Serbia

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Since 1 November 2009, the Serbian merger control regime has been governed by the Law on the Protection of Competition (LPC). It replaced the Competition Act 2005 (CPL). The LPC introduced some changes. In essence, however, it maintained the competition law framework established under the CPL. Since its entry into force, the LPC was further amended and its current version has been applicable since 8 November 2013. In addition to the LPC, the Serbian government has passed two regulations regarding merger control aspects: the Regulation on the Form and Manner of Filing a Notification of a Concentration (newly adopted version applicable since 2 February 2016) and the Regulation on the Criteria for Determining the Relevant Market.

The relevant authority for merger control (and competition law in general) is the Commission for the Protection of Competition (the Commission), which is competent for reviewing notifications and issuing decisions on notified concentrations. The Commission was established on 12 April 2006 and reports on its activities to the Serbian parliament. The Commission consists of the Council and the Technical Service. The Council consists of the president of the Commission as a separate body and four members who are each appointed for a term of five years (renewable for an additional five-year term) by the Serbian parliament.

More information on the Commission may be found on its website.

Scope of legislation

2 | What kinds of mergers are caught?

The LPC defines the following as concentrations:

- mergers and amalgamations of undertakings within the meaning of company law;
- the direct or indirect acquisition of control over all or part of an undertaking by one or more undertakings; and
- the creation of a full-function joint venture.

The temporary acquisition of shares or a participating interest by banking, insurance or other financial institutions for the purpose of resale does not qualify as a concentration, provided that the resale occurs within 12 months from the date of the acquisition and that, during that period, the ownership status has not been used to influence the undertaking's market behaviour. Also, the acquisition of control by a bankruptcy administrator in the course of bankruptcy proceedings is not deemed to be a concentration. In addition, the acquisition of shares or a participating interest in an undertaking by a company for the management of investment funds or an investment fund does not qualify as a concentration, provided that the ownership status has not been used to influence the undertaking's market behaviour and provided that this status is only used to maintain the value of the investment.

The Commission will prohibit concentrations if they significantly restrict, distort or limit competition on the Serbian market, in particular where such restriction, distortion or limitation of competition results from the creation or strengthening of a dominant position.

3 | What types of joint ventures are caught?

The LPC distinguishes between full-function joint ventures and cooperative joint ventures. The creation by at least two independent undertakings of a joint venture that will perform on a lasting basis all the functions of an independent business entity is deemed to be a concentration. On the other hand, the creation of a joint venture aiming at coordinating the market activities of two or more undertakings that maintain their legal autonomy does not constitute a concentration within the meaning of the LPC. The latter may be subject to provisions on restrictive agreements.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

The LPC (article 5(2)) defines control as the ability to exert decisive influence on an undertaking's business activities, in particular on the basis of:

- shareholders' rights (corporate governance on the basis of company law);
- the ownership of or other proprietary rights to use all or part of the assets of an undertaking;
- contractual rights, covenants or securities; or
- claims, means of securing claims, or de facto due to existing business practice determined by the controlling undertaking.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The Commission must be notified of a concentration when in the business year preceding the concentration:

- the combined worldwide turnover of the undertakings concerned exceeded €100 million and the turnover of at least one undertaking concerned exceeded €10 million in Serbia; or
- the combined turnover of the undertakings concerned exceeded €20 million in Serbia and the turnover of each of at least two undertakings concerned exceeded €1 million in Serbia.

In addition, the LPC provides for a filing obligation in the case of certain public takeover bids even where the above thresholds are not met. This provision generally relates to joint-stock companies, the shares of

which are traded on a Serbian stock exchange. Under certain conditions, public takeover bids may be implemented prior to clearance.

Further, the LPC introduced the possibility of opening an ex officio investigation into concentrations where, even when the turnover thresholds set out above are not met, the undertakings concerned have a market share in Serbia of at least 40 per cent. However, there is no Commission practice yet in this regard.

The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between the undertakings affected by the concentration (thus, intra-group or mutual transactions are not taken into account).

In the case of undertakings providing financial services, insurance companies and companies engaged in the reinsurance business, the turnover is to be calculated as follows:

- for credit institutions and other financial institutions, as the sum of the following income items, after deducting VAT and other taxes directly related to those items:
  - interest income and similar income;
  - income from securities (ie, income from shares and other variable yield securities; income from participating interests; or income from shares in affiliated undertakings);
  - commissions receivable;
  - net profit on financial operations; and
  - other operating income; and
- for insurance companies and undertakings engaged in the reinsurance business, as the sum of gross premiums (all amounts received and receivable) with respect to insurance and reinsurance contracts issued by or on behalf of the insurance undertaking, after deducting the taxes charged by reference to the amounts of the individual premiums or total volume of such premiums.

