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The International Comparative Legal Guide to:

Merger Control 2017

13th Edition

A practical cross-border insight into merger control issues

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Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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Country Question and Answer Chapters:

EDITORIAL

Welcome to the thirteenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Four general chapters. These chapters are designed to provide readers with an overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 50 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Nigel Parr and Catherine Hammon of Ashurst LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Serbia

Srđana Petronijević

Moravčević Vojnović and Partners
in cooperation with Schoenherr

Danijel Stevanović

1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The authority with competence over merger control in Serbia is the Commission for the Protection of Competition [*Komisija za zaštitu konkurencije*] ("Commission"), an independent administrative body established in 2005 and operative as of 2006. The website of the Commission is accessible at www.kzk.org.rs. The Commission, competent to enforce antitrust and merger control rules, is an independent governmental body accountable to the Serbian Parliament.

The Commission is considered one of the more active competition authorities in the field of merger control in the CEE region. Pursuant to the Commission's 2015 Annual Report, the Commission initiated 121 merger control proceedings in 2015, unconditionally clearing 113 concentrations in Phase I proceedings, while two concentrations were still under review in Phase II proceedings in 2016. The remaining six concentrations were ultimately not reviewed.

The Commission's decisions can be challenged before the Administrative Court of Serbia [*Upravni sud*] ("Administrative Court").

1.2 What is the merger legislation?

Merger control rules are embodied in the Law on the Protection of Competition [*Zakon o zaštiti konkurencije*] (*Official Gazette of RS*, nos. 51/2009 and 95/2013) ("Competition Act"), in force as of 1 November 2009. In addition to the Competition Act, certain aspects of merger control are regulated by various bylaws. Namely:

- the Ordinance on the Criteria for Defining Relevant Markets [*Uredba o kriterijumima za određivanje relevantnog tržišta*] (*Official Gazette of RS*, no. 89/2009);
- the Ordinance on the Content and the Manner of Submission of Merger Notifications [*Uredba o sadržini i načinu podnošenja prijave koncetracije*] (*Official Gazette of RS*, no. 5/2016) (the "Implementing Ordinance"), which governs the required content and form of merger notifications;
- the Ordinance on the Criteria for Determining the Amount Payable on the Basis of Measures for the Protection of Competition and Procedural Penalties, the Manner and Deadlines for their Payment and the Conditions for Determining these Measures [*Uredba o kriterijumima za određivanje visine iznosa koji se plaća na osnovu mere zaštite konkurencije i procesnog penala, načinu i rokovima plaćanja i uslovima za određivanje tih mera*] (*Official Gazette of RS*, no. 50/2010) ("Ordinance on Fines");
- the Commission's Guidelines on the application of the Ordinance on Fines (of 19 May 2011) [*Smernice za primenu Uredbe o kriterijumima za određivanje visine iznosa koji se plaća na osnovu mere zaštite konkurencije i procesnog penala, načinu i rokovima plaćanja i uslovima za određivanje tih mera*], which supplement the Ordinance on Fines; and
- the Decision on the Manner of publishing Acts and anonymising data in the Acts of the Commission for the Protection of Competition of 7 May 2013 [*Odluka o načinu objavljivanja akata i o zameni, odnosno izostavljanju (anonimizaciji) podataka u aktima Komisije za zaštitu konkurencije*] (*Official Gazette of RS*, no. 95/2013).

1.3 Is there any other relevant legislation for foreign mergers?

There are no specific rules regarding foreign mergers. General merger control rules also apply to foreign mergers provided that the respective jurisdictional thresholds are met (please see questions 2.4 and 2.6 below).

1.4 Is there any other relevant legislation for mergers in particular sectors?

The Competition Act applies to mergers irrespective of the sectors they pertain to. However, certain sector-specific regulations apply to mergers in certain sectors:

- *Banking*: Direct or indirect acquisitions of a qualified shareholding (i.e. from 5% to 20%, more than 20% to 33%, more than 33% to 50% and above 50% of voting rights) in Serbian banks can only be implemented subject to approval by the National Bank of Serbia ("NBS") – Article 94 of the Banks Act (*Official Gazette of RS*, nos. 107/2005, 91/2010 and 14/2015).
- *Insurance*: Direct or indirect acquisitions of a qualified shareholding (i.e. 10%, 20%, 30% or 50%, or any acquisition of shares that confers effective influence on the management upon the acquirer) in Serbian insurance companies require prior approval by the NBS – Article 31 of the Insurance Act (*Official Gazette of RS*, no. 139/2014).
- *Investment Funds*: Direct or indirect acquisitions of a qualified shareholding (10% or more, or any acquisition of shares that confers significant influence on the management upon the acquirer) require the prior approval by the Securities Exchange Commission – Article 11 of the Investment Funds Act (*Official Gazette of RS*, nos. 46/2006, 51/2009, 31/2011 and 115/2014).

