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Challenges To The Effective Development And Implementation Of Competition Policy In Serbia: Examination Of Merger Control Regulation

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Abstract

This thesis investigates the possible negative impacts of horizontal mergers on competition while assessing critical aspects of the protection of competition in Serbia and how effective merger control is in Serbia compared to the EU. The analysis will examine the laws and court decisions in both jurisdictions, focusing on crucial aspects of horizontal merger control and relating them to the decisions of relevant bodies. The need to control mergers and the importance of clear, legally prescribed regulations for conditioning or prohibiting their implementation is stressed. The focus is primarily on horizontal mergers because of the harmful consequences they can have on market competition. The research aims to analyse the development of merger control practices in the Republic of Serbia and compare them with those of the European Union, particularly regarding legal regulations and relevant judicial practice. I will also, in detail, examine the case of the Serbian roasted ground coffee market to point out how competition violations and lack of clear regulatory guidance and action led to the dominance of a single firm. The research will point out the weaknesses and suggest ways to enhance concentration control regulations and improve the work of the Competition Protection Commission in Serbia, with emphasis on the need for Serbian authorities to further get in line with EU standards.

Abstrakt

Diese Arbeit untersucht die möglichen negativen Auswirkungen horizontaler Fusionen auf den Wettbewerb und bewertet gleichzeitig kritische Aspekte des Wettbewerbsschutzes in Serbien und wie wirksam die Fusionskontrolle in Serbien im Vergleich zur EU ist. Die Analyse untersucht die Gesetze und Gerichtsentscheidungen in beiden Gerichtsbarkeiten, wobei der Schwerpunkt auf entscheidenden Aspekten der horizontalen Fusionskontrolle liegt und sie mit den Entscheidungen relevanter Gremien in Beziehung gesetzt werden. Hervorgehoben wird die Notwendigkeit der Kontrolle von Zusammenschlüssen und die Bedeutung klarer gesetzlicher Regelungen zur Konditionierung oder zum Verbot ihrer Durchführung. Der Schwerpunkt liegt vor allem auf horizontalen Fusionen, da diese schädliche Folgen für den Marktwettbewerb haben können. Ziel der Forschung ist es, die Entwicklung der Fusionskontrollpraktiken in der Republik Serbien zu analysieren und sie mit denen der Europäischen Union zu vergleichen, insbesondere im Hinblick auf gesetzliche Regelungen und die einschlägige Gerichtspraxis. Ich werde auch den Fall des serbischen Marktes für gerösteten gemahlenen Kaffee im Detail untersuchen, um aufzuzeigen, wie Wettbewerbsverstöße und das Fehlen klarer regulatorischer Leitlinien und Maßnahmen zur Dominanz eines einzelnen Unternehmens führten. Die Untersuchung wird die Schwachstellen aufzeigen und Möglichkeiten vorschlagen, die Konzentrationskontrollvorschriften zu verbessern und die Arbeit der Wettbewerbsschutzkommission in Serbien zu verbessern, wobei der Schwerpunkt auf der Notwendigkeit liegt, dass sich die serbischen Behörden weiter an die EU-Standards anpassen.

1. Introduction

1.1. General aspects of mergers

In the dynamic market economy, undertakings' ability to swiftly adapt to frequent market changes is crucial for survival and progress. Responding to new market conditions is the only way to a successful market presence. This adaptive behaviour is primarily driven by the intense competitive pressures they face, which compels them to constantly innovate, adapt to the business environment, and grow.

Since the adaptation of undertakings is aimed at finding new forms of growth, the possibilities of internal growth are generally considered first, whereby improving its performance responds to the demands of the dynamic market. By increasing their capacities and innovations, undertakings make efforts to attract consumers by offering them more diverse and better quality products at lower prices. However, internal growth only sometimes achieves the desired results because undertakings often need more funds for such investments and the time to reach the set goals. In addition, internal growth is limited by the market size, so market participants sometimes cannot achieve the set goals and production volume in the existing market.[1]

Suppose we assume profit maximisation is a business's primary motive—rapid expansion is crucial for releasing those goals. In that case, undertakings are likely forced to respond to market challenges with external growth—merging with other market participants. In this way, they significantly reduce costs and, at the same time, achieve results that allow them to preserve and improve their market position.

The importance of mergers of undertakings is confirmed when one looks at how much attention is paid to this topic in terms of academic research, legal and institutional regulation. A significant portion of those regulations deals with different concentrations of undertakings - which have, as a result, the acquisition of control of one over another undertaking and its partial or complete loss of legal and economic independence. Specifically, we are talking about

[1] Worawat Margsiri, Antonios Mello and Martin Ruckes, *A Dynamic Analysis of Growth via Acquisition*, Review of Finance(2008)12:635–671, https://academic.oup.com/rof/article-pdf/12/4/635/26297747/rfn015.pdf, p. 635, acc. 31.03.2024

concentrations of business undertakings, which, when discussed in the context of competition law, appear in the form of mergers of undertakings, acquisitions of control, as well as numerous forms of joint ventures.[2]

Mergers might be the best way to reorganise business entities and are essential because their implementation increases economic efficiencies as a consequence of economies of scale and economies of scope[3] - mergers, therefore, represent a significant factor in the economic development of Serbia, considering that they play a vital role in the process of restructuring the economy and that they significantly contribute to strengthening the competitiveness of undertakings on the market. By more efficient use of shared resources and technological innovations, joint market presence, and access to new markets, the participants in the merger increase their competitiveness. That is why mergers and changes in ownership or management resulting from the concentration implementation significantly improve the performance of related market undertakings.

While implementing concentration can yield numerous benefits, it's crucial to recognise that mergers can pose significant risks, potentially distorting competition. Mergers of undertakings can reshape the market structure by reducing the number of market participants, thereby heightening the risk of collusion among the remaining competitors and the threat of restrictive agreements. Furthermore, by amplifying the market power of the participants in the merger and diluting the competitive pressures they face, the merged undertakings will likely exploit the newly acquired market power. This underscores the critical role of merger control in averting such anti-competitive behaviour.

That is why EU law stipulates that mergers of undertakings are subject to control in proceedings before competent bodies for the protection of competition. In this way, "merger policy can prevent the creation of market structures that lead to anticompetitive effects,[4]" which are the basis for non-competitive market behaviour. This means that merger control has a preventive character, and to fulfil its primary function, the control is carried out before the merger is realised. It is generally accepted that merger control is carried out before the implementation of the merger, so the undertakings that intend to implement the merger must

[2] Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, https://eur-lex.europa.eu/eli/reg/2004/139/oj, Art. 3, acc. 31.03.2024
[3] Margsiri, Mello and Ruckes, p. 638
[4] Giorgio Monti, *EC Competition Law*, Cambridge University Press 2007, p. 246

report it and obtain approval for them to go through with it, provided that the reported merger is subject to control and that the regulations on merger control can be applied[5].

To ensure that competition is protected from being jeopardised by the acquisition of excessive market power by the parties to the concentration, merger control should be subject to strict rules and procedures. However, undertakings can be disincentivised if the legislator prescribes too strict rules, so it can be assumed that a moderate merger control regime is most suitable for the economy's needs. Therefore, the policy of protection of competition must be balanced, and the control of mergers must be regulated in a way that prohibits mergers that threaten competition while at the same time not preventing mergers that increase economic efficiency[6]. However, it is impossible to propose one universal control model because each country establishes control rules in accordance with the interests it wants to protect. The legislator must, at the same time, take into account the fact that the effects of the chosen legal framework cannot be seen immediately since the implementation of control depends on the consistent application of regulations and the actions of the competent body in the control procedure[7].

In Serbian law, merger control was established in 2005, with the adoption of the Law on the Protection of Competition (from now on - LPC), which achieved significant progress in the protection of competition, namely the creation of an independent regulatory body - Commission for Protection of Competition (from now on - CPC). Merger control is still a relatively new legal institution in the law of the Republic of Serbia, so it is understandable why numerous problems arose in practice. Nevertheless, despite its numerous shortcomings, the 2005 law paved the way for a new LPC, adopted in 2009, eliminating certain shortcomings of the previous merger control system and still being in force today.

LPC, from 2009, regulates mergers mainly according to EU competition law, so EU regulations will be used as a benchmark and will be the focus of this paper to determine compliance and review the regulations of the Republic of Serbia compared to EU regulatory solutions and judicial practices. I will analyse EU legal practice, that is, the decisions of the European Commission and the European Court of Justice that answer numerous questions that

[5] Regulation 139/2004, Art. 4
[6] Paul Crampton, *Competition and Efficiency as Organising Principles for All Economic and Regulatory Policymaking*, OECD 2003, https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2490195.pdf p. 2, acc. 31.03.2024
[7] Ibid, p. 31

arise in practice. So, EU practice will be used as a guideline in finding answers, assessing legal solutions in Serbia, and determining if and how the existing system can be adapted to improve the protection of competition as Serbia moves closer to EU membership.

1.2. Scope of the paper

Taking into account the mentioned talking points on mergers, the primary initial hypothesis of the paper is that despite the great potential benefits of mergers, it is necessary to control them and when there are reasons pre-stipulated by law (which also need to be introduced in a clear EU type of guidelines), to condition or prohibit their implementation. Due to this thesis's limitations and the detrimental effects horizontal mergers can have on competition, this research will focus on horizontal mergers and their control. Control is necessary because of the harmful consequences that horizontal mergers can have on competition, so certain mergers need to be conditioned or prohibited. In practice, however, very few mergers do get sanctioned. Therefore, the main aim of this research will be to analyse the control of mergers in the Republic of Serbia and how it compares with the control of mergers in the European Union in terms of legal regulations and relevant judicial practice to answer the question of whether the existing control system is in accordance with EU rules, what are the biggest challenges and how it can be further developed and improved. Due to the complexity of the topic at hand and the limited nature of this thesis, but also due to the importance the role of horizontal merger control has in the system of protection of competition - the emphasis of the thesis will be placed on this topic. When discussing horizontal mergers one case in particular obtrudes and distinguishes itself from others and, I believe, can serve as an excellent case study of not only the current situation of protection of competition in Serbia but also a solid reference for future improvement. That is a case of the Serbian roasted ground coffee market, mainly revolving around Croatian Atlantic Group's Grand coffee brand. In some 20 years that it has been on the market, it had a consistent track record of competition violations, shaping the national roasted ground coffee market into what it is today: a single firm dominance and, in my opinion, on the path to a de facto monopoly. I will be referencing and going back to this case throughout the paper and will try to pinpoint the exact moments when the competition authority's omissions to act contributed to the current market situation. Also, I will try to make a case for the regulatory changes which are needed in order to prevent such situations from arising in the future.

1.3. Short case summary of the Atlantic - Strauss merger

Atlantic Group is a Croatian multinational company, majority privately owned, that is present in the markets throughout the Western Balkans region and is one of the leaders in FMCG (fast-moving consumer goods) with around 20 well-established household staple brands—soft drinks, snacks, candies, coffee products, etc. Revenue for 2023 was close to a billion EUR[8]. Since, 2010 and the acquisition of Slovenian "Droga Kolinska" it became the owner of Serbia's largest, roasted domestic coffee company - Grand Prom with their flagship "Grand Kafa" brand and "Bonito" as a lower-priced alternative.

> "Through the acquisition of Droga Kolinska, Atlantic Grupa becomes one of the largest food companies in Southeastern Europe, with revenues exceeding 600 million euros, 4300 employees and one of the strongest portfolios of wholesale products with leading brands such as Cedevita, Argeta, Barcaffe, Grand Kafa, Cockta, Smoki and Multipower, together with principal brands of global leaders - Wrigley, Ferrero, Hipp and Johnson&Johnson, which the company distributes in the region."[9]

Strauss Adriatic is a part of the Israeli Strauss Group and it

> "has been active in Serbia since 2002 as Strauss Adriatic. Serbians are in love with coffee – it is a part of their history and an integral part of the daily routine and social life. The biggest coffee consumers in Eastern Europe, traditional Roast & Ground coffee accounts for almost 90% of the market. Strauss Adriatic is the #2 coffee company in Serbia, focused on two strong local coffee brands – C Kafa (the family loved traditional R&G Serbian coffee since the 1970s) and Doncafé, a contemporary coffee brand that appeals to modern, changing consumer preferences."[10]

"In October 2023, Atlantic Grupa signed a Sales and purchase agreement with the Strauss Group for the purchase of Strauss Adriatic. The agreed value of the transaction (enterprise value) is EUR 40.5 million... Strauss is known for its strong coffee brands on the Serbian market – Doncafe and C kafa... In addition to well-known brands, Atlantic would take over a modern production facility … near Belgrade and 220 employees."[11] This paper will deal more in detail with this acquisition and analyse the subsequent legal proceedings before the CPC.

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[8] Atlantic Group, FINANCIAL RESULTS IN 2023 (unaudited) Zagreb, 27 February 2024 https://flare.shape404.agency/atlantic/documents/b6676ac0b9105004658043b435c69693/Consolidated_unaudited_financial_results_of_AG_in_FY23.pdf, acc 31.03.2023, p. 4

[9] Atlantic Grupa buys Droga Kolinska for EUR 382 million https://www.tportal.hr/vijesti/clanak/atlantic-grupa-buys-droga-kolinska-for-eur-382-million-20100701/print

[10] https://strausscoffee.com/global-presence/serbia/

[11] Atlantic Group, FINANCIAL RESULTS IN 2023, p. 5

2. Legal aspects of concentrations

2.1. On concentrations in general

With regard to terminology, in European competition law, there is an autonomous concept of undertaking, the creation of which was necessary in order to overcome the differences between the legal rules of the member states. An undertaking represents a particular category of legal entities to which competition rules apply. According to EU law, the concept of undertaking is “a relative one”[12] and is not explicitly defined. Definitions are found in the Commission’s decisions and court rulings, which interpret the term broadly. Namely, in the conceptual definition, the Commission and the courts start from the so-called functional approach, where the activity and function of the subject is taken into account. At the same time, its legal form is entirely irrelevant[13]. “In the context of competition law, the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and how it is financed.”[14] Serbian law similarly defines the term “as all natural and legal entities who, directly or indirectly, permanently, temporary or on one-term basis participate in the trade of goods and services, regardless of their legal status, ownership, citizenship or state affiliation”.[15]

On the topic of terminology, we should look into the legal definitions of mergers which for, in Serbian competition law, the term concentration is used[16]. In both the EU and Serbian laws, concentration is considered a slightly more general term - “European Merger Regulation refers to the control of a ‘concentration,’ which includes, inter alia, mergers, joint ventures and share acquisitions which lead to acquiring control over the target company.”[17] In a narrower sense, the term merger refers to the status change of undertakings entering into a merger, while in a broader sense, it coincides with the term concentration. Therefore for the purpose of this paper, unless explicitly stated, both terms will be used indiscriminately and in their broader sense.

