

Darija Ognjenovic
Attorney at Law, LL.M.
Prica and Partners, Belgrade

Report for Serbia

Question A

The consistency and compatibility of transactional resolutions of antitrust proceedings (such as settlement processes, leniencies, transactions, commitments, and amicable agreements) with the due process and fundamental rights of the parties

International reporter: Dr Pranvera Këllezi, Attorney at law, Meyerlustenberger Lachenal, Switzerland. E-Mail: pranvera.kellezi@mll-legal.com

1. Introduction

1.1 Transactional proceedings in Serbia

Transactional proceedings are not widely used in the Serbian legal system. Other than under competition regulations, which will be analysed in detail under this Report, they are only recognized in criminal proceedings, where the institute of a plea bargain has been introduced only recently. Namely, as of 2012, the Criminal Code has recognized the “agreement with prosecutor on admittance of guilt” and further sets forth the conditions required for its application (only for certain types of criminal offenses, etc.). Such agreement has to be approved by the sitting judge. Unfortunately, a plea bargain is still not commonly used in practice. To the best of our knowledge, only around 50 cases have ended in a plea bargain since its introduction into the legal system.

Otherwise, laws regulating civil and administrative proceedings do not recognize transactional proceedings.

As regards competition regulations, the Law on Protection of Competition (Official Herald of the Republic of Serbia no. 51/2009 and 95/2013, hereinafter the “Law”) sets forth three types¹ of transactional procedures: (i) leniency; (ii) temporary stay of proceedings, i.e. commitment decision and (iii) remedies within merger control. Leniency is set forth only for participation in the restrictive agreements - abuse of dominance is out of scope of leniency but temporary stay of proceedings by interpretation of the Law (since there is no explicit provision) can be related to both restrictive agreements and the abuse of dominance².

1.2 Overview of general (non-transactional) competition infringement proceedings

Proceedings for investigation of competition infringement by both execution and/or implementation of restrictive agreements and the abuse of dominance are initiated *ex officio* by the Commission, by rendering a formal decision on commencement, on the basis of submitted initiatives for determination of infringement by third parties, information or other available data (Article 35 of the Law). The decision on commencement contains legal basis of and reasons for initiation of investigation, as well as a request to third parties to submit relevant data and information they possess to the Commission.

¹ Similarly to the EU concept abandoned in 2004, Serbian Law sets forth the individual exemption of restrictive agreements. Although negotiations are not explicitly set forth under the Law, in practice parties sometimes do negotiate certain provisions of the agreement with the authority. However, this cannot be considered as transactional proceedings and thus is left out of the scope of this Report.

² The Law provides that the abuse of dominant position is prohibited and lists, as an example, the types of behaviour that are considered to constitute the abuse, thus providing an open catalogue of abusive behaviour. Similarly to Article 102 of the Treaty on Functioning of the EU, the following are set forth under the Law as examples of abusive behaviour: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limitation to production, market or technical development; (c) applying dissimilar conditions to equivalent transactions with different trading parties, whereby treating them unfavourably in comparison with their competitors; (d) making conclusion of contracts or agreements conditional upon acceptance of supplementary obligations, which, by its nature or commercial custom and practice, have no connection with the subject matter of such agreement.

Once the investigation is completed, but before rendering a decision on competition infringement, the Commission is obliged to inform the defendant about facts and evidence on which it will base its decision (“*statement of objections*”), in order for the party reply to such allegation, propose new evidence and submit its defence argumentation (“*statement of defence*”).

Besides the declaration of infringement and the pecuniary fine, the decision on infringement also includes measure for removal of the infringement and prevention of the same or similar infringements in the future i.e. *behavioural measures*. This is done by ordering or prohibiting certain behaviour [e.g. prohibition of the behaviour that has caused infringement of competition or any similar explicit or implicit form of such behaviour, ordering publishing of the effects of the Competition’s decision, requesting that consumers are notified of the changed practice, etc]. If there is significant chance that the infringement will be repeated, the Commission is entitled to declare *structural measures*. Please note that per wording of Article 59 of the Law, the Government should have rendered a Decree that would regulate in details the types and requirements for imposing these measures, but such Decree has not been rendered as at the date of this Report.

Decisions on competition infringement are published on the official website of the Commission and in the Official Herald of the Republic of Serbia. Decisions on competition infringement are subject to judicial review by filing a complaint with Administrative Court. The fines for both restrictive agreements and the abuse of dominance are up to 10% of the annual turnover of the party that has committed the infringement.

