

Commission for protection of competition pursuant to article 28 paragraph (3), in relation to article 19 paragraph (1) point 2) of the Law on Protection of Competition (Official Gazette of the Republic of Macedonia no. 145/10, 136/11, 41/14 and 53/16) on its session held on 31.08.2016 adopted the following

Guidelines on determining concentrations cases in which the Commission for Protection of Competition, usually will determine that are in line with the Law on Protection of Competition¹

I. INTRODUCTION

1. This Guidelines determine concentrations cases in which the Commission for Protection of Competition (Commission), usually will determine that certain concentrations, that have been notified, shall not have as its effect significant impediment of effective competition on the market or in a substantial part of it, and that the concentration is compliant with the provisions of the Law on Protection of Competition.

2. The Commission's experience gained in applying the Law on Protection of Competition (Official Gazette of the Republic of Macedonia no 04/05, 70/06 and 22/07) as well as the Law on Protection of Competition (Official Gazette of the Republic of Macedonia no. 145/10, 136/11, 41/14 and 53/16) has shown that certain categories of notified concentrations are normally cleared without having raised any substantive doubts that are in line with the provisions of the Law on Protection of Competition (The Law), provided that there were no special circumstances.

3. The purpose of these Guidelines is a closer determination of the conditions that must be met during the evaluation of notified concentrations so that the Commission will usually enact a decision establishing that the notified

¹ This guidelines are harmonized with the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2013/C 366/04)

concentration is in line with the provisions of the Law. If the necessary conditions established in point 6 or 7 of these Guidelines are met and if there are no specific circumstances, the Commission adopts a decision establishing that the concentration is in accordance with the Law (decision approving the concentration), within 25 working days from the day of receipt of the notification in accordance with Article 19 paragraph (1) point 2) of the Law².

4. However, even in cases where the conditions from point 6 or 7 of these Guidelines are met, the Commission may make a decision to initiate proceedings in accordance with the Law in relation to any concentration for which a notification has been submitted, especially if protective measures can be applied or the exceptions established in points 9 to 18 of these Guidelines.

5. By following the procedure outlined in this Guidelines, the Commission aims to make merger control more focused and effective

Eligible concentrations

6. The Commission will normally determine that the following categories of concentrations are in line with the Law³:

(a) two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the territory of the Republic of Macedonia; such cases occur where:

² The form and content of the notification are determined in the Decree on the form and content of the concentration notification and the necessary documentation that is submitted together with the notification ("Official Gazette of the Republic of Macedonia" no. 44/12).

³ The following categories apply alternatively, not cumulatively, i.e. fulfilling all the criteria of any of the categories mentioned in point 6 (a), (b), (c) or (d) or point 7 will in principle make a notified inline with the Lawe. A transaction may fulfil the criteria of more than one of the categories described in this Guidelines. Accordingly, notifying parties may submit a notification of a transaction on the basis of more than one of the categories described in this Guidelines.

- (i) the turnover of the joint venture and/or the turnover of the contributed activities⁴ is less than EUR 1 million in the territory of the Republic of Macedonia at the time of notification⁵; and
 - (ii) the total value of assets transferred to the joint venture is less than EUR 1 million in the territory of the Republic of Macedonia at the time of notification⁶;
- (b) two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographic market⁷, or in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged⁸;
- (c) two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and both of the following conditions are fulfilled:
- (i) the combined market share of all the parties to the concentration that are engaged in business activities in the same product and geographic market⁹ (horizontal relationships) is less than 20 %¹⁰;

⁴ The expression ‘and/or’ refers to the variety of situations covered; for example:

___ in the case of a joint acquisition of a target company, the turnover to be taken into account is the turnover of this target (the joint venture),

___ in the case of the creation of a joint venture to which the parent companies contribute their activities, the turnover to be taken into account is that of the contributed activities,

___ in the case of entry of a new controlling party into an existing joint venture, the turnover of the joint venture and the turnover of the activities contributed by the new parent company (if any) must be taken into account

⁵ The turnover of the joint venture can be determined according to the most recent audited accounts of the parent companies, or the joint venture itself, depending upon the availability of separate accounts for the resources combined in the joint venture.

