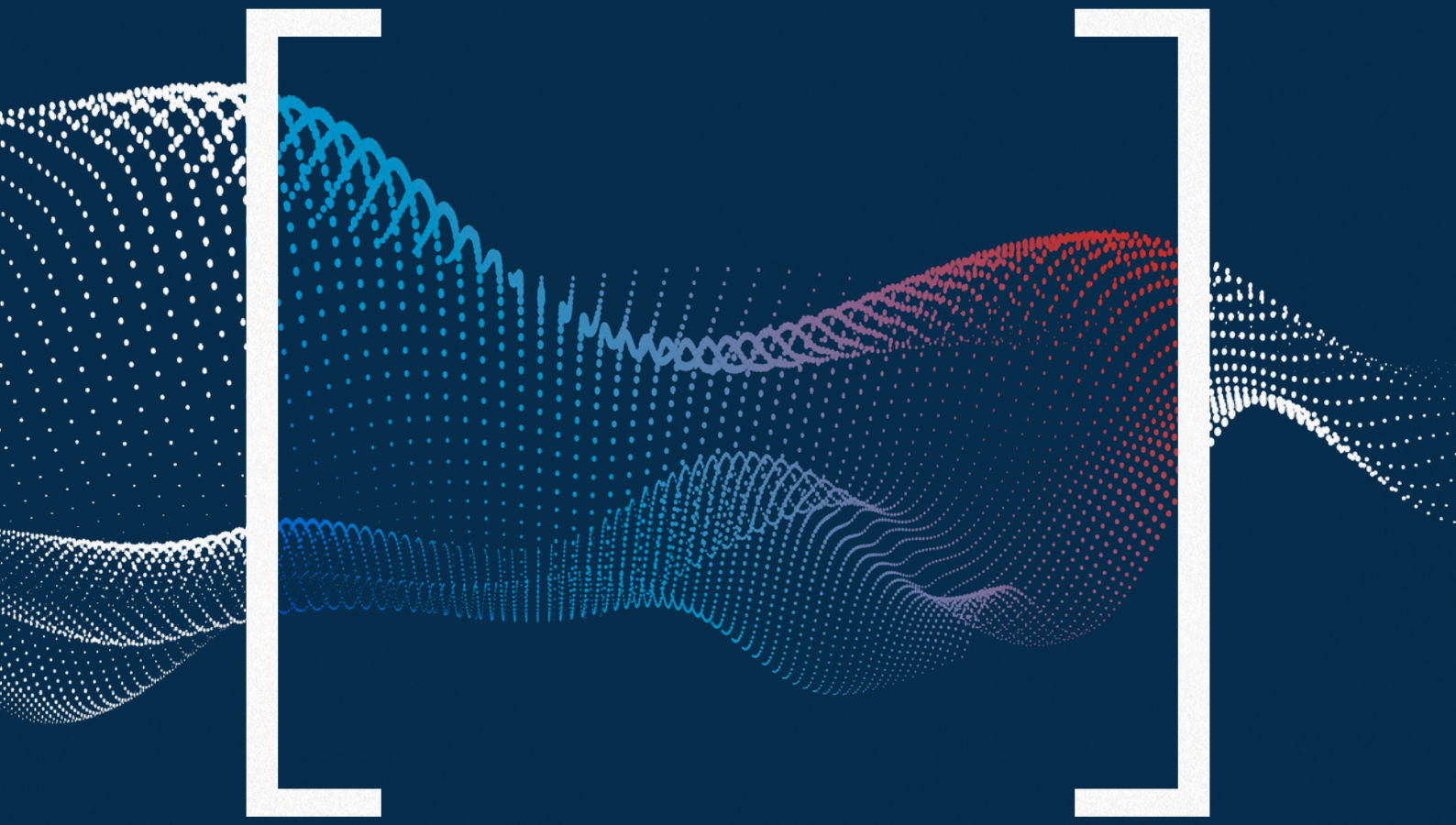
COMPETITION POLICY IN EASTERN EUROPE AND CENTRAL ASIA

Effective Investigation in Competition Cases



OECD-GVH Regional Centre
for Competition in Budapest (Hungary)
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OECD RCC OECD-GVH HUNGARIAN COMPETITION AUTHORITY

Inside a competition authority: **SERBIA**

Contents

Foreword: Life vests to keep afloat and wings to fly

Renato Ferrandi
Coordinator of the Regional Centre, OECD

Prior to the outbreak of the war in Ukraine, the world economic outlook appeared broadly favourable over 2022-23, with growth and inflation returning to normality as the COVID-19 pandemic and supply-side constraints waned. The major humanitarian crisis induced by the war, the associated economic shocks, and their impact on global commodity, trade and financial markets, will also have a material impact on economic outcomes. The latest OECD Economic Outlook projects global GDP growth to slow sharply in 2022 to 3% (around 1.5 percentage points weaker than projected in the December 2021 Outlook), and to remain at a similar subdued pace in 2023.[1]

The end of the war is undisputedly the first priority to put an end to the current humanitarian and social shock. Thereafter, appropriate policies will be necessary to support the most vulnerable groups of the population and foster a quick and inclusive economic recovery. Competition authorities should actively participate in this process and provide their technical support.

Eastern Europe and Central Asia is obviously the region in which the social and economic consequences are perceived most directly. To better surmount these challenges and to be influential actors in the domestic economic debate, the competition authorities of the region should be able to rely on each other's support, on the experience gathered by more advanced competition authorities worldwide, and on the guidance provided by international organizations such as the OECD. This is why the OECD-GVH Regional Centre for Competition (RCC) has further intensified its efforts and explored new tools to develop capacity building and cooperation.

After a successful virtual seminar on Market definition in February, the RCC organized a Heads of Agencies meeting in March, in which the Chairpersons of the beneficiary competition authorities discussed new ways to enhance capacity building and regional cooperation. An immediate implementation of these ideas took place in April, when the first joint Virtual Regional Conference on „Anticompetitive practices of public utility companies" was launched, thanks to the initiative of the Competition Council of Bosnia and Herzegovina.

In May, the RCC could finally resume its traditional in-person seminars, after two years of anxious waiting, and the feedback from participants confirmed that the virtual format had been a precious life vest that kept cooperation afloat, but only personal interaction provides wings to fly.

In June the RCC launched another training video on Market definition, further enriching the series "Key competition topics explained in a few minutes", which slowly but surely is becoming a fully-fledged online competition course.

This publication is another example of the efforts to provide competition authorities in Eastern Europe and Central Asia with the optimal toolkit to navigate uncharted waters. Each issue is dedicated to a topical issue that can improve the authorities' performance.

In this issue, you will find inspiring case studies of effective competition investigations in Eastern Europe and Central Asia, as well as in many other regions of the world. To duly perform their enforcement tasks, it is paramount that competition authorities ensure a sound detection system and effective collection of the relevant evidence, while guaranteeing a transparent and fair process, and a compelling decision, based on the careful analysis of evidence, able to withstand judicial review.

Furthermore, as usual, we draw attention to a special section of the publication, in which we explore the strategies and the enforcement and advocacy records of one of our beneficiary competition authorities. This time, we have the pleasure to welcome the Commission for Protection of Competition of the Republic of Serbia and its Chairperson, Mr. Nebojša Perić.

Enjoy your reading!

The next edition of our Review will focus on competition enforcement and ex-ante regulation in digital markets. We would like to learn about your experience in digital cases. Do you have any stirring enforcement actions to share? Did they achieve the intended objectives? Or did your authority engage in advocacy initiatives, to improve ex-ante regulation? What criteria did you consider selecting the best approach? You are all strongly encouraged to send your contributions, possibly by 15 October 2022.

1 OECD (2022), *OECD Economic Outlook, Volume 2022 Issue 1: Preliminary version*, OECD Publishing, Paris, https://doi.org/10.1787/62d0ca31-en.

Programme 2022

A. Seminars on competition law	
16-17 February Virtual	**Market definition: Methodologies, Challenges and Developments** The definition of a relevant product and geographic market is a necessary step in most competition cases, particularly in merger cases. We look at basic investigatory and analytical steps and the economics of market definition. Practical case examples from OECD members will be presented in order to illustrate the theoretical concepts. The participants will be asked to join the experts in hypothetical case exercises.
22 March Virtual	**Heads of Agency Meeting - Reviewing the past to design the future** In a globalised world, high expertise and international cooperation have become indispensable for competition authorities. Building on the successful experience of the Centre over the last 17 years and the international initiatives in these areas, the event will explore the ways in which the RCC's role as a catalyst for capacity building and regional cooperation can be further enhanced.
16-19 May Budapest	**Introductory Seminar for Young Staff – Competition law principles and procedures** The aim of this seminar is to provide young authority staff with an opportunity to deepen their knowledge of key notions and procedures in competition law enforcement. Experienced practitioners from OECD countries will share their knowledge and engage in lively exchanges with the participants on cartels, mergers and abuse of dominance. We will discuss basic legal and economic theories as well as the relevant case law. Participants will also have a chance to face and discuss procedural issues through practical exercises.
26-27 May Budapest	**COMPETITION LAB FOR JUDGES** **Stepping up with the fundamentals of competition law: from core principles to advanced competition law enforcement** This seminar will focus on fundamental principles and concepts of EU competition law that are addressed by national judges in competition law cases brought before them, in the context of either public or private enforcement. The understanding of fundamental notions of EU competition law will be enhanced through a two-step approach: first, by setting out the elements that form each concept and second, by exploring challenges in competition law enforcement and the judicial review of decisions of Competition Authorities.
14-16 June Moldova	**Outside Seminar in Moldova - Interim Measures in Competition Cases** The debate concerning the effectiveness and efficiency of antitrust enforcement in fast-moving markets turned the spotlight on interim measures, which are protective and corrective tools that may be adopted while investigating possible antitrust infringements. With the help of practiced competition officials, the seminar will explore what kind of cases are best suited for interim measures, what principles and legal standards should be observed, while addressing policy considerations and due process issues.
28-30 September Zagreb, Croatia	**Joint Event in cooperation with the Croatian Competition Agency** **Ex-Ante Regulation and Competition Enforcement in Digital Markets** In light of particular features of digital markets, several jurisdictions have recently proposed some form of ex-ante regulation to supplement existing ex-post competition enforcement. Experts from OECD countries will discuss how competition authorities can help shape better regulation in digital markets and factor in existing regulation in order to ensure successful enforcement.
18-19 October Budapest	**GVH Staff Training** **Day 1 – Managing uncertainty** **Day 2 – Breakout sessions** In separate sessions, we will provide dedicated trainings and lectures for the merger section, the antitrust section, the economics section, the consumer protection section and the Competition Council of the GVH.
10-11 November Budapest	**COMPETITION LAB FOR JUDGES** **Stepping up with the economics of competition law: from core principles to application in practice** This seminar will focus on economic notions underlying the EU competition law framework, in order to introduce complex economic notions in a friendly manner and inform judges about the use of economic concepts, tests and evidence when assessing cases under EU competition law. The seminar will highlight key economic concepts for market definition purposes and for the assessment of anti-competitive effects.

OECD RCC OECD-GVH HUNGARIAN COMPETITION AUTHORITY

EFFECTIVE INVESTIGATION

The recipe for an effective investigation

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Competition Expert, OECD

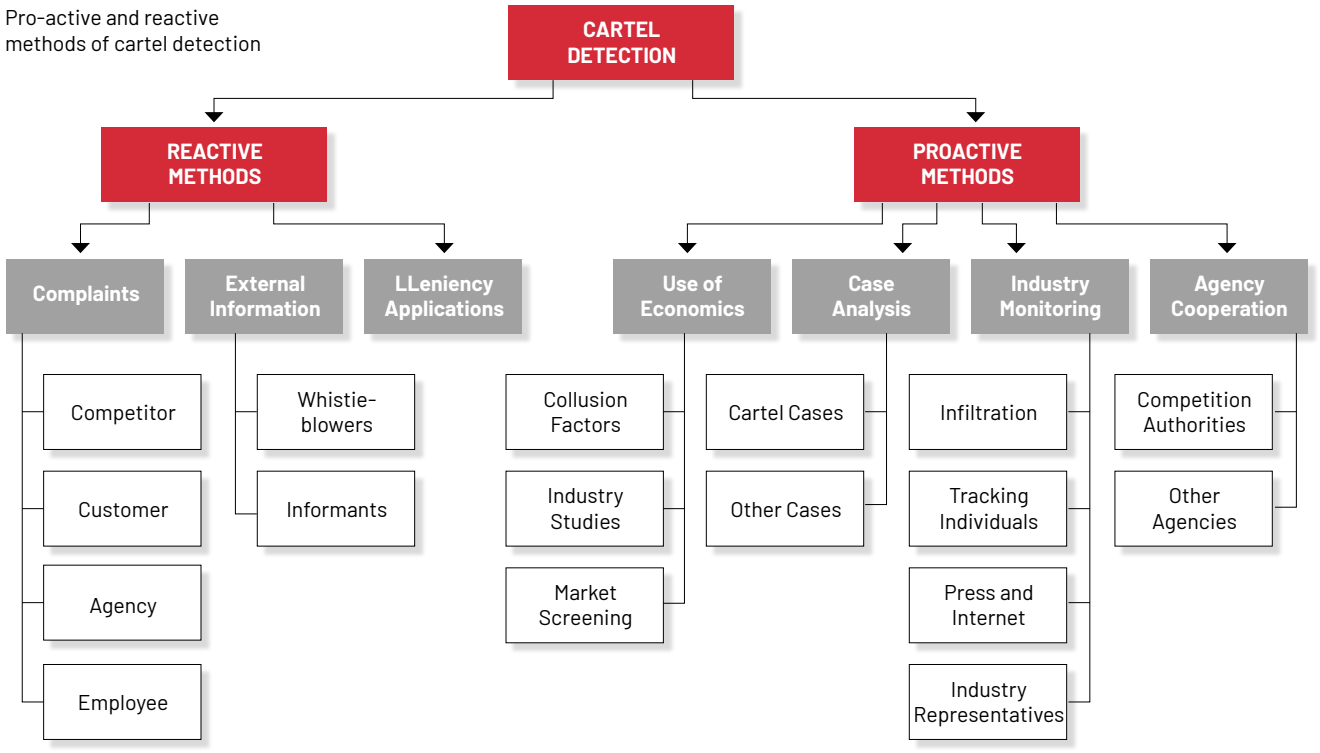
Renato Ferrandi
Senior Competition Expert, OECD

A complex art

Investigation on competition infringements is a complex art. The finding of a cartel or an abuse of dominance can lead to high fines. In some jurisdictions, cartelling is a criminal offence. This imposes high evidentiary standards upon competition authorities and needs to be matched by investigation instruments that enable competition agencies to obtain relevant direct and additional circumstantial evidence to make their cases. Moreover, offenders have become increasingly aware of the illegality of certain practices and may disguise their activity and hide traces of it.

At the same time, effective competition policy requires robust application of competition law and economics. Good processes are essential: a fair, predictable and transparent process bolsters the legitimacy of a competition authority's actions.

This is why several ingredients are necessary for the recipe that ensures effective competition enforcement. Before investigation, a sound detection system needs to be in place, to allow the competition authority to uncover possible competition infringements and focus its efforts on the most significant ones. In the course of the investigation, experienced officials should collect the relevant evidence, while ensuring a transparent and fair process. At the end of the investigation, the competition authority will have to adopt a compelling decision, based on the careful analysis of the evidence and able to withstand judicial review.



Source: OECD (2019), Review of the 1998 OECD Recommendation concerning Effective Action against Hard Core Cartels, cit.

International organizations, such as the OECD and the International Competition Network (ICN), develop and disseminate good practices that help competition authorities to improve their strategy, planning and operations, as well as their enforcement tools and procedures.[2]

Before the investigation: detecting competition infringements

Competition authorities can use both reactive and pro-active detection tools. Reactive detection tools rely on information about potential infringements brought to the attention of the competition agency by outside sources, while pro-active methods involve competition agencies independently working to identify potential competition issues.

Reactive detection tools

Complaints represent a typical source of information about possible competition violations. Complainants can range from customers or suppliers of the infringer(s), competitors, public entities, consumer and trade associations. Despite being a reactive detection tool, complaints presuppose the competition authority's engagement in advocacy, with a view to enhancing public awareness of the role of the authority and the benefits of competition.

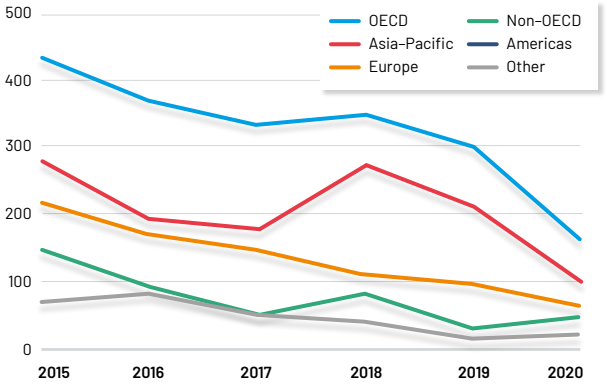
Leniency programmes can be powerful means to uncover cartels. They offer cartel members the opportunity to report their conduct, provide information and evidence, and co-operate with an investigation, in exchange for immunity from, or a reduction in, sanctions.

The uptake of leniency programmes around the world over the last two decades has been impressive. In 2000, only the United States, Canada, the European Commission, the United Kingdom, Germany and Korea introduced such programmes. Nowadays, OECD research has found that 89 leniency programmes are in place on all five continents.[3]

Despite their widespread use, the success of leniency programmes seems to be concentrated in a handful of jurisdictions. According to an OECD survey[4], during the period 2015 to 2020, the top four jurisdictions represented 53.1% of all leniency applications, while the 20 most active leniency programmes attracted 91.2% of the applications made.

In addition, the number of leniency applications declined during the period 2015 to 2020 all over the world. In Europe, where the number of leniency applications steadily declined for the period 2015 to 2020, leniency applications were 70.5% lower in 2020 than 2015.

Leniency applications, 2015–2020



Source: OECD (2022), OECD Competition Trends 2022, http://www.oecd.org/competition/oecd-competition-trends.htm

Another notable reactive detection tool for cartels is the whistle-blower system, which allows outside informants to anonymously come forward (outside the context of leniency applications). This anonymity can alleviate fears among informants of negative consequences of exposing cartels.

The United Kingdom has had a cartels hotline in place since 1995 and a reward scheme since 2008. Likewise, since 2012 Germany offers a "whistle-blower hotline", an anonymous informant system. In 2015, the competition authorities of Hungary, Romania and Canada introduced an anonymous whistle-blowing tool. The European Commission started its anonymous whistle-blower tool in 2017. The Spanish and the Greek competition authorities also have a whistle-blower system in place.

Pro-active detection methods

Over-reliance on reactive detection tools may be associated with the risk of losing sight of enforcement priorities and missing cases with a higher relevance to the economy.

Therefore, reactive tools should be complemented with pro-active detection tools, which are based on efforts by competition agencies to identify possible infringements and to then start investigations on their own initiative ("ex officio"). Pro-active investigations include data screening, systematic monitoring of publicly available information, market studies and cooperation with other public entities and foreign competition authorities.

In the digital era, data screening is becoming increasingly important, particularly as a method to flag suspicious patterns in public procurement. Likewise, digitalisation often has a disruptive impact on well-established markets and brings about novel competition issues. Against this backdrop, market studies can be a powerful tool to enhance the competition authority's knowledge of a specific sector, while supporting its enforcement

2 This article takes into account the experience gathered by the OECD and the ICN, in particular as consolidated in the following documents: ICN Recommended Practices for Investigative Process (2019), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/RPs-Investigative-Process.pdf; ICN Annotated ICN Guidance on Investigative Process (2018), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_GuidanceAnnotated_InvestigativeProcess.pdf; Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement (2021), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0465; OECD Recommendation concerning Effective Action against Hard Core Cartels (2019), https://www.oecd.org/competition/recommendationconcerningeffectiveactionagainsthardcorecartels.htm.

3 OECD (2019), Review of the 1998 OECD Recommendation concerning Effective Action against Hard Core Cartels, https://www.oecd.org/daf/competition/oecd-review-1998-hard-core-cartels-recommendation.pdf

4 CompTrends, 2022

efforts when evidence is uncovered that leads to the opening of an investigation.

During the investigation: wise use of the antitrust toolkit

Many competition authorities have developed templates, guidelines and checklists to orient their internal investigative steps, such as opening an investigation, issuing requests for information, entering an advanced phase of an investigation, and recommendations for agency decisions. Such guiding documents help establish consistency, ensure that the investigation is complete, and inspire confidence that the agency is following the rules.

The OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement requires competition authorities to have "consistent rules and guidelines for procedural steps in competition law enforcement such as requests for information, inspections and interviews and ensuring that these steps do not go beyond the scope of the investigation".[5]

Typically, internal procedures also require that the views of all relevant internal staff–including the legal services or the economics team – are included in the evaluation of the alleged infringement.

Co-operation and exchange of information with other national enforcement bodies, like sector regulators, anti-corruption bodies and public prosecutors, can help competition agencies to obtain valuable evidence, if the relevant legal framework allows it.

Opening decision

A competition case usually follows a preliminary investigation by the competition authority, aimed at verifying whether the evidence gathered is sufficient to justify the opening of formal proceedings.

Many authorities move on to formal proceedings by adopting an official opening decision, which is notified to the parties and published on their institutional website. The document typically summarises the alleged anticompetitive conduct and the legal basis. It also specifies the expected timeframe and the name of the case manager.

The OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement requires competition authorities to "ensure that parties are notified in writing as soon as feasible and legally permissible that an investigation has been opened and of its legal basis and subject matter, to the extent that this does not undermine the effectiveness of the investigation".

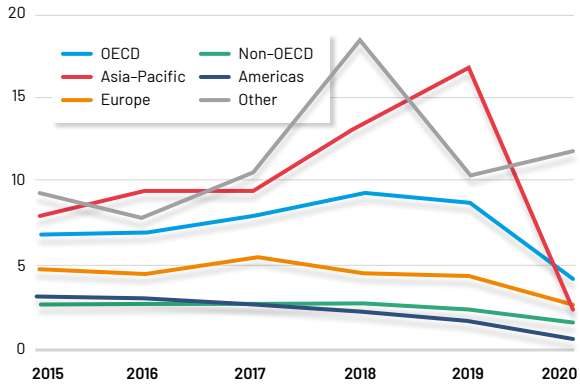
Unannounced inspections

Most competition authorities agree that a particularly effective, and invasive, tool to gather evidence of antitrust infringements is unannounced inspections (dawn raids), particularly for hard-core horizontal agreements.

An increasing number of the competition authorities gather digital data to find evidence. The methods and procedures adopted by the competition authorities differ to a great extent depending on their resources and the relevant legal framework. As a general principle, digital inspections should have a legal basis and be carried out within the boundaries drawn by the inspection decisions or court warrants and the subject matter of the case. Activities relating to the seizure, examination, storage, or transfer of digital evidence should be documented, preserved, and available for review.[6]

Cartel dawn raids were typically stable or increasing in the period 2015 to 2019, and dropped by 52.3% in 2020 due to government restrictions resulting from COVID-19. The evolution of cartel dawn raids in the period 2015 to 2019 differed between the various regions. Cartel dawn raids were decreasing in the Americas, increasing in the Asia-Pacific and Other, and stable in Europe. (Comptrend 2022, https://www.oecd.org/daf/competition/oecd-competition-trends-2022.pdf)

Average number of cartel dawn raids, 2015–2020



Source: OECD (2022), OECD Competition Trends 2022, http://www.oecd.org/competition/oecd-competition-trends.htm

Requests for information

Requests for information (RFI) are one of the most utilized investigative tools, whereby competition authorities ask for information, explanation and documents from the parties to the proceedings and from third parties.

RFIs should focus on the facts at issue and the theory of harm, avoiding requests that are unrelated to specific agency concerns and/or entail unreasonable burdens on recipients and the agency. It is good practice to provide appropriate notice of the investigation in every RFI, including its legal basis and the required timing for response.

