ICLG

The International Comparative Legal Guide to:

Merger Control 2017

13th Edition

A practical cross-border insight into merger control issues

Published by Global Legal Group, with contributions from:

A. A. Antoniou & Associates LLC
Accura Advokatpartnerselskab
Advokatfirmaet Wiersholm AS
AlixPartners UK LLP
Arthur Cox
Ashurst LLP
Asters
BEITEN BURKHARDT
Bergstein Abogados
Blake, Cassels & Graydon LLP
Boga & Associates
BRISDET
Dittmar & Indrenius
DLA Piper
Drew & Napier LLC
ELIG, Attorneys-at-Law
Ivanyan & Partners
Kastell Advokatbyrå AB
King & Wood Mallesons
Koep & Partners
Lakshmikumaran & Sridharan
Lee and Li, Attorneys-at-Law
Linklaters LLP
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Moravčević Vojnović and Partners
in cooperation with Schoenherr
Nagashima Ohno & Tsunematsu
OLIVARES
OmniCLES Competition Law Economic Services
PUNUKA Attorneys & Solicitors
Ropes & Gray LLP
Schellenberg Wittmer Ltd
Schoenherr
Schoenherr in cooperation with
Advokatsko druzhestvo Stoyanov & Tsekova
Schoenherr și Asociații SCA
Sidley Austin LLP
Skadden, Arps, Slate, Meagher & Flom LLP

glg
global legal group

global legal group

Contributing Editors
Nigel Parr and Catherine Hammon, Ashurst LLP

Sales Director
Florjan Osmani

Account Directors
Oliver Smith, Rory Smith

Sales Support Manager
Paul Mochalski

Sub Editor
Hannah Yip

Senior Editor
Rachel Williams

Chief Operating Officer
Dror Levy

Group Consulting Editor
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
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
November 2016

ISBN 978-1-911367-22-2
ISSN 1745-347X

Strategic Partners

MIX
Paper from responsible sources
FSC® C011748

General Chapters:

Country Question and Answer Chapters:

Continued Overleaf →

global legal group

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

Montenegro

Srđana Petronijević

Danijel Stevanović

Moravčević Vojnović and Partners
in cooperation with Schoenherr

1 Relevant Authorities and Legislation

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

The authority with competence over merger control in Montenegro is the Agency for the Protection of Competition [*Agencija za zaštitu konkurencije*] ("Agency"), operational as of 2008, competent to enforce antitrust and merger control rules. The website of the Agency is accessible at www.azzk.me. Pursuant to publicly available information, the Agency reviewed 35 merger notifications in 2015, out of which 32 were approved unconditionally and three subject to certain conditions. Merger control decisions can be challenged before the Administrative Court of Montenegro [*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 MN*, no. 44/12) ("Competition Act"), in force as of 9 October 2012. The Competition Act regulates both the substantive and procedural aspects of merger control. To the extent that some procedural aspects are not regulated by the Competition Act, the Law on General Administrative Proceedings [*Zakon o opštem upravnom postupku*] (*Official Gazette of MN*, nos. 60/03, 32/11 and 56/14) applies subsidiarily.

In addition to the Competition Act, certain aspects of merger control are regulated by various bylaws. Namely:

- the Guidelines on Criteria for Defining Relevant Markets [*Pravilnik o kriterijumima za utvrđivanje relevantnog trzišta*] (*Official Gazette of MN*, no. 18/13);
- the Guidelines on the Content and Manner of Submitting a Request for Issuance of Approval for Implementation of a Concentration [*Uputstvo o sadržaju i načinu podnošenja zahtjeva za izdavanje odobrenja za sprovođenje koncetracije*] (*Official Gazette of MN*, no. 18/13);
- the Notice on the Protection of Confidential Business Data in Proceedings Before the Agency for the Protection of Competition [*Obavjestenje o zaštiti povjerljivih poslovnih podataka u postupku pred Agencijom za zaštitu konkurencije*]; and
- the Tariff Schedule of Fees Payable for Procedures before the Agency for the Protection of Competition (*Official Gazette of MN*, no. 14/13).

Fines for competition law violations, including those pertaining to merger control, are imposed in misdemeanour proceedings by a court, at the initiative of the Agency. Misdemeanour proceedings are regulated by the Law on Misdemeanours [*Zakon o prekršajima*] (*Official Gazette of MN*, nos. 1/11, 6/11, 39/11 and 32/14).

