

Unclassified

DAF/COMP/GF/WD(2016)40

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

27-Oct-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

SANCTIONS IN ANTITRUST CASES

Contribution by Serbia

-- Session IV --

1-2 December 2016

This contribution is submitted by Serbia under Session IV of the Global Forum on Competition to be held on 1-2 December 2016.

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JT03403936

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SANCTIONS IN ANTITRUST CASES

-- Serbia --

1. Introduction

1. When determining the competition protection measures on the territory of the Republic of Serbia, the following acts are implemented: the Law on Protection of Competition (hereinafter: the Law), the Regulation on criteria for setting amount payable on the basis of measure for protection of competition and sanctions for procedural breaches, manner and terms for payment thereof, and method for determination of respective measures. (hereinafter: the Regulation), in addition to the methodology for determining the compensation paid on the basis of competition protection measures defined in the Guidelines for implementation of the Regulation, enacted and implemented from 19 May 2011 (hereinafter: the Guidelines), published and available on the Commission's official webpage <http://www.kzk.gov.rs>.

2. Pursuant to Article 68 of the Law, a measure for protection of competition in the form of an obligation to pay a monetary sum in the amount up to 10% of the total annual income earned on the territory of the Republic of Serbia and calculated in accordance with Article 7 of this Law, will be determined to an undertaking if it:

- abuses a dominant position in the relevant market
- concludes or implements a restrictive agreement
- does not perform or implement measures to eliminate violations of competition, or measure of de-concentration
- conducts a concentration oppose to the obligation of interruption, or for witch the approval for implementation of concentration is not issued.

3. According to the Law, undertakings are considered to be all natural and legal entities who, directly or indirectly, permanently, temporary or ad hoc participate in trade of goods and services, regardless of their legal status, ownership, citizenship or state affiliation.

4. Also according to this Law, affiliated undertakings are considered as a single undertaking – when two or more undertakings who are connected in such a way that one or more undertakings control another or the other undertakings.

5. Apart from administrative measure of protection of competition, the Commission can impose a measure to eliminate violation of competition, as well as other administrative measures in accordance to the Law.

6. In the field of competition policy, the punishment of “perpetrators” mostly relates to imposing monetary fines. Monetary fines achieve implementation of general, as well as special prevention function. In other words, not only it discourages the "offender" to repeat the offense, but also deters other, potential "offenders".

7. It also prescribes the criminal liability for violations of competition, and mainly the criminal responsibility of natural persons - officials of companies that have breached the Law on Protection of Competition. Such sanction is envisaged for the most serious forms of distortion of competition.

8. Similarly, Article 73 of the Law envisages possibility of compensation for damage caused by acts and practices which constitute a violation of competition. This indemnity is achieved in judicial civil proceedings.

9. What is also interesting to note is that during the period 2005-2009, the Commission for Protection of Competition had predominantly an administrative character. Namely, the Commission's activities were mainly confined to the examination of potential distortion of competition and law violation cases. In such situation, the sole punishment was delegated to other state authorities – the courts, and thus, the two proceedings - finding and punishment of violation cases, was occurring in absolute separation. In such environment, when competition authority would determine a violation of competition, it would file a misdemeanour charges. The main objection to this mode of penalty and decision-making system was that misdemeanour judges were deciding on the matter, poorly qualified and insufficiently trained in the complex and specific matters re protection of competition.

10. However, even when the new Law from 2009 entrusted the Commission for Protection of Competition with the possibility of imposing monetary fines, certain aspects of criminal schemes remained within the exclusive jurisdiction of the courts. Namely, only courts can decide whether someone committed a criminal offense or not.

2. Calculation of fines and related practical issues

11. The Government enacted the Regulation on criteria for setting amount payable on the basis of imposed administrative measure. According to the Regulation, there are seven criteria for determining the amount of a fine: (i) infringement of competition has been committed intentionally; (ii) gravity, consequence and duration of infringement; (iii) repetition of infringement by an undertaking; (iv) enticement of other undertakings. Following three other criteria relate to: suspension period of behaviour representing infringement of competition, taking of measures for elimination of consequences caused by distortion of competition prior to procedural competence, and level of undertakings cooperation with the authorities.

