



# ICLG

The International Comparative Legal Guide to:

## **Merger Control 2018**

**14th Edition**

A practical cross-border insight into merger control issues

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## EDITORIAL

Welcome to the fourteenth 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:

Three 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 44 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 editor, Nigel Parr of Ashurst LLP, for his 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.com](http://www.iclg.com).

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## 1 Relevant Authorities and Legislation

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

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

The Commission is considered one of the more active competition authorities in the field of merger control in the CEE region. Pursuant to the Commission’s 2016 Annual Report, the Commission in 2016 reviewed 136 merger control filings, out of which it cleared 131 in Phase I proceedings and five in Phase II proceedings (two of which are subject to conditions).

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

### 1.2 What is the merger legislation?

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

- the Ordinance on the Criteria for Defining Relevant Markets [*Uredba o kriterijumima za određivanje relevantnog tržišta*] (*Official Gazette of RS*, no. 89/2009);
- the Ordinance on the Content and the Manner of Submission of Merger Notifications [*Uredba o sadržini i načinu podnošenja prijave koncentracije*] (*Official Gazette of RS*, no. 5/2016) (the “Implementing Ordinance”), which governs the required content and form of merger notifications;
- the Ordinance on the Criteria for Determining the Amount Payable on the Basis of Measures for the Protection of Competition and Procedural Penalties, the Manner and Deadlines for their Payment and the Conditions for Determining these Measures [*Uredba o kriterijumima za određivanje visine iznosa koji se plaća na osnovu mere zaštite konkurencije i procesnog penala, načinu i rokovima plaćanja i uslovima za određivanje tih mera*] (*Official Gazette of RS*, no. 50/2010) (“Ordinance on Fines”);

- the Commission’s Guidelines on the Application of the Ordinance on Fines (of 19 May 2011) [*Smernice za primenu Uredbe o kriterijumima za određivanje visine iznosa koji se plaća na osnovu mere zaštite konkurencije i procesnog penala, načinu i rokovima plaćanja i uslovima za određivanje tih mera*], which supplement the Ordinance on Fines; and
- the Decision on the Manner of Publishing Acts and Anonymising Data in the Acts of the Commission for the Protection of Competition of 8 February 2017 [*Odluka o načinu objavljivanja akata i o zameni, odnosno izostavljanju (anonimizaciji) podataka u aktima Komisije za zaštitu konkurencije*].

### 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, if the respective jurisdictional thresholds are met (please see questions 2.4 and 2.6 below).

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

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

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

- **Voluntary Pension Funds:** Direct or indirect acquisitions of a qualified shareholding (i.e. 10%, 20%, 33% or 50%, or any acquisition of shares that confers effective influence on the management upon the acquirer) can be made only on the basis of a prior approval by the NBS – Article 14 of the Voluntary Pension Funds and Pension Schemes Act (*Official Gazette of RS*, nos. 85/2005 and 31/2011).
- **Media:** The Electronic Media Act (*Official Gazette of RS*, nos. 83/2014 and 6/2016) established the Regulatory Body for Electronic Media as an independent regulator of the electronic media market. Any change in the ownership structure of the participant on the media market is subject to prior approval of the regulator. Also, the Public Information and Media Act (*Official Gazette of RS*, nos. 83/2014, 58/2015 and 12/2016), enacted in the set of “media laws” together with the Electronic Media Act, prescribes that any form of monopoly on the media market is prohibited.
- **Telecommunications:** Pursuant to issued licences in the telecommunications sector, direct and indirect acquisitions of qualified shareholdings have to be notified to the Regulatory Agency for Electronic Communications and Postal Services.
- **Public-Private Partnerships and Concessions:** Pursuant to the Public-Private Partnerships and Concessions Act (*Official Gazette of RS*, nos. 88/2011, 15/2016 and 104/2016) rights stipulated by PPPCs may be transferred to third parties only upon prior approval of the public partner.