Two or more business transactions between the same undertakings concerned within the last two years are deemed to constitute one single concentration that occurred on the date of the occurrence of the last transaction.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If the jurisdictional thresholds are met, the filing of a notification to the Commission is mandatory.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign mergers are subject to Serbian merger control if the turnover of the parties to the concentration exceeds the jurisdictional thresholds set out above. To date, the Commission's practice has not developed a de minimis or effects-based exemption. In the past few years, most of the cleared concentrations have been foreign-to-foreign mergers. The nexus test is equally not yet developed.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The most important rules in this context are as follows.

Banking

In addition to scrutiny by the Commission, the acquisition of a qualified shareholding (ie, 5, 20, 33 and more than 50 per cent) in a Serbian bank and the acquisition of control over a company active in the financial sector or the establishment of such company by a Serbian bank are subject to prior approval by the National Bank of Serbia.

The Commission and the National Bank of Serbia signed a Protocol on Cooperation in Antitrust Matters in the Financial Sector on 11 February 2008. In the Protocol, the two institutions undertook to exchange information and operate jointly and in a harmonised manner in the event of a violation of competition in the financial sector. In 2015, changes to the Banking Law were adopted; making it clear that the Commission (and not the National Bank of Serbia) is competent to review anticompetitive aspects of concentrations in the financial sector.

Insurance

All corporate transformations of insurance companies (including mergers) must also be approved by the National Bank of Serbia.

There are similar rules for investment funds, voluntary pension funds, the telecommunications industry and the media sector.

Public takeover bids

The LPC provides for a filing obligation in the case of a public takeover bid even where the jurisdictional thresholds are not met. The provision generally relates to the (direct or indirect) acquisition of control over open joint-stock companies, the shares of which are traded on the Serbian stock exchange (exceptionally also closed joint-stock companies can be caught).

On 11 November 2009, the Commission issued a statement on the filing deadline for notifications in the case of public takeover bids. The statement had been requested by the Serbian Securities Commission because of the unclear wording of the LPC. The LPC provides that the notification must be filed within 15 days of the announcement of the public takeover bid or its closing (whichever occurs first). The confusion occurred because of the fact that an undertaking launching a takeover bid does not know the exact percentage of the shareholding it will have acquired until the bid is closed (and, respectively whether such shareholding will confer control to the bidder once the bid is closed). The Commission clarified that in such situation the notification will be deemed timely even if submitted within 15 days of the date of the closing of the bid. Another point raised with the Commission with respect to public takeover bids was the question of whether a notification is always required when a public takeover bid is – by law – required in Serbia. On 16 December 2009, the Commission stated that if there is no change of control, there is no filing obligation (irrespective of the fact that a public takeover bid is required in Serbia).

It remains to be seen how the above rules will affect foreign-to-foreign transactions. The Serbian Securities Commission stated that a public takeover bid in Serbia would be required, under certain conditions, if a change of control occurs in a foreign undertaking (that controls a Serbian joint-stock company) (ie, there is an indirect change of control over a Serbian undertaking). Thus, in such cases, an argument can be made that a notification to the Commission would also be required in Serbia (regardless of whether jurisdictional thresholds are met). The Commission has not opined on this issue to date. However, the Serbian takeover legislation has been amended in the meantime to support the aforementioned interpretation of the Serbian Securities Commission.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The Law on the Protection of Competition (LPC) provides that a merger notification has to be submitted to the Commission within a period no later than 15 days after the signing of the relevant agreement, the announcement of a public offering, the announcement of the start or end date of a public takeover bid, or the acquisition of control (whichever of these triggering events occurs first).

The filing may already be submitted at the time at which the parties have a serious intention to conclude the relevant agreement; that is, they sign a letter of intent, or announce their intention to make a public offer for the purchase of shares in an undertaking.

Late filing may lead to the imposition of a fine by the Commission on the notifying party in the range of €500 to €5,000 per day (but capped at a maximum of no more than 10 per cent of the total annual turnover of that undertaking). The deadline for payment of such procedural penalty is set out in the Commission's decision imposing such penalty and cannot be less than one month or more than three months following the delivery of the decision.

