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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.

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1 Relevant Authorities and Legislation

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

The competent authority for enforcement of merger control law is the Croatian Competition Agency ("Agency"), an independent administrative body which was established in 1995. The Agency is managed by the Competition Council ("Council"), a committee consisting of five members, one of which is appointed as the President of the Council. The website of the Agency is accessible at http://www.aztn.hr/en/. The Agency is accountable to the Croatian Parliament. The merger control proceedings are conducted by the Agency's expert team. After establishing all of the relevant facts and circumstances for decision-making, the expert team reports to the Council, which then renders the final decision as to the individual case.

In the second instance, the substantive decisions of the Agency, as well as various procedural decisions, may be subject to review by the High Administrative Court of the Republic of Croatia, in accordance with the procedural rules laid down in the Administrative Dispute Act.

1.2 What is the merger legislation?

The merger control legal framework is principally laid down by the Croatian Competition Act ("CCA") of 2010, which was amended in 2013. In addition, several bylaws regulate different aspects of merger control, such as the Regulation on the Method and Criteria for Defining the Relevant Market, the Regulation on the Notification and Assessment of Concentrations, and the Regulation on the Criteria for Setting Fines. The Agency has also issued the Interpretive Guidelines on the Assessment of Concentrations, which represent only a soft law source.

Besides the CCA, the proceedings before the Agency are also adequately governed by the General Administrative Procedure Act and the Act on Misdemeanours. The appeal proceedings are governed by the Administrative Dispute Act. Regarding filing costs and court action costs, the Act on Administrative Fees and the Act on Court Fees also apply.

Lastly, the EU competition rules are also directly applicable.

1.3 Is there any other relevant legislation for foreign mergers?

There is no other relevant legislation for foreign mergers.

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

The competence for merger control primarily remains with the Agency, with minor derogations in certain specific sectors.

Media Sector

According to the Croatian Media Act, all concentrations in the media sector have to be notified to the Agency, irrespective of the turnovers achieved by the parties to the concentration. Furthermore, any concentration between publishers of printed general daily or weekly newspapers shall be determined as prohibited if it results in a market share for daily newspapers exceeding 40% in the territory of the Republic of Croatia.

The Croatian Electronic Media Act ("EMA") lays down additional notification and approval requirements as regards the concentrations of TV, radio broadcasters and media services providers. Namely, any change of control arising out of such concentration, irrespective of any statutory thresholds, has to be notified to the Electronic Media Agency. The Electronic Media Agency assesses whether the acquired share capital exceeds the share capital thresholds. If the respective thresholds are exceeded, the concentration will be declared illegal. To this end, the decision of the Electronic Media Agency on the permissibility of such concentrations is a mandatory schedule of the concentration notification that has to be filed to the Agency.

Electronic Communications Sector

The electronic communications sector is governed by the Electronic Communications Act ("ECA"), whereas the competent authority for the supervision, implementation and execution thereof is the Croatian Regulatory Authority for Network Industries ("HAKOM"). According to the ECA, all electronic communications operators which are declared to have significant market power, or those with granted licences for the use of the radio frequency spectrum, which are not covered by the merger control criteria laid down in CCA, are required to notify any merger to HAKOM. HAKOM will conduct a merger assessment procedure as regards such mergers by itself. In addition, while deciding on a merger in the electronic communications industry, the Agency is obliged to request an expert opinion from HAKOM, regarding the possible effects of the merger on the relevant market.

Banking

Irrespective of the merger control proceedings before the Agency, pursuant to the Croatian Credit Institutions Act, any person acquiring a qualifying holding in a credit institution is required to obtain prior authorisation from the Croatian National Bank. Qualifying holdings

are generally set to 20%, 30% and 50% of the voting rights or share capital of the company. The Croatian National Bank will order any person who has acquired a qualifying holding without prior authorisation to sell the respective shares in a time period, which may be neither shorter than three months, nor longer than nine months. As for the finality of the respective order, the holder may not exercise any rights which derivate from the respective shares.

Capital Markets

Pursuant to the Croatian Capital Markets Act, any investment company participating in a merger has to acquire a prior authorisation form the Croatian Financial Services Supervisory Agency ("HANFA").

In addition to the above sector-specific legislation, the Agency has entered into various cooperation agreements with other sector regulators, such as in the sector of energy.

