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

Slovenia

Eva Škufca, LL.M. (LSE)

Schoenherr

Urša Kranjc

1 Relevant Authorities and Legislation

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

The enforcement of merger control rules is delegated to the Slovenian Competition Protection Agency ("Agency"), an independent body which started its operations in January 2012, taking over from its predecessor, the Competition Protection Office. Acts issued by the Agency may be reviewed by the Administrative Court in an administrative dispute, in accordance with the provisions of the Administrative Dispute Act.

1.2 What is the merger legislation?

Merger control legislation is set out within the Prevention of Restriction of Competition Act of 2008 ("Competition Act"), which has been amended several times throughout 2009–2015. There is currently a new amendment in the pipeline (for details, please see question 6.2 below). Substantive merger control provisions are specified in Part III of the Competition Act, whereas procedural rules are outlined in Chapter 3 of Part V. The Agency shall also follow the procedural rules of the General Administrative Procedure Act in instances not specifically regulated by the Competition Act. The (compulsory) merger notification form is prescribed by a government regulation, passed on the basis of the Competition Act (please see question 3.8 below).

1.3 Is there any other relevant legislation for foreign mergers?

No legislation or provisions exist which relate specifically to foreign mergers as such. However, particular sector-specific legislation (e.g. energy, investment funds, banking, insurance, media) contains certain restrictions, in cases when non-EU Member State shareholders would wish to hold controlling stakes in Slovenian companies active in the specified sectors (please see question 1.4 below).

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

Sector-specific legislation governing the sectors for energy, telecommunications, financial services and media, as well as the Takeovers Act, contain specific merger provisions; however, the jurisdiction for merger control primarily remains with the Agency.

Energy Sector

The energy sector is primarily regulated by the Energy Act, which empowers the Agency for Energy to perform the role of the market regulator. The Agency for Energy is, *inter alia*, authorised to supervise the efficiency and competitiveness of gas and electricity markets. The Energy Act also provides specific rules for cooperation with the (Competition) Agency, under which the two agencies cater for each other with all of the necessary information to perform their duties.

Electronic Communications Sector

The electronic communications sector is governed by the Electronic Communications Act ("ECA"), which establishes the Agency for Communication Networks and Services of the Republic of Slovenia ("AKOS") as an independent body that regulates and supervises the electronic communications market, manages and supervises the radio frequency spectrum in the Republic of Slovenia, performs tasks in the field of radio and television broadcasting, and regulates and supervises the postal and railway service markets. The ECA provides specific rules on cooperation between the AKOS and the Agency: they are obliged (i) to furnish each other with information necessary for the performance of their responsibilities, and (ii) to cooperate in analysing relevant markets and determining significant market power. The AKOS retains exclusive competence for assessing significant market power and defining relevant markets under the ECA. The Agency is likely to involve the AKOS's expertise when deciding upon mergers in the telecommunications sector, but retains exclusive competence under the Competition Act.

Financial Sector

Pursuant to legislation regulating banks, insurance companies, stockbroking companies and fund management companies, an approval from the respective public regulators is required for the acquisition of a qualifying holding in such institutions. Qualifying holdings are, in principle, defined as 10%, 20%, 33% and 50% of the voting rights or capital of the company; however, even a stake below 10% may be viewed as a qualifying holding if, given the ownership structure of the company, it enables the holder the possibility to exercise important influence. Any person obtaining a qualifying holding without consent of the regulatory body loses voting rights based on the shares beyond the qualifying holdings. The procedural rules for the assessment of such acquisitions/increases in holdings are in line with Directive 2007/44/EC.

Media Sector

Mergers in the public media sector are specifically regulated by the Media Act. As a general rule, the Media Act prohibits concentrations between issuers of daily newspapers and radio and/or television broadcasters. Moreover, the Media Act requires that all

acquisitions of companies within the media sector which relate to an ownership share or management rights above 20% need approval by the Ministry of Culture before closing, regardless of the publishers' market position. The Competition Act is applicable to mergers between publishers of public media if the concentration meets the criteria (thresholds) set out in the Competition Act. Additionally, the Media Act lays down a number of specific limitations. According to Article 58(3) of the Media Act, the Ministry of Culture shall refuse to approve a merger when it results in a dominant position of the merged publisher in the media market or in the advertising market. It is deemed that a dominant position in the media market occurs if the coverage for the analogue terrestrial radio signal reaches 15% of all listeners in the Slovenian market, or, if the coverage for the analogue terrestrial TV signal reaches 30% of all viewers in Slovenia, or if the relevant market share for daily newspapers reaches more than 40% in the territory of Slovenia.

Consent of the Ministry of Culture is required for any acquisition of:

- more than 20% shareholding (or voting rights) in any publisher of a radio or TV programme; the Ministry of Culture issues such consent after obtaining an opinion by the Broadcasting council; or
- more than 20% shareholding (or voting rights) in any publisher of a printed daily newspaper.

Food Sector

Since the amendment of Agriculture Act in 2014, the Agency cooperates with the so-called Food Chain Supervisor. Even though there are no specific provisions relating to mergers, it would be safe to assume that the Agency might rely on the Supervisor's expertise when assessing mergers within the sector.

