Opinions on the implementation of regulations relating to competition infringements

The Commission enacted a great number of opinions upon requests of undertakings on the implementation of the provisions of the Law, thus enabling undertakings to familiarize with the Commission's practice and align their market behaviors with the competition rules.

Summary of the request: A natural person informed the Commission that the Institute of Transpiration CIP provides the pre-engineering services for reconstruction of seven healthcare centers in Belgrade without conducted public procurement, inquiring if such practice is in accordance with the Law and Article 82 of the Constitution, considering that the Institute of Transpiration CIP is approx. 98 percent state owned.

Issued opinion: The Commission issued opinion informing the applicant that described situation relates to the Law on Public Procurements, and that it falls outside the competence of the Commission, further instructing the applicant to address the Public Procurement Office on the matter. Summary of the request: Eki Transfers doo addressed the Commission with a request for issuing opinion on the results of a self-assessment implemented to establish whether the outsourcing of sub-agents for Western Union money transfer services by contracting various service commissions may represent a cause of legal concerns. This self-assessment contains a description of regulatory changes causing the rise of competitiveness, features of the market where company Eki Transfers operates, particularly those relating to the increase of the number of agents providing identical or similar payment services to the ones offered by Eki Transfers, and an overview on the intra brand competition between Western Union agents, in addition to the assessment of Eki Transfers position, made in accordance with the provisions of Article 15 of the Law. The self-assessment also offers several conclusions based on presented findings.

Issued opinion: In the issued opinion, the Commission stated that statements relating to changes in the legal framework governing wire payment services and money transfers as presented in the self-assessment can be accepted. However, it is also stated that without assessing the regularity of presented statements due to the lack of competences in the matter, the Commission concluded that in line with statements presented in the submitted self-assessment, the agent services market, that is, the global agent services market, as a production dimension of the market analyzed on the territory of the Republic of Serbia (the relevant geographic market), is used for the self-assessment related needs. The Commission underlined that the relevant market used to determine the dominance is established in relation to circumstances of each individual case, thus, that the definition of the relevant market does not always need to be the same, even when the party in different proceedings conducted before the Commission is the same undertaking. This particularly relates to the relevant geographic market that necessarily does not need to be the entire territory of the Republic of Serbia, even in situations when an undertaking, as a party to a proceeding before the Commission, performs its activities on the entire national territory. Following the establishment of a market dominance by an undertaking, it is investigated on the abuse of dominance by an act or action of dominant undertaking. Accordingly, the above-presented clearly exhibits a feature of procedures in which the abuse of dominance is established, namely, the need that an act or action must be performed first in order to establish related actual or potential market effects, which are taken as decisive elements of the Commission's conclusion establishing the abuse of dominance. In line with the presented, based on the fact evidencing on the various manners in which the abuse of dominance can be effected, in terms of its effect on the inter brand and/or intra brand competition, the Commission assessed that in

accordance with the provisions of the Law, exist no possibility for the Commission to present its position in terms of the permissibility to implement a business policy implying the outsourcing of sub-agents for Western Union money transfer services by contracting various service commissions. This is based on the need to assess such actions ex post, due to the specificity of procedure pertaining to the establishment of the abuse of market dominance. Thus, it is only indicated on main guidelines, which are also implemented by the Commission itself, and added that the abuse of dominance is less likely, although not impossible, to occur on more open markets. It is underlined that the relevant market is determined using the interchangeability criterion, as well as that an undertaking potentially abusing dominance must hold a dominant position on the said market, while the effects of such abuse may be reflected on that and/or some other markets. In terms of assessments of the gravity of effects induced by such acts or actions, more serious consequences are those affecting the inter brand competition, but nonetheless, the effects on the intra brand competition should not be undermined as well. It is also stated that a dominant undertaking, acting individually or in a group, must pay a particular attention on effects of acts or actions taken and business policy implemented, especially in the context of its commitment to implement such requirements under equal conditions against all parties fulfilling the pre-established and transparently set objective criteria.

Summary of the request: The Law Office Stanković&Partneri submitted a request to the Commission for issuing opinion, stating that their client as an undertaking is present on the food industry market on the territory of the Republic of Serbia via multiple distribution channels, by establishing equal supply and trade conditions for all distribution and trade channels, thus ensuring the potentials for competitiveness between direct competitors operating in the identical distribution channels. Since in addition to current capacities, the client also intends to establish a special additional retail category exclusively based on a business policy of attracting endconsumers by offering the lowest possible prices, the Commission is requested to issue its opinion whether the undertaking concerned is free to establish dissimilar conditions to identical operations in all cases when based on reasonable assumptions, the undertaking concerned regards various undertakings differently, which from their or manufacturers' standpoints are perceived as dissimilar competitors.

