Merger Control

Jurisdictional comparisons **Second edition 2014**

General Editors:
Jean-François Bellis & Porter Elliott,
Van Bael & Bellis

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Foreword

Jean-François Bellis & Porter Elliott, Van Bael & Bellis

There was a time not so long ago when very few countries in the world had merger control laws. In most jurisdictions, there was no need to notify a merger for prior approval before closing. How different the situation is today. It is estimated that upwards of 100 countries now have merger control laws, and in most of these countries, qualifying mergers, acquisitions and – in some cases – joint ventures must be notified and cleared by the local regulators before they can be implemented. Today, the need to obtain merger control approvals is often the number one factor delaying the closing of deals around the world.

Unfortunately, while more countries have merger control than ever before, there remains relatively little harmonisation, with each jurisdiction having its own rules on what types of transactions must be notified, what thresholds apply, what the procedure is and how long it takes. Even the substantive test for determining whether a notified transaction will be approved is not the same in every jurisdiction. With merger control authorities becoming tougher in their enforcement practices, the challenges facing merging companies have never been more daunting. This book aims to help.

With contributions from leading law firms covering 49 of the most important jurisdictions worldwide, this second edition of *Merger Control* endeavours to address the most common and critical questions of merging companies and their lawyers, including some which are less often addressed in other books of its kind, such as whether pre-notification consultations are customary in a given jurisdiction, whether 'carve-out' arrangements may be implemented to allow for closing to take place in jurisdictions where approval is still pending, whether the jurisdiction at issue has a track record of fining foreign companies for failure to file and whether it has ever issued penalties for 'gun-jumping' offences.

Adopting the reader-friendly Q&A format that has been used successfully in other volumes of *The European Lawyer Reference Series*, including the first edition of *Merger Control* (2011), this book sets out to answer for each jurisdiction the key questions those on the front line are most likely to have, including:

- Whether notification is mandatory (as in most jurisdictions where the thresholds are met) or voluntary (as, for example, in Australia, New Zealand, Singapore and the UK). If mandatory, is the requirement to file based purely on the parties' turnover (as in the EU and many other jurisdictions worldwide), or are there other factors that need to be considered, such as market share (eg, in Portugal, Spain and the UK), asset value (eg, in Russia and Ukraine) or the size of the transaction (eg, in the US)?
- Is there a filing deadline and/or a requirement to suspend implementation pending receipt of an approval decision? In most jurisdictions, there is no filing deadline so long as the deal is not closed until it has been approved, but there are exceptions.

- How onerous is the filing? Most jurisdictions have detailed notification forms that must be completed (Germany being a notable exception), although some forms take far more time to complete than others. For example, although certainly not always the case, it is not unusual for notifications to the European Commission to exceed 100 pages (not counting annexes) and to include very detailed legal and economic analysis. By comparison, the US Hart-Scott-Rodino form is short and straightforward, and it can usually be completed in a matter of days (although a second request in the US can be extremely burdensome).
- What factors are likely to be considered by the relevant authorities in assessing the legality of the transaction? While it must be assumed that every authority will focus first and foremost on whether the transaction would raise competition concerns in its territory, some authorities are more likely than others to consider theories of competitive harm that go beyond traditional concerns related to high combined market shares, such as the risks of vertical foreclosure. Similarly, non-competition issues, such as industrial policy or labour policy, may be more likely to be considered in some jurisdictions than others.

Although by no means a substitute to seeking the advice of local counsel, this book aims to address these and other critical questions in a concise and practical way, and therefore to serve as a valuable resource to companies and counsel navigating their way through the twists and turns of obtaining the required merger control approvals worldwide.

Compiling the second edition of *Merger Control* has truly been a group effort. With this in mind, we would like to thank all the authors for their contributions, as well as the team of *The European Lawyer* for their diligence in bringing this book to fruition. We also wish to express our gratitude to our colleagues at Van Bael & Bellis who assisted us on this project, in particular Reign Lee for her editorial support, and Els Lagasse and Veerle Roelens for their secretarial assistance.

Brussels, March 2014

Foreword

Bernd Langeheine, Deputy Director-General, DG Competition, European Commission

Nowadays, an ever larger number of mergers need to obtain regulatory approval in several jurisdictions. The popularity of merger control is due to a general recognition that it is desirable to maintain a market structure which is conducive to effective competition and, therefore, crucial for a robust, innovative economic landscape. This is in the interest of consumers and market players at different levels alike.