In order to obtain truthful and complete information, it is important that the RFI includes the right questions addressed to right respondent in the right way. The investigative staff that drafts RFIs must have a certain level of knowledge on how to

5 https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0465

6 OECD Global Competition Forum, Investigative Powers in Practice – Break-out session 1: Unannounced Inspections in the Digital Age, Issues Note by the Secretariat, 30 November 2018, https://one.oecd.org/document/DAF/COMP/GF(2018)7/en/pdf

design questionnaires and how to process the acquired information. A certain level of understanding of the relevant sector is also crucial for the effective use of RFIs. This enables the staff to use the correct terminology when drafting the request and focus on the relevant aspects for the investigation. It is also important for the drafters of the RFI to determine upfront how the gathered information will be used and carefully tailor RFIs according to the needs of the case, in order to avoid collecting a massive amount of information which is not particularly relevant to the investigation and complicates access to the most needed information[7].

Statement of objections

Prior to a final finding of violation, the competition authorities provide the parties with a written statement of the charges; e.g., a complaint, statement of objections, case officer report. It sets out the competition authority's position and indicates the legislation on the basis of which it will take a decision.

The Statement of Objections must indicate the essential facts on which the competition authority establishes its case, and how it assesses those facts. This statement may be succinct as long as it is clear and allows the addressee to make known in an effective manner its views on the truth and relevance of the facts and circumstances relied on. The Statement of Objections must be individually adapted for each of the addressees. It must set out the conduct and evidence directly relating to them and contain a detailed description of the infringements by stating for each of them the evidence the authority relies on. When the competition authority intends to impose a pecuniary sanction, it must set out in the statement the main factual and legal criteria justifying the imposition of a fine.

A key ingredient: procedural fairness

Due process requires transparency and procedural fair treatment. Due process strengthens confidence in the legal system and the enforcement authorities, and allows competition authorities to understand facts better and improve the quality of their enforcement actions and decisions.

There are minimum transparency and procedural fairness standards of universal application: enforcement should be predictable and transparent, the enforcement authorities impartial, and the parties' rights of defence respected.

A brief overview of the principles is enshrined in the Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement.[8]

First, the framework for competition law enforcement should be clear and public. This includes establishing and publishing clear laws, procedures and guidelines. Transparency requires publishing enforcement decisions, including their facts and legal bases.

Second, enforcement should be independent –i.e. free from political interference or pressure, as well as any material conflicts of interest. Enforcement professionals should have professional secrecy obligations. Competition authorities should have sufficient human and financial resources, as well as investigation and enforcement tools. Otherwise, they will be unable to carry out their tasks and deliver on their mandate.

Third, due process requires treating parties equally, without discriminating based on nationality or ownership, avoiding imposing unnecessary costs and burdens on parties and following standardised procedures.

Fourth, competition law enforcement should be timely. This requires concluding cases within a reasonable time, taking into account the complexity of each case, and following targets for the deadlines or duration of procedural steps.

Fifth, competition authorities to give parties sufficient information on the opening of a case and its legal and factual basis[9]. Parties should have opportunities for adequate defence before a final decision. This includes opportunities to present their views through a lawyer of their choice, discussions with the competition authority on the investigation's facts, progress, and steps, and a meaningful chance to present a full response to the allegations before the key decision makers. This involves a right for parties to access information and evidence, especially inculpatory or exculpatory evidence, as this directly affects the parties' chances of being found liable, or not.[10]

Besides ensuring due process, interaction with the parties may lead to more informed decisions. The case team may offer to meet with the parties at key stages of an investigation to share the authority's working theories or competitive concerns, while soliciting the parties' responses and views.

Sixth, confidential information (i.e. "business secrets and other sensitive information, as well as any other information treated as confidential under applicable law") should not be disclosed unlawfully. There should be clear rules for the identification and treatment of confidential information, and policies to protect privileged communications between attorneys and clients.[11]

Seventh, enforcement decisions should be open to challenge before a court, tribunal, or appellate body that is independent from the competition authority. All court decisions should be

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7 OECD Global Forum on Competition, Investigative Powers in Practice, Breakout session 2: Requests for Information: Limits and Effectiveness, Issues Note by the Secretariat, 30 November 2018, https://one.oecd.org/document/DAF/COMP/GF(2018)8/en/pdf

8 For a detailed overview, see Despina Pachnou, Due Process in Competition Law Enforcement -The New OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement, Competition Policy International (February 15, 2022), www.competitionpolicyinternational.com/due-process-in-competition-law-enforcementthe-new-oecd-recommendation-on-transparency-and-procedural-fairness-in-competition-law-enforcement/

9 See also Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty; and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings and Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

10 OECD (2019), access to the case file and protection of confidential information, www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

11 OECD (2018), Treatment of legal privileged information in competition proceedings, www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm

in writing, based only on matters of record, and explain the findings of fact, conclusions of law and any orders or sanctions. Judicial review is a part of, and promotes due process, as the authority knows that the case may end up before a court of law.[12]

The outcome: sanctions, settlements and commitments

Sanctions

Decision-making powers in competition cases depend on the legal framework for prosecution, which can be administrative, civil or criminal or a combination of administrative and criminal. When infringements are dealt with in an administrative procedure, the decision to issue a cease-and-desist order and, eventually, to impose a fine will usually be taken by the competition agency. In civil and criminal enforcement regimes, the ultimate decision, after the investigation of the competition agency and/or the public prosecutor, will be taken by a court or a jury.

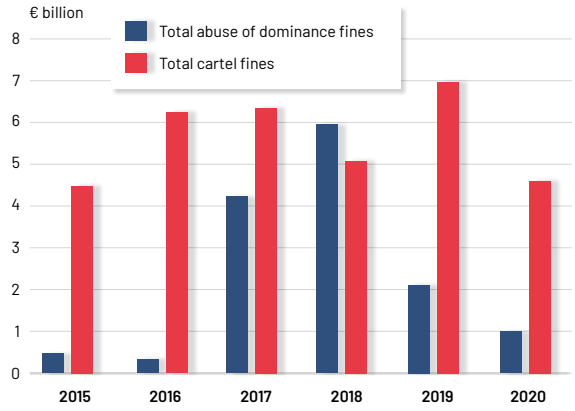
The purpose of fines is to sanction undertakings for having infringed competition rules, in order to deter those undertakings as well as other undertakings from engaging in or continuing behaviour that restricts competition. Deterrence requires that the probability of sanctions and their magnitude are sufficient to prevent or cease unlawful conduct; i.e. it requires a realistic threat that sanctions will exceed the profits expected from the competition breach. Therefore, in addition to the amount of fines, the deterrent effects depend on the reasonable probability that unlawful conduct will be detected and duly investigated, as well as the degree of certainty that sanctions will be imposed.

The method for calculating monetary sanctions against companies varies among jurisdictions. Many start with the calculation of a base fine, usually based on a percentage of the turnover, value of sales or volume of affected commerce related to the infringement. This base fine can be modified based on mitigating or aggravating circumstances (e.g., co-operation with the competition authority or recidivism respectively). The amount can be further adjusted to ensure adequateness and that it does not exceed the maximum penalty allowed by law.

Non-monetary sanctions against companies include reputational effects and debarment (disqualification) from bidding for public contracts when a company has been found guilty of rigging tenders.[13] In criminal enforcement regimes, the strongest non-monetary sanction against individuals is imprisonment.

Competition authorities seem to be well aware of the importance of imposing adequate sanctions. The OECD found that total fines increased with a compound annual growth rate of 31% during the period 2015-2018, even though they then declined by 17% in 2019 and 39% in 2020.

Total of fines imposed by type of infringement (abuse of dominance and cartel cases), by year, 2015–2020



Source: OECD (2022), OECD Competition Trends 2022, http://www.oecd.org/competition/oecd-competition-trends.htm

Settlements

Some jurisdictions provide for settlement procedures, potentially allowing for an expedited conclusion of cartel cases. In the course of the investigation, the competition authorities and the parties may agree on a number of substantive findings in exchange for a speedy resolution of the case and reduction in fines.

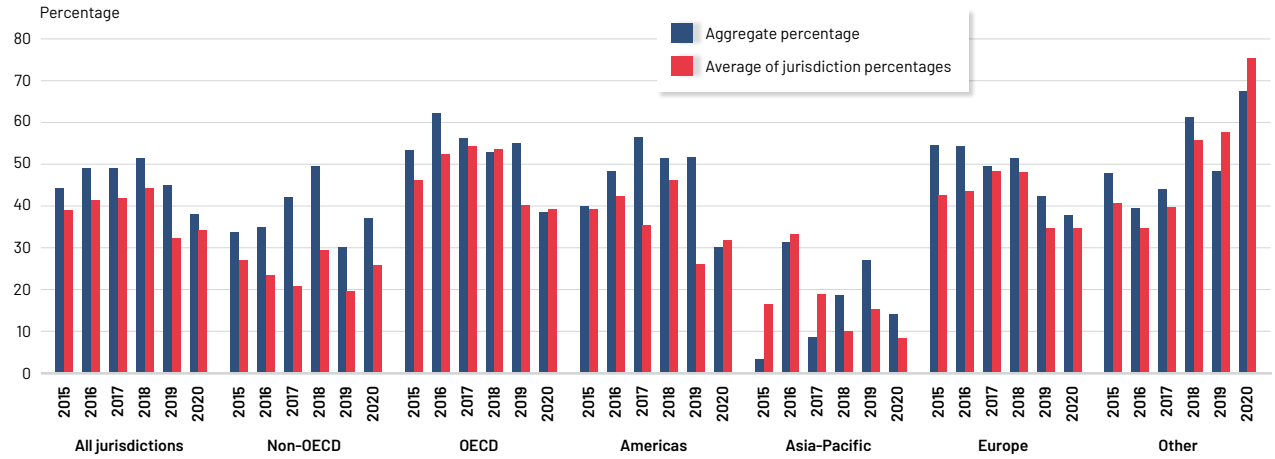
The European Commission introduced settlement procedured for cartels in 2008 and has already implemented them in more than 30 cases. Following a series of meetings aimed at discussing the assessment of the case and key evidence, the party files a settlement submission, in which it gives a voluntary acknowledgement of the infringement, including liability, and provides a summary description of the main facts of the case as well as legal assessment. It also indicates the maximum amount of fine it would be willing to accept. On that basis, the European Commission issues a succinct statement of objections and – after the parties have confirmed that the latter reflects their submission – adopts a settlement decision. This decision establishes the infringement, describes the basic facts of the case, requires the infringement to end and imposes a fine, which is reduced by 10%. All decisions are subject to judicial review.

Ensuring transparency and predictability is a prerequisite for any successful settlement policy. A reliable policy framework and its predictable implementation enhance the incentives for defendants in cartel cases to co-operate on procedure, and provide them with a sense of security as well as influence on the final outcome.

There was a general decline in the percentage of cartel cases with settlements during the period 2015 to 2020, which affected the Americas and Europe in particular.

12 OECD (2019), The Standard of Review by Courts in Competition Cases www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm
13 Debarment may also backfire in markets where there are few potential suppliers and high barriers to entry, as it may decrease the number of qualified bidders to an uncompetitive level and endanger security of supply. The OECD Recommendation on Fighting Bid Rigging in Public Procurement (currently under revision) recommends that debarment should be time bound and discretionary in order to take into consideration the characteristics of the relevant market.

Percentage of cartel cases with settlements, either aggregate percentage in each region or average of jurisdiction percentages in each region, 2015–2020



Source: OECD (2022), OECD Competition Trends 2022, http://www.oecd.org/competition/oecd-competition-trends.htm

Commitments

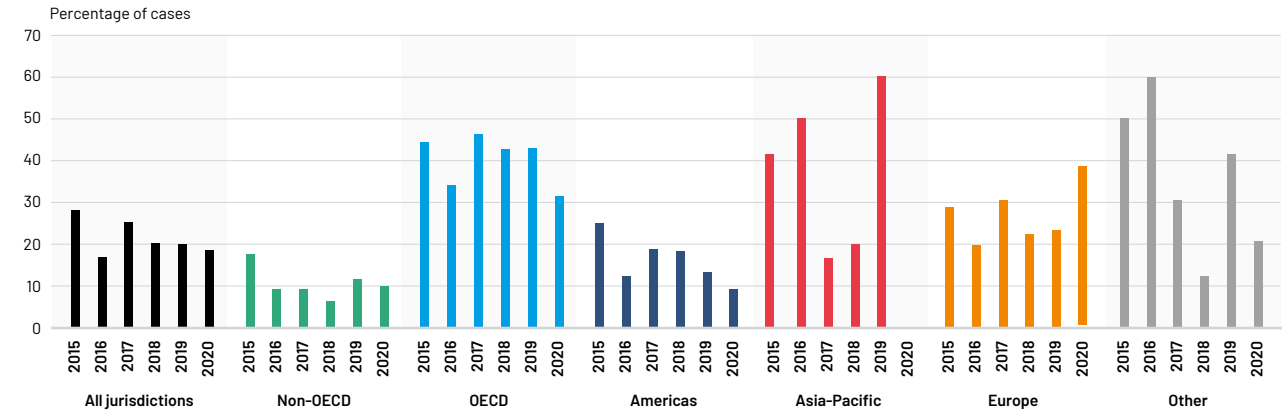
Unlike settlements, commitment decisions do not entail the acknowledgement of any infringement by the parties. In particular, the competition authority simply terminates the investigation by accepting commitments voluntarily proposed by the parties to address the initial concerns identified by the authority. For this reason, commitments are not an option for the most serious competition infringement cases, such as cartels.

From the perspective of the competition authority, the key benefit is the swift reinstatement of competitive conditions, often long before a prohibition decision. This can be particularly important in nascent or fast-growing markets. Moreover, commitments may save administrative resources and reduce the risk of long lasting and costly appeals. Commitment decisions can offer significant advantages to the investigated firms too, as long as the case would end without the establishment of an infringement, without fines and without reputational damages. A commitment decision also implies lower risks of 'follow on' private actions.

Commitments may be structural and include the divestiture of assets, or behavioural, requiring the provision of goods or services under specified conditions. Many competition authorities, including the European Commission, carry out a market test allowing interested stakeholders, such as competitors and customers, to provide their observations on the draft commitments proposed by the parties.

The use of commitments in abuse of dominance cases is relatively common, affecting approximately 20% of cases on average during the period 2015 to 2020. Commitments are more frequent in the OECD than the non-OECD jurisdictions, being used in 40% of cases in the OECD and 10% in the non-OECD jurisdictions. Most of the jurisdictions with the top 10 highest percentage of cases that use settlements or commitments are located in Europe.

Percentage of abuse of dominance cases with commitent procedures, 2015–2020

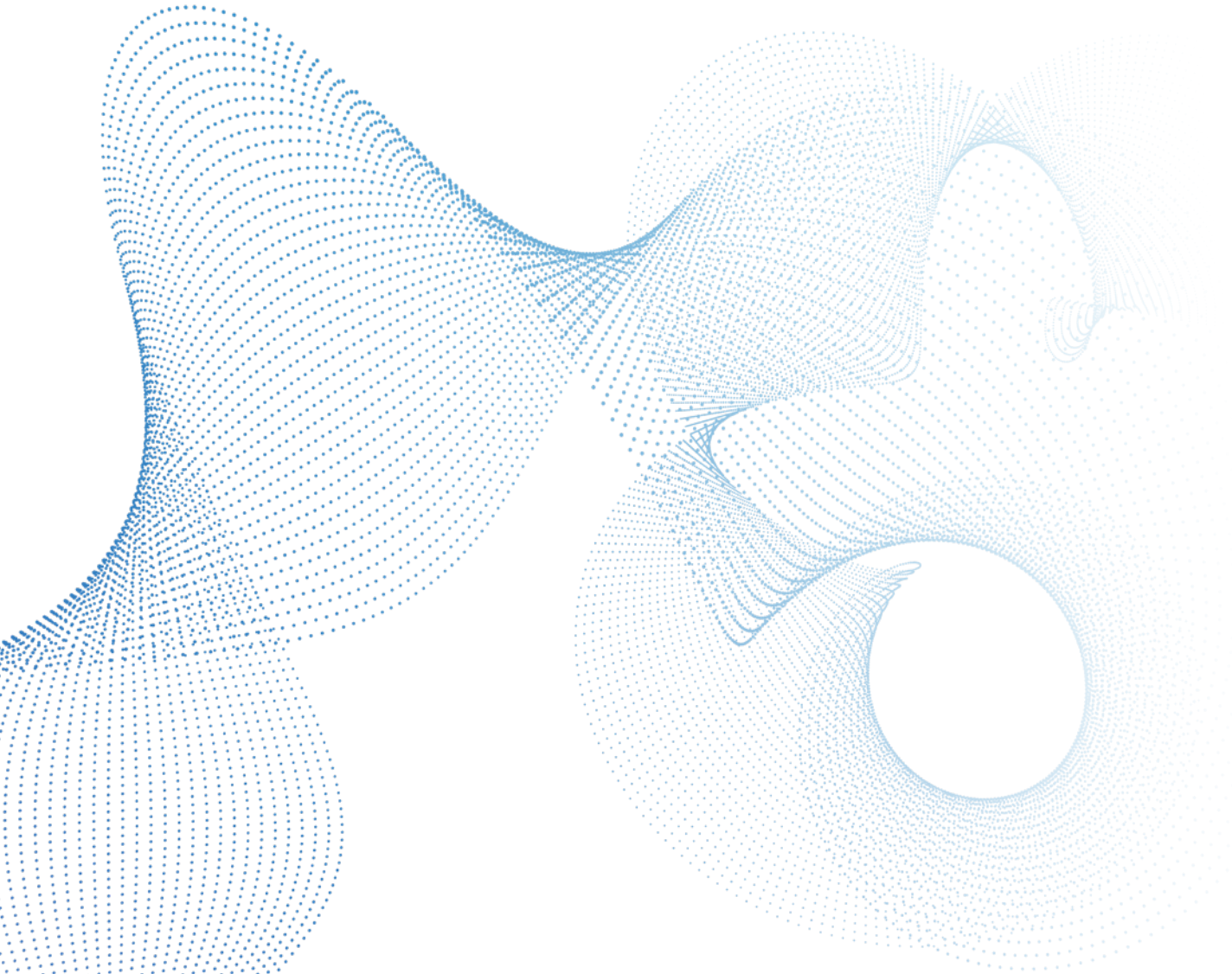


Source: OECD (2022), OECD Competition Trends 2022, http://www.oecd.org/competition/oecd-competition-trends.htm

Conclusion

The steps illustrated above are the necessary ingredients, just like those in a recipe for a good meal. Each of them contributes to the adoption of solid decisions, based on a careful review of evidence and a fair and transparent procedure.

That said, as in cuisine, the final outcome will depend on the skills, dedication and intuition of the competition authority (and a bit of luck, too).



The Fimi Media case: lessons learned in enforcing high-level corruption cases in Eastern Europe and Central Asia

Noel Merillet
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Corruption is a very serious and pervasive issue in the Eastern European and Central Asian region, consistently scoring second to last in Transparency International's Corruption Perception Index over the last four years.[14] Corruption and high-level corruption more particularly, hold up economic and political development, distort business competitiveness and channel large amounts of public funds to those in power.[15] Accordingly, corruption is a big barrier to competition, discouraging genuine competitors from bidding for a contract in cases where they are apprehensive of unfair competition or are unwilling, or unable, to pay bribes. Consequently, corruption and competition offenses often go hand in hand, as in the case of public procurement, which is widely considered a high corruption risk area.[16] For instance, collusion and corruption are distinct problems within public procurement, yet they may frequently occur in tandem, and have a mutually reinforcing effect. Whereas collusion focuses on the horizontal relationship between bidders, corruption looks at the vertical relationship between the public official awarding the contract and the bidders, however the outcome, the award of a public contract for reasons other than fair competition, remains the same.[17]

The covert nature of corruption, resulting in offenses often remaining hidden without an easily discernible victim, makes it particularly difficult for law enforcement to detect, investigate and prosecute corruption offenses. This may be significantly compounded by particularly complex corruption schemes requiring lengthy financial investigations and where evidence is located abroad. While enforcement actions involving petty corruption have showed some progress in the region, complex high-level corruption is more resilient to enforcement efforts.[18] However, there are examples of successful high-level corruption enforcement actions carried out by the region's most proactive countries. In Croatia, the specialised anti-corruption prosecutorial body - the Office for the Suppression of Corruption and Organised Crime (USKOK), wrapped up its long running "Fimi Media case". The case is one of USKOK's highest-level cases to date which saw the former Prime Minister, other high-level public officials, senior members of the former Prime Minister's political circle and the political party itself convicted of associating for the purpose of committing criminal offences and abuse of office and official authority and handed pecuniary sanctions and prison sentences in October 2021.[19]

Fimi Media: a vehicle to embezzle public funds

USKOK detected the scheme in 2010 following allegations made to the media by a board member of a state owned enterprise (SOE). Allegedly the former Prime Minister had instructed public authorities to arrange business activities with a communications company by the name of Fimi Media d.o.o (hereinafter Fimi Media) at a meeting in 2007. Accordingly, the The treasurer of the ruling political party, the Prime Minister's affiliated political party, was designated as facilitator for arranging business activities with Fimi Media. The scheme aimed at funnelling public funds to the Prime Minister and his political party through two trading companies that would issue fake invoices to Fimi Media.[20] To ensure Fimi Media would win public contracts, tenders were conducted through invitation or direct contracting in which only other bidders involved in the scheme were invited and would offer higher bids to ensure Fimi Media would win the tender. In some cases, these tenders were even qualified as trade secrets to ensure that they were not open to public scrutiny.[21] USKOK's investigation revealed that Fimi Media had acquired EUR 23.2 million through the scheme and presented a profit in the sum of EUR 5.9 million, which was shared between the participants of the scheme, of which EUR 3.7 million went to the former Prime Minister.[22]

A proactive approach to investigating high-level corruption

USKOK opened a criminal investigation in 2010 following the public allegations and began by organising interviews with all persons that participated in the 2007 meeting, and requested the tax administration to audit Fimi Media and collected financial documents on the business activities of all public companies and ministries that had contracted Fimi Media. As new evidence emerged, the investigation was extended resulting in the questioning of 350 witnesses. In the course of the investigation, USKOK used plea agreements to gather confessions and

14 Transparency International, Corruption Perception Index, 2018-2021
15 OECD (2014), OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, OECD Publishing, Paris, p.3
16 OECD (2014), OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, OECD Publishing, Paris, p.8
17 OECD (2010), Policy Roundtables, Collusion and Corruption in public procurement, OECD Publishing, Paris, p.9
18 OECD (2019), Anti-Corruption Reforms in Eastern Europe and Central Asia - Progress and Challenges 2016-2019, OECD Publishing, Paris, p.15
19 Total Croatia News, Supreme Court's Fimi Media Ruling: Sanader Gets 7 Years, HDZ Fined HRK 3.5m, 14 October 2021
20 Slobodna Dalmacija, "FIMI-MEDIA Confirmed: Lončar Papeš 11 months, Dimić, must return 3.8 million kuna", 19 March 2012
21 Nacional, "6 million kuna for Fimi-media concealed as trade secret", 18 May 2010
22 RTL, "Fimi Media affair", 9 January 2022

testimony linking senior public officials, including the former Prime Minister, to the scheme.[23]

In parallel, the financial investigation collected information from the Ministry of Finance, the Tax Administration, the Central Depository and Clearing Company, the Financial Services Supervisory Agency, and Croatia's Financial Intelligence Unit (FIU), and verified the asset declaration forms of suspected public officials and information from credit card companies. The Croatian FIU learned that the former Prime Minister and his family members had opened bank accounts in Austria and owned other assets in Germany, Switzerland and the United States. Subsequently, USKOK issued formal mutual legal assistance requests to these countries to gather information on these assets.[24] USKOK also requested expert witness reports on accounting, graphology and financial aspects of the case including unexplained wealth, allowing USKOK to proceed with temporary confiscation orders. In total, 16 temporary confiscation orders were issued relating to real estate, an art collection in Croatia, and bank accounts in Croatia and Austria, collectively valued at EUR 10.6 million.