Notwithstanding the sector involvement of the merger participants, if at least one of them is a joint stock company, provisions of the Croatian Joint Stock Companies Takeover Act could apply.

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?

According to Article 15 paragraphs 1 and 3 of the Act, the following types of transactions are caught by the provisions on concentrations:

- mergers or acquisitions of undertakings;
- the acquisition of direct or indirect control or decisive influence over one or more undertakings or a (substantial) part or parts of one or more undertakings, by acquiring a majority of shares, majority of voting rights or any other way prescribed by general corporate acts; and
- the establishment of a full-functioning joint venture, i.e. a joint venture that will perform, on a lasting basis, all functions of an independent economic entity.

The concept of "control" is defined in Article 15 paragraph 2 in connection with Article 4 of the CCA. To this end, an undertaking is deemed to control another undertaking if it, directly or indirectly, holds more than half of its shares, may exercise more than half of the voting rights, has the right to appoint more than half of the members of the management board, supervisory board or similar managing or supervising bodies, or is able to exercise decisive influence on the business of the "controlled" undertaking in any way.

Various interests, such as convertible warrants, share options, or other instruments which may create an entitlement to acquire an equity interest in the future are not defined by Croatian merger control rules, but it is to be expected that the Agency would interpret the legal framework in accordance with EU merger control rules.

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

The acquisition of a minority shareholding may amount to a merger if it *de facto* or *de jure* allows the acquirer to exercise decisive influence on the business of the "controlled" undertaking, e.g. control may occur on a legal basis in situations where specific rights are attached to this shareholding.

2.3 Are joint ventures subject to merger control?

Joint ventures are subject to merger control if the joint venture will be performing functions of an independent economic unit on a lasting basis, i.e. a full-function joint venture. Notwithstanding the above, if the object and effect of such a full-function joint venture is the coordination of the undertakings that remain independent, it will constitute a concentration; however, the coordinated entity will be assessed under the criteria laid down for anti-competitive agreements. Cooperative joint ventures fall under the scope of the rules applicable for anti-competitive agreements.

Regarding the examples provided in the Guidelines, the first and the third example would not constitute mergers and would fall under the scope of the rules applicable for anti-competitive agreements, whereas the second example would constitute a merger.

The Agency would interpret all factual and business variations regarding joint ventures in accordance with EU merger control rules.

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

A concentration will be caught by the merger control regime set out in the CCA if the following turnover thresholds are met:

- the combined worldwide turnover of all undertakings concerned is at least HRK 1 billion (approximately EUR 133 million) in the financial year preceding the concentration; and
- the aggregate national turnover in Croatia of each of at least two undertakings concerned is at least HRK 100 million (approximatively EUR 13 million) in the preceding financial year.

If the financial statements for the preceding financial year are still not completed at the time of the filing of the notification, the last year for which the financial statements are completed will be taken as the relevant year for assessment of the concentration.

Turnover Calculation

Pursuant to Article 17 paragraph 3 of the CCA, the overall turnover comprises the following:

- turnover of the undertakings (directly) involved in the concentration;
- turnover of the undertakings controlled by the undertakings (directly) involved in the concentration;
- turnover of the undertakings controlling the undertakings (directly) involved in the concentration;
- turnover of the undertakings controlled by the undertakings from the preceding indent; and
- turnover of the undertakings controlling the undertakings from the preceding indent.

Revenues achieved through the sale of products and services between group undertakings are excluded from the calculation. In cases where the concentration arises from an acquisition of control of a part of one or more undertakings, irrespective of whether these parts have the status of a legal entity, only the turnover relating to the part which is relevant to the concentration shall be taken into account.

Special turnover calculation methods apply in the case of concentrations consisting of credit or other financial institutions. Their relevant turnover is calculated based on their overall turnover arising out of their regular business activities in the financial year preceding the transaction. Please also note the following:

- Where credit institutions and other providers of financial services are involved in the merger, the turnover shall

consist of the income from interests charged, income from securities, net profits from financial transactions, income from commissions charged and income from other business activities.

- Insurance companies' turnover consists of gross insurance premiums, including reinsurance premiums charged by these companies in a given year.

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

Yes. Where the jurisdictional thresholds are met, notification is mandatory, notwithstanding a substantive overlap.

