Guidelines under scrutiny horizontal mergers and the interplay between law and practice in Macedonia

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Abstract

The adoption of the new Guidelines on Assessment of Horizontal Mergers (GHM)[1] in 2016 is a significant development in the field of competition law of Macedonia and as such requires a legal analysis of its relevance and application. The distinctive feature of the GHM is that they reduce the number of undertakings from the relevant market or remove at least one independent seller with a consequent increase in market concentration. These guidelines serve to demonstrate that the assessment of mergers needs to go beyond the definition of the relevant market and the calculation of market shares. However, being soft law by their nature, the GHM's provide wide discretion to the Commission for Protection of Competition (CPC) in determining how mergers will be assessed in practice. With this in mind, this research is structured in three parts: the first part provides for short overview of the functions, powers and duties of the CPC in light of GHM's. The second part discusses the decisions of CPC regarding horizontal mergers in 2016 in correlation with GHM and the third part focuses mainly on the application of GHM and the differences between the European Union (EU) and Macedonian GHM's. In light of these developments, the application of competition law in Macedonia is facing significant challenges and also shows incoherence between the legislation adopted and its application in practice.

Keywords: competition law, guidelines, horizontal mergers, European union, Macedonia, market shares, market concentrations.

Introduction

The EU Annual Progress Reports (Progress Report 2015 and 2016) do not note a remarkable progress in the area of Competition Law of Macedonia. However, there is improvement in the adoption of soft law in the form of secondary legislation, including among others notices and guidelines within mergers (Progress Report 2015, Chapter 8, pg.38). In practice, nevertheless, their application is diminutive and this is observed by the decisions issued by the CPC. In fact, the guidelines were merely mentioned in only four decisions (out of more than 30 decisions), and only in one decision they were (inadequately) applied.[2] Two of these decisions were based on articles 28 and 20 of the Law for Protection of Competition (LPC) and three of them are based on articles 28 and 19 of the same law, out of which four are acquisitions and one is a Joint

[1] The abbreviation GHM will interchangeably apply to the term 'Guidelines', and at times will refer to the European Union (EU) GHM as the 'EU GHM' or the Macedonian GHM as MK GHM.

[2] The five cases are: CPC Dec. up.no.08-01, Acquisition between Teva Pharmaceutical and Alergen plc; CPC Dec. up.no:08-6, Acquisition between AD Implek and Niska Mlekara; CPC Dec up no.08-28 Joint Ventures between Nestle and Pai Partner SAS; CPC Dec up.no.08-39, Acquisition between Cajna National and Agrochemical Corporation and Syngenta AG; and the last one CPC Dec, up no. 08-40, An acquisition between Orbiko and Everet International. All are shown illustratively in the table number 3.

Venture. Two decisions (Teva Pharmaceutical and AD Implek) are more relevant and will be addressed in more detail in this paper. For the remaining three, an overview is provided in table 3 (see below). In the *first decision*, except for procedural law, the relevant substantive laws will be examined and explained, (which are applied to all decisions in general terms). The second decision is considered substantial for this research, because it is the only one where the guidelines apply. This will be used as an opportunity to analyze the application of GHM's in these decisions (Kolasky, W. J., & Dick, A. R. 2003. Their application reaches the HHI factor without taking into the consideration whether the created effects are coordinative or non-coordinative (Gruda, S., Bushati, B., & Dibra, A. 2012). This paper ends with a general comparison between the European and the national GHM and concluding remarks that provide for recommendations and suggestions on the role of CPC and the GHM's.

The Commission for protection of competition (CPC)

The CPC is the highest and the only (besides the Government and the Assembly) authority responsible for protection of Competition in Macedonia. Based on the Law on Protection of Competition (LPC), this institution is accountable to the Macedonian Parliament, and formally is an operationally independent authority (Article 26 of LPC). CPC may approve mergers with or without conditions or even prohibit them. In terms of implementation, based on its official web site(http://www.kzk.gov.mk/eng/.), the CPC has functioned relatively well during 2013-2015, with a total of 18 decisions adopted on cartels and abuses of dominant position with fines amounting to EUR 4.5 million. In the European Commission's annual report for 2015, the weak administrative capacity of CPC is underlined jointly with the insufficient budget.[3] The latest EU Progress Report of 2016, notes that the *ex ante* control (Cosnita-Langlais, A., & Tropeano, J. P. (2014); Kocmut, M., & Jur, M. (2005) of mergers and some other issues related to other pillars. This report points out that there is no progress in the field of competition law in general. Comparing national legislation with EU Competition rules and their enforcement, the report states that there is a huge difference between the two, while the first is relatively advanced on one hand, the second needs significant improvement (EU Progress Report 2016, pg. 39).

