A practical guide to understanding merger regimes in multiple jurisdictions.
INTRODUCTION

This TerraLex Pre-Merger Notification Manual has been created to assist all TerraLex members in understanding the merger regimes of jurisdictions in which TerraLex members practice. It has been intentionally drafted with less formality, although not less accuracy, than a guide for general publication has. This is with the aim of providing more practical guidance than a more formal publication.

Perhaps of greatest utility, each of the contributors to the Handbook (60 jurisdictions this year) have agreed that they are, subject to conflict issues, willing to provide brief oral guidance to other TerraLex members, as to the likely application of their respective notification regimes to a proposed transaction, on a without-charge basis. Such advice must be both brief and oral, and not be in the nature of a formal opinion, but in the Editors’ experience, such quick advice on a particular fact pattern can be invaluable. It is often sufficient to determine, on an expedited basis, where merger filings are required.

This edition contains a short reference list that is intended to help sort out the countries where mandatory pre-merger notification duty might apply, even if the nexus to the relevant jurisdiction is low.

Finally, it goes without saying that this Handbook contains advice of a general nature, and is not a substitute for specific legal advice related to particular facts.

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DISCLAIMER

The materials in this handbook are up to date as of June 2017 (except where noted otherwise at the top of the country chapter), and are designed to provide a convenient reference for TerraLex members. They are not legal advice or a substitute for legal advice with respect to any particular factual circumstance, and cannot be relied upon in lieu of legal advice. You should consult with qualified counsel in the relevant jurisdictions for legal advice with respect to particular situations.

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Merger Notification Requirements

1. **Is there a mandatory merger notification regime?**
   
   Under the Law on the Protection of Competition (the “LPC”) (effective as of 2 December 2008) concentrations are subject to mandatory prior notification and approval by the Commission for Protection of Competition (the “Commission”) provided that the jurisdictional threshold (see answer to question 4 below) has been met.

2. **Is there a voluntary merger notification mechanism, and if so, what advantages does it offer?**
   
   Filing is mandatory. There are neither exemptions from filing nor simplified notifications or fast-track proceedings.

Covered Transactions

3. **If there is a mandatory notification system, what types of transactions are caught?**
   
   The LPC applies to the following types of transactions:
   
   - mergers of two or more independent companies;
   - acquisitions of control over a company by persons who already control one or more other companies; and
   - creation of a full-function joint venture company.

   Please note the following issues in relation to the concept of control:
   
   - the control does not need to be exercised, rather the possibility itself is a marker;
   - that acquisition of a minority shareholding may also fall within the scope of Bulgaria’s merger control regime, if the minority shareholding entitles the shareholder to exercise decisive influence over the target company, e.g. by way of veto rights over the strategic commercial behaviour of the target company;
   - control may be acquired also by execution of a long-term agreement (not less than 3 years), setting forth appointment of management bodies, particular voting, quorum and policies.

   The following are not considered as concentrations subject to the notification regime:
   
   - portfolio investments made by banks, non-banking financial institutions and insurance companies, provided that those institutions do not exercise their voting rights to influence the competitive behaviour of the company, and only if the investment has been made with a view of preparing the disposal of the equity interest within one year of the date of acquisition;
• exercise of control by a trustee or liquidator of a company; and
• exercise of control by a financial holding company with the sole purpose of maintaining the full value of the investment in the subsidiary.

The LPC treats as a concentration the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity. Accordingly, a concentration will be considered as present if the establishment of a joint venture leads to long-lasting changes in the structure of the controlling undertakings – that is, the parent companies should transfer to the joint venture the whole activity related to, or respectively retain only a minimal presence on the relevant market.

A joint venture is not full-function where it does not operate independently from its parent companies and/or it is established to carry out a particular function supporting the business of its parent companies without independent access to the market. Generally, the creation of such joint venture presupposes non-existence of long-lasting changes in the structure of the parent companies or in their respective activities on the relevant market and therefore is not treated as a concentration.

