PROTECTION OF COMPETITION

COMPETITION LAW

CURRENT SITUATION

The harmonization with EU competition rules in Serbia began with the adoption of the currently applicable Competition Law in 2009 (the "Law"). The Law set material and technical preconditions in place for the independent work of the Commission for the Protection of Competition (the "Commission"). The Law was amended in 2013, whereas the corresponding by-laws were adopted back in 2009 and 2010 and the new Regulation on the Content and Manner of the Submission of Merger Notifications ("**Merger Control Regulation**") in 2016.

During 2017 the Ministry of Trade, Tourism and Telecommunications, as the authorised proposer, and the Commission for the Protection of Competition began drafting the new competition law. We greatly appreciate the decision of the Ministry and the Commission to invite representatives of the business community in Serbia, including the FIC, to take part in the preparation of comments to the draft law. The adoption of the new law seems to be postponed to 2021.

In late 2019, the new members of the Commission's decision-making body, the Council, have been appointed, whereby Mr. Nebojša Perić was elected as the new president of the Commission. The other members of the Council are Mr. Čedomir Radojčić, Ms. Miroslava Đošić, Ms. Danijela Bokan, and Mr. Siniša Milošević PhD.

Given that the annual report of the Commission has not yet been published at the time of writing this text, the information below is presented in accordance with the information available on the Commission's official website. Out of 175 resolved concentrations, 171 were cleared in summary proceedings, 2 were cleared with conditions, while 1 proceeding was terminated. Therefore, still a vast majority of the Commission's decisions on merger control were adopted in summary proceedings. Short form merger notifications are primarily convenient for those mergers taking place abroad which have no impact or have insignificant impact on competition on the Serbian market, but which have historically taken up a significant portion of the Commission's activities. However, even though the Merger Control Regulation has introduced this form of merger notification, the Commission is also entitled to request submission of a full merger notification when the circumstances indicate that the conditions for allowing the merger have not been fulfilled, granting the Commission a considerable amount of discretion in this regard.

Information on the total number of cases in which the Commission has brought a decision, as well as the total number of opinions issued by the Commission are not available to the public as of yet, given that the annual report of the Commission has not yet been published at the time of writing this text. In the previous period, the Commission used to a greater extent some of the more complex authorizations at its disposal under the Law, which included significantly relying on dawn raids for the purpose of collecting evidence, while there is a noticeable decrease in use of certain other procedural powers such as the suspension of the antitrust proceeding upon accepting the commitments proposal by a party to the proceeding. The Commission imposed one penalty in a case in which a violation considering the conclusion of a restrictive agreement was established and it terminated one antitrust proceeding in 2019. In the one case of merger control that was subject to investigation, the Commission imposed behavioural measures as conditions for carrying out transaction.

The Commission's fees have not changed and they are still very high in the area of merger control.

COVID-19

The COVID-19 situation has impacted the Commission's activities, and especially its activities during the state of emergency in Republic of Serbia in the period between 15 March and 6 May 2020. Nevertheless, the Commission generally remained operational and responsive, although working remotely and/or with reduced capacities. Furthermore, the deadlines for issuance of Commission's decisions were suspended during the state of emergency, but the Commission continued to issue merger clearances and was generally open to parties for consultations.

During the state of emergency, the communication with the Commission was made via telephone, e-mail and regular mail. The Commission has accepted submissions in electronic form (save for merger notifications and files exceeding 100Mb which still had to be filed by hand). After the termination of the state of emergency, the Commission resumed its regular activities (e.g. by allowing the parties to review case files, holding meetings with the interested parties etc.).

The need for further digitalisation of the process and work of the Commission has become evident during the COVID-19 pandemic. The Commission should apply more resources in digitalisation which would ease and simplify their work in the given situation (e.g. holding meetings of the Council electronically, holding meetings with the parties electronically even when it is not possible to meet in person etc.).

POSITIVE DEVELOPMENTS

The scope of the Commission's activities in various fields of its competences, as well as its readiness to use complex mechanisms provided for by the Law, represent significant progress.

In the area of the harmonization of competition regulations with the EU standards and rules (alignment with the acquis), there has not been any significant progress with regards to previous year, given the fact that there was no adoption of several other by-laws, which should regulate in more detail the exemption of restrictive agreements in sectors such as the sale of spare parts for motor vehicles, insurance, transfer of technologies, and road, rail and inland waterway transport. The relevant bylaws addressing the exemptions of restrictive agreements in mentioned sectors were drafted back in 2017 – however, not even in 2019, none of these bylaws was adopted, probably due to intensified work on the adoption of the new competition law. The work on the new competition law is entering its finishing stages, with the FIC actively participating by providing extensive comments on the proposed draft. In the last publicly available version of the draft law, approx. 60% of Foreign Investors Council's comments were adopted either fully or partially.