The application of competition rules has the purpose to establish a market where all undertakings are equal and *perform* under equal conditions and their position on the market should be measured according to the quality of the goods and services they offer (Motta, M. (2004). The legislative framework of Mergers in Republic of Macedonia (RM) is broadly and mainly aligned with Articles 101 restrictive agreements (Rousseva, E. 2010) and Article 102 abuse of dominant position (Kalén, A.2007) of the TFEU and with the corresponding provisions of the Stabilization and Association Agreement (SAA) and certainly the ECMR. Mergers in Macedonia are regulated under the third pillar within Law for protection of Competition (LPC) in Macedonia (Guidelines to the LPC). The EC Merger Regulation is the basis for

[3] With regard to the administrative capacity, the Annual Reports of the European Union point out that human resources of the CPC seem sufficient, but the level of expertise should be improved. The translation of the web site related to the laws and decisions from Macedonian language into Albanian and English needs to be well timed and effectively applied.

creation, adoption and development of mergers in Macedonia, which has developed as a separate section only under the LPC (Lindsay, A., & Berridge, A. 2012). This research will be confined within LPC, although other laws as well regulate this field (such as Company Law, Law on Obligations, Law on Takeovers of Joint Stock Companies). Chapter three of the LPC, articles 12-25, cover mergers, definitions, participants, conditions for notifying the concentration, obligation for notifications and so on. Article 12 of LPC defines concentrations as an umbrella covering mergers, acquisitions and joint ventures. Basically a merger includes two or more separate companies merging into a new entity. In the same line with EU legislation, three types of mergers exist in Macedonia: horizontal, vertical and conglomerates (Kolasky, W. J. 2001).[4] *Horizontal effects* take place where a merger occurs between actual or potential competitors in the same product and geographic market and at the same level being that of production or distribution cycle.[5] Horizontal mergers have a very important role, in particular internationally (Jones, A., & Sufrin, B. (2016) but as such they will not be covered in this research (Jashari, A., & Memeti, N. 2012). Competition law is concerned with the possibility that a merger will lead to a market being less competitive in the future resulting in adverse effects to consumers.[6] As noted by professor Richard Wish, *'Merger mania'* comes frequently within the corporate world, and Macedonia is not an exception in this regard. (Whish, R., & Bailey, D. (2015). For example in neighboring Albania, it is argued that Mergers and acquisitions are a widespread phenomenon today worldwide and domestically and especially in times of crises (Gruda, S., Bushati, B., & Dibra, A. 2012; Kovacic, W. E. 2001; See also: Gal, M. S. 2009). However, even in such circumstances, the following question may be searched: what are the reasons for undertakings to merge? The motivations are many and of course most of them are supposed to be beneficial, but there are as well other reasons, which give a drive for the competent authority to *bark*[7] on them and practice the duty to control them as well (Levy, N. 2003). It's worth mentioning that even though the abuse of dominant position is treated very carefully, mergers should be controlled (Rose, V., & Roth, P. M.) *ex ante* preventively not to create a dominant position and certainly *ex post* as well. (Davies, S., & Lyons, B. (2008). The very starting point is the definition *of dominant position*, which will bring us to the main awareness why competition should be protected and therefore mergers must be controlled. Art. 10 LPC states:

'*An undertaking shall have a dominant position on the relevant market, if as a potential seller or purchaser of certain type of goods has no competitors on the relevant market, or compared to its competitors, it has a leading position on the relevant market, especially in relation to the market share and position and/or - the financial power and/or - the access to sources of supply or the market and/or - the connection with other undertakings and/or - the legal or factual barriers to entry for other undertakings on the market and/or - the capability to dictate the market conditions, taking into consideration its supply or demand, and/or - the capability to*

[4] See Case T-210/01 General Electric v Commission, ECLI:EU:C:2001:210.

[5] Comparing to the vertical mergers they happen between firms that operate at different levels of the market while the conglomerates, which are neither horizontal nor vertical and considered a mixture of horizontal and vertical and sometimes considered genuinely not "dangerous" in the market.

[6] Another detail very important is that horizontal mergers are very similar to the horizontal agreements between undertakings (Article 101 TFEU) and only a thin line exists between them. However, this paper will be narrowed and deal only with horizontal mergers.

[7] One of the main duties of European Commission being a 'watchdog' transferred to CPC.

exclude other competitors from the market by turning towards other undertakings.
The same provision requires for a market share of a certain undertaking, which shall amount to more than 40%, unless the undertaking proves otherwise (Article 10 (2) of the LPC). In particular it shall be presumed that two or more legally independent undertakings have a joint dominant position on a relevant market if they act or participate jointly on the relevant market (Article 10 (3) of the LPC). If the dominance *per se* is not prohibited why the mergers should be notified (George, K., & Jacquemin, A. 1992) In this regard, one may go back to the famous case of *Gencor*, when the court addressed both situations, including *ex ante* and *ex post* control (Whish, R., & Bailey, D. 2015; Practical Handbook 'Competition Policy in the digital age', 2015). The basic function of the Commission for Protection of Competition is the control of the application of the provisions stipulated in the LPC, to monitor and analyze the conditions on the market to the extent necessary for the development of free and efficient competition, to conduct procedures and make decisions according to the provisions of this Law (Becker, G. S. 1958). Mergers are the only pillar under which undertakings shall take notification under consideration, and the competent authorities have the power to assess them. CPC through its control of mergers would prevent them from taking place if proof exists that these companies deprive consumers of their benefits by significantly increasing their market power (Ardic, O. P., Ibrahim, J., & Mylenko, N. 2011). Two very important notions should be mentioned here: market power and market definition (discussed in the text below). In general, based on the EU practice from the European Commission the vast majority of notifications pass the test (Bulmer, S. 1994; Laprevote, F. Ch. (2014). So far, based on the decisions, the same applies to CPC.