10 Which parties are responsible for filing and are filing fees required?

Article 63(3) of the LPC provides that the notification has to be submitted by the person or undertaking acquiring control of all or part of one or more undertakings. In all other cases, the undertakings concerned must jointly submit the notification of a concentration.

The filing fees are determined by a specific tariff (which has been revised as of 14 July 2011), and amount to the following:

- for an expedited procedure (Phase I), the fee is calculated at 0.03 per cent of the combined turnover of all undertakings concerned for the preceding year, but is capped at €25,000; and
- for the regular procedure (Phase II), the fee is calculated at 0.07 per cent of the combined turnover of all undertakings concerned for the preceding year, but is capped at €50,000.

The filing fee for Phase I has to be paid within three days of submission of the merger notification. The filing fee for Phase II (ie, up to additional €25,000) must be paid after the Commission has decided to open Phase II.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The LPC provides that the intended concentration must not be implemented until the Commission issues a decision authorising the transaction or until the expiry of the waiting period.

The duration of the waiting period depends on whether Phase I or Phase II proceedings are applied.

The Commission decides in Phase I proceedings if the concentration will not prevent, restrict or distort competition on the market, especially by creating or strengthening a dominant market position. The Commission then must issue its decision within one month of the submission of the notification. After expiry of this period, it is presumed by law that the concentration has received approval.

In cases that may raise competition concerns, the Commission may initiate Phase II proceedings within one month of submission of the complete notification. The Commission must then issue a decision within four months of initiating such proceedings. Again, after expiry of this period, it is presumed by law that the concentration has received approval.

The suspension obligation does not prevent the implementation of a takeover bid of which the competent authority has been notified in accordance with the regulations on public takeovers or on privatisation. This applies only under the condition that the filing was submitted on time, and that the acquirer does not exercise its voting rights, or does so only to maintain the full value of the investment and based on an explicit written approval of the Commission.

We are not aware that the Commission's approach to the suspension obligation has changed as a consequence of the economic crisis.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

In the case of closing before clearance, the Commission may require the undertakings concerned to:

- dissolve the concentration, sell shares, terminate a contract or take other measures necessary to re-establish the same status that existed before the implementation of the concentration (the measure of de-concentration); and
- impose a fine of up to 10 per cent of the total annual turnover of the responsible undertaking generated in the territory of Serbia in the preceding financial year (the protective measure). The deadline for payment of the fine is set out in the Commission's decision imposing this fine and cannot be less than three months or more than one year following the delivery of the decision. Fines may not be imposed after the expiry of five years following the prohibited implementation of the concentration. Because this five-year period restarts with each Commission's action directed at discovering the breach, the Commission ultimately loses the right to prosecute the infringement after the expiry of an overall period of 10 years. Once the Commission's decision imposing the fine becomes enforceable or final, it may only be enforced within five years.

We are not aware that the above measure of de-concentration has so far been applied in practice. However, there are indications that the Commission's willingness to investigate and sanction infringements of the standstill obligation may be increasing. In April 2013, the Commission opened an investigation against a Serbian company for failure to file (the investigation was based on an anonymous hint and information the Commission extracted from the publicly accessible corporate registry). In the course of that proceeding, the company having infringed the filing obligation submitted the outstanding notification and the Commission cleared the transaction in July 2013. The acquirer was not fined for late filing or for failure to file. However, the Commission, before clearing the case, opened Phase II proceedings and thus the acquirer was required to pay the higher Phase II fees amounting to €50,000 (instead of only €25,000 for Phase I). The Commission applied the same (punitive) approach in at least three other cases in the course of 2014 (all involving unreported acquisitions by a major Serbian telecommunications operator).

Further, in 2014, the Commission opened investigative proceedings against a Russian company for failure to file its acquisition of a 50 per cent share in a Serbian company running one of the oldest Serbian daily newspapers. In the course of the proceedings, the Commission adopted a procedural measure forbidding any disposal of the disputed shareholding until all the relevant facts were established. The Russian company was also required to notify the transaction and, in 2015, the Commission imposed on the Russian company a procedural fine of €143,500 for failure to provide certain information during the merger control proceedings. That was the first time a fine had been imposed by the Commission on a foreign undertaking.

In early 2016, after several public invitations to undertakings to comply with their local notification obligations, the Commission opened investigative proceedings against a local bank for its failure to notify the acquisition of certain real estate property (business premises) in Serbia. These proceedings were stopped in early 2017 owing to the Commission's finding that no concentration in fact occurred.

