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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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Country Question and Answer Chapters:

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 authority with competence over merger control in Bosnia & Herzegovina is the Competition Council [*Konkurencijski savjet*] ("Council"), an independent administrative body established in 2004 and operational as of 2005. The Council is competent for enforcing antitrust and merger control rules in the entire territory of Bosnia & Herzegovina covering both entities (the Republic of Srpska and the Federation of Bosnia & Herzegovina), as well as the District of Brcko. The website of the Council is accessible at www.bihkonk.gov.ba.

Pursuant to publicly available information, the Council reviewed 15 merger notifications in 2016.

Merger control decisions can be challenged before the Court of Bosnia & Herzegovina [*Sud Bosne i Hercegovine*].

1.2 What is the merger legislation?

Merger control rules are regulated by the Law on Competition [*Zakon o konkurenciji*] (*Official Gazette of Bosnia & Herzegovina*, nos. 48/05, 76/07 and 80/09) (the "Competition Act"), which came into force on 27 July 2005 and was last amended in 2009.

The Competition Act regulates both the substantive and procedural aspects of merger control. To the extent that some procedural rules are not regulated by the Competition Act, the Law on Administrative Proceedings [*Zakon o upravnom postupku*] (*Official Gazette of Bosnia & Herzegovina*, nos. 29/02, 12/04, 88/07, 93/09, 41/13 and 53/16) applies subsidiarily.

Certain aspects of merger control are further regulated in secondary legislation, namely:

- The Notice on the Form of a Merger Notification and the Criteria for evaluating a Concentration (*Official Gazette of Bosnia & Herzegovina*, no. 34/10; the "Implementing Notice"), which governs the required form and content of merger notifications, as well as certain procedural issues.
- The Notice on the Definition of a Relevant Market (*Official Gazette of Bosnia & Herzegovina*, nos. 18/06 and 34/10), which regulates how relevant markets are to be defined.
- The Notice on the Setting of Periodic Fines providing for daily penalties that can be imposed by the Council (*Official Gazette of Bosnia & Herzegovina*, no. 31/06).
- The Notice on the Amount of Administrative Fees for Proceedings before the Council (*Official Gazette of Bosnia & Herzegovina*, nos. 30/06 and 18/11).

1.3 Is there any other relevant legislation for foreign mergers?

There are no specific rules regarding foreign mergers. General merger control rules apply also to foreign mergers provided that the respective jurisdictional thresholds are met (please see questions 2.4 and 2.6 below).

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

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

- *Banking*: direct or indirect acquisitions of a qualified shareholding (i.e. at least 10%), in banks are subject to approval by regulatory agencies competent for the Republic of Srpska and the Federation of Bosnia & Herzegovina. Each further acquisition by the same person of 20%, 30% and 50% of the bank's shareholding is also subject to the approval of the regulatory agencies. Also, the acquisition of control over a company by a bank requires prior approval by the respective agencies.
- *Media*: acquisitions of 5% and more shares in an undertaking having a licence to operate in the media sector can be subject to prior approval of the Communications Regulatory Agency of Bosnia & Herzegovina.
- *Telecommunications*: pursuant to the Communications Act (*Official Gazette of Bosnia & Herzegovina*, nos. 31/03, 75/06, 32/10 and 98/12), the Communications Regulatory Agency of Bosnia & Herzegovina is empowered to stipulate conditions and actions in view of preventing abuses of significant market power in the telecommunications sector. Some of the issued licences in the sector may contain provisions requiring approval of the regulator in the case of acquisitions of qualified shareholdings.
- *Energy*: separate energy regulatory agencies exist for each administrative level, i.e. the country of Bosnia & Herzegovina and the entities of the Republic of Srpska and the Federation of Bosnia & Herzegovina. Dependent on the administrative level, an acquisition of qualified shareholding in a licensed operator in the energy sector can be subject to prior approval by the competent regulator.