Immunities, extradition and other challenges in prosecuting high level public officials

In order to proceed to prosecutions, USKOK requested that the parliamentary immunity of those involved in the scheme be lifted. USKOK submitted a request to lift the Prime Minister's immunity to Parliament in 2010, which was approved; however, the former Prime Minister had already left the country. The former Prime Minister was finally arrested in Austria following USKOK issuing an arrest warrant to Interpol and subsequently extradited back to Croatia.[25]

USKOK indicted seven natural persons (including the former Prime Minister), three companies and the political party for associating for the purposes of committing criminal offences and abuse of position and authority in December 2011. In 2014, a first instance Court convicted all natural persons (the former Prime Minister was sentenced to 9 years imprisonment);[26] the political party was issued a pecuniary sanction and the Court ordered the dissolution of Fimi Media. In 2015, the Supreme Court overruled the first instance court decision and ordered a retrial due to violations of procedural law and the right to a fair trial, namely that the defendants were unable to cross-examine witnesses during the trial.[27] The second trial took place from 2016-2021 and the final decision acquitted one of the original defendants, and criminal proceedings were suspended in the case of the CEO of Fimi Media due to her death. In addition, the final decision also reduced the prison sentence of the former Prime Minister to 7 years.[28]

Progress and challenges in fighting corruption in Eastern Europe and Central Asia

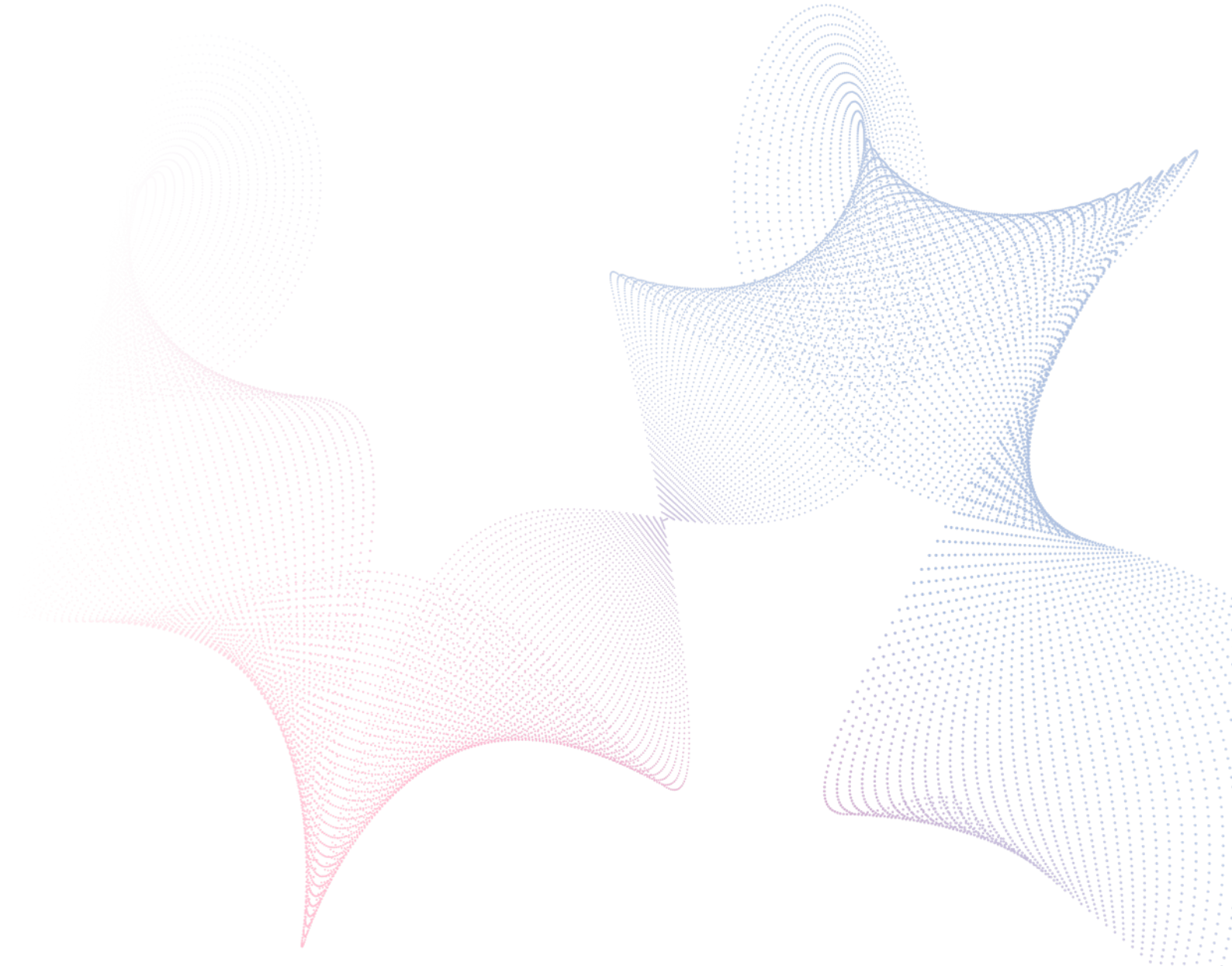
The Fimi Media case, spanning 11 years, can serve as a best practice example of how law enforcement can proactively follow-up allegations of high-level corruption and demonstrates the difficulties posed by such long and complex investigations in terms of resources without factoring in the immense scrutiny that investigators and prosecutors are put under during high profile cases.

Within the region, law enforcement bodies utilize a wide range of conventional sources of detection but have yet to fully utilize other analytical sources; however, Lithuania's Special Investigative Service, Romania's National Anti-Corruption Directorate and the National Anti-Corruption Bureau of Ukraine's incorporation of an analytical department and reliance on their respective FIUs provide interesting illustrations of how analytical sources can be used in detecting corruption.[29] Consequently, it is vital that law enforcement bodies have access to public registries and databases, and financial, banking and commercial records not only for detecting corruption but also during the course of investigations. One of the most effective means of facilitating the exchange of such information in the course of investigations is through cooperation with other public authorities, such as competition authorities, through cooperation agreements, interagency taskforces, domestic joint investigative teams or other forms of interagency cooperation, particularly in cases where anti-corruption functions are fragmented between different agencies.[30]

This is even more important given that while countries within the region have begun to conduct financial investigations the practice is still developing, making the use of external or internal forensic accountants and financial analysts an invaluable investigative tool. In addition, as in the Fimi Media case, procedural settlements such as plea agreements for natural persons exist in most countries in the region and present an important tool in gathering previously unknown pieces of evidence, shortening the length of investigations and subsequently saving resources of law enforcement bodies.[31] Finally, law enforcement bodies within the region have developed a more proactive approach in relation to international cooperation through formal mutual legal assistance mechanisms, joint investigative teams and by developing channels of informal cooperation for example through international and regional law enforcement networks. However, international cooperation remains a challenge in cases of high-level corruption where a certain lack of political will to pursue such crimes exists.

23 Intellinews, "Croatia gears up for landmark graft case", 23 March 2012
24 Tportal, "Attorney says Sanader's Austrian bank accounts unfrozen", 9 May 2011
25 BBC, "Croatian ex-PM Ivo Sanader arrested in Austria", 10 December 2010
26 Two of the defendants had entered into plea agreements for reduced sentences.
27 Supreme Court of Croatia, Decision No.II Kž 343/15-4, 30 September 2015 [HRV]
28 RTL, "Fimi Media affair", 9 January 2022; N1, "Supreme Court rules on Fimi Media: Sanader gets 7 years, HDZ fined 3.5m kuna", 13 October 2021.
29 OECD (2019), Anti-Corruption Reforms in Eastern Europe and Central Asia - Progress and Challenges 2016-2019, OECD Publishing, Paris, p.270
30 OECD (2019), Anti-Corruption Reforms in Eastern Europe and Central Asia - Progress and Challenges 2016-2019, OECD Publishing, Paris, p.292
31 OECD (2019), Anti-Corruption Reforms in Eastern Europe and Central Asia - Progress and Challenges 2016-2019, OECD Publishing, Paris, p.287

One possible solution is ensuring that law enforcement bodies have sufficiently specialised staff, resources and both the mandate and powers to prosecute complex high-level corruption. The emerging trend of specialised anticorruption law enforcement bodies, such as USKOK, is a positive development in this regard within the region allowing countries to truly begin to develop a pool of investigators and prosecutors specialised in complex financial crime. The Fimi Media case serves as a reminder of the progress of anticorruption efforts in the region and that there is a growing willingness within the region to provide law enforcement with the tools to continue prosecuting high-level corruption. Notwithstanding, these specialised bodies remain relatively novel and struggle to ensure their exclusive jurisdiction in practice or lack the resources or capacity to do so, and in some countries are the targets of increased political pressure, especially during high level corruption cases.[32]



32 OECD (2019), Anti-Corruption Reforms in Eastern Europe and Central Asia - Progress and Challenges 2016-2019, OECD Publishing, Paris, p.16

Criteria for predatory pricing in the abuse of dominance and arbitration: Croatian Case CCA v. Hrvatska Pošta d.d.

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President of Competition Council, Croatian Competition Agency

Introduction

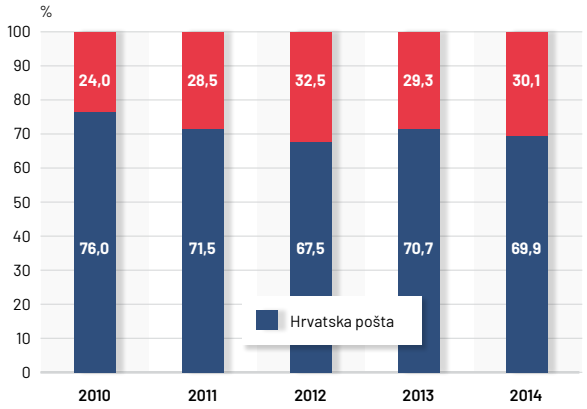
When it comes to predatory pricing, the practice of the EU and national competition enforcement has one thing in common: this type of abuse of dominant position is very difficult to prove. This is why there are only few cases where the criteria for predatory pricing are fulfilled, proved and later confirmed by the courts. The following case of Croatian Competition Agency (hereinafter: CCA) vs. Croatian Post (Hrvatska pošta) is no exception. After detailed economic and legal analysis applying criteria for predatory pricing and using EU competition legislation and case law[33], the CCA did not find sufficient evidence to prove that the practice of HP was predatory. However, this case had another specific feature as a follow up, the arbitration before the International Investor Arbitration Court, which pointed also to the link between competition law and arbitration.

The initiative

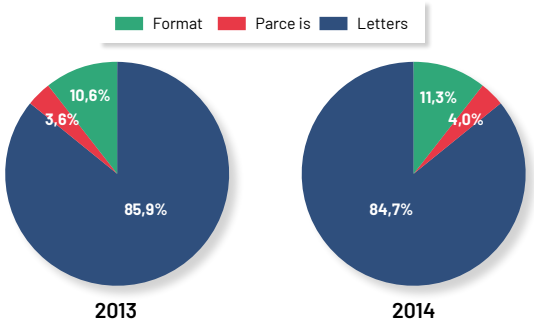
In April 2013 the CCA received an initiative from undertaking CityEx Ltd. to start an investigation on abuse of dominant position against undertaking HP-Hrvatska pošta (hereinafter: HP). HP is the former incumbent on the market for providing postal services in Croatia. The applicant stated that HP sent proposals to a number of banks and other undertakings, some of which were clients of CityEX Ltd, offering its services at prices more than 50% lower than the existing legal prices from HP's official price list. According to the official price list HP offered volume rebates for consumers of universal postal services for the distribution of letters that weigh up to 2,000 grams. Moreover, the applicant claimed that HP offered some of its services free of charge which additionally lowered the prices for distribution of letters up to 2,000 grams and led to those prices being below cost. CityEx claimed that the only purpose of the predatory behavior of HP was to maintain or strengthen its market power and to exclude its competitors from the market for postal services, or to prevent new entrants on the market. After conducting a preliminary analysis, the CCA found sufficient indications that the prices in question might be below cost, i.e. predatory and therefore decided to start proceedings against the undertaking HP.

Dominant position on the relevant market

HP as a historical national incumbent on the market for providing postal services kept high market shares (60-70%) even after liberalization of the market for the provision of letter post services in 2013 and its market share was still significantly higher than the share of its competitors. The CCA established that in the period from 1 January 2013 onwards HP held a dominant position in the relevant market defined as the provision of letter services in Croatia.



Croatian market of postal services in 2013 and 2014-letters prevail



The decision of the CCA: No abuse of dominant position with predatory pricing

By its decision adopted in November 2015, the CCA found that HP did not distort competition in the provision of letter services in Croatia.[34] In the course of the proceedings the CCA did not find evidence that after 1 January 2013, the moment of the full liberalization of the market for the provision of letter post services in Croatia, HP implemented a predatory pricing policy with exclusionary abuse objective or anticompetitive foreclosure with the objective of excluding the existing com-

33 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN
34 https://www.aztn.hr/ea/wp-content/uploads/2016/01/UP-I-034-032013-01010.pdf

petitors from the relevant market and deterring entry of new operators.

In order to come to that conclusion, the CCA analysed cumulative criteria used to prove the evidence of predatory pricing.[35]

Criteria for predatory pricing

The first criterion is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (so called "sacrifice"). The price cost test applied by the CCA showed that the prices of letter post services charged by HP as a dominant undertaking were not below benchmark costs deliberately incurring losses or foregoing profits in the short term ("sacrifice").

The second criterion is evidence of a strategy to exclude competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market. There was no direct or indirect evidence on the existence of such predatory strategy.

The third criterion is possible selectivity of the conduct in question where the dominant undertaking may apply the practice only to selected customers, thereby enhancing the likelihood of anti-competitive foreclosure. The CCA also established that HP did not apply selective pricing policy only to selected customers.

The fourth criterion is that the predator will be able to raise the price above the competitive level (recoupment capability) once it has forced the competitors to exit the market or deter entry and expansion by competitors, thereby increasing or maintaining its market power in the long run. Finally, HP did not raise prices above the competitive level (recoupment capability) later on. [36]

The decision of the CCA particularly took into account the fact that the provision of postal services concerning letter post services, and the universal postal service as a part of this market, is ex ante regulated by the National Regulatory Authority for Postal Services (HAKOM).[37]

Application of Article 102 TFEU

The proceedings in this case were opened by dual application of national law (Article 13 of Competition Act) and Article 102 TFEU due to possible effect on trade between EU Member States. The CCA found that according to Article 102 TFEU there was no ground for further action given the fact that the national competition authority could not take a decision finding that a practice does not restrict competition under Article 102 TFEU.

Judicial review-Judgement of the High Administrative Court of Croatia, 22 September 2017

The High Administrative Court of Croatia (hereinafter: the Court) rejected the claim from CityEx and confirmed the decision of the CCA. The Court established that the CCA correctly concluded that the criteria for predatory pricing were not cumulatively fulfilled to assess predatory abuse by HP in line with Article 13 of the Competition Act. Furthermore, the Court also confirmed that the CCA correctly terminated the proceedings without decision on the merit of non-infringement of Article 102 TFEU. Such decision is in line with EU law, more precisely with the application of the principle of uniform application of national law and the principle of supremacy of EU law over national law.

Arbitration before ICSID

The owner of CityEX undertaking B3 Courier initiated arbitration against Croatia before the International Investor Arbitration Court (further: ICSID). The claim referred to the investment of B3 CCC in CityEX which claimed that Croatia breached the bilateral agreement on investment between Croatia and Netherlands because it treated CityEX in a disloyal manner and led to the insolvency of CityEX. The claimant sought €53 million in damages and insisted that the blame for the bankruptcy of CityEX was on predatory pricing used by the national post HP and the inaction of the CCA which allowed it.

In 2019 ICSID rejected the claim against Croatia, dismissed most of B3's claims and ruled that although some provisions of the Treaty had been violated, these were not the cause of CityEX's bankruptcy. [38]

Conclusion

The presented case emphasized several points in competition law enforcement. First, the process of finding evidence in predatory pricing is complex and requires the application of several economic tests and criteria. Second, good cooperation with the sectoral regulator is crucial for division of powers between ex ante and ex post regulation and for necessary insight into the regulated sector which encompasses services of general interest. Third, the undertakings often try to use alleged abusive behaviour of an undertaking in a dominant position to justify their own business failures on the market. Fourth, arbitration can be used as a last resort and an additional instrument when the regular legal path was not successful in proving competition law infringement. Finally, the national competition authorities always have to take account of the main EU competition law principles when handling cases by dual legal basis (national and European).

35 https://www.oecd.org/competition/abuse/2375661.pdf
36 Some of the criteria can be found in the judgement of the Court of the EU in the case T-340/03 France Telecom v. Commission; https://curia.europa.eu/juris/showPdf.jsf;jsessionid=0829EA353B47623240EA4DC733732C90?text=&docid=66047&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1088574
37 https://www.hakom.hr/en/post/18
38 http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4185/DS15940_En.pdf

Effective investigations in competition cases – an overview of Serbia's track record so far

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Introduction

The Commission for Protection of Competition (CPC)[39] has been operating as an independent authority in Serbia since 2006. The competences of the CPC are set out in the Law on Protection of Competition (2009 and amended 2013 – LPC) and the procedural aspects are also governed by the general framework of the Law on General Administrative Procedure (2016, amended 2018).[40] In line with this legal framework, the CPC conducts specialized administrative proceedings when investigating competition cases.

Some aspects of the procedural framework, such as dawn raids, leniency, procedural penalties, interim measures, and the duty to cooperate are prescribed by the LPC, issues of examining witnesses and oral hearings are governed by general administrative law, while using expert witnesses is governed by both.

Experience with gathering and using direct and indirect evidence

The legal framework provides various investigative tools for case initiation and subsequent investigations.

The CPC initiates cases ex officio, once the relevant legal standard has been established – the existence of a reasonable assumption of competition infringement. When it comes to infringement detection tools, the CPC discovers potential cases through complaints, leniency applications, gathering and analysing publicly available information or through formal and informal market studies. In its decisional practice, most cases have been initiated following some form of gathering of information or market studies, followed by cases initiated upon complaints.

When it comes to investigations, to correctly and fully establish the factual basis of each competition case, the case handlers of the CPC take actions for collecting evidence and in particular, gather statements of the parties and witnesses, take expert evidence, and gather data and documents.[41] In addition, the LPC also provides authorisation for temporary seizure of documents and items, as well as interim measures.

If the companies refuse to submit data or documents, of submit false documents in competition investigations, the CPC can impose procedural penalties ranging from EUR 500 to EUR 5,000 per diem, up to 10% of the previous year's annual turnover.[42] The CPC has resorted to this measure several times, fining non-compliant undertakings.

The methodology in gathering evidence depends on the circumstances of each case; however, dawn raids are usually the first procedural step when it comes to cartel cases. Every case is approached individually, and the outcome of the evidence gathering process, regardless of their direct or indirect nature, varies irrespective of the initial theory of harm. Most resale price maintenance cases of the CPC[43] have been based on direct evidence in the form of an explicit clause in the agreements providing for price maintenance or maximum discounts. In some cases direct evidence was acquired from parties upon an official request from the CPC, whereas in most other cases direct and indirect evidence was discovered through forensic analysis[44] and documents gathered during dawn raids.

It is important to note that when it comes to judicial review of the CPC decisions, the Administrative Court has upheld decisions relying on both direct and indirect evidence, but the standards of proof have yet to be further established and clarified in its decisional practice.

Dawn raids

Dawn raids have proved to be the most efficient method of gathering evidence. In Serbia, dawn raids may be conducted where there is reasonable suspicion that there is danger of destruction or tampering of evidence that could be found at the premises of the parties to the proceedings or third parties.[45] The most distinctive feature of raids in Serbia is that they are

39 The views expressed herein are those of the authors and do not necessarily reflect those of the CPC
40 In accordance with Art.34 LPC
41 Art.41 LPC
42 Art.70 LPC
43 Such as the cases on sportswear, baby equipment or aftermarket car repair.
44 The CPC cases on consumer electronics, concluded in 2021.
45 Art.53 LPC

conducted based on the decision of the President of the CPC[46] and not a court order.

However, if it is necessary to conduct a search at a home or an apartment or other private premises which has the same, similar or related purpose, and the owner or the holder of the premises opposes to it, the President of the CPC requests a court order. Such an order is sought from the Administrative Court and is issued pursuant to the rules of civil procedure for securing evidence, but this option has not yet been utilised by the CPC. The LPC also provides the option of police assistance when entering premises.

Since the first successful implementation of dawn raids in 2015, when the CPC conducted dawn raids in three cases, the CPC has spent the past seven years utilizing this tool in around 20 cases in total and in over 50 locations, for example leading up to a total of 18 dawn raids in 2020. So far, dawn raids have been used as an evidence-gathering tool, both as the first procedural step following the initiation of the case as well as at a later stage. The CPC has conducted successful raids at premises of suspected companies and third parties alike, both in cases related to restrictive agreements (horizontal and vertical), as well as cases of suspected unilateral conduct. Such raids often contribute substantially to procedure efficiency, providing a wide range of gathered evidence, both direct and indirect, later used as a basis for proving competition infringements.

During the past decade, case handlers and computer experts of the CPC have had extensive training on forensic software, dawn raid best practices and evidence gathering. The CPC has also issued guidance for parties, informing them of their rights and duties during a dawn raid.[47]

Experience with handwriting (graphoscopy) expert witnesses

In its investigational and decisional practice, the CPC also relies on expert witnesses. Expertise regarding handwriting and signatures is usually used as direct evidence of infringements. Expert witnesses are appointed by the President of the CPC for a specific task in a specific case, from the list of court-appointed[48] expert witnesses.

Handwriting expertise requires originals of disputed documents and other evidence containing signatures and documents that are presumed to contain all the characteristic features of a normal, undistorted handwriting of an individual. It is also necessary to collect undisputed writing samples of all persons who come into consideration as writers of the disputed texts. Such writing can be found in various written documents, biographies, applications, letters of a private nature, etc. In addition, it is necessary for the suspects to write the disputed text several times with the same means of writing, the same letter and under as similar conditions as possible under which the disputed text was created.

In handwriting expertise, attention is paid to the course of the stroke, its discontinuity, rhythm, pressure on the substrate, position of the writing medium, speed, start and end of the lines, writing angle, direction and type of lines, spacing between letters and mutual proportions.

In three cases of bid rigging,[49] court experts in the field of graphoscopy were appointed to examine whether the same person wrote documents for different bidders on individual bidding forms. The CPC did not seek to determine which person filled out the tender forms, as it was not a determining fact for the case. Identical handwriting on independent bids proved cooperation between direct competitors regarding preparation of bids, manifested in having the same person fill out the forms.

Expertise of handwritten numbers is particularly challenging because they are usually written in a similar way, have few identifying characteristics and offer little material to compare. However, the CPC had a case in which[50] it was necessary to prove that the same person wrote numerical parts of competing bids. Expertise confirmed the suspicions of the case handlers, and it became the first direct evidence of cartel in the specific case. Thanks to that direct link, other evidence could be put in the correct context and transformed from indirect to direct.

Findings of expert witnesses do not always confirm CPC case handlers' suspicions. In the case of the vehicle technical inspection (VTI) cartel (2020), the CPC found that representatives of eleven VTI companies from Čačak gathered at a meeting to discuss prices of VTI services, after which they agreed upon prices, which resulted in creating a joint pricelist, stamped and signed by the parties to the agreement.[51] The case that apparently seemed easily provable was challenged due to a series of difficulties argued by the parties. One of them was the claim that it was not their legal representative who signed the price list, but an unauthorised company employee, forging the signature of the legal representative and stamping the pricelist with the company stamp. The company even hired a court expert in the field of graphoscopy on their own, which gave the opinion that the legal representative did not sign the pricelist. In order to determine if the signature of the legal representative was counterfeit and challenge this expertise, the CPC appointed an expert witness.

