

Competition Law in Macedonia: An Important Factor for Economic Development

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Abstract

In a free market society competition law should ensure a secure economical environment for business entities. In an open market, the efforts undertaken by the businesses to create a safer and a more advantageous position are considered very common. Of course, the efforts taken by an undertaking should be performed within the legal framework when it comes to their efforts to increase production, improve product and service quality etc. Any tendency to operate outside the legal rules may harm the production of goods or products. Undertakings operating in the market can in the process of achieving their goals very often undertake actions which might limit or exclude the actions of other undertakings in the same or different market. These actions are always regarded as unfair.

1. The Meaning of Competition

The origins of the meaning of the word “competition”, comes from the Latin word “*concurrentio*”, which means opponent, competitor. For market economy conditions, the competition process is very common and is regarded as an attempt for each subject to achieve the safest and more beneficial position in the market. Each country has its own competition rules as this is part of the domestic legislation everywhere. It is understandable to say that the business entities should behave in compliance with the specified competition rules. The purpose of these rules is to ensure the free competition, as a result of which is:

- To regulate initiatives of legal entities in the market
- To ensure the normal value of production factors
- To create a balance between the production and the consumption.
- To aid domestic production and its continuous development based on the application of the technical-technological achievements in the production process.

All these advantages can influence increase of production, reduction of costs, quality of goods and products and several other advantages which have as their aim to express the rational business of the economical entities, which in general is one of the conditions for economical development.

The non regulation of the competition sector can cause the existence of the production which is not in compliance with certain market requirements. This can as a result create a hipper production of goods or insufficient production of the same which results with the elimination of needed goods, irrational production, the duplication of the capacities of production, irrational spending and variety of other consequences. This is the reason, why, each society has a duty to regulate this area according to the legal framework predicted. The purpose of doing so is to retain all advantages of the loyal competition system, affecting the removal of unwanted consequences.

In many cases, the entities that are active in the market may in specific instances violate legal provisions in their efforts to achieve specific goals. This as a result affects the consumers and business rights, and beyond everything the interests of the society in general are threatened. Therefore in such cases it is very common for the state to undertake certain measures of repressive nature.

2. The Legal Framework of Competition in Macedonia

In Republic of Macedonia the legal framework for protection of competition relates primarily to the Law for Protection of Competition and the by-laws for the implementation of the abovementioned law.

The determination to guaranteeing the freedom of trade and business, security and equal protection of the legal position of the different entities in the market, are considered as values determined by the constitution. The first part of the first paragraph of Art.37, of the Constitution of R. Macedonia is very concise about the rights that citizens have regarding the trade unions.

As follows:

(1) In order to exercise their economic and social rights, citizens have the right to establish trade unions.

Since the Constitution is the highest act in this country, this provision is a clear source that there is a right to establish a trade union. A trade union may include: a business entity, an undertaking, partnership, joint venture etc. The operationalisation of these constitutional norms is made by the Law Against Limiting Competiton. This Law has created the conditions for the realization of the constitutional guarantees for freedom of trade and business, as well as the constitutional norms for securing the equal legal position of all legal entities in the market. In order for the legal rules to be harmonized with the EU law, the new law on competition was approved. The provisions of this Law have been harmonized fully with the EU Competition rules. After the approval of this law, the monopolistic Directorate within the Ministry of Economy sized to exist and the new Commission for protection of competition as an authorized independent body was created. Its duty was to implement the Law for protection of Competition in Republic of Macedonia.

After the approval of the Law for protection of Competiton, the Government, prepared and proposed by-laws (Regulations):

1. Regulation on block exemption granted to vertical agreements on exclusive right of distribution, selective right of distribution, exclusive right of purchase and franchise
2. Regulation on block exemption granted to horizontal research and development agreements;
3. regulation on block exemption granted to horizontal specialization agreements;
4. regulation on block exemption granted to technology transfer agreements, license or know-how
5. regulation on block exemption granted to agreements on distribution and servicing of motor vehicles
6. regulation on block exemption granted to agreements in the insurance sector
7. Regulation on Agreements of Minor Importance
8. Regulation on the form and the content of the notification and criteria on concentrations' evaluation.

3. Actions Which Can Limit the Competition

The Competition may be limited not only by entering into certain agreements, but also through various decisions or concerted practices. Agreements and legal decisions as well are considered legal issues which regulate the conditions of a subject to do business and if they are oriented toward the obstruction, limitations or destroying the competition they may cause such an effect.

The concerted practice is the situation where there is no need for an enforceable agreement or a decision in a written form, but it is enough that the agreement is fulfilled in silence.