12. In addition to the Regulation on this matter, the Commission also enacted the Guidelines. Namely, the Guidelines more closely stipulate the criteria and manners for setting the amount payable for measure for protection of competition and procedural penalty, manners and terms for payment, as prescribed by the Law and Regulation. This procedure consists of two phases.

13. **The first phase:** setting the **initial amount** (by multiplying the baseline with specific factor in reference to the **gravity of infringement** and **thereupon**, the specific factor regarding the **duration of infringement**). The infringement gravity related factor is set in the range from 1-3, referring to less serious, serious or most serious competition infringements.

14. Following practices are considered as very serious infringement of competition cases: restrictive agreements that directly or indirectly set purchasing or selling prices or other conditions of trade; restrictive agreements on collective boycott of competitors; restrictive agreements on share markets or sources of supply, including bid rigging in public procurements; abuse of dominant position cases having set as a goal or consequence the direct or indirect imposing of unjust purchase or sale price, or other unfair business conditions, and/or excluding competitors from the market; abuse of dominant position by limiting and controlling production, markets, technical development or investments.

15. Following practices are considered as serious infringement of competition cases: horizontal restrictive agreements not qualified as very serious infringement cases, and the abuse of dominant position implying application of dissimilar business conditions to equivalent transactions with respect to variety of market participants by which participants are placed in unfavourable position compared to competitors, or imposing conditions of a contract or agreement re the acceptance of supplementary obligations which, given their nature and trading customs and practices, are not related to the subject of the agreement.

16. Following practices are considered as minor infringement of competition cases: vertical restrictive agreements not directly referred to prices or sales conditions, not approved conducted concentration pursuant to Article 65 of the Law, as well as concentration carried out contrary to obligation of interruption of concentration pursuant to Article 64 of the Law.

17. The duration of infringement factor is set in the range from 1-3.33, depending on observed short, medium or long term infringements.

18. **The second phase:** implies adjustment of initial amount by applying specific factors regarding mitigating and aggravating circumstances.

19. Aggravating circumstances:

- undertakings intention to infringe competition, particularly in the case of restrictive agreements under Article 14(2) of the Law, which are exempt from the *de minimis* rules
- undertakings reoffending
- other undertakings' incitement to commit acts that as a goal or consequence have or may have a significant restriction, distortion or prevention of competition
- refusal to cooperate in competition infringement process
- preventing and/or obstructing implementation of actions of the Commission in competition infringement processes.

20. Mitigating circumstances:

- Negligent infringement of competition when undertaking performs competition infringement, aware that this action may violate competition but carelessly assumes that it will not happen, or unaware that his action may violate competition, but under the circumstances of performed activities and with respect to his features, was obliged and should have been aware of the possibility.
- Extremely short-lived competition infringement (less than six months), a very minor infringement of competition, absence of adverse effects of competition infringement, or minor scale violation.
- Suspension of operations, all or some, that represent competition infringement, prior to undertakings awareness that the violation was detected or immediately after the first procedural action taken by the Commission in accordance with the Law.
- Taking measures for removal of performed violation's consequences by substantially removing harmful effects, whereas the Commission will pay a particular consideration to other undertakings declarations, as well as of other regulatory authorities, i.e. government authorities and institutions.

- Undertakings voluntary cooperation with the Commission for faster, more efficient and cost-effective termination of procedure, removal of harmful effects of infringement, or evidencing on other undertakings infringements.

21. The Guidelines in more details stipulates circumstances which the Commission shall take as mitigating or aggravating, whereas the factors for decreasing or increasing of the initial monetary amount are set in the range from 1.1-1.9.

22. In case of repetition of infringement, the increasing factor of initial amount is two. When in particular case there are no mitigating nor aggravating circumstances, or their "value" is the same, the final amount of the fine shall be equal to initial amount.

23. Also, it should be mentioned that the compliance program is not considered as aggravating nor mitigating circumstance.

24. First of all, it is important to emphasise that following Commission's imposed monetary amount payable as a measure for protection of competition, the party is not allowed to comply, but it can submit an appeal to the Administrative court challenging determined amount of the fine. The Court has the option that in the case of erroneous determination of amount, return the case to the Commission for reconsideration, or to directly or indirectly determine a new amount payable as a measure for protection of competition.

25. Following determination of competition protection measure, the party has no possibility of avoiding payment because of enforced collection tools administered via the Tax Administration.