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[12]Ariel Ezrachi, *EU Competition Law - An Analytical Guide to the Leading Cases*, Hart Publishing, November 2018, p. 1
[13] Ibid
[14] Case C-41/90, *Höfner and Elser v Macrotron GmbH*, par. 21 as referenced in Ezarchi, p. 5
[15]Law On Protection Of Competition “Official Gazette of the RS”, No. 51/2009 and 95/2013, https://www.kzk.gov.rs/kzk/wp-content/uploads/2011/07/Law-on-Protection-of-Competition2.pdf, Article 3, acc. 31.03.2024
[16] Ibid, Art. 17
[17] Ezrachi, p. 398

The conceptual definition of concentrations is essential for the transparency of their control procedures. Undertakings need to know whether merger control rules cover their transactions for at least two reasons. If a particular behaviour can be considered a concentration, market participants should harmonise their actions with the rules regulating concentrations. Second, suppose the transaction does not constitute a concentration and still distorts competition. In that case, it will be covered by the provisions on the prohibition of abuse of a dominant position or the prohibition of restrictive agreements. The concept of concentration is the basis for distinguishing whether the rules on concentration control or the rules controlling the behaviour of market participants are applied to the agreement of market participants. Namely, the rules on concentration control are exclusively applied to agreements representing concentration, while the rules from Article 101 TFEU[18], that is, Article 10 of the LPC[19].

2.2. Sources of Law

Concentrations are defined as different forms of permanent association of undertakings that create legal or factual unity between the participants of the concentration, where the participants were legally and economically independent before the concentration was implemented.[20] Also, only those operations in which there is a change in control over the market participant and in which there is a "lasting change"[21] in control are considered concentrations. Lasting changes in the control of a market participant lead to changes in the market structure, and accordingly, they represent cases dealt with by competition law.

Regulation 139/2004 and the LPC 2009 do not explicitly define what is considered a concentration but determine which business operations and transactions lead to a concentration of undertakings. The non-determination of the concept of concentration is conditioned by the opportunities that exist in modern business. Business entities are connected in various ways, so the existence of a definition would pose a danger that some concentrations would be exempted from legal regulation. According to Regulation 139/2004, concentration occurs when there is a permanent change of control due to the merger of two or more companies or parts of companies that were previously independent[22] or the acquisition of direct or indirect control over the whole

[18] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT, acc. 31.03.2024
[19] LPC 2009
[20] Regulation 139/2004, Art. 3
[21] Ibid, par. 20
[22] Ibid, Art. 3 (1a)

or over parts of one or more other enterprises by one or more persons who already control at least one enterprise or by one or more enterprises, either by purchasing securities or assets based on a contract or in any other way[23]. Also, the creation of a joint venture for the permanent performance of all functions of an independent business entity is considered a concentration in the same sense.[24]

According to the LPC, the concentration of undertakings occurs in three cases:

> - "mergers and other statutory changes in which a merger of undertakings occurs, within the meaning of the law governing status of companies;
> - acquisition of direct or indirect control, within the meaning of Article 5, Paragraph 2 hereof, by one or more undertakings over another or more undertakings or over part or parts of other undertakings, who may represent an independent business entity;
> - joint venture of two or more undertakings in order to create a new undertaking or to gain a joint control, within the meaning of Article 5, Paragraph 2 hereof, over an existing undertaking who operates on a long term basis and has all functions of an independent undertaking."[25]

Although there are certain differences between EU and Serbian regulations, all concentrations can be divided according to whether they affect a change in the legal status of the participants in the concentration. The first group consists of concentrations that lead to changes in the status of the undertakings in question, i.e. in which one or both undertakings lose their legal personality. We can call them concentrations by merger. The second group is represented by concentrations through the acquisition of control, that is, such connections of undertakings that establish direct or indirect control over a market participant or its parts, which can represent a business entity. In the *Atlantic - Strauss* case that we will deal with later in this paper, there is a connection on a contractual basis, and a relationship of superiority and subordination is established between the participants of the concentration. Market participants retain legal subjectivity and are formally and legally independent, but *de facto*, they are not and will continue to function as a "single economic entity," as seen in *Ernst & Young/Andersen Germany* case[26]. Finally, a joint venture, i.e. a joint investment for the permanent performance of all functions of an independent business entity, is nevertheless considered a concentration based on a contractual

[23] Ibid, Art. 3 (1b)
[24] Ibid, Art. 4
[25] LPC 2009, Art. 17
[26] Case IV/M.2824, *Ernst & Young/Andersen Germany,* as referenced in Ezrachi, p. 412

connection, as it does not change the legal position of the market participants.[27] Given the complexity and scope of the subject of the analysis, concentration by merging market participants and concentration by gaining control over the target company will be considered in further detail, while the subject of joint ventures will be considered at another time.

2.3. Concentrations by means of mergers

Mergers of undertakings are legally simpler than other forms of concentration, but they are rare in practice. According to the CPC's most recently published report - from 2021:

> "Out of the total number of issued decisions on clearance of mergers in summary procedure (211), the largest number of issued decisions refers to those cases in which control is acquired over another market participant, or part thereof (174 decisions or 82.46%). In the case of joint venture by two or more market participants, 35 decisions (16.59%) were issued, and two decisions (0.95%) were issued based on mergers or other status changes."[28]

As we stated earlier, Regulation 139/2004 regulates cases of permanent change of control resulting from the merger of two or more undertakings or parts of undertakings which were previously independent. Regulation 139/2004 does not define the term merger, which is understandable if one considers the existence of significant differences in the legal regulation of status changes of undertakings in each of the EU member states. The 2008 EC Notice[29] states that a merger in the sense of Article 3 of Regulation 139/2004 occurs when two or more independent undertakings merge into a new undertaking and cease to exist as independent legal entities[30]. Therefore, a merger occurs when two or more undertakings, which were legally and economically independent until then, lose their own legal subjectivity, that is, they cease to exist as independent legal entities while a new legal entity is simultaneously created. For example in the *Chevron/Texas* case, "the separate existence of Keepep will cease and Texaco will be the surviving corporation and become a wholly owned subsidiary of Chevron. On the date of the merger, Chevron Corporation will be renamed as ChevronTexaco Corporation. Therefore, the notified transaction is a full legal merger and a concentration within the meaning of Article

[27] Ibid, p. 408
[28] Activity Report For The Commission For Protection Of Competition For 2021, https://kzk.gov.rs/kzk/wp-content/uploads/2023/04/GI-2021-_4-eng.pdf, p. 42, acc 31.03.2024
[29] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008XC0416%2808%29, acc. 31.03.2024
[30] Ibid, par. 9

3(1)(a) of the Merger Regulation"[31], similarly "The Commission .. Notice stipulates that a merger within the meaning of Article 3(1)(a) may also occur when an undertaking is absorbed by another and ceases to exist as a legal entity or even in the absence of a legal merger by combining the activities of previously independent undertakings, for example by establishing a common economic management, thus creating a single economic unit."[32] Therefore, a merger is also considered to take place when a company is absorbed by another company, where only the latter company retains its legal personality[33]. The main characteristic of such a merger is that, in the end, there is only one undertaking, which represents an independent economic entity. As, for example, in the recent CPC case of *Max Bet and Balkan Innovative Tech*. merger where the first one, a betting company bought 100% of the share of the latter, an IT firm, and incorporated them and their products and patents into their system, therefore liquidating the target company.[34]

According to the EU regulations, as well as practice, in addition to the legal one, a factual merger is also possible. A *de facto* merger exists when previously independent companies, while retaining their legal personality, combine their activities so that it results in the creation of permanent and independent economic management[35], i.e.

> "in case of *Price Waterhouse/Coopers & Lybrand*..., the Commission considered a series of transactions and contractual arrangements through which the networks of companies owned by Price Waterhouse and Coopers & Lybrand combined worldwide… it was necessary to examine whether these groups of firms can be regarded as single undertakings … within the meaning of Article 3(1)(a). This was done by considering whether the combination of activities has a sufficiently high degree of concentration of decision-making and financial interests to confer on it the character of a single economic entity ... the Commission noted the existence of a combined management board, agreements to pool resources between the members of the group and the existence of a 'combination contract' among the companies … led to their functioning as a single economic unit. These features indicated considerable centralisation of management and led the Commission to conclude that for the purpose of the Merger Regulation, the Price Waterhouse group constituted one single economic entity which is party to the transaction."[36]

[31] Case M.2208 - *Chevron/Texas*, par. 4, as referenced in Ezarchi, p. 411
[32] Ibid, par. 9 and 10
[33] 2008 EC Notice, par. 9
[34] Commission For Protection Of Competition Decision Number 6/0-02-307/2023-4, *Max Bet - Balkan Inovative Technology,* https://kzk.gov.rs/kzk/wp-content/uploads/2023/05/MaxBet1.pdf, acc 31.03.2024
[35] 2008 EC Notice, par. 10
[36] Case IV/M.1016, *Price Waterhouse/Coopers & Lybrand*, referenced in Ezarchi, p. 412

Similarly, when previously independent companies contract to establish a permanent joint economic management or form a so-called dual listed company, we can talk about a merger. Dual-listed companies were defined in the case of *RTZ/CRA* as "corporate entities whose shares are traded not as a single group but through two separate publicly quoted companies. The structure retains RTZ and CRA as separate publicly quoted legal entities, retaining their corporate identities… Rather, the DLC operation is to be effected by entering into contractual arrangements designed to ensure that, so far as possible, RTZ and CRA operate as a single economic enterprise."[37] So, if previously independent companies organise their business together to form an economic entity, there is a *de facto* merger. In the event of a factual merger, the company does not lose its legal personality. When assessing whether there is a *de facto* merger, in addition to permanent joint management as an essential prerequisite, the distribution of profits and the bearing of losses or the existence of an agreement on the sharing of income between different companies in the internal relationship and the joint liability of the company in the external relationship are taken into account.[38]

According to Article 17 of the LPC, concentration occurs in the case of mergers and other status changes involving the merger of undertakings when two or more companies establish a new company and transfer all assets and liabilities to that company, whereby the merging companies cease to exist without liquidation[39]. A status change of merger also exists when one or more companies merge with another company by transferring all assets and liabilities to that company, whereby the merged company ceases to exist (as stated earlier in the case of *Max Bet - Balkan Innovative Tech*. merger).

Article 3 of Regulation 139/2004 does not define the term merger, and from the views expressed in practice, it appears that it is broader than the rules contained in the LPC because it also includes *de facto* mergers. However, this does not mean that a factual merger, without a merger in the legal sense, is not regulated by the LPC, only, as shown in practice, in the absence of better solutions, that case would be covered by paragraph 2 of Article 17 of the LPC, which deals with acquisitions. Because if the conditions for the existence of a business merger are met, the requirements for acquiring control are met at the same time. However, a procedural difference exists between a merger and acquisition of control. Namely, in the case of a merger

[37] Case No IV/M.660 - *RTZ/CRA* Notification of 6.11.95 pursuant to Article 4 of Council Regulation No 4064/89, https://ec.europa.eu/competition/mergers/cases/decisions/m660_en.pdf, par. 5
[38] 2008 EC Notice, par. 10
[39] LPC, Art. 17

and acquisition of joint control, the notification of concentration is submitted jointly by both participants in the concentration. On the other hand, in the case of acquisition of control, the application is submitted by the market participant that acquires control.[40]

2.4. Concentration by means of acquisition of control

Concentration by means of acquisition of control occurs due to a permanent change of control over the undertaking, thereby creating a change in the market structure. Concentration is considered to have taken part when one or more undertakings acquire direct or indirect control over another undertaking or a part which may represent an independent business entity.[41]

Regulation 139/2004 and the 2009 LPC determine the term and meaning of control. Control is based on "exercising decisive influence on the activity of the acquired undertaking as a consequence of rights, contracts or any other means."[42] In Serbian law, control over an undertaking in the sense of the 2009 LPC represents the possibility of decisive influence on the management of the affairs of one or more undertakings.[43] The mentioned norms represent general clauses, the specification of which is carried out considering the goal of concentration control. In this way, the concept of concentration is left open. In other words, any conduct, contract or agreement between market participants that leads to the establishment of decisive influence over another market participant may constitute a concentration within the meaning of Article 3 of Regulation 139/2004 and Article 17 of the LPC.

Control can be acquired by transferring the company's assets, acquiring shares in the company in accordance with status rules, or any other way. In the first case, the company acquires control based on ownership rights or the right to use all or part of the company's assets[44]. On the other hand, control can be achieved by acquiring shares in the company through rights or contracts, which enable a decisive influence on the composition, voting and decision-making of the company's bodies. Finally, the sources of law also regulate the acquisition of control in any other way in order to include all cases of acquisition of decisive influence that may arise in practice[45].

For the existence of decisive influence in terms of concentration control, it doesn't need to be exercised, but the possibility of exercising decisive influence is sufficient - "within the

[40] Regulation 139/2004, Art. 4 and LPC Art. 63
[41] Regulation 139/2004, Art. 4 and LPC Art. 17
[42] Case T-282/02 - *Cementbouw v Commission*, par. 41, as referenced in Ezarchi, p. 418
[43] LPC, Art. 5
[44] Ibid
[45] Ibid

meaning of Article 3(3) Merger Regulation, ‘need not necessarily be exercised in order to exist, the existence of control within the meaning of Article 3 of that regulation requires that the possibility of exercising that influence be effective.”[46]. Decisive influence presupposes the ability of the acquirer to determine the target company's business strategy in a way that excludes the target company's autonomous will formation. The assessment of whether the acquisition of control has taken place is made according to the criterion of the possibility of exerting a decisive influence on the operations of the target enterprise, that is, whether the acquirer of control will be able to exert a decisive influence on the operations of the target undertaking in the future. The possibility of decisive influence may arise on the basis of law or fact. Exercising influence does not have to refer to managing the day-to-day affairs of market participants. It is enough that there is a possibility to influence the making of strategically important decisions. From the EC Notification, we conclude that strategic decisions can be considered decisions on “strategic commercial policy, the appointment of senior management or to the budget or business plan”[47].