- *Voluntary Pension Funds*: Direct or indirect acquisitions of a qualified shareholding (i.e. 10%, 20%, 33% or 50%, or any acquisition of shares that confers effective influence on the management upon the acquirer) can be made only on the basis of a prior approval by the NBS – Article 14 of the Voluntary Pension Funds and Pension Schemes Act (*Official Gazette of RS*, nos. 85/2005 and 31/2011).
- *Media*: The recently adopted Electronic Media Act (*Official Gazette of RS*, nos. 83/2014 and 6/2016) established the Regulatory Body for Electronic Media as an independent regulator of the electronic media market. Any change in the ownership structure of the participant on the media market is subject to prior approval of the regulator. Also, the Public Information and Media Act (*Official Gazette of RS*, nos. 83/2014, 58/2015 and 12/2016), enacted in the set of "media laws" together with the Electronic Media Act, prescribes that any form of monopoly on the media market is prohibited.
- *Telecommunications*: Pursuant to issued licences in the telecommunications sector, direct and indirect acquisitions of qualified shareholdings have to be notified to the Regulatory Agency for Electronic Communications and Postal Services.
- *Public-Private Partnerships and Concessions*: Pursuant to the Public-Private Partnerships and Concessions Act (*Official Gazette of RS*, no. 88/2011) rights stipulated by PPPCs may be transferred to third parties only upon prior approval of the public partner.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

The Competition Act catches the following types of transactions:

- mergers and other statutory changes leading to consolidation of undertakings;
- acquisitions by one (sole control) or more (joint control) undertakings of direct or indirect control over another undertaking or undertakings, or parts of undertakings which can be considered to constitute an individual business unit; and
- establishments of joint ventures or acquisitions of joint control over existing undertakings, performing on a long-term basis all functions of an autonomous undertaking.

An undertaking is deemed to have control over another undertaking if it has the potential to exercise decisive influence on the latter's activities. Such influence can be based on: (i) a controlling shareholding; (ii) ownership or ownership rights over the assets (parts of assets) of an undertaking; (iii) rights deriving from contracts or securities; and (iv) receivables, guarantees over receivables, or on the basis of business practice determined by the controlling undertaking. In the opinions issued on 1 September 2006 (no. 126/06) and 4 November 2008 (no. 1/0-06-418/08), as well as in its Annual Reports, the Commission clarified that asset deals can equally (as share deals) constitute a concentration (if the acquirer through the asset-purchase acquires decisive influence over the acquired business). Privatisations that are administered by the Serbian Privatisation Agency can be subject to the Competition Act provided that they meet the turnover thresholds. The Bankruptcy Act further provides that acquisitions of control via bankruptcy proceedings as well as bankruptcy restructurings may not be performed contrary to the Competition Act. Thus, such acquisitions of control and restructuring plans are subject to control by the Commission. Should it find that an intended restructuring shall give rise to change of control and is subject to prescribed thresholds, the Commission will instruct the parties to file a merger notification.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes, provided that the acquisition of a minority shareholding confers (sole or joint) *de facto* or *de jure* control over the target on the acquiring undertakings (see also question 2.1). As stated under question 2.1, an undertaking is deemed to have control over another undertaking if it has the potential to exercise decisive influence on the latter's activities. Such influence is not limited to ownership rights, but also includes influence deriving from an agreement, securities, receivables, a controlling interest, or any other factor which allows decisive influence to be exercised over business activities of another undertaking. Pursuant to the Commission's opinion no. 1/0-06-409/09-2 dated 11 November 2009, effective control over a company includes the potential to independently deliver the most important/strategic business decisions, the potential to independently dispose of assets of a greater value, and holdings of veto rights that are not limited exclusively to the protection of its investors' interests.

2.3 Are joint ventures subject to merger control?

Yes, joint ventures are subject to merger control. However, only certain joint ventures are subject to merger control, i.e. when two or more independent undertakings establish a new undertaking, or when they acquire joint control over an existing undertaking, which operates on a lasting basis and has all the functions of an independent undertaking (i.e. full-function joint ventures). However, if the establishment of a joint venture purports to coordinate the market activities of two or more independent undertakings, the joint venture is not deemed a concentration and shall be assessed under rules regulating restrictive agreements.

2.4 What are the jurisdictional thresholds for application of merger control?

A transaction has to be notified if either of the following thresholds is met:

- the aggregate worldwide turnover of all the undertakings concerned in the year preceding the concentration is at least EUR 100 million, provided that at least one of the undertakings concerned achieved a turnover in Serbia of at least EUR 10 million; or
- the aggregate turnover in Serbia of at least two undertakings concerned is at least EUR 20 million in the year preceding the concentration, and each of at least two of the undertakings concerned achieved a turnover in Serbia of at least EUR 1 million.

