of two weeks, as the case may be), clearance is considered to be granted.

In Phase II, the Authority investigates the case and has to issue a decision within three months of the start of an in-depth investigation. The deadline can be extended by up to one month if the parties – within two months of the start of the in-depth proceeding – offer to take certain steps to mitigate the possible effects of the merger on the market.

The Authority may suspend the time frame of the proceedings if the proceedings are impeded by the undertakings concerned (in particular, if the parties do not provide the information requested by the Authority within the time limit set; the parties refuse to submit to investigations carried out by the Authority; or the parties did not inform the Authority about changes of facts contained in the merger filing).

Upon request, the Authority may also temporarily approve the merger if such request is justified as otherwise irreparable damage would be caused to the undertakings concerned or to third parties and under consideration of the overall goal of protecting competition.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The Authority may impose fines on the undertakings concerned if they close the transaction before receiving clearance and for late filing, or failure to notify.

Under Albanian merger law, late filing, failure to notify, and the submission of incorrect, incomplete or misleading information to the Authority, is considered a non-serious infringement. In such cases, the Authority may impose fines up to 1 per cent of the aggregate turnover of an undertaking concerned in the previous financial year. Absent a filing, the implementation of concentrations that result in a restriction of competition in the market is considered a serious infringement and may be subject to fines of up to 10 per cent of the aggregate turnover in the previous financial year. The law does not specify any further requirement other than that the implementation of the concentration must result in a restriction of competition to qualify as a serious infringement. It remains to be seen how the Authority will interpret this requirement in practice.

In determining the amount of the fine, the Authority will take into account the financial gain resulting from the violation of the Competition Act; this amount shall be taken as the minimum amount of the fine. If a fine is imposed on a group of undertakings, the amount of the fine shall not exceed 10 per cent of the aggregate turnover generated in the market concerned by the infringement in the preceding business year.

Furthermore, the merger is deemed to be void if implemented without clearance or if conditions to which the merger authorisation is subject have not been fulfilled.

In 2009, the Authority imposed a fine of 2.6 million leks on a company that had violated the merger filing obligation. Other possible remedies, such as structural sanctions, were not imposed. In 2014, the Authority imposed a fine on a company for failure to notify amounting to 100,000 leks. That is in line with two cases in 2012 where the Authority imposed fines on two companies for failure to notify, amounting to 100,000 leks each.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for closing before clearance are applicable also in case of foreign-to-foreign mergers. In practice, however, we are not aware of these sanctions having been applied to any such mergers to date.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Authority may authorise closing before clearance on a temporary basis. A temporary clearance may be granted if the undertakings involved in the merger would otherwise suffer an irreparable damage. The temporary clearance may, however, be issued subject to conditions that the Authority considers necessary to ensure effective competition. To our knowledge, there is no approved practice of carve-out solutions.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

Law No. 10,236 on the takeover of public companies dated 18 February 2010 sets forth special merger control rules for the takeover of Albanian or foreign public companies seated (also) in Albania and that are listed at the Albanian stock exchange. As there is no operational stock exchange in Albania, the said law remains inapplicable to date.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The Authority requires that the notification of a merger is prepared on the basis of a standard filing form; one can further refer to the guideline issued by the Authority for the relevant filing formalities (the Guideline). The Authority issued a new Guideline on 23 June 2008.

On the basis of the Guideline, the Authority has the discretion to require a short form or a full notification.

The notification must, inter alia, provide the following:

- information on the identity of the undertakings concerned and their authorised representatives (such as names and addresses);
- turnover of the undertakings concerned in the domestic market and worldwide;
- market shares of the undertakings concerned, including information on the methods for their calculation or estimation;
- information on the form of the concentration (merger, acquisition of control, etc);
- information on the controlling interests in the undertakings concerned; and
- information on the relevant product and geographical market and, where applicable, the market affected by the concentration.

The applicant is required to submit certain documents with the notification, such as the legal basis of the acquisition or merger; certificates of incorporation; financial statements and balance sheets for the preceding financial year; and analyses, reports, studies, statistics and further supporting materials upon which the information provided in the notification is based. The documents must be originals or copies certified by a notary. Documents that are not in English or Albanian must be translated into Albanian and certified by a notary. Notarial certifications not performed in Albania require an apostille or certification (otherwise known as 'legalisation') by the Albanian embassy in the respective country.

Furthermore, the notification must be accompanied by a certificate of payment of the merger filing fee. Following the filing, the Authority may request additional documents and information. When these requests are met, the Authority will issue a confirmation that the filing is complete and will start its review process.

Fines for supplying wrong or misleading information may amount to up to 1 per cent of the previous annual turnover of the undertaking concerned, which is responsible for the infringement.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Once an application is filed, the Authority examines the notification form and the supporting evidence.

If the Authority requires more information or additional documents, it will send a request to the notifying party detailing such requests and setting a deadline for the reply.

Once its information and documentary requests have been fulfilled, the Authority will complete its examination of the notification and will set out its findings in a report in which it makes the necessary recommendations. On the basis of the report, the decision-making body within the Authority issues its decision, thereby clearing or prohibiting the notified merger.