As a consequence of globalisation, free trade and open markets merger control has become a key element of almost all competition law regimes around the world. Apart from problems related to costs and delays for closing the deal, multiple filings create a risk of inconsistent or even contradictory decisions. This is why all major competition authorities should cooperate closely on cases which require notification in several countries.

During 2011 and 2012, the European Commission, for example, worked together with other antitrust enforcers in about half of all cases for which an in-depth investigation was opened. The most notable example was the wide-ranging cooperation (ie with the US, Chinese, Japanese, Korean and Australian competition authorities) in the 'Hard-disk-drive cases' in 2011. Parties to a merger and their counsel generally have a keen interest in facilitating such cooperation in order to avoid conflicting decisions. This, in turn, requires knowledge about jurisdictional thresholds and other filing requirements as well as about the timelines of proceedings. This book provides a wealth of information on these and other relevant points for all important merger control systems around the world.

Competition rules and their enforcement will continue to be fragmented for lack of an international authority that would have jurisdiction over mergers and could take decisions for more than one country. There are, however, tendencies to avoid multiple filings at least at the regional level. In Europe, the situation is alleviated by the fact that, since 1990, there has been a merger control regime at the EU level under which mergers of a certain size that concern the competitive situation in several Member States are normally vetted by the European Commission. This is complemented by national rules on merger control which apply to all other relevant transactions, ie mainly those which are of a lesser size and which only concern one Member State.

In the EU, there are clear and explicit rules that lay down which (EU or national) authority has original jurisdiction over a merger. But there is also a mature system of referral mechanisms which mitigates the rigidity of the rules for case allocations and ensures that the best-placed authority deals with a particular merger. These referral provisions apply, in particular, where an operation needs to be notified in several Member States or where markets are wider than the national level and trade between Member States is affected.

The transfer of such cases from national authorities to the Commission will reduce the administrative burden for companies to the largest possible extent and avoid multiple filings. But the rules on referrals also foresee the transfer of merger cases from the EU level to a national authority in certain justified cases. A referral can take place upon the request of the parties, before an operation is notified or after notification at the request of a national competition authority. The application of these mechanisms has produced encouraging results over recent years. Between 2004 and the end of 2013, there were almost 280 referrals from national competition authorities to the EU Commission and approximately 130 in the other direction, ie to the national authority of a Member State. Nevertheless, one-stop shopping does not always work and there are still a large number of cases every year which are scrutinised by competition authorities in two or more EU countries (eg, 240 cases in 2007).

At the international level, the picture remains diverse. Intensive merger scrutiny in traditionally strong antitrust jurisdictions has been matched by new merger control regimes springing up in all parts of the world, most notably Asia and Latin America. Today, there are more than 100 merger control systems in force around the world which vary greatly not only with regard to notification requirements, but also with regard to other key elements such as timelines and filing fees.

Notifying parties and their lawyers continue to struggle with the proliferation of merger regimes and the ensuing divergences regarding procedures and substantive criteria or benchmarks. This situation is time-consuming and costly, in particular in cases where the actual impact of an operation in a given country is rather unimportant, but where low national jurisdiction thresholds nevertheless require a notification.

There are various discussion and coordination fora at the international level, such as the International Competition Network (ICN) or the Competition Committee of the Organisation for Economic Cooperation and Development which endeavour to produce more convergence of national merger control systems. Some progress has been achieved in the context of the ICN with the adoption of recommended practices on matters such as jurisdiction, procedure and even substantive assessment. Given the wide variety of underlying national circumstances (nature of the authority, administrative culture, enforcement powers) and the sensitivities often connected to issues of merger control, this remains, however, an undertaking which requires a lot of patience and which will only be crowned by success in the long term. In the meantime, the coexistence and parallel application of a large number of national merger control systems will continue.

Managing multiple filings with a variety of national competition authorities requires important skills in terms of legal knowledge, organisation and coordination. This book provides valuable insights and guidance with regard to these complicated processes and it will be of great assistance to corporations and their counsel.

Brussels, March 2014

Republic of Croatia

Babić & Partners
Boris Babić, Boris Andrejaš & Stanislav Babić

LEGISLATION AND JURISDICTION

1. What is the relevant merger control legislation? Is there any pending legislation that would affect or amend the current merger control rules described below?