The CPC Decisions related to Horizontal Mergers of 2016

In controlling mergers, (Vallindas, G. 2006) the CPC may act in two ways, upon a notification of mergers or on its own initiative *ex officio*. The CPC may approve mergers with or without conditions or prohibit them based on the applicable laws. In 2016, CPC issued decisions regarding mergers in more than 30 cases and in 25 of them, *article 28* and *article 19 or 20* of the LPC and the guidelines of 2016 were applied.[8] Only 5 cases were released based on LPC and GHM.[9] The GHM,[10] unfortunately, have

[8] These guidelines are the latest being adopted by CPC but in no case the least important. They were adopted in the middle of the summer 2016 and their usage from the CPC comparing to the other guidelines (taking that as a factor) is huge. As mentioned above in more than 30 decisions issued in 2016, in 25, CPC applied the following guidelines related to a simplified procedure for treatment of certain concentration. Their main purpose stands to set out the conditions under which the CPC will adopt a short form decision declaring a notified concentration is compatible with the Law on Protecting the Competition. If the necessary conditions set forth at point 6 and 7 of these guidelines are met and provided there are no special circumstances, CPC will adopt a short clearance decision within 25 working days from the date of notification pursuant to Article 19 para. (1) point 2 of the LPC.

[9] The five cases are enumerated in fn.4 and are provided in table 3. For the sake of reflection, the decisions analyzed in this paper, seen comparatively are not considered complicated to deal with comparing to the ones coming from the digital world, see: Parcu, P. L., & Stasi, M. L. (2017). Emerging Trends in US Antitrust and EU Competition law-entrance Annual Conference. Rivista Italiana di Antitrust/Italian Antitrust Review, 3(2). In the digital era, it also seems important to investigate whether the current thresholds, which are based on turnover, are still able to capture all the cases that would need to be examined.

[10] The other new guidelines adopted in 2015 and 2016 are not mentioned by CPC in RM in 2016. See as well: The guidelines named "The guidelines for possible modifications and undertaken commitment regarding

only been applied in one decision and discussed in four others (See Table 3, pg.23). Not all of them will be analyzed in detail, as they are similar (not to say identical) in terms of their substance and procedure as well as structure. The first decision is considered in more detail and provides for an analysis of the provisions that CPC applies in such circumstances based on the competence endowed to CPC pursuant to Article 28 of LPC. All decisions explicitly state that they shall control the application of the provisions of this law and the bylaws adopted and monitor and analyze the conditions on the market for achievement of free and efficient competition (Article 28 (1) of the LPC).

Starting with the first decision, which is an acquisition between two companies hence Teva and Alergen. Pursuant to Article 28 and Article 20 LPC and following the notification from Teva Pharmaceutical, Israel, CPC on the session held on 01.02.2016, adopted the decision by which Teva expresses the intention to gain control over the global generic business of Alergen, including the branches in the USA and other international branches. Although it falls under the Article 20 of the LPC, CPC issued a decision based on which this concentration "*will not result in significant prevention, restriction or distortion of effective competition in the market or its significant part, particularly as a result of the creation or strengthening the dominant position of the participants*. The justification provided: the participants, the legal form of the concentration, the legal basis, the annual total amount, the relevant market, concerning the product and the geographic market, the market shares and the assessment of the concentration.[11] Pursuant to art 15 para.1, LPC Teva sent a notification for concentration having the intention to acquire control over Alergen Plc. *This article clearly states that the participants are obliged to notify the concentration to the Commission for Protection of Competition prior to* its implementation and following the procedural order of the merger agreement, the acquisition of the controlling interest in the nominal capital of the undertaking (Article 15 (1) of LPC). Only Teva is under the duty to provide for notification, because this concentration evaluated from the standpoint of the legal form is an acquisition (Article 12 (1) of the LPC stating the forms of mergers). Based on article 12 of the LPC, a concentration shall be deemed to arise where a change of control on a lasting basis results from the acquisition of direct or indirect control of the whole or parts of one or more other companies by one or more persons already controlling at least one company, or one or more companies, whether by purchase of securities or assets, by means of an contract/agreement or in other manner stipulated by law (Article 12 (1) of LPC). Established on the main *contract of sales,* which serves as the legal basis for this concentration, Teva's will is to buy the entire generic business of Alregan covering all its international branches. According to the information given, the *worldwide aggregate turnover* evaluated, based on article 14, in 2014 was 16.697 million euros, whereas in Macedonia, based on the decision issued from the CPC the aggregate turnover was considered confidential. On the other hand, for Alergen's aggregate turnover, no data is provided, either for the Macedonian or the worldwide market. What CPC provides

the notified concentration accepted by CPC pursuant to LPC. The guidelines are adopted in accordance with the Commission Notice on remedies acceptable under the Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) no. 802/2004 official journal c 267, 22.10.2008, P1-27.

[11] All these elements are used for the other four cases so will not be repeated and the first case will serve as a row model. As well their data can be found below in table no.3, pg. 23.