2. Transactional resolution of agreements and the abuse of dominance

2.1. Overview of transactional proceedings

Leniency

Pursuant to Article 69 of the Law, the authority, Commission for Protection of Competition (hereinafter the “Commission”), shall grant lenient treatment to a party in a restrictive agreement, provided that such party (i) was the first to report the agreement to the Commission or (ii) submitted the evidence based on which the Commission rendered the decision on infringement. Lenient treatment can be accorded notwithstanding whether the agreement is vertical or horizontal, since the Law does not distinguish between the two with respect to leniency. In so far practice, the parties filed for leniency only in relation to vertical arrangements.

The condition for the exemption of fine is that either (i) the Commission has not had any information on the existence of anticompetitive agreement or (ii) it has been aware of its existence, but has not had sufficient information that would allow it to commence the proceedings.

In case a party does not meet the criteria for the relief from the fine, it can benefit from the reduction of fines, under the condition that, in the course of the proceeding, it submits evidence to the Commission, which at that time were not otherwise available. Furthermore, that evidence needs to be sufficient for the Commission to finalize the proceedings and render decision on infringement.

It is further explicitly stated under the Law that a party that has initiated a restrictive agreement cannot benefit from either full or partial immunity.

Besides the Law, there are two additional by-laws regulating leniency in more detail – the Decree rendered by the Government and the Guidelines rendered by the Commission.

The Decree repeats the conditions for the exemption from fine prescribed under the Law (i.e. that the party was the first to report, that it submitted sufficient evidence and that it did not initiate or organize the restrictive agreement), and sets forth additional requirements. Namely, the applicant has to sign a written statement whereunder it declares that it will fully cooperate with the Commission in good faith and that it shall not undertake any action which might jeopardize the proceedings, and in particular it shall not disclose the relevant data to third parties (except if so approved by the Commission), and that it shall not hide or destroy evidence. Further requirement is that the applicant submits all the data, documents and information it possesses and immediately ceases its participation in the restrictive agreement, unless otherwise required by the Commission, with the goal to collect evidence.

The Commission's Guidelines contain the same requirements for both full and partial immunity as set forth under the Law and the Decree, while they particularly point out the importance of full, constant and unconditional cooperation with the Commission. Further, the Guidelines regulate in more detail the commencement and course of the proceeding. It is stated under the Decree that the applicant can either: (i) report the restrictive agreement and request the immunity from fines; or (ii) approach the Commission without revealing its identity (e.g. via an intermediary) or the identity of other participants in the arrangement, with a short description of the agreement. In the latter case, the Commission will inform the applicant whether it has already had the information on such agreement (if not, it will instruct the applicant to apply for full immunity, and if it has, it will instruct the latter to apply for a partial immunity).

The Guidelines recognize the marker principle, in the practically the same manner as under the EU Leniency Notice of 2006. They further regulate in detail the content of the applications, which should be submitted in the prescribed form. There is a possibility of submission of a verbal, instead of a written application; however, this has never been used in practice. The possibility of submission of a joint application is explicitly excluded. Further, the application for partial immunity can be submitted during the proceedings, until the moment when the Commission informs the parties of material facts and evidence based on which it will render its decision (i.e. until it issues statement of objections, inviting the party to submit statement of defense).

The rules for reduction of the amount of fines are the following: (i) the fines for the first to report can be decreased by 30 to 50%; (ii) the fines for the second to report can be decreased by 20 to 30%; and (iii) the fines for the third and every further to report can be decreased by 20%.

In general, notwithstanding the leniency, decision on competition infringement (including conclusion or implementation of restrictive agreement) includes the pecuniary fines as an administrative sanction (called "measure for protection of competition"), prescribed for all competition infringements, including the restrictive agreements, in the amount of up to 10% of the annual turnover in the year preceding the commencement of investigation proceedings.

There are also two by-laws regulating determination of the amount of fines in more details. Basic criteria are the seriousness of the breach and its duration, and the additional could be the intentions of the party committing the breach, cooperation with the Commission, potential repeated breach, inciting other parties, etc. In the Commission's practice, the imposed fines have been in the range from 0.8% to 7% of the annual turnover.