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's provisions on concentrations cover mergers, acquisitions and full-function joint ventures. Article 10 specifies that a concentration occurs when:

- two or more previously independent undertakings merge;
- one or more persons already controlling at least one undertaking, or one or more undertakings, acquire, whether by purchase of shares/securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings; or
- two or more undertakings create a joint venture performing, on a lasting basis, all of the functions of an autonomous economic entity.

For the purposes of the Competition Act, control is deemed to be constituted by way of (acquisition of) rights, contracts or any other means which (either separately or in combination, and having regard to the particularities of the facts or law involved) confer the possibility of exercising decisive influence over an undertaking, in particular by way of:

- ownership of the entire capital or of a capital interest;
- ownership or the right to use all or part of the assets of an undertaking; or
- right or contract, which confers decisive influence on the voting or decisions of the organs of an undertaking.

When establishing the existence of control, the Agency usually abides by the provisions of the Companies Act, the Takeovers Act and the Markets in Financial Instruments Act, which include specific definitions of terms such as affiliated persons, acting in concert, dominating/dominated company, holdings, groupings, etc.; however, it needs to be noted that the Agency is not bound by such definitions. Moreover, the Agency is inclined to rely on the European Commission's practice on the existence of control (though it is not formally binding on the Agency).

De Facto and De Jure Control

Control often results from the acquisition of the majority of the voting rights (50% + 1 share), but can also be acquired on a *de jure* basis (e.g. a minority shareholding with special rights) or on a *de facto* basis (having the majority at the shareholders' meeting). The possibility to exercise decisive influence on an undertaking does not require the existence of "visible" influence on the management of the company. For instance, ownership of shares in a company, allowing for the passing of a resolution at the shareholders' general assembly on its own, would – regardless of the other shareholders – suffice in order to establish the existence of sole control.

Joint Control

"Acting in concert" of the shareholders in a target company constitutes joint control within the meaning of the Competition Act. In the absence of a formal shareholders' agreement, the Agency may also review the voting history of the shareholders in order to establish whether they have been acting in concert.

Share Options

Convertible warrants, share options, or other instruments that may create an entitlement to acquire an equity interest in the future do not – in the absence of other agreements conveying control over the target company – constitute a possibility to control the target company *per se*, and are thus not caught by the merger control provisions. However, the ownership of share options may trigger an obligation to make a tender offer which must be notified to the Agency on the basis of the Takeovers Act.

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

Minority shareholdings are caught by the merger control rules if they result in *de facto* or *de jure* control (without holding 50% + 1 vote in the equity capital) of the company (please see question 2.1 above).

2.3 Are joint ventures subject to merger control?

Creation of a joint venture by two or more independent undertakings, performing all functions of an autonomous economic entity on a lasting basis, constitutes a concentration within the meaning of the Competition Act.

According to Article 11(3) of the Competition Act, creation of a joint venture which has, as its object or effect, the coordination of the competitive behaviour of undertakings that remain independent, shall be assessed under the provisions of Article 6 of the Competition Act which prohibits cartels. In cases where the Agency determines that the joint venture in question does not coincide with the exemptions provided by Article 6(3), such concentrations will not be approved.

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

A concentration is caught by the merger control regime set out in the Competition Act in the following situations:

- The combined aggregate annual turnover of all the undertakings concerned (including undertakings belonging to the same group) exceeds EUR 35 million before tax on the Slovenian market in the last business year, and:
  - the annual turnover of the target company (including undertakings belonging to the same group) exceeds EUR 1 million on the Slovenian market in the last business year; or
  - in the event of creation of a joint venture, the annual turnover of at least two participating undertakings (including undertakings belonging to the same group) exceeds EUR 1 million on the Slovenian market in the last business year.
- If a concentration does not meet the above thresholds, but the market share of the undertakings concerned exceeds 60% in the Republic of Slovenia, Article 42(3) of the Competition Act provides for an (implied) obligation of the undertakings concerned to inform the Agency of the concentration (but not to submit a formal notification).

Pursuant to Article 42(3) of the Competition Act, the Agency may request that a concentration is notified "[…] within 15 days upon having been informed by the undertakings", or upon having learned about the concentration from market sources. In any of the two events, the transaction would have to be suspended until a clearance from the Agency is obtained (please also see question 3.7 below). We note that in spite of the ambiguous wording of the respective provision, the general understanding is that no penalty may be imposed for the failure of an undertaking to inform the Agency of a transaction falling within the scope of Article 42(3) of the Competition Act.

Turnover Calculation

The relevant turnover is calculated on the basis of audited or, in the absence thereof, unaudited annual accounts. Pursuant to Article 3 of the Competition Act, the annual turnover comprises all revenues generated by undertakings participating in the concentration together with group undertakings (please see below), excluding net revenues from the sale of products and services between group undertakings. In cases where the concentration arises from an acquisition of control of a part of one or more undertakings, irrespective of whether these parts have the status of a legal entity, only the turnover relating to the part relevant to the concentration shall be taken into account.