The particular expertise was challenging, as it was based on a printed colour photograph of the signed and stamped document. Despite the utmost effort of the CPC to obtain the original document, it was not possible. In such circumstances, provided that the quality of the printed photograph was sufficient, the expert vouched that expertise can be provided without the original document.

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46 Art.41 LPCs

47 More information on dawn raids in Serbia can be found here: http://www.kzk.gov.rs/kzk/wp-content/uploads/2019/01/Rights-and-Obligations-of-the-Parties-during-Dawn-Raids.pdf

48 The term "court-appointed" is used in this article for the sake of linguistical clarity. In the Serbian legal system, expert witnesses are appointed by the Ministry of Justice in that capacity, which qualifies them to be specifically appointed by courts or administrative authorities in individual cases for specific tasks.

49 The cases were initiated under the previous Law on Public Procurement and before introducing electronic bids in Serbia.

50 Additional analysis of the case was done in the RCC publication Focus on Bid Rigging in Public Procurement, pg.16-18, available at: http://www.oecdgvh.org/pfile/file?path=/contents/about/newsletters/focus-on-bid-rigging-in-public-procurement---competition-policy-in-eastern-europe-and-central-asia&inline=true

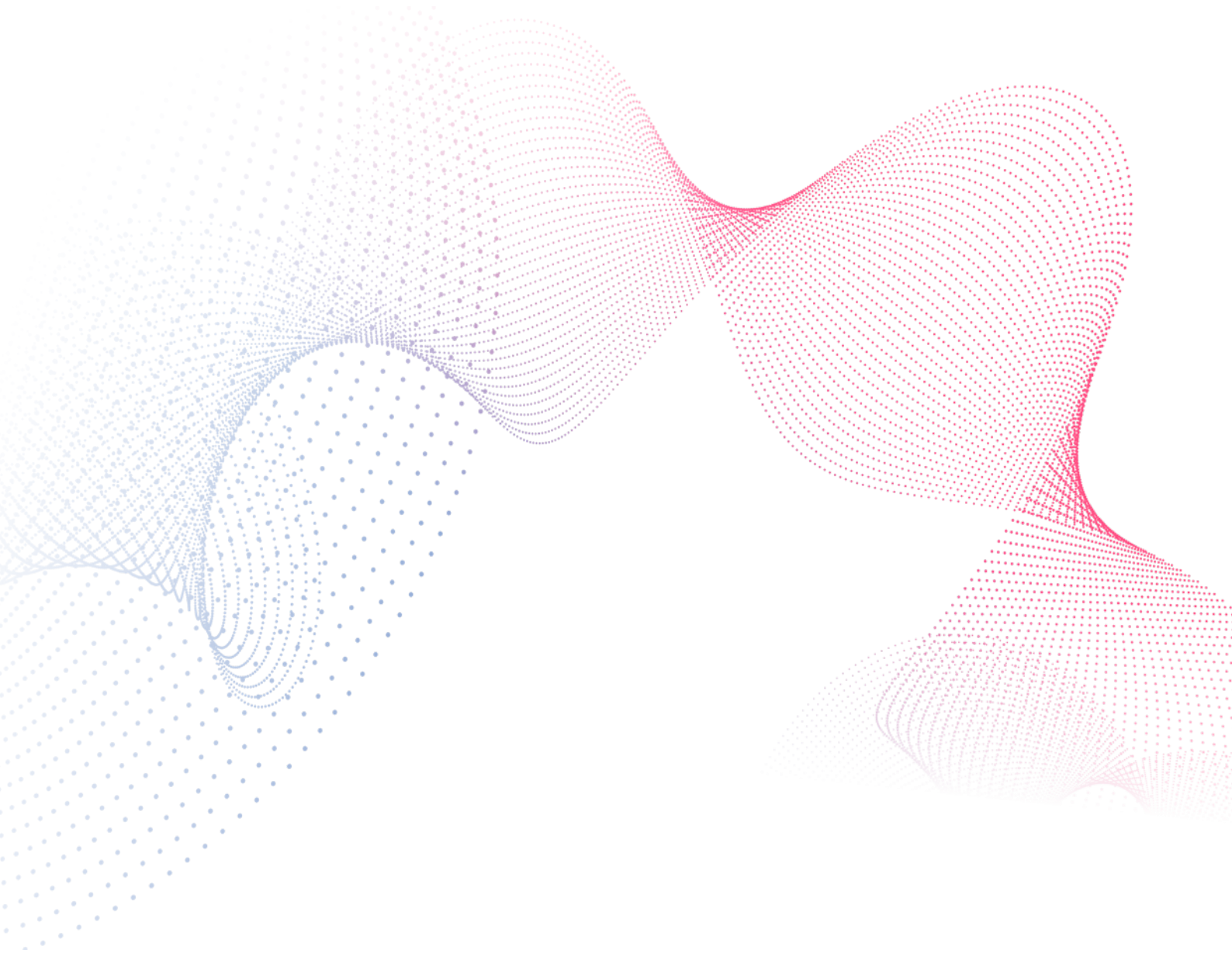
51 A consumer protection group, reporting on the case, published the price list: https://moravainfo.rs/kartelsko-udruzivanje-u-cacku-tehnicki-pregled-za-automobile-skocio-na-6-000-dinara/

After the expert witness's confirmation that the employee did counterfeit the signature, re-examination of other gathered evidence was needed. However, further investigation and linking other indirect evidence in the relevant timeframe proved that the employee signed the document after being instructed from the legal representative to do so, associating the participation of the company in question through indirect evidence.[52]

Next steps

Several years ago, the CPC acquired software from the CMA (UK) to help detect possible collusion in public procurement. With the new digitized system of public procurement, such software could be of great help in discovering competition infringements.

As the business world turns toward an increasingly digital and data-intensive setting, as well as transitioning to alternative means of communication, the CPC will likely use more data-intensive tools in detecting and processing competition infringements, but this transition will follow the pace of digitalization of commerce in Serbia.



52 The final decision is available in Serbian: http://www.kzk.gov.rs/kzk/wp-content/uploads/2020/12/56-30-11-2020-Resenje-tehnicki-pregledi.pdf

Effective Investigations in Competition Cases in Georgia

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Slava Fetelava
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Introduction

The terms of the Association Agreement between the European Union and Georgia, according to which each party shall maintain comprehensive competition laws in their respective territories, effectively address anti-competitive agreements, concerted practices and anti-competitive unilateral conduct of enterprises with dominant market power and also provide effective control of concentrations in order to avoid significant impediment to effective competition and abuse of dominant position. The mentioned terms provided the basis for development of recommendations intended for the Competition Agency in the framework of the EU Assistance Project. The major part of the amendments to the Law of Georgia on Competition entered into force on November 4, 2020, which fully complies with best European practices and DCFTA requirements and reflects the basic principles of EU competition law.

The purpose of the amendment to the Law of Georgia on Competition was to maintain the powers and procedural measures of the Agency, improve the enforcement of competition law in regulated sectors, introduce effective merger control mechanisms and change the structural arrangement of the Agency.

1) New powers of the Agency according to changed procedural norms

In order to conduct effective investigations, the Georgian National Competition Agency has refined its information retrieval mechanisms. In particular, prior to the change of law, undertakings were not obliged to provide the information requested by the Agency, both in the process of reviewing the notification of concentration and in the process of monitoring. This hindered the Agency in implementing its powers. With the changes implemented, undertakings are required to provide essential information to the Agency not only during the investigation but also during the review and monitoring of the notification of concentration - which will facilitate the completion of proceedings. A clear example of this is the information obtained during the investigations carried out by the Agency:

- Aviation Market Monitoring - Out of 30 letters, 16 were answered
- Retail Market Monitoring - 84 emails, 20 replies received, of which 5 were incomplete
- Pharmaceutical Market Monitoring - 36 emails, 36 replies received
- Planned Concentration in Electrical Engineering - Out of 176 letters, 43 were answered
- Retail

However, it should be noted that information was often received several months late.

In order to conduct effective investigations, the Georgian National Competition Agency has extended the investigation deadline. Prior to the law changes, the investigation period was 3 months (10 months for a particularly complex category of cases), which was very short because, as it is well known, the abuse of dominant position and the study of anti-competitive agreements require extensive market analysis and economic research. Accordingly, the initial term of investigation was changed to 6 months, and the maximum term to 18 months.

In order to conduct effective investigations, the Georgian National Competition Agency has improved the dawn raids mechanism. Prior to the law changes, the competition law provided the possibility of on-site inspections of undertakings with the consent of the Court. However, due to lack of special procedural norms, the judge was obliged to notify the undertaking about the impending inspection in advance. As a result of changes in the Code of Administrative Procedure, the Court will not issue prior notification to the undertakings, which will be helpful in terms of protecting the evidence. In accordance with international practice, prior notification of the parties is not carried out in any case.

The COVID-19 pandemic is a major challenge for Georgia today, as well as for all countries in the world. Due to the pandemic factor, the Agency has not used a down raid tool to date. The Agency has not had a down raid practice yet.

In order to conduct effective investigations, the Georgian National Competition Agency has developed sanctions for the facts of unfair competition. As a result of the investigation into the issue of unfair competition, the Agency could only confirm the fact of violation, without imposing any sanctions. With the implemented changes, in case of confirmation of the fact of unfair competition, a penalty mechanism was introduced - up to 1% of the annual turnover, and in case of repetition - up to 3%.

On March 9, 2021, the Georgian National Competition Agency completed an investigation into the alleged violation of Article 7 of the Law of Georgia on Competition (Restrictive Competition Agreement, Decision, and Concerted Action) following a Complaint submitted to the Agency. Based on the investigation, the violation of Article 7 of the Law of Georgia on Competition by the respondent undertakings was confirmed.

In particular, redistribution of the market in specific public procurements announced to provide free canteen services was revealed. During the investigation, the relevant market and its nuances were analysed. Appropriate sanctions were imposed on the undertakings, following the law.

In order to conduct effective investigations, the Georgian National Competition Agency has refined some other procedural changes that will have a positive impact on the investigation process, including the leniency programme.

2) Agency experience on effective investigation

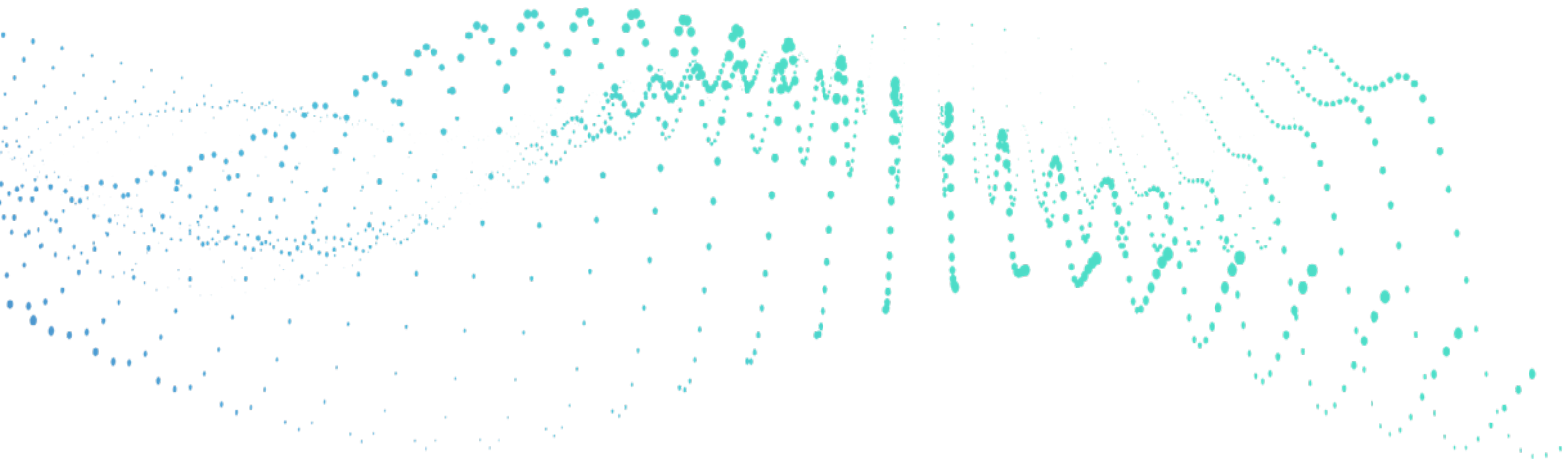
Since 2014, the Agency has investigated a number of cases, both on the basis of complaints and on its own initiative, to prevent abuse of dominant position, restrictive competition agreements, unfair competition and anti-competitive decisions made by administrative bodies.

In 2015, the Agency started an investigation on oil commodity market on its own initiative. The work process included analysis of outgoing and incoming correspondence with the Agency, explanations received from undertakings, workshops held and written materials reviewed during the investigation. As a result of the investigation, it was determined that oil companies were involved in an anti-competitive agreement that included price fixing, market sharing and market restriction. However, the Court annulled the decision and in accordance with the order of the Georgian courts, in 2018, the Competition Agency began to re-investigate the oil commodity market. Accordingly, the Agency made a new decision on the case. As a result of the investigation, the five largest oil companies operating in the country were found to be in breach of market distribution. It also re-established the fact of price fixing in the subcontracting and partnership agreements signed by individual companies. The undertakings were fined up to 3 million Georgian GEL for violating the competition legislation, which was paid into the state budget.

Conclusion

Drafting the amendments to the Law of Georgia on Competition started in 2017 within the framework of the EU project "Support to the Georgian Competition Agency", it lasted for 3 years and, as it is mentioned above, entered into force on November 4, 2020. The draft law, authored by the Georgian National Competition Agency and initiated by the Committee of Sector Economy and Economic Policy of the Parliament of Georgia, is fully in line with best European practices and reflects the basic principles of EU Competition Law. The COVID-19 pandemic in Georgia and in the world in general has had a major impact on almost every area, including competition policy. The new reality has necessitated the introduction and development of new approaches and priorities

The National Competition Agency of Georgia, with the knowledge and experience accumulated in the past, as well as within the framework of the newly added powers, will further contribute to the development of a healthy competitive environment in the country. The above legislative changes are a prerequisite for more effective investigations.



Performing unannounced inspection (Dawn raid) in Montenegro

CRNA GORA
Agencija za zaštitu konkurencije

On 17 December 2018 the Agency took possession of a flyer called Smart Magazine, New Year's edition 2018/2019, which was issued by market participants and which advertised electronic devices at prices identical for all business entities listed on the last page of the flyer. In order to determine the true facts and the way the market functions, the Agency assessed the need for conducting an analysis of competition conditions in the electronic devices market in Montenegro.

During the subject analysis procedure, the Agency addressed a number of participants operating in the relZsofiant electronic devices market in Montenegro, and ordered the delivery of certified copies of all contracts with annexes and contract attachments, concluded between suppliers and customers which are in force or have been in force for the last three years, as well as the supporting documentation that preceded their conclusion or was used for the implementation of the contracts in question, or other forms of communication between the contracting parties.

Inspecting the submitted contracts, the Agency determined that the contracts were standard, that on the basis of those contracts, from the moment of their conclusion, the stated business was continuously performed, that they contained the same contractual clause by which it was agreed that the supplier would commit to adjust its prices for final users with his partner, and that it would at all times provide a sufficient difference between the current final prices and the prices of products for the partner (dealer prices), thus avoiding unfair competition between the contracting parties.

In this regard, the Agency has reasonably assumed that the concluded standard contracts indicate the active role of suppliers in determining the retail prices of buyers in resale, for which there is a reasonable suspicion that it was undertaken to maintain a fixed and/or minimum resale price, thus determining the resale price. Also, the buyer is limited to independently make business decisions related to its pricing policy, and that it has or may have the purpose or the effect of significantly restricting, distorting or preventing competition, in terms of Article 8, paragraph 1, items 1 and 6 of the Law on Protection of Competition.

Based on the above, the Agency, by its Decision, initiated ex officio an investigation procedure against the market participant, in order to investigate the violation pursuant to Article 8, paragraph 1, items 1 and 6 of the Law on Protection of Competition, which stipulates that null and void acts, the effect of which is or may be to prevent, restrict or distort competition in the relZsofiant market shall be prohibited and shall be null and void, including written or verbal arrangements, agreements, contracts, single provisions of agreements, explicit or tacit agreements, concerted practice, as well as decisions by associations of undertakings which directly or indirectly fix purchase or selling prices or any other trading conditions.

In the continuation of the examination procedure, it was assessed that in order to collect data, it is necessary to perform an inspection of the business premises of the participants in the subject market. The unannounced inspection (Dawn raid) was undertaken with the intention of determining the purpose of setting the disputed clauses of the concluded contracts, in a way that the inspection was performed by authorized persons of the Agency, who collected items and files containing documents, data and information on business relations between suppliers and buyers, as well as data related to other market participants engaged in the sale of electronic devices in Montenegro.

Namely, in this particular case, early in the morning during the inspection, the officials entered and inspected the business premises where the party performs its business activities, reviewed business books and other documents, copied and scanned the necessary business documentation, downloaded communication and data in digital format from employees' computers, took statements from party representatives and employees, as well as documents on facts related to the subject of the inspection, and made a report on the inspection. Also, officials issued orders to obtain additional documentation with a deadline for submission and performed other actions in accordance with the Law on Protection of Competition. The unannounced inspection was carried out successfully without any objections from the party and it played a key role in resolving and terminating the entire proceedings.

Application of "soft law" instruments in anti-monopoly control in Kazakhstan

Yerlan Ibragimovich Alzhan
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In 2015, the Republic of Kazakhstan adopted the Action Plan for Economic Development of the Nation "100 Concrete Steps", which envisages a number of institutional reforms, including reforms to both competition law and the institutional status of the competition authority to bring them in line with OECD standards and best practices.

Underlining the particular importance of measures to implement the OECD standards in competition law, conditions have now been created to encourage market actors to behave pro-competitively, as the competition authority can resort to warnings (soft law) and market actors can voluntarily commit to rectifying infringements and restoring competition.

The main instruments of soft law are notification, antitrust compliance, and warning.

The Kazakhstan Antimonopoly Agency, the Agency for Protection and Development of Competition, has shifted from ex post facto response to prevention of violations for many types of infringements. While previously the antimonopoly authority immediately initiated an investigation, now the market participant is first notified of an antimonopoly law violation, abuse of dominant position (except for monopolistically high and low prices), unfair competition, anticompetitive concerted actions and vertical agreements. If the indicated violations are voluntarily eliminated, no investigation is conducted.

The specific nature of antitrust cases is that they are time-consuming. Investigations can last from 3 to 5 months. The use of a notification tool allows for quick resolution of problems, allowing the competition authority to promptly remedy antitrust violations. The use of this tool has a positive effect in most cases.

For example, this year the regional offices of the Agency issued 48 notifications against producers and wholesale suppliers of eggs, sunflower oil, sugar, buckwheat groats, dairy products, chicken meat, and pasta (carrots) on grounds of anti-competitive concerted actions and abuse of a dominant position. Of these, 39 have already been enforced. A number of producers and wholesalers of chicken eggs, sunflower oil, sugar and buckwheat have announced price reductions of up to 10%, which means that in most cases the prices of products have been restrained by "soft law".

One important soft law instrument is the institution of antimonopoly compliance, which was introduced into antimonopoly law with the adoption of the Entrepreneurial Code of the Republic of Kazakhstan in 2016; previously there had been no such provision. Antitrust compliance is a system of measures and procedures aimed at preventing and minimising antitrust risks. Using this tool, at the beginning of this year prices for PCR tests were reduced from 18 thousand tenge to 9 thousand tenge through the conclusion of anti-monopoly compliance providing for transparent trade and sales policy, with 36 market players. KDL Olimp LLP and Invivo LLP set prices not exceeding 9 thousand tenge, and individual laboratories Sunkar LLP and Aigerim LLP reduced prices to 6 thousand and 7 thousand tenge, respectively.

Prices for medical face masks have been reduced by manufacturers by over 50%, from an average of 30 tenge to 21 tenge per unit, distributor and retailer mark-ups reduced from 20 to 3 tenge per unit, from an average of 60 to 28 tenge per unit through anti-monopoly compliance work with manufacturers, distributors and retailers.

A warning not to violate competition law is, in fact, a letter from the anti-monopoly authority to an official of a market player or public entity to prevent its planned anti-competitive conduct in the goods market.

The basis for issuing a warning is a public statement by an official of a market participant or a public authority concerning planned conduct in the goods market, if such conduct may lead to a violation of the antitrust legislation and there are no grounds for an investigation.

The institution of warning exists to prevent possible antitrust offences being planned. If there are indications that such an offence has been committed, then, obviously there are grounds for launching an investigation.

Thus, the new tools introduced in Kazakhstan's anti-monopoly legislation allow market participants to voluntarily remedy violations without initiating an investigation procedure against them and, accordingly, without imposing administrative fines.

Investigation in fertilizers market in Albania: DAP, Nitrate, Urea

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Director, Albanian Competition Authority

1. Legal bases and methodology

The Albanian Competition Authority (ACA) based on law no. 9121/2003 "On competition protection" and on the best international practices, considers itself as an arbitrator by ensuring fair competition and fair rules of play for undertakings operating in the markets.

The investigative powers of the ACA are based both on law no. 9121/2003 and sublegal acts. When detecting cartels ex-officio, the ACA considers both direct and indirect evidences. Nowadays finding direct cartel evidences has become more and more difficult when conducting dawn raids. Thus the ACA assesses elements based on the OECD methodology "Prosecuting cartels without direct evidence"[53] such as market structure in terms of stability of market shares over the years in the relevant market, high market concentration, high barriers to entry, high level of vertical integration and homogeneous products; and evidences of the undertakings' conduct in terms of high profits, equal selling prices and repeated conduct of competition infringement.

Besides dawn raids, request for information to public institutions and competitors is used as a way to retrieve data for economic analysis. In difficult cases or new markets where defining the relevant market is a struggle, the ACA gains insight from other competition authority experience, as part of the international network of OECD-GVH/RCC by using the instrument of "RFI".

2. Fertilizers market: DAP, Nitrate, Urea

In March 2021, different concerns arose in the media over the increase in the price of chemical fertilizers. The ACA promptly monitored the market and after finding suspicious doubts of competition infringement the Competition Commission by decision no. 783/2021 opened a preliminary investigation in the import and wholesale market for chemical fertilizers. The investigation period encompassed the year 2020 and January-September 2021. Furthermore, due to the risk of serious and irreparable damage to competition in the market, the Competition Commission by decision no. 784/2021 decided to take a temporary measure for undertakings operating in the market to immediately stop the increase of fertilizers price. This measure would have been in force upon the completion of the entire investigation procedure.

Fertilizers are very important for the agriculture sector as they contain nutrients for plants. In the analysis of this investigation, three main products were taken into consideration: Di-ammonium Phosphate (DAP), Nitrate and Urea. They are imported seasonally mostly from the same place of origin: Russia, Ukraine and other European countries. In the market there are few importers that operate in the wholesale market as well. DAP is used to fertilize the land while planting, and it has seasonal use mainly in the first 6 months of the year. Nitrate and Urea are used when the plants are growing as they contain nitrogen and phosphorus, and they are used the entire year. From the demand-side, demand for DAP, Nitrate and Urea is inelastic due to the seasonal necessity of their use in plant cycle, and these products will continue to be purchased by farmers despite the price increase. From the supply-side, DAP, Nitrate and Urea are substitutable as sellers can import any of these products.

The market is regulated by law no. 17/2020 "On fertilizer products", which sets the rules for the production, registration, trade, import, export, use, control of quality, traceability, information, advertising and inspection of activities related to fertilizer products, as well as the organization and operation of relevant structures. The Ministry of Agriculture and Rural Development grants licenses to market operators and holds a register of all registered fertilizers in Albania. Regarding barriers to entry, there are no legal barriers to entry into this market, but from an economic point of view, a new entry in the market requires financial investment to meet transport and storage conditions, as they must guarantee the preservation of the physicochemical qualities of the fertilizers, according to the requirements defined in the label, and the requirements in force for environmental protection.