for (and should be emphasized) is that the aggregate turnover of undertakings participants, generated by sale of goods and/or services on the world market, exceeds the amounts of 10 million euros in MK Denars according to the exchange rate applicable on the day of compiling the annual account. Determined by the business year preceding the concentration and provided that at least one participant it has been registered in the Republic of Macedonia. The aggregate turnover of all undertakings participants, generated by sale of goods and/or services in the Republic of Macedonia, exceed 2.5 million euro in MK Denar, again, according to the exchange rate valid on the day of compiling the annual account, realized in the business year preceding the concentration. This is another reason why based on Article 14 (1) of the LPC, this concentration should be notified to the Commission for Protection of Competition. Now turning to the irresistible matter of 'market definition' (Ivaldi, M., & Verboven, F. 2005) the undertaking notifying the concentration identifies the potential product markets pursuant to the approaches developed by CPC,[12] the European Commission (ECOMM) and the competent national authorities from the region regarding the pharmaceutical sector (LaMattina, J. L. 2011; W. S., & Scherer, F. M. 2013). In such circumstances, the participant emphasis that regarding the final pharmaceutical products, EU, traditionally, as a basis for defining the product market, used the Anatomical Classification Guidelines developed by the European Association for research in the Pharmaceutical Market (see their web-site at: www.ephmra.org) supported by them and Intercontinental Medical Statistics. The importance of these guidelines is that they comprise four stages based on which the medical products are classified. We will confine our self within the third standard used frequently by the European Commission as well, based on which the medical products are classified on the *intended purpose*. This is what the participant considers the starting point in research and definition of the product market with which CPC agrees. *The participant* makes a distinction between the original and the derivative products, the medicals with and without prescriptions, all these belonging to different product market and accepted as well by CPC. Teva, the company submitting the notification, identifies the products market as follows: a) ATC level sorts the medical products based on their intended usage, b) original and derivative medicals are one single common market and c) the medical with and without medical prescriptions are two different product market, but it is not indispensable to detach them because the result will not make a difference when the effect of concentration will be evaluated. All of these three suggestions were accepted by CPC as adequate. The national market is considered to be the geographic market based on the participant's suggestion and this was accepted by CPC (Hedlund, E. 2007). The market share levels and the assessment of the concentration are shown in table nr.1:

Table no.1

	Share 2013	Share 2014	½ 2015
Common share A04A	/	/	***40-50%***
Teva share	/	/	40-50%
Alergen Share	/	/	0.00%

[12] Two previous decisions are referred to here: Dec. no. 08-44, 4.03.2011, Valeant Pharmaceutical International Inc/Pharma Swiss SA and Dec. no. 07-402 /6, 28.11.2008, Teva Pharmaceutical Industries Ltd/ BARR

Common share J01F	/	/	*30-40%*
Teva share	/	/	30-40%
Alergen Share	/	/	0-5%
Common share L01B	/	/	*10-20%*
Teva share	/	/	10-20%
Alergen Share	/	/	0.00%
Common share L01C	/	/	***50-60%***
Teva share	/	/	20-30%
Alergen Share	/		20-30%
Common share L01X	/	/	*0-5%*
Teva share	/	/	0-5%
Alergen Share	/	/	0-5%
Common share L02B	/	/	*30-40%*
Teva share	/	/	30-40%
Alergen Share	/	/	0.00%
Common share M05B	/	/	*30-40%*
Teva share	/	/	30-40%
Alergen Share	/	/	0.00%

The table provides that the *Common market shares* of 'L01C' is 50-60% and in 'A04A' is 40-50% which undoubtedly indicates that the share exceeds the 40% prescribed by law. The party notifying the concentration demonstrates that this happens only in two categories in which two important factor exist that make the distortion of competition impossible: *the number of competitors in this market is vast and is comprised of very important* pharmacies, worldwide leaders; and second, it should be taken into consideration that the market shares from one year are a weak indication for demonstrating market power (Eckbo, B. E. 1983). This derives from the fact that bids are occasional, which is a sign that the market shares of the participants are very changeable and unpredictable. The notifying party provides that it may be reasonably accepted if that would bring negative effect to competition in the Macedonian part or substantial part of it, in compliance with Art 17(2) LPC, bases this conclusion on what was stated above and its argument. CPC issues a conclusion based on Article 17, paragraphs 2, 3, 4 and the guidelines on assessment of horizontal mergers. Based on Article 17, even though this concentration is subject to the provision of the same, *is examined as in compliance with it and does not significantly impede or distort effective competition on the market or in a substantial part of it, in specific as a result of the creation of a dominant position or strengthening the same.* In making an appraisal of the concentration, CPC takes into account several factors. They include: the need to maintain and develop effective competition on the market or in a substantial part of it, especially in terms of the structure of all markets concerned and the actual or potential competition from undertakings located in and outside of RM; the market position of the undertakings concerned and their economic and financial power, the supply and alternatives available to suppliers and users, as well as their access to

the supplies or markets, any legal or other barriers to entry on and exit from the market, the supply and demand (Säcker, F. J. (2008), trends for the relevant goods and/or services, the interest of the consumers and the technological and economic development, provided this is benefits the consumers and the concentration does not form an obstacle to competition as provided in Article 17 (4) of the LPC. The second criterion of the CPC is based on the guidelines on assessment of horizontal mergers (GHM). The guidelines are mentioned, however, there is no reference that a certain provision has been applied.

The second decision is the only one where the GHM applied, in particular the HHI index including delta change. The participants in this acquisition are: AD IMPLEK from Beograd, Serbia and NISHKA MLEKARA, Nish, Serbia. In 16.10.2015 AD IMPLEK from Beograd, Serbia sent a notification for acquiring a complete control over NISHKA MLEKARA, Nish, Serbia. This decision makes it clear that it is an acquisition pursuant to Article 12 (1) of the LPC. The CPC issued this decision based on article 28 and 19 LPC. The CPC examines the notification the day of receiving it, pursuant to Article 15 (as discussed in the first decision) and if it finds that the concentration *shall not have as its effect significant impediment of effective competition* on the market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, it shall adopt a decision declaring that the concentration is in compliance with Article 19 (1) of the LPC.