The Agency generally establishes the turnover of the parties to the concentration solely on the basis of their publicly available or provided balance sheets. In the case of groups of companies, the total turnover on the Slovenian market needs to be assessed regardless of the geographical scope of the product market in which it is achieved. According to Article 3 of the Competition Act, the following companies are deemed to belong to the same group:

- undertakings (directly) involved in the concentration;
- undertakings controlled by the undertakings (directly) involved in the concentration;
- undertakings controlling the undertakings (directly) involved in the concentration;
- undertakings controlled by the undertakings from the preceding indent; and
- undertakings in which one or more of the undertakings mentioned in the preceding indents jointly, or in collaboration with one or more undertakings, exercises decisive influence.

As a rule, the Agency will only include those affiliates in the turnover calculation that are listed in the consolidated balance sheet of the companies involved in the merger. In cases where the balance sheets do not reflect the turnover achieved on the Slovenian market, the parties to the concentration must provide separate turnover calculations with respect to the Slovenian market.

Two specific examples may be given:

- Where banks, saving organisations or other financial institutions are involved in the merger, the turnover shall consist of the income from interests charged, net profits from financial transactions, commissions charged, income from securities held by these organisations and of the income from other business activities.
- Insurance companies' turnover shall consist of gross insurance and reinsurance premiums charged by these companies in a given year.

Market Share Calculation

With regard to the relevant product market, all the products and/or services that the consumer and/or user considers to be interchangeable or substitutable by reason of their characteristics, price or intended use, are deemed as constituting a single relevant product market. The relevant geographic market comprises all areas in which competitors on the relevant product market compete in the sale or purchase of products, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because the competition conditions are appreciably different.

Please note that the relevant geographic market might be (and usually is) broader than the Slovenian market. However, when determining whether a concentration falls under the regime of Article 42(3) of the Competition Act (i.e. whether or not the Agency may request its notification in the absence of turnover thresholds – please see above), the market share for relevant products and services on the Slovenian market only must be taken into account.

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

Yes. As soon as the thresholds set out under question 2.4 above are met, merger control regulation applies, irrespective of an (substantive) overlap. Please note that this applies also for concentrations, which may be subject to review by the Agency on the basis of Article 42(3) of the Competition Act (i.e. where the undertakings concerned do not meet the turnover thresholds but have a market share exceeding 60% in the Slovenian market).

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?

Foreign-to-foreign transactions are caught by the merger control legislation as soon as the thresholds (please see question 2.4 above) are met. It is not necessary for foreign undertakings to have an established legal entity or subsidiary in Slovenia. The only exemption from this situation is when the concentration is to be appraised by the European Commission in accordance with Regulation 139/2004/EC. In such cases, "foreign-to-foreign" transactions (as all others) do not need to be notified to the Agency.

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

The only case where the jurisdictional thresholds set out in the Competition Act are overridden is when the concentration in question has an EU dimension and must therefore be notified to the European Commission. The Agency does not have the jurisdiction to review such concentrations.

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?

Apart from stipulating – for the purpose of turnover calculation – that two or more transactions executed within two years by the same persons with respect to the same target undertaking are deemed as one transaction (occurring with the execution of the latest one), the Competition Act does not contain any specific rules on how to deal with a merger that takes place in stages. Furthermore, no guidelines have been adopted on the issue. Generally, the Agency will consider a merger in stages as a single transaction as long as all stages of the transaction have been disclosed in the notification, and the steps take place only among the undertakings participating in the concentration as disclosed in the merger notification. In cases where a target company is purchased by a group of joint purchasers, with the intention of dividing up the assets of the target between the joint purchasers, it would, in principle, be possible to notify the original purchase of the target company as well as the subsequent series of steps dividing the assets as one transaction, and the Agency would most likely consider it as only one transaction. Please note that the decision upon the transaction would be based on the facts existing at the time of rendering the decision. Should, for example, the control in one or more of the joint purchasers change subsequently to the decision of the Agency clearing the joint purchase of the target company, such a joint purchaser would most likely nevertheless have to notify again the subsequent acquisition of parts of the target company.

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?

Whenever the thresholds set out in the Competition Act are met, the notification is mandatory. The participants to the notification must notify the concentration to the Agency within 30 days after the conclusion of the underlying agreement, the announcement of the public bid or acquisition of a controlling interest. The 30-day deadline starts running when the first of those events occurs.

With regard to takeovers, the Agency shall be notified of a compulsory tender offer (takeover bid) in accordance with the provisions of the Takeovers Act – even if the planned concentration does not constitute a concentration within the meaning of the Competition Act (note that the takeover process is primarily monitored by the Slovenian Securities Market Agency). In such events, the obligation to inform the Agency pursuant to the Takeovers Act is sufficiently fulfilled by way of a simple letter sent to the Agency, and there is no requirement that the formal Merger Notification Form is submitted.

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

There is one exception to the filing obligation that applies to banks, insurance companies, savings institutions and other financial undertakings, whose regular activities include trading securities on their own behalf or on behalf of others. No notification is required if such an institution acquires equity interests in an undertaking with the purpose of resale, provided that it does not exercise voting rights arising from such equity interests in order to affect the competitive actions of the undertaking in question, or provided that it only exercises such voting rights in the interest of arranging for the sale of such equity interests, with a further condition that such sale is made within one year upon purchase of the equity interests. The one-year period may be extended by the Agency at the request of the undertaking if such an undertaking is able to demonstrate that the sale could not be properly executed within the prescribed period.