The leniency application has been submitted for the first time in October 2009, prior to enactment of the currently valid Law (in force as of 01 November 2009). A major retailer, Metro Cash and Carry, submitted an application for exemption from fines due to participation in numerous vertical agreements containing, among other, resale price maintenance, during validity of the old Law (per old Law, the fines were not imposed by the Commission, but by courts in separate misdemeanour proceedings, which was one of its major shortfalls). That Law had a provision stating that the penalty shall not be imposed to the party who revealed the existence of the agreement and its participants prior to commencement of the proceedings, without further details). The idea of the applicant was to benefit from the exemption from fines under the old Law, since the Law of 2009 contained different rules and requirements. Per transitional provision of the Law enacted in 2009, the old Law should have been applied to the proceedings *commenced* before its effective date. Therefore, the question of the applicable law was raised, as there was no consistent standpoint of the Commission. Namely, some officers thought that the moment when the proceedings were commenced was the time of filing of the application, while the others believed that it was the moment when the Commission rendered its conclusion on commencement. Finally, the Commission took the standpoint that the proceedings commenced at the time of rendering the conclusion and, therefore, it decided to apply the new Law and the leniency application was subsequently dismissed.

The Commission started applying the leniency program in 2011, wherein a party to two different restrictive vertical agreements (Idea, a major chain of supermarkets) was granted full immunity from the fines³, since it was the first to report and it fulfilled other criteria (although, initially, the Commission refused to grant it the lenient treatment, it did so upon the decision of the Administrative Court). It is also interesting that in Swiss Lion case the Commission granted full immunity to both parties, accepting the holding of the Court that they had filed pursuant to the old Law and should be granted immunity based on that Law.

According to the Commission Report for 2011, the leniency program was declared as the most important way of revealing competition infringements, which represented effective stimulation for the parties to report restrictive agreements and discontinue competition violations.

In the practice of the Commission, the decision on leniency application (whether positive or negative) is a part of the general decision on infringement. Namely, the decision declares the infringement, sets forth the amount of fines and behavioural measures, and, finally, contains a declaration whether the applicant is granted the lenient treatment.

Pursuant to the Commission Report for 2012, there were no leniency applications submitted during that year. The Report for 2013 has not been published at the time of writing this Report and thus, it cannot be determined with certainty whether any leniency applications were filed during 2013 (note that no leniency decisions were published in 2013 and 2014, however, there

³ Commission case 4/02-13/2011 Commission vs Idea and Swisslion

is a possibility that the proceedings were commenced upon the leniency applications, but have not been completed yet),

Commitment decision

Per previously valid version of Article 58 of the Law, the Commission was entitled to stay the proceedings for the period of up to six months, if the breach of competition was insignificant and the party undertook to discontinue and not repeat the infringing action, i.e. that it shall reimburse or remove the damage caused. According to the recent amendments to this Article, enacted at the end of 2013⁴, the Commission will stay the proceedings if the party submits a proposal of measures it shall undertake in order to remedy the breach, including the conditions and deadlines for the implementation of such measures. A party can submit the commitment proposal until the moment of receipt of the statement of objections.

Once the Commission receives the commitment proposal, it shall publish its brief summary on its web page (including the main elements of the case and proposed measures) and invite all third interested parties to deliver their comments, state their positions and opinions within the following twenty days.

It is further explicitly stated under the Law that the Commission is not required to accept the proposal. If it does, it shall render a decision to stay the proceedings, under which it will set forth the deadline for implementation of the commitment and delivery of the respective evidence.

The proceedings shall continue if, within three years as of rendering of the commitment decision, one of the following occurs: (i) the circumstances on which the decision was based have materially changed; (ii) a party does not meet its commitments or (iii) the Commission determines that during the proceedings the party has submitted false, incomplete or deceiving evidence.

To the best of our knowledge, commitment decision has never been proposed or rendered in practice.

2.1.1. Discretion of competition authorities during proceedings

In both leniency and commitment decision cases, the parties to the proceedings are to initiate the transactional proceedings, i.e. the Commission is not by the wording of the Law entitled to propose either leniency, or commitment decision. However, by analogy with practice of the Commission in other types of cases, the possibility that the Commission might verbally suggest to a party to file a commitment proposal (if it deems that there are grounds) cannot be excluded.

In leniency cases, the requirements for both full and partial immunity are regulated in details and thus the discretion of the Commission is not very wide – it should practically evaluate whether all of the requirements have been met. On the other hand, there are no detailed rules

⁴ Per the explanation given by the Commission, the provisions regulating commitment decision were amended in order to comply with Article 9 of the EU Regulation 1/2003.

regarding commitment decisions, which is why the level of discretion of the authority, when deciding whether it would accept or reject the proposal, is rather high.