In late 2016, the Commission opened investigative proceedings against a local software developer for not reporting its acquisition of sole control in a local computer retailer (the software developer had previously reported its acquisition of joint control in the latter). The

company was eventually fined in 2017 with a fine amounting to 0.25 per cent of its turnover generated in Serbia in the preceding year (ie, approximately €56,000).

In late 2019, the Commission opened another investigation against a Croatian food and retail conglomerate for not reporting its acquisition of a number of local companies active mainly in the food sector. In February 2021, the Commission issued a clearance decision for that acquisition, while at the same time fining the acquirer with a fine amounting to approximately €75,000 for failure to file.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for closing before clearance are also applicable in case of foreign-to-foreign mergers. However, we are not aware of any cases where the Commission has applied these sanctions to such mergers since the introduction of the LPC in November 2009. Under the provisions of the Competition Act 2005, only one case has been reported where misdemeanour proceedings were initiated against a Croatian company in connection with a foreign-to-foreign merger.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There have been indications in practice that in certain instances the Commission may find local 'hold-separate' arrangements acceptable to permit the implementation of foreign-to-foreign mergers outside Serbia before clearance in Serbia. However, such arrangements have not been tested formally with the Commission and the Commission has not issued a written opinion in this regard.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The LPC provides for a filing obligation in the case of a public takeover bid even where the jurisdictional thresholds are not met. The provision generally relates to the (direct or indirect) acquisition of control over open joint-stock companies, the shares of which are traded on the Serbian stock exchange (exceptionally also closed joint-stock companies can be caught).

On 11 November 2009, the Commission issued a statement on the filing deadline for notifications in the case of public takeover bids. The statement had been requested by the Serbian Securities Commission because of the unclear wording of the LPC. The LPC provides that the notification must be filed within 15 days of the announcement of the public takeover bid or its closing (whichever occurs first). The confusion occurred because of the fact that an undertaking launching a takeover bid does not know the exact percentage of the shareholding it will have acquired until the bid is closed (and, respectively whether such shareholding will confer control to the bidder once the bid is closed). The Commission clarified that in such situation the notification will be deemed timely even if submitted within 15 days of the date of the closing of the bid. Another point raised with the Commission with respect to public takeover bids was the question of whether a notification is always required when a public takeover bid is – by law – required in Serbia. On 16 December 2009, the Commission stated that if there is no change of control, there is no filing obligation (irrespective of the fact that a public takeover bid is required in Serbia).

It remains to be seen how the above rules will affect foreign-to-foreign transactions. The Serbian Securities Commission stated that a public takeover bid in Serbia would be required, under certain conditions, if a change of control occurs in a foreign undertaking (that controls a Serbian joint-stock company) (ie, there is an indirect change of control over a Serbian undertaking). Thus, in such cases, an argument can be made that a notification to the Commission would also be required in Serbia (regardless of whether jurisdictional thresholds are met). The Commission has not opined on this issue to date. However, the Serbian takeover legislation has been amended in the meantime to support the aforementioned interpretation of the Serbian Securities Commission.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

On 2 February 2016, a new Regulation on the Form and Manner of Filing a Notification of a Concentration (the Filing Regulation) entered into force. The new Filing Regulation determines the information to be submitted in a merger filing and, for the first time, distinguished between a short and long-form filing.

A short-form notification is sufficient where the undertakings concerned have no overlapping activities in Serbia or where the competitive impact of the transaction would be small (ie, where the combined market share of the undertakings concerned in a horizontal merger is below 20 per cent, and where the individual or combined market shares of the undertakings concerned in a product market which is upstream or downstream of a product market in which any other undertaking concerned is engaged (vertical relationships) is below 30 per cent; or where the combined market share of the undertakings concerned in a horizontal merger is below 40 per cent, and the change (delta or Δ) of the Herfindahl-Hirschman Index (HHI) is below 150). Concentrations concerning changes from joint to sole control will also benefit from a short-form notification. However, even in all these cases, the Commission can ask for a long-form notification under certain conditions (one of such conditions being that a relevant market is a highly concentrated one (ie, where HHI is equal or above 2,000) and the HHI Δ is equal or above 150). Where the notifying party wishes the authority to review and assess restrictions that are directly related and necessary to the transaction (otherwise known as ancillary restraints), it will need to submit a long-form notification.