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

The exercise of any rights arising from a notifiable concentration prior to receiving clearance from the Agency may entail the following sanctions:

- **Fines**: a penalty in the amount of up to 10% of the turnover achieved by the undertaking (along with other undertakings of the same group) in the preceding business year, in the case of a failure to notify and for late filing of the concentration. In addition, a fine between EUR 5,000 and 10,000 may be levied on the responsible person of such an undertaking or on the responsible independent contractor. If the nature of the offence is deemed to be particularly serious given the amount of resulting damages or the amount of unlawfully acquired pecuniary benefits, the undertaking's responsible person may be fined up to EUR 30,000.

  The fines imposed by the Agency may be annulled or reduced through an appeal process to the Administrative Court.
- **Suspension of Rights and Nullity**: the parties are prohibited from exercising the rights arising from the merger that is subject to notification before a clearance decision is issued by the Agency. Article 12(4) of the Competition Act authorises the Agency to file a lawsuit to declare such an act (i.e. the exercise of rights in the absence of a notification) null and void. The acquirer of shares in the target company in breach of the filing obligation may lose its voting rights from the shares acquired. Consequently, the remaining shareholders can judicially challenge any resolution of the target company's general assembly passed on the basis of voting rights stemming from the shares acquired without notification to the Agency.
- **Other Measures**: the Agency may order division of the undertaking, disposal of all the shares acquired, sale of interests, sale of securities, or other measures appropriate to achieve a restoration of the situation prevailing before the implementation of the concentration. However, the Agency may only do so if the merger resulted in strengthening of the power of one or more undertakings, individually or jointly, as a result of which effective competition on the relevant market is significantly impeded or excluded.

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

In principle, carving out the local completion of a merger is possible, although it depends on the structure of the transaction. Under the Competition Act, mergers are only assessed in relation to the effects on the Slovenian market; therefore, the Agency is only competent to appraise those effects of the merger which can be clearly defined to exist on the Slovenian market. As a result, it should be possible to carve out the part of the transaction that affects only the Slovenian market and proceed with the implementation outside Slovenia or *vice versa*; however, there is no practice or official guidance available in this respect.

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

The Competition Act only provides for the final deadline by which the filing must be completed, i.e. in general, 30 days after signing the agreement (see question 3.1 above). The Agency has, however, developed a practice that a notification can be filed before the parties execute a binding agreement (e.g. the execution of the agreement is still subject to internal corporate approval measures) if the undertakings concerned show a serious intent to enter into the planned transaction and disclose to the Agency all the milestones of the envisaged transaction.

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?

Pre-notification Phase

First and foremost, it needs to be emphasised that the pre-notification phase is not a statutory part of the merger control process and is not regulated by the Competition Act. However, prior to the notification, the Agency is usually willing to provide information at the request of the parties. Moreover, in past years, the Agency has even been prepared to meet with the parties prior to the submission of a formal notification.

Phase I

In Phase I procedures, the Agency may adopt one of the following three decisions:

- If the Agency finds that the concentration notified does not fall within the scope of the provisions of the Competition Act, it shall issue such a finding by way of a decision.
- If the Agency finds that the notified concentration, although falling within the scope of the provisions of the Competition Act, does not raise serious doubts as to its compatibility with competition rules, it shall issue a decision not to oppose the concentration, and declare the concentration compatible with competition rules.
- If the Agency finds that the concentration notified falls within the scope of the provisions of the Competition Act and raises serious doubts as to its compatibility with the competition rules, it shall issue a decision on the instigation of a Phase II procedure.

All Phase I decisions are legally required to be issued within 25 working days from the filing of the merger notification. However, the said deadline only starts running once the filing has been deemed complete by the Agency. Given the exhaustive nature of the Merger Notification Form (see question 3.8 below), requests by the Agency for supplementation of the filing (prolonging the initiation of the initially predicted deadline) are not uncommon and can, in practice, significantly impact the transaction timetable. Moreover, as this time limit is only instructive to the Agency, it may even happen that no Phase I decision is taken within the said time limit. The parties may, however, following a notice to the Agency (which gives the Agency an additional seven days to issue a Phase I decision), file a lawsuit with the Administrative Court demanding the Agency to issue a Phase I decision. We note that, in the meantime, the exercise of rights deriving from a concentration prior to a Phase I decision(s) is not allowed.

Phase II

Should the Agency decide to initiate Phase II proceedings, it is bound to issue a final decision in 60 days upon having issued a decision on the initiation. Again, the 60-day period is only instructive; therefore, it sometimes takes longer to issue a Phase II decision. In cases where the Agency does not issue a Phase II decision in time, the parties may file a lawsuit with the Administrative Court demanding that the Agency issues such a decision.

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 Competition Act only prohibits the exercise of rights deriving from a concentration prior to a final clearance decision (please see question 3.3 above). It could therefore be argued that mere completion of a transaction (i.e. the transfer of title to shares/assets of the target undertaking) is not prohibited *per se*. However, please note that, to date, practice has not yet established a definite answer in this regard; a possibility that the Agency might adopt a different position can consequently not be excluded.

