

Opinions on the implementation of the provisions of the Law relating to concentrations

During 2017, the Commission issued 29 opinions on the implementation of the provisions of the Law relating to concentrations by acting on requests of interested undertakings, and in such manner implemented one of its legal competences. A great number of issued opinions – relative to the average number of issued opinions in previous years, can still be interpreted as an indicator of increased responsibility of undertakings in terms of controls of the existence of legal obligation to file a notification of concentration and their awareness of the need to act in compliance with these legal obligations. The requests for issuing opinions were mainly submitted for two principle reasons: for establishing the nature of transaction and assessment of the existence of concentrations that would be created pursuant to those transactions, and for providing an assessment of the fulfilment of conditions on notifiability of concentration relating to the annual turnover of the parties to the concentration envisaged by the Law. Other requests have related to the interpretation of other provisions of the Law concerning concentrations that are not directly related to defining contractions and an obligation to notify on concertation.

The Commission establishes that by issuing opinions from the concentration investigation domain, in a full and complete compliance with its stipulated legal competences, it has acted in the shortest possible and reasonable deadline in all cases (whereby, the deadline for issuing opinions is not regulated by the Law) and has replied to all received requests for issuing opinions. That means that in 2017, the Commission acted on all submitted requests and accordingly presented opinions on the existence of an obligation pertaining to the notifiability of concentrations. In two cases, the Commission acted on requests submitted in 2016. Below is presented a brief overview of issued opinions in relation to frequently asked questions submitted for the Commission's interpretation.

Summary of requests: Applicants requested the Commission to assess the fulfilment of conditions pertaining to the notifiability, relating to the level of annual turnover generated by the parties to the concentration. The Commission established whether the parties to the concentration (either directly or via affiliated undertakings, within the meaning of the Law) generate revenues that correspond to those set out in Article 61 of the Law, pursuant to which has assessed the existence of an obligation pertaining to the notifiability of concentrations.

Issued opinions: The Commission issued four opinions by way of which is concluded on the absence of obligation pertaining to the notifiability, being that none of alternative conditions regulating the obligation to notify concentrations within the meaning of Article 61(1) of the Law are identified, while in four other opinions is established on the existence of such obligation, considering that one of the stipulated conditions was fulfilled.

Summary of requests: Applicants requested the Commission to assess the fulfilment of conditions pertaining to the notifiability, relating to the level of annual turnover generated by the parties to the concentration in cases when the control is acquired over a bankruptcy debtor or over assets of a bankruptcy debtor which may represent an independent business entity.

Issued opinions: In all related cases, the Commission confirmed that a concentration is created by the acquisition of a bankruptcy debtor as a legal person or by acquisition of assets of a bankruptcy debtor which may represent an independent business entity. In four such cases is nonetheless established on the absence of an obligation pertaining to the notifiability, being that none of alternative conditions regulating the obligation of notifiability of concentrations

within the meaning of Article 61(1) of the Law are identified, while in three opinions is established on the existence of such obligation, considering that one of the stipulated conditions was fulfilled.

Summary of requests: Applicants requested the Commission to present its position in relation to the existence of an obligation pertaining to the notifiability of concentration created by the acquisition of company equity undergoing the privatization. Issued opinions: The Commission issued two opinions in which is assessed that described transactions represent concentrations. Pursuant to the submitted data on turnover of the parties to the concentration, the Commission in both cases concluded on the absence of obligation pertaining to the notifiability, being that none of alternative conditions regulating the obligation of notifiability of concentrations stipulated in Article 61(1) of the Law are identified, since the parties to the concentration have not generated turnover as regulated in Article 61 of the Law.

Summary of the request: The applicant requested the Commission to present its position in relation to the existence of an obligation pertaining to the notifiability of concentration created by leasing business premises for retail purposes (retail facility) without retaining previous employees.

Issued opinions: The Commission issued opinion based on data submitted in the request for issuing opinion and concluded that the applicant is obligated to notify this concentration to the Commission in accordance with Article 17(1/2) of the Law, being that it acquires control over a part of another undertaking that may represent an independent business entity, in addition to the fulfilment of conditions for the submission of notifications of concentrations stipulated in Article 61(1) of the Law. For this purpose, the Commission particularly considered the fact that the applicant will purchase equipment from the lessor of retail facilities, that is, inventory from the retail facilities concerned, which will serve for retail purposes in the leased premises, pursuant to a special agreement concluded following the conclusion of the agreement on lease.