- *Concessions*: the laws on concessions regulating infrastructure building and exploitation of natural resources establish several different concession authorities for each administrative level, i.e. the country of Bosnia & Herzegovina and the entities of Republic of Srpska and the Federation of Bosnia & Herzegovina, as well as various similar, but different, concession regimes. Acquisitions of qualified shareholdings in some concessionaires may require prior approval of the concession authority.

2 Transactions Caught by Merger Control Legislation

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

The Competition Act catches the following types of concentrations:

- mergers and acquisitions of two or more independent undertakings or parts thereof;
- any acquisition of direct or indirect control over another undertaking or parts thereof by one (sole control) or more undertakings (joint control); and
- establishments of joint ventures performing on a lasting basis all functions of an autonomous undertaking.

An undertaking is deemed to have control over another undertaking if it can exercise decisive influence on the latter's activities. Such influence can be based on (ownership or voting) rights, agreements or any other legal or factual basis.

Pursuant to numerous official opinions and conclusions rendered by the Council (see, for example, Council Conclusion no. 01-26-1-02-5-II/11 of 23 March 2011 and Council Opinion no. 01-26-7-852-2-I/10 of 18 January 2011), intra-group acquisitions and restructurings are not caught by merger control rules.

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

Yes, provided that the acquisition of a minority shareholding confers (sole or joint) *de facto* or *de jure* control over the target on the acquiring undertakings (see also question 2.1).

For example, in *HVB Capital Partners/Comtrade Group* (Council Decision no. 01-04-26-002-16-II/08 of 13 May 2008), the Council decided that the acquisition of a 20% interest conferred decisive influence on HVB Capital Partners by enabling it to take strategic commercial decisions in the target company and therefore amounted to an acquisition of control over Comtrade.

2.3 Are joint ventures subject to merger control?

Yes, joint ventures are subject to merger control. However, only joint ventures which operate on a lasting basis and have all the functions of an independent undertaking (i.e. full-function joint ventures) are considered a concentration, as long as they do not purport to coordinate the market activities of the joint venture partners, in which case the joint venture is not deemed a concentration but shall be assessed under rules regulating restrictive agreements.

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

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

- the aggregate worldwide turnover of all the undertakings concerned achieved by selling goods and/or services in the business year preceding the concentration is at least BAM 100 million (approximately EUR 50 million); and
- the aggregate turnover of each of at least two undertakings concerned achieved by selling goods and/or services in the market of Bosnia & Herzegovina in the business year preceding the concentration is at least BAM 8 million (approximately EUR 4 million) *or* their joint market share on the relevant market(s) exceeds 40%.

Article 2 of the Implementing Notice further specifies the turnover thresholds prescribed by the Competition Act, i.e. pursuant to Article 14 of the Competition Act, the worldwide and national turnover thresholds must be cumulatively met in order for an obligation to notify a transaction to be established. The Implementing Notice, however, sets out that (i) in cases where the undertakings concerned are registered outside Bosnia & Herzegovina, the filing obligation is triggered if the thresholds are met cumulatively, while (ii) in the case that the undertakings concerned are registered in Bosnia & Herzegovina, the notification obligation exists even if only the local thresholds are met. Thus, although it can be argued that the Council via its interpretation of the Competition Act actually defined a rule that it is not coherent with the one prescribed by the Competition Act (and that thereby it exceeded its competences), the Council enforces Article 2 of the Implementing Notice in practice, and therefore, transactions without a cross-border element only have to meet the local thresholds in order to be notifiable (see Council Decision no. 01-05-26-033-22-II/09 of 23 March 2010 in the case *Optima Grupa/Zovko/Zovko Oil*). In return, local presence is not required for a transaction to be notifiable as long as the national thresholds are met by selling goods and/or services on the market of Bosnia & Herzegovina (see Council Opinion no. 01-01-26-738-5-I/09 dated 21 October 2009, as well as e.g. Council Decision no. 01-26-1-013-8-II/13 of 1 August 2013 in the *Blagoevgrad-BT/Fabrika duvana Banja Luka* case).