## 2 Transactions Caught by Merger Control Legislation

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

The Competition Act catches the following types of transactions:

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

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

### 2.2 Can the acquisition of a minority shareholding amount to a “merger”?

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

### 2.3 Are joint ventures subject to merger control?

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

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

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

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

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

Turnover encompasses all revenues derived from the sale of products or the provision of services before taxes in the year preceding the concentration. Turnovers are calculated by taking into account all revenues derived from the sale of products or provision of services in the year preceding the year in which the concentration is notified.

The turnover of an undertaking assumes the total turnover of the group it belongs to, save for intra-group sales, which are not taken into account. In addition, the value of exports has to be deducted for the calculation of local (domestic) turnover. If the acquisition of control concerns a part of an undertaking, only the turnover attributable to that part should be taken into account. The total group turnovers of both joint venture partners are considered in establishment of joint venture. Special rules for the calculation of revenue apply to banks, credit institutions, financial entities, and insurance companies. The relevant revenue for banks, credit institutions, and financial companies shall consist of: (i) the income from interest charged; (ii) net profits from financial transactions; (iii) commissions charged; (iv) income from securities; and (v) income from other business activities. The turnovers for insurance and reinsurance companies are calculated by taking into account the value of net income from premiums. As per the Commission's opinion published in its 2010 Annual Report, revenues achieved in Kosovo are, pursuant to the Constitution of the Republic of Serbia, considered revenues achieved in Serbia. Thus, revenues generated in Kosovo should be considered for the calculations of turnovers achieved in Serbia.

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

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

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

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

### 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 override of the jurisdictional thresholds. However, the applicability of the sector-specific regulation (outlined in question 1.4) does not require meeting the turnover thresholds. Direct or indirect acquisitions of qualified shareholdings in certain sectors in principle require approval of a 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 alongside the approval of the sector-specific regulator. Further, as explained under question 2.4, a concentration resulting from the takeover of a joint stock company registered in Serbia through a public bid has to be notified even if the thresholds are not met.

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

In practice, when an acquisition of a stake in a target company is performed in several stages, merger control is triggered when the acquisition of shares allows the exercise of a decisive influence over the target's business activities – i.e. when the acquirer has established control over the target. The Commission has also confirmed this in its opinion dated 11 November 2009. Pre-existing, as well as subsequent, acquisitions of shares in a same target do not trigger filing obligation(s). Further, two or more transactions between the same undertakings realised in a period of less than two years are deemed as one concentration, occurring on a date of the latest of such consecutive transactions.

## 3 Notification and its Impact on the Transaction Timetable

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

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

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

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

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

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

- only a final and binding agreement triggers the 15-day filing deadline, whereas no filing deadline applies to transactions notified on the basis of serious intent;
- the document evidencing serious intent (a letter of intent, memorandum of understanding, etc.), provided as the basis of the merger control filing, must explicitly show the serious intent of all parties to engage in the transaction and must be signed by all parties; and
- if the document evidencing serious intent, provided as the basis of the merger control filing, deviates in key facts, on which the Commission based its clearance, from the final and binding transactional document, the parties to the transaction will bear all the risks connected with implementing such a transaction contrary to the clearance. This also means that the parties can be required to submit a new merger control filing to the Commission.

Under the Competition Act, if another undertaking acquires control over the whole or part of one or more undertakings, the undertaking acquiring control has to submit the notification. In all other cases, the undertakings concerned have to jointly submit the notification.

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

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

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

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

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The Competition Act provides that parties that fail to timely notify a transaction face procedural penalties in the range of EUR 500–5,000 per day of delay, capped at 10% of the total annual turnover achieved by the violating undertaking(s). Further, the breach of the suspension clause is subject to fines of up to 10% of the total annual turnover generated in Serbia. At the same time, the Commission may also enact de-concentration measures so as to (re)establish or protect competition in the market (by ordering the parties to split a company, divest shares, terminate a contract, or undertake any other steps necessary). The Commission's practice on fines in merger control proceedings has not advanced much up until recently. However, the Commission has significantly stepped up its activities as of 2014 and *ex officio* initiated a number of proceedings concerning concentrations which were allegedly implemented without prior notification and approval. In July 2017, the Commission issued a landmark decision fining an acquirer for failing to notify a concentration which met the turnover thresholds (arising from the change of control from joint to sole).