Parties to the transaction have a possibility to request an order permitting the implementation of the concentration within a specified scope and/or under specified conditions prior to issuing clearance, provided that the undertakings can demonstrate that the implementation is essential to maintain the full value of the investment or to perform services of general interest. The Agency is obliged to decide on such requests within 15 working days.

Parties that exercise rights arising from a concentration (that should have been notified), prior to obtaining approval by the Agency risk fines and other sanctions (see question 3.3 above for details).

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

Every notification needs to be submitted on a Merger Notification Form – a questionnaire prescribed by the Decree on the content of notification form for the concentrations of undertakings (passed in 2009 and revised in 2014). The scope of information requested by the Merger Notification Form is quite exhaustive (it closely mirrors the EC Merger Regulation's Form CO) and includes, *inter alia*:

- certified copies of the documents or the draft documents bringing about the planned concentration;
- a list of the members of the management board, major shareholders or interest holders in the undertakings which have participated or are planning to participate in the concentration;
- audited accounting statements of the participants in the concentration for a minimum of the preceding three tax years; in the event that a participant is not obliged to audited accounting statements, regular accounting statements are to be submitted;

- a report on any form of participation in a concentration of undertakings in Slovenia in the last three years;
- a list of controlled undertakings and subsidiaries;
- a list of controlling undertakings;
- data on the market shares of the participants in the transaction;
- data on all relevant product/service markets wherein the parties to the concentration operate (including size, past and future development, structure of demand and supply, market access, etc.); and
- data on the main customers, suppliers and competitors; and data on the expected economic consequences of the concentration.

Parties to the concentration may ask the Agency for a waiver regarding some of the required information predicted within the Merger Notification Form.

Furthermore, the Merger Notification Form must be accompanied by a so-called Publication Form, providing basic details about the concentration in question, based on which the Agency publishes a notice on the start of the merger notification procedure on its website. Information published shall include the names of the companies involved, the date of the receipt of the notification by the Agency, the case number and the industry sector. The acquirer, as the notifying party, may object to such publication on the basis of justifiable reasons such as trade secret protection. Such objections are assessed by the Agency, who may adopt a decision not to publish the notice and the accompanying data. This procedure was only introduced on 3 April 2013, when the Agency introduced the Instruction on the publication of the data and information on the Agency's website in the merger notification procedures ("Publication Instruction"). There has been little practice so far in this respect, and it is not yet known in which cases the Agency will agree not to publish the relevant information.

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 Competition Act provides no grounds for a short version of the merger notification form, and all information needs to be provided regardless of the size or market position of the undertakings concerned. However, in certain cases, the Agency is willing to waive this obligation and accept a less detailed notification. The circumstances which allow the submission of a shortened filing in practice resemble those of the EU Commission's Short-Form CO, i.e. there have to be no overlap between the parties with a combined market share exceeding 15%, no vertical link between the parties with a market share exceeding 25% on one of the related markets, or no neighbouring market where either party enjoys a market share of more than 25%.

In addition, it should be noted that one can always speed up the clearance timetable by supplying the Agency with a notification that is as detailed and complete as possible and taking into account relevant sector specific rules, as each request of the Agency for the submission of additional information extends the applicable 25-day deadline.

3.10 Who is responsible for making the notification?

The filing obligation lies with the acquirer. However, a joint notification by the acquirer and the target company is possible. In cases where a concentration results from an acquisition of joint control, joint notification by merging companies or companies acquiring joint control has to be filed.

3.11 Are there any fees in relation to merger control?

The filing fee (which should be paid to the Agency at the time of filing) currently amounts to EUR 2,000. The fee is subject to adjustment by the government and should therefore be double-checked at the time of filing.

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 Slovenian merger control regime mirrors the EU Merger Control Regulation to the extent that public bids can be closed prior to clearance, provided that the respective bid has been notified in a timely manner and the acquired voting rights are not exercised prior to clearance.

3.13 Will the notification be published?

No, only the clearance decision will be published. However, basic information of the notification will be made public, as described under question 3.8 above.

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?

Concentrations are generally assessed with a view to establish whether or not there is a treat of creating or strengthening an undertaking's dominant position, as a result of which effective competition could be distorted or significantly impeded. The market test applied by the Agency broadly corresponds to the European Commission's "substantial impediment of effective competition test". Effects of the assessed concentration are analysed in the light of the relevant product and geographic market. It is important to note that a high market share does not always give rise to competition concerns, as the market shares are appraised together with other competition-related parameters, such as the choice available to suppliers and consumers, and the openness of the market for new entries. Pursuant to Article 11(2) of the Competition Act, the Agency takes the following factors into account:

- the alternatives available to suppliers and users;
- the market positions of undertakings concerned;
- the access to sources of supply and to the market itself;
- the structure of the relevant markets;
- the barriers to entry for competing undertakings;
- the financial capability of affected undertakings;
- the interests of intermediate and ultimate consumers; and
- supply and demand trends on the relevant markets.

4.2 To what extent are efficiency considerations taken into account?

Efficiency considerations are to be taken into account by the Agency within the process of its assessment, if the parties to the concentration are able to demonstrate that consumers shall benefit from these efficiencies as well. A concentration that leads to a substantial

lessening of competition may still be cleared if the parties can evidence that the transaction will lead to overriding efficiencies. To this end, synergies and other pro-competitive effects should be set out in the filing and can be substantiated in the further proceedings.