The primary piece of legislation regulating major aspects of the competition law in Croatia is the 2009 Competition Act (the 'Competition Act'), which entered into force on 1 October 2010 (*Zakon o zaštiti tržišnog natjecanja*, *Official Gazette* nos. 79/09, 80/13). The following implementing regulations are relevant in the context of the merger control: (i) Regulation on Notification and Assessment of Concentrations (*Uredba o načinu prijave i kriterijima za ocjenu koncentracija poduzetnika*, *Official Gazette* no. 38/11); (ii) Regulation on the Definition of the Relevant Market (*Uredba o načinu i kriterijima utvrdjivanja mjerodavnog tržišta*, *Official Gazette* no. 9/11); and (iii) Regulation on the Method of Setting Fines (*Uredba o kriterijima za izricanje upravno kaznenih mjera*, *Official Gazette* no. 129/10).

The Act on General Administrative Procedure (*Zakon o općem upravnom postupku*, *Official Gazette* no. 47/09), Act on Misdemeanours (*Zakon o prekršajima*, *Official Gazette* nos. 107/07 and 39/13) and the Administrative Disputes Act (*Zakon o upravnim sporovima*, *Official Gazette* nos. 20/10 and 143/12) will apply on a subsidiary basis regarding the procedure. The Act on Administrative Fees (*Zakon o upravnim pristojbama*, *Official Gazette* nos. 8/96, 77/96, 95/97, 131/97, 68/98, 66/99, 145/99, 30/00, 116/00, 163/03, 17/04, 110/04, 141/04, 150/05, 153/05, 129/06, 117/07, 25/08, 60/08, 20/10, 69/10, 126/11, 112/12, 19/13 and 80/13) and the related Tariff will apply with regard to filing fees.

Finally, pursuant to the Treaty between Member States of the European Union and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union (*Ugovor između država članica Europske unije i Republike Hrvatske o pristupanju Republike Hrvatske Europskoj Uniji*, *Official Gazette*/International Treaties no. 2/12), as of 1 July 2013 European competition law acquis became part of the internal legal system in Croatia and EU competition law rules became directly applicable in Croatia. In this context, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) and related EU instruments fall within the merger control legislation applicable in Croatia.

There is no pending legislation that would affect Croatian rules on merger control.

2. What are the relevant enforcement authorities, and what are their contact details?

The competition rules in Croatia are enforced by the Croatian Competition Agency (*Agencija za zaštitu tržišnog natjecanja*, Savska cesta 41, 10000 Zagreb, tel: +38 5161 76448, email: agencija.ztn@aztn.hr; the 'Agency'). The Agency is an independent authority responsible to the Croatian parliament. More details on the Agency and its activities can be found on its website at *www.aztn.hr*.

3. What types of transactions are potentially caught by the relevant legislation?

Under the Competition Act, a concentration arises by change of control over an undertaking on a lasting basis. The control may be changed as a consequence of: (i) merger between previously independent undertakings (or parts thereof); or (ii) acquisition of direct or indirect control or the controlling influence over the undertakings (or parts thereof) by acquiring a majority shareholding or a majority of the voting rights, or by other means in accordance with the provisions of the Croatian Companies Act (*Zakon o trgovačkim društvima*, *Official Gazette* nos. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 152/11, 111/12, 144/12, 68/13) and other laws.

4. Are joint ventures caught, and if so, in what circumstances?

Only those joint ventures that perform as independent economic entities on a lasting basis (full-function joint ventures) are caught by merger control rules. Cooperative joint ventures are subject to rules on restrictive agreements. However, even a full-function joint venture may be assessed under the criteria relevant for anticompetitive agreements (albeit within the scope of the merger control proceedings) if its object or effect is coordination of competitive behaviour of the undertakings that remain independent.

5. What are the jurisdictional thresholds?

A concentration must be notified where the combined worldwide turnover of all participating undertakings is at least HRK 1 billion (approx. EUR 134 million) in the financial year preceding the concentration; and the aggregate Croatia-wide turnover of each of at least two of the participants is at least HRK 100 million (approx. EUR 13.4 million) in the same period. For worldwide turnover to be met, at least one undertaking participating in the concentration has to have a seat or a branch office in Croatia.