18 What is the statutory timetable for clearance? Can it be speeded up?

In Phase I proceedings, the Authority has to decide on the merger within two months of the working day following the confirmation of receipt of a complete notification. That period can be extended by another two weeks if the parties offer certain measures to the Authority to mitigate the possible negative effects of the merger on the market. In practice, it is our experience that the Authority strives to decide on the transaction within one month of the receipt of a complete notification.

In June 2016, the Authority introduced a fast-track merger control procedure for the following types of concentrations that usually do not give rise to competition concerns:

- two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no actual or anticipated activities in the Republic of Albania – such cases occur when:
    - turnover of the joint venture or of the activities contributed to the joint venture is less than 300 million leks in the territory of the Republic of Albania at the time of notification; and

- the total value of assets transferred to the joint venture is less than 300 million leks in the territory of the Republic of Albania at the time of notification;
- two or more undertakings merge, or one or more undertakings acquire sole or joint control over another undertaking, provided that none of the parties to the concentration engage in business activities in the same product and geographic market, or in a product market that is an upstream or downstream market in relation to the product markets in which any other party to the concentration is engaged;
- two or more undertakings merge, or one or more acquire sole control of an enterprise or joint company, when the two following conditions are met:
  - the combined market share of all the parties to the concentration, dealing with business activities in the same product and geographical market (horizontal relationships), is less than 15 per cent; and
  - the individual or combined market share of all parties to the concentration that are engaged in business activities in a product market that is upstream or downstream from the product market in which any other party to the concentration is engaged (vertical relationships) is less than 25 per cent; or
- upon its discretion, the Authority may also decide to apply the fast-track procedure where two or more undertakings merge, or one or more undertakings take sole control or joint control of another undertaking, and when both of the following conditions are met:
  - the combined market share of all the parties to the concentration that are in a horizontal relationship is less than 50 per cent; and
  - the increase (delta) of the Herfindahl-Hirschman Index resulting from the concentration is below 150.

Under the fast-track procedure, the Authority clears concentrations by way of a short-form decision within 25 days of the working day following the confirmation of receipt of a complete notification.

In in-depth proceedings (Phase II), the Authority has to issue a decision within three months of the start of such in-depth proceedings; this period can be extended by up to one month if the parties – within two months of the start of such proceeding – offer to take certain steps to mitigate the possible effects of the merger on the market.

The Competition Act provides that temporary clearance can be granted under certain circumstances.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Competition Act provides that a merger shall be prohibited if it leads to a significant impediment to effective competition in the market or part of it, especially if this results from the creation or strengthening of a dominant market position. The potential effects of the merger are assessed on the basis of diverse information and data relating to the Albanian market, including the market shares of the undertakings concerned and of their competitors, barriers to market entry, potential competition, demand substitutability, etc.

We are not aware of any decision where the Authority has applied the 'failing firm' defence.

20 | Is there a special substantive test for joint ventures?

The Competition Act does not establish a substantive test specific to joint ventures.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

In general, the Authority will assess whether a merger leads to a substantial lessening of competition in the relevant market or part of it. The Authority's assessment is based on a series of factors, including the market share of the companies participating in the merger and of their competitors; barriers to market entry; potential competition; the economic and financial power of the undertakings concerned; the economic dependency of suppliers and customers; the development of the distribution networks; economic relationships with other undertakings; demand substitutability, etc. Neither the Competition Act nor the Guideline (or other guidelines in Albania) specify theories of harm that the Authority investigates specifically (besides the substantial lessening of competition); however, in practice, the Authority's assessment often refers to precedents established by the European Commission. Therefore, it is not unlikely that the Authority would look at theories of harm such as coordinated effects, foreclosure, harm to innovation, etc.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The Competition Act does not expressly mention non-competition issues such as industrial policy or public interests as being relevant for the assessment process.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

When assessing a merger, the Authority may take into account any economic efficiencies (such as rationalisation of production, economies of scale, purchasing economies and technological progress) that may result from that merger, in particular those that bring about benefits for the consumers (which are set off against the negative effects deriving from the merger), where the same economic efficiencies cannot be achieved by less anticompetitive means, and the alleged efficiencies are measurable.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The implementation of a notifiable concentration without prior clearance from the Authority renders the transaction null and void.

Where a transaction has been implemented without the Authority's prior clearance, the Authority shall, besides the possibility of imposing fines, undertake a review of the transaction on its own initiative. The Authority may require that the undertakings concerned take the steps necessary to re-establish the situation as it existed prior to the transaction and, where relevant, may impose the separation of the merged undertakings, or the sale back of acquisitions and assets that have been transferred.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Authority may require certain remedies for clearance of the concentration, such as the divestiture of certain parts of the undertaking, the sale of shareholdings in other undertakings, the termination of contractual relations, the granting of licences, and behavioural remedies.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The Competition Act does not provide, and the Authority has not elaborated, specific rules concerning the conditions for and timing of the application of remedies. Whenever the Authority imposes conditions and remedies, these must be proportionate to the anticompetitive effects of the merger.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The Authority, to our knowledge, has not yet imposed any remedies in foreign-to-foreign mergers.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

In notifying a merger, the notifying undertakings are required to disclose restrictions related to the merger. The restraints directly related and necessary to the merger will be covered by the clearance of the Authority or may be subject to other conditions and remedies.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

The Competition Act requires the Authority to publish the fact that it has received a notification. On that basis, third parties may submit their comments to the Authority. In general, third parties can bring facts that they consider to be an infringement of the Competition Act to the Authority's attention.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The notifying undertakings may request that the Authority treats the information provided with the notification or obtained in the course of the review process in a confidential manner. The Authority may not disclose any commercially sensitive information or business secrets.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Authority can cooperate with antitrust authorities in other jurisdictions on the basis of bilateral agreements or simply in response to their requests.