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 to which they pertain. However, certain sector-specific regulations apply to mergers in those sectors:

- *Banking*: Acquisition of a qualified shareholding (i.e. 5%, 20%, 33%, or 50% or any acquisition of shares that confers significant influence on the management upon the acquirer) in Montenegrin banks is subject to prior approval by the Central Bank of Montenegro pursuant to the Banks Act (*Official Gazette of MN*, nos. 17/08, 44/10 and 40/11).
- *Insurance*: Acquisition of a qualified shareholding (i.e. 10%, 20%, 30%, 50%, or any acquisition of shares that confers significant influence on the management upon the acquirer) in a Montenegrin insurance company is subject to prior approval by the regulatory insurance body of Montenegro pursuant to the Insurance Act (*Official Gazette of MN*, nos. 78/06, 19/07, 45/12, 6/13 and 55/16).
- *Media*: The Media Act (*Official Gazette of MN*, nos. 51/02, 62/02, 46/10 and 40/11) prohibits all transactions which result in the creation of a monopoly in media sectors in general, while the Electronic Media Act (*Official Gazette of MN*, nos. 46/10, 40/11, 53/11, 6/13 and 55/16) regulates concentrations in the (electronic) media sector.
- *Telecommunications*: The Electronic Communications Act (*Official Gazette of MN*, nos. 40/13 and 56/13) provides for the establishment of the Agency for Electric Communications and Postal Activities, whose competences include monitoring of the sector, determining whether an operator has significant market power, as well as imposing measures aimed to mitigate or prevent negative effects on a relevant market.
- *Concessions*: The Concessions Act (*Official Gazette of MN*, no. 8/09) explicitly provides that the change of control in concession companies is subject to approval by the concession grantor (i.e. the Government, the Parliament or

the Municipality). The Concession Commission, established pursuant to the Concessions Act, keeps the register of all changes regarding the concession contracts.

- *Energy*: The Energy Act (*Official Gazette of MN*, no. 5/16) establishes the Administrative Agency for Energy which, *inter alia*, may perform all activities regarding the licensing of the companies involved in the energy sector, as well as the monitoring and regulating of the energy market. In terms of protection of competition, the relevant authority is entitled to supervise the behaviour of the market participants and to inform the Agency on any potential competition concerns on the energy market.

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?

Pursuant to the Competition Act, a concentration arises where:

- two or more independent undertakings or parts thereof merge;
- one or more undertakings or natural persons controlling at least one undertaking acquire (directly or indirectly) control over another undertaking or parts thereof; and
- at least two independent undertakings establish a new undertaking on the market 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. joint ventures).

Control is defined as the possibility of exercising (solely or jointly) decisive influence over an undertaking, on a *de jure* or *de facto* basis. In particular, control will exist where one undertaking in another holds more than half of the shares or voting rights, as well as in cases where it has the right to appoint the majority of board members or representatives of that undertaking.

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 jure* or *de facto* control over the target on the acquiring undertakings (see also question 2.1).

2.3 Are joint ventures subject to merger control?

Yes, joint ventures are subject to merger control. However, merger control rules apply only to those joint ventures which operate on a lasting basis with 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?

Under the Competition Act, a transaction has to be notified if either of the following thresholds are met:

- the aggregate turnover in Montenegro of at least two parties to the concentration exceeds EUR 5 million; or
- the aggregate worldwide turnover of the parties to the concentration exceeds EUR 20 million, provided that at least one of the parties achieve a turnover of EUR 1 million within the territory of Montenegro.

Upon learning that a concentration has been implemented, the Agency can order the participants to the concentration to notify the concentration if their joint market share in the relevant market in Montenegro is at least 60%. The burden of proof that the 60% market share threshold is met lies with the Agency. 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 concentrations are 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. In addition, as a matter of practice, for the calculation of local (national) turnover, 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. According to currently developed practice, local registered presence is not required as long as the thresholds are reached through sales conducted in the territory of Montenegro.