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

Foreign-to-foreign transactions are caught by the CCA, provided that at least one of the parties to the transaction has its seat and/or branch office situated in the Republic of Croatia, and that the thresholds set under question 2.4 above are met. The exemption can be found in cases where the subject concentration is to be assessed by the European Commission in accordance with Regulation 139/2004/EC. In such cases, foreign-to-foreign mergers do not need to be notified to the Agency.

Furthermore, pursuant to Article 2 of the CCA, the application thereof is limited to agreements and practices that may impact the Croatian market. Strictly and theoretically speaking, a concentration does not require notification if it has no local impact, notwithstanding the achievement of the above thresholds. However, this should be confirmed by the Agency in each individual case, as the Agency has not published any guidance or official opinion on the local impact test.

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

The jurisdictional thresholds will be overridden and the subject concentration will not be caught by the CCA if it is to be assessed by the European Commission in accordance with Regulation 139/2004/EC and if the concentration does not impact the Croatian market. The latter exemption may be found in mergers within the media industry, as described under question 1.4 above.

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

In the case of a merger taking place in stages, two provisions of the CCA specifically apply. The first one concerns the situation where the envisaged mergers are focused on the acquisition of just one or more parts of undertaking. To this end, if two or more of such partial transactions are carried out within a period of two years, they will be deemed as a single concentration, executed on the day of the last transaction.

The second provision concerns the discretionary power of the Agency to connect two or more merger proceedings if it deems it purposeful and economical. Such statutory possibility will exist if the Agency, while conducting a merger assessment procedure, receives another merger notification, as a result of which the party to the former concentration should acquire control or decisive influence over another undertaking.

In such cases, the Agency may decide to deem all the received notifications as a single concentration, to conduct a single procedure and render a single resolution for all notified concentrations. Furthermore, the deadline for the rendering of the decision will be calculated as of the day of the last notification.

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?

Where the jurisdictional thresholds are met, the notification is compulsory. The CCA does not prescribe for an exact filing deadline. Generally, a notification may be submitted as soon as the agreement between the undertakings participating in the merger has been signed, or after the public offer has been made. Exceptionally, a possibility is set forth to file the notification even before signing the agreement, as long as, based on the good-faith principle, a serious intention to enter into the transaction agreement may be demonstrated.

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

The CCA provides for three exceptions where clearance will not be required, even though the jurisdictional thresholds are met, i.e. where the transactions are excluded from the application of merger control rules:

- first of all, clearance will not be required in the case of intra-group transactions, that is, acquisitions of shares or share capital that is the result of the restructuring of undertakings linked by joint control;
- the second exclusion applies to credit institutions, other financial institutions, investment funds or insurance companies when they are, within their ordinary course of business (which includes transactions and dealing with securities), acquiring shares for their own account or for the account of third parties. Such transactions will not require clearance, provided that the shares are acquired with the purpose of resale for a period of no longer than 12 months and that the above institutions do not exercise voting rights arising therefrom in order to affect the competitive actions of the undertaking in question. The respective deadline of 12 months may be prolonged by the Agency if the relevant undertaking provides it with evidence that the sale could not have been carried out within the given term; and
- finally, the clearance will not be required if due to bankruptcy, liquidation or winding up, the control over the undertaking is transferred to the bankruptcy administrator or liquidator within the meaning of the Croatian bankruptcy Act or Companies Act.

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

The following sanctions could be applied in cases where the merger rules are not respected:

Fines:

- A fine not exceeding 10% of the total turnover of the undertaking realised in the last year for which the financial statements have been completed will be imposed on the undertaking which participated in the implementation of a prohibited concentration.
- A fine not exceeding 1% of the total turnover in the last year for which the financial statements are completed will be imposed on a party to the proceedings where it (i) fails to submit the obligatory prior notification of concentration to the Agency, (ii) submits to the Agency incorrect or misleading information in the concentration assessment proceedings, or (iii) implements a concentration prior to obtaining a clearance.

In the last two years, symbolic fines have been imposed several times for failing to notify a merger in the sector of electronic media, as set out under question 1.4 above. The imposed fines ranged from HRK 4,500 (approximately EUR 600) to HRK 25,000 (approximately EUR 3,300).