Turnovers are calculated by taking into account all revenues derived from the sale of products or provision of services in the year preceding the year in which the concentrations is notified, after the deduction of taxes and rebates. The turnover of an undertaking assumes the total turnover of the group it belongs to, save for intra-group sales which are not taken into account. For the calculation of local (national) turnover, in addition to the foregoing, the value of exports has to be deducted. If control is acquired over part of an undertaking, only the turnover attributable to that part is to be taken into account. In the case of joint ventures, total group turnovers of both joint venture partners are to be taken into account. However, there are no guidelines or clearly developed practices that would provide sufficient guidance on which are the undertakings concerned and how revenues are to be allocated. In practice, such a state of affairs can result in uncertainties.

Special rules for the calculation of revenue apply to banks, insurance companies and other financial institutions. In that regard, the relevant revenues consist of the net aggregate income generated from (i) interest, (ii) commissions, (iii) net profits from financial transactions, (iv) income from equity securities and share capital, and (v) income from other business activities. Regarding insurance companies, the thresholds are calculated by taking into account the value of written gross premiums.

As for the 40% relevant market threshold, the Competition Act calls for a joint market share. However, in at least one decision, the Council held that a merger control filing obligation is triggered by a single undertaking having a market share above 40% while the other undertaking had no presence on the same relevant market (Council Decision no. 05-26-1-019-8-II/11 of 29 November 2011 in the *iQ*

Power/Tesla/JV case). The relevant market is defined pursuant to the Notice on the Definition of a Relevant Market (*Official Gazette of Bosnia & Herzegovina*, nos. 18/06 and 34/10), under which the Council assumes national markets, but may consider markets wider than national if Bosnia & Herzegovina forms part of such a market.

Thus, if the prescribed thresholds are met, a filing obligation is triggered. A transaction shall be assessed by the Council on the basis of various factors provided for by the Competition Act and the Implementing Notice. A concentration has to be notified even where the merger does not raise any competition concerns and/or has no domestic effect.

However, a concentration may be appraised by the Council *ex officio* even if the prescribed thresholds are not met. Namely, upon learning of an implemented concentration, the Council may carry out an assessment of the respective concentration *ex officio* if the Council considers that the merger is likely to cause a considerable prevention, restriction or distortion of competition. The Competition Act does not prescribe deadlines in which it may open such proceedings and/or impose measures for removing competitive concerns. However, such transactions may voluntarily be notified to the Council on a fail-safe basis, or alternatively, the parties to a transaction may request the Council to render an official opinion on whether the transaction is notifiable.

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

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

This was made clear by the Council in *Čez/Mol* (no. 01-06-26-015-5-II/08, dated 12 June 2008) and in *Nokia/Alcatel Lucent* (no. 06-26-1-016-13-II/15, dated 15 September 2015), provided that the jurisdictional thresholds are exceeded, a concentration has to be notified even where the merger does not raise any competition concerns in Bosnia & Herzegovina.

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

Any foreign-to-foreign merger is subject to merger control in Bosnia & Herzegovina if the jurisdictional thresholds are met. A domestic effects doctrine has not yet been adopted by the Council, although Article 2 of the Competition Act provides that the Competition Act applies to acts which have, or might have, effects on competition in the territory of Bosnia & Herzegovina. However, the decisional practice so far is not supporting the view that a transaction, besides meeting the jurisdictional thresholds, also needs to have an effect on competition in Bosnia & Herzegovina in order to trigger a filing obligation. Hence, foreign-to-foreign transactions that meet the jurisdictional thresholds of the Competition Act trigger a filing obligation in Bosnia & Herzegovina.

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

There are no mechanisms which provide for the jurisdictional thresholds to be overridden. However, the applicability of the sector-specific regulation outlined in question 1.4 does not require the turnover thresholds stipulated in the Competition Act to be met. Direct or indirect acquisitions of qualified shareholdings in certain sectors, in principle, require approval of the competent regulator irrespective of the aggregate turnovers of the parties to the concentration. However, if the jurisdictional thresholds are exceeded, merger clearance is also required in addition to the approval of the sector-specific regulator.