Issued opinion: The Commission established that the request contains a question on potential, still hypothetical business decision of an undertaking – client, enacted pursuant to the assessment of all circumstances, which from the respective standpoint may be considered valuable for future operations.

Considering the usual business uncertainty and a range of decisions that undertakings can enact, and which cannot be always anticipated, from the standpoint of the implementation of the Law, the Commission is unable to evaluate behaviors not yet undertaken, emphasizing that the freedom of business decision-making is always restricted by the rights and obligations established by the Law, with which undertakings must be familiar. In that regard, the applicant is informed that the Commission published a position concerning inquiries on Jan 17, 2017, accessible on the official webpages in the opinions section. Summary of the request: Opinion on the obligation to submit a request for individual exemption of restrictive agreement from the prohibition due to amendments to the agreement, previously individually exempt as a restrictive agreement from the prohibition, and specifically relating to the amendments to bonus policy.

Issued opinion: The Commission presented its position that in this specific case referred amendments to an annex have a minor effect on the implementation of the previously issued decision of the Commission, considering that related amendments do not have a restrictive nature from the standpoint of fulfilment of conditions from Article 11 of the Law.

Summary of the request: The Party presented a request for obtaining the Commission's position on the obligation to submit requests for individual exemption of restrictive agreements on exclusive distribution with extraterritorial features.

Issued opinion: Being that the inquiry also underlined that the distributor concerned is non-operational, meaning that is not an active undertaking on the market of the Republic of Serbia, while the manufacturer is operational on the market of the Republic of Serbia, in addition to the information that the manufacturer and distributor are on the vertically different geographical markets, the Commission underlined on the lack of jurisdiction of this institution in this specific case, considering the deficiency of preconditions on territorial dimension envisaged in Article 2, in reference to Article 10(1) of the Law. It is underlined that such position of the Commission is based on facts presented in the request, and in line with the current legislation governing competition, as well as on the Commission's operational practice to date. Also, such position is without prejudice to the Commission's future acting in specific cases, does not represent or preempt the Commission's positions and conclusions in potential cases that will be decided and acted on by this institution by way of implementing its competences.

Summary of the request: The Commission received a request for issuing opinion submitted by Air Serbia ad Beograd with reference to the introduction of a scale for subsidies to tour operators based on the concluded charter operated agreements by Air Serbia as a carrier and respective tour operators for 2017 summer season.

Issued opinion: The Commission issued opinion stating that in line with the principles of free market competition, undertakings are free to establish their commercial policy, including the rebate policy as well, as long as they do not have a considerable market power, that is, hold a dominant position on a particular relevant market, in which case are obligated to align their commercial policy with the provisions of the Law towards preventing any act or activity that might represent an abuse of dominance on the relevant market.

In accordance with Article 16 of the Law, implementation of dissimilar business conditions to equivalent operations with respect to a variety of undertakings on the part of the dominant undertaking may represent an infringement of competition, being that some undertakings are placed in unfavorable position compared to competitors. It follows that, under the assumption that individual dominant undertaking implements identical conditions in a clear and transparent manner against all business partners, in principle exist no risks of infringements of competition from the perspective of competition regulations.
In accordance with the Law, the Commission is not competent to issue approvals on business policies of undertakings, nor to establish beforehand if sombehaviors are contrary to the Law, but to establish the existence of infringements of competition in each individual case.

The issued opinion is based on facts presented in the request, and is in line with the current legislation governing competition and the Commission's practice to date.

Summary of the request: The Law Office of Prica i partneri addressed the Commission with a request to issue opinion on the implementation of Article 9 of the Law. The opinion is requested in reference to the following: “Is it permissible for undertakings operating on a different level of production chain to exchange, that is, sell certain business information (turnover information and individual suppliers’ turnover ratio).

More precisely, is it permissible for a trader to sell information on the turnover and turnover ratio of individual suppliers to another supplier whose product assortment is also sold in its retail stores.”

Issued opinion: The exchange of information between undertakings may represent an object of interest of the Commission, being that in addition to positive, it may also cause adverse effects on the competition. Although from the competition perspective both neutral and positive types of the exchange of information exist in practice, undertakings also exchange information that may be qualified as anticompetitive. The infringements of competition are evaluated on individual basis, while the related assessments rest on the quality of information, circumstances governing the exchange, as well as specificities of the relevant market and a ratio on the relevant market of the parties to the exchange.

The exchange of information that have no direct impact on the future commercial strategies of undertakings do not raise competition concerns, and if such information are: anonymous and consolidated, publicly available, that is, directly or indirectly also available to competitors not included in the exchange of information and to consumers.