3. Findings of the investigation

Following the preliminary investigation, the ACA inspectors carried out dawn raids at the undertakings operating in the market. As a result, in April 2021 the Competition Commission decided by decision no. 794/2021 to impose fines on the following undertakings: Agro blend in the amount of ALL 2,000,000 (approximately 17,000 euros); MBM, ALL 2,000,000 (approximately 17,000 euros); ÇAÇA, ALL 500,000 (approximately 4,000 euros) as they failed to consider implementing the temporary measure. The three undertakings appealed against the decision to the Administrative Court of Tirana.

After the findings of the preliminary investigation, in June 2021, the Competition Commission by decision no. 806/2021 decided to launch an in-depth investigation. In order to collect the necessary facts and data related to the investigation, the ACA requested data from: the General Customs Directorate on

53 https://www.oecd.org/daf/competition/prosecutionandlawenforcement/37391162.pdf

imports; the Ministry of Agriculture and Rural Development on licensing and other legal aspects for the relevant market; the Directorate-General for Taxation for annual turnover of the undertakings under investigations; and made an RFI via the OECD-GVH/RCC network.

No direct evidence was found during the dawn raids. Instead, referring to the economic analysis and all indirect evidence analysis regarding the market structure and conduct of the undertakings under investigation, it concluded that during the investigation period, the import of the fertilizers was mainly done by the three undertakings subject to investigation. In the market of DAP there is a dominant undertaking. The market structure is highly concentrated in three main undertakings and concentration indicators were increased. At the beginning of 2021 there was a simultaneous and immediate increase in the wholesale price of fertilizers as a result of the coordinated conduct of the undertakings by directly determining the selling prices and sharing the markets. The undertakings should not have immediately increased the selling price in order to comply with the increase in price on the international stock market, because they already had storage of fertilizers bought from imports in the previous year. Besides, even though they imported from different sources and they had different costs, they resulted in the same selling price.

Therefore, the Competition Commission assessed that the conduct of Agro Blend, MBM and ÇAÇA during the period under investigation violated Article 4, sections 1 a) and c) of law no. 9121/2003 "On competition protection".

4. Decision of the Competition Commission and final remarks

The Competition Commission, following the procedures, invited to a hearing session the undertakings to comment on the findings of the report. The Ministry of Agriculture and Rural Development was also invited to comment on the market's problems. It is worth noting that, during the hearings, none of the undertakings contested the data report, processing and results. The minutes of the hearings, disclosed and signed by the Competition Commission, according to Article 30 of law no. 9121/2003 is considered confidential information and it is not made public but has probative force before the court.

After the hearing session, the Competition Commission, in March 2022, by decision no. 874/2022 decided to fine the undertakings:

- AGRO BLEND in the amount of ALL 118,978,015 (approximately 1 million euros);
- MBM in the amount of ALL 66,088,573 (approximately 550,000 euros);
- ÇAÇA in the amount of ALL 7,087,994 (approximately 60,000 euros).

Law no. 9121/2003 provides that: The Competition Commission imposes fines, in the amount of "up to 10 percent of the turnover of the previous financial year, for each undertaking". The Regulation "On fines and leniency" (2009) of the ACA stipulates that the Competition Commission, in determining the basic value, uses the value of revenues from the sale of the products, to which the violation committed is directly or indirectly related, in the relevant market. So, the "turnover", according to the regulation, is determined as the turnover in the relevant market and not the whole turnover of the undertaking.

The fines for the three sanctioned undertakings based on the above legislation are, respectively:

- 9% of the sales value in the relevant market examined (net of taxes and duties related to this value, values reported by the investigated undertakings) for Agro Blend, a dominant undertaking, after assessment: duration of infringement, aggravating and attenuating circumstances;
- 7% of the sales value in the relevant market examined (net of taxes and duties related to this value, values reported by the investigated undertakings) for MBM after assessment: duration of infringement, aggravating and attenuating circumstances;
- 3% of the sales value in the relevant market examined (net of taxes and duties related to this value, values reported by the investigated undertakings) for ÇAÇA, after assessment: duration of infringement, aggravating and attenuating circumstances;

As described in this article, but also as it resulted from the RFI in other competition authorities' experience in the region, the Competition Commission does not use per se the fine as a tool to punish the undertakings; the final outcome of the whole investigation procedure should be restoring competition in the market and ensuring better choices for consumers. In this context this market will be monitored for one year, in order to evaluate the conduct of the undertakings after the fine.

Oil case in Kosovo[54]

Market surveillance

Based on concerns raised by public opinion, through the media and civil society about their claims for prohibited agreements or concerted practice between undertakings engaged in the trading of oil products in the wholesale and retail sales of oil and gasoline in the territory of the Republic of Kosovo, the KCA Commission started monitoring the oil market.

In the monitoring process of the oil sector in the Republic of Kosovo, the Authority noticed that there was no reflection of the reduction of oil and oil product prices when there was a price movement, decrease or increase, for this product in the stock market. Therefore, in order to confirm and analyse in detail this non-reflection of price reduction, the Authority initiated an investigation procedure based on Article 35 of the Law on Protection of Competition.

In-depth investigation

On 15th February 2019, the Kosovo Competition Authority Commission, due to reasonable suspicion of distortion of competition in the market of oil products in violation of Article 4 "Prohibited Agreements" and Article 11 "Abuse of dominant position" in the relevant market, reached a conclusion for the initiation of investigative procedures against 16 undertakings of oil products.

The KCA Commission decided to initiate an in-depth investigation procedure in the relevant market to substantiate the allegations/suspicions of agreement, coordination, concerted practice or parallel behavior in the market for fixing oil and gasoline prices between the companies under investigation, for this case.

KCA has the relevant market and product market.

- PRODUCT MARKET - The product market is considered to be Oil and Gasoline.
- GEOGRAPHICAL MARKET exists in the territory of the Republic of Kosovo.

The KCA Commission set the investigation period for the undertakings under investigation from 1st January 2018 to 31st January 2018.

Pursuant to Article 45 of Law no. 03/L-229 and amendment no. 04/L-226 on Protection of Competition, the Authority submitted to the undertakings the Notification of Preliminary Facts ascertained in the procedure, and accepted the comments of the undertakings against the Notification of the preliminary facts ascertained in the procedure.

In accordance with Article 49, paragraphs 1 and 2 of Law no. 03/L-229 and amendment no. 04/L-226 on Protection of Competition, the Authority presented the Finding of the factual situation. The Authority held a Hearing Session for the undertakings in the procedure.

Findings and analysis of competition

In order to ascertain the prohibited agreement or concerted practice, the Commission of the Kosovo Competition Authority is to observe Article 3 Par. 1.2 as well as Article 4 Par.1 point 1.1 and Article 66 of the Law on Protection of Competition cited: "Implementation of this Law must comply with the European Union Competition Directives".

Based on the amendment of the Law on Protection of Competition, Agreement is any form related to undertakings, with or without binding force, decisions or recommendations of groupings of undertakings, as well as concerted practices between enterprises, which operate at the same level, or at different levels of the market.

Based on the Law on Protection of Competition, Concerted Practice is an activity that involves informal cooperation between two or more undertakings and is not based on a formal decision or agreement.

The KCA Commission, based on Article 66 of the Law on Protection of Competition as well as based on the paper, "The Economics of Tacit Collusion" prepared for DG Competition provides this explanation and definition of Tacit Collusion:

Tacit collusion

Tacit collusion does not necessarily mean involvement in a tacit agreement or the involvement of the parties to reach an agreement or communicate.

However, it refers to tacit agreement because the result (in terms of pricing or quantity produced) may resemble EXPLICIT AGREEMENT or even an OFFICIAL CARTEL.

Tacit collusion is a market behaviour that enables firms to realize extra profits, where "normal" profits correspond to the equilibrium situation. Tacit collusion can arise when firms interact repeatedly.

They may then be able to maintain higher prices by tacitly agreeing that any deviation from the tacit path would cause retaliation.

Revenge refers to the firm's reaction to a deviation from the tacit path. To be effective, retaliation must mean a significant loss of profit for the deviant firm, compared to the profit it would have earned by adhering to the tacit path.

As the burden of proof falls on the Kosovo Competition Authority, the Authority proved that there were Coordinated Agreements, hence tacit collusion between the undertakings in the procedure through economic and statistical analysis, as follows.

Oil products

During the analysis and processing of data the KCA noticed that from January/2018 to October/2018 the average gross profit per litre was 0.093 cents per litre, while for NOVEMBER/2018 - DECEMBER/2018 the average gross profit per litre was 0.14 cents per litre.

54 This designation is without prejudice to positions on status and is in line with UNSCR 1244 and the Advisory Opinion of the ICJ on Kosovo's declaration of independence. Hereafter referred to as Kosovo.

When we use the comparability parallel for FEBRUARY and DECEMBER, in FEBRUARY/2018 the purchase price per litre was 0.93 cents per litre while the gross profit per litre was 0.09 cents per litre and the selling price per litre was 1.02 cents per litre which is reflective of the world stock exchange price, while for DECEMBER where the stock exchange price had decreased from the previous month and also the import price per litre was the same as that of FEBRUARY/18, 0.93 cents per litre, gross profit per litre for DECEMBER was 0.17 cents per litre, and the selling price per litre was 1.10 cents per litre, which the undertakings did not reflect with a decrease in gross profit per litre compared to the decrease in the stock market price and the import price.

The form of pricing or profit margin by applying a coordinated practice by undertakings operating in the relevant market is contrary to Article 4, paragraph 1.1 of Law no. 03/L-229 and amendment no. 04/L-226 on Protection of Competition: "set, directly or indirectly, the purchase or sale prices, or any other trading conditions".

Based on this legal basis and the established facts, the Kosovo Competition Authority estimates that the enterprises, in a coordinated manner, set the retail price and gross profit margin per litre for NOVEMBER and DECEMBER, a form of cooperation which is sanctioned by the Law on Protection of Competition.

Gasoline products

During the analysis and processing of data the KCA noticed that from JANUARY/2018 - OCTOBER/2018 the average gross profit per litre was 0.15 cents per litre, while for NOVEMBER/2018 - DECEMBER/2018 the average gross profit per litre was 0.26 cents per litre.

When we use the comparability parallel for FEBRUARY and DECEMBER, in FEBRUARY/2018 the purchase price per litre was 0.93 cents per litre, while the gross profit per litre was 0.11 cents per litre, which is reflective of the stock market price.

In DECEMBER where the stock market price had decreased and also the import price per litre was lower than in the previous months, 0.88 cents per litre, the gross profit per litre in DECEMBER was 0.27 cents per litre, which the companies did not reflect with a decrease in gross profit per litre versus a decrease in the stock market price and the import price.

The form of pricing or margin with concerted practice by undertakings operating in the relevant market is contrary to Article 4, paragraph 1.1 of Law no. 03 / L-229 and amendment no. 04/L-226 on Protection of Competition: "if undertakings set, directly or indirectly, the purchase or sale prices, or any other trading conditions".

On this legal basis, the Kosovo Competition Authority estimates that the undertakings, by concerted practices, set the retail price and gross profit margin for NOVEMBER and DECEMBER, a form of cooperation which is sanctioned by the Law on Protection of Competition.

The Authority found that the undertakings operating in the relevant market (retail - gasoline) did not reflect the above individually, based on the selling price and gross profit per litre for November and December.

The Commission of the Kosovo Competition Authority found that this was a concerted practice and consequently qualifies as Tacit Collusion and disrupted trade competition during NOVEMBER and DECEMBER 2018, and with these actions the undertakings committed a violation of the provisions of Law no. 03/L-229 on Protection of Competition, Article 4 "Prohibited Agreement or Concerted Practice", paragraph 1, subparagraph (1.1).

The Commission of the Kosovo Competition Authority did not find that the companies under investigation had abused their dominant position in the market individually or collectively, respectively there is no legal violation under Article 11 of the Law on Protection of Competition.

The Commission of the Kosovo Competition Authority imposed the measure of administrative sanction against 14 undertakings in the amount of € 4,040,450.78.

The undertakings not satisfied with the KCA decision exercised their right to appeal to the Competent Court for Administrative Affairs in Pristina.

For the imposition of the administrative measure, the KCA assessed as a mitigating circumstance the fact that the undertakings in the investigative procedure cooperated with the Authority, and that no party had been previously punished for any form of deregulation of competition.

The Authority ascertained that the violation occurred in the months of NOVEMBER and DECEMBER, and for this the Authority applied the sanction rate of 3% of turnover.

The KCA closed the investigation procedure for both undertakings for the fact that: during the investigation procedure it was found that the undertakings did not distort trade competition, the undertakings did not sell oil products on a retail basis, except for wholesale import and wholesale.

Anti-competitive agreement between companies providing logistics services in Armenia

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In recent years, online commerce has rapidly developed in the Republic of Armenia. A number of international postal delivery companies have been established and successfully operating in the country, providing Armenian consumers with access to major international online trading companies such as Alibaba, Aliexpress, Walmart, Amazon, eBay, etc.

With the transformation of digital technology and global economic processes, as well as trends in the global marketplace, third-, fourth- and even fifth-generation logistics services are rapidly evolving.

In general, based on the types of services and modes of delivery, as well as other features, logistics services are generally classified into 5 main groups.

A company providing a 5PL (Fifth-Party Logistics) logistics service provides a full range of services through the use of comprehensive information technology. These 'virtual' logistics companies are equipped with high-tech software which enables them to handle the most efficient logistics chains. At the same time, such an outsourcing company may not have its own material, financial, labour and other resources directly used in the process of organising transportation.

Online shopping through similar organisations has become an affordable and quick way to obtain goods. This type of commerce has made goods more accessible to people, including the ones they cannot find in their own country or could only buy at higher prices.

Such companies in the Republic of Armenia are Global Shipping, Onex and Shipex, which provide foreign addresses to consumers online. Consumers order their preferred goods from a number of international shops, indicating the address provided online by the logistics company as the delivery address, and these logistics companies deliver the goods to the Republic of Armenia after collecting the goods received through the foreign address provided in advance, to the consumer.

In addition, it should be noted that consumers are also able to deliver personal parcels to Armenia through these addresses, i.e. goods that are not ordered from online marketplaces.

According to the legal regulations in force in the Republic of Armenia and Annex 2 of Eurasian Economic Commission Council Decision No. 107 of 20 December 2017 "On certain issues related to goods for personal use" from 1 January 2020, international postal items for personal use worth up to €200 and weighing up to 31 kg are not subject to customs clearance in Armenia. The Republic of Armenia, as a member state of the EAEU, generally carries goods from the Russian Federation without customs clearance. The value and weight parameters for duty-free trade are such that consumers of these goods have a wide choice to buy online (by brand, price, colour, size, etc.). These products have lower prices and, at the same time, a wider range than the local market can offer. This is an opportunity for shoppers to buy more and more products online from foreign stores.

With the development of e-commerce, there has recently been an increasing number of allegations of possible violations of competition law. In particular, the Commission for Protection of Competition of the Republic of Armenia (hereinafter: the Commission) received a notification on the subject of possible signs of an anti-competitive agreement between Global Shipping, Onex and Shipex (hereinafter: the Companies) in accordance with the provisions of the RA Law "On Protection of Economic Competition", in force until May 31, 2021.

According to the notifying party, the companies provide the same service, which means that these companies operate in the same product market and are, in fact, competitors. All of the services offered by the companies were in fact priced the same, not only for previous deliveries, but also the amount of payments for recent months had been revised and the same rates for delivery services had been re-set for the respective destinations. The said companies, though acting as competitors, set the same price for the same type of service they offer without any minor price variations.

The Commission's systematic observation revealed that the transport of goods from one point to another is possible through postal and/or logistics services, among others, but a detailed examination of these modes of transport and their technical, functional, price and other characteristics shows that one type of goods transport service may differ significantly from another type of transport service.

In this case, the service of transportation of goods was provided by the logistics company by way of providing the consumer with an address in the relZsofiant country, which the consumer could use for online purchases from various foreign electronic platforms, including such electronic platforms from which, without this address, it would be impossible to purchase the relZsofiant goods and/or it would not be economically feasible to purchase the goods. The transport of goods in this way

is therefore significantly different from other modes of goods transport.

However, given the fact that in some cases goods can also be purchased through other business entities providing similar services, which however, based on the specifics of the services they provide, belong to logistics service group 3 (3PL – Third-Party Logistics), such as DHL, Fedex and other courier services, a "Hypothetical Monopolist" test was conducted to assess the possibility and feasibility for consumers to substitute the services provided by the companies in question.

The test revealed that if Global Shipping, Shipex and Onex increase their prices by 5% to 10%, it would not make sense for potential customers to buy from DHL and Fedex.

In addition, the services provided by the above-mentioned companies are not comparable with their price criteria, in particular the cost of 1 kg of delivery from the USA to the Republic of Armenia through DHL is 96,000 Armenian drams (about USD 196), the maximum weight of express services is 300 kg, in this case the cost of delivery is 3,400,000 Armenian drams (about USD 6,940) (11,330 Armenian drams / USD 23 per 1 kg). The cost of shipping 1 kg through Fedex is 45,300 Armenian drams (about $92) (minimum charge is 35,000 Armenian drams/$71 in case of up to 200 grams). These companies are more specialised in providing high volume shipping services and delivery of important documents.

In terms of interchangeability of services, differences in modes of delivery, consumer characteristics and feasibility of substitution have been considered. Thus, the delivery of goods from certain countries within a service may be carried out in several ways – by air, sea and overland – but different modes of delivery from the same country are not interchangeable. Although the end result of the delivery service is the same for these modes, their characteristics are such that these modes cannot be interchanged. Particularly, prices for the services by the means mentioned differ significantly, and differences in delivery time are significant, for example, delivery time from the USA by air is from 4 to 10 working days, while it is from 2 to 3 months by sea, and one of the significant circumstances of delivery by sea is the minimum price for this service, for example, for an order weighing up to 10 kg from the USA, the minimum price payable is 12 000 Armenian drams (about 24 USD).

The issue of interchangeability of delivery services using the same mode, from the point of view of the consumer, in the case of delivery from different countries, has also been addressed. Thus, some e-platforms may be able to buy and deliver the same product to different countries. However, by the same logic, it should be noted that some online platforms are available only in certain countries and in this case there is no possibility to purchase goods from these platforms and deliver them to Armenia using a different country address. In addition, delivery services from different countries to the Republic of Armenia, at least from a functional point of view, cannot be considered interchangeable when delivering personal parcels.

Companies attributed their price changes since the beginning of 2020 to the pandemic situation, which has caused logistical difficulties, as well as a significant increase in tariffs for a number of services they purchase, such as the cost of services provided by airlines and overseas warehouses.

Research showed that companies not only charged the same prices for services, but also increased prices for services at the same time (on the same day or with a difference of one day). It is noteworthy that notifications of price increases for some types of services by companies were sent to clients on the same day or with a difference of one day.

To prove concerted action, consideration was given to the fact that the Companies suspended the allocation of bonus points as a result of customer deposits and the fact that customers were notified of this during the same period.

The application of a pricing policy agreed by the Companies at the same time indicates a possible breach of competition law, in particular a manifestation of an anti-competitive agreement. In this context, the nature of the simultaneous action, i.e. the change in sales prices and other terms and conditions, in this case a bonus, is of key importance.

As a result of an in-depth examination and a comparison of facts, the aforementioned actions of the Companies were classified as anticompetitive agreements and a fine was imposed on the said Companies.

According to the RA Law on Protection of Economic Competition, 75% of the fine imposed by the Commission's decision was paid by the Companies within two months after the decision came into force and the obligation to pay the fine was deemed to have been duly performed.

Evidence Gathering and Review in U.S. Cartel Investigations

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In the United States, cartels are per se violations of federal antitrust laws. Such violations are criminally prosecuted by the U.S. Department of Justice's Antitrust Division (the "Division") under the Sherman Act (Title 15 of the United States Code). [55] To convict cartel members, Division prosecutors must prove three essential elements: (1) the charged conspiracy was knowingly formed and was in existence at or about the time alleged; (2) the defendant knowingly joined the charged conspiracy; and (3) the charged conspiracy either substantially affected interstate or foreign commerce or occurred within the flow of interstate or foreign commerce.

The burden of proof at trial is like any other criminal case in the United States: beyond a reasonable doubt.[56] The Division charges both corporations and individuals, and the cases are decided by a unanimous jury of citizens.[57] There is a five-year statute of limitations on bringing criminal charges under the Sherman Act.[58]

Many of the Division's cartel investigations are complex, involving simultaneous examination of voluminous materials collected from large corporations and investigating potentially dozens of culpable individuals. Division prosecutors are mindful of the tools available to them during the investigation, or they may find those five years consumed by irrelevant materials and ineffective review.

Part I: Collecting Relevant Evidence

The best way to avoid having an investigation slowed by the review of irrelevant materials is to avoid collecting those materials in the first place. Division prosecutors use three primary tools to obtain materials during their investigations: (1) compulsory requests for information (i.e., grand jury subpoenas); (2) dawn raids/inspections (i.e., search warrants); and (3) information provided by leniency applicants. Each of these tools has its advantages and disadvantages when it comes to collecting relevant materials and moving an investigation forward.

Grand jury subpoenas

The grand jury subpoena is the tool used most often by Division prosecutors to seek the compulsory request of information. Grand jury subpoenas are officially issued by grand juries[59] tasked with investigating and charging federal offenses. Division prosecutors initially identify the recipients of grand jury subpoenas, however, and what those recipients are asked to do. A grand jury subpoena generally asks the recipient to either produce documents (subpoena duces tecum) or answer questions from the prosecutor in front of the grand jury (subpoena ad testificandum).

A grand jury subpoena ideally results in the production only of narrow categories of information which Division prosecutors believe are likely to contain relevant evidence. Although requesting production of broad categories of information can be tempting, the result will often be that any relevant evidence will be overwhelmed and lost in technically-responsive but irrelevant materials. The better practice may be to send a broad subpoena, thus ensuring the recipient preserves all potentially relevant materials, but to negotiate more narrow terms with the recipient for the materials which need to be initially produced. These initial requests can be supplemented as the investigation progresses.

Grand jury subpoenas require some level of trust in the subpoena recipients. Division prosecutors may have some idea of what materials are in a recipient's possession, but, unless the recipient is willing to voluntarily identify the full universe of relevant materials in its possession, some level of guesswork is necessary in drafting the subpoena. Further, the subpoena recipients get to decide whether or not specific materials in their possession are responsive and need to be produced. A particu-

55 Julia Maloney and Kaitlyn Barry are criminal prosecutors in the U.S. Department of Justice's Antitrust Division. Both are involved in the Antitrust Division's Procurement Collusion Strike Force, available at: https://www.justice.gov/procurement-collusion-strike-force. The views expressed herein are their own and do not purport to represent those of the U.S. Department of Justice.

56 See In re Winship, 397 U.S. 358, 365 (1970).

57 Cases may also be resolved through plea agreements or deferred prosecution agreements entered into by the defendant(s) and the Division.

58 18 U.S.C. § 3282(a).

59 In the United States, grand juries are panels of citizens tasked with determining whether or not there is probable cause to believe an individual has committed a federal offense. If so, the grand jury will issue an indictment of that individual. For more information on grand juries, see the Justice Manual § 9-11.000, available at: https://www.justice.gov/jm/jm-9-11000-grand-jury.

larly deceitful or difficult recipient may be able to slow an entire investigation.[60]

Search Warrants

Search warrants are a type of dawn raid or inspection and another common method of collecting evidence about cartels in the United States. A search warrant is executed by law enforcement agents, not Division prosecutors. Search warrants require that the law enforcement agent establish to a judge that there is probable cause to believe evidence of a particular crime will be located in a particular location before execution.

Unlike a grand jury subpoena, use of a search warrant ensures that the recipient has little opportunity to destroy evidence, tamper with witnesses, or hinder the ongoing investigation. Further, the use of search warrants rather than grand jury subpoenas reduces the likelihood of implicating an individual's right against self-incrimination in the United States. Although traditional search warrants involve sending law enforcement agents to a suspect's office or home, Division prosecutors can also collect electronic evidence remotely through search warrants under the Electronic Communications Privacy Act.[61]

Search warrants can be complicated. Collection and preservation of the seized material can be a legal minefield for the inexperienced Division prosecutor. One perennial issue in Division investigations is ensuring that any seized materials that are protected by the attorney-client privilege are identified and segregated from the other seized material so that those materials are not reviewed by the investigative team. To prevent violating such privilege, a filter team[62] usually examines all seized materials in search of potentially privileged materials for sequestration or return to relevant privilege holders. This process is necessary to avoid tainting the investigation, but it can keep seized materials out of the investigative team's hands for months.