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

In the event of staggered transactions, the notification obligation is triggered at the moment of the acquisition of the share that enables the acquirer to exercise decisive influence over the target. Therefore, prior as well as subsequent acquisition(s) of shares in the same target does not trigger a (additional) filing obligation(s). Two or more concentrations between identical undertakings performed in the period of less than two years shall be considered as one concentration that occurred on the date of the last of such consecutive concentrations.

3 Notification and its Impact on the Transaction Timetable

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

Notification is compulsory when the thresholds set by the Competition Act are met (please see question 2.4 above), save for certain exceptions (please see question 3.2 below).

A concentration has to be notified within 15 days following any of the following acts, whichever occurs first: (i) conclusion of an agreement representing the legal basis for a concentration (e.g. share purchase agreement, joint venture agreement, etc.); (ii) publication of a public bid; or (iii) the acquisition of control.

Since the 2009 amendments to the Competition Act, the Bosnian competition regime provides for a possibility that a transaction be notified on the basis of serious intent to implement a concentration (e.g. on the basis of a Framework Agreement, a Letter of Intent, a Memorandum of Understanding signed by all the parties to the concentration or based on a publicly announced intent to submit a public bid).

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

The Competition Act provides for fines of up to 1% of the total annual turnover of the undertaking(s) that fail to meet the notification deadline. Besides the undertakings, responsible persons within the undertaking are also exposed to fines in the range of BAM 5,000 to BAM 15,000 (approximately EUR 2,500 to EUR 7,500). The Council determines fines in relation to the total annual worldwide turnover of the notifying undertaking(s), i.e. the applicant(s) (see, for example, Council Decision no. 01-05-26-033-22-II/09 of 23 March 2010 in case *Optima Grupa/Zovko/Zovko Oil*, Council Decision no. 01-01-26-012-12-II/08 of 19 June 2008 in case *Volkswagen AG/Scania AB*, Council Decision no. 02-26-1-09-14-II/13 of 1 August 2013 in case *Coca Cola/BIMAL/Banjalučka pivara/JV*, Council

Decision no. 06-26-1-017-9-II/13 of 25 September 2013 in case *Skuter/Drvopromet* and Council Decision no. 05-26-1-032-7-II/16 of 21 December 2016 in case *Tržnica/Čistoća*).

The Council's policy of fines for delays in notifying transactions (i.e. notifying after the notification deadline has lapsed) is very strict in practice. In *Tržnica/Čistoća* (Council Decision no. 05-26-1-032-7-II/16 of 21 December 2016), the Council fined the applicant (Čistoća) approximately EUR 5,000 for a 38-day delay. In *B.S.A/Ljubljanske Mlekarne* (Council Decision no. 05-26-1-023-21-II/12 of 6 March 2013), the Council fined the applicant (B.S.A.) approximately EUR 155,000 for a 32-day delay. In *Telekom Slovenia/Blic.Net* (Council Decision no. 01-02-26-039-3-II/07 of 30 January 2008), the Council fined the applicant (Telekom Slovenia) approximately EUR 100,000 for a 10-month delay. In *Coca Cola/BIMAL/Banjalučka pivara/JV* (Council Decision no. 02-26-1-09-14-II/13 of 1 August 2013), the Council fined the applicants (JV partners) approximately EUR 80,000 for a two-year delay. In *Cez/Mol/JV* (Council Decision no. 01-06-26-015-5-II/08 of 12 June 2008), the Council imposed a fine of approximately EUR 75,000 on the applicants (Cez and Mol) for a four-month delay, while in *Volkswagen AG/Scania AB* (Council Decision no. 01-01-26-012-12-II/08 of 19 June 2008), a fine in the same amount was imposed on the applicant (Volkswagen AG) for a 26-day delay. In January 2009, in the case *Dukat/Kim* (Council Decision no. 01-06-26-040-17-II/08 of 13 January 2009), the applicant (Dukat) was fined approximately EUR 10,000 even for a two-day delay.