Regulation 139/2004 and the 2009 LPC distinguishes between several forms of control. First, based on the authority to exercise control, we distinguish between direct and indirect control[48]. In the case of direct control, the acquirer of control is the holder of the rights or can use the rights from the contracts in question.[49] Therefore, the acquirer directly exerts a decisive influence on the target company's operations (e.g., by acquiring a majority share of the company). An indirect acquisition of control exists when the acquirer of control, although not the holder of the rights nor able to use the rights from such contracts, has the authority to exercise the rights arising from them[50]. Indirect control is characteristic of related companies, where the acquirer of control can exercise control through another market participant or a person who is the acquirer in the formal sense (e.g., when the parent company exercises control in the target company through its subsidiary). In other words, the acquirer of control differs from the person or market participant who formally has the rights or can use the rights under the contract. Therefore, a chain of right-holder companies is created in that case, the first of which exercises control over the next and so on until the last company in the series, “for example, Case No IV/M.2510 *Cendant/Galileo*, [2001] OJ C321/8, in which Galaxy Acquisition Corp, a wholly owned subsidiary of Cendant, merged into Galileo, the latter being the surviving corporation in

[46] *Cementbouw v Commission*, par. 58, as referenced in Ezarchi, p. 418
[47] Case T-2/93 - *Air France v Commission*, par. 73, as referenced in Ezarchi, p. 415
[48] Regulation 139/2004, Art. 3 and LPC Art. 17
[49] Ibid
[50] Ibid

the merger, which then became a wholly owned subsidiary of Cendant."[51]. The existence of indirect control is a factual question to be decided on the basis of the circumstances of each specific case. In the evaluation, the following factors are particularly important: share in the company, contractual relations, source of financing and family ties[52]. Finally, an undertaking can acquire both direct and indirect control based on a single concentration; that is, by gaining direct control over the target company, it simultaneously acquires indirect control over the subsidiary companies of the target company.

Second, control can be individual or joint. Individual control exists when one undertaking can exercise decisive influence over another. In other words, control is exercised through an individual legal rights. Usually, individual control is achieved by acquiring all or most of the shares in the company or by acquiring the majority of voting rights in the target company. CPC had an interesting case in 2015 where the Croatian "Agrokorp" corporation acquired direct individual control based on the recapitalisation of the company "Adriatica" in such a way that its debts to "Agrokorp" were converted into the basic capital share of this company, whereby "Agrokorp" established control through the increase of its shares in this company from the existing 23% to an estimated 90% share[53]. The acquirer of individual control can independently make strategic decisions for the target company regardless of the interests of all other shareholders in that company, on the other hand, "joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking"[54]. Holders of joint control can make decisions about the company's business policy only together, that is, with the consent of all holders of joint control. As a rule, each of the holders of joint control has the possibility to veto the adoption of strategic decisions they disagree with.[55]

And finally, although there is no explicit distinction in Regulation 139/2004 and the 2009 LPC, control can exist in a positive or negative form. Positive control exists when the acquirer, through its decisions, determines the strategic market behaviour of the controlled company, and negative control, when the acquirer can prevent the adoption of strategic decisions through a veto[56].

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[51] Case No IV/M.2510 - *Cendant/Galileo*, par. 5, as referenced in Ezarchi, p. 411
[52] 2008 EC Notice, par. 13
[53] Commission For Protection Of Competition Case Number: 6/0-02-505/2015-1, *Agrokorp - Adratica*, https://kzk.gov.rs/kzk/wp-content/uploads/2017/12/2015-405-Decision-on-approving-concentration-in-summary-procedure.pdf, acc 31.03.2024
[54] *Cementbouw v Commission*, par. 42, as referenced in Ezarchi, p. 418
[55] *Air France v Commission*, par. 66, 67, as referenced in Ezarchi, p. 415
[56] 2008 EC Notice, par. 54

2.5. Types of concentrations

The division of concentrations into horizontal, vertical, and conglomerate is common and generally accepted in academic works and judicial practice. The classification is made according to the degree of competitive relationship that exists between the participants in the concentration, which is why it is essential for assessing the permissibility of concentrations and determining the harmful effects that they can have on competition, even if the regulations on the protection of competition do not explicitly distinguish between types of mergers[57].

The financial thresholds for the notification of mergers are the same for all mergers, and the substantive test for assessing the permissibility of mergers is equally applied to all types of mergers.

> "A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."[58]

However, certain criteria for assessing mergers differ depending on the type of merger, so special guidelines for assessing horizontal and non-horizontal (vertical and conglomerate) mergers are established. In addition, it is essential to distinguish mergers when determining the relevant market, as well as because of the economic efficiency that mergers increase in different ways. [59]

Stricter criteria are applied to horizontal mergers than those applied to non-horizontal mergers because they are the most significant cause of the creation of non-competitive market structures and can have significantly more severe consequences for competition than non-horizontal mergers. Although all types of mergers can affect the creation of non-competitive market structures, the ways in which such structures are created differ, depending on the kind of merger being implemented. Horizontal mergers directly affect the creation of non-competitive market structures by directly reducing competition on the market (reducing the number of competitors)[60], and vertical and conglomerate mergers can indirectly affect competition,

[57] Monti (2007), p. 249
[58] Regulation 139/2004, Art. 2(3) as cited in Monti (2007), p. 250
[59] Ken Daly, Steve Spinks, *Merger Control in 2024*, International Comprative Legal Guides, Global Legal Group Ltd, London, https://online.flippingbook.com/view/774748373/2/, p. 89, acc. 31.03.2024
[60] Ezarchi, p. 403

primarily by establishing barriers to the entry of new competitors, i.e. by controlling the market entry process. That is why vertical and conglomerate mergers are often classified into one group, the so-called non-horizontal mergers, since they can threaten market competition differently than horizontal mergers[61].

In the control procedure, however, all mergers are subject to a unique assessment - each merger is analysed individually, case by case, taking into account all the specifics of the specific case and all possible effects that the reported merger may have. However, taking into account the differences in terms of the merger, when examining mergers, special rules can be applied, i.e. different criteria for evaluating horizontal and non-horizontal mergers, and the competent body for the protection of competition must in each specific case, prove the harmful effects of the merger on competition. The burden of proof is on the body responsible for the protection of competition since it is assumed that all mergers are permitted and have a favourable effect on competition, except for those proven to distort competition on the relevant market significantly, and therefore must be regulated.

2.5.1. Horizontal mergers

Horizontal mergers connect undertakings that offer identical or interchangeable products in a specific geographical area - “same product and geographic market and thus direct competitors”[62]. We are talking about mergers between competitors who operate at the same level of the chain of production or turnover so that by connecting these participants, competitive pressures are removed and the market structure is directly affected - the number of undertakings on the market decreases, and the market share of the participants in the merger increases. Participants in a horizontal merger compete with each other in terms of the products or services they sell because they are market participants who offer identical products or products that are close substitutes for customers, satisfying their same needs similarly. Therefore, since they are engaged in the production or sale of products that represent close substitutes, i.e. products that consumers consider substitutable in terms of their properties, common use and price - thus the participants in a horizontal merger can be considered to belong to the same relevant market and we can talk about the “closeness of competition”.[63]

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[61] Ibid, p.404
[62] Guidance on Substantive Merger Control, Bundeskartellamt 2012, p. 8 https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20-%20Substantive%20Merger%20Control.pdf?__blob=publicationFile&v=6, acc. 31.03.2024
[63] Ibid, p. 16

The practice of the European Commission has shown that, when considering the "closeness" of the participants in the merger or taking into account the elimination of competition between them, the fact that the products of the participants in the merger are close substitutes represents an unfavourable circumstance in the process of assessing the unilateral effects of the merger. In these cases, significant market shares are strong indicators of gaining a dominant position, that is, strengthening market power, so the Commission used this circumstance as an additional argument to strengthen its opinion on unilateral effects. However, the European Commission has also repeatedly accepted the fact that the products of the parties to the merger are not close substitutes as a defence argument in cases where the parties to the merger have acquired a significant market share after the merger and acknowledged that in some cases the market "depend much more on the substitutability of the competitors' products than on their respective market shares or dominant position"[64].

Since horizontal mergers involve market participants operating in the same branch of activity and strengthening their position in the market, the consequence of this connection is the elimination of mutual competition in the market. Weakening the competitive pressures between the participants in the merger creates conditions for forming a non-competitive market structure. "Depending on how market power and the competitive situation on the market change as a result of the merger, single firm dominance (I.) or collective dominance (II.) may be created or strengthened"[65]. Because of the direct reduction in the number of competitors on the market, there is a danger that competition will be significantly threatened, so horizontal mergers are considered the most significant potential threat to competition. Due to this fact and the limited scope of this paper, after a short analysis of the remaining types of mergers, the focus will be placed on the comparative study of horizontal mergers in EU and Serbian legal practice.

2.5.2. Vertical mergers

Vertical mergers occur between undertakings who operate at different levels of the same production chain, so this is about connecting market participants within different, successive phases of business activity in one vertical chain. Participants in vertical mergers are entities that do not operate in the same branch of activity and are not direct competitors because they operate

[64] Horner, Neil, *Unilateral Effects and the EC Merger Regulation – How The Commission Had its Cake and Ate it Too*, HANSE LAW REVIEW (HanseLR) [Vol. 2 No. 1], 2006, http://hanselawreview.eu/wp-content/uploads/2016/08/Vol2No1Art03.pdf , p.27
[65] Ibid, p. 8

in different markets and have different positions in the production chain, and the goal of this type of merger is to ensure the continuity of that chain. Vertical mergers connect market participants who are in a seller-buyer relationship: one of them is a producer, that is, a supplier, and the other is a buyer of a specific product[66].

2.5.3. Conglomerate mergers

Conglomerate mergers are defined negatively in the literature - as mergers that are neither horizontal nor vertical since participants in a conglomerate merger are market participants operating in different, mutually unrelated markets with no horizontal or vertical overlap. A conglomerate merger is therefore represented by any merger that is neither horizontal nor vertical.[67]

3. Effects concentrations have on competition

Despite the fact that the implementation of concentrations brings numerous benefits, they also have certain adverse effects, as a result of which competition can be significantly impaired. Concentrations affect the structure of the market by reducing the number of market participants, thus facilitating the mutual coordination of the remaining competitors and the conclusion of restrictive agreements between them. At the same time, by increasing the market power of the participants in the concentration and weakening the competitive pressures they face, there is a danger that the connected market participants will abuse the acquired market power. In terms of EU regulations on concentration control, market power refers to the ability of market participants to profitably increase prices, reduce production volume, affect choice or product quality, innovation, or otherwise negatively influence competition parameters[68]. Possible adverse effects of concentrations on competition are classified into two basic groups - coordinated and non-coordinated effects.

Unilateral or non-coordinated effects occur due to the acquisition or strengthening of the market power of the participants in the concentration, since after the concentration a significant competitor disappears from the market. The coordinated effects are reflected in the easier mutual

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[66] Ezarchi, p. 404
[67] Ibid
[68] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements C/2023/4752, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023XC0721%2801%29#ntc40-C_2023259EN.01000101-E0040, par. 32(c), acc. 31.03.2024

coordination of the remaining participants after the concentration, so, given the smaller number of market participants, the probability of concluding restrictive agreements, that is, the creation and maintenance of cartels, increases. Unilateral effects are most pronounced in the case of horizontal concentrations because the weakening of mutual competitive pressures is a consequence of the concentration's direct impact on the market structure[69]. Horizontal concentrations reduce the number of market participants active in the relevant market and increase market concentration, unlike non-horizontal concentrations, which do not have this effect on the market structure. The participants in the horizontal concentration are mutual competitors, therefore horizontal concentrations connect direct competitors on the market, i.e. market undertakings who offer the same or interchangeable products in a certain geographical area[70], so by their merger, critical mutual competitive pressures that existed before the concentration can be immediately removed, as a significant competitor disappears from the market.

> “A horizontal concentration that does not create or strengthen a dominant position can also significantly impede effective competition through other non-coordinated effects in an oligopolistic market if those effects are likely to result in significant price increases or degradations in quality or other competitive parameters. The EU Court of Justice ruled in July 2023 (Case C-376/20 P) that such non-coordinated effects can arise in an oligopolistic market if (a) the concentration eliminates important competitive constraints that the parties had exerted upon each other before the concentration, or (b) it reduces competitive pressure on the remaining competitors.”[71]

Hence, stricter criteria are applied to horizontal concentrations than those applied to non-horizontal concentrations, because they are the most significant cause of creating non-competitive market structures and can have significantly more severe consequences for competition than non-horizontal concentrations. Although all types of concentrations can affect the creation of non-competitive market structures, how such structures are created differ, depending on the type of concentration being implemented. Horizontal concentrations directly affect the creation of non-competitive market structures by directly reducing competition on the market (reducing the number of competitors), and vertical and conglomerate concentrations can indirectly affect competition, primarily by establishing barriers to the entry of new competitors, i.e. by controlling the market entry process. That is why vertical and conglomerate

[69] Monti(2007), p. 262
[70] Guidelines on horizontal co-operation agreements C/2023/4752, par. 16
[71] Ken Daly, Steve Spinks, p. 97

concentrations are classified into one group, the so-called - non-horizontal concentrations since they can threaten market competition in a different way than horizontal concentrations.

Bearing in mind that there is a difference in the way horizontal and non-horizontal concentrations affect competition, it would be necessary to clarify this issue in more detail, which certainly goes beyond the scope of this paper and for all it matters of any law in the field of competition protection. The practice of the developed competition protection systems is to prescribe guidelines for the assessment of concentrations, which aim to more clearly define the criteria for the evaluation of concentrations and the actions of the body responsible for the protection of competition in those cases. In this regard, it would be desirable to define guidelines for horizontal and non-horizontal concentrations separately, based on similar documents of the most developed bodies for the protection of competition, which the EU practice is the one primarily being referred to, mainly due to the level of sophistication, experience and legal practice which accumulated over the years, but also because Serbia is an EU candidate country and that it should work towards complete legal integration with EU regulations. In the section of the paper that follows, I will try to point out the importance of this topic for the system of competition protection in Serbia and the evident need for adopting guidelines for the assessment of concentrations, to point out the reference guidelines and cases in this area and to provide the principles on which guidelines of this type can be formulated.