Information Provided by Leniency Applicants

The "most important prosecutorial tool" for Division prosecutors is the Leniency Program.[63] This program provides the opportunity for participants in cartels to self-report their conduct and cooperate with the Division's investigation. In return, the Division agrees not to criminally prosecute the first corporate or individual conspirator to meet the Leniency Program's requirements for the anticompetitive activity being reported.[64]

When working with a leniency applicant, Division prosecutors are able to bypass much of the uncertainty and guesswork that goes into structuring a grand jury subpoena or search warrant affidavit. The applicant has a significant incentive to provide timely, truthful, continuing and complete cooperation during the investigation. That cooperation often includes, for example, making corporate executives available for interviews and providing relevant documents. The quality of evidence that can be provided by a motivated leniency applicant can be significant, powerful and dispositive.

Part II: Conducting an Effective Review of Information Gathered

A fulsome U.S. cartel investigation may collect hundreds of gigabytes or even terabytes of information before its conclusion. The next challenge presented is what to do with the information collected. Below are best practices for processing the information gathered, including how to find relevant evidence supporting the three essential elements noted above in the documents and data gathered, and when to make the determination that the information gathered has been sufficiently reviewed.

Create a Document Review Plan

Multiple challenges of document review include: huge amounts of collected materials; time constraints; resource constraints; irrelevant material intertwined with and outnumbering relevant evidence; likely no one incriminating piece of evidence; and finding supporting evidence in the large amount of material collected. Many of these challenges can be overcome, or at least mitigated, by creating a plan for tackling review.

A meaningful review plan will include timing goals and objectives, a plan for how the materials will be reviewed, and delegate responsibility over certain aspects of the review process to maximize efficiency. The plan should discuss the methodology for review of the documents including, where appropriate, using available analytics in a review platform, predictive coding, search terms, metadata, and linear (review of each document) review. The methodology used may vary depending on the type of documents under review. Meeting frequently with the review team throughout the investigation helps to refine the timing, order, and methodology of review, and identify potential issues and challenges. The development of a clear review plan at the outset of an investigation is critical, but given the length of cartel investigations, it is crucial that the review plan is continually reviewed and revised.

Review plans depend on many variables, including the software review platforms available; IT support; the format of documents (electronic v. hard copy); the types of documents to review; the amount and size of documents to review; developments in the case; time constraints, such as those set by the court; familiarity with an industry or subject matter; and knowledge of the facts in an investigation. Division prosecutors must be flexible and always open to revising a review plan as necessary, particularly during computer-assisted review. Maintaining detailed and useful records of searches conducted and the efficacy of those searches help in revising the review plan.

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60 Division prosecutors may seek to bring federal charges against particularly deceitful recipients. Depending on the facts of the particular case, these charges may include obstruction of justice (18 U.S.C. § 1503), false statements to federal law enforcement agents (18 U.S.C. § 1001), and perjury before a grand jury (18 U.S.C. § 1623).

61 18 U.S.C. § 2510 et seq. See Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations, available at: https://www.justice.gov/file/442111/download.

62 Division prosecutors occasionally allow defense counsel to handle the initial privilege review. This practice minimizes the chance of privilege claims surfacing once the investigation has progressed, but it can be even more time-consuming than using an internal filter team.

63 A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement (Feb. 19, 2020), available at: https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international.

64 Requirements of the U.S. Leniency Program available at: https://www.justice.gov/atr/leniency-program.

Having a results-focused outcome can be helpful to tackle the review of a large amount of documents. Most documents can be reviewed as they are received. Searches based on targeted information, like dates, people or document type, can tailor the review to further increase efficiency in the review process.

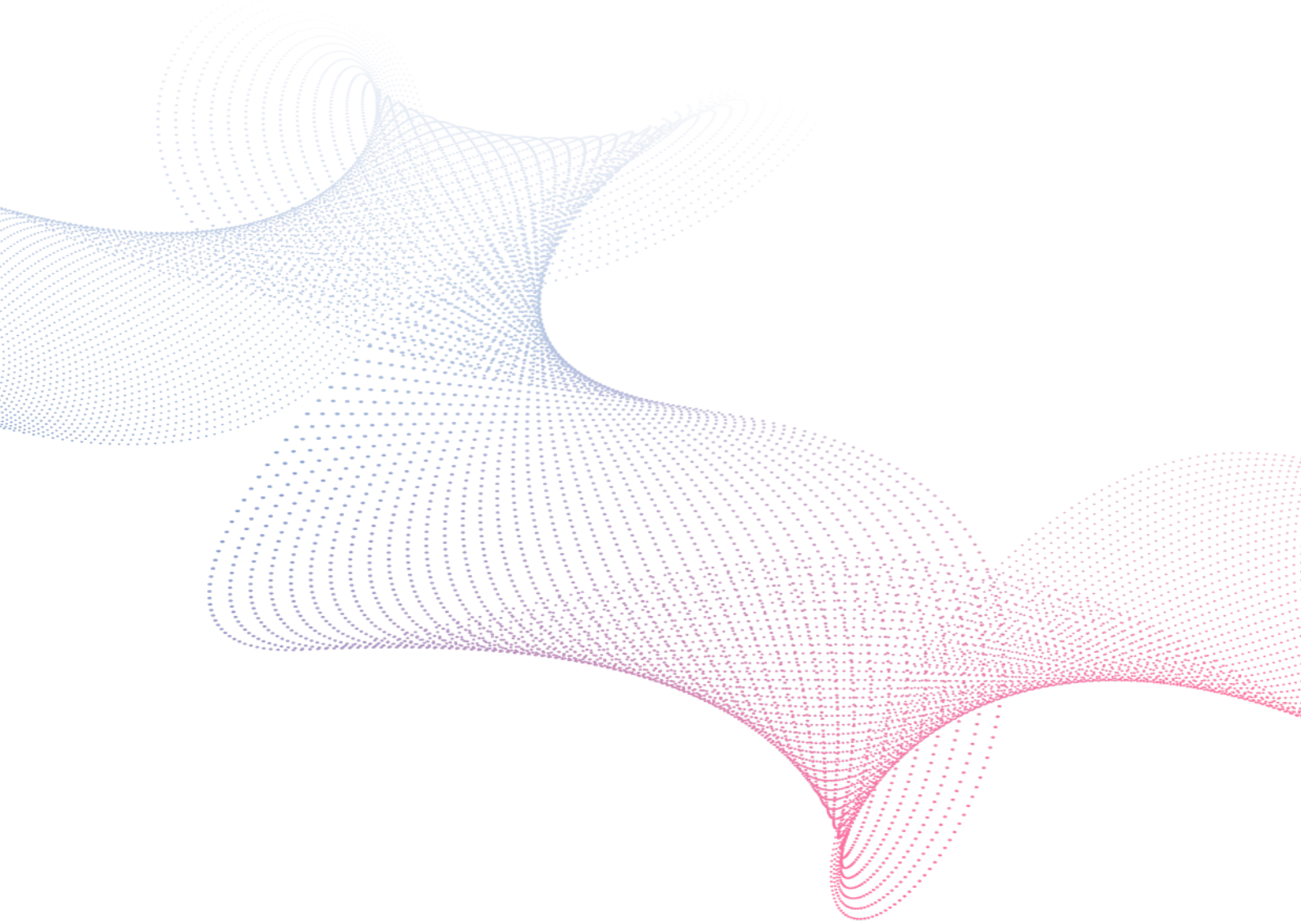
Some helpful tips for document review:

- Understanding that messages and chats are best reviewed by first segregating by people and then linear review, rather than with search terms;
- Sorting emails by key dates and authors or recipients;
- Reviewing spreadsheets in native format, mindful that hidden data columns and revision history may be present;
- Reviewing phone records in spreadsheet form, if possible;
- Remembering that data from smart phones may include notes, pictures, and GPS tracking data;
- Knowing what information in bid records helps investigating and gathering that data;
- Examining pricing data and potentially consulting an economist; and
- Searching travel records and tax records chronologically.

Documents should be classified, organized, and coded on a rolling basis in order to make them accessible and determine their relevance and usefulness for a developing case. Evaluation codes are the most frequently used, particularly during the beginning of the review process. The definition of each evaluation code should be part of the investigative team's document review plan. Examples would include "Hot," "Relevant," "Useful," "Reviewed," and "Supports Defense Position." Avoid using coding "Not Relevant" as an evaulation code, as potential relevancy may change as the investigation progresses. Adding elemental issues or categories can also be helpful, such as "Agreement" or "Interstate Commerce," elements that must be proved in a cartel case in the United States.

Perfection is not a realistic or desirable goal when managing voluminous evidence. Choices can be made during the review process, however, that will mitigate the adverse effect of overlooking key materials during the initial review. Searching for relevant documents using different approaches (search terms, key dates, key people, and certain document types) will decrease the possibility that an important document will be missed. Additionally, reviewers should consider all the documents already logged. By coding reviewed documents or creating a saved search in real time, Division prosecutors save valuable time and resources.

Lastly, but perhaps most importantly, Division prosecutors are mindful of the elements of the most likely charges. The end goal is always to determine whether criminal charges are appropriate and necessary in light of the information gathered.



Comprehensive exclusivity strategy and abuse of dominance: the Italian Competition Authority's approach in the Unilever case

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1. Foreword

On 31 October 2017, the Italian Competition Authority (hereinafter also "ICA" or "Authority") concluded an investigation ascertaining an abuse of dominant position in the market of impulse packaged ice cream by Unilever Italia Mkt Operations S.r.l. (hereinafter also "Unilever"). The abuse committed by the Italian branch of the Anglo-Dutch company, selling in Italy the well-known "Algida" ice cream brand, consisted in having applied exclusivity purchasing obligations and loyalty rebates to the customers (undertakings operating at retail level). ICA subjected Unilever to a € 60 million fine and obliged the dominant operator to adopt suitable measures to put an end to the anti-competitive practices.

The infringement attributed to Unilever involves a complex strategy consisting of a broad use of exclusivity purchasing obligations as well as other commercial conditions and conducts, overall aimed at keeping a long-lasting exclusive supply of Algida ice creams in the points of sale (e.g. coffee bars, beach resorts, hotels, etc.).

The case stems from a complaint from an Italian niche producer of fruit ice-lollies named "La Bomba", who claimed that Unilever – also by means of its local distributors - forced retail clients to purchase and resell only Unilever's ice creams.

The ICA decision was published just a few months after the long-awaited judgment of the European Court of Justice (ECJ) regarding the Intel case[65]. As it is known, the Commission found that Intel abused its dominant position in the semiconductor industry through a combination of conditional rebates and payments to customers intended to induce them to cancel or delay orders from Intel's main competitor AMD (i.e. exclusivity rebates and naked restrictions). In its decision the Commission held that the alleged conducts were by their very nature capable of restricting competition so that an "As Efficient Competitor Test" (hereinafter also AECT or AEC test) was not necessary to ascertain the infringement. Nevertheless, it carried out an AEC test, the outcomes of which confirmed the finding that the conducts in question were exclusionary.

On appeal to the General Court, Intel argued that the Commission's analysis of the AEC test was flawed, but the Court stated that it was not necessary to establish whether the Commission carried out the AEC test correctly or not.

The ECJ judgment of 6 September 2017 held that the case law starting from Hoffmann-La Roche had to be further clarified when the dominant undertaking "on the basis of supporting evidence, [proves] that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects" (§ 138). In fact, in that case, the Commission "is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market"[66].

At the end of the day, in the 2017 Intel judgment the ECJ did not prescribe the application of the AECT in order to analyse such exclusionary conducts, but underlined that the General Court should have examined all Intel's arguments questioning the validity of the test: indeed, it was a procedural prescription. Recently, the EU General Court came back on the issues raised by the ECJ and annulled the Commission decision dealing with the system of rebates applied by Intel, considering that "the AEC test carried out in the contested decision is vitiated by errors and […] the Commission did not consider properly the criterion relating to the share of the market covered by the contested practice and did not analyse correctly the duration of the rebates"[67].

The Intel "saga" on the application of the AECT represented a relevant issue at stake during the Italian Unilever administrative proceedings and in the following legal dispute, such that - thus far - there is an ongoing preliminary ruling trial before the ECJ.

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65 ECJ, judgment of 6 September 2017, C-413/14 P, Intel Corp. v European Commission, EU:C:2017:632.

66 §139 of the above-quoted Judgment. See also judgment of 27 March 2012, Post Denmark, C-209/10, EU:C:2012:172, paragraph 29.

67 EU General Court, T-286/09, RENV-Intel Corporation/Commission, judgment of 26 January 2022, § 524. European Commission appealed the General Court decision before the European Court of Justice (C-240/22P, Commission/ Intel Corporation).

After a brief outline of the grounds of the ICA decision, this paper will explain the path of the Unilever appeal, which is still ongoing before the Italian Appeal Court, pending the above mentioned ECJ preliminary ruling. Lastly, the paper expounds the reasons why, in the Authors' opinion, the ICA decision is fully consistent with the European case law, including the Intel judgment. In particular, some considerations will be made on the main issues that are likely to influence the final decision of the ongoing legal dispute.

2. The ICA assessment

2.1. The relevant market

The relevant product market of the alleged infringement was defined as the sale of industrial packaged ice cream to retailers in the impulse channel, separate from the market of scoop ice cream.

As widely argued in the final Decision, the individually wrapped ice cream products are considered scarcely substitutable with scoop ice cream both by retailers (the demand at wholesale level) and by consumers. In particular, from the retailer perspective, the two products have significant differences (resale margin, labour costs to store up the product and to serve it to the consumer, physical space to place the freezer in the outlet). Even from the consumer point of view, the differences (packaging, prices, role of brand in the buying decision, easiness of consumption) limit substantially the interchangeability between the two products.

Furthermore, the majority of scoop ice cream is distributed by specialized stores, while packaged products represent a small percentage of stores turnover, as they are generally distributed by points of sale like coffee bars, recreational areas, etc., mainly focused on the supply of other products or services.

In the light of the above mentioned evidences, the Authority concluded that scoop ice cream places only a limited competitive pressure on packaged industrial ice cream. This assessment, consistent with the previous national and European decisions,[68] has been confirmed during the investigation by Unilever competitors (like the complainant La Bomba and other relevant companies, such as Nestlè and Sammontana) and even by Unilever internal analysis, which also considered the packaged ice cream sold in the impulse channel as a separate sector.

In terms of geographical extension, the Authority considered, in line with its previous decisions, the relevant markets for ice cream to be national in scope due to substantial homogeneity in consumers' habits and competition conditions. It is worth noting that Unilever itself negotiated sale conditions with customers at a national level, without any regional differentiation.

2.2. Unilever's dominance in the impulse packaged ice cream market

The ICA proceedings ascertained that Unilever was in a dominant position in the relevant market of industrial packaged ice cream sold to retailers in the impulse channel, able to behave independently from competitors, customers and consumers.

Several factors contributed to this assessment. Focusing on the structural profile, the Authority highlighted: i) a market share above 60%, fourfold compared to its main competitor's market share; ii) an increase of Unilever market share in the last five years, thus showing the capability to maintain and strengthen its structural advantage over competitors; iii) a greater presence in some areas, channels and points of sale characterized by higher concentration of ice cream sales and lower risks of fluctuations of sales (e.g. swimming pools, beachfront resorts, theme parks, etc.).

Besides, with reference to the characteristics of supply, the following elements were considered as indicative of a strong market power: i) higher Algida brand reputation index for consumers; ii) the breadth and depth of Unilever ice creams assortment; iii) the commercial strength and the specific reputation of some products within this assortment.

Finally, Unilever held a particularly widespread and capillary distribution network, bound by product and area exclusive agreements.

2.3. Distributors as a single economic entity

A preliminary assessment regarded the relationship between the dominant undertaking and its own vertically integrated distribution network.

ICA proved that Unilever and its local distributors (sales concessionaires acting at the wholesale level), even in the absence of any formal hierarchy or control relationship, behave as a unitary entity, so that the exclusivity obligations and rebates applied by distributors to local retail customers should be considered as a part of Unilever's global commercial policy.

To verify the substantial lack of autonomy of distributors and their inability to act as single economic entities, ICA considered several factors, including the distributors' geographical and product exclusivity; their limited economic risk; pervasive control by Unilever on distributors' activity and sales accounting; distributors' obligation to implement Unilever indications relative to commercial strategies; the circumstance that in a previous ICA case (2003) Unilever committed to not apply exclusivity clauses also to distributor-customers.

Nevertheless, as it will be explained later, the application of the single economic entity doctrine to the distribution network of Unilever has been a focal point of the legal dispute.

2.4. The ascertained conducts

All verbal as well as written contracts between Unilever and its customers contained exclusivity purchasing obligations and/or other clauses aiming to induce Unilever customers to keep substantial supply exclusivity. In particular, all contracts included conditions such as cabinet exclusivity, invoiced fixed discounts, end-year (retroactive) rebates, target rebates, promotional bonuses, assortment and target bonuses, long duration of contract (longer than two years on average).

Moreover, during the contractual relationship, Unilever applied to its customers other practices and conditions aiming to induce customers to buy only from Unilever, including i) retroactive payments of rebates and bonuses used as reprisal against customer's violation of its exclusivity obligation;

68 Among others: Case M.7946, Pai/Nestle/Froneri, European Decision of 14 July 2016.

ii) selective application of rebates and bonuses to customers targeted by other competitors; iii) obligation to purchase the weakest Unilever products bound with the strongest ones; iv) promotional bonuses unrelated to any actual promotional activity; v) financing of trade associations in order to monitor compliance by their members with the exclusivity agreements.

All the above mentioned conducts have been applied selectively, targeting clients potentially reachable by competitors.

For instance, to hinder or exclude single-product competitors – such as producers offering only ice lollies – Unilever mainly used exclusivity purchasing obligations, fidelity rebates or the obligation to buy jointly the strong products and the weakest ones. Instead, to exclude competitors selling a full-range of ice cream products, Unilever applied conditions such as multi-year contracts, target and retroactive rebates and contributions, payment of economic incentives with credit notes, bonuses not related and/or proportionated to the service provided by the customer.

Furthermore, Unilever and its local dealers adopted focused actions to verify the actual respect of exclusive purchases, with a particular obstinacy in the areas where the competitor La Bomba, whose products were highly appreciated by consumers, was trying to expand its presence in the market.

In summary, Unilever adopted an overall and complex strategy consisting of i) a widespread application of exclusive obligations and different kinds of retroactive and loyalty-inducing rebates; ii) a targeted application of these obligations and incentives to different costumers depending on the competitors to be excluded; iii) other conducts and practices jointly and intentionally aimed at hampering competitors' presence in the points of sale of its own clients.

2.5. Assessment of the exclusionary strategy

The proceedings ascertained that Unilever, a dominant undertaking which owns brand products characterized by high reputation in the market, applied exclusivity clauses to the majority of its customers, ranging from 60-70% to 70-80% of the sales, thus blocking at least 30%-40% of the whole market.

According to the ECJ, exclusive purchase agreements granted by an undertaking in a dominant position violate Article 102 TFEU[69], regardless of any economic offset

Furthermore, the Italian Authority proved that the percentage of the market in which competition is at least hindered by Unilever exclusionary strategy exceeds 60%, considering that Unilever applied to almost all its customers, having or not an exclusivity obligation, other conducts and conditions jointly aimed at impeding competitors' presence in the same points of sale.

According to the Italian Authority, the described conducts taken as a whole have had the capacity to not only foreclose single-product competitors, but also to hinder the presence of Unilever competitors offering the full range of packaged impulse ice creams.

The Unilever strategy described above prevented competitors from expanding their sales in proportion to the actual appreciation of their products. As already stressed, this was due to the "forced" purchase of Unilever ice creams by consumers that don't find competitors' products in the stores where impulse consumption arises. As a consequence, Unilever's conduct significantly diminished the ability of competitors to compete on the merits, thus resulting in a restriction of consumer choice.

2.6. The Unilever AEC Test

During the investigation, Unilever objected that the abuse of dominance could have been probed through a quantitative As Efficient Competitor Test, described by the Commission Guidelines on the application of Article 102 TFEU, pointing to demonstrate that an equally efficient competitor of the dominant undertaking would have been able to respond to the Unilever exclusivity obligations and fidelity-inducing rebates. According to the test provided by Unilever, the proportion of customers to which Unilever discounts were not replicable by an equally efficient competitor was negligible.

In this respect, the ICA observed that many of the alleged conducts were capable of restricting competition independently of the matter that they force Unilever or its competitors to sell below their cost. In particular, exclusivity and fidelity discounts were only a part of the alleged conducts that included instruments unsuitable to be quantified in a test of replicability, such as contractual obligations to keep product exclusivity, long term contracts, contributions to trade associations, the threat of not giving back bonuses, the bundling of the strongest and the weakest products, etc.

Within this framework, the ICA concluded that the AECT was not capable of making an exhaustive assessment of the restrictive impact of the overall strategy, nor was it required by the European case law to ascertain the infringement of Article 102 TFEU. Indeed, as also pointed out in the ECJ Intel judgment, the assessment of the exclusionary capability of such conducts only requires the evaluation of the circumstances or context, such as the share of the market covered by the challenged practice, the conditions of the rebates and contract duration[70].

So, the ICA assessment of the Unilever exclusionary strategy was based on a theory of harm perfectly in line with the European case law, including the ECJ Intel judgment of September 2017.

3. National Judgments and requests for ECJ preliminary ruling

The ICA's decision has been upheld by the Lazio Regional Administrative Court ("TAR Lazio"), which substantially confirmed ICA's findings (judgment no. 6080, May 31st 2018), by recognizing that exclusivity rebates and other economic

69 ECJ, judgment of 6 September 2017, C-413/14 P, Intel Corp. v European Commission, paragraph 137.

70 See: ECJ, judgment of 19 April 2012, C549/10 P, Tomra Systems and Others v Commission, paragraph 18, EU:C:2012:221; ECJ, judgment of 15 March 2007, C95/04 P, British Airways v Commission, EU:C:2007:166, paragraph 67; ECJ, judgment of 9 November 1983, C-322/81, Nederlandsche Banden-Industrie-Michelin v Commission, EU:C:1983:313, paragraph 73; C413/14 P, Intel, opinion of the Advocate General Wahl at the sitting on 20 October 2016, EU:C:2016:788, paragraphs 75-76; ECJ, judgment of 6 October 2015, C23/14, Post Danmark A/S contro Konkurrencerådet, EU:C:2015:651, paragraph 68. And ECJ, judgment of 6 September 2017, C-413/14 P, Intel Corp. v European Commission, paragraphs 139-142.

incentives applied by Unilever were only part of a wider strategy aimed at foreclosing competition and keeping exclusivity.

In particular, according to the TAR Lazio judgment, the circumstance that Unilever's exclusionary abuse was not confined to conditional rebates, as opposed to the Intel case, made the use of the AEC test worthless. In this regard, the Italian Court of First Instance also stated that the repetition of Unilever rebate schemes by Unilever competitors would have not produced an equal and opposite effect to Unilever's conducts, given the fact that "Algida"' branded ice creams had a higher level of notoriety and reputation for consumers. Moreover, TAR Lazio confirmed that exclusivity clauses were abusive by object.

As a matter of fact, TAR's decision specified that the annulment of the General Court's ruling in the Intel case was only due to a procedural issue - namely to the fact that the Commission carried out the AEC test and the General Court did not analyse in full Intel's arguments. Therefore, no general principle about the necessity of AEC test could be inferred from Intel.

Tar Lazio confirmed the ICA approach also with regard to the liability of Unilever for the local distributors' conducts, arguing that these conducts could be substantially attributable to Unilever.