### Thresholds and Jurisdiction

4. **If there is a mandatory notification system, what are the threshold tests, above which a notification is required and below which it is not?**

Transactions are subject to mandatory pre-merger notification where:

- the joint turnover of all undertakings concerned for the year preceding the year of the concentration exceeds BGN 25 million (approx. EUR 12.25 million); and
- the turnover of each one of at least two of the undertakings concerned for the year preceding the year of the concentration exceeds BGN 3 million (approx. EUR 1.5 million) or the turnover of the target undertaking for the year preceding the year of the concentration exceeds BGN 3 million (approx. EUR 1.5 million).

In calculation of turnover, the LPC takes into account the entire economic groups of the undertakings concerned in Bulgaria. Turnover is calculated on the basis of revenues during the financial year preceding the concentration. The Commission applies the rules of the European Merger Control Regulation (“ECMR”) for geographic allocation of turnover and excludes turnover from sales abroad. When the concentration involves acquisition of control over part of one or more undertakings, only the turnover of the respective part, which is subject to acquisition, shall be taken into account. In concentrations of banks and non-banking financial institutions, turnover figures are calculated on the basis of income from interest and securities, commissions’ receivable, net profit on financial operations and other operating income after deducting all taxes. The turnover of insurance companies is calculated on the basis of insurance premiums, less all taxes, statutory contributions and fees.

5. **What is the necessary nexus with the jurisdiction to require a filing?**

As explained in answer to question 4 above, the jurisdictional threshold for merger control review is solely based on turnover realized in Bulgaria. There are no requirements for the existence of Bulgarian corporate presence or Bulgarian based assets. Foreign-to-foreign transactions would be subject to notification in Bulgaria as long as the undertakings concerned realize turnover in Bulgaria which meets the requirements set out in answer to question 4 above.
Required Information

6. What sort of information is required in a merger notification, and how long does it typically take to compile such information?

The LPC and the Merger Notification and Procedures Guidelines (the “Notification Guidelines”) require that the pre-merger notification contains detailed information about the undertakings concerned; the legal and economic structure of the concentration; the relevant markets; the companies over which the undertakings concerned exercise control; the undertaking which exercises control over the undertakings concerned; the joint market share and joint turnover of the undertakings concerned; market entry barriers; the principal competitors, suppliers and customers of the undertakings concerned; and written explanations as to whether the proposed concentration raises serious concerns that it will create or strengthen a dominant position on the relevant markets.

In addition to the submission of a notification containing all the necessary information listed above, the Commission requires the submission of a number of supporting documents, including documents relating to the personal and corporate status of the undertakings concerned, financial statements from the year preceding the concentration, business plans and other documents pertaining to the contemplated transaction. Where the documents are in a language other than Bulgarian, such documents have to be supplied with a certified Bulgarian translation. Official documents issued by non-Bulgarian authorities need to be legalized in accordance with the applicable rules.

The Commission will not declare a notification complete and initiate review proceedings until it is satisfied that all relevant supporting documents have been submitted.

The timeframe for collection of the relevant information is a question of fact. It depends on the types of the companies, their scope of business, organization and their trade capacity. Compilation of the necessary information is possible to be effected in a timeframe approximately between 2 to 4 weeks.

7. Are there ways to minimize the required information filing?

There are no mechanisms for minimization of the required filing information. As explained in answer to question 2 above, there are neither exemptions from filing nor simplified notifications or fast-track proceedings.

Fees

8. Are there fees with respect to merger notification?

The LPC establishes a two-tier fee system in merger control proceedings. It consists of a flat filing fee of BGN 2,000 (approx. EUR 1,000), payable at the time of filing, and a clearance fee, payable in the event that the concentration is approved. The clearance fee is equal to the amount equivalent to 0.1 % per cent of the combined turnover of the undertakings concerned in Bulgaria, with a cap of BGN 60,000 (approx. EUR 30,000). No clearance fee is due where the Commission finds that the notified transaction does not constitute a concentration within the meaning of the LPC, or where the Commission blocks the concentration.