The turnover figures must be calculated on the worldwide consolidated group basis, excluding intra-group sales.

Where the concentration consists in the acquisition of parts of one or more undertakings, whether or not constituted as legal entities, only the turnover relating to the parts subject to the transaction shall be taken into account with regard to the seller. Two or more such transactions that take place within a two-year period shall be deemed one concentration arising on the date of the last transaction.

6. Are these thresholds subject to regular adjustment?
The thresholds are not subject to regular adjustments.

7. Are there any sector-specific thresholds?
Any merger in media sector has to be notified to the Agency regardless of the turnover thresholds.

8. In the event the relevant thresholds are met, is a filing mandatory or voluntary?
In the event the relevant thresholds are met the filing is mandatory.

9. Can a notification be avoided even where the thresholds are met, based on a 'lack of effects' argument?
If the thresholds are met (and at least one participating undertaking has a seat or a branch office in Croatia) a notification cannot be avoided based on a 'lack of effects' argument.

10. Are there special rules by which a notification of a 'foreign-to-foreign' transaction can be avoided even where the thresholds are met?
There are no special rules for notification of a 'foreign-to-foreign' transaction. However, due to the requirement that at least one participating undertaking has to have a set or a branch in Croatia, proper 'foreign-to-foreign' transactions should not be notified to the Agency.

11. Does the relevant authority have jurisdiction to initiate a review of transactions which do not meet the thresholds for a notification?
The Agency does not have an express jurisdiction to initiate review of transactions which do not meet the thresholds for a notification. However, even if there are no express statutory provisions providing for such residual jurisdiction one might argue that other statutory provisions (eg, on abuse of dominance) could be construed so as to encompass assessment of transactions falling below thresholds. Although low, such risk should not be completely excluded and will depend on, for example, the profile of the deal, parties to the deal etc.

NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES

12. Is there a specified deadline by which a notification must be made?
The notification has to be made (i) after signing of the relevant agreement (or publication of the takeover bid) and (ii) before closing of the transaction.

13. Can a notification be made prior to signing a definitive agreement?
Exceptionally, a notification can be made prior to signing a definitive agreement. However, a notifying party has to prove in good faith an actual intent for conclusion of the relevant agreement (eg, by providing

appropriate letter of intent, by demonstrating actions aimed at conclusion of the agreement etc).

14. Who is responsible for notifying?
In case of acquisition of the sole control, an acquirer is responsible for notifying the transaction. In all other cases, all participating undertakings should submit a single notification based on their mutual agreement.

15. What are the filing fees, if any?
The initial filing fee is set in the fixed amount of HRK 10,000 (approx. EUR 1,342). An additional filing fee will be charged depending on the complexity of the proceedings in the amount of (i) HRK 10,000 (approx. EUR 1,342) in case of Phase I proceedings and (ii) HRK 150,000 (approx. EUR 20,134) in case of Phase II proceedings.

16. Where a notification is necessary, is approval needed before the transaction is closed/implemented (is there a waiting period or a suspension requirement)?
If a notification is necessary, the transaction may not be closed/implemented before the lapse of Phase I review (30 days as of complete notification) or before the Agency issues an approval.

17. If there is a suspension requirement, is it possible to apply for a derogation in order to close before approval is granted? If so, under what circumstances?
The closing proper is not possible before the transaction is approved. However, based on the request from the notifying party in justified cases the Agency may allow certain closing actions even before the approval. When considering such requests the Agency takes account of all circumstances of the case and especially of damage that may arise for the participating undertakings and third parties and of possible effects the transaction may have on the relevant markets.

18. Are any other exceptions (carve-outs etc) available to allow parties to close/implement prior to approval?
Since the Competition Act does not impose any restrictions in this respect, it appears that hold-separate agreements pending a decision by the Agency should prove to be acceptable provided that the closing in other jurisdictions cannot have an adverse effect on the Croatian market. However, careful analysis and structuring is required to pursue this course of action.

19. What are the possible sanctions for failing to notify a transaction?
An undertaking failing to notify a transaction may be exposed to a fine of up to 1 per cent of the aggregate annual turnover.

20. What are the possible sanctions for implementing a transaction prior to receiving approval (so-called 'gun-jumping')?

In case a transaction is closed prior to receiving approval, participating undertakings may be exposed to fines of up to 1 per cent of their respective aggregate annual turnover.