3.1. Horizontal concentrations in Serbia

When assessing horizontal concentrations, the CPC applies the 2009 LPC because there is no other legal source on these issues and no guidelines for horizontal concentrations. In doing so, CPC mainly follows the practice of the European Commission, so it often applies the criteria that exist in EU law, especially in the EU Guidelines on the assessment of horizontal concentrations. The CPC is therefore guided by the practice that exists in the EU and it adheres to the conditions established in the EU Guidelines for the assessment of horizontal concentrations, although sometimes this is not explicitly stated. This behaviour is in accordance with the Stabilization and Association Agreement, which stipulates the obligation of correct and practical application and enforcement of the law harmonised with EU law, which means the interpretation of harmonised law in accordance with EU law[72].

[72] Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part Official Journal L 278 , 18/10/2013, Art. 72 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22013A1018%2801%29, acc. 31.03.2024

The application of harmonised regulations in the above-mentioned manner can create certain doubts and difficulties in practice, so it would be better if the CPC nevertheless issued particular guidelines for the implementation of the LPC, which would regulate in detail numerous issues related to concentrations. One of the competencies of the CPC is precisely to issue instructions and guidelines for the implementation of the LPC.

In the regulations of the Republic of Serbia, concentrations are not divided, so there are no special rules for evaluating different types of concentrations. In this regard, it is instrumental for the CPC to establish specific guidelines for horizontal and non-horizontal concentrations, which significantly contribute to legal certainty and certainty in the business operations of market participants. It is necessary to distinguish between specific rules for evaluating horizontal and non-horizontal concentrations because the mechanisms by which these types of concentrations affect the creation of non-competitive market structures and, thus, competition are also different. Different and generally stricter assessment criteria should be applied to horizontal concentrations because they are the most significant cause of the creation of non-competitive market structures.

The development of particular guidelines, especially in the area of horizontal concentration control, can justifiably be considered an essential recommendation for the improvement of competition protection policy, because in this way the regulatory risk is reduced - a risk that is based on uncertainty regarding regulations, the uncertainty of their change and most often, uncertainty regarding their application and specific decisions of regulatory bodies. Imprecise legal provisions and unclear legal standards provide vast possibilities for interpretation, which affects the increase of regulatory risks. Those risks could be reduced, starting with adopting particular guidelines for evaluating horizontal concentrations. The Commission has a diverse and rich practice regarding examined horizontal concentrations, which speaks in favour of the necessary experience for adopting guidelines of this type. Most of these concentrations are approved in an abbreviated procedure, whereby since 2005, in only two cases has a decision been made to prohibit, and in less than 20 cases a decision on conditional approval of concentrations[73].

In this way, clear criteria would be established for the evaluation of concentrations and the application of the law, that is, for the action of the CPC during the implementation of the law.

[73] https://kzk.gov.rs/en/odluke

This would not only contribute to legal certainty and enable undertakings to plan their business ventures better but, which is even more critical in my opinion, put an end to the CPC's discretionary right to (not) act in cases that represent the vast majority of their cases and thus income. The guidelines would represent a benchmark and introduce legal thresholds that could not be ignored and that could not be crossed to adapt the rules depending on the case and different interests.

3.2. Recommendations

To complete the regulatory framework for horizontal concentrations, guidelines for assessing the effects of these concentrations based on the best comparative practice would be necessary. The guidelines would have to fit into the existing regulations of the Republic of Serbia so that they correspond to the current legal practice and achievements of the CPC in implementing the law.

When drawing up the guidelines, one should consider that they do not serve to replace the law, but to define the practical steps of implementing the merger control procedure based on the LPC. This would provide interested parties with an answer to the question of how the Commission implements concentration control in practice, which was consistent with the law, whose existing provisions are extremely general and subject to further elaboration within the guidelines.

Nevertheless, relying on already established solutions of EU law is quite desirable in order to avoid learning from one's own mistakes and speed up the process of forming the still relatively young system for the protection of competition. Finally, the text of the guidelines would indicate the level of sophistication of the procedure carried out by the CPC. The subsequent development of the guidelines would be based on the growth of experience from their application and the improvement of the analytical apparatus available to the CPC. Since this is the most analytically complex field of competition law, the development of guidelines would represent a benchmark for the development of the competition protection system in Serbia.

Undoubtedly, the control of horizontal concentrations is the most demanding type of analysis in the field of competition protection and is based on the results of economic theory and tools for their application adapted in accordance with experience and limitations in conducting this policy. In this sense, the challenge is to create a document that would properly cover all the existing issues, while being simple enough to understand.

> "As regards efficiencies the purpose of such guidelines should be threefold:
>
> i) Explicitly state the underlying welfare standard (normative concerns)
>
> ii) Explain how efficiencies are evaluated in a merger investigation and what type of efficiencies are more likely to matter (positive concerns)
>
> iii) Assist the business community in explaining and demonstrating their efficiency claims (procedural concerns)
>
> Such an explicit policy would also help, in particular with reference to borderline cases.. clarifying the policy standards with regard to efficiencies in mergers, the Commission will improve the quality of decision making, as well as ensure consistency and transparency of analysis so that efficiency-enhancing mergers will not be unnecessarily discouraged."[74]

The guidelines should determine the criterion and standard of regulation in accordance with the objective of the law on which the regulation primarily relies, which constitutes their normative dimension. The fact that the guidelines would specifically refer only to horizontal concentrations provides an opportunity to more closely regulate the criteria for their evaluation, since the current substantive test for evaluating the permissibility of concentrations is applied without exception to all mentioned types of concentrations.

The guidelines should specify how the criteria for assessing the permissibility of concentrations are practically applied, especially with regard to determining market shares, levels and changes in market concentration, evaluation of efficiency and other factors with a positive effect on competition, but also negative effects that lead to increased market concentration and participants' power after concentration. The logic of the "safe harbour" criteria, which is based on the criteria of market concentration, mainly on the Herfindahl-Hirschman index, should consider the size and concentration of domestic markets and be interpreted as a "tolerability range"[75].

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[74] Miguel De la Mano, *For the Customer's Sake: The Competitive Effects of Efficiencies in European Merger Control*, Enterprise Papers 11 - 2002, European Commission, https://op.europa.eu/en/publication-detail/-/publication/895e57a0-4f81-416b-8f36-b15f67888d60, p. 30, acc. 31.03.2024

[75] Ibid, p. 29

The last but not the least important dimension is related to the pre-procedural role of the guidelines. When it comes to specific horizontal concentration, the guidelines should provide informative support to all interested parties on that occasion, which significantly raises the level of legal certainty when it comes to the control of horizontal concentrations. The foundation of this dimension lies in the need to make it clear to market participants what criteria a concentration must meet in order to be approved, or to make it clear when a concentration can meet the "safe harbour" criteria. This would mean that the guidelines should be seen as a document that significantly facilitates the business planning of market participants who intend to integrate.

Since the CPC has so far formed a certain practice that would allow it to regulate the area of concentration control in more detail, especially if one takes into account the fact that in the EU there are numerous rules that regulate this area. Such improvements could have a favourable effect on the connections of market participants and on the quality of work of the CPC. It could be assessed that the CPC sometimes faces difficulties in their work so that these regulations would contribute to a better understanding of merger control. In this way, Serbia could continue the process of approaching the EU legal system in the area of competition law, i.e. concentration control, even though the Law accepted the most important principles on which concentration control in the EU is based. The LPC and the accompanying Regulations are significantly aligned with the EU Regulation on concentrations and there are no significant deviations from the EU legal solutions. Concentration control in the Republic of Serbia should be regulated in accordance with EU law, but does not exclude the possibility of considering other high-quality and technically applicable solutions from other jurisdictions when the time comes for drafting of the guidelines.

4. Concentration control

4.1. Concentration thresholds

Since concentration controls apply only to those concentrations that, due to their size, could negatively impact market structure and thus pose a potential danger to competition, it is crucial to distinguish such concentrations from those that have little significance for competition and do not warrant control. Objective and easily measurable quantitative criteria for concentration notification thresholds are established by concentration control regulations, reflecting the market power of participants planning to engage in concentration[76]. Setting the notification thresholds establishes a distinction between concentrations that demand attention from regulatory bodies and those that are considered trivial in terms of their impact on market competition. This allows regulatory bodies to focus only on essential concentrations, while simultaneously allowing concentrations that are not subject to control to go through without much interference.

It is essential for the criteria to be established appropriately, or numerous problems may arise in practice. If the notification thresholds are set too high, fewer concentrations will be reported, however, certain concentrations that could threaten competition and therefore should be prohibited may fall outside the scope of control. On the other hand, if the thresholds are set too low, even greater problems may arise. Not only will the workload of the competition authority for protecting competition increase due to numerous notifications, but errors are bound to occur in the decision-making process during the control procedure[77]. Furthermore, market participants are discouraged from engaging in concentration and are deterred by having to report concentrations that do not threaten competition while paying high fees.

The 2005 LPC provided that the request for the approval of the concentration is warranted under the condition that:

> 1) the joint total annual income of all participants in the concentration achieved on the market of the Republic of Serbia exceeds the amount of 10 million euros, or

[76] Andreas Reindl, *Setting Notification Thresholds for Merger Review*, International Competition Network, Japan April 2008, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_SettingMergerNotificationThresholds.pdf, p. 2, acc. 31.03.2024
[77] Ibid, p. 29

2) the joint total annual income of the participants in the concentration achieved on the world market exceeds the amount of 50 million euros, where at least one undertaking that is a participant in the concentration must be registered on the territory of the Republic of Serbia[78]

This was one of the major problems in the work of the CPC following the adoption of the first LPC in 2005, as the notification thresholds established by the law were too low. Low thresholds were considered the biggest individual shortcoming of the law, with concentration control seen as a priority of the CPC. As a result, the CPC was overwhelmed with requests for concentration approval and could not adequately address competition protection in the market. Another reason for criticism were the high fees charged by the CPC for concentration notification, which constitutes an administrative barrier to market entry and often referred to as a hidden "merger tax"[79], as the CPC and the budget of the Republic of Serbia benefited from notification fees due to the large number of requests. There were even criticism that “the State has offloaded the cost of running the Competition Commission to undertakings”[80] and we if we observe the CPC’s latest Report from 2021 we can see that the fees “For merger clearance decisions” still make up 99% of the CPC’s annual revenue[81].

4.2. 2009 LPC concentration thresholds

The Law on the Protection of Competition prescribes financial thresholds related to the participants' income in the previous year, so only concentrations that exceed the prescribed thresholds are subject to control.

“The concentration must be reported to the Commission in the case if:

1) total annual revenue of all concentration participants generated on the international market in the preceding financial year exceeds 100 million EUR, provided that at least one concentration participant revenue generated on the market of the Republic of Serbia exceeds ten million EUR;

[78] Law on Protection of Competition of Republic of Serbia 79/05 https://www.kzk.org.rs/kzk/wp-content/uploads/2011/07/Zakon-o-zastiti-konkurencije.pdf, Art. 23, acc.31.03.2024 (only available in Serbian language)
[79] Vladimir Pavic, *The 2005 Competition Act - Devolution of Competences and Shortcomings* in V. Beširević (ed.), *Public Law in Serbia: Twenty Years After*, Esperia, London 2012, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101611, p. 251
[80] Ibid, p. 250
[81] Activity Report For The Commission For Protection Of Competition For 2021, p. 120

> 2) total annual revenue of at least two concentration participants generated on the market of the Republic of Serbia exceeds 20 million EUR in the preceding financial year, provided that at least two concentration participants generated revenue on the market of the Republic of Serbia exceeds one million EUR per participant, in the same period;"[82]

The first threshold was determined by taking into account the power, that is, the income, of the undertaking on the international market and the corresponding income of one of the undertakings on the domestic market. It is conceived in such a way that it should only cover concentrations in which at least one of the significant participating market undertakings is already present in the market of Serbia. The threshold related to the income of participants in the international market was increased, and an additional condition was introduced in order to prevent excessive control of concentrations related to smaller investments of domestic undertakings and foreign direct investments.[83]

However, certain objections can be made to this legal provision, questioning the way the legislator prescribed the first threshold, even though it was increased and determined differently, it can still hinder the concentrations of undertakings and create obstacles for both domestic and foreign investors.

- First, the basis for controlling the entry of foreign investors into the domestic market is still retained, since even large foreign investors who do not operate in Serbia are obliged to submit an application if they take over a domestic undertaking with an income of more than ten million euros. This kind of legal solution is questionable, because the mentioned concentrations, as a rule, improve the competition on the market and introduce additional competitive pressures, so it is unclear why their control is necessary.
- Secondly, large domestic undertakings, which generate income of more than 100 million euros on the world market, must practically declare each of their concentrations, because realistically it can be expected that they will

[82] 2009 LPC, Art. 61

[83] Dusan Protic, Nebojsa Lazarevic, *Competition Policy in Serbia - What is the Problem,* European Policy Centre, Belgrade 2015, https://www.balkanfund.org/site/pubs/uploads/publications/think%20and%20link/Competition_Policy_in_Serbia_Wha.pdf, p. 35, acc. 31.03.2024

simultaneously fulfil the condition related to income on the domestic market, i.e. that they have achieved in Serbia income of at least ten million euros.