Suspension of Rights and Nullity:

- The Agency is authorised to file a lawsuit to declare null and void any act of the undertaking which has been conducted prior to obtaining the merger control approval or which contravenes approval of the Agency.
- In addition, the Agency will, at its own discretion and by virtue of a separate decision, propose all necessary measures, whether behavioural or structural, aimed at restoring efficient competition in the relevant market, and set the terms for their adoption in cases (i) where the concentration concerned has been implemented contrary to the decision of the Agency by which the concentration has been assessed as incompatible, or (ii) where the concentration concerned has been implemented without the obligatory prior notification of concentration. On the basis of such decisions, the Agency may, in particular: (i) order the shares or interest acquired to be transferred or divested; and (ii) prohibit or restrict the exercise of voting rights related to the shares or interest in the undertakings parties to the concentration, and order cessation of the joint venture or any other form of control by which a prohibited concentration has been put into effect.

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

As the execution of the transaction prior to obtaining the clearance is prohibited, it might be difficult to justify local carve-outs before the Agency. However, bearing in mind that the CCA should only apply to concentrations which impact competition in the Republic of Croatia, local carve-out should, in principle, be possible. However, please note that the Agency has never commented officially on carve-outs; therefore, parties should consider carefully whether they want to go ahead with closing before clearance in Croatia and carve-out the Croatian angle of the transaction.

The Agency may allow the implementation of certain actions before the clearance as described under question 3.7 below.

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

Generally, a notification may be submitted as soon as the agreement between the parties to the merger has been signed, or after the public offer has been made. There are no explicit deadlines for the filing. Exceptionally, notification may be filed even before signing the agreement, as long as serious intent to enter into the envisaged transaction agreement may be demonstrated to the Agency.

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?

The regulatory process is divided into two phases (Phase I and Phase II).

Phase I

Phase I starts from the day on which the Agency receives the complete filing, and has to be completed within 30 days. During these 30 days, the Agency can adopt a decision granting clearance or a decision to initiate Phase II. The concentration is deemed cleared if the Agency does not issue a decision within 30 days following the initiation of Phase I.

Phase II

Phase II may take three months, with the possibility of an extension by another three months. Phase II ends by the Agency adopting a written decision, either permitting (conditioned or unconditioned) or prohibiting the merger. The CCA also provides that the Agency, after opening Phase II, is obliged to publish a Notification on Facts determined in the proceedings, allowing all parties to the concentration and all other parties holding a legal interest in the result of the procedure to submit their arguments and to conduct an oral hearing before the final decision will be made.

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

The Agency is authorised to allow the implementation of certain actions before the clearance. Such derogation from the suspension clause requires a separate request by the undertakings involved in the merger proceedings and a consequent approval by the Agency, which will only be granted after reviewing all the facts at stake. Considering that even partial execution of the transaction is prohibited prior to obtaining a formal clearance, the risks of not filing adequately, set out under question 3.3 above, apply in cases of completing before clearance is received.

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

The format of the notification is determined by the Regulation on notification and assessment of concentration (hereinafter, the "Regulation"). In line with the foregoing, the Regulation provides for two distinct forms of merger control notifications, which closely follow the Short Form CO and Form CO at EU level. All required notification forms are available online under the address http://www.aztn.hr/prijava-koncentracije/. All requested data in the forms, except the data explicitly defined as voluntary and optional, make up the mandatory content of the application.

The notification should be accompanied by:

- the original or a certified copy, or a certified translation (if the original official text is not written in Croatian) of the document representing the legal grounds for the concentration. An apostille is required if there is no bilateral agreement on the recognition of foreign certifications;
- annual financial reports for the parties to the concentration for the financial year preceding the concentration (if not in Croatian, accompanied by a certified translation); and

- other information and documents required by the Regulation, i.e. copies of all analyses, reports, studies, surveys, and any comparable documents prepared by or for any member(s) of the board of directors, or the supervisory board, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting, for the purpose of assessing or analysing the concentration with respect to market shares, competitive conditions, competitors (actual and potential), the rationale of the concentration, potential for sales growth or expansion into other product or geographic markets, and/or general market conditions.

Also, in the case of media mergers, an additional document will be required, as set under question 1.4 above. In addition to the obligatory information and documents set out under the Regulation, the Agency may require additional information and documents beyond the list provided for in the Regulation. Furthermore, the notifying party has to inform the Agency of the jurisdictions where the merger has also been filed.