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

Pursuant to the Competition Act, the following transactions are not caught by merger control rules, irrespective of the revenue of the undertakings concerned:

- a temporary acquisition of shares by a bank, other financial institution or an insurance company for resale within 12 months (extendable for an additional period under certain circumstances), provided that during this period, the shareholders' rights are not exercised to influence business decisions of the respective undertaking in a manner that would affect market competitiveness of the undertaking concerned or prevent competition on the relevant market;
- the acquisition of control by persons acting as a bankruptcy or liquidation receiver [*stecajni ili likvidacioni upravnik*]; and
- a joint venture that purports to coordinate the market activities of two or more independent undertakings and cannot be considered for a full-function joint venture, as it shall be assessed under rules regulating restrictive agreements.

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

The undertakings concerned are under an obligation to notify the transaction within the prescribed deadline and to suspend the implementation of the transaction until the transaction is cleared (or is legally deemed to have been cleared).

Undertakings that breach the suspension obligation are exposed to fines of up to 10% total annual turnover realised in the year preceding the breach. The responsible persons within the undertaking in breach are exposed to fines in the range of BAM 15,000 to BAM 50,000 (approximately EUR 7,500 to EUR 25,000). In addition, the Council can also impose appropriate measures to restore effective competition on the relevant market in cases where a concentration has been implemented without prior notification, and it also results in a restriction, distortion or prevention of competition. Such measures can take the form of (i) re-transfer of the acquired shares, (ii) suspension or limitation of voting rights in undertakings participating in concentration, and/or (iii) termination of control over joint venture and other forms of concentration.

In *Coca Cola/BIMAL/Banjalučka pivara/JV* (Council Decision no. 02-26-1-09-14-II/13 of 1 August 2013), the Council fined the applicants (JV partners) approximately EUR 327,000 in total for (i) late notification, and (ii) closing without obtaining clearance. In *Integral/Jedinstvo* (Council Decision no. 01-03-26-004-14-II/09 of 23 April 2009) and *Optima Grupa/Zovko/Zovko Oil* (Council Decision no. 01-05-26-033-22-II/09 of 23 March 2010), the Council *ex officio* initiated proceedings over the alleged failure to obtain clearance before closing, and imposed fines of approximately EUR 130,000 (some 0.10–0.15% of total annual worldwide revenue) and approximately EUR 100,000 (some 0.80% of total annual worldwide revenue) on the respective would-be applicants for closing without obtaining clearance.

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

Participants to a concentration are under the obligation to suspend the implementation of a transaction until cleared by the Council. To the best of our knowledge, carve-out arrangements have not yet been tested with the Council. It is likely that the Council will initially take a conservative approach to carve-out mechanisms. One of the carve-out structures that might be permitted is to make use of the financial institution exception (see above question 3.2) by engaging a bank as an interim buyer of shares of the group/company concerned. However, acquisitions of companies by local banks can be subject to control by a respective financial authority.

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

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

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

After the filing of the notification, the Council assesses the completeness of information and documents provided in the filing. In the case that the notification is incomplete, the Council will request the notifying parties to complete it within eight days. In exceptional cases, the Council may prolong the deadline for an additional 15 days.

Once the Council finds that the notification is complete, it shall issue a certificate of completeness and deliver it to the applicant. In order for a merger notification to be deemed complete, it has to satisfy the conditions prescribed by the Competition Act and the Implementing Notice, in regard to both required content and manner of submission. Therefore, the "clock will start ticking" only once the parties have submitted all documents and data which the Council requires in order to assess the concentration. Following this event,

the Council may either: (i) decide to clear the concentration in a summary proceeding (Phase I) within 30 days if it finds that the concentration is unlikely to raise competition concerns; or (ii) open an investigation (Phase II) if it finds that the concentration may raise competition concerns. In the case that the Council does not render a final decision or a decision on opening Phase II proceedings within the 30-day deadline, the concentration shall be deemed cleared.