21. What are the possible sanctions for implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision?

If a transaction is implemented despite a prohibition decision or in breach of conditions imposed by conditional clearance decision, the Agency may order appropriate measures in order to restore free market competition on the relevant market and especially: (i) may order divestment of the acquired shares; and/or (ii) may impose suspension of the voting rights. In addition, participating undertakings may be exposed to fines of up to 10 per cent of their respective aggregate annual turnover.

22. What are the different phases of a review? Is there any way to speed up the review process?

Upon receipt of complete notification (the completeness is assessed by the Agency), the Agency shall publish on its website a public invitation for the submission of comments and opinions (third parties are generally granted a period of 10 days for delivery of their comments). Within 30 days of the date of receipt of complete notification the Agency must decide whether to initiate a Phase II investigation. If the Agency's decision on commencement of a Phase II investigation is not issued within such 30-day period, the transaction will be deemed tacitly approved by the Agency in the Phase I and the Agency will issue an official confirmation to this effect.

As a result of a Phase II investigation, the Agency will either prohibit the transaction, approve the transaction or conditionally approve the transaction. The Phase II decisions must be rendered within three months from commencement of the Phase II proceedings (in exceptional cases this time limit may be prolonged).

If the parties timely engage in pre-notification consultations with the Agency and remain in close contacts with the case handlers and other officials throughout the process, the review process may be speeded up to a certain extent.

23. Is there a possibility for a 'simplified' procedure or shorter notification form and, if so, under what conditions would this apply?

A specific short form notification is available in the following instances: (i) there is no horizontal overlap between the participating undertakings or, if there is, an aggregate market share of the participating undertakings is less than 15 per cent of the relevant market; (ii) the participating undertakings are not active on the neighbouring vertical markets (upstream or downstream) or, if they are, an individual or aggregate market share of the participating undertakings on any of the relevant markets is less than 25 per cent; (iii) acquirer changes quality of control from joint to sole; and (iv) control is acquired over a joint venture that has no significant operations in the Republic of Croatia.

24. What types of data and what level of detail is required for a notification?

A notification has to be prepared on a special template set out in the Regulation on Notification and Assessment of Concentrations. The notification has to *inter alia* include: a description of the transaction and legal basis for the transaction, strategic and economic reasons for the transaction, effects and benefits of the transaction, information on the participating undertakings, their shareholding structure and their activities, financial data on the value of the transaction and turnovers of the participating undertakings, elaborate information on the relevant and neighbouring markets and market shares of the participating undertakings and their main competitors, distribution and supply channels etc. Also, a notifying party has to indicate whether it is obliged to notify the concentration to another competition authority outside Croatia, whether such notification has already been filed and to deliver the decision of such other competition authority, if already issued. Finally, the Agency may request delivery of any other data/document it considers necessary for the appraisal of the transaction. The Agency generally expects that a notification includes elaborate and detailed explanations of the required information.

Therefore, preparing a notification is often a time-consuming process, which, depending on the complexity of the case and availability of data and documents, may take several weeks.

25. In which language(s) may notifications be submitted?

The notification should be generally prepared and submitted in Croatian, although it would be theoretically possible to submit a notification drafted in some other, foreign language. However, notification in foreign language and any other accompanying document prepared in foreign language should be accompanied with a translation certified by the court-appointed interpreter.

26. Which documents must be submitted along with a notification?

Documents that must be enclosed in notification include, *inter alia*, commercial registry excerpts for the participating undertakings, the agreement or other underlying document related to the transaction, annual financial reports, all available studies, surveys, analyses and other reports prepared for or by the boards or shareholders of the participating undertakings, any document (eg, study, internal report, report prepared by third independent party etc) that may substantiate statements made in the notification (eg, on positive effects of the transaction, efficiencies) etc.

27. What are the possible sanctions for providing incorrect, misleading or incomplete information in a notification?

If an Agency's approval is based on the incorrect or misleading data, the Agency may withdraw the approval decision and may order appropriate measures in order to restore free-market competition on the relevant market and especially: (i) may order divestment of the acquired shares; and/or

(ii) may impose suspension of the voting rights. In addition, a notifying undertaking may be exposed to fines of up to 1 per cent of the aggregate annual turnover.