The CCA does not provide for any particular provision on the pre-notification phase, but parties to a transaction may enter into informal pre-notification talks with the Agency which could help secure a clear framework for possible factual or legal issues. During such talks, the Agency does not usually give a conclusive standpoint on any of the discussed issues prior to the time when the actual notification is submitted.

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

The Regulation provides for two distinct forms of merger control notifications, which closely follow the Short Form CO and Form CO at EU level. The circumstances which allow for the submission of an accelerated procedure and submission of a shortened filing are, in particular:

- none of the parties to the concentration are engaged in business activities in the same product and geographic market, and there is no horizontal overlapping, or in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged;
- the combined market share of all the parties to the concentration that are engaged in business activities in the same product and geographic market is less than 15%, and/or none of the individual or combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (vertical relationships) is 25% or more;
- a party is to acquire sole control of an undertaking over which it already has joint control; and
- two or more undertakings gain control over a joint venture which has no significant activities on the territory of the Republic of Croatia, or when such significant business activities are not expected within a reasonable time period.

The other informal way to speed up the process is to file the notification as completely as possible, in order to avoid the prolongation of Phase II for another three months.

3.10 Who is responsible for making the notification?

In cases where an undertaking is acquiring control or decisive influence over another undertaking, the notification obligation lies with the acquirer. In all other cases, all parties to the concentration are obliged to file a single notification, based on their mutual agreement.

3.11 Are there any fees in relation to merger control?

The filing fee may amount to up to HRK 10,000 (approx. EUR 1,300) or up to HRK 5,000 (approx. EUR 650) for filings submitted under sector-specific laws. For filings approved in Phase I, the Agency may charge a fee of up to HRK 10,000 (approx. EUR 1,300) or a fee of up to HRK 5,000 (approx. EUR 650) for filings approved under sector-specific laws. For filings approved in Phase II, the Agency may charge a fee of up to HRK 150,000 (approx. EUR 19,500) or HRK 15,000 (approx. EUR 1,950) for filings approved under sector-specific laws.

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

The Croatian merger control regime does not provide for special rules for transactions concerning a public offer.

3.13 Will the notification be published?

Each notification has to contain a short publication form. Based on the respective form, the Agency will publish a notice when initiating the respective merger proceedings on its website. The published information includes the names of the companies involved, the date of the receipt of the notification by the Agency, the industry sector and a brief description of the merger. Furthermore, the Agency will publish on its website a public call to interested parties to deliver written comments and opinions on the concentration.

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 applied by the Agency is whether the transaction results in a "significant impediment of effective competition". The test is purely focused on competition concerns while wider considerations do not come into play. On this end, the Agency takes into consideration possible pro- and anti-competitive effects caused by the concentration; it appraises the structure of the relevant market, the market share, the position of the undertakings concerned and their competitors, and the effects of the concentration on other undertakings, etc. The Agency takes into account the impact of the transaction on consumer welfare in particular, and assesses whether the concentration will contribute to a decrease in prices of goods and/or services, an improvement in the distribution of goods, etc. The Agency has also issued the Interpretive Guidelines on the Assessment of Concentrations.

4.2 To what extent are efficiency considerations taken into account?

The Agency is allowed to take into account efficiency considerations, if consumer benefit will be shown as a final result of a merger.

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

Non-competition issues in relation to possible wider public interest considerations, e.g. national security and industrial policy concerns, are not taken into account.

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

Third parties may participate in the process either as formal participants; alternatively, their role may be limited to the provision of the necessary information to the Agency.

Formal Participation

Third parties are entitled to formally participate in the process if they are able to prove their legal interest in the outcome of the process to the Agency. The Agency's decision on the formal participation of a third party has to be passed within 30 days from the filing of the third party's request. Appeal against such a decision is not allowed; however, it may be contested by initiating an administrative dispute proceeding before the High Administrative Court of the Republic of Croatia. A party which has been allowed to take part in the proceedings may request (i) that the notification on preliminary determined facts is delivered to it, and (ii) to be heard in the proceedings.

Informal Participation

Upon the receipt of the complete notification, the Agency shall, on its website, publish a public request to all interested parties to submit their comments on the notified concentration within a period of eight to 15 days.

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

The Agency may, at any time, request from the third parties all the information which it deems necessary. For not complying with the Agency's request, a third party undertaking may be fined with a penalty ranging from HRK 10,000 to HRK 100,000 (approximately EUR 1,300 to 13,100).

