Serbia – modernizing the legal framework

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Competition and anti-trust rules in Serbia are in definite need of overhaul due to numerous issues arising in practice of the Commission for Protection of Competition (the Commission). The Law on Protection of Competition (the Law) dates from 2009 and fails to address a large number of significant topics in detail, despite the lack of relevant bylaws or even guidelines issued by the Commission.

Problems with the current framework

There are numerous notable issues with the rules currently in force in Serbia. We will attempt to illustrate some of the most pertinent ones.

The rules which are arguably most in need of redrafting, considering especially the Commission's activities in the past two years, pertain to unannounced visits by Commission inspectors – dawn raids. While on the one hand the Commission and its inspectors enjoy an extremely wide array of authorities with regards to dawn raids, on the other the rules regarding privileged information are far from clear. Namely, letters, notices and any other communications (e.g. emails) that are directly related to the proceedings between the party against which the proceedings is being conducted and its representative/legal counsel, is considered as "privileged communication" under the Law. This type of information has the status of confidential information, meaning that the only "privilege" in this communication refers to the fact that it will not be made available to third parties and public. Even though, supposedly, the concept of privileged communication was, as in other jurisdictions, to ensure free communication between parties and their legal counsel, without fear that such communication might be used against them as evidence in the proceedings conducted by the Commission, the Serbian legislator did not recognize the significance of this concept and only ensured protection with regards to third parties and public, i.e. it gave the Commission full authority to use such communication as evidence against the parties. Further, in case of doubt about potential abuse of the privileged communication status, the president of the Commission may review the content of the communication and decide on the removal of this status in relation to some parts or all of it.

As for restrictive agreements and practices, there are currently no sectors or industries singled out for exemption from enforcement action (although new acts of secondary legislation are in the pipeline). Exemptions apply only on a case-by-case basis regardless of the sector, i.e. industry where the restrictive agreement occurs. Restrictive agreements may be exempt in one of the three following manners: 1) if it is a *de minimis* agreement, 2) if the block exemption rules apply, or 3) by individual exemption granted by the Commission. Therefore, in addition to exemption methods listed under 1) and 2) (applicable via self-assessment but without clear guidance provided by the Commission or the legislator), the method listed under 3) represents the model which has long been considered outdated in the EU context.

EXPECTED INCREASE IN THE COMMISSION'S ACTIVITY WILL HOPEFULLY BE FOLLOWED BY ADEQUATE CHANGES IN LEGISLATION

Bright spots

As part of the modernization effort, the new Decree on the Content and Manner of Submitting the Notification on Concentration entered into force in February of 2016 (the Decree).

However, the relevant context should first be provided. The Law prescribes the obligation of notifying certain concentrations which fulfill the prescribed thresholds, as well as the obligation of the concentration participants to abstain from its implementation until the Commission renders a decision on its (conditional or non-conditional) approval. In case of non-compliance

with these obligations, the Commission is authorized to, inter alia, impose various measures for protection of competition, including a monetary fine in the amount of up to 10 percent of an undertaking's total annual revenue. In addition, the Law prescribes relatively low thresholds for notification of concentration, with the result of a great number of (even "foreign-to-foreign") concentrations being captured and notified to the Commission, regardless of the fact that these concentrations do not have any impact on the competition on the national market whatsoever. Thus, for example, a joint venture of two foreign companies, established in a foreign jurisdiction with an aim to conduct business activities outside of Serbia, is subject to the approval procedure in Serbia if at least one of the parties of the JV generated revenue in the amount of over 10 million euros in Serbia (under the condition that the total revenue of both parties, generated on the worldwide market, exceeds 100 million euros), even if the revenue generated in Serbia arises from the business activity which is not related to the business activity of the JV. Having in mind that, due to this situation, a large number of transactions was notified to the Commission, and because of the existence of only one (regular) procedure on deciding upon notifications which entailed a detailed assessment of all facts and circumstances, the Commission was overloaded with work which certainly affected its efficiency and speed, as well as the cost (in both funds and time) of the preparation of notifications. Hence, the Commission itself suggested a more detailed regulation of this area via the introduction of an additional, less demanding notification procedure. In that regard, the new Decree was adopted according to which the concentration fulfilling certain conditions, i.e. in situations in which it is less likely that the concentration will negatively affect the competition and for which the simplified notification is determined as sufficient, may be subject to a simplified procedure. The simplicity of the respective procedure is primarily reflected through the reduced number of necessary documents and information required for proper enactment of decision. It is noticeable that the data on 5 top customers and 5 top suppliers, along with the data on value of sales for each customer/supplier for 3 years preceding the year in which the concentration is being conducted, is still required, which arguably diminishes to a great extent the "simplified" character of the Decree. The text of the new Decree was published on 1 February 2016 on the website of the Commission, along with the templates of the notifications on concentration both in regular and simplified procedure. The model notification which the Commission published simultaneously with the Decree contains a reference which introduced a type of pre-filing consultations with the Commission for the first time, which market participants should certainly take full advantage of.

It is also noteworthy that Serbian leniency rules are relatively advanced compared to the rest of the legal framework. The Law explicitly provides for immunity from fining to a cartel participant who is first to report the existence of restrictive agreement to the Commission (so called "first-in-the-door" participant), or submits evidence based on which the Commission may initiate the proceedings. Further, the applicable legislation provides the possibility of decreasing the fine for those cartel participants who subsequently provide new and significant evidence based on which the Commission may complete the proceedings and enact a decision on violation of the law. As the provisions of the Law leave no doubt about granting the immunity or leniency by the Commission in case of reporting cartels, and since the relevant rulebook and guidelines prescribe the procedure of granting the immunity/leniency in detail, it is arguable that Serbian antitrust legislation provides significant clarity on the benefits and risks of disclosure or non-disclosure to the authorities.

The path ahead

It follows from the above that the relevant rules in Serbia are in need of significant redrafting. This is one of the main factors behind the initiative, which is in the pre-public discussion phase at the time of this article, for the enactment of a brand new competition act by the Serbian legislator. The push for this reform comes from many stakeholders, including NGOs and professional associations, and it seems that the legislator is quite open to including these stakeholders in the discussion as numerous working groups have been formed. Further, greater enforcement is expected considering that the President of the Competition Commission has recently issued several public statements to this effect. In relation to merger control, the activity of the Commission has shown significant increase in the past two years.

Apart from announcing the adoption of several acts of secondary legislation, and preparation of the draft of the new competition act, performance of dawn-raids, and enactment of several unprecedented decisions, the Commission has shown significant efforts in developing general awareness on competition policy and its significance in the Serbian economy.

The Commission has continuously pointed out in various public announcements and statements how fundamentally important compliance with the Law is and that it plans to increase its activities in order to prevent breaches of the Law. The Commission has increased its capacities in terms of case handlers, and has engaged several experts in economy to assist them in complex cases. Therefore an even further increase in the overall activities of the Commission is expected in the coming period and our hope is that the new legislation will provide the much needed legal certainty in this area of increasing importance for market participants.