The competition can be limited also by the creation of the concentrations. Also, the competition may be limited by the abuse of the dominant position in a market, or its part from different subjects. To create a dominant position it doesn't mean that the intolerable or abandoned position should also be secured. The dominant position in the market is not prohibited per se. But if this position is going to be abused then it is considered that a competition is affected. The next article of the same Law, in an explicit way describes in details the abuse of the dominant position on the relevant market or a substantial part of it. Art 5 of the Law on Protection of Competition o.f '145/10', gives the definitions of the essential terms which are used in the competition law. In Macedonia, in the period 2005-2010 the dominant position on the market has been abused in 23 cases. A finding of an abuse of dominant position based on the procedure in six cases was initiated ex officio, while in seventeen cases was initiated by the request of the interested party. In all these cases, decisions are issued, based on which the abuse of dominant position was established.

3.1. Agreements, Decisions and Concerted Practices

All agreements concluded between subjects, decisions by the subjects and concerted practices, which have as their object or effect the distortion of competition are prohibited by law. Article 7 of the Law on Protection of Competition enumerates the following:

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 procedural order of agreements subject to 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.

In 2006 The Commission on Protection of Competition in Macedonia, analyzing the different contracts concluded by the different business entities with the consumers, has decided that these contract norms are limiting the competition based on:

- a. price fixing and the inability to form prices freely
- b. fixing the other trade conditions based on the limitations of the allowed discounts offered by the store as a distributor;
- c. the market limitations and the share of sources of supply. .

The Commission on protection of competition adopted a decision for the way that the parties orally agreed at the same time to increase sales prices for the tickets for public bus transport of passengers on the territory of the city Skopje for the same amount of 5 denars per ticket. This agreement was founded in violation with the law on protection of competition.

In 2006, The Commission for protection of competition, initiated an *ex officio* procedure for determining a prohibited agreement between undertakings, as the Public Undertaking SKOPJE-Skopje, the Association of Private Transporters in the City Skopje-Skopje and the Undertaking for the transport of Goods, Passengers, Custom Clearance, Wholesale and Retail MAKEKSPES PREVOZ export-import DOO Skopje. The Commission for Protection of Competition has reached the ruling that the above mentioned parties had orally agreed to increase the prices at the same time for the same amount. As was mentioned above, this was against the law on protection of competition.

During the 2006 The Commission on Protection of Competition acting upon the request of the Faculty of Civil Engineering of the University 'St. Cyril and Methodius' – Skopje, has initiated a procedure against the Chamber of Commerce of Macedonia, to verify the decision which confirms that the Institute for Earthquake Engineering and Engineering Seismology – Skopje is the only public institution in Republic of Macedonia which provides services form the seismology sphere, and performs duties in the scope of defining the seismic project parameters, elaboration of locality documentation, analysis and projecting, recovery and revitalization documentation, etc. The Commission, proceeding upon the request, reached a ruling with a decision that e law has been infringed, having as its object or effect prevention, restriction or distortion of competition.

Any agreement and decision or individual provisions thereof prohibited pursuant to paragraph (1) of this Article shall be considered null and void.

The provisions of this paragraph of this Article shall not apply to agreements, decisions of associations of undertakings and concerted practices that contribute to promoting the production or distribution of goods and services or to promoting technical or economic development, provided that the consumers have a proportionate share of the resulting benefit, and which

1. do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and
2. do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.
3. if it deals with block exemptions. Block exemptions apply to the following categories of agreements: vertical agreements for exclusive right of distribution, selective right of distribution, exclusive right of purchasing and franchising. Vertical agreement shall mean an agreement between undertakings, decisions of associations of undertakings or concerted practices among entities operating at different levels of production or distribution on the market.

Horizontal agreements for research and development or specialization. Horizontal agreement shall mean an agreement between undertakings, decisions of associations of undertakings or concerted practices among entities operating at the same level of production or distribution on the market; Agreements for transfer of technology, license or know-how; agreements for distribution and repairing motor vehicles;

In Macedonia there are 25 importers of vehicles and there is a competition between known brands of vehicles which are known as the “inter brand competition”. In the majority of cases there is only one entity authorized to act as an importer. However, none of them participates in the market with more than 5%-10% of insurance agreements.

If there are agreements, decisions of associations of undertakings and concerted practices that which object or effect is the restriction on competition shall be considered null and void if they are agreements of minor importance. Agreement of minor importance shall be considered to be any agreement in which the joint market share of the parties to the agreement and undertakings under their control on the market does not exceed the threshold of 10% among entities operating at the same level of production or distribution on the market (horizontal), or the threshold of 15% among entities operating at different levels of production or distribution on the market (vertical). In case where it is not possible to classify the agreement as either horizontal or vertical, the 10% threshold shall apply. Agreement of minor importance shall also be considered the situation where a shareholder in the last two years it is not enlarge more than 2 %.