26. What can be questioned is whether the current system of calculating the monetary amount payable as a measure for protection of competition is an optimal one. It is to a great extent optimised, as shown in the practice so far, but this optimality can be undoubtedly further improved by introducing the relevant revenue category as a starting point for calculating amount payable as a measure for protection of competition.

3. Alternatives to fines

27. Discussing the issue of introducing alternatives to fines for infringements of competition certainly requires consideration of historically proven rule according to which there is no effective implementation of rules without the rigorous penalties. The importance of rigorous penalties, which can include both monetary fines, criminal offences and other non-financial sanctions, would be reflected in the creation of "deterrent effect" for all undertakings. Therefore, the effectiveness of additional sanctions depends on the achieved purpose of punishment, i.e., the level of all undertakings discouragement against repeating activities effecting in competition infringement.

28. In Serbia, as in most countries in the region, there is a sanctions dualism. Namely, in addition to penalties prescribed by the Law on Protection of Competition, which refer to pecuniary fines and legal remedies, and structural and behavioural measures, domestic legislation defines other sanctions for competition infringements.

29. Additional sanctions are defined for following competition infringements cases:

- abuse of dominant position
- misfeasance in public procurement.

30. Actually, articles of the Criminal Code prescribe criminal sanctions for individuals, while the Law on Liability of Legal Entities for Criminal Offences provides for criminal sanctions regime for undertakings participating in cartels.

31. Related to the abuse of dominant position and pursuant to Article 232 of the Serbian Criminal Code, a responsible person of a legal person that provokes a market disorder by abusing a dominant position or by concluding a monopolistic agreement, as well as a responsible person of a legal person that places that legal person in a favourable position, shall be sanctioned by an imprisonment from six months to five years.

32. Related to the misfeasance in public procurement and pursuant to Article 234a of the Serbian Criminal Code, a responsible person in a company or other business enterprise with capacity of legal entity or an entrepreneur, who in respect to public procurement submits an offer based on false information, or colludes with other bidders or undertakes other unlawful actions with the aim to thus influence the decision of a contracting authority shall be punished with imprisonment from six months to five years. In determining the amount of penalty, the value of public procurement is taken into account, so if this value exceeds one hundred and fifty million dinars, the perpetrator shall be punished with imprisonment from one to ten years. This article of Criminal Code also provides an opportunity of remittance from punishment for the perpetrator who voluntarily discloses that the offer is based on false information or collusion with other bidders.

33. Apart from this criminal responsibility, Article 167 of the Public Procurement Law envisages creation of so called “black list” for infringement of competition in public procurements, which means that organisation authorised for protection of competition may ban a bidder from participating in public procurement procedure when bidder’s violation of competition rules in public procurement procedure is determined, pursuant to competition protection law provisions.

34. In addition to two before mentioned competition infringement forms implying criminal charges, the Serbian Law on Liability of Legal Entities for Criminal Offences, envisages that a legal person shall be criminally liable in case a responsible person in a company commits a criminal act. Sanctions can be various, from pecuniary fines up to five million dinars and interdiction to pursue certain activities according to Articles 14 and 24, to a “death penalty” or dissolution of a legal person according to Article 18 of this Law.

35. A question that gains importance nowadays and that can be a crucial for further development of competition law in many countries, including Serbia, is question of private enforcement. Introduction and implementation of private enforcement (final decision) would have a dual purpose: allowing victims of infringement to obtain compensation and prevention from potential future infringements of competition.

36. There are two types of actions for private damages: follow-on actions brought once when the competition authority has determined the infringement of competition, and stand-alone actions brought in the absence of a prior determination of infringement by the competition authority.

37. Private damages actions for competition infringement, as an instrument, was introduced into domestic legislation by the Law on Protection of Competition, which means that other market participants, consumers and service users can initiate actions for damages for competition law infringements in the civil proceedings. Namely, the Law on Protection of Competition envisages only follow-on actions, which means that aggrieved parties that suffer damages as a consequence of a competition infringement, may in principle initiate only these actions for damages in front of Serbian courts. Nevertheless the CPC’s final decision of infringement being a necessary precondition, the Law on Protection of Competition does not declare that the CPC’s finding of infringement represents a proof of damage. Thus, the existence of

damage has therefore to be separately demonstrated in the court proceedings. The burden of proof of damage and determining the causal link between the breach of competition determined by the decision and the damage incurred is on the court, not on the Commission for Protection of Competition. In Serbia, the area of private enforcement is underdeveloped and not sufficiently tested in practice.