The Appeal Court ("Consiglio di Stato") has not been convinced by the First-Instance Court arguments and, with its 2020 Decision[71], proposed a referral of two preliminary rulings to the European Court of Justice (C-680/20, Unilever Italia Mkt. Operations).

The first request for a preliminary ruling deals with the extension of the single economic entity doctrine, specifically aimed at establishing if, in Unilever's case, the producer and its intermediaries might be classified as a single economic entity under competition law.

The second request is related to AECT and exclusivity agreements. In particular, the question referred to the ECJ deals with the legal obligation of applying the AECT in the case of exclusivity clauses and/or in the case of exclusionary conducts characterized by a large number of abusive practices (such as loyalty-inducing rebates or exclusivity clauses).

4. Focal points of the legal dispute

The main issues of the legal dispute in the assessment of the Unilever case deal with the application of the single economic entity doctrine to the distributive network of Unilever and the usability (or even the necessity to apply) the AEC test as the most appropriate tool to assess the abuse in a case - like the Italian Unilever ascertainment - mainly based on non-pricing practices such as exclusive purchase agreements.

4.1. "The single economic entity" approach

As it is well-known, a "single economic entity" is the minimum combination of natural and legal persons able to exert a single competitive force on the market. The need for a concept of single economic entity arises because not all economic interactions between separate legal entities are capable of having competitive significance. In order to understand if a specific kind of cooperative commercial relation could be captured by the notion of single economic entity we have to go back to the basic notion of competition according to which: "each economic operator must determine independently the policy which it intends to adopt on the common market including the choice of persons and undertakings to which he makes offers or sells" (lastly C-8/08, T-Mobile, 2009).

With reference to cases involving contractual coordination, the Court of Appeal noted that all cooperative commercial relationships are characterized by a certain degree of interference by the principal in the procedures used by the intermediary to perform the service. However, these relationships could merely regulate a particular form of division of labour between large undertakings and small and medium-sized enterprises. Independence does not have to be absolute. This is the case for example, when the concessionaire encounters constraints in certain instructions received but this does not call into question the contractor's commercial and decision-making independence and direct responsibility for the costs and risks associated with its specific activities. Indeed, in the classical hypothesis, a sales concessionaire does not merely bring together the parties to close a sale, as would an agent who facilitates contracts between customer and third parties. Rather, according to the principal's provisions, the dealer buys from the principal firm and resells to third parties, promotes the goods and collects the difference between the purchase price and the resale price.

If the clash between the autonomous strategies adopted by each entity constitutes evidence of competition, the identity of interest of two or more subjects could not be classified as competition, but as a common policy. Indeed, each entity at this stage is able to "contribute to the commission of an infringement of the kind referred to in that provision" (T-11/89, Shell v. Commission, 1992).

As a matter of fact, in the Unilever case the local concessionaries' contracts in fact were enacted similarly to the agency agreements' object of the above quoted case law. An agent is a self-employed person who has continuing authority to negotiate the sale or purchase of goods on behalf of another or to negotiate and conclude such transactions on behalf of and in the name of the principal[72].

With regard to the Unilever distributors, this kind of doubtful approach is mainly grounded on the issue that financial risks criteria could lead to the impossibility to apply the single economic entity doctrine, considering that the distributors are autonomous undertakings. Nevertheless, the ECJ, in C-48/69, ICI v Commission, judgment of 14 July 1972 (§ 140), stated that "In the circumstances the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition".

71 Dec. n. 7713, December 7th 2020.

72 In C-266/93, Bundeskartellamt v. Volkswagen AG and VAG Leasing GmbH, 1995, the ECJ stated that *"Representatives can lose their character as independent traders only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal and they operate as auxiliary organs forming an integral part of the principal's undertaking (see Joined Cases 40/73 to 48/73, 50/73, 54 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663, paragraph 539). However, the German V AG dealers case-law assumes, at least in part, the financial risks linked to the transactions concluded on behalf of VAG Leasing[…]".* (§19).

Following this approach, the impossibility of competition has to be the main criterion to use in order to determine which separate legal entities have to be treated as a single economic entity. So, in order to collect the "relevant criteria" for the liability of the conducts of independent economic operators as to the economic entity providing them strategic and commercial guidelines, it is necessary to evaluate the presence of: i) unity of purpose; ii) identity of interests and implementation of actions within the scope of their commercial relationship. Mutatis mutandis, the European Court of First Instance has already stated that employees form an economic unit with their employing undertaking since they are not independent economic entities when acting within the scope of their employment relationship[73].

4.2. AECT and Unilever exclusionary strategy

As underlined above, the Unilever rebates and bonuses were just a part of the overall Unilever exclusionary strategy. The remaining conducts, comprising the contractual exclusivity obligations, cannot be easily quantified to be included in an AEC Test, since they are all "non-pricing" policies. This is the principal reason why, according to the ICA and to the following TAR Lazio judgement, this test was not appropriate to give an exhaustive assessment of the restrictive impact of Unilever conducts.

On this issue, the recent ECJ "silence" in the Servizio Elettrico Nazionale judgment is more than "meaningful". In particular, in its judgment of 12 May 2022[74], the European Court, distinguishing between pricing and non-pricing policies, highlighted that the AECT – for the assessment of the pricing policies abuse of dominance - is just one of the methodologies to ascertain that the dominant undertaking used anticompetitive means. Instead, the Court did not mention the AECT in relation to non-pricing conducts.

In addition, as also remarked by the Court of First Instance, the repetition of Unilever rebate schemes by its competitors would not produce the same impact on the market, due to the "non-replicability" of the dominant operator's offer, characterized by very strong brands and including many of the best known and appreciated products.

In this framework, we consider that to base the allegation of competition offence on the equally efficient competitor criterion - and in particular on a quantitative AECT- is not only unnecessary, but it may even be misleading, exposing the assessment to a serious risk of obtaining an outcome of "false negative" foreclosing capacity. And indeed, only a systematic and careful evaluation of all the circumstances of the context can lead to an effective and balanced evaluation of exclusionary effect arising from Unilever overall strategy, thus allowing a correct ascertainment of the infringement.

Furthermore, in the described case, contractual exclusivity obligations formed a prevailing part of the alleged conducts. These clauses, prohibiting buyers to make their purchases from any other operator, have - by definition - the capacity of foreclosing competitors, whether or not they are equally efficient. For this reason, they are considered abusive by object if applied by a dominant operator.

In this framework, it is remarkable that, after the ECJ Intel judgment, there have been other antitrust authority decisions on exclusivity clauses - or even dealing with different kinds of conduct – which concluded that AECT is not fit for the "non-pricing policies" competitive assessment.

At the end of 2017, the German Bundeskartellamt considered that the ECJ Intel statements on the applicability of AECT did not apply to exclusivity agreements considering, among other, that exclusivity agreements entail higher risk of market foreclosure in comparison to exclusivity rebates. Hence, the Authority rejected the AECT submitted by the dominant firm. More specifically, in the CTS Eventim case[75], the German Authority noted that "The per se prohibition of exclusivity agreements in Hoffmann La Roche, paragraph 90, has neither been overruled nor modified by the CJEU's Intel judgement".

In May 2018, the French Court of Appeal made a pronouncement on the Umicore case of the Autorité de la Concurrence[76]. Umicore, a zinc industry company, pursued a strategy aiming to foreclose the market through the application of exclusivity agreements to retailers (Decision No. 16-D-14 of 23 June 2016). Against this background, the Court noted that the Intel judgment did not affirm that there was a legal obligation requiring that a rebate scheme had to be based always on the AECT. Anyway, the Court stated that the AECT is relevant when the loyalty scheme has a financial nature.

Even if related to other conducts, id est discriminatory pricing, a recent judgment of the UK Court of Appeal[77] is remarkable with regard to the Intel interpretation. Indeed, the Court stated (§ 38-41) that the AECT is one of the available tools to assess whether there is an abuse of dominant position. It also added that there may be circumstances in which carrying out an AECT is either impracticable or inappropriate. According to the UK Court, the essence of the Intel case is simply that the General Court was wrong not to consider whether or not Intel's criticisms of the AEC test carried out by the Commission were well founded.

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73 In T-66/99, Minoan Lines SA c. Commission, 2003, the Court of First Instance stated that *"The case law shows that this sort of situation arises not only in cases where the relationship between the companies in question is that of parent and subsidiary. It may also occur, in certain circumstances, in relationships between a company and its commercial representative or between a principal and his agent. In so far as application of Articles 85 and 86 of the Treaty is concerned, the question whether a principal and his agent or „commercial representative" form a single economic entity, the agent being an auxiliary body forming part of the principal' s undertaking, is an important one for the purposes of establishing whether the given conduct falls within the scope of one or other of those provisions. Thus, it has been held that „if ... an agent works for the benefit of his principal he may in principle be treated as an auxiliary organ forming an integral part of the latter' s undertaking, who must carry out his principal , s instructions and thus, like a commercial employee, forms an economic unit with this undertaking*" (Suiker Unie and Others v Commission, quoted above, paragraph 480)" (§ 125).

74 C-377/20, Servizio Elettrico Nazionale SpA e a. v Autorità Garante della Concorrenza e del Mercato e a.

75 *Bundeskartellamt,* CTS Eventim, Decision of 4 December 2017.

76 Paris Court of Appeal, 17 May 2018. This decision has been confirmed by the French Supreme Court, 2 September 2020, appeal n° H 18-18.501, V 18-18.582, P 18-19.933, *Umicore France SAS, Umicore SA*.

77 Competition Appeal Tribunal, *Royal Mail plc v Office of Communications* [2021] EWCA Civ 669, 7 May 2021.

Among the Commission Decisions, it is useful to recall the 2018 Qualcomm case[78], an abuse of dominant position in the baseband chipsets market dealing with the application of exclusivity clauses to a key customer. In this case, the Commission considered that there was no obligation to run the AECT. Afterwards, in the 2018 Android decision[79], the Commission performed an effects analysis applying also a quantitative test, but it was just one of the several tools and factors used to assess the infringement. Lastly, in the AdSense case dealing with exclusivity clauses[80], the Commission considered that the AEC test was not applicable.

4.3. Some closing remarks

Waiting for the publication of the ECJ Unilever preliminary ruling, we suggest that the ongoing legal dispute and its final outcome are likely to be influenced by two major issues.

The first deals with the question of the Unilever distributors' network. In this regards we retain that in the light of the case law recalled above, the production company and its formally autonomous and independent distributors may be considered, for the purpose of imputing the offence, as a single economic entity, beyond the criterion of the assumption of financial risk. As a matter of fact, their contractual and commercial relationships imply: i) unity of purpose and interests; ii) a pervasive interference of Unilever on distributor choices regarding commercial strategies and product orders.

The second has to do with the AECT and non-pricing policies, such as the comprehensive Unilever strategy based on exclusivity obligations. We believe that AECT is not a suitable tool to assess the actual capacity of these conducts to foreclose competitors, considering the presence of qualitative elements that could not be appreciated throughout such a test. This argument seems to be confirmed by the illustrated European and national cases, which suggest, on the one hand, that AECT-use should be limited to pricing conducts in order to weigh quantitative restrictions and, on the other hand, that "non-pricing" policies should be assessed mainly through a qualitative analysis of all the relevant circumstances of the specific case.

78 *Qualcomm,* AT.40220, 24 January 2018.
79 *Google Android,* AT.40099, 18 July 2018.
80 *Google Search-AdSense* AT.40411, 20 March 2019.

Bid rigging in the construction industry: the highest fines ever imposed in Austria

Lukas Cavada
Senior Case Handler, Austrian Federal Competition Authority

Since 2017, the Austrian Federal Competition Authority (AFCA) has been investigating on suspicion of comprehensive infringements of competition law (Section 1 of the Cartels Act and Art 101 TFEU) in the construction industry throughout Austria. Pursuant to the Cartels Act, undertakings can be fined up to 10% of their (group) turnover in the latest financial year. As a peculiarity of Austrian competition law, the Austrian Criminal Code provides a sentence of imprisonment of up to three years in the case of bid-rigging and up to ten years for serious fraud (under certain circumstances participation in a cartel might be prosecuted as fraud under Austrian Law as well).

Background

The alleged cartel included price fixing, market division, and the exchange of competitively sensitive information, as well as the formation of anti-competitive working groups and bidding consortia in the construction and civil engineering sector from at least 2002 until 2017. The alleged infringements concern both public and private tenders with contract volumes ranging from approximately EUR 50 000 to EUR 60 million. Public tenders are financed by taxpayer money. More than 40 construction companies are suspected of having participated in the infringement. This is one of the largest investigations in Austria in recent years.

Investigations

The investigative powers of the AFCA, which are not hierarchical but optional in parallel for the agency to choose from, include conducting dawn raids as probably the most effective tool. Accordingly, the AFCA conducted several dawn raids in the construction industry across Austria in spring 2017. During these raids, paper documents and IT data were seized on a large scale. Another investigatory instrument of the AFCA is request for information. In individual circumstances, this possibility was also used (to a lesser extent) in the course of the investigation.

The Austrian Constitution provides the possibility of mutual assistance. Since the alleged conduct is also punishable under criminal law, the AFCA is in close cooperation with the Austrian Public Prosecutor's Office against Corruption (WKStA) and the Austrian Federal Bureau of Anti-Corruption (BAK). The cooperation includes e.g. mutual assistance regarding gathered evidence.

Leniency programme

The AFCA has a well-established leniency programme and offers a comprehensive handbook as a guide. It may refrain from requesting the imposition of fines or may request a reduction of fines for undertakings which due to their cooperation contribute to detecting infringements of Section 1 of the Cartel Act and/or Art 101 TFEU. Several undertakings applied for leniency in the case at hand. Also, the AFCA has a well-established practice with public prosecution for individuals being privileged from criminal prosecution if they cooperate as part of a companies' leniency application.

Decisions

The AFCA submitted its initial statement of objection to the companies concerned in 2019.

On 14 July 2021, the AFCA applied for the imposition of a fine in the amount of EUR 45.37 million as part of its investigations into the Austrian construction industry. On 21 October 2021, the Cartel Court confirmed the fine and found that the undertaking has infringed Section 1 of the Cartels Act and Art 101 TFEU. More specifically, it was found on the grounds of a single and continuous infringement in the form of illegal price fixing, market sharing and information exchange with competitors with regard to public and private tenders in the building construction and civil engineering sector in Austria during the period July 2002 to October 2017. The decision is final. At the time, it was the highest fine ever imposed on an undertaking in Austria.

Subsequently, the AFCA requested to impose a fine of EUR 62.35 million on another undertaking. The Cartel Court confirmed the request on 17 February 2022. The decision is now also final. This is currently the highest fine ever imposed on a company in Austria.

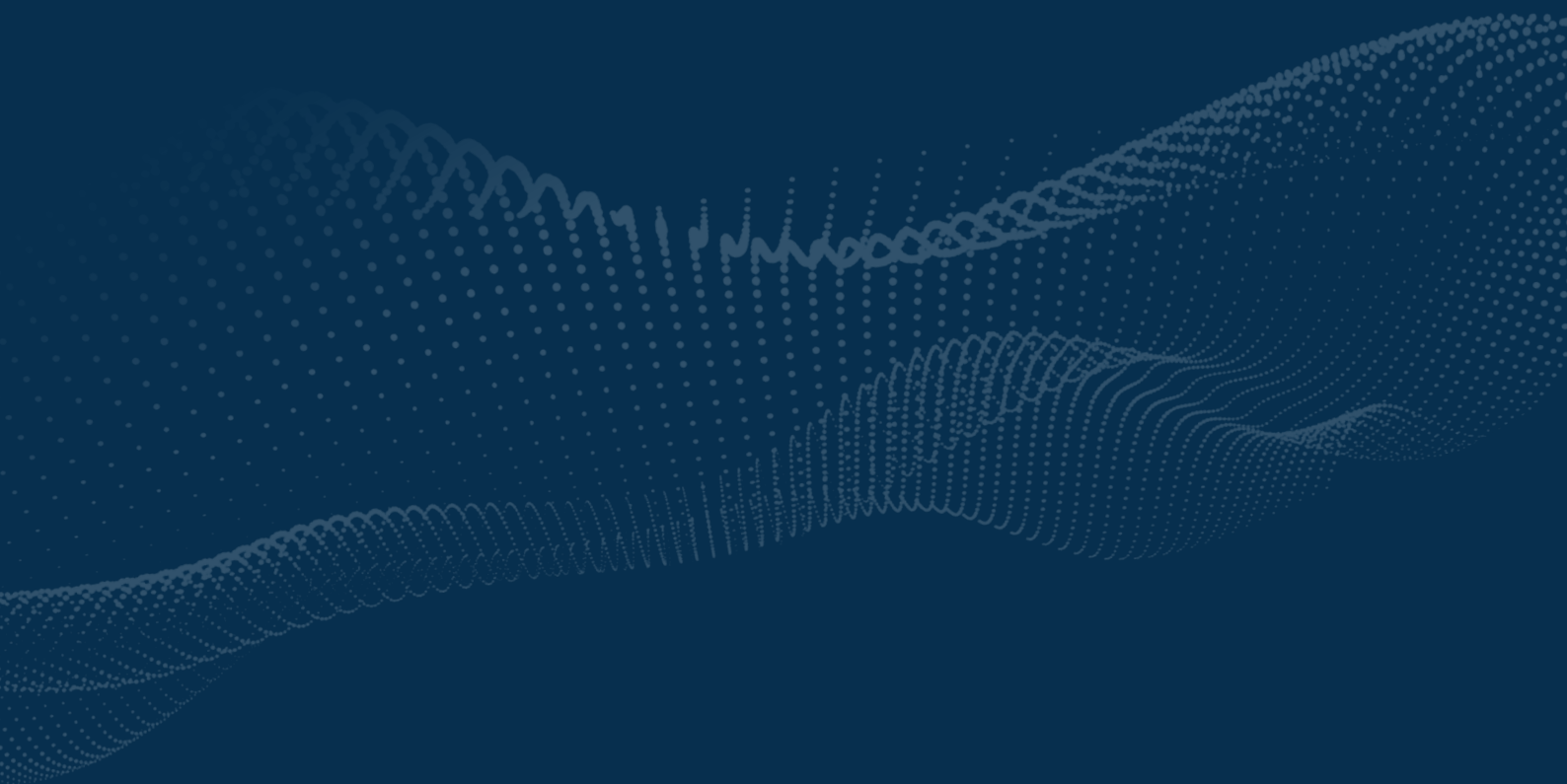
Both decisions confirmed a single and continuous infringement in the form of illegal price fixing, market sharing and information exchange with competitors with regard to public and private tenders in the building construction and civil engineering sector in Austria during the period July 2002 to October 2017.

Investigations are currently ongoing in relation to further undertakings involved, with additional applications to the Cartel Court expected in the near future.

Conclusion

It is fair to say that this case is one of the largest investigations in Austria ever. The AFCA used several of its investigative powers. This approach allowed obtaining direct and indirect evidence. It mainly refers to dawn raids and, subsequently, the cooperation of companies. In addition, mutual assistance with the law enforcement agencies has proved extremely fruitful. Against the background of limited resources, it was also crucial to ensure effectiveness and efficiency in respect of the investigations.

NEWS FROM THE REGION



Virtual regional conference on anticompetitive practices of public utility companies

A Virtual Regional Conference on "Anticompetitive practices of public utility companies", organised by the Competition Council of Bosnia and Herzegovina in cooperation with the OECD-GVH RCC was held on 7 April 2022 through the platform Zoom. Participants from Serbia, Croatia, Montenegro, Albania, Kosovo, North Macedonia and Slovenia attended the Conference. The main goal of the event was to share experiences and views with the competition authorities in the region on the topic of competitive neutrality and discuss the cases of anticompetitive practices of public utility companies in the respective countries.

Mr. Amir Karalić PhD, President of the Competition Council of BiH and Mr Renato Ferrandi, Coordinator of OECD-GVH RCC training activities, OECD opened the Conference with introductory remarks, both agreeing on the importance of the improvement of regional cooperation in the field on competition law and policy.

Ms. Federica Maiorano, Senior OECD Competition Expert, held a presentation on "ADDRESSING PUBLIC COMPANIES: THE ROLE OF COMPETITIVE NEUTRALITY". She explained that competitive neutrality is a principle according to which all enterprises are provided a level playing field with respect to a state's ownership, regulation or activity in the market. Ms. Maiorano also spoke about the main elements of the OECD RECOMMENDATION ON COMPETITIVE NEUTRALITY. The Recommendation invites adherents to ensure that the legal framework applicable to different enterprises competing on the same market is neutral and is enforced in a neutral way, so that competition is not unduly distorted. In addition, it deals with support measures, such as loans, guarantees and state investment in capital. The Recommendation states that countries should avoid offering such support when it benefits some competitors over others selectively. When exceptions are needed because of overriding public policy objectives, these should be transparent, proportionate and periodically reviewed. Finally, compensation for public service obligations should be proportionate to the value of the services provided and should be subject to transparency requirements to reduce the risk of cross-subsidisation.

Speakers from the Competition Council of Bosnia and Herzegovina Ms. Lejla Sakovic Karic and Ms. Aleksandra Dunjic, Expert Advisors, presented two case studies in Bosnia and Herzegovina regarding central heating services. In one case, users of central heating services whose consumption and billing are calculated according to MWh, were only permitted to disconnect from central heating subject to consent of all other users on that joint measurement unit. Users of the central heating service, whose consumption and price of heating are calculated per m2, were enabled to be disconnected from central heating only if all users of the service were disconnected.

In the second case, users of central heating services whose consumption and billing are calculated according to megawatt hour (MWh), were only permitted to disconnect from central heating subject to consent of all other users on that joint measurement unit. Users of the central heating service, whose consumption and price of heating are calculated per square meter (m2), were enabled to be disconnected from central heating only if all users of the service were disconnected.

In both cases the Competition Council established that the undertaking "Centralno grijanje (Central heating)" d.d. Tuzla, abused its dominant position in the heat distribution market in the City of Tuzla, by applying Article 29 of the General Conditions for Connection to the District Heating System and Delivery of Thermal Energy prescribing the conditions for separating the tariff customer from the heating system, which by their nature have no connection with the subject matter of the agreement, in accordance with the provisions of Article 10, paragraph (2), item d) of the Law on Competition.[81]

Ms. Mirta Kapural PhD, President of the Competition Council, Croatian Competition Agency, Republic of Croatia presented a case study in Croatia: CCA v. HRVATSKA POŠTA d.d., Zagreb (Croatian Post): Abuse of a dominant position and alleged predatory pricing.

On 5th April 2013 the Croatian Competition Agency (CCA) received the initiative from undertaking CityEx Ltd to start an investigation on abuse of dominant position against undertaking HP-Hrvatska pošta (HP). Its allegations were that HP abused its dominant position on the relevant market by application of predatory pricing of postal services with the goal to exclude its competitors from the market or to prevent new competitors to enter the market.

Proceedings were opened by application of Article 13 of the Competition Act and Article 102 TFEU involving possible effect on trade between EU Member States. The CCA informed the EC about the proceedings opened on the basis of Article 102 TFEU. The CCA decided that HP did not distort competition/abused its dominant position on the market for provision of letter post service in Croatia-no evidence that HP implemented predatory pricing policy with the aim to exclude competitors from the market and/or to foreclose market for new competitors was found, since none of the 4 criteria of predatory conduct

81 Law on Competition ("Official Gazette of BiH", No. 48/05, 76/07 and 80/09), http://bihkonk.gov.ba/en/competition-act-unofficial-consolidated-text.html

(deliberately incurring losses, intention to exclude competitors from the market, selectivity, harm to consumers) were met.

The high administrative court in Croatia rejected the claim from CityEx and confirmed the CCA Decision, and the owner of CityEX initiated ICSID arbitration against Croatia. The international investor arbitration court ICSID rejected the claim against Croatia, filed by the owners of the defunct CityEX courier company, which sought €53 million in damages as it laid the blame for the company's bankruptcy on predatory pricing used by the national post HP and the inaction of Croatia's competition agency AZTN which allowed it.