In 2019, the results of sector inquiries in the retail sale of petroleum products and retail market for fast moving consumer goods, were published, while at the beginning of 2020, an analysis of the conditions of competition on the market of production and sale of sunflowers on the territory of the Republic of Serbia for the period 2016-2018 was published.

Concerning the meetings with parties, it is noticeable that the Commission improved its practice, and is open to meetings with the parties. Scheduling a meeting became pretty straightforward and without undue delays. Its efficiency in allowing the parties to review case files also increased and the Commission now usually awards access to case files promptly after the submission of the request.

In 2019, the Commission continued making progress in competition advocacy and public relations. The Commission regularly informs the public on its activities, and publishes a great majority of its decisions on its official website. However, it is noticeable that the Commission does not publish all the decisions in relevant areas or that it publishes them with significant delays, which does not contribute to either transparency or legal certainty. The Commission published on its website the Guidelines on Rights and Obligations of the Parties during Dawn Raids, as well as the Leniency Policy Leaflet. This positive development concerning competition advocacy is important as it contributes to the overall improvement of the current legal framework and to better understanding on the part of the general public and the media of competition rules and activities and the importance of the Commission's role.

Finally, it is commendable that the Commission increasingly implements advanced economic analyses in inquiries into competition infringements and complex mergers.

REMAINING ISSUES

The Commission publishes a majority of its decisions, in large part or to an extent, on its website (especially merger clearances), which is seen as progress. However, relevant court decisions issued in the process of control of the Commission's decisions are not publicly available at all since such decisions are not published on the Commission's website. The noticeable decrease of the number of opinions and individual exemptions published represents a step back given that this poses a significant obstacle to transparency and free access to information on key decisions of the Commission. Another shortcoming is the fact that the database of the Commission's decisions does not allow for advanced search (with more detailed criteria). Additionally, the Commission does not publish information on submitted initiatives, even after the decision on such initiatives have been made.

The proceedings before the Commission still do not sufficiently guarantee all procedural rights of the parties, such as the rights of the parties to have access to the case file and powers of the Commission in terms of the treatment of privileged communication. Certain cases in the Commission's practice indicate potential concerns with regards to

a privileged treatment of state companies in the proceedings before the Commission, which was also pointed out by the European Commission in its annual progress report for Serbia.

As for dawn raids, it seems that the Commission's decisions on dawn raids lack explanations of reasonable suspicion that evidence will be removed or altered, which is a statutory condition for carrying out dawn raids. Although the Commission has made serious efforts to improve the quality of economic analyses, it is necessary to consistently apply economic analyses in all proceedings before the Commission, taking into account the specifics of each particular case, and further work is needed in improving the quality of reasoning behind the Commission's decisions. In the previous period, it was evident that the Commission has issued contradictory decisions with regards to its previous practice in certain cases, without proper reasoning for doing so.

On the other hand, judges of the Administrative Court still lack comprehensive knowledge in the areas of competition law and economics to be able to interpret the Commission's arguments and decisions properly. Decisions of the Administrative Court often lack a detailed reasoning and consideration of the merits of the case, limiting their scope only to repeating the Commission's findings and consideration of the basic procedural issues, without analysing the arguments of the parties in dispute. This is a serious shortcoming, as it prevents a confrontation of opinions, a comprehensive and adequate control of the Commission's decisions, and the development of practices, while it also jeopardizes further appeal proceedings in cases when an extraordinary legal remedy is lodged. A detailed reasoning of the decisions of the Commission and the court, with a particular consideration of arguments and evidence presented by the parties to the proceedings, is of considerable importance for establishing judiciary oversight of the Commission's work. Otherwise, the Commission would be in the position to misuse its powers and independence.

As for the leniency programme, the Commission made efforts concerning the promotion and development of this institute with additional education of its employees. However, the use of this institute is hardly noticeable in practice and is still fairly underdeveloped.