The Competition Act also provides for a special rule for cases where control over a joint stock company registered in Serbia (fulfilling certain conditions) is acquired through a public bid. In such cases, the concentration has to be notified to the Commission irrespective of the turnover thresholds. In other words, all acquisitions of control over joint stock companies registered in Serbia through public bids are subject to merger control, notwithstanding the turnovers of the parties. However, the special rule is not further expanded upon in any bylaw and decisional practice, so particular attention needs to be exercised in all instances where control is acquired over a joint stock company registered in Serbia.

Turnover means all revenues derived from the sale of products or the provision of services before taxes in the year preceding the concentration. Turnovers are calculated by taking into account all revenues derived from the sale of products or provision of services in the year preceding the year in which the concentration is notified. The turnover of an undertaking assumes the total turnover of the group it belongs to, save for intra-group sales which are not taken into account. For the calculation of local (national) turnover, in addition to the foregoing, the value of exports has to be deducted. If control is acquired over part of an undertaking, only the turnover attributable to that part is to be taken into account. In the case of joint ventures, total group turnovers of both joint venture partners are to be taken into account. Special rules for the calculation of revenue apply to banks, credit institutions, financial entities, and insurance companies. As regards banks, credit institutions, and financial companies, the relevant revenue shall consist of the income from interest charged, net profits from financial transactions, commissions charged, income from securities, and income from other business activities. Regarding insurance and reinsurance companies, the turnover thresholds are calculated by taking into account the value of net income from premiums. According to the Commission's opinion published in its 2010 Annual Report, revenues achieved in Kosovo are considered revenues achieved in the Republic of Serbia, pursuant to the Constitution of the Republic of Serbia. Thus, revenues achieved in Kosovo are to be taken into account for the calculations of turnovers achieved in the Republic of Serbia.

2.5 Does merger control apply in the absence of a substantive overlap?

Yes. The applicability of merger control rules does not require the existence of a substantive overlap. The only criterion for the applicability of merger control rules is the fulfilment of one of the turnover thresholds outlined in question 2.4 above.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

Any foreign-to-foreign merger is subject to merger control in Serbia, as long as any of the turnover thresholds are satisfied. A domestic effects doctrine has not yet been adopted by the Commission, although the Competition Act provides that it applies to concentrations which have or might have effects on competition in the territory of Serbia. However, the decisional practice so far is not supporting the view that a transaction, besides meeting the thresholds, also needs to have an effect on competition in Serbia in order to trigger a filing obligation. Hence, foreign-to-foreign transactions that meet the turnover thresholds trigger a filing obligation in Serbia, and are regularly reviewed by the Commission.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

There are no mechanisms which provide for the jurisdictional thresholds to be overridden. However, the applicability of the sector-specific regulation outlined in question 1.4 does not require the turnover thresholds stipulated in the Competition Act to be met. Direct or indirect acquisitions of qualified shareholdings in certain sectors in principle require approval of the competent regulator, irrespective of the aggregate turnovers of the parties to the concentration. However, if the jurisdictional thresholds are exceeded, merger clearance is also required in addition to the approval of the sector-specific regulator. In addition, as explained under question 2.4, a concentration brought about by the takeover of a joint stock company registered in Serbia through a public bid has to be notified even if the thresholds are not met.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

In practice, when an acquisition of a stake in the target company is performed in several stages, merger control is triggered at the moment of the acquisition of the shares that allow decisive influence to be exercised over the target's business activities, i.e. when an acquirer has established control over the target. This has also been confirmed by the Commission's opinion dated 11 November 2009. Pre-existing, as well as subsequent, acquisitions of shares in the same target do not trigger filing obligation(s). Two or more transactions between the same undertakings realised in a period of fewer than two years shall be deemed as one concentration that occurred on the date of the last of such consecutive transactions.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

A concentration has to be notified within 15 days following any of the following acts, whichever occurs first:

- conclusion of an agreement;
- publication of a public bid, offer or closing of the bid; or
- acquisition of control.

The Commission issued an opinion on 11 November 2009, clarifying that a bidder might opt to file a merger notification within 15 days following either the publication of the public bid or the closing of the bid. The deadline for filing a merger notification is therefore 15 days following the closing of the takeover bid.

The parties may notify a transaction to the Commission even before one of the aforementioned events if they demonstrate their serious intent to enter into an agreement, e.g. by signing a letter of intent, publicising their intent to make a takeover offer, or any other similar act demonstrating serious intent.