The decision covers all the elements analyzed in the first decision and separately referred to in table no.3 (see below), whereas table no. 2 provides for the market shares concerning the 2nd decision:

Table no. 2, The product market: MILK

Participants in concentrations	MARKET SHARES IN 2014		
	Milk UHT	Fresh pasteurized milk	Milk with taste
AD IMPLEK Beograd Mlekara AD Bitola	50-60%	70-80%	70-80%
Niska mlekara Nish	0-5%	/	/
Total	50-60%	70-80%	70-80%

Table no. 2,The product market: YOGURT

Participants in concentrations	MARKET SHARES IN 2014	
	PLAIN YOGURT	YOUGURT WITH SUPPLEMENTS (fruits, grain)
AD IMPLEK Beograd Mlekara AD Bitola	40-50%	10-20%
Niska mlekara Nish	0-5%	/
Total	40-50%	10-20%

The EU Guidelines (GHM) are considered important within the EU and this is one of the main reasons why they were adopted in Macedonia.[13] The decisions of CPC based on the MK GHM must take into account any significant impediment to effective competition likely to be caused by a concentration. The first element coming out of such a competitive harm is the creation or the strengthening of a dominant position concept. The MK GHM states that this definition is based on article 10 of LPC, explained above, however, the definition found in ECMR, is based on the ECJ Judgment.[14] The creation or strengthening of a dominant position held by a single firm as a result of a merger has been the most common basis for finding that a concentration would result in a significant obstacle to effective competition. As a consequence, it is expected that most cases of incompatibility of a concentration with the common market will continue to be based upon a finding of dominance (Brouwer, M. T. 2008). That concept therefore provides an important indication as to the standard of competitive harm that is applicable when determining whether a concentration is likely to impede effective competition to a significant degree, and hence, as to the likelihood of intervention. To that effect, these guidelines learn from the EU GMH and preserve the guidance that can be drawn from previous practice and take full account of past case law of the Community Courts. Previous decisions are also an influential source of authority in Macedonia.

The MK GHM being an implicit reflection of EU GH Mergers and both being traditional in their view are decisive in stating that the assessment of mergers normally should entail the definition of the relevant markets and the competitive assessment of the merger. The main purpose of market definition (Crane, D. A. 2014)[15] is to identify in a systematic way the immediate competitive constraints facing the merged entity.

[13] Adopted in accordance with the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings, Official Journal C 31, 05.02.2004, p. 5-18, Official Journal C 31, 05.02.2004, p.5-18.

14 Case T-102/96, Gencor v Commission, ECLI:EU:T:1996:102, para. 200, Joined Cases C-68/94 and C-30/95, France and others v Commission, ECLI:EU:C:1994:68 and ECLI:EU:C:1995:30, para. 221.

[15] For comparative purposes, it is worth mentioning that even though this is changing rapidly in the US In recent years, traditional market definition has come under severe attack in the legal academy and in the antitrust agencies. In 2010, the Justice Department and the Federal Trade Commission (FTC) drastically revised their Horizontal Merger Guidelines (Horizontal Merger Guidelines or Guidelines) and demoted market definition from the critical starting point to merely one available tool in merger cases. Louis Kaplow, one of the best theorists of antitrust, published an article in the *Harvard Law Review* calling the entire enterprise of market definition questioning whether market definition should ever be required; Hovenkamp, H. (2012). Markets in merger analysis. *The Antitrust Bulletin*, *57*(4), 887-914; Fullerton, L. (2010). Introduction: 2010 Horizontal Merger Guidelines. *Antitrust*, *25*, 8.: Kaplow, L. (2010). Why (Ever) Define Markets?, 124 Harv. *L. Rev*, *437*, 444-47(arguing that the market definition process should be abandoned). Keyte, J. A., & Schwartz, K. B. (2010). Tally-Ho: Upp and the 2010 Horizontal Merger Guidelines. *Antitrust LJ*, *77*, 587.

Guidance on this issue can be found in the Notice on the definition of the relevant market.[16]

In Macedonia, the main purpose of these guidelines is to provide control and assistance as to how CPC should assesses concentrations when the undertakings concerned are actual or potential competitors on the same relevant market. Two important issues should be clarified here: first, the term concentration based on LPC as explained above, covers: mergers,[17] acquisitions and certain joint ventures and second, that these guidelines assess only the horizontal mergers, that is the competitors that are performing on the same market which in these guidelines are denoted as 'horizontal mergers' (Guidelines on the concept of concentration).[18] Two facts are worth mentioning: first, details of all possible applications of this approach cannot be provided by CPC and second only the approach described within GHM to the particular facts and circumstances of each case will be applied. One of the main duties of CPC is, through its control of mergers, prevent those that would be likely to deprive consumers (Nallari, R., & Griffith, B. 2013; (Cseres, K. J. 2016) of benefits by significantly increasing the market power undertakings. By '*increased market power* (Kaplow, L. 2016) is meant the ability of one or more firms (Waller, S. W. 1998) to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition. In this notice, the expression 'increased prices' is often used as to describe the various ways in which a merger may result in competitive harm. This expression should be understood to also cover situations where, for instance, prices are decreased less, or are less likely to decrease, than they otherwise would have without the merger and where prices are increased more, or are more likely to increase, than they otherwise would have without the merger (MK GHM, par. 7). Considering the *consumers* above, one must take into account that based on the GHM, both suppliers and buyers can have market power. However, for clarity, market power will usually refer here to a supplier's market power. In assessing the competitive effects of a merger, the main duty of CPC is to compare the competitive conditions that would result from the notified merger with the conditions that would have occurred without the merger. In most circumstances the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some situations, CPC may take into account future changes to the market that can reasonably be predicted. This is not at all an easy thing to accomplish and these occurrences are considered very sensible regarding the decisions of the European Commission and in particular the judgments of the Court of first Instance and the high Court of Justice.[19] Once more, CPC learned from their practice indirectly through the EU secondary