38. Taking into account these additional sanctions, it can be concluded that legal framework in Serbia offers plenty of good opportunities for application of sanctioning policy, but question that arises is whether the private enforcement is practically effective enough or not. It is important to mention that without a sufficient number of cases of application of criminal and other sanctions as defined by law, is difficult to talk about the effectiveness of additional penalties and their contribution to achieving the purpose of punishment.

39. Therefore, if we want to build an effective system based on criminal sanctions, following factors should be taken into consideration:

- level of cooperation between national competition authority and public prosecutor's office
- precise and clear definition of criminal offence
- connection with other instruments such as leniency program.

40. With regard to precise defining of criminal offence, it is important to note that the Ministry of Justice and Commission for Protection of Competition are currently carrying out a joint activity on drafting normative framework amendments, i.e. the Criminal Code. These amendments are related to introducing criminal offence of "Restrictive agreements" instead of previously defined "Abuse of monopolistic position" and "Misfeasance in Public Procurement".

41. On the other hand, according to Criminal Code amendments, the importance that the "immunity" tool holds in detecting hard-core types of competition infringement will be taken into consideration so that responsible persons can be remitted from punishment, preconditioned meeting prescribed requirements.

42. The question that should be taken into consideration is on the relationship between the leniency program and liability for damages. According to current rules, private actions for damages reduce incentives for cartel participants from applying for leniency, and therefore undermine leniency programs. On the other side, granting leniency recipients "immunity" from liability in follow-on actions for damages, deprives partially the victims of competition law infringements of their subjective right to claim compensation for the harm caused to them. In this sense, particular attention should be placed to this problem when defining overall competition protection program.

43. It should be noted that when considering introducing some new forms of punishments, i.e. effective application of different types of sanctions, the following factors must be taken into consideration:

- legal framework
- number of cases referred to grave breaches of competition
- level of cooperation between competition authority, courts and public prosecutor's office.

44. In that sense, consideration of introducing new legal solutions and amending existing ones is a comprehensive process that requires cooperation between all relevant institutions in a country. This process would aim to build an optimal sanctions program whose effectiveness would be confirmed in practice as well. Only such optimal program of sanctions could help competition authority to more quickly detect, evidence and punish perpetrators of hard-core forms of competition infringement, consequently making it easier and more efficient for prosecution and sentencing by other competent national authorities.

4. Conclusion

45. The lack of awareness on the importance of competition in the market such is Serbian, as well as relative undeveloped "culture of competition", foremost with undertakings but also consumers, shall certainly continue to mark the period to come. We believe that the role of the Commission in improving such conditions, apart from all other authorities and regulators' activities in the Republic of Serbia, shall be of a great importance.

46. Precisely in this segment, the importance of a "sanction policy" as implemented by the Commission within its competence is not to be neglected. It is our opinion that strict sanctioning of competition offenders can be a strong deterring factor, but the assumption remains that undertakings have to be aware and informed on the competition rules, their responsibilities and possible sanctions.

47. From experience gained so far, we can recognise situations where undertakings continued with competition infringement because they were unaware that such conduct is prohibited and punishable.

48. Criminal sanctions can also be a strong instrument in competition protection related efforts, as they increase cautiousness of persons in charge when making business and strategic decisions due to the possibility of their criminal prosecution in case of competition infringement. On the other hand, existence of criminal liability may diminish the success of leniency program, as meeting of conditions for exploitation of this program benefits implies that legal entity is relieved from the payment of fine, but not the person in charge from the criminal liability. Having in mind the fact that the decision on applying for leniency program nearly always is made by the person and/or persons in charge for managerial operations, one can reasonably assume the existence of a great and serious dilemma: to apply for leniency and relieve the company of a fine, but at the same time to risk personal criminal liability, or not to notify on the existence of restrictive agreement for possibility of personal criminal liability.

49. Activities of a competition authority in the field of advocacy can significantly contribute to undertakings' education regarding competition protection, and therefore have a deterring effect, which might even be compared to sanctioning effects re competition infringements.

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