Also, according to the General Administrative Procedure Act, all administrative public bodies are obliged to cooperate and to provide each other with the required legal assistance.

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

Confidentiality

It is regulated by the CCA that the employees of the Agency shall keep and not disclose the information classified as a business secret, irrespective of the way they came to know it, whereby the obligation of business secrecy shall continue to be in effect five years after the expiry of their engagement with the Agency.

Under the term business secret, as prescribed by Article 53 of the CCA, the following shall be considered: (i) all which is defined to be a business secret by law or other regulations; (ii) all which is defined to be a business secret by the notifying party, provided that such view is accepted by the Agency; and (iii) all correspondence between the Agency and the European Commission, and between the Agency and other international competition authorities and their networks. Thus, information, documents and data provided to the Agency during the notification process is treated as confidential only provided that the notifying party (i) explicitly requests protection of business secrets, and (ii) demonstrates that the information in fact constitutes a business secret.

A business secret shall be considered in particular as business information which has actual or potential economic and market value, the disclosure or use of which could result in economic advantage for other undertakings. In principle, the Agency considers that the following information would not normally be covered by the obligation of business secrecy in the sense of the CCA:

- information which is publicly available, including information available through specialised information services or information which is common knowledge among specialists in the field;
- historical information, in particular information at least five years old, irrespective of the fact of whether they have been considered as a business secret;
- annual and statistical information. Turnover is not normally considered as a business secret, as it is a figure published in the annual accounts or otherwise known to the market; and
- data and documentation on which the decision of the Agency is based.

It should be kept in mind that when the notifying party submits to the Agency confidential documentation and data, and fails to provide a copy of the relevant documentation containing no confidential information, the Agency shall – after it has sent a reminder thereof to the notifying party – finally assume that such a documentation does not contain data which are covered by the obligation of business secrecy.

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

5.1 How does the regulatory process end?

Throughout the assessment process, the Agency may reject the notification if it determines that there are no legal requirements for the initiation of the proceedings, or that notified concentration does not fall within the scope of the provisions of the CCA, in which case the Agency shall issue a special procedural decision stating such finding.

Phase I starts from the day on which the Agency receives a complete filing, and has to be completed within 30 days. The concentration is deemed cleared if the Agency does not issue a decision within 30 days following the initiation of Phase I. In this Phase, the Agency may also issue an express clearance decision.

In Phase II, the Agency may, by decision, approve the transaction conditionally or unconditionally, or prohibit the concentration:

- **Unconditional clearance**: if the Agency finds that a concentration is not incompatible with the provisions of the CCA, it shall issue a decision declaring the compatibility of the concentration.
- **Conditional clearance**: the Agency may impose remedies (additional obligations and conditions) intended to ensure that the concentration complies with the requirements laid down in the CCA.
- **Prohibition of merger**: if the Agency finds that the concentration is incompatible with the provisions of the CCA, it shall issue a decision declaring that the concentration is incompatible with the CCA.

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

Although negotiating remedies are not explicitly foreseen by the regulatory framework, there is an implied possibility to interact with the Agency over the expected content of a remedy. The Agency may accept the remedies proposed by the party in their entirety or parts

thereof, if it establishes that the measures concerned are adequate to alleviate competition concerns arising from notified merger. In cases where that the Agency does not accept, or just partly accepts, the proposed remedies, it is authorised to define other behavioural and/or structural remedies suitable for the restoration of effective competition in the market.

In general, the remedies have to eliminate the competition concerns entirely, and must be capable of being implemented effectively.

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

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

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

The remedies may be proposed by the notifying party as early as in the notification of the concentration concerned.

Where, in the course of the assessment proceedings, the Agency finds that the concentration in question may be declared compatible only after the necessary obligations and conditions are fulfilled, it will, without delay, inform the notifying party. Following this, the notifying party shall, in the time period which may not exceed 30 days from the day of the receipt of this notice, propose adequate remedies (whether behavioural and/or structural measures) and other conditions, in order to remove the negative effects of the concentration concerned.

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?

There is no official position of the Agency with regard to terms and conditions to be applied to divestments, as remedies are set individually in each case.