On 5 July 2016, the Commission published the Notice on Notifications filed based on serious intent. Given certain issues related to such filings in practice, the Commission outlined the following:

- only a final and binding agreement triggers the 15 days filing deadline, whereas no filing deadline applies to transactions based on serious intent;
- the document evidencing serious intent (a letter of intent, memorandum of understanding, etc.), provided as the basis of the merger control filing, must explicitly show the serious intent of all parties to engage in the transaction and must be signed by all parties; and
- if the document evidencing serious intent, provided as the basis of the merger control filing, deviates from the final and binding transactional document, in respect of the key fact on which the Commission based its clearance, the parties to the

transaction will bear all risks connected with implementing such a transaction contrary to the clearance; this also means that a new merger control filing needs to be made with the Commission.

Under the Competition Act, if control over the whole or part of one or more undertakings is acquired by another undertaking, the notification has to be submitted by the undertaking acquiring control. In all other cases, the notification has to be submitted jointly by the undertakings concerned.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Under the Competition Act, a concentration does not arise and thus no merger control notification is required, when:

- a bank, insurance company or another financial institution, in the course of regular business activities, temporarily acquires shares for further resale to be realised within a period of 12 months (with a possible extension of six months) and provided that during this period the shareholders' rights are not used to influence business decisions of the respective undertaking that concern its conduct in the market;
- an investment fund or a fund management company acquires a stake in an undertaking, provided that it utilises its rights stemming from that stake only to maintain the value of its investment and under the condition that it does not influence the behaviour of that undertaking in the market;
- a joint venture that purports to coordinate the market activities of two or more independent undertakings and cannot be considered for a full-function joint venture, as it shall be assessed under rules regulating restrictive agreements; and
- control over an undertaking is acquired by persons acting as a bankruptcy receiver [*stečajni upravnik*].

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

The Competition Act provides that parties that do not notify a transaction in a timely manner face procedural penalties in the range of EUR 500–5,000 per day of the delay, capped at 10% of the total annual turnover achieved by the violating undertaking(s). Further, a breach of the suspension clause is subject to fines of up to 10% of the total annual turnover achieved in Serbia, while the Commission may in addition also enact de-concentration measures so as to (re-) establish or protect competition in the market (by ordering the parties to split a company, divest shares, break up a contract, or undertake any other steps necessary). The Commission's practice concerning fines in merger control proceedings has, up until recently, not advanced much; however, as of 2014, the Commission has significantly stepped up its activities and *ex officio* initiated a number of proceedings concerning concentrations which were allegedly implemented without prior notification and approval.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

Participants to a concentration are under the obligation to suspend the implementation of a transaction until cleared by the Commission. To the best of our knowledge, carve-out arrangements have not yet been tested with the Commission. It is likely that the Commission will initially take a conservative approach to carve-out mechanisms. One of the carve-out structures that might be permitted is to make use of the financial institution exception (see above question 3.2) by engaging a bank as an interim buyer of shares of the group/company concerned. However, acquisitions of companies by local banks can be subject to control by the National Bank of Serbia.

3.5 At what stage in the transaction timetable can the notification be filed?

Parties to a transaction may notify it to the Commission as soon as they can demonstrate their serious intent to enter into an agreement, e.g. by signing a letter of intent, publicising their intent to make an offer or by any other way which precedes any of the triggering events (please see question 3.1 above).

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Under the Competition Act, the Commission is obliged to decide within one month from the receipt of a complete merger notification whether to clear the transaction in summary proceedings (Phase I) or to initiate investigation proceedings (Phase II). In order for a merger notification to be deemed complete, it has to satisfy the conditions prescribed by the Competition Act and the Implementing Ordinance, in regard of both required content and manner of submission. Therefore, the "clock will start ticking" only once the parties have submitted all documents and data which the Commission requires in order to assess the concentration.

A concentration will be cleared in summary proceedings if it can be reasonably expected that it will not significantly restrict, distort or prevent competition in the Republic of Serbia. If the Commission does not make a decision within one month (clear the concentration in summary proceedings or open investigation proceedings), the concentration is deemed cleared. However, should the Commission decide to open investigation proceedings, it has to decide ultimately whether to (unconditionally or conditionally) clear or prohibit the transaction within four months from the date of initiating investigative proceedings.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

The undertakings concerned are under the obligation to suspend the implementation of the transaction until cleared by the Commission. Under the Competition Act, a concentration is deemed cleared if the Commission fails to deliver a decision within one month following receipt of a complete merger notification (i.e. within an (additional) four months following the initiation of investigative proceedings).

The Competition Act provides one exemption from the general suspension requirement. This rule applies in cases of acquisitions which are performed in line with laws regulating takeovers of joint stock companies or in accordance with laws regulating privatisations. The implementation of the transaction is permitted although not (yet) cleared only under the following conditions: (i) the filing has been made in a timely manner; (ii) the acquirer will not influence the decision-making of the company based on its shareholding (unless it is directed towards maintaining the value of its investment); and

(iii) the "special" approval from the Commission has been obtained. The president of the Commission decides upon such requests by issuing a conclusion.