2.1.2. Legal nature of the transactional decisions

There are no separate rules which would regulate the legal nature of the transactional decisions. Therefore, general rules for decisions of the Commission are applicable. The decisions of the Commission regarding infringement of competition (notwithstanding whether due to restrictive agreements or the abuse of dominance) are full and final in the first instance, i.e. there is no body of the second instance and there is no right to appeal. They represent unilateral administrative decisions, immediately enforceable, since there is no second instance proceedings (they are, however, subject to judicial control of the Administrative Court⁵).

The final decision declaring the infringement, full or partial immunity (and in the latter case the amount of fines) in case of leniency, or agreed commitments including the deadlines for their implementation in case of commitment decisions are part of the operational element (holding) of the decision. The justification further contains facts of the case, evidence and reasoning.

2.1.3. Legal consequences for the parties

Both leniency and commitment decisions are binding for the parties. In case of leniency, the decision declares the breach, potential behavioural measures and the declaration on exemption from or reduction of fine. If a party does not comply with the behavioural measures, the Commission is entitled to initiate new proceedings. As regards the commitment decisions, the situation is rather similar. The Commission monitors the implementation of commitments within the period of three years and in case the party fails to implement the proposed commitments, it will lift the stay and resume the proceedings. In either case the Commission may order new behavioural measures⁶, impose the fines in the amount of up to 10% of the annual turnover (note that non-compliance with the measures or commitments, i.e. repetition of breach would be considered an aggravating circumstance per rules determining the amount of fines). A new decision is subject to the claim to the Administrative Court.

2.2. Fundamental and procedural rights of the parties

2.2.1. Right against self-incrimination and presumption of innocence

The presumption of innocence and right against self-incrimination are widely recognized in the Serbian legal system, especially under the Criminal Code. Unlike the EU trends, the only criminalized anticompetitive behaviour in Serbia is the abuse of dominance. Other types of infringements, e.g. bid rigging or cartels, are not subject to criminal prosecution. Per wording

⁵ For details, please see below under 2.2.5 *Right to trial*

⁶ There is as well a possibility of imposing structural measures, however, they have never been declared in practice

of the Criminal Code, a person⁷ responsible for the abuse of dominant or monopolistic position or conclusion of monopolistic agreement that causes distortion in the market, which causes harmful effects to competitors and consumers, shall be imprisoned for the period from 6 months up to 5 years. The practice of the criminal courts related to this criminal offence is practically non-existent.

Contrary to the criminal proceedings, the competition law investigations do not recognize the right against self-incrimination. The parties are obliged to submit all the relevant data and information, regardless of whether such data and information might incriminate the responsible persons or the company⁸. Duty to cooperate with the authorities is even more articulated in the transactional (i.e. leniency) proceedings than in the regular types of proceedings, as envisaged above under 2.1 *Leniency*. In particular, full cooperation is one of the main requirements for granting the lenient treatment. In all types of the proceedings, failure to cooperate, i.e. failure to submit the data and information required by the Commission can be subject to procedural penalty in the amount of EUR500 up to 5,000 for each day of non-compliance.

Per the Commission's Guidelines regulating leniency, if upon receipt of the Commission's information that it does not qualify for the full immunity, the applicant decides to withdraw the submitted evidence, that withdrawal does not affect the right of the Commission to obtain the evidence from either the party or other participants in the proceedings, using its powers. The applicant should give a statement within five working days as of the receipt of the Commission's information whether it applies for partial immunity. If it does not provide the statement within the set deadline, it shall be deemed that the former has consented to the Commission's use of all of the submitted evidence in the proceeding.

Further, the regulations neither provide for any safeguards which would ensure that statements given by a party during the discussion cannot be used against the party in the case the negotiations fail, nor set forth the rules on communication on a non-prejudice basis. This shows that the right against self-incrimination practically does not exist in the transactional proceedings.

The Law recognizes the principle of legal privilege, stating under Article 51 that all types of communication between the defendant and its attorneys are privileged. However, the Chairman of the Commission has the right to investigate even the privileged communication, in case it suspects that there is an abuse of such communication. This rule is drafted in a manner that it leaves huge discretionary right to the authority and practically denies privileged communication principle.

2.2.2. Right of the parties to know the case against them (statement of objections)

In standard proceedings (which may end by rendering commitment decision), the proceedings commence by rendering a conclusion on commencement, which contains the description of actions that might represent breach of competition rules, legal grounds and the reasons for

⁷ Per Law on Criminal Liability of Legal Entities, a company can also be subject to criminal liability and can be imposed a fine (in the most severe cases, it can be liquidated)

⁸ The Law is silent on the right against self-incrimination and presumption of innocence and there is no formal requirement for either the waiver or acknowledgment of guilt or liability.

investigation. That conclusion is delivered to a party and published both on the web page of the Commission and the Official Herald⁹. Upon the completion of the investigation, the Commission is obliged to deliver to the defendant a statement of objections, containing all relevant facts and evidence. The party is entitled to submit a statement of defence in response to such allegation, whereunder it can propose new evidence and submit its defence argumentation.