- Thirdly, CPC control still covers foreign-to-foreign mergers that relate to the concentrations of foreign undertakings abroad, and which cannot cause significant consequences on the domestic market. Therefore, even if these concentrations are not carried out in Serbia, if one of the participants also operates on the domestic market (with an turnover larger than 10 million EUR), then the participants in the concentration are obliged to report the concentration to the CPC. In this way, the workload of the CPC increases, even though it is about concentrations that have no significance for the domestic, nor they change the market structure "and the Commission regularly reviews them and clears them in Phase I"[84], for a fee off-course. So, even though the LPC clearly states that the "Territory of Application" is : "The provisions of this Law shall apply to acts and practices performed on the territory of the Republic of Serbia, as well as on acts and practices performed outside of its territory that affect or could affect the competition on the territory of the Republic of Serbia."[85] The domestic effects doctrine has not yet been adopted by the CPC.[86]

The second threshold is based on the importance of the concentration for the Serbian market and the market power of individual participants in the concentration. In addition to the overall revenue increase generated by all participants in the domestic market, a supplementary condition regarding the revenue of at least two participants in the concentration has been introduced. The use of this avoids situations where the concentrations of low-revenue undertakings unnecessarily add to the workload of the CPC[87]. However, it may be worth examining whether the new threshold still needs to be set higher in order to determine if still a large number concentrations that do not threaten competition are subject to control and to include a mandatory filing in cases where thresholds are not met but when the potential concentration exceeds 40% market share[88].

[84] Srdana Petronijevic, Danijel Stevanovic, Nina Rasljanin, *Merger Control Laws and Regulations Serbia 2024*, International Comprative Legal Guides, Global Legal Group Ltd, London, https://iclg.com/practice-areas/merger-control-laws-and-regulations/serbia, par. 2.6, acc. 31.03.2024
[85]2009 LPC, Art. 2
[86] Srdana Petronijevic, Danijel Stevanovic, Nina Rasljanin, par. 2.6
[87] Ibid
[88] Katarina Ranđelovic, Aleksandar Jezdimirovic, MERGER CONTROL 2023 - Serbia, McMillan LLP, https://mcmillan.ca/wp-content/uploads/2022/11/Merger-Control-2023-McMillan-Full.pdf, acc. 31.03.2024, p. 943

4.3. Relevant market

Determining the relevant market is a mandatory stage in merger control procedures, since in this way, in each specific case, the necessary identification of undertakings that compete with each other in terms of the goods and services they offer in a particular geographical area is carried out. This actually defines the boundaries of that part of the market where there are competitive pressures faced by the participants in the concentration and where the effects of the concentration are determined in the specific case[89]. The boundaries of the market are defined in a real sense - according to products that face each other and which represent substitutes for customers, because they satisfy their same needs in a similar way (relevant product market), and in a geographical sense - according to the territory where market participants compete with each other in terms of the products they offer (relevant geographic market).[90] There is a big problem in this area because "the relevant geographic market in the merger decisions of the Serbian NCA is most often defined on a national level (in around 85% of the cases). In the remaining cases 15% cases the relevant geographic market was either local or mixed,"[91] showing that very little is being done to proportionally examine competition across the country.

In line with the economic approach that prevails in modern competition law, contemporary legislation increasingly uses quantitative techniques for determining the relevant market based on various appropriate tests. One of the widely used techniques is the hypothetical monopolist test. "This question can be assessed by asking whether a hypothetical monopolist in the candidate market would find it profitable to implement a small but significant non-transitory increase in price (the 'SSNIP test')"[92]. It actually determines whether the observed market can be monopolised, that is, whether the assumed price increase is sustainable since the profitability of a permanent price increase is evaluated, depending on which substitutes are included in the market[93].

[89] Monti (2007), p. 135
[90] Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law C/2023/6789, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AC_202401645, acc. 31.03.2024, par. 12
[91] Dragan Gajin, MERGER CONTROL IN SERBIA: 2019, https://www.gajin.rs/2020/05/merger-control-in-serbia-2019/
[92] Ibid, par. 29
[93] Monti (2007), p. 152

The implementation of the assumed monopolist test is mainly based on quantitative methods, the most important of which is the concept of price elasticity of demand[94]. The price elasticity of demand shows the degree of change in the amount of demand that occurs due to the change in the price of the product, so the determination of the profitability of the assumed price increase is actually based on the assessment of the level of decline in the amount of demand for the observed product in the specific case, which is caused by the assumed price increase. "Situations of sufficiently strong demand substitution arise when customers would switch easily from the products of the undertaking(s) involved to readily available alternative products."[95]

“The substitutability of products from the perspective of suppliers (supply substitution) can be relevant for market definition where suppliers use the same assets and processes to produce related products that are not substitutes for customers, and where this leads to similar conditions of competition across the range of such related products.”[96] Substitution of supply on the market can be taken into account when determining the relevant market in those situations when, in response to a competitor’s SSNIP, there is a possibility that other undertakings will offer the product in question on the market, i.e. its substitute, in the short term and without significant costs.

4.3.1. Relevant market definition in Serbian law

In Serbian law, the application of the presumptive monopolist test is not mandatory, since the Regulation on criteria for determining the relevant market does not foresee its application, that is, it does not mention it at all[97]. This Regulation only states the criteria, on the basis of which the possibility of substitution of demand and supply on the market is assessed[98]. The previous Regulation, which was adopted on the basis of the 2005 LPC, provided that the relevant market was determined by applying the presumptive monopolist test, which meant that the CPC was obliged to apply it in every competition protection procedure[99]. At the same time, this means

[94] Notice on the definition of the relevant market for the purposes of Union competition law C/2023/6789, par. 53
[95] Ibid, par. 25
[96] Ibid, par. 32
[97] Dušan Popovic, Mirko Vasiljevic, *Competition Law Enforcement in Serbia: Six Years of Staggering Along*, European Business Organization Law Review 13, T.M.C.ASSER PRESS 2012, https://link.springer.com/content/pdf/10.1017/S1566752912000079.pdf, acc. 31.03.2024, p. 8
[98] Regulation on Criteria in Defining the Relevant Market Pursuant to Article 6 para 4 of the Law on Protection of Competition (‘Official Gazette of the RS’, no. 89/09), https://kzk.gov.rs/kzk/wp-content/uploads/2016/11/08-Regulation-on-the-criteria-for-defining-the-relevant-market.pdf, acc. 31.03.2024
[99] Regulation on Criteria in Defining the Relevant Market Pursuant to Article 6 para 4 of the Law on Protection of Competition (‘Official Gazette of the RS’, no. 79/05), Art. 2, par. 2,

that the current Regulation on the criteria for determining the relevant market from 2009 is not fully harmonised with EU law and the practice of EU authorities. The regulation only regulates the relevant market in summary, and the presumptive monopolist test is not used at all. In addition, the Regulation differentiates between a narrower and a broader relevant market, which can introduce confusion since the LPC does not mention any such categories when determining the relevant market.[100]

Such provisions represent shortcomings of the rules on concentration control and competition law in Serbia. Not only is legal certainty and stability on the market reduced, but the protection of competition on the market can also be weakened. Due to the lack of an obligation for the CPC to apply economic analyses and the presumed monopolist test, the quality of the analyses performed by the CPC in competition protection procedures, on the basis of which it makes final decisions on competition violations and the permissibility of concentration, may be reduced.

Without conducting serious economic analyses, especially the presumed monopolist test, and clearly established criteria, one could get the impression that CPC decisions are made on the basis of an arbitrary assessment of demand and supply substitution, since the CPC's discretionary decision-making is not limited by the application of specific quantitative tests. The lack of the obligation to apply the presumed monopolist test and the lack of predetermined, precisely prescribed rules of the procedure for determining the relevant market, may influence the decision on the permissibility of concentration and thus reduce the protection of competition. Namely, it is difficult to talk about predictability in the work of the CPC, given the lack of grounds for its consistent action. Just as no decision in the competition protection procedure may be based on a free discretionary assessment, the CPC may not base a decision on the relevant market on a free assessment of demand and supply substitution and arbitrary definition of the relevant market.

That is why it would be desirable to re-establish the obligation to apply the presumed monopolist test, which would ensure the predictability of the CPC's actions and legal certainty. The presumed monopolist test is a quantitative test, the application of which establishes an unbiased definition of the relevant market, based on data obtained by econometric tests, so that

https://kzk.gov.rs/kzk/wp-content/uploads/2011/08/Regulation-on-Criteria-in-Defining-the-Relevant-Market.pdf, acc. 31.03.2024

[100] Dušan Popovic, Mirko Vasiljevic, p. 9

the possibility of arbitrary decision-making would be reduced. Although the test has certain disadvantages related to its application and requires a lot of data, this does not mean that it should not be applied or abandoned. On the contrary, the test should be applied, and the application of the test should be enabled by collecting the necessary data and creating appropriate databases.

5. Concentration control processes

5.1. Legal standards for concentration assessment

Taking into account the fact that concentrations as such are not prohibited, the body responsible for the protection of competition must apply the appropriate legal standard when examining the concentration and, based on various criteria, evaluate the effects of the concentration on competition and make a decision on its implementation.

The substantive test is the basic factual-legal criterion that is applied when assessing the concentration and on the basis of which the body responsible for the protection of competition determines whether it can approve the concentration. Based on this criterion, the potential danger of the concentration to the competition is assessed, so that the concentration can be prohibited only if its negative effects satisfy the established criteria, that is, if it is really established that the concentration would threaten the competition. CPC and EC apply the same legal standard - the so-called SIEC test - significant impediment of effective competition[101]. The CPC can prohibit a concentration only if the concentration would significantly limit, impair or prevent competition in the market of the Republic of Serbia or its part, and especially if that limitation, impairment or prevention would result in the creation or strengthening of a dominant position. The European Commission evaluates concentrations in the same way, taking into account the EU single market - A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market[102].

The criterion of significant distortion of competition is established in Serbian law by the 2005 LPC, based on the test applied by the EC since Regulation 139/2004. It can be concluded that the EU Merger Regulation established a broader legal standard for the assessment of concentrations, because it includes those concentrations which do not create or strengthen a

[101] Monti (2007), p. 259
[102] Regulation 139/2004, par. 5

dominant position, but which nevertheless distort competition. These are concentrations that establish an oligopolistic market structure, in which none of the participants individually has a dominant position, but it is considered that competition will still be impaired - for example, the merger of the second and third largest market participants as in the famous *Babyfoods* case.

> "In that decision, the FTC prohibited the merger between the second and third largest producers in the market for baby food, even through the resulting firm would not have been the dominant producer, but the second largest. The Court of Appeal agreed with the FTC's findings … that the merger would result in the removal of a significant competitive constraint and higher prices irrespective of the dominant firms pricing decisions."[103]

Regulation 139/2004 specifies in this regard that the "notion of "significant impediment to effective competition""[104] should be interpreted so that, except in the case of a dominant position, it also refers to those negative non-coordinated effects of the concentration whose participants would not have a dominant position on the market. This means that a concentration that does not acquire or strengthen a dominant position can be prohibited only if the distortion of competition is the result of these non-coordinated effects, that is, the SIEC test is applied either to the acquisition or strengthening of a dominant position or to the non-coordinated exploitation of the market power of the participants in the concentration which individually do not have a dominant position[105].

Similarly, back in 2007, a young CPC, only established by the 2005 LPC, failed to recognize the potential risks of then "Grand Prom" (owned by the Atlantic Group since 2010) acquisition of "Bonito" coffee brand[106]. At the time second and third largest companies on the Serbian roasted domestic coffee market. Doncafe Group (owned by Strauss Adriatic since 2008[107]) held around 40% of the market and was the "most influential domestic brand" at the time[108]. Grand coffee used Bonito to cover the lower priced product niche[109] and already by the

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[103] Neil Horner, p. 27
[104]`Regulation 139/2004, par. 25
[105] Neil Horner, p.24
[106] https://www.ekapija.com/news/991249/sarmantni-ducan-moj-porodicni-posao-beogradske-porodice-boskovic
[107] https://www.ekapija.com/news/161108/kompanija-doncafe-group-promenila-ime-u-strauss-adriatic
[108] https://www.ekapija.com/news/81161/robna-marka-nike-proglasena-za-najuticajniji-strani-brend-u-srbiji-medju-domacima
[109] https://me.ekapija.com/sr/news/403325/srecko-nakic-potpredsednik-uprave-atlantic-grupe-necemo-prodavati-srpske-brendove

time CPC initiated proceedings against them for restrictive agreements, in 2009, they were already the dominant undertaking on the market[110], title they hold to this date. A simple market analysis, proper relevant market definition and simple enforcement of 2005 LPC back in 2007 could've made all the difference - all the regulatory tools were there.

5.2. Relevant market dominance

The criterion of acquiring a dominant position was retained in the SIEC test as the most important criterion in order to preserve legal certainty and ensure continuity with the practice of the European Commission and EU courts in applying the concept of a dominant position and other criteria for evaluating concentrations. In this way, the rich practice of European authorities can still be used, since the EU rules on concentration control and on the prohibition of abuse of a dominant position do not define the concept of a dominant position. The content of the term and the criteria for determining the dominant position are determined by the decisions of the European Commission and the courts, so they can be used as guidelines when applying the SIEC test[111].