In the case that the Council decides to initiate an investigation, it is obliged to render a decision within three months of the initiation of such Phase II proceedings. The investigation begins with a formal written decision of the Council. Once the investigation is opened, the Council has a spectrum of possibilities to acquire relevant evidence: to request data, statements (oral and/or written) and documents from the parties; to inspect documents and databases, if required on the premises of the parties; and/or to acquire data, statements and documents from third parties. The Council can prolong the investigation for an additional three months if the circumstances of a given case demand so. After the investigation has been concluded, the Council may unconditionally or conditionally clear the concentration or prohibit it.

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 undertakings concerned are under the obligation to suspend the implementation of the transaction until cleared by the Council. Under the Competition Act, a concentration is deemed cleared if the Commission fails to deliver a decision within 30 days following receipt of a complete merger notification (i.e. within (an additional) three months following the initiation of investigative proceedings).

Undertakings that breach the suspension obligation are subject to fines of up to 10% of the total annual turnover realised in the year preceding the breach. The responsible persons within the undertaking in breach are subject to fines in the range of BAM 15,000 to BAM 50,000 (approximately EUR 7,500 to EUR 25,000).

The Competition Act provides one exemption from the general suspension requirement, pursuant to which the suspension obligation does not prevent the implementation of a public offer which is duly notified to the competent authorities in accordance with the applicable laws. However, there is little practice in this regard and due caution should be exercised before reliance on this exemption.

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

Besides the Competition Act, rules regulating the form and the data to be provided by a merger notification are set out in the Implementing Notice, which provides only a single form for merger notifications, i.e. it does not provide for a "short form" or "long form" notification. In its practice, the Council is rather formalistic, as it (in principle) requires certified excerpts from commercial registers (properly legalised where applicable), certified financial statements/annual reports (properly legalised where applicable), legalised power of attorney, and legalised copies of two separate documents which form part of the merger notification: (i) the Statement on the Correctness and Accuracy of Data provided in the Merger Notification; and (ii) the Report on the Reasons for carrying out the Concentration. All documents have to be coupled with a corresponding certified translation into one of the languages officially in use in Bosnia & Herzegovina (Bosnian, Serbian and Croatian). The Council is empowered to request any other information it considers relevant for the assessment of the intended concentration. Similarly, the applicant may submit other information and documents that it considers relevant for the assessment of the envisaged concentration.

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?

There is no short form procedure for any type of merger. The Implementing Notice prescribes only one type of the format in which the merger notification shall be submitted to the Council.

The only way to speed up the clearance timetable is to supply the Council with a notification that is as detailed as possible, in accordance with relevant rules applicable to the contents of notifications (please see question 3.8 above).

3.10 Who is responsible for making the notification?

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

Filing fees amount to BAM 2,000 (approximately EUR 1,000). In addition, the parties have to pay a clearance fee of BAM 2,500 (approximately EUR 1,250) if the concentration is cleared in Phase I proceedings, whereas the fee amounts to BAM 25,000 (approximately EUR 12,500) if an investigation procedure in Phase II is initiated.

3.11 Are there any fees in relation to merger control?

See question 3.10.

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

Pursuant to the Competition Act, in the case of acquisition of control through a public offer that has been duly notified to the competition authorities, the parties to a concentration may finalise the public offering notwithstanding the general rule that concentrations must be suspended until they are cleared (or respective waiting periods have passed).

3.13 Will the notification be published?

The Competition Act provides that some information on the notification has to be published in the daily press. The publication shall contain (i) the names of the undertakings concerned, (ii) a brief description of the transaction, and (iii) the affected industry.

The Council shall also publish its decisions (with respect to the legitimate interests of the parties to the concentration and third parties) in the *Official Gazette of Bosnia & Herzegovina*, as well as on the Council's website (www.bihkonk.gov.ba).

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?