In case of incomplete notification, the Agency will request from the notifying party to deliver required data/documents and will not initiate review process until all such data are properly delivered. In addition, failure to timely comply with the Agency's request for delivery of data/documents is again subject to fines of up to 1 per cent of the aggregate annual turnover.

28. To what extent is the relevant authority available for pre-notification discussions? Are pre-notification consultations customary?

It is customary (even advisable) to approach the Agency in pre-notification phase (especially in case of more complex transactions) and the Agency generally welcomes such approach. Of course, the scope and the content of such pre-notification consultations will depend on the complexity of the planned transaction, parties involved, industries concerned etc.

29. Where pre-notification consultations are possible, what measures does the relevant authority take to ensure that such discussions are treated confidentially?

The officials of the Agency are statutorily obliged to maintain confidentiality of business secrets learned during their time in office (including during any pre-notification consultations). However, depending on all circumstances of the case, in particularly sensitive transactions it may be feasible to engage in discussions with the officials on a 'no-name' basis.

30. At what point and in what forum does the relevant authority make public the fact that a notification has been made?

The fact that a notification has been made is publicised via the Agency's website after the Agency issues to the notifying party a confirmation that the notification is complete. This Agency's notice invites all interested persons to submit their comments on the planned transaction. Some third parties (eg, competitors of the participating undertakings) may be specifically subpoenaed by the Agency to deliver their comments and relevant documents.

31. Once the authority has issued its decision, what information about the transaction and the decision is made publicly available?

The Agency's Phase II decisions are published in full on the Agency's website and in the *Official Gazette*. However, business secrets designated by the undertakings are omitted from the publication. The Agency's decisions sets in full detail all aspects of the transaction relevant for the Agency's assessment (details of the parties, details of the transaction, economic and business rationale and effects, etc). In case of Phase I clearances, the Agency publishes (on the Agency's website) a simple confirmation that the particular transaction has been cleared by the Agency.

SUBSTANTIVE ASSESSMENT OF THE MERGER, ROLE OF THIRD PARTIES AND REMEDIES

32. What is the substantive test for assessing the legality of a notified transaction?

The Competition Act adopted the SIEC test. The relevant clause provides that a concentration of undertakings which would significantly impede effective competition on the market, particularly if this impediment is a result of creation or strengthening of a dominant position of a party to the concentration represents a prohibited transaction.

33. What theories of harm are considered by the authority in assessing the transaction? How concerned are the authorities with non-horizontal (eg, vertical or conglomerate) effects, and are any other theories of harm analysed (eg, coordination in the case of joint ventures)?

As a starting point, the Agency will typically investigate the market structure and the market power of the participating undertakings (by relying on, eg, the HHI index). Depending on the results achieved, the authorities might proceed with further investigation in line with EU standards (including, eg, assessment of coordination in the case of joint ventures).

34. Are non-competition issues, such as industrial policy or labour policy, commonly taken into account in the assessment of the transaction?

Non-competition issues are of limited importance in the review process.

35. Are economic efficiencies considered as a mitigating factor in the substantive assessment?

The Agency will take into account economic efficiencies to the extent that the parties are able to show that the efficiency gains will benefit consumers.

36. Does the relevant authority typically cooperate/share information with authorities in other jurisdictions?

Through the European Competition Network and International Competition Network, the Agency has achieved a certain level of cooperation with various foreign antitrust authorities (especially in other EU Member States). Furthermore, the Agency maintains close contacts with the antitrust authorities in neighbouring jurisdictions.

37. To what extent are third parties involved in the review process?

Involvement of third parties in the review process is rather limited. Third parties principally participate by submitting opinions/documents (either following the specific Agency's request or as a response to the public invitation published on the Agency's website). In addition, it still remains to be seen to what extent third parties may enjoy a right of appeal against the Agency's decisions rendered in the merger control proceedings.

38. Is it possible for the parties to propose remedies for potential competition issues?

During the Phase II investigation, the Agency may conclude that the transaction can be approved solely if the participants undertake additional remedial measures. In this case, the Agency will inform the notifying party and the latter should deliver the proposal of the appropriate remedies within 30 days. The notifying party may propose the remedies even before the Agency's invitation (eg, in the notification). The Agency may reject the proposed remedies in part or in full and independently impose a different set of remedies.

39. What types of remedies are likely to be accepted by the authority (eg, divestment remedies, other structural remedies, behavioural remedies etc)?