Short-form filings must in principle provide certain basic information about the business activities of the undertakings concerned, their representatives, revenues and local Serbian activities, as well as their suppliers and customers. Furthermore, the transaction structure must be explained (including the expected deadline for its closing) as well as the markets concerned and the competitive situation therein. To the extent possible, the market and business information provided should also be supported by documentation; apart from that, the authority expects to receive at least the following formal supporting documents: power of attorney, certificates of incorporation and annual reports of the undertakings concerned, and a copy of the transaction documents. Except for the power of attorney (which must be provided as original and addition must also be legalised), simple copies are sufficient (instead of originals).

If a long-form notification is required, the level of detail to be provided with respect to the relevant market increases significantly. In particular, market data must be provided for the last three completed business years (instead of only for the last year prior to the transaction).

The Commission has the right to require additional information and documents. If the notifying party is not able to submit some of the documents or information required, it should provide a brief explanation as to why a particular document or piece of information is not available.

Providing wrong information or ignoring the Commission's requests for information may lead to fines in the range of €500 to €5,000 per day (but capped at a maximum of no more than 10 per cent of the total annual turnover of the undertaking).

The notification and all documents attached need to be submitted in the Serbian language.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

The concentration must not be implemented until the Commission issues its decision authorising the transaction or until the expiry of the waiting period. In Phase I proceedings, the Commission decides within one month of the submission of a complete merger notification. In Phase II proceedings, the Commission has to issue a decision within four months of initiating such proceedings. If the Commission does not decide within these waiting periods, the concentration is deemed to be approved. In our experience, the Commission typically decides within the given deadlines.

The LPC does not provide the possibility for the parties to obtain a waiver or to apply for expedited proceedings.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The Commission may apply Phase I proceedings if an accurate assessment of the case may be undertaken already based on the submitted evidence or if the assessment can be based on facts already known to the Commission, and it may be reasonably assumed that the concentration is likely not to impede effective competition, mainly by not creating or strengthening a dominant position in the market.

In more complex cases that do not satisfy these criteria, the Commission may initiate Phase II proceedings. Apart from the four-month deadline for decision-making, the procedural setup of such in-depth investigations is largely unregulated and thus subject to the Commission's discretion.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Commission determines in its assessment whether the notified concentration will lead to a significant prevention, restriction or distortion of effective competition; in particular, whether it will result in the creation or strengthening of a dominant position in the relevant market.

The Law on the Protection of Competition (LPC) provides the following general criteria for the assessment as to whether a concentration prevents, restricts or distorts competition:

- the structure of the relevant market;
- actual and potential competitors;
- the market position of the undertakings concerned and their economic and financial power;
- the alternatives available to suppliers and users in the relevant market;
- legal and other barriers to entry on the relevant market;
- the domestic and international competitiveness of the undertakings concerned;
- supply and demand trends for the relevant goods or services (or both);
- the development of technical and economic progress; and
- the interests of the intermediate and ultimate consumers.

In the proceedings, the Commission will assess the effect that the intended concentration is likely to have (even if the 'failing firm' defence is pleaded with respect to the target). In practice, the Commission often relies on criteria developed by the European Commission.

20 | Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures, but the Commission would assess whether the establishment of the joint venture is likely to trigger 'spillover' effects on the competitive behaviour of the parent companies.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The theory of harm applied by the Commission is in general very much in line with the approach under EU competition law. In addition to a test of dominance (over 40 per cent market share), the Commission will consider anticompetitive effects that could potentially arise out of a concentration (eg, loss of current and potential competition, unilateral effects resulting from horizontal mergers, joint dominance, conglomerate effects and vertical effects).

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

The LPC exempts companies performing activities in the public interest as well as official monetary institutions if the application of the LPC could prevent them from performing activities in the public interest (ie, from performing entrusted affairs).

According to its 2009 Report, the Commission rejected a merger notification regarding the acquisition of 51 per cent of the shares in the public Serbian petroleum company NIS owing to a lack of jurisdiction. The Commission took the view that the Law on Confirming the Agreement in the Oil and Gas Sector (Official Gazette of the Republic of Serbia – International Agreements, No. 83/2008), which required the Republic of Serbia to sell 51 per cent of the shares in NIS to the acquirer, constituted a lex specialis and that therefore it did not have jurisdiction to assess this concentration.

We are not aware that the Commission's approach has been affected by the economic crisis.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

The Commission will, to some extent, take into account economic efficiencies in assessing whether a concentration prevents, restricts or distorts competition. However, as the Commission is a relatively new institution, there is hardly any precedent in the merger control sector on the Commission's approach in this respect.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Commission is competent (inter alia) to issue a clearance decision, a conditional clearance decision or to prohibit the concentration.

