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CAN BE CONSIDERED AS ONE CONCENTRATION

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Publisher: JPM Janković Popović Mitić  
Delta House, 8a Vladimira Popovića street  
[www.jpm.rs](http://www.jpm.rs)

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Design and prepress: JPM Janković Popović Mitić  
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Having in mind the ever-increasing number of complex transactions on the market and that the Law on the Protection of Competition of RS (the „Law“) does not explicitly prescribes whether the scope of one concentration can be several undertakings that are not considered interrelated undertakings, on August 17, 2022, the Commission for the Protection of Competition (the „Commission“) published “The Position regarding the application of Article 17, paragraph 1 of the Law”.

There are several ways for the implementation of concentration between undertakings (merger of two or more undertakings, acquisition of control by one or more undertakings, and joint ventures). Having this in mind, the Law makes it indisputable that the scope of acquisition in one concentration can be several undertakings that were previously interrelated. Although the Law does not prohibit, the legal gap in domestic legislation leaves room for different interpretations, when undertakings that are independent i.e., that have not been previously interrelated, are in the scope of acquisition.

By this Position, the Commission clarifies the conditions under which independent undertakings could be the subject of a single concentration, referring to the Council Regulation (EC) No 139/2004 of January 20, 2004, on the control of concentrations between undertakings (the „EU Merger Regulation“) and to the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004, on the control of concentrations between undertakings (2008/C 95/01) (the „EU Jurisdictional Notice“).

Under Recital 20 of the EU Merger Regulation, it is stated that it is expedient that closely connected transactions should be treated as one concentration, if they are linked by a certain condition or take the form of a series of transactions in securities, which are realized in a short period of time.

The EU Jurisdictional Notice provides special rules regarding those conditions. When acting in such cases, it is necessary to identify the economic reality underlying the transactions i.e., to determine whether the transactions are mutually dependent i.e., connected in such a way that one without the other would not have been executed. Pursuant to the EU Jurisdictional Notice, even if they are interrelated by a condition, it is also necessary that control is eventually acquired by the same undertaking or same group of undertakings, in order for the transactions to be considered a single concentration.


However, if the transactions are not interrelated and not connected by condition, and if the undertakings in the concentration would continue to carry out one transaction, independently of the other, then each transaction should be considered solely, as separate concentrations.

Conditionality is usually shown if the transactions are linked de jure i.e., if their agreements are mutually conditional.

But, in response to the disputed question in the Law, if de facto conditionality can be proved, it will be sufficient to regard the transactions as a single concentration.

Furthermore, by this Position, the Commission recognizes two scenarios that have arisen in the past decisional practice - parallel acquisition and serial acquisition, in which several transactions are considered as one concentration, as the most common situations.

Parallel acquisition of control is when, one undertaking (A) acquires control of two or more undertakings (B and C) in parallel from separate sellers on condition that A is not obliged to buy either, and neither the seller is obliged to sell, unless both transactions proceed. Another scenario is a serial acquisition of control i.e., undertaking A acquires control of undertaking B conditional on B's prior or simultaneous acquisition of undertaking C.

A row of pencils is shown against a dark background. Most of the pencils are dark grey or black. One pencil in the center is bright yellow, standing out from the rest. The pencils are arranged in a slightly curved line, with their tips pointing upwards. The yellow pencil is taller than the others, suggesting it is the focus or the 'odd one out' in the group.

In accordance with all of the above, the Commission, when acting, assesses in each case whether several transactions can be considered as one concentration, even if they are not inter-related de jure, and all this, in order to facilitate business in conditions made difficult by the pandemic of the COVID-19 virus and to an ever-increasing number of complex transactions on the market.