The Agency has been accepting both structural (eg, various types of share/asset divestments) and behavioural remedies (eg, monitoring measures, stand-still obligations etc) or a combination of both. The acceptability of the particular remedy will ultimately depend on the specifics of the transaction and especially on the Agency's assessment of the gravity of the possible anti-competitive effects. It may be generally inferred that the Agency will prefer structural remedies in case of particularly problematic transactions.

40. What power does the relevant authority have to enforce a prohibition decision?

In case of non-compliance with the prohibition decision, the Agency may order divestment of the acquired shares and suspend voting rights attached to such shares. In addition, the Agency may impose fines ranging up to 10 per cent of the aggregate annual turnover of the relevant undertaking. Further non-compliance with the Agency's orders would again be subject to fines of up to 10 per cent of the aggregate annual turnover. All non-paid fines could be collected in summary proceedings reserved for tax debts. Effectiveness of the Agency's powers in cross-border set-up will depend on the specifics of the particular case (eg, competent jurisdiction of the participating undertakings and especially of the notifying party etc).

JUDICIAL REVIEW

41. Is it possible to challenge decisions approving or prohibiting transactions? If so, before which court or tribunal?

The Agency's decisions (including on merger control) are subject to judicial review before the High Administrative Court in Zagreb. The judicial review is initiated by statement of claim that should be submitted within 30 days as of delivery of the relevant decision.

42. What is the typical duration of a review on appeal?

Due to the general jurisdiction of the High Administrative Court and heavy caseload (the Court is not specialised for antitrust/competition law matters but covers a broad range of administrative issues), the proceedings may take up to several years before a final and not-subject-to-appeal judgment

is rendered. It remains to be seen whether recent reorganisation of the administrative judiciary in Croatia will have positive effects on the duration of the review proceedings.

43. Have there been any successful appeals?

Generally, successful appeals against the Agency's decisions are rather rare. It may be generally concluded that appeals raised on the procedural grounds (eg, violation of due process) have greater chance of success.

Due to the Agency's track record (as of writing of this chapter all notified transactions have been ultimately cleared or cleared with conditions attached), the appellate process in case of the merger control proceeding was not properly tested.

STATISTICS

44. Approximately how many notifications does the authority receive per year?

Typically, the Agency receives 5–15 merger notifications per year.

45. Has the authority ever prohibited a transaction? How many prohibition decisions has the authority issued in the past five years?

The Agency has thus far issued only one prohibiting decision (UniCredit's acquisition of *Zagrebačkabanka* dating back to 2001/2002). It should be noted that even this transaction was subsequently cleared with the conditions attached, however, as a part of a separate filing.

46. Over the past five years, in what percentage of cases have binding commitments been required in order to obtain clearance for a transaction?

Overwhelming majority of the notified transactions (about 90 per cent) is cleared as a result of the Phase I proceedings. Therefore, binding commitments are required only rarely. In recent years, the Agency has imposed binding commitments in six instances. It may be interesting to note that there are currently three pending Phase II proceedings that may possibly result in commitments decisions.

47. How frequently has the authority imposed fines in the past five years?

The Agency acquired authority to directly impose fines for violations of the competition law (including fines for not notifying) only relatively recently (in 2010). This authority was previously vested in the competent Misdemeanour Courts and such system proved to be utterly ineffective. The Agency has since rendered five decisions, imposing fines on undertakings for failure to notify (other available fining decisions relate to antitrust violations and non-compliance with the Agency's subpoenas which are not relevant in the merger control setting).

Previous practice on fines (ie, practice before 2010) is not readily available and could serve as a guideline only to a very limited extent (due to complete overhaul of the system).

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Merger Control

Provisions on merger control are a key element of almost all competition laws around the globe, from the United States to the European Union, from China to Brazil.

Today, the need to obtain merger control approvals is often the number one factor delaying the closing of M&A deals worldwide. While more countries have merger control laws than ever before, merger control regimes differ dramatically from one another, not only with regard to notification requirements, but also in other key elements such as timing and costs.

Managing multiple filings with a variety of competition authorities requires important skills in terms of knowledge, organisation and coordination.

This second edition of ‘Merger Control’ provides valuable insights and guidance to these complicated processes and will be of great assistance to corporations and their counsel.