A breach of the suspension clause is subject to fines of up to 10% of the total annual turnover achieved in Serbia, while the Commission may in addition also enact de-concentration measures so as to (re-) establish or protect competition in the market (by ordering the parties to split a company, divest shares, break up a contract or undertake any other steps necessary). The Commission's practice concerning fines in merger control proceedings has, up until recently, not advanced much; however, as of 2014, the Commission has significantly stepped up its activities and *ex officio* initiated a number of proceedings concerning concentrations which were allegedly implemented without prior notification and approval.

3.8 Where notification is required, is there a prescribed format?

Save for the Competition Act, the form and content of notification is governed by the Ordinance on the Content and the Manner of Submission of Merger Notifications (*Official Gazette of RS*, no. 5/2016).

In February 2016, the new Implementing Ordinance came into force, which introduced short and long form notifications (please see question 3.9 below).

The merger notification shall be submitted in the Serbian language. All appendices can be submitted as copies, while documents in a foreign language need to be submitted along with the translation by a sworn court interpreter into Serbian. The Commission is empowered to request any other information it considers relevant for the assessment of the intended concentration. Similarly, the applicant may submit other information and documents that it considers relevant for the assessment of the envisaged concentration. In the case that the Commission requests additional information, but it is not provided, the merger notification will be dismissed.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

The 2016 Implementing Ordinance introduces a short form filing, which applies in cases where a respective concentration is unlikely to raise competition concerns.

In particular, the Ordinance sets out four alternative conditions that must be met in order for a concentration to qualify for a short form filing:

1. Where two or more undertakings merge, or one or more undertakings acquire sole or joint control over another undertaking or a part thereof, provided that no participant in the concentration is active in the same relevant product and geographic markets, or in the same relevant product market as any other participant in the concentration upstream or downstream.
2. Where two or more undertakings merge, or one or more undertakings acquire sole or joint control over another undertaking or a part thereof, provided that the following conditions are met:
   a) the aggregate market share of all participants in a horizontal merger is less than 20%; and
   b) the individual or aggregate market share all participants in a vertical merger is less than 30%.
3. Where the notifying party acquires sole control over an undertaking over which it already has joint control.
4. Where the aggregate market share of all the horizontally related participants in the concentration is less than 40% and the change (delta) in the Herfindahl-Hirschman Index resulting from the concentration is less than 150.

If none of the specified criteria are met, the concentration must be notified in the regular (long form) filing. Also, the Commission can request that a long form filing be submitted in cases where the facts of the case indicate that a concentration does meet the criteria for it to be approved.

3.10 Who is responsible for making the notification?

Under the Competition Act, if control over the whole or part of one or more undertakings is acquired by another undertaking, the notification has to be submitted by the undertaking acquiring control. In all other cases, the notification has to be submitted jointly by the undertakings concerned.

Filing (or rather clearance fees) for clearance decisions issued in summary (Phase I) proceedings is 0.03% of the combined annual turnover of the undertakings concerned – capped at EUR 25,000. For clearance decisions in investigation (Phase II) proceedings, the fee is 0.07% of the combined annual turnover of the undertakings concerned – capped at EUR 50,000. The fee shall be paid within three days following the submission of merger notification; failing which, the notification will be deemed withdrawn. Confirmation of the payment has to be presented to the Commission.

3.11 Are there any fees in relation to merger control?

See question 3.10.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

The Competition Act provides that in cases where control over a joint stock company registered in Serbia (fulfilling certain conditions) is acquired through a public bid, the concentration has to be notified to the Commission irrespective of the turnover thresholds. In other words, all acquisitions of control over joint stock companies registered in Serbia through public bids are subject to merger control, notwithstanding the turnovers of the parties. However, this rule is not further expanded upon in any bylaw or decisional practice, so particular attention needs to be exercised in all instances where control is acquired over a joint stock company registered in Serbia.

Pursuant to the Competition Act, a concentration brought about by a public offer has to be notified within 15 days following the publication of the public bid or offer or closing of the bid, whichever occurs first. The Commission issued an opinion on 11 November 2009, clarifying that a bidder might opt to file a merger notification within 15 days following either the publication of the public bid or the closing of the bid. The deadline for filing a merger notification is therefore 15 days following the closing of the takeover bid, while the earliest moment can be upon any action undertaken by the parties that may prove their serious intent to execute the transaction.

Further, the Competition Act provides an exemption from the general suspension requirement in cases where control over a joint stock company registered in Serbia is acquired through a public bid. The implementation of the transaction is permitted, although not (yet) cleared, under the following conditions only: (i) the filing has been made in a timely manner; (ii) the acquirer will not influence the

decision-making of the company based on its shareholding (unless it is directed towards maintaining the value of its investment); and (iii) the "special" approval from the Commission has been obtained.