3.2. Concentrations as form of limiting the competition

Concentrations are considered as merger or acquisition of certain subjects in order to make their business more efficient. By joining the entities, they establish a dominant position in a particular market or market share, which if abused, may violate free competition in the market. Legally, during the merger or acquisition of undertakings the subjects of law may or may not lose their legal independence. In this case, the loss of the legal independence is not as important as the fact whether changes or not change the economic power of the subjects they create with the concentration. Therefore, the entities that create the concentration are obliged to inform the competent body for protection of competition, in order to verify that the concentration for which information is delivered can cause restriction or elimination of competition in the market.

After establishing a concentration, the participants have a legal obligation to inform the competent body about the established concentration. After informing the body that the concentration was created, it is evaluated by the competent body in order to determine whether the same are in compliance or not with the legal provisions. In Macedonia in the period 2000 - 2005, the assessment of concentrations was done in some cases, out of which in three cases the initiating procedures to assess the concentration were made ex officio, and in five cases at the request of interested persons. The number of concentrations is increasingly growing in Macedonia. For example in 2006 in Macedonia seven requests for assessment of concentrations are submitted. In 2010 22 requests for assessment of concentrations were submitted out of which in 18 cases it was concluded that the concentrations were in accordance with legal provisions. In Albania in 2010 six requests for evaluation of concentrations were submitted. In assessing the concentration the public body especially takes into account:

- 1) The market structure, existing or future competitors in the market, supply and market supply opportunities, costs, risks, appropriate technological conditions, economic and legal to enter and exit the market, the potential consequences of the concentration to the competition in the market. The case CETELCE / teledom Telecom, presented in the restructured form within the group CETEL which includes also Altelecom, did not cause any effect on the structure of the telecommunications market, and therefore it is not considered a concentration;
- 2) the position and participation in the market, economic and financial power, the action of the subjects, the internal and external advantages of the participants vis-a-vis competitors, as well as possible changes in the performance of the participants after the concentration operation. The case of the acquisition of 7.78% of the stock market Albania Intesa San Paolo Bank owned by European Bank for Reconstruction and Development by Intesa San Paolo, is not considered a concentration, since this transaction does not change the structure of control within the subject Intesa San Paolo Bank Albania;

- 3) the effects of concentration on other subjects, especially considering the favorable conditions for consumers, and other purposes and consequences of concentration, such as lowering the price of goods and services, more efficient distribution, reduction of the transport costs, distribution and other costs, specialization of production, and other favorable conditions arising from concentration. For instance, merging entities Unique Group Austria Sigal and Sigal Holding, did not cause any effect regarding other subjects. Therefore, the Competition Authority has come to a conclusion that in this case a concentration doesn't exist. .

From the many types of concentrations, very important concentrations are the so-called non-horizontal merger arising from adhesion of active entities in different relevant markets.

These concentrations can be found in the form of vertical concentrations and conglomerates. Vertical concentrations and conglomerates, varying from horizontal concentration , have no significant impact on eliminating the competition, unless if as the result of their concentration a dominant position of one of the entities is created. There are several ways how the non-horizontal concentrations can effectively harm competition creating various kinds of effects such as non-coordinated and coordinated effects. Non-coordinated effects may arise in cases where non-horizontal concentration cause the subject's inability to have access to raw materials, to access the market, by which his competitive ability is going to be reduced. According the abovementioned, it can be concluded that in these cases through the creation of a concentration the exclusion of competitors might be affected by limiting their access to customers and to limit their so-called main inputs (in this case by limiting access to products or services which could be supplied in absence of concentration, and thus increasing the costs of the competitors). These effects cause market exclusion of subjects, which by harming and restricting access of entities or of their products in a market thus harming or restricting their competitive ability. The coordinated effects arise in cases where the concentrations change the character of competition in a way that a subject who has not previously coordinated their behavior, could now work on a coordinated way, by price increase or otherwise to harm effective competition.

According to what has been said until now, we can summarize that, non-horizontal concentration, are less likely to limit effective competition than horizontal concentration because:

- a) First, unlike horizontal concentrations, these concentrations do not eliminate competition between the participating entities of a concentration in the same market, and
- b) Secondly, vertical concentrations and conglomerates provide real opportunities for efficiency. A characteristic of these concentrations is also the implementation of business activities or products belonging to subjects being involved in a concentration in a particular market. The integration of business activities within an entity, as occurs in horizontal concentration, can cause completely non-competitive effects.