Some legal uncertainty is also caused by a lack of clarity in the application of merger control rules to transactions that involve the acquisition of control over parts of undertakings, as well as the acquisition of control on a short-term basis. These problems often arise in the interpretation of the term "independent business unit", usually related to the acquisition of control over real estate, where the business community needs a clear and timely guidance from the Commission in respect of future practices, which still do not exist, i.e. are not published.

It is noticeable that the Commission has been applying a more complex methodology in analysing the individual exemption of restrictive agreements. While the need for a detailed examination of complex cases is clear, the speed of business developments and the fact that parties to proceedings cannot implement a restrictive agreement without the Commission's decision, it is essential that this practice should not adversely affect the efficiency of the Commission's decision-making process, in terms of avoiding any unjustified delay. In practice, the review period of individual exemption requests is often prolonged beyond the 60 days deadline as envisaged by the Competition Law (and in some cases even lasts for 4-5 months). This is causing practical problems to the business community when it comes to implementing agreements and business policies which require prior approval of the Commission. The economic reality requires swift action from all parties including the Commission. Additionally, the rather restrictive and formalistic approach of the Commission is more evident, as well as deviations from the comparative EU practice in the interpretation of certain procedural legal institutes, which is especially relevant in the procedures of individual exemptions. It is necessary, in the context of preparations for the new competition law, to examine the acceptability of the concept of individual exemption, which the European Union abolished several years ago. In the last version of the draft law, the legal institute of self-assessment was introduced, whereby the system of individual exemptions was also retained, which was the proposal of Foreign Investors Council.

Finally, the method of determining penalties is characterized by inconsistency and unpredictability in the application of the Law. For example, a substantial part of the existing guidelines is not in compliance with the law, the methodology for determining coefficients for individual factors in meting out the penalty is unclear, the Commission's decisions often do not include an overview of the established coefficients for individual factors nor a proper reasoning, and total revenues of the party to proceedings

is taken as a basis for the calculation of the fine, instead of calculating the fine based on revenues derived from only the relevant market where competition was infringed. In the last version of the draft law it was provided that penalties will be calculated based on the relevant turnover, i.e. turnover generated on the relevant market on which the competition infringement was made, which is a significant progress with regards to previous situation.

FIC RECOMMENDATIONS

- Adoption of the new Competition Law as soon as possible. (3)
- In order to enhance transparency and legal certainty, the Commission should issue clear guidelines and instructions containing the manner of application of certain provisions of the Law, with the involvement of interested parties in commenting proposed documents. (2)
- The fees in the Tariff Rules should be decreased to a reasonable sum, especially in the merger control area. (3)
- The Commission should publish issued opinions and decisions on individual exemptions, i.e. to altogether improve transparency and predictability of decisions. (1)
- The Commission should issue publications of the relevant definitions of product markets grouped by industries every six months, with the aim of harmonizing practice. (1)
- The Commission should invest more resources into further digitalisation of its processes in order to ensure undisrupted and efficient work in the COVID-19 pandemic. (3)
- Judges of the Administrative Court should complete advanced training in both competition law and economics. All rulings of said court should be made publicly available, and explained in detail in terms of the substantive issues of the Commission's decisions. (2)
- The Commission must allow legitimately interested third parties to comment on procedures which affect their business, for the complete and correct determination of facts. (2)
- The Commission's practice should be consistent with respect to all market players. Considering the penal nature of decisions in the area of competition protection and the significant powers of the Commission, predictability as well as consistency and legal certainty are of crucial importance for all market players. (2)

STATE AID

CURRENT SITUATION

The legal framework regulating the granting of state aid in the Republic of Serbia consists of the Law on State Aid Control – newly adopted in October 2019 ("Law"), and its bylaws.

The latest publicly available edition of the Annual Report of the Commission for State Aid Control (CSAC) is for 2018. The total amount of state aid in Serbia was EUR 818 million, a 3% increase compared with 2017. Serbia's state aid expenditure as a percentage of GDP was 1.9%, which was a decrease against 2017, when this percentage was 2.2%. By comparison, in 2018 EU Member States spent EUR 120.9 billion, or 0.76% of the EU's GDP, on state aid.

In 2018, 28% of the total state aid went to the agricultural sector and the remaining 72% to industry and services, a small decrease compared with 2017, when this percentage was 73%. The largest chunk of the total aid to industry and services was horizontal aid (34.4%), followed by sectoral and regional aid, with 9.1% and 28%, respectively.

The share of subsidies in the total state aid continued to increase in 2018, reaching 69.6% (compared to 66.8% in 2017), while tax incentives accounted for 27.6%, guarantees 1.3% and soft loans 1.2%.