Since modern economic science does not know the concept of a dominant position, it is considered that the legal definition of a dominant position is reduced to the economic definition which defines market power as “the ability of one or more firms to profitably maintain prices above the level corresponding to perfect competition for a significant period of time”[112]

In its decisions, the Court of Justice concluded that a dominant position is held by a market participant who has such economic strength that enables him to prevent effective competition on the relevant market by gaining the ability to behave to a considerable extent independently of competitors, customers and consumers.[113] 2009 LPC defines dominant market position according to the EU jurisprudence stating that “The dominant position holds an undertaking that because of its market power in the relevant market can substantially

[110] COMISSION FOR PROTECTION OF COMPETITION, Number: 4/0-02-64/12-69, Reference: 4/0-02-14/2009 Date: September 20, 2009 https://kzk.gov.rs/kzk/wp-content/uploads/2016/11/DECISION-on-measures-for-protection-of-competition-Grand-Prom-and-Idea-doo.pdf
[111] Neil Horner, p. 40
[112] Mano, p. 9
[113] Case 322/81, *Nederlandsche Banden Industrie Michelin v Commission*, para 37, referenced in Ezarchi, p. 40

independently operate in relation to actual or potential competitors, customers, suppliers or consumers."[114]

In accordance with the structural approach of assessing concentrations, the EC interpreted this determination of the term dominant position as market leadership. For this reason, it was generally considered that only the largest market leader has a dominant position, but:

> "Dominance does not mean monopoly, nor does it require market leadership. This is illustrated by the European Courts' interpretations of this concept: the Courts have found dominance for the purposes of Article 82 and the ECMR with market shares as low as 40 per cent, and have often stated that a degree of competition in the market is not incompatible with dominance… Dominance, in other words, means commercial power to resist competitors' entry, it does not mean the power to behave completely independently of rivals."[115]

Such an interpretation that participation in the market is only one of the factors on the basis of which the existence of a dominant position is determined, so that only by applying other criteria, especially taking into account the existence of barriers to the entry of new competitors and the strength of actual and potential competitors, it can be determined that market participants they have a dominant position even though they may not have the largest market share. Therefore, the LPC foresees that when determining the dominant position, the market power of market participants is determined in relation to relevant economic and other indicators, and in particular: 1) the structure of the relevant market; 2) the market share of the undertaking whose dominant position is determined, especially if it is greater than 40% on the established relevant market; 3) actual and potential competitors; 4) economic and financial strength; 5) degree of vertical integration; 5) advantages in access to supply and distribution markets; 6) legal or factual obstacles to the access of other market participants; 7) buyer power; 8) technological advantages, intellectual property rights[116]

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[114] 2009 LPC, Art. 15

[115] Giorgio Monti, *The New Substantive Test in the EC Merger Regulation – Bridging the Gap Between Economics and Law?*, LSE Law, Society and Economy Working Papers 10/2008 London School of Economics and Political Science Law Department, https://deliverypdf.ssrn.com/delivery.php?ID=625020126116009012004068119093118110019034089065086086005092103087101111099074126030117004043063053096045101003080122081125107107073033081079065007122100014101066039037038101124086024098082115117009012120107028023108108084104089104015001099073118116&EXT=pdf&INDEX=TRUE

[116] 2009 LPC, Art. 15

5.3. Other Criteria

In accordance with the basic legal standard for the assessment of concentration, the permissibility of concentration is determined in relation to various other criteria, which represent important factors that can affect significant distortion of competition. According to the LPC (and to the large extent Regulation 139/2004) the the criteria for the assessment of concentrations are practically reduced to the dominant position criteria and the analysis of the effects of the concentration to the market power of the participants in the concentration: 1) the structure of the relevant market; 2) actual and potential competitors; 3) market position of the participants in the concentration and their economic and financial power; 4) options for choosing suppliers and users; 5) legal and other obstacles to entering the relevant market; 6) the level of competitiveness of the participants in the concentration; 7) supply and demand trends of relevant goods or services; 8) trends in technical and economic development; 9) consumer interests.[117]

5.3.1. Market structure

It is difficult to determine the limit on the basis of which it would be determined whether a participant has a dominant position, that is, significant market power, although in EU practice it is often indicated that there is a doubt that market participants with a share of more than 40% may be dominant. This limit is also established in the LPC Article 15, since the Law provides that the market power of the undertaking is determined in relation to the share that the undertaking has in the established relevant market. The EU guidelines for the assessment of horizontal mergers, however, indicate that substantial market shares (50% or more) may be sufficient evidence of a dominant position, referring to existing practice, as well as concentrations involving shares of less than 50 %, and sometimes even 40%, can distort competition[118].

Based on the established factual situation in the *Atlantic - Strauss* procedure, the CPC confirmed that it is a horizontal concentration, the implementation of which leads to the strengthening of the applicant's dominant position on the market for the production and wholesale of traditional domestic roasted coffee, with a market share of at least /70-80/%, which would lead to the restriction, distortion or prevention of competition in this market. It can be

[117] LPC, Art. 19
[118] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52004XC0205%2802%29, par. 17

seen that the joint market share of the post-concentration participants in the traditional roasted coffee production and wholesale market in 2022 will be at least /70-80/%, with individual market shares at least /40-50/% and /20 -30/%. When the other competitors in this relevant market were observed, the gap between the participants in the concentration and the other participants in the market was extremely large. The market share of the next competitor is /0-5/%, the next three competitors are also between /0-5/%, and all the others individually have less than /0.5/%.[119]

However, all the mentioned limits on market share must be taken with a reservation, since the existence of a dominant position must be established in each specific case. That is, to analyse how the increase in market share affects the acquisition of significant market power. EC believes that it is important to keep in mind that market shares are variable, so one must take into account the period of observation of market share. Hence, current market shares are usually used when examining a concentration, although these may be adjusted to reasonably reflect certain future changes in the market.[120]

Analysis of the market structure can also be carried out considering the concentration of supply on the market, which is often measured by the Herfindahl-Hirschman Index (HHI). HHI represents the sum of the squares of the individual shares of all market participants and is considered a reliable indicator of market power, as it gives proportionally greater importance to the market share of large market participants. Although it is best to include all market participants when calculating the HHI, the lack of data on very small participants need not be a problem, as such participants do not significantly affect the HHI. The absolute level of HHI is the first indicator of competitive pressures after the concentration, but the change in HHI is also considered a valuable indicator of the change in competitive pressures due to the realisation of the concentration.[121] The greater the number of undertakings on the market, the less likely that the concentration will distort competition, so concentrations that are realised in a highly concentrated market are more dangerous than those that are realised in a fragmented market. For the same reasons, concentrations that significantly increase the degree of concentration are more dangerous than concentrations that increase concentration only marginally. That is why the change in HHI is used as an additional criterion - "The Commission is also unlikely to identify

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[119] CPC, Atlantic - Strauss decision, https://kzk.gov.rs/kzk/wp-content/uploads/2024/02/Resenje-Atlantic-Grand-Strauss-Adriatic.pdf, p. 30
[120] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), Art. 15
[121] Ibid, Art. 16

horizontal competition concerns in a merger with a post-merger HHI between 1000 and 2000 and a delta below 250, or a merger with a post-merger HHI above 2000 and a delta below 150”[122]

This coincides with the past practice of the CPC and in Atlantic-Strauss case it is stated that circumstances point to the possibility of failure of the existence of conditions for the permissibility of concentration, especially in the case when the relevant market is highly concentrated (HHI ≥ 2000), and the change (delta) HHI ≥ 150), and according to the practice that exists in EU competition law, it is considered that a horizontal concentration does not pose a threat to competition and that it can be considered that the concentration is not likely to distort competition if the HHI after the concentration is between 1000 and 2000, and it's delta is lower than 250. In the Atlantic - Strauss case the HHI before the implementation of the concentration, as well as after the implementation of the concentration were redacted by the CPC, the only available measure was that of the delta HHI - which was “around 2,429”[123]. My estimate is that post-merger HHI would've had to be more than 5000.

5.3.2. Countervailing Buyer Power

Opposing power of the buyer is reflected in the buyer market power, which gives him the opportunity to choose another seller and not a participant in the concentration, or to use market power in another way in order to oppose the market power of the seller. Therefore, the competitive pressure on the participant in the concentration is not only exerted by its competitors, but can also be exerted by its customers. Therefore, sellers with a substantial market share may not be able to distort competition after a concentration, especially by acting largely independently of buyers, if the buyers have significant countervailing power. In the *Enso - Stora* case “Commission's analysis revealed a two-sided oligopoly where, following the transaction, the number and the relative size of the producers would match that of the buyers… The investigation showed that the relationship between the suppliers and the customers is one of mutual dependency… the Commission considers that the buyers in these rather special market circumstances have sufficient countervailing buyer power to remove the possibility of the parties' exercising market power.”[124] The countervailing power of the buyer should therefore be

[122] Ibid, Art. 20
[123] CPC, Atlantic - Strauss decision, p. 30
[124] Case IV/M.1225, *Enso/Stora*, European Commission, par. 86 and 97, as referenced in Ezarchi, p. 478

interpreted as the bargaining power that the buyer has in business negotiations in relation to the seller due to its size, business importance for the seller and ability to choose other suppliers[125].

5.3.3. Market entry

In order to claim that the entry of new competitors into the market creates significant competitive pressure on the participants in the concentration, it is necessary to prove that the entry into the market is probable, timely and sufficient to prevent or neutralise all possible negative effects of the concentration. First, it is determined whether the potential entry into the market after the concentration is likely to exert competitive pressure on the entrants already present in the market. The probability of entry is assessed based on the profitability of entry, taking into account the effects of increased production volume on market prices and the possible reaction of existing participants.[126]

High risk and costs of failed entry can make entry less likely, so entry can only be considered likely if there are negligible entry and exit costs, especially sunk costs. The freedom to enter the market is actually based on the absence of barriers to entry, which are related to entry and exit costs[127]. Different barriers can exist in the market, "legal, structural and strategic barriers to entry, depending on the underlying reasons for the hindrance of entry."[128]

Legal barriers are based on some general or individual legal act that limits the number of market participants by prohibiting entry (e.g. state monopoly), issuing entry permits, patent protection, i.e. protection of intellectual property rights or contracts, or establishing various institutional barriers (e.g. regarding the registration of business entities, i.e. work permits, construction land status), customs and non-customs barriers, etc.[129]

"Structural barriers to entry result from the characteristics of the market, the production process of the goods concerned or on the special market position of a company. They generally have a direct effect on the cost of entry and/or on the level of the profit expected after entering the market."[130] An important structural barrier may exist due to the established market position of

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[125] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), par. 64
[126] Ibid, Art. 69
[127] Monti(2007), p. 146
[128] Bundeskartellamt, p.23
[129] Ibid, p. 23-24
[130] Ibid, p.24

an existing entrant, especially if it is the result of its acquired reputation, experience or developed market brand. Because of such a position of the market participants, the new entrant has to bear the costs of acquiring customers (e.g. advertising costs, large price discounts), and these costs are significantly higher than the costs incurred by the existing entrants when acquiring customers. The amount of these costs is determined by various factors that affect the reputation of the undertaking, such as brand recognisability and consumer loyalty to a certain market brand and consumer shopping habits. For example, in the Serbian domestic roasted coffee market we can observe a high degree of habitual shopping and extreme customer loyalty, where up to 60% of research participants stated they would continue to purchase the preferred coffee brand even if the price went up.[131]

"Strategic barriers to entry can exist if the well-established firms are able to raise rivals' costs of entry or to lower their expected profits. This can deter potential entrants by making entry more difficult and risky. For example, the well-established firm can increase its production volume specifically with a view to limiting potential entrants' opportunities to earn profits."[132] Also, access to large retail chains can be considered a barrier to entry, due to the complex and mutually dependent nature of the relationship between them and large market players. This is what a coffee shelf in "Maxi", a largest retailer on Serbian market looks like:[133]

[131] Mediana: On the Serbian market, the largest percentage of large consumers of ground coffee https://www.instore.rs/sr/article/82819/mediana-na-srpskom-trzistu-najveci-procenat-velikih-konzumenata-mlevene-kafe, acc. 31.03.2024 (only available in Serbian language)
[132] Ibid, p. 26
[133] Donkafe, Grand, Bonito and C coffee become brands of the same producer: the Commission approved the merger of Atlantic Group and Strauss Adriatic, https://www.danas.rs/vesti/ekonomija/kafa-brend-atlantik-straus/, acc. 31.03.2024

(red represents Atlantic Group brands, blue are Strauss Adriatic, leaving Jacobs and Frank grey)

5.4. Economic efficiency argument

One of the most important criteria that is applied when examining the concentration is the criterion related to the trends of technical and economic development, which is related to the most important benefit from the implementation of the concentration - the increase in economic efficiency. The CPC and the EC, therefore, take into account economic efficiency during the comprehensive examination of the effects of concentration, with the EC taking into account the trends of technical and economic development provided that they benefit consumers and do not create obstacles to competition[134].

However, when it is shown that concentration can harm competition, the criterion of economic efficiency gains importance, since then those positive effects justifying the concentration can be analysed, even though it simultaneously causes negative effects and poses a threat to competition. Namely, the participants in the concentration can use the argument of economic efficiency - efficiency defence and prove that the concentration has significant positive effects that can neutralise the negative effects on the competition. In the famous *BASF/Pantochim/Eurodiol* case "The Commission…concluded: 'Under these conditions,

[134] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), par. 76

considered cumulatively under the particular circumstances of this specific case, the market conditions can be expected to be more favourable than in case of the market exit of the assets to be acquired.'...and it might be the first case where the efficiency defence as set out in the Horizontal Merger Guidelines was applied"[135]This case was also important for the principle of "failing firm defence" which will be discussed later on.

5.4.1. Conditions for application of economic efficiency argument

The conditions for the application of the argument of economic efficiency are established in the Guidelines for the assessment of horizontal concentrations and must be cumulatively met in order for the EC to approve the concentration through its application. Such a decision can be made if, based on the evidence, it can be concluded that the efficiency generated by the concentration can improve the ability and incentives of the undertaking to encourage competition for the benefit of the consumer, and thus suppress the negative effects that the concentration could otherwise have[136]. In order for the European Commission to be able to take into account allegations of increased efficiency and, based on those allegations, to conclude that there are no grounds to prohibit concentration, the efficiencies must be in favour of consumers and related to a specific concentration, and must be proven, that is, they must be confirmed[137].

The first condition dictates that the efficiencies must be such that they lead to an increase in consumer welfare, that is, to the realisation of their benefits. The benefits to consumers must be substantial and timely and must be such that the concentration does not put consumers at a disadvantage[138]. The benefits of concentration refer to e.g. on the reduction of production or distribution costs, on the production of better quality or new products that are the result of research and development, or on the consequent decrease in incentives for coordinated action of undertakings. The assessment of these benefits is linked to the existence of competitive pressures from the remaining market participants and to potential market entries, so the greater the negative effects of concentration, the lower the probability that the argument will be accepted. Therefore, there is a low probability that a concentration that acquires a near-monopoly position, i.e. the market power corresponding to this position, will be approved, given that in that case it is

[135] Case COMP/M.2314 *BASF/Pantochim/Eurodiol* [2002] OJ L132/45, as cited in Monti(2007), p.298
[136] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), par. 77
[137] Ibid, par. 78
[138] Ibid, par. 79

assumed that the benefits of the concentration are not sufficient to neutralise its negative effects[139].