The commitment proposal can be submitted as of the moment of the commencement of the proceedings, during the investigation but not later than by the receipt of the statement of objections. The same goes for leniency application for partial immunity – it can be submitted during the investigation until the issuance of the statement of objections by the Commission. Therefore, the proposal for transactional solution has to be given by the parties *prior to* receipt of the statement of objections.

As regards certainty and predictability for the companies prior to the commitment decision, the Law is rather unclear and there is no relevant practice. Namely, per wording of Article 58 Paragraph 4 of the Law, if the Commission deems that it is likely that the proposed commitments will remedy the breach, it shall render decision based on the proposal. However, per Paragraph 5, it is not obliged to accept the proposal. Therefore, it is questionable whether the Commission can only accept/reject the proposal or it can modify it as it deems appropriate. It could be assumed that the latter is the case; however, only practice (which does not exist at the moment) will tell.

As regards the level of fines, it is sufficiently predictable to companies, since there are rather detailed rules regulating both the amount of fines in regular and leniency proceedings for the parties which qualify for the partial immunity¹⁰.

2.2.3. Right to be heard and access to file

Pursuant to Article 33 of the Law, the following market participants are considered as the parties to the proceedings: (i) the entity which has filed merger notification; (ii) the parties that have submitted request for individual exemption of the restrictive agreement and (iii) the entity against whom a proceeding has been initiated. It is further explicitly set forth that the persons who report breach of competition (i.e. who have filed “initiative for investigation of breach of competition”) or persons who submit the relevant data and information (which obviously is a reference to other market participants, i.e. suppliers, customers, competitors, etc.) do not have the status of a party.

Article 43 Paragraph 1 of the Law stipulates that the party is entitled to review the case file and photocopy “certain parts” of the file. Namely, the following parts of the file cannot be reviewed: (i) minutes on voting; (ii) drafts of decisions; (iii) documents marked as classified, and (iv) protected data¹¹.

Having in mind the above, it can be concluded that the parties have access to the case file, as of the moment of the commencement of the proceedings.

⁹⁹ Unless the Chairman of the Commission deems that the publication might jeopardize the proceedings, in which case it is only delivered to a defendant

¹⁰ For details, please see under 2.1 *Leniency*

¹¹ For definition of protected data, please see Paragraph 2.3.4 below

2.2.4. Right to an impartial judge

Transactional resolutions (both leniency and commitment decisions) are rendered by the Commission Counsel and are full and final in the first instance, i.e. they are not either approved or ratified by another authority. However, the decisions are subject to the control of the Administrative Court, with whom the party dissatisfied with the decision can file a complaint (please see below under 2.2.5).

2.2.5. Right to trial

A party to the competition proceedings can file a complaint with the Administrative Court within thirty days as of the receipt of the decision. The proceeding before the court is regulated by the Law on Administrative Disputes, which is of rather general nature and it states that, among other, the complaint can be filed because of incorrect application of the substantive law (there are no further references to the grounds for challenge)¹². Furthermore, the Administrative Court is overwhelmed with the significant number of pending cases arising out of numerous types of administrative procedures (e.g. re tax, customs, election issues, etc.). There are no judges specialized in competition issues, although there are certain pending projects in place to advance their education. For the time being, the judges cannot appraise complex economic issues and therefore most of the judgments are based on formal and not substantive reasons. This has been appropriately noted by the EU Commission during monitoring the implementation of EU competition regulations and practice, as per Article 73 of the EU Accession Treaty.

The court can deny or accept the claim. In the latter case, it is entitled to render a new decision, i.e. exercise full jurisdiction (which does not happen in practice) or return the case file to the administrative authority (i.e. Commission) for the repeated trial. The deadline for the Administrative Court to render the decision is two months and is complied with by the court in most of the cases.

However, judgments of the Administrative Court are subject to extraordinary legal remedies filed with the Supreme Court of Cassation, which is rather slow and sometimes it takes it more than a year to render a decision.

The Commission (in its annual reports and public announcements) often expresses the need for educating judges of both courts and increasing their responsiveness, but so far, without visible results.