The Commission will prohibit the concentration if the conditions for approval are not fulfilled. If the Commission understands (following a first assessment of the case) that the notified concentration may not fulfil the conditions for approval, it will inform the notifying party about the relevant facts, evidence and other elements on which this assessment is based. The notifying party may then present its view before the

Commission and propose modifications (conditions and obligations) to meet the requirements for approval within a given time frame set by the Commission. If the Commission, after the modification of the notification, concludes that the concentration no longer raises serious doubts, it shall issue a conditional clearance decision providing conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they entered into with the Commission to approve the concentration. Such commitments are binding for the parties and, in the case of a breach, the Commission may repeat the proceedings.

As regards ancillary restraints, these are for the first time now specifically addressed in the new Filing Regulation, which became applicable in February 2016. The Filing Regulation makes clear that the notifying party needs to submit a long-form notification if it wishes the Commission to review and assess restraints that are directly related and necessary to the transaction. For the time being, there is no further guidance available on how the Commission will assess them.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Law on the Protection of Competition (LPC) provides for the undertakings concerned the possibility to propose conditions and obligations to remedy competition concerns. However, the LPC does not specify the type of remedies acceptable to receive merger clearance. Hence, they have to be negotiated in the course of the proceedings on an individual basis.

In 2009, the Commission issued two conditional clearance decisions. In the first case, the acquirer was ordered to maintain certain current lease agreements of which the target company was the lessor and to annually report on the status of those agreements for the next three consecutive years. In the second case (a foreign-to-foreign transaction in the aviation business) the undertakings concerned were obliged to maintain an existing code-share agreement for a certain flight route to or from Belgrade and to abstain from increasing the ticket price on that flight route for a certain period of time without prior approval from the Commission. We are not aware that any conditional clearance decisions were issued by the Commission in 2010. In 2011, after exhaustive negotiations, the Commission prohibited the implementation of a concentration in the sugar sector, as it found that the remedies proposed were insufficient to compensate for the distorting effects caused by the concentration. However, this decision was overturned on appeal by the Administrative Court and the Commission conditionally approved the concentration ultimately in early 2013 (the commitments, inter alia, included the divestment of a part of the target's business in Serbia to an unrelated, financially sane buyer with experience in the sugar business).

In 2012, the Commission issued conditional clearance decisions in the context of the acquisition of a bankrupt company in the retail sector and with regard to a merger relating to the sector of e-prepaid top-up cards and services for mobile phones. In 2013 the Commission cleared a concentration between two retail chains prescribing structural and behavioural remedies. In 2014, two more conditional clearances were issued, one in the cement sector (with one undertaking committing to divest all of its Serbian business operations) and one in the airline industry (where the commitments of the undertakings concerned included, among other things, an obligation to release certain daily slots in relevant airports to one or more new interested market entrants). The Commission issued no conditional clearance decisions in 2015, but issued one decision subject to conditions, in the sugar industry, in 2016 and one, in the telecommunications sector, in 2017. In the 2016 conditional clearance decision, the acquirer committed to various reporting remedies as well as to offer for sale the underperforming sugar factories prior to any business decision to permanently close such factories. The conditional clearance decision of 2017 combined a divestiture commitment and behavioural remedies. The incumbent telecommunication services operator committed to divest a part of its network infrastructure in the territory of the city of Belgrade, where overlapping activities were found to exist. This was combined with reporting commitments as well as the commitment by the acquirer to offer an alternative solution to the current service users of the target company when entering into an agreement with them. In 2018, one further conditional clearance followed in the yeast sector that subjected the undertakings concerned mostly to reporting. In 2019, at least two more conditional clearances followed – one in the retail sector of domestic home appliances, TV audio and video equipment, mobile and fixed phones, computers and IT equipment (where the acquirer committed to either divest, sublease or terminate the lease on a number of retailing outlets in several cities in Serbia) and the other in the sector for the production and selling of fresh bread in several cities in Serbia (where the acquirer committed to various reporting obligations, including regarding its future wholesale prices and rebate policy).