If we are mentioning a near-monopoly market situation we can briefly analyse the CPC's assessment that led to (conditional) approval of such a concentration. In the case of *Atlantic - Strauss* concentration, the CPC, as part of the investigative proceedings, sent out a questionnaire to a group of what were defined as "relevant market competitors' ' and "largest buyers". Evaluating the effects of concentration on customers in the Republic of Serbia, competitors have different ratings. Five competitors positively appreciated such an impact, in the sense that product quality and assortment will increase. Two competitors cited a negative impact in response, in terms of long-term monopoly creation or dumping. Five competitors believe that the implementation of the concentration in question will have no impact or no benefit on end consumers, while the remaining competitors, 12 of them, were not able to provide the requested assessment due to lack of information. One competitor stated in connection with the implementation of the concentration in question that it will lead to the strengthening of the applicant's already very dominant position on the market and its potential abuse, as a result of which there will be displacement, i.e. the weakening of the remaining participants in the market, as well as that it cannot cause positive effects on the relevant market, competition, and especially not on end consumers.[140]

The largest buyers of the participants in the concentration also submitted an assessment regarding the effect on end consumers, where two of them estimated that the implementation of the concentration in question may have a positive effect on end consumers in terms of reducing costs and prices, as well as increasing the quality and range of products. Two buyers were unable to submit their assessment, one stated that he did not have enough knowledge and information to assess the impact on end consumers, and two buyers indicated negative effects on consumers, in the sense that the implementation of the concentration in question could lead to an increase in prices and limiting the range of products, i.e. that the negative effects will be expressed especially in terms of retail prices and innovations, bearing in mind that there is a real risk of price growth and the shutdown of "unprofitable" brands that have been competitors in this market until now, including small private brands.[141] What we also have to have in mind is that

[139] Ibid, par. 84
[140]Atlantic Strauss concentration, p. 33
[141] Ibid, p. 34

the buyers which were interviewed all have a strong, highly dependant and mutually beneficial relationship with Atlantic Group and their answers need to be taken with a dose of reservation. Reason for this is that, apart from Grand Kafa, Atlantic Group has some 20 other brands which are, if not as dominant as Grand Kafa, then major player across several relevant markets of consumer products - waters and soft drinks, canned foods, snacks, chocolates etc[142].

In the second condition, it is analysed whether the benefits for consumers are a direct consequence of the implementation of the concentration and whether the benefits can be realised in some other way, which would harm competition to a lesser extent. Therefore, it is necessary to determine the cause-and-effect relationship between the concentration and the increase in efficiency, i.e. whether the concentration is necessary for the realisation of benefits and to prove that there are no other forms of connecting market participants that would represent a lesser threat to competition (e.g. concentration with another participant, a joint venture that does not have the character of a concentration or the conclusion of an agreement on the transfer of a licence, etc.)[143].

The third condition refers to the possibility of successfully proving the allegations made about the increase in efficiency, which aims to prevent unargued, unclear or speculative statements, that is, unproven claims about future benefits from the concentration. Efficiencies must be verifiable, i.e. proven so that the EC can reasonably be convinced that the efficiencies will be achieved and that they are sufficient to neutralise possible harm to consumers that would result from the concentration.[144]

5.4.2. EC practice

In practice, two cases were singled out in which the European Commission considered the claims of participants about increasing efficiency:

The first case refers to the concentration of Swedish undertakings in the cardboard packaging market - *Korsnäs AB (Korsnäs) and AssiDomän Cartonboard Holding AB (AD Cartonboard)*. The concentration would create an unfavourable market structure - a duopoly, but the European Commission already approved the concentration in the first stage of the procedure,

[142] Atlantic Group - Our Brands, https://www.atlanticgrupa.com/en/products-and-distribution/our-brands/
[143] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), par. 85
[144] Ibid, 86

considering that it does not distort competition. Analysing the numerous criteria for the assessment of concentrations, the European Commission considered the statements and the evidence provided by the participants on the efficiency and benefits for consumers related to the reduction of costs, the expansion of the product range, research and development and the offer of higher quality products and approved the concentration because it considered that it does not create a dominant position and that there is no danger of unilateral effects of concentration, due to the countervailing power of the buyer and low barriers to market entry.[145]

The second case shows that the participants in the concentration failed to prove all the conditions for the application of the argument, so the European Commission did not accept the argument as a defence of the concentration. The merger was nevertheless conditionally approved after the participants agreed to implement certain corrective measures. The concentration referred to the connection of the Danish mining companies in the nickel and cobalt market - the company *Inco Limited* and the company *Falconbridge Limited*. The participants in the concentration pointed out numerous benefits that are reflected in the reduction of production costs and other costs, the increase in the volume of production, etc., which they substantiated with numerous internal studies. On the basis of those studies, the EC concluded that the efficiencies were quantified and that the participants proved that they were likely to be achieved, but at the same time considered that they could not be taken into account, since the participants did not prove that the efficiencies were specific to the proposed form of connection and to achieve benefits for consumers in this way. The EC indicated that the benefits can be realised in another way, e.g. by joint investment, so concentration was not necessary to increase efficiency. Then, there was little likelihood that the benefits would flow from the upstream market to the downstream market, where the parties to the concentration would have an almost monopoly position, to consumers, given that the benefits would be realised far away from them[146].

5.4.3. CPC practice

Although there is no express statutory authority for the CPC to consider allegations of efficiency, the parties to the concentration may present their allegations and thereby strengthen their case by indirect use of the economic efficiency argument. Namely, the Regulation on the content and manner of filing a concentration application stipulates that the applicant provides in

[145] Case No COMP/M.4057, *Korsnäs/AssiDomän Cartonboard*, European Commission, [2006] OJ C209/12, as referenced in Ezarchi, p. 483

[146] Case COMP M.4000, *Inco/Falconbridge*, European Commission, [2007] OJ L72/18, as referenced in Ibid, p. 481

the application a description and detailed explanation of the expected benefits that will arise from the implementation of the concentration from the point of view of consumer interests, such as: lowering product prices, increasing product quality, introducing innovations, and increasing and expanding the possibility of choosing products for the consumer[147]. To some extent, this gives the CPC a legal basis for considering the use of the argument of economic efficiency.

In the case of *Archer Daniels Midland Europe B.v. – Victoria Group*, the CPC approved the concentration after analysing the assessment criteria and found that the concentration does not distort competition, even though it strengthens the dominant position of the participants in the concentration. The Commission took into account the statements of the participants in the concentration that the planned investments in modernisation of production facilities will bring benefits for consumers in the form of lower prices and greater selection of products.

According to the information in the application, in 2020, the applicant achieved income from the sale of relevant products on the market of the Republic of Serbia, which represents a market share of /0-5/%. In the observed year, the target company, in this relevant market of products, had revenue which represents a market share of /50-60/%. The joint market share of participants in the concentration on the market of production and wholesale trade of soy products used in human nutrition in the Republic of Serbia in 2020 was /50-60/%. As the biggest competitors of participants in the concentration on this relevant product market in the Republic of Serbia in 2020, the following company 1) with a realised market share according to the value of sales of about /20-30/%, company 2) with a realised market share according to the value of sales are listed of about /5-10/% and company 3) with achieved market share according to sales value also of about /5-10/%[148].

Bearing in mind that the applicant did not own any production plants or registered subsidiaries in Serbia, as well as his limited presence in this relevant product market (/0-5/%) through the import of relevant products, the CPC concluded that the implementation of the concentrations lead to horizontal overlaps which would not significantly change the structure of the market and was therefore approved.

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147 Regulation on the content and manner of submitting notification on concentration “Official Gazette of the RS”, no. 5, January 25, 2016, https://kzk.gov.rs/kzk/wp-content/uploads/2016/11/01-Regulation-on-the-content-and-manner-of-submitting-notification-on-concentration-20161.pdf, Art. 2, acc. 31.03.2024

148 https://kzk.gov.rs/kzk/wp-content/uploads/2021/11/22-09-2021-604-archer-Sojaprotein.pdf, p. 6, acc. 31.03.2024

However, if there are no other rules and regulations that would more closely regulate the efficiency analysis the question arises whether it can be determined with certainty how the CPC would perform this analysis, i.e. whether there is legal certainty and predictability in relation to the CPC's decisions. Based on the existing practice and available data, such a conclusion cannot be made with certainty, which is why it seems justified to regulate this issue in more detail in the future[149].

5.5. Failing firm defence (FFD)

The failing firm defence is used as an argument for a concentration in which one of the participants is a company facing bankruptcy or liquidation due to financial difficulties and which could not survive on the market as a result, and on the basis of which the concentration can be approved despite the fact that its implementation significantly threatens competition. Competition will be threatened even if the concentration is not realised, because the disappearance of the failing firm from the market reduces the number of competitors and thereby endangers competition due to the deterioration of the market structure.

The assessment of concentrations whose participants refer to the FFD is approached very cautiously, because the evaluation of such concentrations is extremely complex and differs from the usual assessment when comparing market structures in a pre-merger situation and a post-merger situation. If undertakings refer to this argument, the evaluation of the concentration implies an analysis of the market structure that would arise after the implementation of the concentration and the market structure that would arise as a consequence of the non-implementation of the concentration - counterfactual, "but-for"[150] analysis. This further complicates the work of the competent body because it is necessary to take into account other possibilities, such as the termination of the company or its takeover by another undertaking, and compare them with the expected effects of the concentration.

LPC and EU Regulation 139/2004 do not regulate the use of the argument of the company in financial difficulties, but the EU Guidelines on horizontal mergers expressly provide conditions for its application, which are followed by the European Commission, but also, in the absence of domestic regulations for the assessment of horizontal mergers, by the CPC. During

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[149] Petronijevic, Stevanovic, Rasljanin, par. 4.2
[150] OECD, Failing Firm Defence 2009, DAF/COMP(2009)38, 2010, https://www.oecd.org/competition/mergers/45810821.pdf, p. 33, acc. 31.03.2024

many years of practice, these conditions were improved, but only in rare cases were concentrations approved.

As mentioned above, *BASF/Eurodiol/Pantochim* was one of the rare mergers approved on the grounds of the “failing firm defence”. The participants in the concentration first proved that the target companies in the near future will be forced to go bankrupt and exit the market, which "would likely cause supply shortages and price increases which would have hurt customers more than if the merger was allowed"[151]. Then, the participants proved that another purchase that would have less negative consequences for the competition was not possible, since none of the interested buyers was ready to take over the target companies and their assets. It was established that the company *BASF* is the only interested party, so the EC concluded that the second condition for the application of the argument of the company in difficulties was also met[152].

EC considered that the fulfilment of the first two conditions is not enough to rule out the possibility of third parties acquiring the assets of the target companies if they go bankrupt. That is why the third condition for the application of the argument of a failing firm has been determined - that the assets of a company will inevitably leave the market if the concentration is not implemented. Establishing this condition was necessary because *BASF* could not be expected to take over the entire market shares of *Eurodiol* and *Pantochim* if they left the market. The commission actually determined that the assets of the target companies would exit the market and that, as a result, market conditions would significantly deteriorate, to the detriment of consumers[153]. Based on everything, the Commission concluded that the market structure is less disturbed in the case of a concentration than in the case of its prohibition, so it was approved.

In Serbia, the CPC considered the application of the FFD in one case and on that occasion rejected its application, although it conditionally approved the concentration of undertakings in the concentration - *Deutsche Lufthansa AG - Austrian Airlines AG*. When deciding on the concentration, the CPC considered the allegations of the participants that Austrian Airlines had difficulties in doing business in recent years, taking into account the relatively small domestic market and fierce competition from other companies. According to those statements, events on the world market at the time of the global financial crisis contributed

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[151] Case COMP/M.2314 *BASF/Pantochim/Eurodiol* [2002] OJ L132/45, para 144-148 as cited in Ezarchi, p. 488
[152] Ibid
[153] Ibid, para. 148-152

to the target company falling into a difficult financial situation. On the other hand, the company Lufthansa intended for Austrian Airlines to become a significantly more efficient airline after the completion of the concentration which would ultimately produce consumer welfare in terms of lower price and better services[154].

Taking into account the statements of the participants in the concentration, the CPC did not accept as an argument for the defence of the concentration based on the FFD, considering that there is no evidence that the company Lufthansa, as the acquirer of control, was the only interested bidder for the purchase of the target company[155]. The determination of this condition refers to the absence of the possibility of another purchase that would have less negative consequences for the competition, which according to the decision of the CPC was not proven. Also, sufficient evidence was not presented that the assets of the target company will inevitably exit the market if the concentration is not implemented, which is a necessary condition for the application of FFD[156].

It can therefore be concluded that the CPC is guided by the practice that exists in the EU and that it adheres to the conditions established in the Guidelines for the assessment of horizontal concentrations, although this is not explicitly stated in this case. It would therefore be very useful if the CPC would determine the conditions for the application of the argument in special guidelines or instructions, in order to reduce legal uncertainty of if, when and how it will apply the EU Guidelines.

5.6. *Atlantic - Strauss* merger proceedings in front of the CPC

Analysing the criteria for assessing the permissibility of a concentration on the market for the production and wholesale of traditional domestic roasted coffee, the CPC concluded that the applicant will strengthen its dominant position on the market after the concentration, because, in terms of Article 15 of the LPC, it can be considered a market participant who, due to its market power, can operate on the relevant market to a significant extent independently of actual or potential competitors, customers, suppliers or consumers.

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[154] CPC, *Deutsche Lufthansa AG - Austrian Airlines AG,* 6/0-02-114/09 https://kzk.gov.rs/kzk/wp-content/uploads/2011/08/lufthanza.pdf, p. 11
[155] Ibid
[156] Ibid

The assessment of the market power of the applicant after the concentration was carried out by the CPC according to the criteria from the LPC, which refer to relevant economic and other indicators, especially taking into account the structure of this relevant market and the market shares of the participants in the concentration and their, actual and potential, competitors and the economic and financial strength of the applicant. “The market concentration analysis of coffee processors in Serbia indicates the existence of the strong oligopoly according to all variables. Two large companies (Grand Prom and Strauss Adriatic) have a dominant market share.”[157] Analysing the other criteria for evaluating the permissibility of the concentration, apart from the structure of the market for the production and wholesale of traditional domestic roasted coffee and the market shares of the participants in the concentration, i.e. the assessment of the dominant position, the CPC concluded that the applicant has the possibility of independently abusing the acquired market power on this market in Serbia. “Roasted and ground (fresh, black, traditional, Turkish) coffee have had a market share of over 90% of the overall coffee consumption in Serbia for many decades.”[158]

The commission concluded that the applicant would have a leading role in the relevant market, where the remaining competitors have significantly lower market shares than the applicant and where no significant competitors would exert competitive pressure on it. The CPC assesses that the concentration does not represent a case where it is considered that there is no danger in terms of competition, especially taking into account the analysis performed in the procedure, which justifies the CPC’s concern for the consequent effects of the implementation of the concentration in question on this relevant market, as well as the previous violations (restrictive agreements violation in 2012) of competition committed by the *Atlantic Group*. The Commission also took into account that by the CPC's decision of December 29, 2023, it was established that the participants in the concentration, *Strauss and Atlantic Group*, concluded a restrictive agreement in the sense of Article 10, paragraph 2(1) of the LPC.