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

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

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

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

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### 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?

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

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

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### 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?

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

The Competition Act provides one exemption from the general suspension requirement. This rule applies in cases of acquisitions performed in line with laws regulating takeovers of joint stock companies or in accordance with laws regulating privatisations. The implementation of a not-yet-cleared transaction is permitted only under the following conditions: (i) the filing was timely; (ii) the acquirer will not influence the decision-making of the company based on its shareholding (unless it is directed towards maintaining the value of its investment); and (iii) the "special" approval from the Commission has been obtained. The President of the Commission decides upon such requests by issuing a conclusion.

A breach of the suspension clause is subject to fines of up to 10% of the total annual turnover achieved in Serbia. The Commission may also enact de-concentration measures to (re)establish or protect

competition in the market (by ordering the parties to split a company, divest shares, terminate a contract or undertake any other steps necessary). The Commission's practice on fines in merger control proceedings has not advanced much up until recently. However, the Commission has significantly stepped up its activities as of 2014 and *ex officio* initiated a number of proceedings concerning concentrations which were allegedly implemented without prior notification and approval. As noted in question 3.3 above, in July 2017, the Commission issued a landmark decision fining an acquirer for failing to notify a concentration which met the turnover thresholds (arising from the change of control from joint to sole).

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

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Save for the Competition Act, the form and content of notification is governed by the Implementing Ordinance (as defined under question 1.2 above), which came into force in February 2016 and introduces short- and long-form notifications.

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

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### 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?

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

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

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

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

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### 3.10 Who is responsible for making the notification?

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

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

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### 3.11 Are there any fees in relation to merger control?

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See question 3.10.

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### 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?

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

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

Further, the Competition Act provides an exemption from the general suspension requirement when control over a joint stock company registered in Serbia is acquired through a public bid. The implementation of a not-yet-cleared transaction is permitted only under the following conditions: (i) the filing was timely; (ii) the acquirer will not influence the decision-making of the company based on its shareholding (unless it is directed towards maintaining the value of its investment); and (iii) "special" approval from the Commission has been obtained.



### 3.13 Will the notification be published?

In line with the Competition Act, and pursuant to the Decision on the Manner of Publishing Acts and anonymising data in the Acts of the Commission for the Protection of Competition of 8 February 2017, the Commission will publish the entire merger control decision rendered in Phase I and Phase II proceedings. The decision will be published on the Commission's website ([www.kzk.org.rs](http://www.kzk.org.rs)). For the protection of the confidential data and, subsequently, the publication of the non-confidential version of the clearance (instead of the confidential version), a separate confidentiality request needs to be filed with the Commission, by which the parties will define such confidential data and request that it be protected as such. Confidential versions of the decisions are going to be available only to the competent courts and other state bodies with notice that they are obliged to treat such data as confidential.

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

## 4 Substantive Assessment of the Merger and Outcome of the Process

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

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

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

### 4.2 To what extent are efficiency considerations taken into account?

The Competition Act foresees that protection of competition shall be ensured to the benefit of consumers. Furthermore, pursuant to Article 2 point 22 of the Implementing Ordinance, the Notifying Party may suggest to the Commission to assess efficiencies brought about by the transaction. In particular, the Commission will consider the effects that the transaction will have on the participants in the concentration as well as consumers, including lower costs, lower prices, increased quality, increased choice and innovations. Thus, the Commission has a legal basis to take into

account efficiencies when assessing mergers, although there are no further guidelines on weighing the efficiencies against the potential anticompetitive effects. Efficiency considerations can also be seen in the Commission's decisional practice, as it analyses possible efficiencies resulting from the concentration in its decisions. However, to the best of our knowledge, the Commission has not undertaken significant attempts to substantiate and/or quantify efficiencies.