3.2.1. Vertical concentrations

Vertical concentrations are the concentrations among subjects working at various levels of chain supply. For example: when a subject as the manufacturer of certain products will join any entity that makes the distribution of these products which as an entity is at lower level of hierarchy. For example this can be found in the case of concentration between "Tikurila Oij" (with its primary activity being the production of colors) and "Zorka Colour" (with primary activity trade with color). This type of concentration can cause both coordinated and non coordinated effects. When it comes to the non-coordinated effects, then it is considered that the concentration leads to exclusion of potential or actual competitors in offer or markets by reducing the ability of entities to compete. One such exception may hinder the expansion of competitors or prevent their entry into the market or exit from the market. Under this, it is clearly stated that there are two types of exceptions:

- a) first of all, when a concentration affects the rising cost of competitors in the market by limiting their entry into that market (excluding inputs). This is achieved when the concentration created by limiting access of products or services to the market increases the spending costs in the market. In this situation benefits the concentration which is created by rising prices at the expense of consumers. Excluding of the inputs can be done in different ways. The established concentration may decide not to cooperate with its associated competitors in vertical relationships. Another form of exclusion may be the limitations of the offerers to increase prices at the expense of competitors.

- b) Second, when a concentration is expected to exclude competitors in the market by limiting the entry of a sufficient number of customers (excluding customers). Exclusion of clients can happen when an offerer is going to be integrated with another offerer in the market and because of this concentration may exclude the entry of potential clients or prospective competitors in the market place by reducing their ability to compete. Hence the creation of concentration should be examined by the competent body among others, whether the concentration has the ability for exclusion from market entry, by reducing purchases from competitors, the exemption would have a harmful effect on consumers in the market, etc.. Exclusion of customers can be done in different forms. Thus, for example the concentration can provide all required products, thus stopping purchases from its competitors. Because of this possibility the competent authority should consider alternatives for the competitors to sell their products on the market.

3.2.2. Conglomerate concentrations

Conglomerate Concentrations (mixed conglomerates) are concentrations among subjects that are in mutual relation that is neither purely horizontal (as competitors in the same relevant market) nor vertical (supplier and buyer). In this case it comes to concentration arising from entities that deal with various activities from different areas and different markets. In most cases, these concentrations appear in the expression by a fusion (union) between entities that are active in different markets and deal with the manufacture of products that buyers purchase primarily for the same purpose. As usual these concentrations are created using the connections, the joint sales or other exclusionary practices. Binding and common sale as such are considered common practices without anticompetitive circumstances. The subjects are related or participate in joint sales in order to provide their buyers better products or offers. However, in certain cases these practices can cause reduction of capacity, or tendency of existing or potential competitors to compete. All this could as a result affect an increase in price.

Although it is established that these concentrations do not cause competition problems, in some cases they could affect competition. Thus the legislator has explicitly defined the possibility that the Commission assess the effects of anti-competition.

During evaluation of these concentrations, the Commission primarily should assess that the subject after the concentration will be able to exclude its competitors and will have an economic motive to do that. And last that this exemption will give harmful effects to customers or not. The fastest way to exclude competitors is by conditioning sales of certain products on the market. This is accomplished by the practice of grouped and conditional sales. The practice of grouped sales refers to used methods by concentrations on the products provided and price determination. In this regard we distinguish pure and mixed practices. In the first case the products are sold only in fixed proportions. In the second case the products can be sold alone, but the price amount of each product taken separately is greater than the price of the products together. The practice of conditional sales refers to situations where customers that buy a product from a manufacturer will be required to also purchase another product. This conditioning can be based on contractual or technical basis. For example if a product is designed in such a way that works only on a specific product and not the alternative product offered by competitors. The contractual conditioning requires that the client who buys the product will only be buying the product and not alternative products offered by competitors.

Conglomerate concentrations, in some cases may facilitate the anti-competitive coordination in the market. One of the ways in which a concentration may have such an effect is by reducing the number of competitors to the extent that tacit coordination is a real possibility.

Conclusion

In open market conditions, the efforts undertaken by business entities to ensure a safer and more useful position in a particular market are a considered normal. Efforts of business entities should always be performed within the foreseen legal framework and thus by increasing production, reducing costs, improving product and service quality and several other advantages create conditions for economic development. In some instances the tendency to operate outside the legal rules may cause hyper production of goods or products thus distorting the market. Entities operating in the market in the process of achieving their goals very often can undertake actions with a tendency to limit or exclude certain actions of other entities in the market. These efforts are always regarded unfair.

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