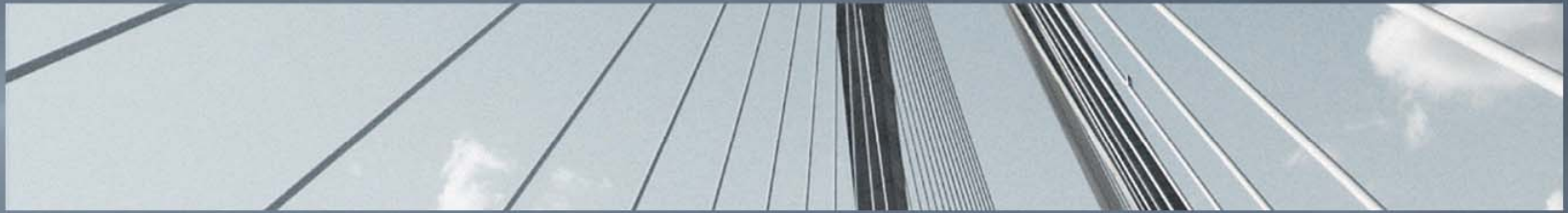


# SIEC vs. Dominance Test: Croatian and EU Perspective

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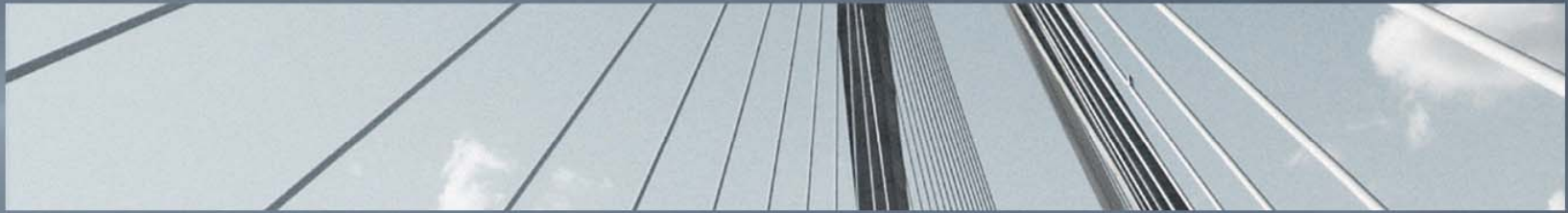
# Overview

- Essence of Dominance Test
- Why SIEC ?
- Meaning of SIEC
- Concept of Dominance
- Key issues concerning dominance (I)
- Key issues concerning dominance (II)
- Conclusions



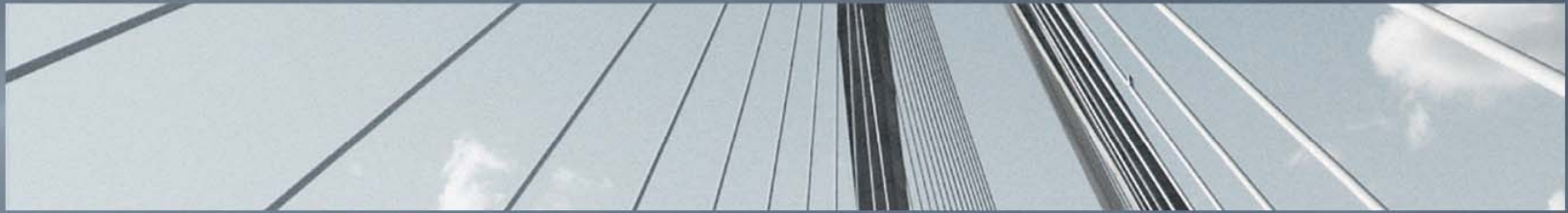
# Essence of Dominance Test

- “A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.” (EC Council Regulation 4064/89, Article 2/3)
- “There shall be prohibited the concentrations of undertakings that create a new, or strengthen a dominant position of one or more undertakings, individually or as a group, if they can significantly influence the prevention, restriction or distortion of competition, unless the participants in that particular concentration provide valid evidence that their concentration will lead to strengthening of competition in the market, bringing benefits that will prevail over negative effects produced by the creation or strengthening of their dominant position.” (Article 18 Croatian Competition Act 2003; Article 36/1 German Competition Act)
- Dominance requirement for prohibition
- Second limb invoking significance redundant in the practice



# Why SIEC ?

- Resolving the gap: Some transactions can impede effective competition even if dominance is not created or strengthened
- Preserving guidance from previous case law
- Solution: “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 common market.” (ECM Regulation 139/2004; Article 16 Croatian Competition Act 2009)




# Meaning of SIEC

- Dominance is a primary form of harm: “A significant impediment to effective competition generally results from the creation or strengthening of a dominant position.” (Recital 26, ECMR 139/2004)
- SIEC is a legal standard not a discretionary tool: “The notion of “significant impediment to effective competition” in Article 2(2) and (3) should be interpreted as extending, beyond concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behavior of undertaking which would not have a dominant position on the market concerned.” (Recital 25, ECMR 139/2004)


# Concept of Dominance

- “The concept of a dominant position is defined in a settled case-law as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.” (ECJ C-250/92 Gottrup-Klim vs. DLG)
- “An undertaking is [in Croatian law presumed to be] dominant where, as a supplier or purchaser of certain kinds of goods or commercial services on the relevant product and geographic market, it:
  1. has no competitors or is not exposed to any substantial competition, or
  2. has a paramount market position in relation to its competitors; for this purpose, account shall be taken in particular of its market share, its financial power, its access to supplies or markets, its links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the scope of application of this Act, its ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings.” (Article 19/2 German Competition Act; Article 12/2 Croatian Competition Act 2009)



# Key issues concerning dominance (I)

- Dominance either exists or not: The whole concept of dominance cannot be “rebutted”
- Presumption of dominance is typically market share based (example: Article 19/3 German Competition Act; Article 15/3 Croatian Competition Act 2003)
- Croatian Competition Act 2009 abolished market share based presumption of dominance



# Key issues concerning dominance (II)

- Croatian Competition Act 2009 (Article 12/2) contains a safe harbour: “Within the meaning of this Act an undertaking which holds more than 40% of the market share in the relevant market may hold a dominant position.”
- Collective dominance under Croatian Competition Act 2009 (Article 12/3): “Two or more legally independent undertakings may hold a joint dominant position if they act or perform with regard to their competitors and/or suppliers and/or consumers jointly on the relevant market.”
- Inconsistent with EU law





# Conclusions

- Substantive test is SIEC both in EU and Croatia
- Focus still should be on dominance as a primary form of harm
- SIEC should be interpreted in Croatia as a legal standard in line with EU law
- Future reform of competition law in Croatia should resolve inconsistencies and bring the law further in line with EU competition law

# Thank you!

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