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

The Competition Act and the applicable bylaws are neither concerned with non-competition issues nor are these given a prominent role in merger analysis. Still, the Commission may reflect upon them during the review.

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

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

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

In the case of summary (Phase I) proceedings, the Commission can request documents and data which it finds necessary to review the concentration. Should it not be provided with such documents and information, the merger notification will be dismissed, and subsequently no decision will be rendered. In the case of an investigation (Phase II) procedure, the Commission disposes with various additional investigative tools. In addition to requesting documents and data from the parties, the Commission can also request documents, data, or statements from third parties (e.g. customers, suppliers and competitors).

Further, the Competition Act provides that parties that do not comply with a request to provide documentation and/or data, or provide false or incorrect data, face procedural penalties in the range of EUR 500–5,000 per day of delay, capped at 10% of the total annual turnover achieved by the violating undertaking(s). The Commission imposed such fines in several cases. For example, in the *East Media Group/Politika* case from 2015, the Commission imposed a fine of EUR 145,500 on the acquirer for failure to respond to an RFI during investigation (Phase II) procedure, and the *Delhaize/Delta Maxi* case from 2011, where it imposed fines on three (non-merging) undertakings for failure to respond to RFIs, a decision upheld by the Administrative Court (Veropoulos, one of the three undertakings that failed to comply with the Commission's request (the other two being CDE S and KTC), was fined EUR 26,500 for 53 days of delay).

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

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

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

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

### 5.1 How does the regulatory process end?

Pursuant to the Competition Act, the Commission may:

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

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

Yes. If the Commission concludes that the notified concentration will restrict, distort, or prevent competition, it shall issue a statement of objections to the notifying party to notify it of the facts and evidence on which it intends to base its decision, and ask that it provides its comments within a certain deadline. In its answer to the Commission, the notifying party may suggest measures to be undertaken with the goal to remove anticompetitive concerns, which are required for the concentration to be approved. In principle, the Competition Act allows for both behavioural and structural

measures. If the Commission believes that such measures are sufficient and that, consequently, the concentration will not restrict, distort or prevent competition, it will clear the concentration subject to conditions. The terms and conditions under which the concentration shall be cleared, as well as methods of monitoring their implementation, shall be stipulated in the clearance.

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

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

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

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

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

The Competition Act expressly provides that the Commission may require divestment as a remedy. However, it neither regulates in detail how it shall approach the terms and conditions of the divestment, nor have the relevant guidelines been adopted yet. As a general proposition, structural remedies will be required if there are no equally or similarly effective behavioural measures, or if the behavioural measures would create a disproportionate burden on the parties. At the same time, remedies have to be proportionate and directly related to the competition concern at hand. The terms and conditions under which the concentration shall be cleared, as well as methods of monitoring of their implementation, shall be stipulated in the clearance.

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

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

### 5.7 How are any negotiated remedies enforced?

If negotiated remedies are not complied with, the Commission may impose: (i) de-concentration measures so as to (re)establish or

protect competition in the market (by ordering the parties to split a company, divest shares, break up a contract or undertake any other steps necessary); and (ii) fines of up to 10% of the total annual turnover achieved in Serbia.

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### 5.8 Will a clearance decision cover ancillary restrictions?

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

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### 5.9 Can a decision on merger clearance be appealed?

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

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### 5.10 What is the time limit for any appeal?

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

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

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

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## 6 Miscellaneous

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

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

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

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There are currently no specific proposals to reform the merger control regime in Serbia. However, it is expected that the Commission will prepare a proposal for a new Competition Act. It is not known at this moment when work on the new Competition Act will begin or when it will enter the legislative process.

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

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These answers are up to date as of 6 October 2017.



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