Special rules for the calculation of turnover apply to banks, credit institutions, financial entities, and insurance companies. As regards banks, credit institutions, and financial companies, after deducting taxes, the relevant turnover shall consist of the income from interest charged, net profits from financial transactions, commissions charged, income from securities held by these organisations, and income from other business activities. As regards insurance companies, the turnover is calculated with respect to the value of written gross premiums.

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 Montenegro, as long as one of the turnover thresholds is satisfied. A domestic effects doctrine has not yet been adopted by the Agency, although Article 2 of the Competition Act provides that the Competition Act applies to acts which have, or which might have, effects on competition in the territory of Montenegro. However, the decisional practice so far does not support the view that a transaction, besides meeting the jurisdictional thresholds, also needs to have an effect on competition in Montenegro in order to trigger a filing obligation. Hence, foreign-to-foreign transactions that meet the jurisdictional thresholds of the Competition Act trigger a filing obligation in Montenegro and are regularly reviewed by the Agency.

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 regulations 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.

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 the event of staggered transactions, the obligation to notify is triggered at the moment of the acquisition of the share that enables the acquirer to exercise decisive influence over the target. Two or more transactions between identical undertakings performed within a period of two years shall be deemed a single concentration.

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?

Notification is compulsory when the thresholds set by the Competition Act are met (please see question 2.4 above), save for certain exceptions (please see question 3.2 below). A concentration has to be notified within 15 days following any of the following acts, whichever occurs first: (i) the conclusion of an agreement; (ii) announcement of a public bid or offer or closing of the public offer; or (iii) the acquisition of control. However, the parties may notify a transaction to the Agency even before one of the above-mentioned 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 an offer, or by any other way which precedes any of the triggering events mentioned. 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.

The following acquisitions of control shall not be deemed concentrations:

- when banking or other financial institutions temporarily acquire shares or other securities of an undertaking, under the conditions that it resells them within a period of 12 months (with a possible additional six-month extension), and provided that during this period, the shareholders' rights are not used so as to influence the business decisions of the respective undertaking towards its competitors, or that they are used exclusively so as to prepare the sale of those shares or securities;
- when control over an undertaking is acquired by a person in the capacity of a bankruptcy or liquidation receiver [*stečajni ili likvidacioni upravnik*]; and
- when a joint venture purports to coordinate the market activities between two or more undertakings that retain their independence (as it shall be assessed under rules regulating restrictive agreements).

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 prescribes fines in cases where the parties to the transaction fail to file the merger notification within the 15-day period. In such a case, an undertaking may be subject to fines in the range of EUR 4,000–40,000. The responsible persons within the undertaking in violation may be fined in the range of EUR 1,000–4,000. If an undertaking performs a concentration without prior clearance of the Agency (in violation of the suspension obligation), it may be fined in the amount of 1–10% of its total annual turnover in the financial year preceding the violation. The responsible persons within the undertaking in violation may be fined in the range of EUR 1,000–4,000. In cases where a concentration is performed without clearance, the Agency may also impose various structural or behavioural measures and, in particular, the divestment of shares or limitation/prohibition of use of voting rights.

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 Agency. To the best of our knowledge, carve-out arrangements have not yet been tested with the Agency. It is likely that the Agency 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.

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

Parties to a transaction may notify it to the Agency 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?

Upon submission of a complete notification, the Agency is obliged to deliver a decision approving the concentration unconditionally within 105 working days, or a decision approving the concentration subject to conditions within 125 working days. If the concentration creates or strengthens a dominant market position and consequently prevents, restricts, or distorts competition, the Agency shall prohibit the concentration within 130 working days. The Agency shall render a decision within 25 working days if the notified concentration does not meet the jurisdictional thresholds (please see question 2.4 above). If the Agency does not render a decision within the above-mentioned deadlines, the transaction is deemed to be cleared.

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?

If an undertaking performs a concentration without prior clearance of the Agency (in violation of the suspension obligation), it may be fined in the amount of 1–10% of its total annual turnover in the financial year preceding the violation. The responsible persons within the undertaking in violation may be fined in the range of EUR 1,000–4,000. In cases where a concentration is performed without clearance, the Agency may also impose various structural or behavioural measures and, in particular, the divestment of shares or limitation/prohibition of use of voting rights.