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

As the Competition Act does not require the Agency to include criteria (other than those outlined above) in its market test, the impact of a merger on the public interest or other non-competition issues (e.g. employment, industrial policy) do not play a role in the assessment of a concentration.

We note, however, that non-competition issues arising from concentrations in certain regulated industries may be taken into account by sector regulators (see question 1.4 above). For example, the Bank of Slovenia – when assessing whether or not a certain person is suitable to hold a qualified share (10% or more) in a Slovenian bank – takes into account factors such as the competence of the investor for the involvement in the target bank's business, its financial stability and even its reputation. An analogue test is performed by the Insurance Supervision Agency when deciding on issuing of a permission to acquire a qualified shareholding in a Slovenian insurance company.

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

Third parties may request to participate in the proceedings if they are able to demonstrate a legally recognised interest in the outcome of the proceedings. The decision as to whether to admit the third party to the procedure lies with the Agency. If the interest is not recognised, the third party may challenge the Agency's refusal (to grant standing) before the Administrative Court.

Formal Participation in Phase I and Phase II Proceedings

The Agency publishes a list of all notified transactions as well as all decisions on the instigation of Phase II proceedings on its website. On this basis, third parties may identify transactions which are of their concern and which require the Agency to allow them to participate as a party with legal interest; however, they must be able to establish that they should participate in the proceeding in order to safeguard their legal entitlements.

If the Agency recognises such third parties' interest to join the procedures, the third parties will be (i) able to participate in the entire procedure, (ii) granted access to file, (iii) entitled to propose evidence and present their opinion on all relevant issues, and (iv) entitled to file a lawsuit with the Administrative Court challenging the final decision issued by the Agency. It should be noted that the Agency is not inclined to acknowledge the existence of a legally recognised interest to third parties.

Informal Involvement

Furthermore, third parties may submit statements and evidence to the Agency even without formally joining the proceedings. Although the Agency is not required to take such submissions and evidence into account (and may not base its decision on such evidence without having given the parties to the respective concentration a chance to comment on them beforehand), such submissions may, in practice, have an impact on the assessment of the merger.

Information Requests

The Agency may, on its own initiative, contact third parties (usually the competitors to the notifying parties, their customers or suppliers) and send them requests for information (please see question 4.5 below).

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

Pursuant to Article 27 of the Competition Act, the Agency is entitled to request specific information from any market participant – even without having instigated a formal procedure against such undertaking. This provision is relied upon by the Agency also when conducting market tests with respect to proposed concentrations. If the undertaking (i) fails to submit the requested data, (ii) provides the Agency with incorrect or misleading data, or simply (iii) fails to comply with the Agency's request in a timely manner, a fine of up to EUR 50,000 may be imposed on such an undertaking. If the undertaking continues with not complying with the request for information, the Agency may continue to impose sanctions until the aggregate amount of the respective monetary penalties reaches 1% of the respective undertaking's annual turnover in the preceding business year.

Undertakings and/or persons against which/whom the procedures are not formally opened may be summoned as witnesses under the General Administrative Procedure Act, which implies an obligation to cooperate with the Agency under the threat of fines.

Investigations shall be carried out by persons employed with the Agency (and may also be assisted by authorised external experts). As of 2014, the Agency needs an annotated written judicial approval or the undertakings consent to enter premises of the registered corporate seat of the undertaking subject to an investigation and any other premises in which the respective undertaking or other authorised undertakings carry out activities and business operations from which a violation of competition law might have arisen. The court can only issue an order for investigation (*odredba za preiskavo*) based on Agency's reasoned proposal, and if there are reasonable grounds to believe that the undertaking is in breach of the respective merger-specific provisions laid down in the Competition Act. Additionally, it must be reasonable to expect that the investigation will provide the Agency with the information which is important for the procedure.

If the undertaking subject to inspection (a) refuses to allow access to its business premises, (b) otherwise obstructs the investigation, or (c) if such obstruction may be reasonably expected, Agency officials may enter premises and access business books or other documentation by force; the police may be called upon to support the Agency officials. Obstructing the investigation may be sanctioned with fines of up to 1% of the respective undertaking's annual turnover. Furthermore, penalties of up to EUR 50,000 may be imposed on "third persons" – natural persons not attributable to the investigated undertaking (i.e. persons other than representatives, employees or contractual co-workers) – for the obstruction of the investigation.

Whether an inspected undertaking has a right to immediate legal assistance in the event of a "dawn raid" is not explicitly regulated by the Competition Act; pursuant to the established practice, the Agency officials are not obliged to wait for the arrival of an external counsel, unless the investigation has been initiated by the Public Prosecutor (based on an alleged infringement of the Slovenian Criminal Code).

The Agency's officials are empowered to: (i) review business books and other documentation, regardless of the medium on which it is written or stored; (ii) obtain copies of or extracts from business books and other documentation in any form using photocopying devices and computer equipment of the undertaking or the Agency;

(iii) seal all business premises and business books and other documentations during the investigation and to the extent required; (iv) seize items and business books and other documentation for a maximum period of 20 working days; and (v) require any representative or employee to give an oral or written explanation of facts or documents which relate to the subject or purpose of the investigation, and record this in the minutes.