3.13 Will the notification be published?

In line with the Competition Act, and pursuant to the Decision on the Manner of Publishing Acts and anonymising data in the Acts of the Commission for the Protection of Competition of 7 May 2013, the Commission will publish the entire merger control decision rendered in Phase I and Phase II proceedings. The decision will be published on the Commission's website (www.kzk.org.rs). In order for confidential data to be protected and subsequently for the non-confidential version of a merger control decision to be published (instead of the confidential version), a separate request needs to be filed with the Commission, by which the parties will define such confidential data and request that it be protected as such. Confidential versions of the decisions are going to be available only to the competent courts and other state bodies with notice that they are obliged to treat such data as confidential.

The publication of a decision rendered on the basis of a serious intent to implement a concentration can be postponed, but only temporarily until the final transactional document(s) has been concluded, and in any case not more than 90 days as of the day the decision has been delivered to the notifying party(ies).

In addition, the Competition Act provides that the Commission shall publish its conclusions on initiating investigative (Phase II) proceedings in the *Official Gazette of RS* and on the Commission's website.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The substantive test against which a concentration will be assessed is whether a concentration would cause a "significant restriction, distortion or prevention of competition, particularly as a result of the creating or strengthening of a dominant position". When carrying out the appraisal, the Commission will take into account the following factors:

- structure of the relevant market;
- existing and potential competitors;
- market position of undertakings involved in the concentration and their economic and financial power;
- freedom of choice when choosing suppliers and consumers;
- legal and other market entry barriers;
- the level of competitiveness of the undertakings involved in the concentration;
- trends of supply and demand of relevant goods and/or services;
- trends of technical and economic development; and
- consumers' interests.

In the *Victoria Group/Soja Protein* decision, rendered in Phase II, the Commission, after assessing entry barriers, the choice of suppliers available to customers of the merged entity, low transaction costs, and the incentives and possibilities of the parties to foreclose competitors, concluded that the transaction shall not lead to significant negative effects, although it did strengthen an existing dominant position in the market. In the *Fresenius Medical Care/Incentive Aktiebolag (Gambro)* decision, also rendered in Phase II, the Commission, with particular reference to the large market share of a competitor of the post-merger entity, found that the transaction shall not lead to significant anticompetitive effects, although it did further strengthen an existing dominant position in the market. The Commission also took into account the claim by the parties that the merger would result in lower prices and greater choice for consumers.

4.2 To what extent are efficiency considerations taken into account?

The Competition Act foresees that protection of competition shall be ensured to the benefit of consumers. Furthermore, pursuant to Article 2 point 22 of the Implementing Ordinance, the applicant may suggest to the Commission to assess efficiencies brought about by the transaction. In particular, the Commission will consider the effects that the transaction will have on the participants in the concentration as well as consumers, including lower costs, lower prices, increased quality, increased and choice and innovations. Thus, a legal basis for the Commission to take into account efficiencies when assessing mergers is in place, although there are no further guidelines as to how efficiencies will be weighed against potential anticompetitive effects. Efficiency considerations can also be seen in the decisional practice of the Commission, as it analyses possible efficiencies resulting from the concentration in its decisions. However, to the best of our knowledge, significant attempts to substantiate and/or quantify efficiencies have not yet been undertaken by the Commission.

4.3 Are non-competition issues taken into account in assessing the merger?

The Competition Act and applicable bylaws are not concerned with non-competition issues nor are they given a prominent role in merger analysis, although they may be reflected upon by the Commission in the course of review.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

The Competition Act provides that the Commission shall publish its conclusions on initiating investigative (Phase II) proceedings in the *Official Gazette of RS* and on the Commission's website. Although the matter is not regulated further by the Competition Act or bylaws, third parties can provide the Commission with information, data, and opinions relevant to the transaction under review. Once it initiates investigative proceedings, the Commission can also request information, data and opinions from third parties (e.g. customers, suppliers and competitors). Furthermore, third parties that prove their legal interest may get involved in the regulatory scrutiny process and request access to certain (non-confidential) information that has been submitted to the Commission.

4.5 What information gathering powers does the merger authority enjoy in relation to the scrutiny of a merger?

In the case of summary (Phase I) proceedings, the Commission can request documents and data which it finds necessary for the appraisal of the concentration. Should it not be provided with

such documents and information, the merger notification will be dismissed, and subsequently no decision will be rendered. In the case of an investigation (Phase II) procedure being initiated, the Commission has various additional investigative tools at its disposal. In addition to requesting documents and data from the parties, the Commission can also request documents, data, or statements from third parties (customers, suppliers and competitors).