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

Non-compliance with a remedy is equivalent to a breach of the suspension clause, i.e. it may entail fines and the respective acts are exposed to nullity. It therefore depends on the wording of the remedy as to whether the transaction can be closed prior to complying with the undertaken remedy. Namely, as the imposed remedies may be determined to be complied with either prior to the completion of the merger or after, a transaction may be completed even before the compliance with the remedies (due to the structure of the remedies). In such cases, the non-compliance with remedies will subsequently result in annulment of the clearance decision.

5.7 How are any negotiated remedies enforced?

The remedies are indirectly enforced by the Agency's authority to annul its decision on concentration (*ex officio* or upon the request of any of the parties), if any of the parties has not fulfilled the obligations imposed by the Agency and/or if the decision has been made on the basis of incorrect or untrue information deemed essential in making the decision. By way of the same decision, the Agency will also declare the concentration as prohibited; it will further order the parties to undertake measures needed for the restoration of effective competition and, finally, it will impose monetary fines as set under question 3.3 above.

5.8 Will a clearance decision cover ancillary restrictions?

Ancillary restraints (such as, in particular, non-compete clauses) are not assessed by the Agency in the merger process. It is the parties' responsibility to self-assess whether a restriction is indeed ancillary (i.e. essential for the success of the concentration and proportional) and therefore covered by the clearance decision. When looking at the permissibility of non-compete covenants, adequate EU rules should also be considered under Croatian law.

5.9 Can a decision on merger clearance be appealed?

Against the decisions of the Agency, as well as various procedural decisions, a lawsuit may be lodged to the High Administrative Court of the Republic of Croatia, in accordance with the procedural rules laid down in Administrative Dispute Act. The decision may be appealed due to:

- erroneous application of the substantive competition law;
- substantial violation of procedure rules;
- erroneous or incomplete establishment of the facts; and
- erroneous decision on the fine, or other questions for which Agency is competent.

The Court goes to the merits of the case, and does not only limit its review to procedural issues. All actions brought before the Court are urgent. The lawsuit does not suspend the enforceability of the Agency's decision. The parties may not present new facts, except those presented before the Agency. Exceptionally, new facts may be presented if the appellant proves that it was not able to present them before the Agency previously.

Against the ruling of the High Administrative Court, an extraordinary request for the protection of the legality of a final judgment may be filed by the competent state attorney in the case of breach of law by the ruling in question to the Supreme Court of the Republic of Croatia. Pursuant to the Administrative Dispute Act, a party may file a request for the renewal of the court's proceedings, but only in special circumstances provided for in the Administrative Dispute Act.

In principle, administrative dispute proceedings last approximately one to two years. Regarding the right of appeal for third parties, meaningful interpretation of the Administrative Disputes Act leads to the conclusion that third parties can initiate a court proceeding against the decisions of the Agency in front of the High Administrative Court of the Republic of Croatia, provided that they can demonstrate their legal interest. Appeals against merger decisions are not common in Croatia.

5.10 What is the time limit for any appeal?

The parties may file a lawsuit against the decision of the Agency before the High Administrative Court of the Republic of Croatia within 30 days from the day of receiving the respective decision.

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

Pursuant to the CCA, the proceedings for determination of the infringement of the merger control legislation may not be initiated after the expiry of five years as of the date of the infringement.

6 Miscellaneous

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

The Agency is entitled to provide the European Commission and the competition authorities of other EU Member States with all information and documents required for the fulfilment of their duties. *Vice versa*, the Agency may also ask for the provision of such information and documents. As the Agency is a member of the European and the International Competition Network, the Agency cooperates closely with all other members of the networks.

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

There is no pending legislation or publicly announced initiatives that would affect Croatian merger control rules.

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

These answers are up to date as of 8 November 2017.

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Christoph Haid is a partner of Schoenherr, and is responsible for the EU & Competition practice in several Schoenherr jurisdictions, including Croatia. He has been involved in numerous high-profile merger control proceedings before the Austrian and Slovenian competition authorities, as well as the European Commission, and has coordinated global merger control filings, particularly in the CIS. On the non-contentious side, Christoph advises clients in setting up and maintaining state-of-the-art antitrust compliance programmes across the region, with a special focus on food and non-food retailing. In addition to his role as head of the EU & Competition team in various Schoenherr jurisdictions, Christoph has been the managing partner of the Zagreb office since 2013.

Recent merger control references include advising and representing clients in the, *inter alia*, following industries: retail; energy; automotive; construction and building materials; telecommunication; financial services; and chemicals.

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