[16] '*Nasoki za definiranje na relevanten pazar za celite na zakonot za zastita na konkurencijata'*, issued pursuant to the *European Commission Notice on the definition of the relevant market for the purposes of Community competition law*, OJ C 372, 9.12.1997

[17] The term merger will be interchangeably used for the term concentration for the simple reason not to create confusion, since this is the practice within the EU, however it should be clearly noted that in RM only the term 'concentration' is used within CPC and LPC.

[18] 'Nasoki za konceptot Koncentracija' issued from CPC, in RM.

[19] See Commission Decision 98/526/EC, Hoffmann La Roche/Boehringer Mannheim, OJ

legislation and in particular the soft nature of the notices and guidelines. Specifically, it may take account of the likely entry or exit of firms if the merger did not take place when considering what constitutes the relevant comparison. (ECLI:EU:T:1999:102)[20] The MK GHM deal with market shares and concentration thresholds as well as with, the likelihood that a merger would have anti-competitive effects in the relevant markets, in the absence of countervailing factors, the likelihood that buyer power would act as a countervailing factor to an increase in market power resulting from the merger, the likelihood that entry would maintain effective competition in the relevant markets and so on.[21] CPC uses current market shares in its competitive analysis. However, current market shares may be adjusted to reflect reasonably certain future changes, for instance in the light of exit, entry or expansion. Post-merger market shares are calculated on the assumption that the post-merger combined market share of the merging parties is the sum of their pre-merger market shares. In such decisions CPC deals only with the market share and concentrations thresholds using the HHI index (Rhoades, S. A. 1993). In the light of these elements, CPC determines, pursuant to Article 17 LPC whether the merger would significantly impede effective competition. CPC initially explores all the market shares and concentration levels, which provide useful initial indications of the market structure and of the competitive importance of both the merging parties and their competitors. In order to measure concentration levels, CPC applies the Herfindahl-Hirschman Index (HHI) [22], which is calculated by summing the squares of the individual market shares of all the firms in the market.[23] The HHI ranges from close to zero (0) market to 10 000 (in the case of a pure monopoly).[24] While the absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger; the change *delta* is a useful alternative for the change in concentration directly brought about by the merger.[25] In

L 234, 21.8.1998, para. 14, point 13.

[20] Case T-102/96, Gencor v Commission, paras. 247-260.

[21] It is important to emphasize that these factors are not a 'checklist' to be mechanically applied in each and every case. Rather, the competitive analysis in a particular case will be based on an overall assessment of the foreseeable impact of the merger in the light of the relevant factors and conditions. Not all the elements will always be relevant to each and every horizontal merger, and it may not be necessary to analyze all the elements of a case in the same detail, see MK GHM para 11.

[22] CPC Dec. up. *no. 08-6*, An acquisition between AD IMPLEK Belgrade and Niska Mlekara, Nis, see: *www.kzk.gov.mk*. Comparatively HHI measure of market concentration, is used by the US horizontal merger guidelines as well, see also: Department of Justice and Federal Trade Commission, '*Horizontal merger guidelines' 1992.*

[23] For example, a market containing five firms with market shares of 40 %, 20 %, 15 %, 15 %, and 10 %, respectively, has an HHI of 2 550 ($40^2 + 20^2 + 15^2 + 15^2 + 10^2 = 2\,550$).

[24] The HHI gives proportionately greater weight to the market shares of the larger firms. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly. See EU GHM, para 16.

[25] The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, a merger of two firms with market shares of 30 % and 15

the decision we examined issued by CPC pursuant to the GHM, the global level of concentration of one market provides useful information for the competition environment. In order to measure the levels of concentration, CPC applies the index of HHI. The product market in this decision was defined in the category of '*milk*' and '*yogurt and the products based on yogurt'*. HHI, before the mergers took place *for milk* (relevant product) was 3762, 52, after the mergers took place became 3775,46. Delta, the change of index was 11.94. HHI before the mergers occurred regarding the *yogurt and the products based on yogurt* was 2253, 77, after the concentration took place was 2262, 61 with delta 8.84. Even in the circumstances where HHI after the mergers occurs is above 2000, it is not a case when concern should be raised because delta in this decision is below 150. In general, CPC is unlikely to identify horizontal competition concern in a market with a post-merger HHI below 1 000 and such markets normally do not require extensive analysis. However, even for mergers that meet these safety criteria, the GHM (para. 18) goes on to list six more conditions that might create an exception to the safe *harbor (*Derek, R. 2002) when[26]: one or more of the following aspects are present: (a) a merger involves a potential entrant or a recent entrant with a small market share; (b) one or more merging parties are important innovators in ways not reflected in market shares; (c) there are significant cross-shareholdings among the market participants; (d)one of the merging firms is a maverick firm with a high likelihood of disrupting coordinated conduct; (e)indications of past or ongoing coordination, or facilitating practices, are present; (f)one of the merging parties has a pre-merger market share of 50 % of more (Derek, R 2002).[27] Each of these HHI levels in combination with the relevant deltas, may be used only as an initial indicator of the absence of competition concerns (Brouwer, M. T. 2008).[28] However, they do not give rise to a presumption of either the existence or the absence of such concerns.[29] Regarding **GHM's,** it is very important to strongly emphasize that there are two main ways in which *horizontal mergers* may significantly impede effective competition, in particular by creating or strengthening a dominant position, and they are known by having non-coordinated effects and coordinated effects (Carlton, D. W. 2010).[30] Regarding the first one, (Horner, N. 2006)[31] a situation may arise where by eliminating % respectively would increase the HHI by 900 ($30 \times 15 \times 2 = 900$). The explanation for this technique is as follows: Before the merger, the market shares of the merging firms contribute to the HHI by their squares individually: $(a)^2 + (b)^2$. After the merger, the contribution is the square of their sum: $(a + b)^2$, which equals $(a)^2 + (b)^2 + 2ab$. The increase in the HHI is therefore represented by 2ab.