2.2.6. Ne bis in idem

The general *ne bis in idem* principal is widely recognized in the Serbian legal system, including criminal, civil and administrative law. There is no explicit reference to this principle under the Competition Law, however, it is recognized under the Law on Administrative Procedure (which is *mutatis mutandi* applicable to competition proceedings). Therefore, it can

¹² There are other grounds, e.g. rendering the decision by non-competent body etc. which are irrelevant for this Report

be concluded that any decision rendered in the competition proceedings, including transactional, cannot be subject of a repeated proceedings, except in limited circumstances (e.g. if the decision was rendered based on false evidence/statements or by committing of criminal offense, and similar).

Potential transactional resolution declaring the infringement does not trigger the immunity from criminal prosecution (note that only the abuse of dominance is subject to criminal prosecution¹³).

2.3. Rights of third parties

2.3.1. Right to be heard and access to file

Unlike the parties, whose rights of access to file are provided under Article 43 Paragraph 1 of the Law, as envisaged in detail under 2.2.3 hereunder, persons who have reported breach of competition, persons who have provided information or others who may have interest in monitoring the proceedings, have the right to be informed of the course of the proceeding (Paragraph 3). Further, the persons who reported the breach (i.e. filed the “initiative”) are entitled to be informed of the outcome of their initiative. Per the following Paragraph 4, the Counsel of the Commission should have rendered the rules which regulate in detail the content and manner of providing the access to the case file to the previously mentioned third persons. However, such by-law has not been rendered to date. On the other hand, the Commission has rendered the Instructions regulating publication of its decisions and disclosure of the data, based on, among other, Notice on the rules for access to the Commission file in cases. These Instructions only regulate manner of publication of the decisions and non-disclosure of protected data to the general public, i.e. there are no separate rules which would regulate access to the case files to the interested persons, as referred under Article 43.

Therefore, it can be concluded that, at the moment, rights of third parties to access the case files are rather limited.

2.3.2. Right to trial

As explained above under 2.3.1, third parties have the right to be informed of the course of the proceedings, but they are not considered a party to the proceedings.

As stated above under 2.2.5, the decisions of the Commission are final in the first instance, i.e. they are not appealable. Therefore, the only legal remedy is filing a complaint with the Administrative Court. Per Law on Administrative Disputes (Article 11), any physical or legal person, who deems that an administrative act (please note that the decisions of the Commission are considered administrative acts) has breached some of its rights or interests based on the law, can be a claimant in the administrative dispute.

¹³ For details, please see 2.2.1 above

It was questionable in legal theory whether the above can be interpreted in a manner that a third party to the competition proceedings, e.g. competitor not satisfied with a decision of the Commission, would be entitled to file a complaint against such decision¹⁴. The response was given by the Administrative Court¹⁵ and subsequently confirmed by the Supreme Court of Cassation in 2013¹⁶ (the Supreme Court of Cassation is competent for extraordinary legal remedies against judgments of, among other, Administrative Court). Namely, the Commission granted the individual exemption to the exclusive distribution agreement made between Telekom Serbia (a state owned major Serbian telecom operator) and Centrosinergija, on distribution of prepaid mobile recharges. The consequence of such approval was that Telekom terminated the distribution agreements with all other distributors. Four of those distributors filed a complaint with the Administrative Court, claiming that their right to operate their business was breached by termination of the distribution agreements, directly caused by the decision of the Commission. Further, their argument in favour of the existence of the legal interest was the analogy with the right to file an initiative for breach of competition in the competition proceedings. In its response to the complaint, the Commission expressed its position that the challenged decision only related to the parties in the agreement and thus does not affect their rights or interests. Such position was confirmed by both the Administrative Court and the Supreme Court of Cassation.

The two mentioned court decisions represent the precedent with respect to rights of third parties to challenge decisions of the Commission. Although legal system in Serbia is not based on precedents and the general rule is that the courts are not bound by decisions of the same or other courts in similar matters, in practice, all the courts tend to firmly stick to the previous decisions and repeat the same argumentation.

Based on the above stated, it could be assumed third parties, i.e. competitors, suppliers etc. are generally not entitled to challenge decisions of the Commission, including transactional decisions.

2.3.3. Follow on actions

The follow on actions are regulated in one provision only (Article 73 Paragraph 2), which regulates that the damage caused by breach of competition regulations can be claimed before the court in a standard litigation proceeding, if the breach was determined by the decision of the Commission. The respective article was drafted in a manner that it could be interpreted that the decision of the Commission on infringement is a condition precedent to filing a complaint, i.e. that it is not allowed to file a standalone action. This would completely exclude a possibility of standalone actions and would be contrary to the practice of the European Court of Justice¹⁷. To the best of our knowledge, standalone actions have never been filed in practice. Anyhow, it would be interesting to see the standpoint of the court with respect to this provision, i.e. whether the court might have a different interpretation.