Summary of the request: The applicant requested the Commission to issue opinion in relation to the interpretation and implementation of Article 61(1), in reference to Articles 17 and 5 of the Law. Specifically, it is inquired on the manner of calculating the turnover of an undertaking or its part, subject to the acquisition of control: 1) whether in the case of acquisition of control on the part of one or several undertakings over another undertaking (target company), only the turnover of the target company is taken into account, or also of affiliated parties of the target company (the entire corporate group in which the target company is a member); 2) whether in the case of acquisition of control on the part of one or several undertakings over only a part or parts of other undertakings, which may represent an independent business entity, only the turnover generated by the related part(s) being acquired is taken into account, or also of affiliated parties of the company whose part(s) are acquired.

Issued opinion: The Commission issued opinion, in accordance with the Instructions for calculating the total annual income (published on the Commission's website at <http://www.kzk.gov.rs/uputstva>, with a practical example provided), indicating that when submitting a notification of concentration, in cases of affiliated undertakings within the meaning of Article 5 of the Law, the total annual turnover from Article 61 of the Law is calculated as a sum of all total revenues generated by undertakings considered as affiliates and belonging to identical corporate group. In accordance with the abovementioned, in this concrete case relating to the acquisition of control on the part of one or several undertakings

over another undertaking (target company), the revenues generated by the target company and all affiliated parties of the target company should be taken into account (the entire corporate group in which the target company is a member) as subjects to the acquisition of control, that is, provided that those affiliated parties are not exempt from the acquisition of control. In accordance with Article 17(1/2) of the Law, when the control in concentration procedure is acquired only over a part of an undertaking, as well as in line with the Instructions on the manner of calculating the total income of parties in the concentration when the control is acquired over a part of company (published on the Commission's website at <http://www.kzk.gov.rs/uputstva>), only revenues generated by the part(s) of undertakings being acquired should be taken into account, and not revenues generated by other parts of undertakings which are not the subject of the acquisition of control. Summary of requests: Applicants requested the Commission to issue opinion relating to the existence of an obligation to notify the Commission on concentration created in the case when individual company, as a co-owner of (target) company and executor of joint control with the other co-owner in the target company, intends to purchase from the second co-owner its co-ownership interest and becomes a sole owner, i.e., majority shareholder in the target company.

Issued opinions: The Commission issued opinions that such transactions represent concentration, since are created as a result of the change of form of control over a target company, in a manner by changing previously co-executed joint control by two companies into individual, that is, creating an independent control executed by a company which becomes a sole owner, i.e., majority shareholder in the target company. Summary of requests: Applicants requested the Commission to issue opinion in relation to transactions implemented between a subsidiary and one of its holding companies, as well as in the case when a company incorporates its daughter (subsidiary) company. Issued opinions: The Commission issued opinions that such transactions do not constitute concentrations, since they are considered to be internal reorganizations within the corporate group, being that they are implemented between affiliated undertakings within the meaning of Article 5 of the Law.

Summary of the request: The applicant requested the Commission to issue opinion concerning the existence of an obligation to notify the Commission on concertation in the case when a company acquires shares in another company in which it already holds majority share interests, or more specifically, when it acquires additional shares in the (target) company in which it already holds 53.66 percent of the total number of issued voting shares.

Issued opinion: The Commission issued opinion that transaction as described in this specific case does not constitute a concentration, considering that the applicant already confers the possibility of exercising decisive influence on the business policy of the target company, pursuant to the Incorporation act, regardless of the presented intention to purchase a share of equity. Considering that decisions in the target company are enacted by the majority of 50 percent of the total number of issued voting shares, the Commission assessed that the applicant is already a controlling shareholder that exercise individual control over the target company, and thus, the purchase of a part of equity would not represent a concentration within the meaning of Article 17 of the Law. Summary of the request: The applicant requested the Commission to issue opinion concerning the existence of an obligation to notify the Commission on concertation in the case of potential acquisition of portfolio of non-performing corporate and micro credits that a bank sells to a company as compensation for financial and consulting services, whose registered predominant business activity is "activities of collection agencies and credit bureaus".

Issued opinion: The Commission issued opinion that transaction as described in this specific case does not constitute a concentration within the meaning of Article 17 of the Law, since it was unable to conclude that the company purchasing the account receivables portfolios of various structures (which also includes the due unpaid receivables which may be secured or unsecured, including debt-securing property or mortgage) will acquire control over an undertaking and/or its part within the meaning of the Law.