Deadlines

9. Is there any deadline within which a notification must be filed, and what is the earliest time a filing may be effected?

The LPC establishes a pre-merger notification system. There is no specific filing deadline, however undertakings must notify following the execution of an agreement, public announcement of the tender offer or acquisition, but prior to the implementation of the transaction.
The earliest moment of time when a filling could be effected is prior to the execution of an agreement or public announcement of the tender offer. However, this is only possible where notifying undertakings present sufficient evidence demonstrating their intent to execute the respective agreement or where they have made public their intent to accept a tender offer.

Additionally, where the transaction concerns a public tender or bid, the notification must be filed within 7 days of the day the winner in the tender is announced.

### Waiting Period

10. **If there is a mandatory notification system, are the parties required to wait a certain period of time before completing the transaction, or can the transaction proceed without a waiting period?**

The undertakings concerned are under an obligation to suspend implementation of the transaction until receipt of clearance by the Commission. The suspension obligation applies to both Phase I and Phase II investigations (see answer to question 11 below). Exceptions are provided only for certain transactions that take place on a regulated stock exchange.

Please note that under Bulgarian law a transaction may be implemented only following the receipt of a clearance decision by the Commission. Undertakings may not proceed to closing on the basis solely of expiration of the waiting period in the absence of explicit clearance decision by the Commission.

### Time Frame

11. **What are both the statutory and the practical time periods necessary in order to “clear” a transaction?**

The Commission should register a notification within three days of submission, provided that the notification is complete. Upon registration of the notification, the Commission has 25 business days to complete an accelerated (Phase I) investigation. The review period will be suspended where additional information is needed until it is furnished. Notifying undertakings may request an extension of up to 10 business days in order to contemplate proposals for change in the structure of the concentration, propose remedies, or both. Where the notifying undertakings have made such proposals, the deadline for review will automatically be extended by an additional 10 business days to allow assessment of the proposed changes by the Commission, regardless of whether the deadline has already been extended upon the request of the notifying undertakings.

Upon the completion of the investigation the Commission in a closed session may issue any of the following decisions:

- declare that the proposed concentration does not fall within the scope of the merger control rules of the LPC;
- approve the concentration;
- approve the concentration subject to structural changes offered by the notifying undertakings; or
- initiate a full scope (Phase II) investigation.

The Commission usually makes use of the whole review period to complete Phase I investigations. As a practical matter in a normal course the Commission would issue a decision within one month of registration of a notification.

A Phase II investigation would be initiated where the proposed concentration raises serious concerns that it will create or strengthen a dominant position, and that the effective competition on the relevant markets will be impeded, restricted or otherwise limited. The Commission has a
four-month period to complete the investigation and issue a decision. The term may be extended by 25 business days in cases of factual and legal complexity, and by additional 15 business days where approval by the Commission is made subject to commitments and remedies.

Upon the collection of sufficient information for the assessment of the proposed concentration the Commission holds a closed session where it may either grant an approval to the concentration or adopt a statement of objections. If a statement of objections is adopted the notifying undertakings and third parties, which may be constituted as parties in a Phase II investigation, would be given not less than 14 days to review the collected materials and evidence by the Commission and to submit a written statement. The Commission would then hold a public hearing with the participation of the notifying undertakings and other parties to the proceedings. By such decision the Commission may:

- approve the concentration;
- approve the concentration subject to remedies and conditions; or
- block the concentration.

### Sanctions

12. **What are the consequences of failing to notify if a transaction is in excess of the relevant thresholds, or closing a transaction without notification, or before the expiry of the waiting period?**

The Commission may impose on undertakings acquiring control fines of up to 10% per cent of their total Bulgarian turnover for failure to notify a notifiable concentration. Together with the decision imposing a fine for filing violations, the Commission may also order adequate measures to preserve effective competition. This may include an order for divestment of the combined capital, shares or assets, and an order for termination of joint control.