WOLF THEISS

Denis Selimi
denis.selimi@wolftheiss.com

Guenter Bauer
guenter.bauer@wolftheiss.com

Eurocol Center, 4th Floor
Murat Toptani Street
Tirana 1001
Albania
Tel: +355 4 2274 521 / +43 1 515 10 5600
Fax: +355 4 2274 521 / +43 1 515 10 25
www.wolftheiss.com

The Authority may, however, refuse requests if the cooperation is not reciprocal or compliance with the obligation to keep commercially sensitive information or business secrets confidential would not be guaranteed.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

Decisions by the Authority may be challenged before the Tirana Court. Fines imposed by the Authority have to be challenged within 30 days.

The Authority may revoke its decision if:

- it is based on incorrect or improperly obtained data; or
- the undertakings concerned breach the obligations set forth in the authorisation of the merger.

We are not aware of any recent cases where merger control-related decisions of the Authority have been subject to judicial review by the Tirana Court.

Time frame

33 | What is the usual time frame for appeal or judicial review?

The time frame for appeal or judicial review depends greatly on the complexity of the disputed matter. In practice, taking into account the usual duration of court proceedings in general, judicial review may take as long as one or two years.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Authority has in recent years shown its general willingness to impose fines on undertakings that violate the filing obligation or the prohibition to complete concentrations prior to receipt of Albanian merger clearance (for the respective fining practice in previous years). However, no fines regarding those merger filing infringements were imposed in 2020.

Beside the area of merger control, the Authority has shown specific interest and launched investigations regarding alleged infringements of competition law, in particular in regard to the following sectors or products: trading of medical protection equipment (such as face masks and antibacterial gels), liquid petroleum gas, mobile communications, banking and insurance services, crude oil, flour production, and energy. However, only one fine was imposed in 2020.

To enhance the Authority's access to information on concentrations that infringe the filing obligation, several measures have been announced in recent years, such as the conclusion of a cooperation agreement with the trade registry under which the Authority would receive more information about acquisitions or changes of control in Albanian companies. According to a statement by the Authority, this cooperation has been implemented. The Authority receives periodical updates of ownership changes on shares and verifies whether such changes qualify as a notifiable concentration.

Reform proposals

35 | Are there current proposals to change the legislation?

We are not aware of any current proposals to change the legislation.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2020, the Authority reviewed and cleared four concentrations of which all were related to the domestic market.

Apart from these, the Authority has shown specific interest and launched investigations involving: trading of medical protection equipment (such as face masks and antibacterial gels), liquid petroleum gas, mobile communications, banking and insurance services, crude oil, flour production, taxis and energy, etc.

The impact of the coronavirus crisis is being felt in Albania. However, we are not aware that this has had any effect on the Authority's practice in merger control cases or led to any respective policy statements.

Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Albania	
Voluntary or mandatory system	Mandatory system: the filing of a notification with the Albanian Competition Authority is mandatory in cases where the applicable turnover thresholds are met.
Notification trigger/ filing deadline	Concentrations have to be notified within 30 days from the date of entering into the merger agreement or the agreement pursuant to which a controlling interest is acquired, or from the date of publication of the public offer to purchase or exchange shares.
Clearance deadlines (Stage 1/Stage 2)	A preliminary proceeding (Phase I) applies where a merger is unlikely to lead to the creation or strengthening of a dominant position in the relevant market. The Authority has to decide on the merger within two months of the working day following the confirmation of receipt of a complete notification. Since June 2016, a fast-track proceeding is available. An in-depth (Phase II) proceeding applies where the transaction gives rise to concerns regarding a dominant position being created or reinforced. The Authority must investigate the case and issue a decision within three months from the start of such Phase II proceeding (which can be extended by up to one month). If within these time limits, the Authority does not issue a decision, the concentration is deemed to be approved.
Substantive test for clearance	The Authority assesses whether the concentration may lead to a substantial lessening of competition in the market or a part thereof, especially by the creation or strengthening of a dominant position on the relevant market.
Penalties	If the undertakings that are required to notify the merger fail to duly file within the set time limits (late filing), the Authority may impose fines of up to 1 per cent of their annual turnover in the last completed business year. If the undertakings concerned close the transaction prior to clearance, the Authority may impose fines amounting to up to 10 per cent of each participating undertaking's previous annual turnover.
Remarks	Although the Albanian merger control regime is still a rather young regime, it has experienced a clear increase in activities by the Authority in enforcing merger control law (and competition law in general).