The Agency may not review:

- confidential attorney/client correspondence; letters, notifications and other methods of communication related to the procedure between the undertaking and its legal representatives are exempted from the investigative action. The privilege also applies to in-house lawyers if the in-house lawyer is admitted to the bar and he/she represents the undertaking based on a power of attorney; or
- correspondence/documents not relating to the subject matter of the investigation; the officials have to be enabled to ascertain the (ir-)relevance of all books and other records. If it is disputed whether a document is in fact privileged, the respective document shall be put in a sealed envelope. The Agency will then decide on the permissibility of the review of such documents, and the question will be decided by the Administrative Court within 15 days of the Agency's request for assessment.

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

Confidentiality

The information and data provided to the Agency during the investigation is treated as confidential, provided that the submitting party (i) requests protection of business secrets, and (ii) demonstrates that data (with regard to which protection is sought) constitute business secrets. In principle, the Agency is obliged to evaluate whether certain information or data indeed constitute business secrets, and may not rely purely on the parties' designation – in practice, the definition of the notion of a "business secret" from the Companies Act (ZGD-1) has been followed.

Recent developments show that the Agency will only grant such protection if the interested party has (i) explicitly requested protection of business secrets, and (ii) provided the Agency with a "clean" version of the respective documents (i.e. documents containing only information which does not constitute business secrets).

With regards to the mandatory publication pursuant to the Competition Act, by which final decisions are published on the Agency's website, the Agency is required to protect the confidentiality of data, and may only publish the data which are indispensable for achieving the purpose of publication. The Agency officials must treat all information and data obtained during the procedures as confidential, and shall be liable for any unauthorised disclosure. Even when delivering the decision to the parties of the procedure, the Agency is obliged to blacken the parts of the decision containing business secrets of the other party. Moreover, the Competition Act sets out rules under which the Agency must, upon request, keep the identity of a company or an individual, who has filed a complaint or provided the Agency with secret information, if it is likely that the disclosure of the identity could cause significant damage to such company or individual.

Access to Files

Access to files is regulated by the Competition Act as well as by the General Administrative Procedure Act. The parties are granted access to file; however, the Agency may deny a party access to (a) internal documents of the Agency relating to the case, (b) documents which are deemed to constitute a business secret of another undertaking (please see above), and/or (c) data pertaining to the identity of an information source which has requested confidentiality.

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

5.1 How does the regulatory process end?

Please see question 3.6 above regarding the end of Phase I.

Should the Agency open Phase II, it may (within 60 days) close it in either of the following ways:

- **Unconditional clearance**: if the Agency finds that a concentration is not incompatible with the provisions of the Competition Act, it shall issue a decision declaring the concentration compatible with competition rules.
- **Conditional clearance**: the Agency may impose additional obligations and conditions intended to ensure that the concentration complies with the requirements laid down in the Competition Act.
- **Prohibition of merger**: if the Agency finds that the concentration is incompatible with the provisions of the Competition Act, it shall issue a decision declaring the concentration incompatible with competition rules. In its decision, the Agency may impose measures with a view to eliminate the effects of the prohibited concentration, which have already occurred (e.g. division of the undertaking, disposal of all the shares acquired, sale of interests, sale of securities, or other measures appropriate to achieve a restoration of the situation prevailing before the implementation of the concentration). If the undertakings concerned fails to comply with the decision containing de-merger or other obligations addressed to the parties within the specified deadline, the Agency may impose fines of up to 10% of the turnover of the infringing undertaking (together with other undertakings belonging to the same group) in the preceding business year. A fine of EUR 5,000 to 10,000 may be levied on the responsible person of such undertakings or a responsible independent contractor. If the nature of the offence is deemed to be particularly serious given the amount of resulting damages or amount of unlawfully acquired pecuniary benefits, the undertaking's responsible person may be fined up to EUR 30,000.

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

In cases where the Agency identifies competition concerns, the parties are encouraged to propose remedies in order to overcome such concerns either in Phase I or Phase II proceedings.

The remedies (structural or behavioural), which the Agency is willing to accept depend on the nature of the competition concern identified. In general, the remedies must be suitable to ensure a permanent solution for the identified concern. The Agency may request the notifying party to provide a report on the implementation of remedies imposed by the decision.

In Phase II proceedings, the Agency must present all of the findings deemed necessary for the decision (as well as potential concerns) to the parties prior to the final decision in a statement of objection, whereby concerns identified in Phase I can be discussed in an informal manner.

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

To the best of our knowledge, there have been no pure foreign-to-foreign mergers in which remedies were imposed and concentration cleared 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.

The Agency is willing to engage in negotiations of remedies either in Phase I or Phase II, most likely after receiving the (first) results of the market test of the proposed concentration. The undertakings concerned can only suggest remedies prior to the adoption of a final decision on the concentration.

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 empowers the Agency to impose divestment obligations onto the parties of a concentration; however, it does not provide any detailed regulations of such measures. While the Competition Protection Office has previously already imposed divestment obligations on a few occasions, the practice is still far from having established any uniform approach to the applicable terms and conditions, which could be relied upon by market participants as standards for future conduct of the Agency.

