

Position of the Commission for Protection of Competition
on the application of Article 17, Paragraph 1 of the Law on Protection of Competition

The concept of concentration
Article 17

Concentration of undertakings occurs in cases of:

- 1) mergers and other status changes where a merger of undertakings occurs within the meaning of law governing status of companies;
- 2) acquisition of direct or indirect control within the meaning of Article 5, Paragraph 2 of this Law, by one or more undertakings over another or more undertakings or over a part or parts of other undertakings which may represent an independent business entity;
- 3) joint venture of two or more undertakings in order to create a new undertaking or acquire joint control within the meaning of Article 5, Paragraph 2 of this Law, over an existing undertaking that performs on a lasting basis with all the functions of an independent undertaking.

Concentration participant as object of acquisition of control

Concentration of undertakings occurs in cases of acquisition (direct or indirect) of control over one or more undertakings that are considered affiliated within the meaning of Article 5, Paragraph 1-2 of the Law on Protection of Competition (Official Gazette of the RS, 51/09 and 95/13 – hereinafter, the Law). The linguistic interpretation makes it conclusive that the object of acquisition in a concentration can relate to several undertakings that were previously affiliated.

Given the content and purpose of the foregoing provision and investigations of concentrations, as well as the content and purpose of EU competition law, the provision of Article 17, Paragraph 1, Item 2) of the Law does not exclude the possibility that the object of acquisition of control can be undertakings that are not considered affiliated or that the control is acquired by one or several legal transactions, provided that those transactions are unitary in nature and that the end result constitutes a single concentration.

Under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal L. 24/2004, in Recital 20 to the Regulation, the concept of concentration is expedient to define in such a manner as to cover transactions bringing about a permanent or lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore also appropriate to include, within the scope of this Regulation, all joint ventures with a view to creating new undertakings that perform on a lasting basis with all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by a certain condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.

Under Recital 20 to the EC Merger Regulation, as well as pursuant to the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, O.J. C. 95/2008, that more closely regulates Recital 20 to the Regulation, it is appropriate to treat as a single concentration multiple transactions that are interdependent by being linked by condition. The Commission

Consolidated Jurisdictional Notice stipulates special rules that more closely regulate the conduct in such cases.

For the assessment, the economic reality underlying the transactions is to be identified and thus the economic aim pursued by the merger parties. In other words, in order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not have been carried out without the other.

Based on this Notice, several transactions, even if linked by condition upon each other, can only be treated as a single concentration only if control is acquired ultimately by the same undertaking(s). Only in these circumstances two or more transactions can be considered to be unitary in nature and therefore to constitute a single concentration within the meaning of EC Merger Regulation.

Conditionality of transactions

The Commission is assessing the interdependence of transactions or their conditionality, which implies that none of the transactions would take place without the others and they therefore constitute a single operation. This requirement is also confirmed in the EU case-law (case *Cementbouw v. Commission (Cementbouw Handel and Industrie BV v. Commission of the European Communities)*, No. T-282/02, Judgement of the Court of First Instance of February 23, 2006), which corresponds to the clarification from the EC Merger Regulation that transactions are linked by condition. However, if different transactions are not interdependent or linked by condition, and if the merger parties would proceed with one of the transactions if the other ones would not succeed, it seems appropriate to assess these transactions individually under the Law as separate concentrations.

Such conditionality is normally demonstrated if the transactions are linked *de jure*, i.e. the agreements themselves are linked by mutual conditionality. However, if *de facto* conditionality can be satisfactorily demonstrated, it may also suffice for treating the transactions as a single concentration. This requires an economic assessment of whether each of the transactions necessarily depends on the conclusion of the others. Further indications of the interdependence of several transactions may be simultaneous conclusion of the relevant transaction agreements that represent an act on concentration. A conclusion of *de facto* interconditionality of several transactions will be difficult to reach in the absence of their simultaneity. A pronounced lack of simultaneity of legally inter-conditional transactions may likewise put into doubt their true interdependence.

Parallel and serial acquisitions of control

For the treatment of several transactions for acquisitions of control as a single concentration, several scenarios can be identified in practice.

One such scenario is a parallel acquisition of control, i.e. a situation where undertaking A acquires control of undertakings B and C in parallel from separate/different sellers on condition that A is not obliged to buy either (B and C) and neither seller is obliged to sell (B or C), unless both transactions (purchase of B and C) proceed.

Another scenario is a serial acquisition of control, i.e. a situation where undertaking A acquires control of undertaking B conditional on B's prior or simultaneous acquisition of control of undertaking C.

Serial acquisition of control may also lead to the acquisition of joint control. It concerns cases where, in a serial transaction, an undertaking agrees to acquire first sole control of a target undertaking, with a view to directly selling on parts of the acquired stake in the target to another undertaking, finally resulting in joint control of both acquirers/undertakings over the target company. If both acquisitions of control are inter-conditional, the two transactions constitute a single concentration that acquire joint control, as the final result of the transactions.

In the light of impeded operations of undertakings as a result of the exceptional circumstances caused by the COVID-19 outbreak, as well as of the increasing number of complex market transactions that represent concentrations within the meaning of the Law on Protection of Competition, and with a view of more efficient controlling of concentrations, the Commission for Protection of Competition assesses that for the handling of cases where several interdependent transactions or transactions linked by condition can be viewed as a single concentration, the above-mentioned criteria can be applied, which also apply in the EU law. In the application of the provision of Article 17, Paragraph 1 of the Law, the Commission will, inter alia, assess the fulfilment of these criteria and related necessary requirements in each specific case, provided only that the control is acquired ultimately by the same undertaking(s). Accordingly, in such cases is assessed whether a number of transactions give rise to a single notification or whether those transactions must be regarded as giving rise to a number of concentrations, i.e. a number of notifications.