⁶ The total value of assets of the joint venture can be determined according to the last prepared and approved balance sheet of each parent company. The term ‘assets’ includes: (i) all tangible and intangible assets that will be transferred to the joint venture (examples of tangible assets include production plants, wholesale or retail outlets, and inventory of goods; examples of intangible assets include intellectual property, goodwill, etc.), and (ii) any amount of credit or any obligations of the joint venture which any parent company of the joint venture has agreed to extend or guarantee. Where the assets transferred generate turnover at the time of notification, then neither the value of the assets nor that of the annual turnover may exceed EUR 1 million

⁷ Guidelines on defining relevant market for the purposes of the Law on Protection of Competition

⁸ A vertical relationship normally presupposes that the product or service of the undertaking active in the upstream market in question constitutes an important input to the product or service of the undertaking active in the downstream market: see the Commission’s Guidelines on the assessment of vertical and conglomerate concentrations

⁹ See footnote 7

¹⁰ The thresholds for horizontal and vertical relationships apply to any plausible alternative product and geographic market definition that may have to be considered in a given case. It is important that the underlying market definitions set out in the notification are precise enough to justify the assessment that these thresholds are not met,

(ii) the individual or combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (vertical relationships)¹¹ are less than 30 %¹²;

(d) a party is to acquire sole control of an undertaking over which it already has joint control.

7. The Commission may, usually, also determine that the concentration is in line with the Law where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, and both of the following conditions are fulfilled:

(i) the combined market share of all the parties to the concentration that are in a horizontal relationship is less than 50 %; and

(ii) the increment (delta) of the Herfindahl-Hirschman Index (HHI) resulting from the concentration is below 150¹³¹⁴

8. For the purpose of the application of points 6(b), 5(c) and 7 in the case of an acquisition of joint control outside the field of activity of the joint venture, relationships that exist only between the undertakings acquiring joint control are not considered horizontal or vertical relationships for the purpose of this Guidelines. Those relationships may however give rise to coordination as referred to in Article 17(5) of the Law; such situations are dealt with in point 15 of this Notice.

Safeguards and exclusions

9. In assessing whether a concentration falls into one of the categories referred to in points 6 and 7, the Commission will ensure that all relevant circumstances

and that all plausible alternative market definitions that may have to be considered are mentioned (including geographic markets narrower than national).

¹¹ See footnote 8

¹² See footnote 10

¹³ The HHI is calculated by summing the squares of the individual market shares of all the firms in the market: see Commission Guidelines on the assessment of horizontal concentrations. However, in order to calculate the HHI delta resulting from the concentration, it is sufficient to subtract from the square of the sum of the market shares of the parties to the concentration (in other words, the square of the merged entity's market share post-concentration) the sum of the squares of the parties' individual market shares (since the market shares of all other competitors in the market remain unchanged and thus do not influence the result of the equation). In other words, the HHI delta can be calculated on the basis of only the market shares of the parties to the concentration, without a need to know the market shares of any other competitors in the market.

¹⁴ See footnote 10

are established with sufficient clarity. Given that market definitions are likely to be a key element in this assessment, the parties should provide information on all plausible alternative market definitions. Notifying parties are responsible for describing all alternative relevant product and geographic markets on which the notified concentration could have an impact and for providing data and information relating to the definition of such markets. The Commission retains the discretion to take the ultimate decision on market definition, basing its decision on an analysis of the facts of the case. Where it is difficult to define the relevant markets or to determine the parties' market shares, the Commission will not adopt decision according to this Guidelines. In addition, to the extent that concentrations involve novel legal issues of a general interest, the Commission will not adopt decision according to this Guidelines.

10. While it can normally be assumed that concentrations falling into the categories referred to in points 6 and 7 will not raise serious doubts as to their compatibility with the Law, there may nonetheless be certain situations which require initiation of procedure.

11. The following are indicative examples of types of cases in which Commission may not enact decision according to this Guidelines

12. It is unlikely that the Commission will enact a decision in accordance with these Guidelines for concentrations if any of the special circumstances listed in the Commission Guidelines on the assessment of horizontal concentrations exist/are present. This includes instances where the market is already concentrated, where the proposed concentration would eliminate an important competitive force, where the proposed concentration would combine two important innovators, or where there are indications that the proposed concentration would allow the merging parties to hinder the expansion of their competitors.