[26] CPC is also unlikely to identify horizontal competition fears in a merger with a post-merger HHI between 1 000 and 2 000 and a delta below 250, or a merger with a post-merger HHI above 2 000 and a delta below 150, except where special circumstances.

[27] Some of these exceptions relate to non-coordinated effects (e.g. if one of the firms had a pre-merger share in excess of 50%), but most are designed to deal with coordinated effects concerns (e.g. if one of the parties is a "maverick" player, if there is existing evidence of coordination, etc).

[28] The author argues that Herfindahl index is not a perfect instrument to measure enhanced chances of market coordination (collusion) due to merger.

[29] See as well the EU GHM, para 20, whereas the US GHM deem a merger resulting in an HHI greater than 1800, with an increase greater than 100 as presumptively result in anticompetitive effects, para. 1.51(c).

[30] Explicitly stating that the distinction between "non coordinated" and "coordinated" effects in the Guidelines is artificial and should be de-emphasized.

[31] In the literature mostly can be found as well by the name having unilateral effects.

important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behavior (non-coordinated effects). The most direct effect of the merger will be the loss of competition between the merging firms. The second type that may create coordinated effects (known as "conscious parallelism, Derek Ridyard 2002) occurs by changing the nature of competition in such a way that firms that previously were not coordinating their behavior, latter on are more likely to do so and will coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms, which were coordinating prior to the merger (coordinated effects) (Rill, J. F., Taladay, J. M., Norton, A., Oxenham, J., Matsushita, M., Montag, F., & Rosenfeld, A. 2004); (Jayaratne, J., & Ordever, J., (2013).[32] The European Commission assesses whether the changes brought about by the merger would result in any of these effects. Both instances mentioned above are relevant when assessing a particular transaction. CPC has never mentioned those in its decisions so far, therefore they will not be addressed here.

Table 3 below provides data for the main elements based on the five decision regarding mergers, related to the GHM issued by CPC in 2016.

Table no. 3

No. Dec.	***Participants***	***Competences based on LPC***	***LPC***	***The legal form***	***Annual total income***	***Product market***	***Geographic market***	***Market shares***	***Guidelines on horizontal mergers***	***Assessment based on Art.***
08-1	*Teva Pharmaceutical, Israel and Alergan Plc, Ireland*	*Art 28 LPC*	*Art 20*	*Acquisition Art 12, para 1. Item 2*	***Classified***	*Pharmaceutical/ medical products*	*National*	*See table no.1.*	***Mentioned NOT APPLIED***	*Article 17(2) (3)(4) LPC*
08-6	*AD IMPLEK BELGRAD in RM*	*Art 28 LPC*	*Art 19*	*Acquisition Art 12, para 1. Item 2*	***Classified***	*Milk, yogurt, sour cream, and cheese*	*National*	*See table nr.2*	***Applied the HMG and HHI index***	*Article 17(2) (3)(4) LPC*

[32] This study evaluates the treatment of coordinated effects in the regulatory framework of 12 jurisdiction based on their respective guidelines.

08-28	*NESTLE Switzerland and PAI Partners SAS, France*	*Art 28 LPC*	*Art 19*	*Joint Ventures* ***Art. 12 (4)***	***Classified***	*Frozen food:Ice cream: three types*	*National*	*2015: Nestle:0-10%, P&P: 5-10-%* *2015:*	***Mentioned NOT APPLIED***	*Article 17(2)(3)(4) LPC*
08-39	*China National Agrochemical corporation, China and Syngenta AG Switzerland*	*Art 28 LPC*	*Art 19*	*Acquisition Art 12, para 1. Item 2*	***Classified***	Selective herbicides, insecticides and Fungicides	*National*	*From min: 0-5%- max: 40-50 for all the product markets*	***Mentioned NOT APPLIED***	*Article 17(2)(3)(4) LPC*
08-40	*ORBIKO Croatia and EVERET International Slovenia*	*Art 28 LPC*	*Art 20*	*Acquisition Art 12, para 1. Item 2*	***Classified***	Decorative cosmetics for general consumption, hygiene products and products on face and body	*National*	*min:0-5%- max: 50-60 for all PM*	*Mentioned* ***NOT APPLIED***	*Article 17(2)(3)(4) LPC*

It forms part of a wider set of reforms, which cover both procedural and substantive issues, aimed at improving the quality of the economic analysis conducted by DG COMP in all areas of EC competition law enforcement (Lindsay, A., & Berridge, A. 2012). The practice shows that vast majority of the mergers are not challenged (See website: http://www.kzk.gov.mk/eng/). This is a reason why some authors characterize merger enforcement process as a regulatory system (Melamed, A. D. 1995). Mergers are ordinarily regarded to be efficient, an important feature of a dynamic market economy (Kaplow, L. 2016). In specific, Kaplow states that the role of market power in horizontal merger analysis appears *schizophrenic* in particular having in mind the lack of explicit justification in the guidelines themselves or in academic commentary for the guidelines' treatment of market power).