Pursuant to the Competition Act, the Council makes a prospective analysis of whether a notified concentration would cause a considerable restriction of competition, in particular, as a result of the creation or strengthening of a dominant position. When carrying out its assessment, the Council will take into account the following factors:

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

In the *Klas/Sprind* case (Council Decision no. 01-06-26-033-65-II/08 of 6 April 2009), the Council found that an envisaged merger of pastry producers active in the municipality of Sarajevo would amount to a considerable restriction of competition by the strengthening of a dominant position; consequently, the Council prohibited the merger. The test applied by the Council included the assessment on the market shares of the parties, their competitors, the possibilities to expand production, the parties' trend of growth, the barriers to entry and the consumer's freedom of choice. This was the first, and so far the only, merger prohibited by the Council.

4.2 To what extent are efficiency considerations taken into account?

Neither the Competition Act nor the applicable by-laws explicitly mention or discuss efficiency considerations. However, the Implementing Notice requires that expected benefits resulting from the concentration be named. The Implementing Notice particularly mentions benefits such as lower prices, better quality, innovation and greater consumer choice. Thus, efficiency considerations form part of the substantive assessment, although this is not reflected in the Council's decisional practice.

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

No. The Competition Act and applicable by-laws are not concerned with non-competition issues, nor are they given a prominent role in merger analysis, although they may be reflected upon by the Council in the course of review.

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

The Competition Act provides that some information on the notification has to be published in the daily press. The publication shall contain the names of the undertakings concerned, a brief description of the transaction and the affected industry. Although, the matter is not regulated further by the Competition Act or by-laws, we believe third parties can provide the Council with information, data and opinions relevant to the transaction under review.

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

In principle, the Competition Act vests the Council with broad investigative powers, as it has a spectrum of possibilities to acquire relevant evidence: to request data, statements (oral and/or written) and documents from the parties; to inspect documents and databases, if required on the premises of the parties; and to acquire data, statements and documents from third parties. The Council is entitled to request information irrespective of whether such information is confidential or not. The Council may also issue interim measures.

Pursuant to the Competition Act, non-compliance with investigative measures may lead to fines of up to 1% of the total annual turnover in the preceding business year. Moreover, the Notice on the Setting of Periodic Fines provides for daily penalties amounting to a maximum of 5% of the average daily revenue in the preceding year for failing to disclose true and complete data.

Responsible persons within an undertaking may be subject to fines in the range of BAM 5,000 to BAM 15,000 (approximately, EUR 2,500 to EUR 7,500). Responsible persons were fined BAM 5,000 (approximately EUR 2,500) in several cases for supplying inaccurate information in merger filings (e.g. in *Anex/Koming-Pro* (Council Decision no. 01-03-26-054-15-II/08 of 16 March 2009) and *Klas/Sprind* (Council Decision no. 01-06-26-033-65-II/08 of 6 April 2009)).

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

The Competition Act provides that an applicant may request that certain information submitted to the Council is treated as confidential. Such information cannot be disclosed or published if it relates to sensitive commercial information or information affecting the privacy of third parties. However, should the Council find that any of the denoted data and information is already publicly available, it will not be considered as confidential and therefore will not be omitted in the final decision. The Council's website (www.bihkonk.gov.ba) contains detailed rules and guidelines on the classification of information and relevant procedures.

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

5.1 How does the regulatory process end?

Pursuant to the Competition Act, the Council may:

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

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

Even though the Competition Act does not explicitly provide for the submission of remedy proposals, the Council may clear a transaction subject to conditions. If it finds that a concentration may be cleared only subject to commitments, it shall set forth the measures to be taken and the corresponding timeline to be complied with. However, neither the Competition Act nor applicable by-laws make a distinction between behavioural and structural remedies. Nonetheless, it does allow for any measure to be taken in order to restore effective competition in the market. In that sense, the Council may impose the following measures (i) the re-transfer of the acquired shares, (ii) the suspension or limitation of voting rights in undertakings participating in concentration, and/or (iii) the termination of control over a joint venture and other forms of concentration. It is believed that remedy proposals can be submitted at any stage during the review process.

