

Albania: New Draft Guidelines on the Control of Concentrations Involving Undertakings

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This post was written by Ms. Renata Leka and Mr. Erlind Kodhelaj of Boga & Associates, Tirana, Albania. The Albanian Competition Authority recently circulated for comments its new draft guidelines entitled "On the Control of Concentrations involving Undertakings" ("the Guidelines").

Key highlights

Law No. 9121, dated 28.07.2003, "On the Protection of Competition" ("the Law") requires certain concentrations to be notified to the Albanian Competition Authority. The purpose of the Guidelines is to clarify the rules to be applied in evaluating and analyzing these concentrations.

Under the Law, a concentration is deemed to arise where a lasting change of control results from (i) the merger of two or more previously independent undertakings or parts of undertakings; (ii) the acquisition, by one or more persons who are already in control of at least one undertaking, or by one or more undertakings, whether by purchase of shares or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings; or (iii) direct or indirect control of one or more previously independent undertakings or parts of such undertakings.

"Control" comprises those rights, contracts or any other means which may permit the exercising of decisive influence over an undertaking, whether separately or in combination, and having regard to considerations of fact and law. In particular, control will arise where the relevant party (i) owns or has the right to use all or part of the assets of an undertaking, or (ii) has contractual rights which confer decisive influence over the composition, votes or decisions of the official bodies of an undertaking.

Existing Albanian secondary legislation provides for concentrations to be treated in an essentially procedural fashion by the Albanian Competition Authority. The Guidelines, on the other hand, introduce and explain substantive legal ideas. They explain and distinguish the concepts of (i) "control" (including its means and object), (ii) a change of control on a lasting basis, (iii) interrelated transactions, (iv) internal restructuring, (v) sole and joint control, (vi) "undertakings concerned", (vii) net turnover and financial accounts, and (viii) the attribution of turnover (whether geographically or otherwise).

By way of example, the Guidelines provide that the acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e. a business with a market presence, and to which a market turnover can be clearly attributed. The transfer of a business's client base may fulfill these criteria if it results in the transfer of a business with a market turnover.

The Guidelines also introduce the novel concept of "control acquired by other means"; for example, where a relationship of economic dependence results in de facto control. The Authority explains that important long-term supply agreements may lead to such de facto control.

The Guidelines also clarify that, as a rule, a concentration will not arise from a temporary change of control. However, underlying agreements with a defined term may still constitute lasting change if the agreements contain provisions for their own renewal. Even without such renewal provisions, a concentration may be deemed to arise if the definite end date of the contracts is sufficiently far in the future as to effectively constitute a lasting change in control.

Moving closer towards EU legislation

The Guidelines are detailed and in many cases follow the EC notice on the control of concentrations between undertakings. They should be a helpful tool in dealing with cases which may fall under Albanian law and represent another vital step towards the harmonization of Albanian competition legislation with EU rules.