The exchange of business sensitive data (relating to the nature of business operations, that is, current or future prices, sale costs and production volumes, information on credit or conditions of trade, promotional costs, discounts and rebates offered to consumers, information on consumers and operational or strategic and marketing plans, etc., and particularly if such data cannot be considered as historical), may enable undertakings to perform a better and faster conversion of business policies in relation to competing strategies and to increase the probability of creating anticompetitive effects on the relevant market. Such exchange may lead towards increased coordination in taking certain activities and as such represents a cause of concern for the Commission.

The exchange of information may occur in different forms and be exhibited by way of direct exchange of information between competitors, as well as between non-competing undertakings. In cases when undertakings that operate on the different level of production or distribution chain exchange information, that either being a one-way or two-way exchange, concerning one or several competing parties of the acquirer of information, such behavior may represent a form of illicit exchange of information. Illicit exchange of information reduces the uncertainty created by competitive pressure, and in consequence increases the predictability of future market behaviors. The probability may be further increased if information are obtained by encumbered legal transactions and/ogranted on an exclusive basis.

With regard to the issue at hand, it is underlined that described situation in certain cases may also represent a relation corresponding to the hub-and-spoke conspiracy as a form of cartel, a specific form of the exchange of information.

Namely, the seller may act as a hub, that is, as a “focal point” for the exchange

of information between two or several suppliers. In accordance with the presented, considering that the exchange of information may, but not necessarily, represent the infringement of competition, the Commission underlined that such practice will be separately reviewed in each individual case, while its permissibility or impressibility will be evaluated only upon the detail establishment of facts.

Summary of the request: Lita Van Bell doo Beograd addressed the Commission with a request to issue professional advice with regard to behavior of its competitors. In the letter is stated that company Lita Van Bell is the exclusive distributor of female underwear on behalf of its foreign partner, Creationes Selene from Spain, for the markets of the Republic of Serbia and Montenegro, and that it directly imports and distributes the said products to its clients in the Republic of Serbia and Montenegro. It continues to say that goods subject to the exclusive distribution rights for the Republic of Serbia and Montenegro are also imported by competing companies, purchased via wholesale distributors in Italy. The Commission is requested to provide an answer to the inquiry on mechanisms of the exclusive distribution rights protection, or whether is possible to prevent unauthorized imports of mentioned goods and whether is possible to prevent the imports of mentioned goods on the borders of the Republic of Serbia and Montenegro.

Issued opinion: The Party is informed that the Commission took the position and issued opinion on the implementation of competition rules in reference to the institute of "exhaustion of rights" and the so-called "parallel imports", which is included in the Activity Report 2013.

Summary of the request: The Commission received a request for issuing opinion on the General terms and conditions of bus station operations, submitted by the Transport association of the Chamber of Commerce and Industry of Serbia.

Issued opinion: The Commission Council issued an opinion that draft texts of the General terms and conditions of bus station operations and the Act on categorization of bus stations do not contain provisions that might be disputable from the perspective of implementing the Law. In addition to such opinion, the Commission submitted to the Transport association of the Chamber of Commerce and Industry of Serbia an information in reference to the submitted acts, that is, on the potential discrepancy of individual provisions in the submitted acts with the provisions of the Law on Road Passenger Transport, noted upon the performed review, and on which the line ministry in charge of transport is informed, as an additional institution reviewing the acts and issuing related opinions.

Summary of the request: Distribution system operator EPS Distribucija doo Beograd submitted via email an information to the Commission on the public consultations on the Draft amendments to the Decision on approval of electricity distribution network code of the Distribution system operator EPS Distribucija doo Beograd, pursuant to Articles 53 and 136 of the Energy Law and the Instructions on the method and procedure of approval of legal acts approved by the Agency and deadlines for the submission of data and documentation. The Commission was also invited to issue opinion, suggestions and comments to the act as part of the public consultations.

Issued opinion: In its opinion, the Commission stated that during the analysis of the Draft amendments to the Decision on approval of electricity distribution network code of the Distribution system operator EPS Distribucija doo Beograd, the most attention is placed on a part referring to Chapter 6 – Distribution system access, Item 6.3 – Collaterals for distribution