> “The Commission identified several phases in the cooperation and market conduct of Atlantic and Strauss. Specifically, the period spanning from 2012 to 2014 is characterised as a “price war” during which both parties consistently and intensively reduced prices to compete for customers. During the dawn raid, internal emails of

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[157] Daniela Nuseva, Kristina Mijic, Dejan Jaksic, The Performances Of Coffee Processors And Coffee Market In The Republic Of Serbia, Economics of Agriculture 1/2017, https://scindeks-clanci.ceon.rs/data/pdf/0352-3462/2017/0352-34621701307n.pdf, acc. 31.03.2024, p. 314

[158] Daniela Nuseva, Kristina Mijic, Dejan Jaksic, p. 309

> Atlantic revealed the strained relations with Strauss due to differing views on pricing policy. Internal emails of Strauss, on the other hand, showed examples of statements emphasising the desire to avoid a price war with Atlantic at all costs. From 2015 to 2021, there have been three price increases in the relevant market and the Commission has found evidence of collusion in the price increase in all three instances. Between these increases, the parties colluded to maintain price stability in the market… Commission observed a pattern of exchanging signals between the parties via the media. Initially, the responsible person from Atlantic publicly stated that a price increase was "inevitable" and shortly thereafter Strauss echoed a similar sentiment. Following these media announcements regarding the "inevitable" price increase, the actual increase in February 2017 was approximately 11.5%. According to the evidence uncovered, within a little over ten minutes of receiving the pricelist from Atlantic via email, Strauss' employee informed the group representative via WhatsApp that "Atlantic sent the pricelist so that we have 11.5 as agreed". Subsequently, Strauss Adriatic adjusted its own price list to mirror the price list of Atlantic."[159]

With this decision, the CPC imposed a measure of competition protection on the mentioned companies in the form of an obligation to pay a monetary amount of around EUR 2 million and prohibited the participants in the concentration from any future actions that could limit, impair or prevent competition.

The CPC states that the participants in the concentration were given a measure to protect competition due to the agreement and coordination of wholesale prices of ground coffee in Serbia, and that after the initiation of the procedure, which ended with the decision of December 29, 2023, it was established that the participants in the concentration changed their behaviour and that after the initiation of the procedure, the price changes were not implemented at the same time. In accordance with all of the above, when taking into account the previous market behaviour of the participants in the concentration on the wholesale market of traditional coffee, the CPC assesses that there is a concern regarding the behaviour of the applicant after the merger with the largest competitor.

The CPC concluded that its implementation could cause adverse effects on that market, given that it is a concentration whose participants are direct competitors - the realisation of the

[159] Karanovic Partners, The Biggest Coffee Producers in Serbia Face EUR 2 Million in Antitrust Fines and Are Granted Conditional Approval for their Merger, https://www.karanovicpartners.com/news/the-biggest-coffee-producers-in-serbia-face-eur-2-million-in-antitrust-fines-and-are-granted-conditional-approval-for-their-merger/ acc.31.03.2024

reported concentration will lead to a change in the structure of the relevant market and a significant increase in the applicant's market share. The CPC concluded that the concentration in question cannot be unconditionally approved because of these direct consequences that would arise from the implementation of the reported transaction.

The CPC assesses that this concentration is implemented in a highly concentrated duopoly market and that the concentration would significantly increase the degree of concentration in that market. The CPC considers that the applicant has the possibility to independently use the acquired market power on the market of the Republic of Serbia (e.g. to increase prices after the concentration), and therefore, there is a concern, taking into account the procedure that was conducted due to the violation of competition.

The CPC believed that the reported concentration could be approved only with the proposal of appropriate conditions in order to fulfil the assumptions of the permissibility of the concentration from Article 19 of the LPC. But, if we take a look at Article 19, which states that: "Concentrations of undertakings shall be permitted, unless they significantly restrict, distort or prevent competition in the market of the Republic of Serbia or its part, and especially if that restriction, distortion or prevention is the result of creating or strengthening of a dominant position."[160] One cannot but wonder how this Article could be reconciled with the established facts of the case and why this concentration wasn't prohibited, but the CPC accepted *Atlantic's* proposed measures and believes that a, multiple competition offender, will act in good faith and conduct all the reasonable actions in order to fulfil the conditional obligations with consumer welfare and market competition in mind, I for one doubt it.

> "The conditions proposed by the applicant, and accepted by the Serbian competition authority, can be divided into two groups – the structural measure and the behavioral measures. The structural measure consists in the applicant's obligation to divest a coffee producing plant of the combined entity, including the factory and machines necessary for the production. As for the behavioral measures, they consist in various reporting obligations by the applicant, including information about its sales policies and utilization of its production capacities. Another notable behavioral measure is that the applicant, within a period of five years, does not enter into new agreements for the production of private label coffees. Phase II merger proceedings are rare in Serbia – there is one such proceeding every couple of years or so. What this case shows is that the authority would open a Phase II probe only if there is a significant overlap between the

[160] LPC, No. 51/2009 and 95/2013, Art. 19

> parties on the Serbian market, in particular if their combined market share exceeds 40%. The case also shows that the Serbian competition authority is reluctant to block a merger, even if the combined market share of the parties is around 80%, as was the case here."[161]

6. Conclusion

The analysis of the LPC solution (together with the accompanying Regulations) showed that Serbia lacks certain rules on concentration control, which could regulate in detail some outstanding challenges related to concentration control. By passing by-laws (regulations, guidelines or instructions), which would regulate open issues, concentrations of undertakings could be facilitated, legal certainty increased and competition protection improved, so it can be said that the absence of these special rules represents a lack of concentration control in Serbia.

Their non-enactment can be explained to a certain extent by the fact that concentration control was relatively recently introduced into the legal system of Serbia. But, in almost 20 years of its existence, the Commission has so far formed a certain practice that would allow it to regulate the area of concentration control in more detail, especially if one takes into account the fact that in the EU there are numerous rules that regulate this area. Very little has been done in the past 20 years in terms of strengthening the LPC through by-laws, and the possibility of adopting new regulations, i.e. building on the existing regulations on concentration control, must be seriously considered.

Although the existing rules on concentration control are sufficient to ensure competition protection, the mentioned shortcomings may introduce uncertainty regarding their application and reduce predictability in the work of the Commission for the Protection of Competition. Research so far shows that the regulations on concentration control could be improved in certain areas, so in this regard, certain issues can be singled out that should be paid attention to in future changes to the regulations, when they are implemented.

In Serbian law, there are no clear rules that would establish criteria for assessing concentrations and that would regulate certain issues in the control procedure in more detail. No

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[161] Dragan Gajin, MERGER CONTROL IN SERBIA: COMBINATION OF COFFEE PRODUCERS CLEARED CONDITIONALLY, https://www.gajin.rs/2024/04/merger-control-in-serbia-combination-of-coffee-producers-cleared-conditionally/

special guidelines have been established for the evaluation of concentrations, and since the regulations of the Republic of Serbia do not distinguish between horizontal and non-horizontal concentrations, the same evaluation criteria are consistently applied to all types of concentrations, which seems inappropriate. It is necessary to differentiate between certain rules for evaluating horizontal and non-horizontal concentrations, because the mechanisms by which these types of concentrations affect the creation of non-competitive market structures and thus competition are also different. Different assessment criteria should be applied to horizontal concentrations, because they are the most significant cause of creating non-competitive market structures.

Not only that, but there is a risk that due to the lack of strict and precise guidelines, the CPC is left with too much room to arbitrate, which opens the possibility for corruption and political influence. A simple analysis shows that state-owned companies are practically exempt from competition infringement procedures before the CPC and that their mergers are rubber stamp approved[162]. Also, it would prevent different business interest-groups in exerting their influence to swing the CPC's (lack of) decisions their way, because "the ACs independence is not entirely achieved. Members of ACs Council are elected by the National Assembly in a process that includes aggressive lobbying. Furthermore, current and former members did not possess adequate experience in the field of Antitrust compliance. The same stands for the know – how in economy and econometrics. However, the last version of the Law introduces a mandatory election of two members with the academic / business background in economics."[163]

The problem of determining the relevant market has not been completely properly solved, so it can still be a problem for the CPC and for market undertakings. The law does not foresee the (mandatory) application of the presumed monopolist test and only briefly regulates, i.e. lists the criteria for determining the relevant market. Therefore, it would be desirable to have an obligation to apply the presumed monopolist test, which would increase legal certainty and predictability of the actions of the CPC.

[162] Dušan Popovic, Mirko Vasiljevic, FOURTH PROBLEM: DOUBTS AS TO THE PRIVILEGED TREATMENT OF UNDERTAKINGS WITH STATE-OWNED CAPITAL, https://link.springer.com/content/pdf/10.1017/S1566752912000079.pdf, acc. 31.03.2024, p. 14

[163] Dragan Loncar, Sinisa Milosevic, ANTITRUST POLICY IN SERBIA: REGULATORY FRAMEWORK AND ENFORCEMENT MECHANISM, JCEBI, Vol.2 (2015) No.2,https://journals.ukim.mk/index.php/jeccf/article/view/109/54, acc. 31.03.2024, p. 89

The thresholds for notification of concentrations have been increased and changed, but they are still not optimal, thus burdening the CPC, hindering the connection of undertakings and creating certain obstacles for domestic and foreign investments in the Serbian market, as well as, due to the lack of the domestic doctrine , foreign concentrations that have no impact on the domestic market and competition. This brings to the forefront as a topic the fees and charges that the applicants pay for the issuance of the decision of the CPC upon application of the concentration, which are very high. They could be lower, so that they cover only the actual costs of the merger examination procedure and the issuance of a decision on the permissibility of the concentration, rather than seeing them as a "merger tax" and as an additional source of income for the Commission[164].

"The introduction of competition law and policy must pursue broader objectives such as economic and political liberalisation, economic development and improving the quality of life"[165] .In terms of competition culture and competition advocacy "it can be concluded that very little has been done. In the whole period of the past years, marked by the introduction of new legislation to protect competition, the construction of relevant institutions, initiation of procedures and decision making in all jurisdictions and the establishment of case law, activities of public advocacy of competition were not in focus and were without a significant impact on the public awareness raising about the importance of competition and the development of a culture of competition."[166]

Something I did not deal with in this paper is the accountability of the CPC, the fact that the annual reports are 2-3 years late to be presented and adopted by the National Assembly.

Taking into account all the mentioned circumstances, the control of concentrations is not fully regulated in a way that allows the control of concentrations not to prevent at the same time those concentrations that increase economic efficiency and that do not distort competition. This means that the existing solutions could affect concentrations on the market that have favourable effects on social well-being and to a certain extent on the economic development of Serbia, especially if it is taken into account that concentrations are the basic mechanisms of restructuring the real sector of the economy of the Republic of Serbia, as well as having still a lot of state

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164 Dragan Loncar, Sinisa Milosevic, p. 89

165 Dragan Penezic, Zoran Soljaga, Chapter 12: Building an efficient system of protection of competition in Serbia on its path to the EU, p. 274 in (ed) Deborah Healey, Michael Jacobs, and Rhonda L. Smith, Research Handbook on Methods and Models of Competition Law, Edward Elgar Publishing, 2020

166 Protic, Lazarevic, p. 60

monopolies that need to be broken up and where the CPC will have a crucial role in controlling those processes.

Therefore, certain recommendations, i.e. guidelines could be considered to improve the regulations on concentration control and to improve the practice of the Commission for the Protection of Competition, with the aim of establishing an appropriate legal framework within which market participants can make business decisions, which would create for them incentives to network in the market. This would fully establish a moderate regime of concentration control, appropriate to the needs of the economy of the Republic of Serbia, and at the same time would not reduce the protection of competition on the market, because solutions are proposed that are expedient and do not affect the degree of protection provided by the existing rules.

Specific changes would even improve that protection (eg, in connection with determining the relevant market or more detailed regulation of certain issues), because legal certainty would be increased and the space for possible errors and abuses in the control procedure would be narrowed. With the adoption of the LPC, significant progress was made in the protection of competition and its provisions on concentration control represent a good basis for the protection of competition, but by adopting special guidelines or instructions, that protection could be improved, the work of the Commission for the Protection of Competition could be relieved from unnecessary procedures for concentration applications, especially those concentrations that have almost no impact on the market of the Republic of Serbia, unnecessary barriers for market participants would be removed and their connection would be facilitated.

In this way, the Republic of Serbia could continue, that is, complete the process of approaching the EU legal system in the area of competition law, that is, concentration control. Although the Law accepted the most important principles on which the control of concentrations with a European dimension is based, certain useful solutions that exist in EU law still need to be included.

The LPC and accompanying Regulations are, in principle, aligned with the EU Regulation on Concentrations, but further integration is needed to ensure a stable implementation system. Chapter 8 of the accession negotiations between the EU and Serbia, which deals with competition, has not yet been opened, and I think it is a crucial moment to use those processes to solve the long list of challenges that the entire competition protection system deals with[167].

Alignment with EU law is therefore very important, but it seems that it is more important than the alignment of regulations itself to ensure and protect competition on the market by applying those regulations, because the protection of competition is one of the most important conditions for the development of the market economy in the country, i.e. one of the ways to establish an efficient market that will enable achieving economic efficiency and increasing social well-being. Therefore, the recommendations for harmonisation with EU law should be understood beyond the framework of politics, but primarily as recommendations for improving the system of protection and promotion of competition on the market of the Republic of Serbia.

[167] Screening report Serbia Chapter 8 – Competition Policy, WP ENLARGEMENT + COUNTRIES NEGOTIATING ACCESSION TO EU MD 205/15, https://neighbourhood-enlargement.ec.europa.eu/system/files/2018-12/screening_report_ch_8_serbia.pdf acc. 31.03.2024

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