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Cross-border Mergers – Contribution from Serbia

- Session II -

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More documentation related to this discussion can be found at: oe.cd/gfc24.

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Cross-border Mergers

- Contribution from Serbia -

1. Introduction

1. In an era of intensive globalisation and digitalisation, number of cross-border mergers has increased considerably in Serbia as a result of international trade and foreign investment. Thus, an increasing number of transactions are subject to multi-jurisdictional merger review.

2. The Commission for Protection of Competition of the Republic of Serbia (hereinafter: Commission) frequently applies national merger control rules to mergers between undertakings based abroad and reach beyond its territorial border to protect competition within domestic market. The possibility results directly from the objective criteria on which the notification thresholds are based. To be specific, any cross-border merger which meets the relevant turnover thresholds will be caught by the Serbian merger control regime, irrespective of place of business and registration of undertakings concerned.

3. The Serbian legal framework for merger control consists of the Law on Protection of Competition (hereinafter: the Law),[1] Regulation on the Criteria for Defining the Relevant Market (hereinafter: the Relevant Market Regulation)[2] and Regulation on the Content and Manner of Submitting Notification on Concentration.[3] On its website, the Commission also provides several instructions and stances, including those on calculation of turnovers as financial thresholds that trigger a notification requirement.

4. The Commission decides on the permissibility of mergers in administrative procedures, and addresses the rights and obligations of the merger parties. The purpose of merger controls is to protect competition, i.e. prevent anticompetitive mergers. Mergers between undertakings are permitted unless they significantly restrict, distort, or prevent competition on the market of the Republic of Serbia or its part, and especially if that restriction, distortion or prevention is the result of creating or strengthening of a dominant position.

5. The merger procedure (including Phase I and Phase II investigation) is based on an *ex ante* merger control. The Commission establishes the permissibility of a merger against criteria referred to in Article 19 of the Law and adopts the appropriate decision.

2. Notification and procedure of cross-border mergers

6. In Serbia, there is an established practice of jurisdiction over cross border mergers on the basis of the Law. When the Commission determines that a cross-border merger meets the financial thresholds under the Law, the Commission starts effects assessment of

[1] Law on Protection of Competition ("Official Gazette of the RS", 51/09, 95/13).

[2] Regulation on the Criteria for Defining the Relevant Market ("Official Gazette of the RS", 89/09).

[3] Regulation on the Content and Manner of Submitting Notification on Concentration ("Official Gazette of the RS", 5/16).

such concentration. The requirement for respective thresholds creates an assumption that there is an appropriate nexus between the transaction and domestic market ("local nexus") and that competition authority only reviews those mergers that have an impact in its jurisdiction.

7. Serbian merger control rules do not contain provisions which limit the application of merger control rules on cross border merger by the Commission, since they apply to all concentrations which meet financial thresholds. The Law provides no exemption for the notification of foreign-to-foreign transactions. Consequently, as long as any of the turnover thresholds are satisfied, the Commission can control even cross-border mergers. A number of concentrations carried out by undertakings based in third countries or having their seat or headquarters there can easily reach the turnover threshold and, therefore, fall under control pursuant the national rules. A foreign company acquiring shares becomes subject to the merger control in Serbia even if the company does not have physical presence in the domestic market (e.g. there are no branch, subsidiary nor assets belonging to the company, but are present indirectly (imports/sales), even in the event that a target has neither assets nor sales in domestic market). Thresholds can be achieved simply on the basis of local sales.

8. Considering the Regulation on the Content and Manner of Submitting Notification on Concentration, the merging parties in these cases submit the short form of notification ("notification on concentration in summary form") which does not require to list other jurisdictions where the transaction has been or must be notified when submitting notification to the Commission. Only if notification cannot be submitted in summary form as prescribed in this Regulation, the merging parties are obliged to submit information on whether the notification is submitted to competition authorities in other countries and/or the European Commission, i.e. information on the intent to submit such notification.

9. Therefore, the Commission does not incentivise merging parties to notify their transaction in other jurisdictions nor the Commission determine whether there is a duty to do so. The Commission can request from a merging party to submit such data if they are found important for investigation of concentration effects on competition and estimate on the permissibility of concentration. Following Commission's request, the merging party is obliged to submit necessary data for additional explanation or specification of data submitted in notification. The merging party can also voluntary submit these data considered potentially important for an estimate of notification on concentration.

10. The Commission usually requests these data, including other data submitted in notification to competition authorities in other countries, if it considers important to find out how the transaction was presented to other jurisdictions. For example, the Commission may ask about detailed description of the type of concentration and control, total annual turnover of merging parties, proposal of definition of relevant market, etc. These data are obtained in order to find out whether the concentration of undertakings occurs, as well as is it sole or joint control, whether the transaction meets threshold or how to define relevant market or how to assess the effects of concentration.

11. The Commission very rarely engage with other jurisdictions when it finds out that the same transaction was notified in other jurisdictions. It can do by its own initiative, usually asking the European Commission or national competition authorities in the region. Sometimes, these competition authorities ask the Commission about the particular cross-border merger, in the very early stages of the merging review or later. The Commission then gives its opinions and conclusions which are based on data submitted in the notification. But sometimes, the Commission's decision depends on the findings of other jurisdictions, especially European Commission. When this happens, the Commission stops the clock in terms of the suspension of the deadline for merger review, while waiting for

another jurisdiction's decision or while engaging in conversations with other competition authorities on the transaction, in accordance with the Law. Meanwhile, the Commission considers the notification as incomplete.