¹⁴ There is a possibility for so called interested parties to participate in the court proceedings initiated by the party to the competition proceedings, however, only the parties “whom cancellation of the decision would directly cause damage” and not vice versa

¹⁵ The decision was not publicly available

¹⁶ Supreme Court, Case 547/2012

¹⁷ In accordance with Article 73 of the Agreement on Stabilization and Association between Serbia and the EU, the Commission is obliged to apply EU regulations (directives and soft law), as well as the practice of EU institutions – European Commission and both the Court of Justice and the General Court.

Under Paragraph 2 of Article 73 of the Law further explicitly provides that, notwithstanding the decision on infringement, the existence of damage cannot be assumed, but it has to be proved before the court. This could potentially cause issues in practice, having in mind the awareness and knowledge of local judges and financial sworn in court experts¹⁸ of competition related issues. Therefore, it is questionable how those cases would be handled in practice. Insofar there has only been one case of follow up action, before the civil and not commercial court, since the claimants were physical persons – raw milk producers. The complaint was filed upon rendering the decision of the Commission declaring abuse of dominance by two milk producers – Imlek and Mlekara¹⁹. The case is still pending and thus, it can be concluded that at this point of time, the court practice is practically non-existent.

Having in mind the above explained current situation and lack of practice, interests of the third parties are not adequately protected and their right to follow on action, although provided for under the Law, has highly limited range.

2.3.4. Confidentiality and publicity of the transactional solutions

As envisaged above under Paragraph 2.2.1, the rule applicable to all the proceedings before the Commission, including transactional, is that *a party* has access to case file, except for minutes of voting of Commission’s Counsel members, draft decisions, protected data and classified documents.

Per definition in Article 45 of the Law, the protected data can be designated as such based on a request of a party to the proceedings, a third person who has reported a breach of competition or submitted the data to the Commission. The data shall be granted protected status only if the Commission finds that the interest of the person requiring protection is justified and that its interest is substantially more important in comparison to the public interest.

Classified documents are not at all defined under the wording of the Law; it may be assumed that those would be the documents designated as such by the Commission based on its discretion.

Third parties with legal interest are entitled to “monitor” the procedure, however, separate rules related to the manner of monitoring and submission of data and information to third parties have never been rendered by the Commission (for details, please 2.3.1 above).

Per Article 1 of the Instructions regulating publication of the Commission’s decisions and disclosure of the data, the Commission publishes the following decisions: (i) on commencement of the proceedings *ex officio*; (ii) on infringement of competition; (iii) on individual exemption, and (iv) on merger notification. All of the parts of the decision (introduction, holding and confidential version of justification) are to be published.

Further, pursuant to Article 4 of the Instructions, the Commission publishes (i) its official opinions; (ii) information on the outcome of the initiative for determination of breach of competition and (iii) conclusions on completion of a proceeding, for which it deems that are

¹⁸ Who would be in charge of calculating the amount of damages

¹⁹ Commission Case 5/0-02-533/2012 Commission vs. Imlek and Mlekara

of general importance or if there is significant interest of public. This formulation leaves too much discretion to the Commission, since it freely decides which opinions and decisions it would publish, without any prescribed criteria. This leads to a lack of published practice, which is rather important in sense of awareness of the market participants and competition advocacy.

3. Merger control

Similarly to the EU, the procedure can be completed in Phase 1 ("summary procedure") or Phase 2 ("investigation procedure"). The deadlines for the Commission to render decision are one month for Phase 1 and four months for Phase 2, calculated as of the moment the complete documentation is submitted.

If the procedure goes into Phase 2, the Commission can either deny the merger or render conditional clearance, subject to commitments. Possible commitments are not listed under the Law; but it is left to be decided by the Commission on a case by case basis. In practice, the commitments (remedies) are both structural and behavioural. Most common measures imposed by the Commission were sale of part of the business (including appointment of a trustee for sale), submission of reports on sale to the Commission within certain time period, restrictions related to sale of products to subsidiaries, restrictions related to product price etc.

3.1. Negotiation of remedies

Per wording of the Law (Article 66 Paragraph 1), if upon completion of Phase 1 investigation, the Commission finds that the transaction does not meet the conditions for approval, it will inform the applicant of the relevant facts (statement of objections²⁰) and invite it to provide its statement. Per Paragraph 2, the applicant is entitled to propose special conditions (i.e. remedies) it would be willing to accept (which would eliminate competition concerns) in order to obtain the approval. If the Commission finds that the proposed conditions are appropriate, it will render decision on conditional approval, whereunder it will determine the deadlines for implementation of remedies and the manner of monitoring the remedies.