The overall number of conditional clearances issued since the Commission was first set up in 2006 is approximately 20.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

As there are no specific provisions in the LPC that identify the type of remedies acceptable and the practice of the Commission in this regard is scarce, much is left to the discretion of the Commission. The 2014 conditional clearance cases were interesting in the sense that the commitment processes (including the timing issues related thereto) followed the procedural steps and formalities applicable under the EU regulatory framework. This may have been a consequence of the fact that the undertakings concerned had to coordinate their commitment process before the Commission with the respective case pending before the European Commission. For future cases and to improve legal certainty, guidelines by the Serbian Commission on the procedural steps to follow and on the formalities and provisional timing of the proposed remedies or commitments would be welcomed.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

See above.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Where the notifying party wishes the authority to review and assess restrictions that are directly related and necessary to the transaction (otherwise known as ancillary restraints), it will need to request that and submit a long-form notification.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

In Phase I proceedings, customers and competitors are typically not involved in the review process.

In Phase II proceedings, the Commission may require information and data from the undertakings concerned, competitors, customers, complainants, public bodies and organisations (eg, communal authorities, statisticians and tax authorities). Also, third parties can submit observations to the Commission.

The Law on the Protection of Competition (LPC) explicitly defines who is not considered to be a party in the proceedings:

- providers of information and data;
- experts and organisations whose analysis is used in the procedure; and
- other public entities and organisations cooperating with the Commission in the proceedings.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

In line with the LPC, the Commission publishes in the Official Gazette and on the website of the Commission general information about decisions made on the infringement of competition (eg, the infringement of the filing or standstill obligation) and orders to initiate ex officio proceedings. Notice on the submission of a merger filing is not published.

In recent years, the Commission has gradually developed its approach regarding the publication of decisions. In a first step, in early 2012 the Commission started making public the operational part of its decisions (and in some exceptional cases even whole decisions). In mid 2013, the Commission began publishing complete non-confidential versions of its decisions (ie, entire decisions with confidential data redacted). Information is redacted from the decision only following the party's well-founded request accompanied by a reasonable explanation as to why confidentiality is of utmost importance (instead of simply stating that it considers the case and related information to be confidential).

Only the parties to the proceedings may request access to the file. Third parties that may have an interest in monitoring the procedure receive only general information on the course of the proceedings.

A party that provided information to the Commission may request from the Commission that it protects its source of information or the information itself, provided that there is a justified reason to believe that the disclosure of the source or the information itself may cause substantial damages. The president of the Commission is competent to issue the respective order on the protection of the source or the protection of information.

Merger filings also receive some publicity from the Commission's annual report on its activities for the preceding year.

Cross-border regulatory cooperation

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Commission generally cooperates with antitrust authorities in other jurisdictions, in particular with those from the region (ie, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Montenegro, Romania and Slovenia). In June 2010, it concluded a memorandum of understanding with the Austrian Federal Competition Authority that, inter alia, refers to the exchange of case-related information. In 2011 and 2012, the international cooperation has been further increased (eg, in 2012, cooperation agreements were signed with the competition authorities of Kazakhstan, Romania and Russia; in 2013, cooperation agreements were signed with Slovenia and Croatia). Most recently, cooperation agreements were signed with the competition authorities of Belarus and Turkey.

In addition, the Commission cooperates with a number of international organisations that are (to some extent also) involved in antitrust matters. Such organisations include the International Competition Network, the Organisation for Economic Cooperation and Development, the Secretariat of the United Nations Conference for Trade and Development and the Network for the Protection of Competition in South Eastern Europe. In September 2013, the Commission also became a member of the Merger Working Group.

Within the framework of Serbia's Stabilisation and Association Agreement, the Commission also cooperates on a regular basis with the European Commission and the Delegation of the European Union to Belgrade.

JUDICIAL REVIEW

Available avenues

32 What are the opportunities for appeal or judicial review?

Against the final decision of the Commission, a legal action may be filed with the Administrative Court (which became operational in 2010). For a recent example of judicial review see, for example, the successful appeal submitted in a case relating to the sugar industry.

Time frame

33 What is the usual time frame for appeal or judicial review?

The legal action has to be filed within 30 days of the date the decision was submitted to the party concerned. The Administrative Court shall then decide at the latest within a period of three months. However, the law does not provide for a sanction if the court fails to issue its decision within this period. In practice, judicial review may take several months, depending on the complexity of the case.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2008, according to publicly available information, the Commission (still under the provisions of the Competition Act 2005) initiated with regard to a foreign-to-foreign merger misdemeanour proceedings against a Croatian company (and a responsible person within such company) with a misdemeanour court for implementing a concentration without obtaining the Commission's prior approval. When the misdemeanour court rejected the Commission's request, it filed an appeal, the outcome of which has not been published. Further details of this case have not been made public. In 2017, the Commission imposed its first fine for failure to notify and another fine followed in early 2021. In general, enforcement activities of the Commission are increasing.