12. When co-operating with other competition authorities in the assessment of cross-border mergers, the Commissions respects confidentiality restrictions and applies confidentiality rules, as well as it can co-operate involving the granting of waivers for sharing confidential information.

3. Issues concerning the assessment of cross-border mergers

13. When it comes to regulating cross-border mergers, the fact that notification of the merger needs to occur in more than one jurisdiction could cause the same issues (or problems) in different countries. A particular problem arises where several competition authorities investigate the same transaction and have different assessments of whether the concentration should be allowed.

14. Nevertheless, in Serbian competition law, the principle of extraterritoriality departs from the traditional territoriality principle since the Commission have the power to regulate conduct performed outside of Serbian territory that affect or could affect the competition on the domestic market. The Commission has not yet adopted any guidelines nor any regulation exists which would exempt certain cross-border mergers and has not recognised a domestic effect doctrine, although the Law applies to all forms of distortion of competition that have an effect in Serbian market, even if they result from acts carried out outside of national territory.

15. The Commission does not support the view that a concentration, besides meeting the thresholds, also needs to have an effect on competition in domestic market in order to trigger a filing obligation. Such "domestic effects doctrine" has not been adopted by the Commission because the purpose of merger control in Serbia is the assessment of (potential) effects of the transaction on domestic market, which is only relevant once the Commission's jurisdiction has been established. With the aim to identify existing or potential restrictions to competition in domestic market, merger control procedure in Serbia starts with the question of jurisdiction, i.e. whether a particular merger falls within the scope of the Law and whether the relevant turnover thresholds are satisfied. This is what triggers the entire process of substantive merger appraisal. If the jurisdictional thresholds are met, the notification of the merger will be necessary and consequently the Commission will assess notified merger. The assessment of effects is therefore only relevant once jurisdiction has been established.

16. The territorial scope of the Law is not the issue on which the Commission takes position during the preliminary assessment of merger notification because the Law is applied independently of the location of the undertakings concerned, whether within or outside the domestic market. The Law does not require that undertakings in question must be established in Serbia or that the production activities covered by the concentration must be carried out within Serbia.

17. Anyway, when defining the relevant market for the analysis of a merger, the Commission does not consider the possibility to define supra national markets. The Commission always assess the effects of merger within the territory of the Republic of Serbia and design and impose remedies independently. The Commission aims primarily at resolving the identified competition concerns in Serbia.

18. Therefore, the Commission does not consider the impact of the remedies proposed in Serbia in markets in other jurisdictions, although it can analyse the type of remedies (design of remedies) proposed or imposed in other jurisdictions, in co-operating with other authorities or merging parties. The Commission also designs remedies to impact only Serbian market, but cannot prevent potential impact on other markets. The Commission had a case where the merger was conditionally approved but eventually the merger was abandoned in Serbia because merging parties abandoned it while waiting the European Commission's decision in Phase 2 probe.

19. In addition, the Commission had a cases which have reached an outcome that may be seen as opposing to other outcomes reached by competition authorities regarding the same transaction (for example, when determines the notion of concentration, the thresholds or relevant market). These did not impact the Commission's final decision because the Commission assess the effects of merger within the territory of Serbia, but the Commission has had in mind all the facts during the proceedings.

4. Conclusion

20. To conclude, the best Serbian practice in general demonstrates that cross-border mergers are regularly subject to merger control under national merger control rules. Nevertheless, it can be said that Commission's practice is in accordance with the effects doctrine of public international law, i.e. it is consistent with public international law because international law does not contain unequivocal criteria for determining the extent of the national jurisdictions. Still, the Commission is free to examine whether concentrations restrain competition within its territory.

21. Serbian practice contains a number of decisions where cross-border mergers with extremely low or even no effects at all on Serbian markets were found to be notifiable and where the approval has been granted by the Commission.

22. When evaluating cross-border mergers, Serbia has not faced challenges that could impact its proceedings. Sometimes, the Commission waits merging parties to complete the merger notification because the deadline for notification in Serbia is short and merging parties are preparing notification for other jurisdiction where the transaction had to be notified.

23. When co-operating with other authorities, the Commission uses formal and informal way, as well as the other authorities do when contacting the Commission. The Commission has signed several memorandums (International protocols) which provide legal basis to exchange non-confidential information on merger cases or collects information of in those countries. The Commission also uses the formal procedure prescribed by the Regional Center for Competition in Budapest (OECD-GvH RCC) to exchange information.

24. We think that the relative size of Serbian economy is not disadvantage when reviewing cross border mergers, because the Commission's decisions on cross border mergers mostly does not impact Serbian market and cannot highly impact the outcome the review of other jurisdictions. The Commission does not discriminate such cases, because according to the Article 3, the Law applies all undertakings, regardless of their legal status, ownership, citizenship or state affiliation, including: 1) domestic and foreign companies and entrepreneurs; 2) state authorities, bodies of territorial autonomy and local government; 3) other natural and legal entities and associations of undertakings (unions, associations, sports organizations, institutions, cooperatives, holders of intellectual property rights, etc.); 4) public enterprises, companies, entrepreneurs and other undertakings who perform

activities of public interest, or those that have been given a fiscal monopoly through the act of competent state authority, unless the implementation of the Law would prevent performing these activities or delegated tasks the Commission.