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

Remedies imposed by the Agency may be such that they have to be complied with either prior or after the completion of the merger. The parties can therefore complete the merger before the remedies have been complied with if the Agency agrees with such a timeframe in its decision.

5.7 How are any negotiated remedies enforced?

The negotiated remedies form part of the final Agency decision on the proposed concentration, and should the remedies not be fulfilled/upheld, the Agency has the power to annul its clearance decision.

5.8 Will a clearance decision cover ancillary restrictions?

The Competition Act does not contain specific provisions on the assessment of ancillary restrictions. Nevertheless, parties are required to describe potential ancillary restrictions in the Merger Notification Form. Generally, the ancillary restrictions are covered by the merger clearance decision; however, there is no existing jurisprudence.

5.9 Can a decision on merger clearance be appealed?

The final decision of the Agency in merger procedures, as well as some procedural decisions, may be appealed to the Administrative Court. The appeal to the Administrative Court may only pertain to the facts and legal grounds in the Agency's final merger decision in substance, but not to fines imposed by the Agency within the procedure. Decisions on fines must be challenged separately before a regular (criminal) court – under certain conditions and with substantial limitations, the final decision of a Circuit Court may be further appealed before the Higher Court.

When deciding upon the lawsuit, the Administrative Court may adopt any of the following decisions:

- it may reject the lawsuit as unsubstantiated;
- it may annul the decision of the Agency (partially or fully) and request the Agency to issue a new decision; or
- on rare occasions, the Court may even amend or alter the Agency's decision itself, if all the relevant facts were fully and correctly established by the Agency, but the Agency failed to correctly apply the law, and if any further delay in rendering a final decision would have a detrimental effect on the interests of the parties involved.

5.10 What is the time limit for any appeal?

Parties may appeal decisions of the Agency before the Administrative Court within 30 days from the service of notice.

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

The Competition Act does not provide any time limit for the enforcement of merger control legislation. In principle, the Agency may, at any time, initiate procedures with regard to non-notified mergers *ex officio*.

The misdemeanour procedures for imposing monetary fines for the failure to notify the merger may not be initiated after a period of five years from the date when the merger should have been notified; after 10 years, no misdemeanour proceeding may be initiated or continued (absolute prescription).

6 Miscellaneous

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

The Agency is a member of the European Competition Network and the International Competition Network.

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

A new amendment to the Competition Act is currently being publicly discussed, and concerns: (i) private enforcement of competition laws (in accordance with provisions of the EU Directive 2014/104); (ii) administrative sanctions for legal entities; (iii) additional investigative powers; (iv) additional procedural provisions; and (v) amendments to the appraisal of concentrations procedure; however, the proposal is not yet in the Parliamentary proceeding, and it is hence not clear when and in what form the reform will enter into force.

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

These answers are up to date as of 31 August 2016.

Eva Škufca, LL.M. (LSE)
Schoenherr
Tomšičeva 3
SI-1000 Ljubljana
Slovenia

Tel: +386 1 2000 980
Email: e.skufca@schoenherr.eu
URL: www.schoenherr.eu

Eva Škufca is a partner of the Schoenherr Ljubljana office, and is in charge of the office's competition and EU matters. She has represented diverse clients in front of the Slovenian Competition Authority, and works as a counsel in cases in front of the European Commission and the European courts. She also acts as a representative in civil cases for damages arising out of anti-competitive conduct. Eva has broad experience in various sectors, most notably having recently advised in the TMT, energy and retail sectors. She is the lead counsel in various (national and EU) state aid cases relating to restructurings and/or sales of publicly owned companies, and also advises on state aid issues arising from infrastructure projects. Having a broad background in EU law, she has also advised numerous foreign clients on the implementation of EU rules to Slovenian legislation. Eva holds degrees from the University of Ljubljana (*univ. dipl. iur*) and the London School of Economics (LL.M.).

Urša Kranjc
Schoenherr
Tomšičeva 3
SI-1000 Ljubljana
Slovenia

Tel: +386 1 2000 964
Email: u.kranjc@schoenherr.eu
URL: www.schoenherr.eu

Urša Kranjc is an associate at Schoenherr Ljubljana, where she specialises in EU and competition law. Prior to joining Schoenherr, she gained experience as a trainee in a global business law firm based in Vienna. Urša helps the local partner in advising clients on transactions involving competition law issues. As a regular part of her work, she also researches and stays informed with the competition law practices and activity of the European Commission and European Court of Justice.

schönherr

Schoenherr is a leading full-service law firm in Central Europe. As one of the first international law firms to move into CEE/SEE, we have grown to be one of the largest firms in the region. With 14 offices and several country desks, our comprehensive coverage of the region means that we can offer solutions that perfectly fit the given industry, jurisdiction and company.

Schoenherr Slovenia's EU & Competition Team advises on all aspects of EU law with an emphasis on European and national competition law. The team represents national and foreign undertakings in front of the Slovenian Competition Protection Agency, as well as in front of the European Commission and the European Courts. It has become one of the frontrunners on the Slovenian market, and has gained an outstanding reputation in advising on complex antitrust issues and multi-fold state aid concerns in privatisation proceedings, in addition to restructurings and challenging merger control proceedings. It has also established tailor-made compliance programmes for clients from multiple sectors.

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