system access.The Commission underlined that it did not engage in calculations on the amount of funds, but pointed to the fact on the lack of explanation on the risk value beingmultiplied with constant 2.4, and also on the lack of explanation on what such constant represents when calculating the amount of collaterals in the case of selection of a special purpose (guarantee) deposit on the revolving principle, or in the case of selection of a bank guarantee payable on first demand and without protest. These issues are particularly pointed out due to the fact that in the previous period, based on the current Model procedure governing drafting agreements on distribution system access, the risk value in case of defaults is set by multiplying the maximum value of the network access fee with coefficient 1.1, while the result represented the amount of collateral. Considering that the Draft amendments to the Decision on approval of electricity distribution network code of the Distribution system operator EPS Distribucija doo Beograd stipulated that a special purpose (guarantee) deposit on the revolving principle is automaticall extended corresponding to the period of the original term deposit, every subsequent year of the extended term of deposit, unless the bank within 15 days prior to the expiry of term period receives a statement by DSO requesting that extended term of deposit need not to be provided, the Commission underlined that is necessary to take into account that disposed assets may only be kept until the completion of business activity for which were deposited, followed by the release and free disposal of assets by the depositor. In terms of a two year period after the entry into force of the Decision on approval of electricity distribution network code of the Distribution system operator EPS Distribucija doo Beograd for the harmonization of general and other acts of DSO, as well as of the concluded agreements and contracts, as stipulated by the draft regulation, the Commission assessed that harmonization of concluded agreements on the distribution system access is necessary to be executed in the shortest possible time, that is, immediately after the fulfilment of all stipulated conditions. As the most important point, considering that the Commission only issues opinions in accordance with its entrusted competences, it is emphasized that from the aspect of implementation of the Law is necessary that the implementation of the Electricity distribution network code be identical for all undertakings falling under the regulation.

Summary of the request: The Commission received an inquiry sent via email by an undertaking active on the retail market concerning the conduct of suppliers when establishing business cooperation relations.

Issued opinion: In the submitted reply, the party is informed that in accordance with the Commission's operating practice to date, opinions on establishing the obligation of suppliers to contract gross prices with separately shown rebates have not been issued. However, it is pointed that in individual proceedings conducted before the Commission, as one of behavioral measures imposed by the Commission, is the obligation to establish a transparent price list and rebate policy, while keeping in mind that the manner of contracting is not therewith established, seeing that the manner of contracting of sale and purchase prices, that is, implementation of the contract provisions, falls outside the competence of the Commission. On the occasion, the Commission underlined that when analyzing the conduct of suppliers, particularly dominant ones, it is insisted on the implementation of transparent business policy, implying that each dominant supplier is obligated to equally treat various undertakings in case of identical operations. Thus, a dominant undertaking must pay a particular attention to ensuring that each undertaking with whom it cooperates, holds a prior knowledge on the necessary preconditions required for the eligibility in terms of benefits stipulated by the supplier's business policy, and to implement in a full and complete manner all benefits in relation to all eligible undertakings.

Summary of the request: The Commission received an inquiry via email on the failure to comply with the price of bread made with T-500 flour on the part of potential dominant undertaking.

Issued opinion: The Commission underlined that the Government of the Republic of Serbia passed the Regulation on compulsory production and trade in bread made with "T-500" flour (Official Gazette of the RS, no. 7 of Jan 31, 2017), entered into force on Feb 1, 2017 and valid through Jul 31, 2017. Seeing that Article 6 of the Regulation stipulates a sanction for failure to comply with the price calculation regulated in the Regulation, the supervision falls under the competence of line ministries in charge of agriculture and trade. It is also underlined that a dominant undertaking is an undertaking that because of its market power on the relevant market can substantially independently operate in relation to actual or potential competitors, and that the infringement of competition relates to a situation where a dominant undertaking abuses its position in some of the manners stipulated in Article 16(2) of the Law.

Summary of the request: The Commission received a request submitted by attorney at law Nenad Stanković, requesting an opinion on the implementation of the Law. The opinion is requested in relation to the situation in which by purchasing the tender documents in privatization procedure pertaining to Galenika ad Beograd, "other subjects, also including the closest current competitors are granted a direct access to business results, data on suppliers, conditions of supply of active substances and other intermediate materials, data on employees, fees, production costs, planned investments, etc.". By way of a request, the Commission is requested to present its position whether such exchange and availability of data complies with the Law, considering the protection of interests of the current and every subsequent owner of Galenika.

Issued opinion: Considering the fact that the subject-matter presented in the request (privatization procedure) is regulated by the Law on Privatization (Official Gazette of the RS, 83/2014, 46/2015, 112/2015 and 20/2016 – authentic interpretation) and related bylaws, the applicant is directed to the Ministry of Economy.

Summary of the request: The Commission received inquiries via email relating to the restriction of territory and placement of competing pharmaceuticals in accordance with "agreements on the manner of issuing permits for the use of proprietary information (licenses), that is, agreements on the supply of pharmaceuticals between two pharmaceutical manufacturers".

Issued opinion: The party received a reply informing on the Commission's impossibility to provide response to the above-mentioned hypothetical situation, which is issued in accordance with the Commission's position in relation to issuing opinions concerning competition regulation of Jan 17, 2017, published on the official website.