COVID-19

The COVID-19 pandemic was fought on the State aid front too, through financial measures of the Government aimed at helping the affected businesses stay afloat. This also led to an increased activity of the CSAC in the first half of 2020.

Following in the footsteps of the European Commission, the CSAC issued a notice on the application of the Law in the context of COVID-19 in March 2020. The notice aimed to clarify what is necessary for certain measures to constitute State aid and under which conditions they are likely to be compatible with the rules. The rolling out of the Government's package of economic measures in April 2020 was accompanied by two new regulations setting out the rules and criteria for compatibility of the COVID-19 related State aid. Applying the rules laid out in these regulations, the CSAC assessed the compatibility of the economic measures in May 2020, reaching a conclusion that certain measures were either compatible with the Law (direct grants, favourable loans and state guarantees) or need to be adjusted to ensure compatibility (fiscal measures).

POSITIVE DEVELOPMENTS

The new Law which aims to regulate this area in more detail, align local rules with the EU acquis and remove some of the main concerns the European Commission previously flagged its Progress Reports.

The Law entered into force in January 2020 when the wholly new CSAC commenced its mandate, replacing the old regulator which was an arm of the Ministry of Finance. Under the Law, the CSAC - consisting of the president and Council - functions as an independent body, formed by and accountable to the Parliament. This change removed one of the European Commission's main concerns about the previous framework that brought into question the old CSAC's independence. In the upcoming period, the new CSAC should work further to increase and strengthen its capacities.

The new CSAC has a duty to publish its decisions on its website and to maintain a registry of granted aid, including a separate de minimis aid registry. These rules, aimed at achieving a higher level of transparency of the CSAC's work and thus legal certainty too, seem to be yielding results - since its constitution in January 2020 the CSAC is more prudent with the publication of notices and decisions. Aid registries are yet to be set up, however.

REMAINING ISSUES

In its previous Progress Reports (the newest, 2020 one is not available during the preparation of this text), the European Commission continuously pointed out that a number of existing state aid schemes in Serbia, including fiscal ones, still need to be aligned with the EU acquis. The same holds true for the harmful practice of exempting companies in the process of privatization from the rules for granting state aid. At the normative level, Serbia has not yet adopted regional state aid maps.

The trend of a lack of aid for research and development remains notable, whereas environmental protection state aid continues to record a small growth (10.2% in 2018, com-

pared to 8.3% in 2017), which is a positive sign but nevertheless leaves plenty of room for improvement.

Individual state aid (direct granting of state aid to individual enterprises) is principally a significant challenge for the Serbian budget and market competition, in particular in the case of companies that cannot successfully compete on the market, even with such aid. Such allocation of state aid has a tendency of putting other market participants in an unequal position and also leads to imprudent spending of limited budgetary resources (i.e., taxpayers' contributions).

In 2018, the CSAC adopted 70 decisions on permissibility of state aid out of which 14 were cases of subsequent control. The new CSAC has, in the first half of 2020, had only one (out of 17) case of subsequent control. The CSAC is yet to order the return of granted state aid – although this is not entirely atypical for a relatively young authority in the pre-EU accession period, it could also bring the independence and integrity of the CSAC into question.

State aid policy must become predictable and consistent. Clear plans and programmes, based on which companies and the public can be informed about the said policy, have to be adopted. Attracting investments in the underdeveloped regions, as well as pinpointing areas to strengthen competitiveness, are essential starting points for achieving the clear and cost-effective granting of state aid.

With the new Law in place, the CSAC also needs to prioritize its advocacy activities and increasing the stake holders' awareness of the relevant rules. This should further enable the inclusion of both state aid beneficiaries and the general public in drafting state aid policy, so that specific, predictable, and effective solutions can be reached jointly.

FIC RECOMMENDATIONS

- Increasing and strengthening personnel capacities of the CSAC. (3)
- Securing a timely adoption of the relevant bylaws that are aligned with the EU acquis (especially with regards to companies in the process of privatization), as well as a proper implementation of the Law in the area of transparency (registries, reports). (3)
- Effective state aid control – utilizing different mechanisms envisaged in the Law in order to monitor granted state aid and also impose measures for incompatible state aid. (2)
- Consistent application of state aid rules, EU standards and practices and the harmonization of the fiscal schemes with the EU acquis. (2)
- Continued advocacy efforts towards aid grantors, beneficiaries and third parties alike. (1)