The difference between Macedonian and European Guidelines on Horizontal Mergers

In general, as mentioned in the text, the Macedonian guidelines are a reflection of EU HGM. However, based on the differences in terms of the market size, the principles of openness and efficiency, some minor changes can be reviewed briefly as follows:
1. Mergers in general, within the UE are regulated under secondary legislation (EEC) No 4064/89) without any references to them in the Treaties (primary). Contrarily, in RM they are regulated by the Law on protection of Competition adopted by the Macedonian Assembly. However, the guidelines and the notices regarding competition Law are adopted by the National authority protecting the competition (CPC) domestically while within the EU the HMG are adopted by the Council considered as secondary legislation with non binding nature.
2. The second difference is the scope of the market, since under the ECMR the European Commission has to appraise concentration whether or not they are compatible with the *common market or a substantial part of it*. For that purpose, the Commission must assess, whether or not a concentration would significantly impede effective competition in the European *common market or a substantial part of it*. In Macedonia, of course the CPC has to appraise concentrations within the national market or substantial part of it where at least one of the parties is registered within the territory.
3. The other difference between EU GHM and MK GHM is the fact that the first draws and elaborates on the Commission's developing experience with the appraisal of horizontal mergers (Regulation no.4064/89) mostly learning from the experience based on the case law of the European Courts. The European Commission's interpretation of the Merger Regulation as regards the appraisal of horizontal mergers is without prejudice to the interpretation, which may be given by the High Court of Justice or Court of first Instance. The Macedonian guidelines on the other hand are based on the European guidelines and indirectly apply the judgments of the European Courts. The relevant case law is not mentioned at all in the guidelines. The indirect transportation except considered as a difference from the EU GHM, also applies in an inaccurate and misguided manner. This, primarily due to the fact that Macedonia is still a candidate state and therefore the CJEU cases cannot be used as a legally binding source; and second, even EU proceedings are considered part of the *civil law tradition* (in theory) and their mixed nature of having higher rank of important case law cannot be reflected in Macedonia based on the civil legal tradition. Therefore, a main point of suggestion would be to explicitly state within the Macedonian guidelines what is transferred from European Guidelines and what comes from the EU courts judgments.
4. According to the well-established case law, very large market shares within the EU (around 50 %) may in themselves be evidence of the existence of a dominant market position (Ahlborn, C., & Evans, D. S. 2009). In RM this percentage is 40, which again may be considered very high having in mind the small market in RM (compared to the EU). What is common for both however is that smaller competitors may act as a sufficient constraining influence if, for example, they have the ability and incentive to increase their supplies. This of course doesn't mean that a merger involving a firm whose market share will remain below 50 % after the merger may not raise

competition concerns in view of other factors (Kollasky and Elliot 2003).

Conclusions

This paper addressed several difficulties related to the application of GHM in Macedonia as adopted in 2016 by discussing decisions adopted by CPC. There is reference to the GHM in five decisions and they are applied deficiently in only one. This is due to the weak institutional and human resource capacities of the CPC on the one hand and the soft non-binding nature of the guidelines on the other hand. The adoption of guidelines and notices even as soft law is nonetheless very important due to their advanced legal standing as for their technical and detailed nature and they should be effectively implemented in practice (Ridyard, D. 2002). Powerful National Competition Authority applying its own rules and regulations effectively and efficiently must be the cornerstone of every society in the field of competition law (Kokkoris, I. (2010). Fundamentally significant will be comprehensive implementation of the guidelines in practice in order harmonization effects to be achieved (Mario Monti 2004). Finally, this conclusion provides for the following recommendations and/or suggestions for the national authority or Commission for Protection of Competition:

1. The 'confidential data' of the merging parties while applying the GHM regarding the market shares should be replaced by the principle of transparency. (Ezrachi, A).
2. The CPC should provide for more detailed information about any infringements in their decisions, especially in the current context, where settlements are very common and public;
3. The CPC should be more engaging and communicate with other stakeholders like business and consumer community, giving them the opportunity to participate in this very important issue of public interest. (Shapiro, C. (2010).
4. Authors analyzing EU HM guidelines as well as US HM guidelines, (Sokol, D. D. 2017) consider very important for the analysis, the effects and the implementation of anti-competitive effects that the horizontal mergers might create (coordinated or non-coordinated). CPC doesn't even mention in its decisions these two very important types.[33]

Decades ago, the practical functioning of the EEC competition rules was a topic, considered to be very much in the air in the European Union. (Forrester, I., & Norall, C. 1984). In similar terms, this impression may appear in this paper, observing the work of the CPC regarding application of horizontal mergers. (Fullerton, L., & Alvarez, M. (2011).

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[33] Since HHI it is applied in 'Teva', the presupposition stands that the effects of unilateral concentration take place.

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