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

The format and content of merger notifications is regulated by the Guidelines on the Content and Form for Submitting a Request for Issuance of Approval for Implementation of a Concentration [*Uputstvo o sadržaju i načinu podnošenja zahtjeva za izdavanje odobrenja za sprovođenje koncetracije*] (*Official Gazette of MN*, no. 18/2013). The merger notification shall be submitted in the Montenegrin language. In principle, all documents in a foreign language shall be submitted notarised and, where necessary, super-legalised along with the translation by a sworn court interpreter into Montenegrin. The Agency is empowered to request any other information which 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. The Agency may revoke its decision if it is based on incorrect or incomplete information submitted by the parties.

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?

Pursuant to the Guidelines on the Content and Form for Submitting a Request for Issuance of Approval for Implementation of a Concentration, a "short-form" merger notification can be submitted in certain instances, i.e.: (i) when the combined market share of the undertakings concerned on the relevant market is less than 10%, and/or less than 15% on a vertically integrated market; (ii) when an undertaking acquires individual control whereas it previously held joint control over a certain target undertaking; or (iii) if the undertakings concerned are not present on the same relevant product market or vertically integrated markets, or markets that are closely connected in or outside Montenegro. Although there is no formal obligation for the Authority to act upon such a notification within a shorter deadline than the general one prescribed, it should be expected that the Authority will review such merger notification more expediently, as the conditions under which a "short-form" merger notification can be submitted assume a lack of (significant) anticompetitive effects.

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.

Clearance fees are regulated by the Authority's Tariff Schedule. Clearance fees for mergers cleared in "Phase I" are 0.03% of the combined annual turnover of the undertakings concerned, the amount being capped at EUR 15,000, while fees for mergers cleared after a "Phase II" investigation are 0.07% of the combined annual turnover and capped at EUR 20,000.

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?

Pursuant to the Competition Act, a concentration has to be notified 15 days from an announcement of a public bid or offer, or closing of the public offer; whichever occurs first. Also, undertakings that make a public offer in accordance with the law regulating the takeover of joint stock companies, and consequently acquire control in terms of the Competition Act, must notify the Agency of the public offer. In the case of acquisition of control through a public offer, the parties to a concentration may continue with the public offer, notwithstanding the obligations to suspend the concentration, if the acquirer does not exercise voting rights or does so only as to maintain the value of the target undertaking until clearance has been issued. Furthermore, the Agency may, upon a reasonable request of the notifying party, render a decision with urgency if it is necessary for the protection of that party's rights or the assets of the acquired undertaking. However, there is little practice in respect of transactions concerning a public offer, and due attention needs to be exercised in all instances where control is acquired over a joint stock company.

3.13 Will the notification be published?

Pursuant to the Competition Act, the Agency is obliged to publish certain information from the merger notification in the *Official Gazette of MN*. Such information includes: (i) the names of the undertakings concerned; (ii) a brief description of the transaction; and (iii) the economic sector in which the transaction occurs. Furthermore, the operative part of the Agency's decision shall be published in the *Official Gazette of MN* and on the Agency'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 creates or strengthens a dominant position, as a result of which effective competition on the relevant market may be restricted, distorted, or prevented. If the answer is affirmative, such a concentration will be prohibited, unless the parties to the concentration demonstrate that the resulting consumer benefits outweigh the negative effects resulting from the creation

or the strengthening of a dominant position. When assessing the effects of a concentration, the Agency shall consider the following factors:

- the structure and concentration of the relevant market(s);
- actual and potential competitors;
- the market position of the parties to the concentration and their economic and financial power;
- the possibility to choose sources of supply and purchasers;
- legal and other barriers to enter the relevant market;
- the domestic and international level of competitiveness of the parties to the concentration;
- the trends of supply and demand of relevant goods/services;
- the trends of technical and economic development; and
- the interests of consumers.

4.2 To what extent are efficiency considerations taken into account?

The substantive test against which the admissibility of the concentration will be assessed requires that the negative and positive effects of the concentration be weighed and balanced. Consequently, the efficiencies stemming from the concentration need to be taken into account by the Agency in order to assess its admissibility. This is also reflected by the mandated content of the merger notification which requires that expected benefits from the point of view of consumers (such as lower prices, improved quality, increased R&D, and increased consumer choice) be named and reasoned. Efficiency considerations can also be seen in the decisional practice of the Agency, 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 Agency.