The Commission has a record of imposing pecuniary penalties for filing violations. The constant practice of the Commission is to impose sanctions on the undertakings concerned for failure to notify a notifiable concentration, even where the transaction is cleared in the same proceedings. The enforcement record of the Commission so far shows that sanctions are imposed in the context of both domestic and foreign-to-foreign concentrations.

Pursuant to the Methodology on Sanctions, filing violations of low gravity would be penalized with a sanction of up to 5% of the annual turnover but not less than the filing fees that would have been due had the transaction been notified. Violations of medium gravity would be penalized with up to 7% of the annual turnover, but not less than the filing fee that would have been due, and fines for serious violations would be in the amount of up to 10% of the undertaking’s turnover. In practice, the sanctions are usually determined below the thresholds set by the Methodology on Sanctions.

### Post-Closing Challenges

13. **If the statutory waiting period expires without a challenge, is there any possibility of post-closing challenge?**

All merger control decisions, except for decisions for opening of an investigation ex officio and opening of a Phase II investigation, are subject to judicial review by the Supreme Administrative Court (“SAC”). Standing to appeal is granted to the parties to the proceedings and to any third “interested party”. The LPC provides a fairly broad definition of the term ‘interested party’, which includes any person, undertaking or association of undertakings whose interests may potentially be affected by a violation of the LPC. In its interpretation of the LPC, the SAC has also confirmed that a competitor in the relevant market as well as a customer or a consumer of the products or services affected by the concentration would have standing to appeal a decision.
of the Commission. Appeals must be lodged within 14 days, which for the parties to the proceedings begin as of the date of receipt of notice for the decision and for any interested third party, as of the date of publication of the decision in the electronic Public Registry of the Commission.

Challenges against a concentration following the entry into effect of a merger control decision approving such concentration may be initiated by the Commission in one of the following instances: (i) non-compliance with remedies imposed with a decision of the Commission; (ii) implementation of a concentration that has been blocked by the Commission; (iii) non-compliance with a decision of the Commission. In all of the above cases the procedure can be initiated upon request of any person whose interests are affected or threatened by any of the listed violations. Besides that the Commission itself can initiate the proceedings. Whenever the Commission has initiated the proceedings by itself the decision through which this was made cannot be appealed.

14. Are there ways to protect a transaction from post-closing challenge?

As explained in answer to question 13 above, appeals against a merger control decision of the Commission may be lodged only within a 14 day period following the announcement of the decision by any “interested party”.

Other challenges against a concentration that may be brought by the Commission (e.g. for alleged filing violation or other breach of merger control rules and non-compliance with a decision of the Commission) are precluded with the expiration of the statutory limitation period. Limitation periods are divided into two main categories depending on the type of the violation:

- three years for a violation of the provisions relating to requests for information or inspection; and
- five years for any other type of violations of the LPC.

Competent Agency

15. What is the nature of the Agency which reviews merger transactions, and what are its powers to move against anti-competitive transactions?

The Commission is a collective body consisting of 7 commissioners, including a chairperson and a deputy chair. It is supported in the execution of its powers by a body of experts and administration. The Commission is an independent, specialized state agency whose members are elected by Parliament. The tenure of all members of the Commission, including the chairperson and the deputy chair is 5 years. The mandate of all members, including of the chairperson and the deputy chair may be terminated by Parliament on limited grounds, which are exhaustively listed in the LPC. The institutional and administrative independence of the Commission from the executive branch is reinforced by the fact that its budget is reviewed and approved only by Parliament.

The Commission has authority to open investigations into alleged filing violations or other breaches of merger control rules on its own initiative or upon a notification from a third party. The LPC grants to the Commission broad investigative powers to investigate concentrations, to collect information from authorities and private parties, to impose pecuniary sanctions for failure to provide assistance. Further information about the Commission and its activities can be found on its website, www.cpc.bg.

Confidentiality

16. What level of confidentiality does a merger notification filing enjoy?

The fact of opening of merger control investigation is usually announced in the Public Registry of the Commission available on its official website. Upon the request of the notifying party and only in well-justified cases (e.g. when publicly traded companies are merging), the Commission
might refrain from publishing a notice for the opening of an investigation on its website. Also, the LPC explicitly provides that all merger control decisions that close an investigation and decisions for the initiation of Phase II investigation are also published on the Commission’s website.