As noticeable, the wording of the Law is rather wide and does not specify sufficient details. However, in practice, the parties sometimes propose remedies in the initial application, in order to speed up the process, i.e. not to wait for the Commission to invite them to provide the statement of defence. Furthermore, although the Law sets forth only the submission of statement, the parties to the transaction in practice hold meetings with the Commission, where the remedies are negotiated. Depending on the complexity of the transaction, the parties can hold several meetings with the Commission and exchange more than one written proposals. Finally, when remedies are agreed, the Commission renders its decision on conditional clearance or, if the agreement is not reached, on ban of concentration. Discretion of competition authorities to accept or reject proposals of notifying parties is rather high.

In recent practice of the Commission, there have only been a few conditional approvals, e.g. the Commission approved foreign to foreign merger in the airline industry²¹, whereunder the

²⁰ Issuance of statement of objections by the Commission stops the clock and the deadlines shall be calculated as of receipt of the response.

²¹ Case 6/0-02-114/09 Lufthansa and Austrian Airlines

parties have been ordered to retain the code sharing arrangement with local air carrier for certain time period and to refrain from increasing the prices during the same period. Further, the Commission has conditionally approved merger of two major retail chains and two sugar producers²². In both cases, the concentration was banned under the initial decision, but conditionally approved upon cancellation of the decision by the court.

Once the Commission decides to run Phase 2 procedure, such conclusion is published and third parties are invited to submit the relevant data and information. This is practically the only right granted to third parties, who can express their arguments against the proposed merger. However, the Commission is not obliged to take them into consideration.

Further, it has not happened in practice, however, it is questionable whether the Administrative Court would accept the right of a third party to file a claim against the decision on merger, having in mind its practice whereunder it has expressed the standpoint that only the parties to the competition proceedings are entitled to file the claim (please see 2.3.2).

3.2. Enforcement of remedies

Again, since the Law does not contain any particular details, the practice developed the institute of a “Monitoring Trustee”. It is a person appointed by the applicant to monitor the implementation of remedies and to communicate with the Commission, within the set deadlines. It has to be a person, who is not related to the applicant or any physical persons related to the applicant, usually an attorney.

Per Article 67 of the Law, if the parties fail to implement remedies, the Commission is entitled to (note: does not have to, but may) impose measures required for reestablishment or preservation of competition at the relevant market, i.e. de-concentration measures. Those could be divestiture of a company, sale of shares, termination of contracts or any other similar measures required to establish market conditions which existed prior to merger at the relevant market.

Third parties (e.g. competitors and suppliers) are not entitled to require the enforcement of remedies, since they are not a party to the proceedings. They could only submit an initiative for determination of breach of competition, based on general rules. However, as envisaged above under 2.3.1, they could only be entitled to receive the information concerning the outcome of their initiative (i.e. whether the proceedings have been commenced or not) and monitor the proceedings (there are no rules regulating details regarding monitoring).

To the best of our knowledge, the Commission has never ordered any of de-concentration measures.

4. Impact on transactional outcome and on market intervention

In principle, per standpoint of the Commission, the purpose and the goal of leniency is to enable investigation of cases of which the Commission would not otherwise have any

²² Case 6/0-02-3/2013 Sunoko and Hellenic Sugar Industry

knowledge. In its Report for 2012, the Commission stated that leniency is the most important manner of discovering competition infringements. Granting lenient treatment to the applicant is justified by the fact that the latter was not an initiator of the restrictive arrangement and it enabled the Commission to expose and fine other participants, which is a manner of individual and general prevention.

The situation is similar regarding commitment decisions, where ceasing infringing activities and prevention of further infringements is achieved without imposing fines.

Unlike commitment decisions, leniency could potentially increase the unpredictability of competition regulations. However, its beneficial effects seem to justify unpredictability to a certain extent.

5. Conclusion and recommendations

Since the introduction of the first Competition Law in 2005 and establishment of the Commission²³, as the competent authority until the present, the significant progress in the field of competition has been achieved. However, there is always room for improvement and thus the existing regulations should be amended and the new should be rendered in order to: (i) reduce the discretionary rights of the Commission in order to increase legal certainty, and (ii) facilitate more active role of third parties in the competition proceedings.

²³ There was the Antimonopoly Law in force and the respective antimonopoly authority in the seventies, however, the law was not applied in practice at all