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 the merger analysis, although they may be reflected upon by the Agency 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 Agency is obliged to publish a description of the notified transaction in the *Official Gazette of MN*, and in particular include: (i) the names of the participants in the concentration; (ii) a brief description of the transaction; and (iii) the economic sector in which the transaction occurs, with the aim that third parties get acquainted with the intended concentration. Although the matter is not regulated further by the Competition Act or bylaws, we believe third parties can provide the Agency with information, data, and opinions relevant to the transaction under review.

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

Pursuant to the Competition Act, the Agency may utilise a wide range of information gathering powers. Although most of these are specifically designed for behavioural investigations (e.g. cartel investigations), the Competition Act nevertheless explicitly states that they may also be utilised in relation to merger control proceedings. Although it is unlikely that the Agency would actually use most of these powers in merger control proceedings, it may nevertheless: request that the parties to the concentration provide certain information and documents; conduct on-site investigations (i.e. inspect business premises, business records, and other documents, copy or scan business documents, and seal business premises and documents); take statements from representatives and employees of the parties to the concentration; take expert witnesses' testimony; hold oral hearings; and conduct sectoral investigations, etc. The Agency may also contact other state authorities to collect relevant information and/or to verify facts. At the request of the Agency, undertakings (as well as other legal and natural persons) are obliged to provide it with information and documents of relevance for a given proceeding before the Agency within a period of 15 days. Undertakings that fail to comply with such requests can be subjected to fines in the range of EUR 500–5,000 for each day of non-compliance, but not more than 3% of the total annual turnover achieved in the previous financial year.

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

Upon the request of a party supplying commercially sensitive information, the Agency may allow such data or the source of such data to be protected, if the request is justified and outweighs the public interest to access such data. However, the party making the request has the burden to prove that it would incur damage should such data or its source be made publicly available. The detailed scope and procedure by which commercially sensitive information can be protected is regulated by the Agency's Notice on the Protection of Confidential Business Data in Proceedings Before the Agency for the Protection of Competition [*Obavjestenje o zaštiti povjerljivih poslovnih podataka u postupku pred Agencijom za zaštitu konkurencije*]. Client-attorney communication is considered privileged communication.

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

5.1 How does the regulatory process end?

Pursuant to the Competition Act, the Agency may:

- reject the notification if the jurisdictional thresholds are not met;
- cease the procedure if the notification is withdrawn;
- clear the concentration unconditionally;
- clear the concentration subject to conditions; or
- prohibit the concentration.

In cases where the Agency clears the concentration based on incorrect or untrue data and/or facts, it shall declare the clearance null and void.

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

Yes. If the Agency concludes that the notified concentration may restrict, distort, or prevent competition, it shall notify the parties to the concentration of the facts and conditions on which it intends to base its decision. In their answer to the Agency, the parties to

the concentration may suggest measures to be undertaken before or after the concentration is performed, with the goal to remove any anticompetitive concerns. The Competition Act allows for both behavioural and structural measures. If the Agency 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 shall clear the concentration subject to conditions. The terms and conditions under which the concentration shall be cleared, as well as the methods of monitoring/supervision of their implementation, shall be stipulated in the clearance. If the parties fail to implement the remedies, the Agency shall revoke its decision. In 2015, the Agency cleared three concentrations subject to remedies.

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

To the best of our knowledge, no (foreign-to-foreign) concentration has yet been approved subject to conditions.

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 Agency concludes that a notified concentration may restrict, distort, or prevent competition, it shall notify the parties to the concentration of the facts and conditions on which it intends to base its decision. In their answer to the Agency, the parties to the concentration may suggest measures to be undertaken before or after the concentration is performed. However, although the Competition Act suggests that remedies are only offered once the Agency has notified the parties of its intention to prohibit the concentration, 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 provides that the Agency 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. The Competition Act provides that remedies need to be proportionate to, and directly aimed at, the competitive concerns they aim to remedy. As a general proposition, structural remedies shall be required if no equally effective behavioural remedies may be imposed, or if a behavioural remedy would be a greater burden on the parties to the concentration than a structural remedy. The Agency in particular (but not exclusively) may impose the following types of structural remedies: sale of undertakings or parts thereof to an unrelated party; dissolution of a joint venture (of the company and the underlying agreement); or severance of personal ties between undertakings (e.g. decision-making and executive bodies). To the best of our knowledge, no divestment remedies have yet been imposed by the Agency.