Commercially sensitive information is subject to full disclosure to the Commission. Addressees of a request for information from the Commission cannot call upon protection of business secrets to refuse to provide to the Commission a particular piece of confidential information. The LPC requires competition officials to protect any information identified by the undertakings concerned as business secrets. Moreover, documents and information may only be used by the Commission for the purposes of the LPC. Any information identified by the notifying undertakings as business secret would be erased from the public version of the decision that is published in the Public Registry of the Commission.

### Substantive Appraisal

17. **Are there any rules of thumb or general guidance as to when mergers are likely to face challenge?**

The substantive test for assessment under the LPC is whether the concentration will result in the establishment or strengthening of dominant position, which would significantly impede competition on the relevant markets. Naturally, transactions that are likely to impede competition are prone to challenges. The LPC does not provide specific market share thresholds, but in the Market Assessment Methodology adopted by the Commission it notes that a combined market share of less than 15% on the relevant market in horizontal concentrations and a market share of less than 25% on the respective relevant markets in vertical or conglomerate concentrations may not impede or restrict competition and a market share of less than 40% is unlikely to impede or restrict competition. Therefore, concentrations that exceed the above market share thresholds are more likely to face challenges by competitors or other interested parties.

The Commission however has discretion to approve a concentration that leads to the establishment or strengthening of a dominant position if it is expected to bring positive effects that would outweigh on balance the negative impact associated with the establishment or strengthening of a dominant position. Pursuant to the LPC such positive effects should relate to (i) modernization of a business, a branch of the economy, or the national economy as a whole, (ii) development of infrastructure, (iii) market entry of investor with substantial experience on the relevant market, (iv) provision of better services to consumers, (v) increasing the potential for research and development. In practice the Commission does not confine its review to the effects set out in the LPC and often takes into account broader efficiency considerations and considers whether on balance the expected positive results outweigh the negative results from a concentration.

### Practical Recommendations

18. **What is the typical or recommended approach in dealing with the reviewing agency?**

Notifying undertakings are well advised to start the preparation of a merger control notification and the collection of the relevant documents and information, which need to be submitted, well in advance so that the notification is declared complete and the review process initiated immediately following its submission to the Commission. With regard to the preparation for filing, the authority is generally open to pre-notification meetings. Such meetings may be useful where parties seek guidance regarding the amount and detail of information which they need to present in the merger notification. However, the merit of such meetings is limited if parties seek to obtain a waiver from filing, unless the case at hand is clearly not a concentration within the meaning of the LPC.
All official communication and/or submission of statements with the Commission in relation to a merger control procedure should be carried out in writing. The applicable language for the proceedings is the Bulgarian language.

Upon request for additional information and documents made by the Commission the undertakings concerned should strive to present the respective documents and information in the fullest scope possible and without unnecessary delay in order to avoid extension of the review periods or other delay of the proceedings.

**Other Notifications**

19. **Other than antitrust/competition review, are there other investment controls or similar regimes to be aware of?**

Generally, besides competition review, there is no special investment control or other similar regimes that undertakings should comply with. However, in some sectors there are special regulations that would apply to mergers and acquisitions in addition to the merger control rules of the LPC. The Law on Credit Institutions and the Insurance Code, for example, require approval by the respective regulatory authority for acquisitions of stakes in banks and insurance companies exceeding certain statutory levels. The Law on Public Offering of Securities requires the disclosure of interests in listed companies. Further sector-specific regimes regulate telecommunications and energy, where operators act under license. In the energy sector in particular the respective regulatory authority is vested with the power to authorize any transfer assets with which the licensed activity is being carried. Similarly, as a matter of practice, state and municipal authorities that privatize public assets impose an obligation on the buyer that the subsequent transfer of shares of privatized enterprises executed within a certain period of time may take place only with the prior approval of the respective privatization authority.