Further, the Competition Act provides that parties that do not comply with a request to provide documentation and/or data, or provide false or incorrect data, face procedural penalties in the range of EUR 500–5,000 per day of delay, capped at 10% of the total annual turnover achieved by the violating undertaking(s). The Commission imposed such fines in the *Dehaize/Delta Maxi* case from 2011, where it imposed fines on three (non-merging) undertakings that failed to comply with the Commission's request to provide certain data for the purpose of the merger review, a decision upheld by the Administrative Court (Veropoulos, one of the three undertakings that failed to comply with the Commission's request (the other two being CDE S and KTC), was fined EUR 26,500 for 53 days of delay).

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

On request by the parties to the concentration or third parties who provide certain information for the purpose of the merger review, a measure by which the source of data or the data itself shall be declared confidential can be imposed by the president of the Commission. In order for the source or the data to be declared confidential, two conditions have to be satisfied: (i) the interest of the party demanding confidentiality has to outweigh the interest of the public to have that source or data non-confidential; and (ii) the party demanding confidentiality has to prove as probable that damages might occur if the source or the data are revealed. It is advisable that confidential data be designated as such from the outset by the participant to the concentration in the merger notification itself, as well as that all submissions (and in particular merger notifications) be submitted together with non-confidential versions of those submissions. The names of parties providing certain documents and/or information shall not be declared confidential.

The parties have the right to access the Commission's file and make copies of certain documents; however, records on voting, official reports and draft decisions, records labelled as confidential, as well as data designated as confidential, cannot be accessed. The Competition Act provides that third parties that prove their legal interest to be informed of the current state of a proceeding may be provided with such information. Letters, notices, and all other forms of communication between the parties and their attorneys directly relating to the procedure itself, shall be considered privileged communication. In cases where there is suspicion that such privileged communication is used in an abusive manner, the president of the Commission may inspect the contents of such communication and, if required, may withdraw the privileged status in its certain aspects.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

Pursuant to the Competition Act, the Commission may:

- reject the notification if the jurisdictional thresholds are not met or the notified transaction is not a concentration in terms of merger control rules;
- cease the procedure if the notification is withdrawn;
- clear the concentration unconditionally;
- clear the concentration conditionally; or
- prohibit the concentration.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Yes. If the Commission concludes that the notified concentration will restrict, distort, or prevent competition, it shall issue a statement of objections to the notifying party in order to notify it of the facts and evidence on which it intends to base its decision, and ask that it provides its comments within a certain deadline. In its answer to the Commission, the notifying party may suggest measures to be undertaken with the goal to remove anticompetitive concerns required for the concentration to be approved. The Competition Act in principle allows for both behavioural and structural measures. If the Commission is of the view that such measures are sufficient and as a result of them the concentration will not restrict, distort or prevent competition, it will clear the concentration subject to conditions. The terms and conditions under which the concentration shall be cleared, as well as methods of monitoring of their implementation, shall be stipulated in the clearance.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

Remedies have been imposed only exceptionally in foreign-to-foreign mergers, but there is a trend towards more mergers being cleared subject to remedies. In its practice, the Commission has imposed both behavioural and structural remedies in relation to foreign-to-foreign mergers.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

If the Commission concludes that the notified concentration shall restrict, distort, or prevent competition, it shall issue a statement of objections to the notifying party in order to notify it of the facts and evidence on which it intends to base its decision and ask that it provides comments within a certain deadline. In its answer to the Commission, the notifying party may suggest measures to be undertaken with the goal to remove anticompetitive concerns required for the concentration to be approved. However, although the Competition Act suggests that remedies can be offered only once the Commission issues a statement of objections, we are of the opinion that remedies could be offered from the outset of the merger review process.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The Competition Act expressly provides that the Commission may require divestment as a remedy. However, it does not regulate in detail how it shall approach the terms and conditions to be applied to the divestment, and relevant guidelines in this respect have not yet been adopted. As a general proposition, structural remedies

shall be required if there are no equally or similarly effective behavioural measures, or if behavioural measures would create a disproportionate burden on the parties. At the same time, remedies have to be proportionate and directly related to the competition concern at hand. The terms and conditions under which the concentration shall be cleared, as well as methods of monitoring of their implementation, shall be stipulated in the clearance.

5.6 Can the parties complete the merger before the remedies have been complied with?

The parties are obliged to act in accordance with the Commission's decision. The Commission may approve a concentration subject to conditions, specifying the manner in which those conditions shall be performed and the applicable deadlines. Therefore, completion of the merger in relation to the remedies imposed will depend on the terms and conditions specified in the conditional clearance.

5.7 How are any negotiated remedies enforced?

If negotiated remedies are not complied with, the Commission may impose de-concentration measures so as to (re-)establish or protect competition in the market (by ordering the parties to split a company, divest shares, break up a contract or undertake any other steps necessary) and impose fines of up to 10% of the total annual turnover achieved in Serbia.