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

Yes. The Competition Act expressly provides that measures can be undertaken before or after the concentration is performed. However, the terms and conditions, in accordance with which the measures shall be undertaken, will be set out in the clearance. If the parties fail to implement the measures, the Agency may revoke its decision.

5.7 How are any negotiated remedies enforced?

Pursuant to the Competition Act, negotiated remedies may be enforced in two ways. Firstly, if parties to a concentration fail to implement the negotiated remedies, the Agency may revoke its conditional clearance. Secondly, failure to comply with the negotiated remedies may incur fines of the violating undertaking in the amount of 1–10% of the total annual turnover in the financial year preceding the violation. Furthermore, the responsible persons within the undertaking in violation may be fined in the range of EUR 1,000–4,000.

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 Agency has not dealt with the issue of ancillary restraints in its case law. However, at the same time, there is nothing preventing the Agency 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 Agency in separate proceedings.

5.9 Can a decision on merger clearance be appealed?

Yes. Merger control decisions of the Agency can be appealed before the Administrative Court of Montenegro. The Competition Act does not set out the circle of persons that can challenge a merger control decision. According to the Administrative Disputes Act, the following persons are entitled to bring an appeal: (i) the parties to the concentration whose rights or legally protected interests are violated by a decision; (ii) third parties whose rights or legally protected interests are violated by a decision; or (iii) the attorney general or other competent state body if the law has been violated in favour of or to the detriment of certain third parties.

5.10 What is the time limit for any appeal?

The time limit for appeals to the Administrative Court of Montenegro is 30 days from the date of receipt of a decision. If the appeal is to be brought by a party that has not received the decision, the time limit is 60 days from the date of receipt of the decision by a party in whose favour it has been rendered.

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

Fines for competition law violations, including those for merger control, are imposed in misdemeanour proceedings by a court, at the initiative of the Agency. Misdemeanour proceedings against undertakings and responsible persons within undertakings, for (i) failure to notify a concentration within the prescribed deadline, (ii) failure to suspend the concentration until clearance, (iii) failure to comply with the terms and conditions of a conditional clearance, and (iv) performing a prohibited concentration, cannot be initiated after two years from the date on which the violation occurred. In any case, misdemeanour proceedings cannot be initiated after four years from the date on which a violation occurred.

6 Miscellaneous

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

Pursuant to publicly available information, the Agency is a member of the International Competition Network, and has also concluded certain bilateral agreements, in particular with the Bulgarian, Austrian, Croatian and Serbian competition authorities.

The Agency is also active in projects organised by the Regional Cooperation Council. On 1 June 2015, the Agency signed memorandums of understanding and cooperation in the area of protection of competition ("Memorandums") with the competition authorities of Serbia and Croatia. The backdrop of signing the Memorandums is to come closer to European standards in competition law and policy, and to improve cooperation in this field. Furthermore, the Agency (together, the competition authorities of Albania, Bosnia & Herzegovina, Bulgaria, Croatia, Kosovo, Macedonia and Serbia) signed the Sofia Statement during the first Sofia Competition Forum meeting in 2012, expressing its willingness to deepen and strengthen the regional cooperation and maintain regular contact in the framework of the initiative.

In addition, the Agency is also closely cooperating with the Energy Community Secretariat based on the Declaration on Cooperation between the Competition Authorities of the Contracting Parties and the Energy Community Secretariat from 2012.

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 Montenegro.

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.

moravčević vojnović
and partners
in cooperation with schonherr

Moravčević Vojnović and Partners in cooperation with Schoenherr has been active in the Serbian market since 2002. The firm's practice is client-orientated, with specialised practice groups that provide industry-focused services to meet the demands of a competitive, developing and rapidly changing marketplace. The firm's client list includes leading companies, financial institutions, organisations and governments. The Belgrade office, via its specialised country desks, acts as a hub for Bosnia & Herzegovina, Macedonia and Montenegro.

Schoenherr is a leading full-service law firm in Central and Eastern Europe. More than 300 professionals service national and international clients from our offices in Austria, Belgium/EU, and throughout the entire CEE region. As one of the first international law firms to move into CEE, we have grown to be one of the largest firms in the region.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

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