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

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

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

Please see question 5.2.

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

The Competition Act does not address divestment remedies in detail, but only provides that a transaction can be cleared subject to conditions. As described, the Competition Act applies to foreign-to-foreign transactions and the Council may impose any measure it deems necessary to restore effective competition including the obligation of the parties to divest assets. However, it should be noted that the Competition Act does not explicitly recognise the ability of the Council to request a divestiture outside of Bosnia & Herzegovina and such a request has not yet been tested in practice.

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

Pursuant to the Competition Act, the parties cannot implement the merger before meeting all conditions determined by the conditional clearance. The Council may revoke conditional clearance if the parties fail to fulfil the imposed obligations or it may modify the clearance if the relevant conditions are violated due to circumstances which could not be foreseen or prevented and which are not dependent on the will of the parties. In exceptional circumstances, the Council may allow the parties to consume a transaction prior to meeting the respective conditions.

5.7 How are any negotiated remedies enforced?

Remedies are enforced in several ways. Firstly, a conditionally approved concentration may be performed only once the terms and conditions have been complied with (unless the Council for justified reasons decides otherwise). Secondly, the Council may change (and thus revoke) its conditional decision. Thirdly, the Council may impose fines of up to 10% of the total annual turnover realised in the preceding financial year, while responsible persons within the undertaking concerned are exposed to fines in the range of BAM 15,000 to BAM 50,000 (approximately EUR 7,500 to EUR 25,000).

5.8 Will a clearance decision cover ancillary restrictions?

Neither the Competition Act nor any by-laws regulate the issue of ancillary restraints. To the best of our knowledge, the Council has not dealt with the issue of ancillary restraints in its case law. However, at the same time, there is nothing to prevent the Council from also clearing ancillary restraints in its decisions.

5.9 Can a decision on merger clearance be appealed?

Yes. Merger control decisions of the Council can be appealed before the Court of Bosnia & Herzegovina.

Most appeals brought before the Court of Bosnia & Herzegovina concerned fines imposed by the Council for delayed notifications, but the Court confirmed most Council decisions. For example, it refused to lower the fine of approximately EUR 130,000 imposed in the *Integral/Jedinstvo* case (Council Decision no. 01-03-26-004-14 -II/09 of 23 April 2009), for closing without clearance and to lower the fine of approximately EUR 55,000 imposed in the *Amko Komerc/Vino Župa* case (Council Decision no. 01-03-26-049-13-II/08 of 16 March 2009) for late filing.

5.10 What is the time limit for any appeal?

The time limit for appeal is 30 days from the day of receipt (or publication) of a decision.

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

The statute of limitations for imposing fines for (i) infringements of the suspension clause, and (ii) implementing prohibited concentrations, is five years. The statute of limitations for imposing fines for (i) failing to notify within the prescribed deadline, (ii) notifying the transaction based on false and inaccurate data, and (iii) failing to observe the Council's decision/order, is three years. The limitation period for enforcing fines is five years following the decision becoming legally binding. The absolute limitation period is twice the limitation period for the respective breach.

6 Miscellaneous

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

The Council has been a member of the International Competition Network since 2005. In 2012, the Council (together with the competition authorities of Albania, Bulgaria, Croatia, Kosovo, Macedonia, Montenegro and Serbia) signed during the first Sofia Competition Forum meeting the Sofia Statement expressing its willingness and resolve to deepen and strengthen the regional cooperation and maintain regular contact in the framework of the initiative. It also signed a number of memorandums of

understanding with the national competition authorities of Serbia, Croatia, Macedonia, Bulgaria and Turkey, which are published on the Council's website. Pursuant to the memorandums of understanding signed with the competition authorities of Serbia, Croatia and Macedonia, non-confidential information pertaining to actual cases before these authorities may be exchanged. It is not known that the Council has used some of the possibilities stemming from these agreements in merger control proceedings.

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

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

There are currently no proposals for reform of the merger control regime in Bosnia & Herzegovina.

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

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

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

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