5.8 Will a clearance decision cover ancillary restrictions?

Neither the Competition Act nor any bylaws regulate the issue of ancillary restraints. To the best of our knowledge, the Commission has not dealt with the issue of ancillary restraints in its case law. However, at the same time, there is nothing preventing the Commission from also clearing ancillary restraints in its decisions. Nonetheless, such restraints can, at the request of the parties, be notified for individual exemption from prohibition by the Commission in separate proceedings.

5.9 Can a decision on merger clearance be appealed?

Yes. Merger control decisions of the Commission can be appealed before the Administrative Court. The Competition Act fails to provide a list of persons who can bring an appeal against a decision of the Commission. According to the Law on Administrative Disputes, the following persons are entitled to bring the claim: (i) the parties to the transaction; (ii) an interested third party or public body if it can be the holder of any right deriving from the decision; and (iii) a competent authority in the case that the decision infringes the law. Bringing an appeal does not postpone the enforcement of the decision.

5.10 What is the time limit for any appeal?

The time limit for appeal is 30 days from the date of receipt of a decision.

5.11 Is there a time limit for enforcement of merger control legislation?

Pursuant to the Competition Act, the deadline for determining and imposing fines (for implementing a concentration contrary to the suspension obligation or for which clearance has not been issued) is five years as of the infringement, while the absolute statute of limitations is set to 10 years. The deadline for determining and imposing procedural penalties is one year as of the infringement.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

On the international level, the Commission liaises with a number of organisations and authorities in other jurisdictions. Firstly, the Commission cooperates with the EU Commission and DG Competition in particular. The relationship is primarily based on the Stabilisation and Association Agreement signed between Serbia and the EU and its Member States, pursuant to which the Commission is, *inter alia*, under the obligation to take into account relevant EU rules and developments when resolving cases. The Commission also regularly reports to the EU Commission on legislative and enforcement efforts. The Commission is a member of UNCTAD, the ICN, and it participates in the OECD's Regional Competition Centre, the Sofia Competition Forum, a Competition Authorities Network in the SEE, and the Competition Network of the Energy Community. Secondly, the Commission also cooperates with foreign national competition authorities, i.e. the competition authorities of Austria, Bosnia & Herzegovina, Bulgaria, Croatia, Hungary, Kazakhstan, Macedonia, Montenegro, Slovenia, Romania and Russia.

6.2 Are there any proposals for reform of the merger control regime in your jurisdiction?

There are currently no proposals to reform the merger control regime in Serbia.

6.3 Please identify the date as at which your answers are up to date.

These answers are up to date as of 26 September 2016.

Srđana Petronijević
Moravčević Vojnović and Partners
in cooperation with Schoenherr
Dobračina 15
11000 Belgrade
Serbia

Tel: +381 11 3202 600
Email: s.petronijevic@schoenherr.rs
URL: www.schoenherr.rs

Srđana Petronijević is a partner with Moravčević Vojnović and Partners in cooperation with Schoenherr, where she heads the firm's competition and white-collar crime practice in Serbia. She has been involved in numerous high-profile multijurisdictional merger control proceedings before the competition authorities particularly in the former republics of Yugoslavia. In addition, she also advises clients on all aspects of antitrust law, including infringement proceedings with respect to alleged anticompetitive practices providing full coverage in Albania, Bosnia & Herzegovina, Macedonia, Montenegro, Serbia and Kosovo. She has designed a number of compliance programs for our larger corporate clients, tailor-made to their individual needs. Another of Srđana's tasks is advising clients on all aspects of criminal compliance and white-collar crime matters in Serbia.

Danijel Stevanović
Moravčević Vojnović and Partners
in cooperation with Schoenherr
Dobračina 15
11000 Belgrade
Serbia

Tel: +381 11 3202 600
Email: d.stevanovic@schoenherr.rs
URL: www.schoenherr.rs

Danijel Stevanović is an attorney at law with Moravčević Vojnović and Partners in cooperation with Schoenherr since 2009 and is a member of the firm's EU and Competition practice. He has extensive experience in competition law matters in Serbia and neighbouring jurisdictions (Albania, Bosnia & Herzegovina, Kosovo, Macedonia and Montenegro) in a wide range of industries (including energy, industrials, consumer goods & services, financials, healthcare, technology and telecommunications). Danijel has advised in some of the leading antitrust investigations and antitrust damages cases in the Balkans, as well as in numerous high-profile merger control cases of international and regional significance. He holds postgraduate degrees from Central European University Budapest (International Business Law) and King's College London (Economics for Competition Law), and is fluent in English, Hungarian and Serbian.

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glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.co.uk