13. The same may also apply where it is not possible to determine the parties' precise market shares. This is often the case when the parties operate in new or little developed markets.

14. Certain types of concentrations may increase the parties' market power by combining technological, financial or other resources, even if the parties to the concentration do not operate in the same market. Concentrations where at least two parties to the concentration are present in closely related neighbouring

markets¹⁵ may also be unsuitable for enactment of decision according to these Guidelines, in particular, where one or more of the parties to the concentration holds individually a market share of 30 % or more in any product market in which there is no horizontal or vertical relationship between the parties but which is a neighbouring market to a market where another party is active¹⁶.

15. Furthermore, the Commission may not enact decision according to these Guidelines for concentrations where an issue of coordination as referred to in Article 17(5) of the Law arises.

16. Change from joint to sole control may in exceptional cases require initiation of procedure. A particular competition concern could arise in circumstances where a former joint venture is integrated into the group or network of its remaining single controlling shareholder, whereby the disciplining constraints exercised by the potentially diverging incentives of the different controlling shareholders are removed and its strategic market position could be strengthened. For example, in a scenario in which undertaking A and undertaking B jointly control a joint venture C, a concentration pursuant to which A acquires sole control of C may give rise to competition concerns in circumstances in which C is a direct competitor of A, where C and A will hold a substantial combined market position and where this removes a degree of independence previously held by C. In cases where such scenarios require a closer analysis, those cases are inadequate for enactment of decisions according to these Guidelines.

17. Commission will not enact decision according to these Guidelines for concentrations that Commission have not reviewed the prior acquisition of joint control of the joint venture in question.

18. In the case of concentrations described in point 8, the Commission will decide on a case-by-case basis whether, under the particular circumstances of the case at hand, the increase in market concentration level indicated by the HHI delta is such that the case should be, or not dealt under these Guidelines.

II. PROCEDURAL PROVISIONS

¹⁵ Product markets are closely related neighbouring markets when the products are complementary to each other or when they belong to a range of products that is generally purchased by the same set of customers for the same end use.

¹⁶ See Commission Guidelines on assessment of vertical and conglomerate concentrations

Pre-notification contacts

20. The Commission has found pre-notification contacts between notifying parties and the Commission on a voluntary basis beneficial even in seemingly unproblematic cases. Cases (merger notifications) that fall within these Guidelines may raise complex issues, for instance of market definition (see point 9), which should preferably be resolved prior to notification. Such contacts allow the Commission and the notifying parties to determine the precise amount of information to be provided in a notification. Notifying parties are particularly encouraged to engage in pre-notification contacts in the situation described in point 7. Under the Law, notifying parties are entitled to notify a concentration at any time, provided the notification is complete. The possibility to engage in pre-notification contacts is a service offered by the Commission to notifying parties on a voluntary basis in order to prepare the formal merger review procedure. As such, while not mandatory, pre-notification contacts can be extremely valuable to both the notifying parties and the Commission in determining the precise amount of information required in a notification and, in the majority of cases, will result in a significant reduction of the information required.

21. Nonetheless, pre-notification contacts, may be less useful in cases falling under point 6(b) of these Guidelines, that is in cases where there are no markets on which the concentration can have an effect¹⁷. since the parties are not engaged in business activities in the same product and geographic market, or in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged.

22. The determination of the absence of markets on which the concentration can have an effect needs to be undertaken in accordance with point 9 of this Guidelines. It therefore remains the responsibility of the notifying parties to submit all the information necessary for the Commission to conclude that the proposed concentration does not give rise to any market on which the concentration can have an effect. The Commission will not enact decision under these Guidelines on the basis of point 6(b) if it is difficult to conclude that the

¹⁷ For definition of markets on which the concentration can have an effect see definition in paragraph (9) point 10 of the Guidelines on how to submit and complete a concentration notification

proposed concentration does not give rise to any markets on which the concentration can have an effect.