One of the current concerns of the Commission is the possibility of enforcing sanctions in the event of a foreign-to-foreign merger (ie, in situations where the undertakings concerned, although they do not have a registered entity in Serbia, realise income on the basis of their product sales in this market, thus meeting the turnover thresholds).

Reform proposals

35 Are there current proposals to change the legislation?

Following the remarks and recommendations of the European Commission expressed in its 2012 Progress Report for Serbia, the Law on the Protection of Competition (LPC) was amended in late 2013. Furthermore, a new Filing Regulation started to apply in February 2016. In 2018, a new set of amendments to the LPC was prepared by the working group within the Serbian government, which currently continues to be subject to public debate. The Commission is also expected to provide guidance on frequently asked questions in the merger control sector.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The working group set up within the Serbian government to prepare a new Competition Protection Law has circulated the first proposal of the new law for comments by the public in 2018. The proposal was updated and circulated for an additional round of comments in early 2019. On the one hand, the proposal attempts to consolidate into existing rules the Commission's practices since its establishment and, on the other, to reconcile the procedural aspects of the Commission's work with recently enacted Law on Administrative Proceedings.

As regards merger control, it is proposed that the jurisdictional thresholds for notifiable concentrations are increased (something that has long been lobbied for by industry representatives) as well as to introduce a mandatory filing obligation regarding acquisitions leading to shares of more than 40 per cent in a product market in Serbia (ie, regardless of whether the turnover thresholds are met). The existing exceptions from the notion of a 'concentration' are restricted insofar as, for example, acquisitions by investment funds can no longer benefit from this exception. The time limits for the submission of the notification and for deciding on the case are prolonged. Furthermore, the procedure for requesting a derogation from from the suspension obligation (eg, in cases of public takeovers or privatisations) shall be facilitated.

In early 2019, the Serbian Commission also initiated two Phase II merger control proceedings: one in the sector of retailing of home appliances and the other in the telecommunications sector. The former ended with a conditional clearance and the latter was unconditionally cleared. In 2020, the Commission initiated three Phase II merger control proceedings, one in the pest control sector and two in the sandwich panels' market. Two out of three latter cases were unconditionally cleared, whereas the outcome of the third proceeding is not yet made publicly available.

In 2021, the Serbian Commission issued a long awaited guidance with respect to interrelated transactions acknowledging that it would follow the guidelines streaming from the EU Competition Law in that respect. This marks a significant turn in the Serbian Commission's decisional practice, as this was one of the rare merger control areas, where, owing to lack of explicit regulation in the Law on the Protection of Competition, the Commission's practice diverged from the EU guidelines.

In late 2019, the Commission's leadership (the president and most members of the Council) changed.

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Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Serbia	
Voluntary or mandatory system	The filing of a notification with the Commission is mandatory in cases where the applicable jurisdictional thresholds have been met.
Notification trigger/ filing deadline	The merger notification must be submitted to the Commission within a period no later than 15 days after the triggering event (ie, the signing of the agreement, the announcement of a public offering, the announcement of the start or end date of a public takeover bid or the acquisition of control (whichever occurs first)). The filing may already be submitted once the parties have a serious intention to conclude the relevant agreement (ie, they sign a letter of intent, or announce their intention to make a public offer for the purchase of shares in an undertaking).
Clearance deadlines (Stage 1/Stage 2)	After submitting the complete filing, the Commission will decide either in one month (in Phase I) or within four months from the decision to initiate in-depth proceedings (Phase II).
Substantive test for clearance	The Commission assesses whether the notified concentration will lead to a significant prevention, restriction or distortion of effective competition, in particular, if it will result in the creation or strengthening of a dominant position in the relevant market. In addition to a test of dominance (over 40 per cent market share), the Commission will consider anticompetitive effects that could potentially arise out of a concentration (eg, loss of current and potential competition, unilateral effects resulting from horizontal mergers, joint dominance, conglomerate effects, vertical effects).
Penalties	For late filing, the Commission may impose on the notifying party a procedural penalty in the range of €500 to €5,000 per day (but capped at a maximum of no more than 10 per cent of the total annual turnover of that undertaking). For failure to file and breach of the suspension obligation the Commission may impose a fine of up to 10 per cent of the total annual turnover of the responsible undertaking generated in Serbia in the preceding financial year (protective measure). Moreover, it may also order to dissolve the concentration, sell shares, terminate a contract, or take other measures necessary to re-establish the status as before implementation of the concentration (measure of de-concentration).