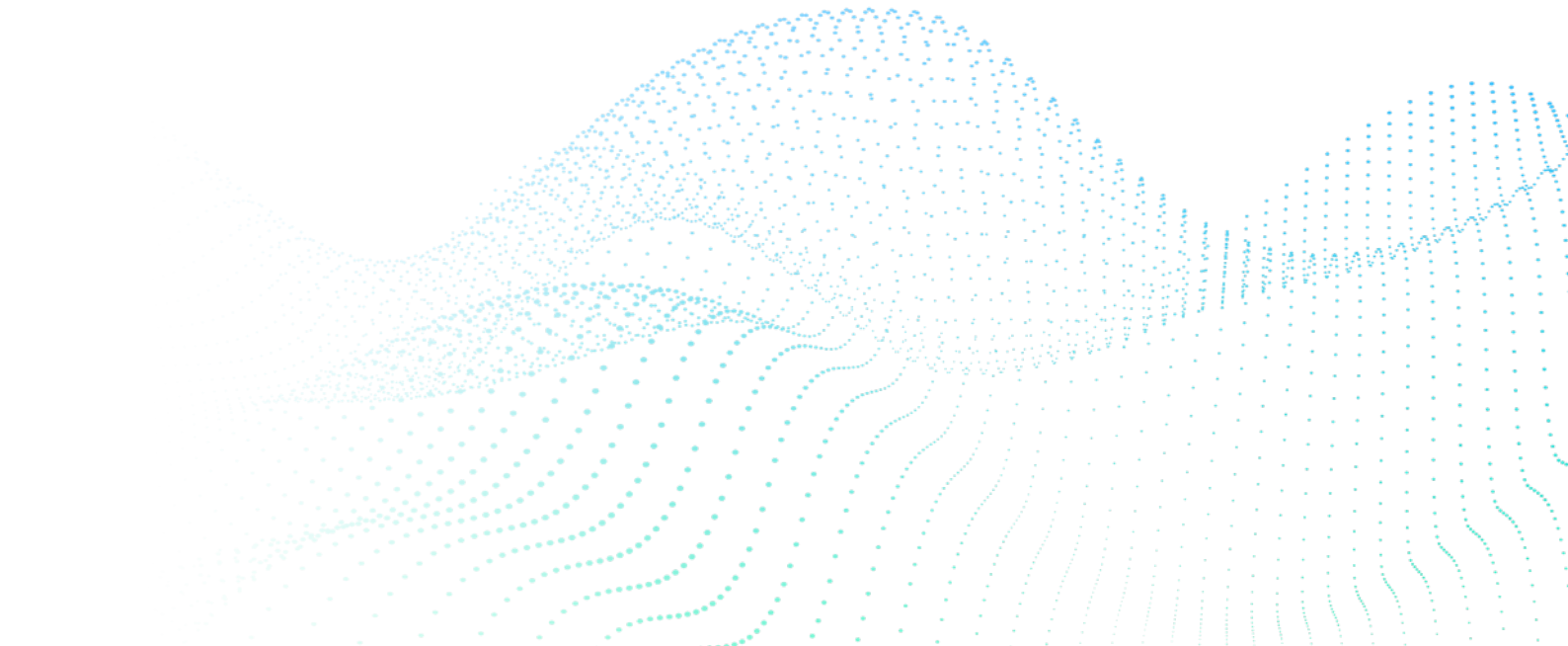
Ms. Maja Dobrić, Independent Advisor, Commission for Protection of Competition, Republic of Serbia presented several case studies in Serbia related to funeral services. The first case was initiated against JKP Gradska groblja Kragujevac (Public Utility Company – City Cemeteries of Kragujevac), which abused its dominant position in the relevant market for leasing graves in cemeteries in Bozman district in Kragujevac. In the second case JKP Pogrebne usluge (Public Utility Company Funeral Services) held a dominant position in the relevant market for leasing graves in cemeteries in Belgrade (10 cemeteries in Belgrade). In both cases abuse of dominance consisted of tying entrusted (gravesite leasing) and commercial activities (stonemason services) to protect the incumbent's position, hindering independent stonemasons as downstream competitors from accessing the market, as well as through excessive pricing. In addition to imposing a monetary sum (measure of protection of competition), behavioral measures were applied in both cases: removing exclusivity clauses from standard agreements, offering existing users to remove the clause and publishing the decision. Similar issues occurred in the cities of Novi Sad and Pančevo, where the CPC resolved the problems through advocacy activities.

To solve the systemic public utility problem, the CPC addressed the competent Ministry through an Opinion proposing legislative changes to promote competition in the public utilities market. The CPC stressed the importance of providing equal conditions for all undertakings in commercial activities in the public utilities market, and the negative effects of creating legal monopolies. Following this Opinion, legislation was changed, unbundling entrusted and commercial activities."

Ms. Ksenija Malović, Agency for the Protection of Competition, Republic of Montenegro presented the case of Public utility company Nikšić regarding the funeral services market. Two requests for initiating proceedings to examine the conditions of competition on the funeral services market were lodged against Komunalno Nikšić. Komunalno Nikšić imposed double prices for the lease of chapels and for the use of funeral refrigerators in its chapels. It also linked the service of renting chapels and the service of using funeral refrigerators. Komunalno Nikšić transferred its dominant position in the chapel rental market as an entrusted activity to the liberalized market for the use of funeral refrigerator.

Mr. Sinisa Milačić, Agency for the Protection of Competition, Republic of Montenegro presented the case on water supply company Vodovod Budva. In 2015, the Agency initiated ex officio procedure to determine the existence of an act of abuse of dominant position by imposing unjustifiably high prices, primarily for the purpose of exploiting consumers by water supply and wastewater treatment company LLC Vodovod i kanalizacija Budva. The price shares for maintenance and reading of water meters in the average bill for the citizens of the Municipality of Budva were significantly higher than in other municipalities on the coast – up to ten times higher in amount to comparable economic entities. The Agency issued its Decision establishing that LLC "Vodovod i kanalizacija" Budva abused its dominant position under Article 15, Pragraph 2 Line 1 and 4 of the Law on Protection of Competition. In the misdemeanor proceedings before the Misdemeanor Court LLC Vodovod i kanalizacija Budva was found guilty and a fine was imposed on LLC Vodovod i kanalizacija Budva in the amount of EUR 61,553.22. Vodovod i kanalizacija Budva did not implement the measure of conduct determined by the Agency's Decision and in the second proceedings it was fined in the amount of EUR 1,500.00.

All the presentations were followed by questions and discussion of cases. This was the first regional conference organised by the Competition Council of Bosnia and Herzegovina with the tendency to become an annual event that would help build a network of competition authorities in the region and further expand regional cooperation.



Peer Review of Competition Law and Policy in the Eurasian Economic Union

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Over the course of many years, since 1998, the Organisation for Economic Co-operation and Development (OECD) has been conducting peer reviews of competition laws and policies, which have been a valuable tool for the countries, regardless of OECD membership, in reforming, strengthening and improving their competition regulation structures.

The OECD Peer Review is an in-depth analysis of the methods of competition regulation, covering many key aspects, starting from the stability and rationality of competition law, and ending with the structure and effectiveness of competition institutions, enforcement practice and competition advocacy. Based on the analysis results, OECD experts make recommendations.

Thus, the competition authorities receive an assessment of current competition law and their competition policy as a matter of compliance with the best world standards. In addition, the recommendations contained in the reviews, which also relate to the public policy being conducted, become part of nationwide public debate, and serve as a tool for the implementation of best practices. Therefore, countries (regional organisations) and particularly competition authorities should be ready, on the one hand, for the evaluation of their activities, and on the other hand, for the possibility of improving it.

The OECD conducts both country peer reviews, i.e., aimed at assessing competition policy and law for a particular country, and supranational - for regional organisations. Throughout more than twenty years, about 100 peer reviews[82] have been carried out, 3 of which at a regional level[83].

The Eurasian Economic Commission (EEC) was established in 2012. As a full-fledged supranational competition body with law enforcement powers, the EEC began to function in 2015. During the period of work, a legal framework was formed, and certain experience in law enforcement was accumulated. Considering the positive and negative results of the work, it became necessary to improve the law of the EAEU in the field of competition. Certain issues were revealed due to law enforcement and judicial practice, as well as active interaction with businesses and the legal community. At that, the necessity of an expert outside view in order to apply the best foreign experience certainly arose.

With a view to obtaining an expert assessment and recommendations for improvement of activities, an agreement was reached between the EEC and the OECD in 2019 to conduct a peer review, and in 2021 the OECD conducted the Peer Review of Competition Law and Policy in the Eurasian Economic Union (EAEU Peer Review).

OECD experts analysed a large amount of data, and held a series of meetings to discuss and clarify issues that arose in the process of work. Also, two stages of interviews were conducted with representatives of the EEC, national authorities, academic, legal, and business communities, including companies that had been investigated. A total of 35 interviews were conducted with 52 persons.

Each country, and even more so, an integrational association operating in all the territories of its member states, has its own particularities, and the EAEU is no exception in this case. Therefore, during the review process, there arose a need for detailed elaboration of issues, discussions and clarifications. It also served as an excellent opportunity, even at the first stages of the analysis, to look at already formed approaches from a different point of view, and sometimes to see for the first time the controversial or unresolved issues.

It should be noted that the object of analysis was the regional or supranational level, i.e., competition policy and the law of EAEU member states were not considered within the framework of this review. At the same time, experts drew attention to the interaction between the EEC and national competition authorities.

The results of the EAEU Peer Review were presented on December 8, 2021 at the OECD Global Forum on Competition.

The EAEU Peer Review provides an assessment of the EAEU functioning in general, since its formation. According to experts: "... The enormity of these changes cannot be understated. Setting up a new international organisation and competition agency with competences across different jurisdictions, each going through reforms of their own; harmonising competition rules; and putting in place common competition policy, enforcement and practice across countries with different trajectories since their independence, are all challenging tasks… The implementation of reforms over the last years demonstrates that the Eurasian Economic Union has risen to the challenge." However, there are still areas where certain work needs to be carried out.

Further, the results of the analysis of the legal framework of the EAEU competition policy and the institutional aspects of competition law enforcement are presented. The substantive and procedural norms, as well as law enforcement, were studied very thoroughly, with a detailed description of cases of violation of the general rules of competition set out in the Treaty on the EAEU. Special attention is paid to the issues of international

82 Including two EAEU member-states at a country level
83 https://www.oecd.org/daf/competition/countryreviewsofcompetitionpolicyframeworks.htm

cooperation and advocacy of competition, as well as to related areas such as trade policy, consumer protection, etc. In the end, the conclusions are presented, and recommendations are made, within which the opinion of OECD experts on the advantages and disadvantages, as well as on possible options for improving competition policy and law in the EAEU is presented.

The EAEU Peer review in Russian and English is posted on the official websites of the OECD and the EEC.[84] However, the focus of this article is the conclusions and recommendations made by the OECD experts. They concern those issues that differ or do not correspond to the best world practices.

According to the conclusions of OECD experts, some of the substantive legal norms of the EAEU, while aligned with the relevant national norms, differ with innovation and go beyond the typical competition rules that are in force in various countries of the world (for example, joint dominance, coordination of economic activities). Besides, the application of some more traditional competition law concepts also departs from OECD practice, such as the strict market share thresholds for establishing dominance (35%).

As for the competence of the EEC, according to experts, it is strictly outlined in terms of the division of powers between the EEC and the national competition authorities. The EEC has competence only when the situation concerns cross-border markets, i.e., when the relevant markets include the territories of two or more member states, which, along with some other restrictions on the functionality of the EEC, significantly complicates effective law enforcement.

According to the Treaty on the EAEU, member states may introduce additional provisions regarding national prohibitions in the field of competition. National courts are also free to interpret the competitive provisions of the EAEU in other ways. This opens the door to different competition rules at the national level.

The broad mandate also detracts EEC from carrying out control in core areas of competition. In particular, departing from the approach taken in OECD countries is the inclusion of the area of unfair competition as a focus of competition policy – which in other countries covers matters more commonly classified as unfair business practices.

The EEC has no jurisdiction in cases where the company under investigation is not registered in a country of the EAEU. In such cases, competence passes to those national competition authorities that have extraterritorial jurisdiction. This situation means that the EEC is not entitled to prevent possible infringements, even if the potential infringement could have very similar consequences in several or all member states.

International agreements and memorandums concluded at the EAEU level contain provisions on cooperation with competition authorities of third countries and regional organizations. They provide for the exchange of information, but they do not regulate cooperation in the field of law enforcement, which is the main theme recommended by the OECD: "…requiring Adherents to commit to effective international co-operation wherever possible, and take appropriate steps to minimise direct or indirect obstacles or restrictions to effective enforcement cooperation between competition authorities".[85]

Among the differences from most competition regimes, OECD experts drew attention to the fact that "…there is no merger control at the regional level, with competences over mergers staying with the national competition authorities empowered to review them under national law".

The OECD experts also noted that in order to promote the application of competition law and policy, the EEC is engaged in regulatory impact assessment and holds regular meetings with representatives of the business community and the general public in all EAEU countries.

In general, the OECD experts concluded that the powers of the EEC, as well as the rules that enhance interaction with and between national competition authorities, serve as a reliable basis for creating efficient and consistent competition enforcement practices in the EAEU and in the member states.

As a result of the work carried out, OECD experts made 16 groups of recommendations in 4 areas.

Substantive law

Recommendation I – Clarify goals of competition policy

Recommendation II – Harmonise EAEU and national competition rules, and ensure that EAEU competition rules have primacy over national law on cross-border cases

Recommendation III – Align findings of dominance with international practices

Recommendation IV – Ensure that sanctions are deterrent

Recommendation V – Harmonise the competition treatment of IPR related matters

Recommendation VI – Issue guidelines and block exemptions

Recommendation VII – Explore the possibility of adopting a single regional merger control notification for transactions with cross-border dimension

Enforcement, prioritisation and advocacy

Recommendation VIII – Allow prioritisation by the Commission, and enhance its agenda-setting role for all EUEA Member States

Recommendation IX – Prioritise traditional competition enforcement, including against cartels

Jurisdiction

Recommendation X – Remove limitations to appropriate territorial competence

Recommendation XI – Replace the market share threshold for the Commission to have competence over cross-border abuses of dominance

Procedure

Recommendation XII – Set in place effective and practical leniency procedures

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84 https://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-eurasian-economic-union-2021.htm https://eec.eaeunion.org/comission/direction/caa/

85 OECD (2014) Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings) OECD/LEGAL/0408, at II.

Recommendation XIII – Ensure that (co-ordinated) dawn raids are possible across the EUEA

Recommendation XIV – Set in place early resolution mechanisms for all types of cases

Recommendation XV – Protect the confidentiality of documents, without creating unnecessary obstacles to enforcement procedures and rights of defence

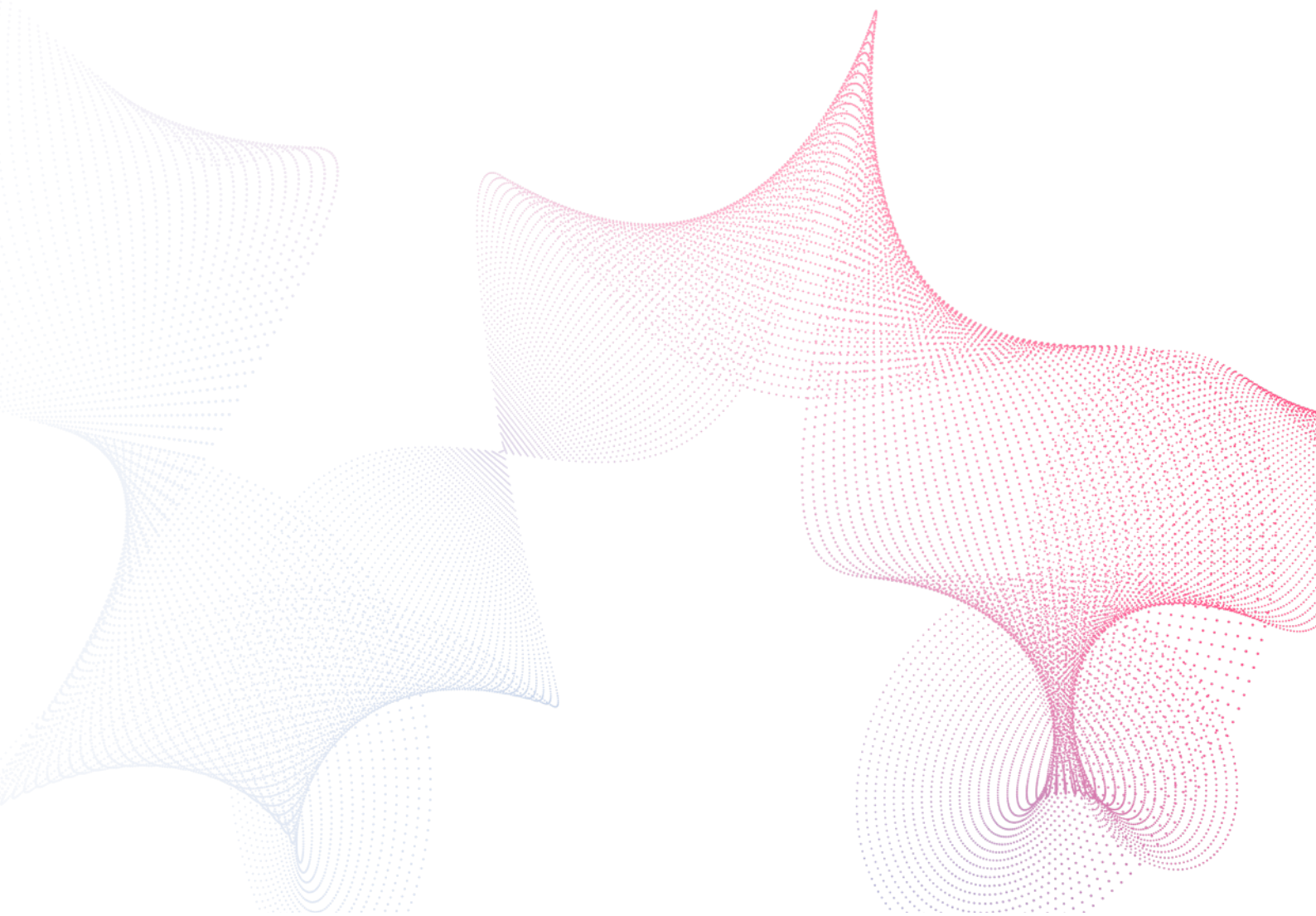
Recommendation XVI – Enhance due process and procedural fairness

As can be seen from the findings above, the OECD experts believe that the EAEU could bring its practice closer to the practice recommended by the OECD in the field of competition policy and suggest some policy measures options that could help strengthen the competitive regime of the EAEU.

The EEC analysed all the conclusions and recommendations of the OECD experts, prepared its own proposals for their implementation, and discussed them with the member states. At the time of conducting the EAEU Peer Review, relevant work was already being carried out by the EEC on some issues. In particular, the issues of extraterritorial powers, prescription period, mitigation of punishment and leniency, etc., had been the subject of discussion between the EEC and the EAEU countries over the past few years.

At the same time, the recommendations contain proposals that are difficult to implement in a short time. There are issues that will be considered in stages, for example, the introduction of block exemptions.

At the first stage, the EEC conducted an analysis of foreign experience and EAEU countries and prepared a review. Step by step, as soon as the EEC and the EAEU countries are ready, the OECD recommendations will be discussed in terms of the advisability and readiness of their implementation. This is not a matter of one year, and it will be implemented by the EEC based on joint decisions made with the EAEU countries.



News from the region – Azerbaijan

State Service for Antimonopoly and Consumer Market Control

For the first time, the competition authority was established in Azerbaijan in 1992, right after it gained independence for the second time in the 20th century. Initially named the Antimonopoly Policy and Entrepreneurship Support Committee, over the years, it had undergone significant institutional and functional reforms. Recent structural changes included the establishment of the State Service for Antimonopoly Policy and Consumer Protection in 2009. The newly established organization obtained legal powers and functions on antitrust, unfair competition, supervision of natural monopolies, oversight of compliance with advertisement legislation, and control of the consumer market. Further expansion occurred in 2016, when the duties and functions of the State Procurement Agency of the Azerbaijan Republic were transferred to the competition authority. After reforms in 2018, the competition authority received its new name, State Agency for Antimonopoly and Consumer Market Control, and was integrated into the structure of the Ministry of Economy. Later, in 2019, the Metrology Institute, the Standardization Institute and the Accreditation Centre became subordinated to the competition authority, which received powers in the field of technical regulation, standardization, metrology, conformity assessment, accreditation and quality management. Finally, the current form of the competition authority was approved on December 19, 2019, and it was renamed State Service for Antimonopoly and Consumer Market Control (the State Service).

The most recent organizational structure of the State Service was approved in October 2021, which enabled the expansion of staff capacity from 199 to 319 employees. The 60% increase in the number of employees highlights the growing importance of competition to the Government of Azerbaijan and for the development of the local economy in general. In particular, there has been a significant increase in the size of the competition complex of the State Service, with the number of primary departments expanded from 1 to 3 main departments. The new competition block consists of the Supervision of Unfair Competition and Advertising Legislation, the Antimonopoly (Antitrust) Control and the Department of State Oversight of Natural Monopolies. The composition of these departments represents the main competition issues that the State Service is facing and their specialized separation allows for better market oversight in those fields.

In addition to the structural changes, there were several senior-level appointments at the State Service that helped facilitate a transition to a more efficient work process. At the end of 2021, a new head of the State Service was appointed. Moreover, new heads of departments were appointed in 2021-2022. All of these changes have already positively affected the organization and helped to improve oversight of the relevant markets. Consequently, both the quality and the number of investigations this year have increased substantially compared to the previous years.

Discussing the natural monopolies, it should be noted that there are a few large state-owned natural monopolies in Azerbaijan that have a tremendous impact on the economy and people. Therefore, having a specialized department is crucial for supervising the activities of natural monopolies and protecting consumers in the relevant markets. To facilitate the oversight, the State Service organized meetings with the monopolies operating in the utility sector (water, gas, electricity and melioration). In addition to soft measures, the State Service often undertakes hard steps, too. For instance, in April 2022, the State Service opened a case against Azerbaijan Railways CJSC (state-owned monopolist) for refusal of service and abuse of market position.

In the field of unfair competition and advertisement, there has been a significant increase in the number of investigations as well as launched probes. From just 6 cases in 2020 and 19 cases in 2021, the number of inquiries increased to 15 in just 4 months in 2022. Furthermore, the importance of evolving digital markets has been observed by the competition authority, and the case against food delivery company Bolt was opened, while a previous case against Wolt, another delivery company, was conducted and closed in 2021. Recently, an investigation was conducted against one of the largest retail chains in the country, which spread false information in advertisements about the prices of goods. The resolution instructed the company to refrain from using unfair and inaccurate advertising methods and imposed a fine of 2.5 million manats (equivalent to roughly 1.5 million USD) for allowing unfair competition. All of these dynamics highlight the shift in the operations of the State Service.

In the antitrust field, there have been significant improvements in research and investigation of the relevant markets. In particular, essential food product markets have been extensively researched and potential competition issues were identified in the markets for salt, rice, flour, bread, buckwheat, butter, and spread (margarine). Research of several markets has indicated the elements of abuse of dominance, while several of them will be brought forward in the new investigations. In addition to that, there have been multiple signs of significant violation of antimonopoly legislation that have been identified in the market for electronic products, which might also involve potential collusion or cartel.

In support of the activities above, extensive work has been done drafting the legislation on competition laws, which will be included in the new Competition Code. This legal document has passed through most administrative stages, obtaining recommendations from necessary government organizations, and is currently in its final stage of review in the Cabinet of Ministers. Once approved, the Code will be sent to the Milli Mejlis (National Assembly of the Republic of Azerbaijan) for examination and approval. The approval of this piece of legislation will be a crucial step forward in improving the compet-

itive environment in Azerbaijan. The new Competition Code will modernize current competition laws and will effectively expand the authority of the State Service to better respond to the current global and domestic competition trends.

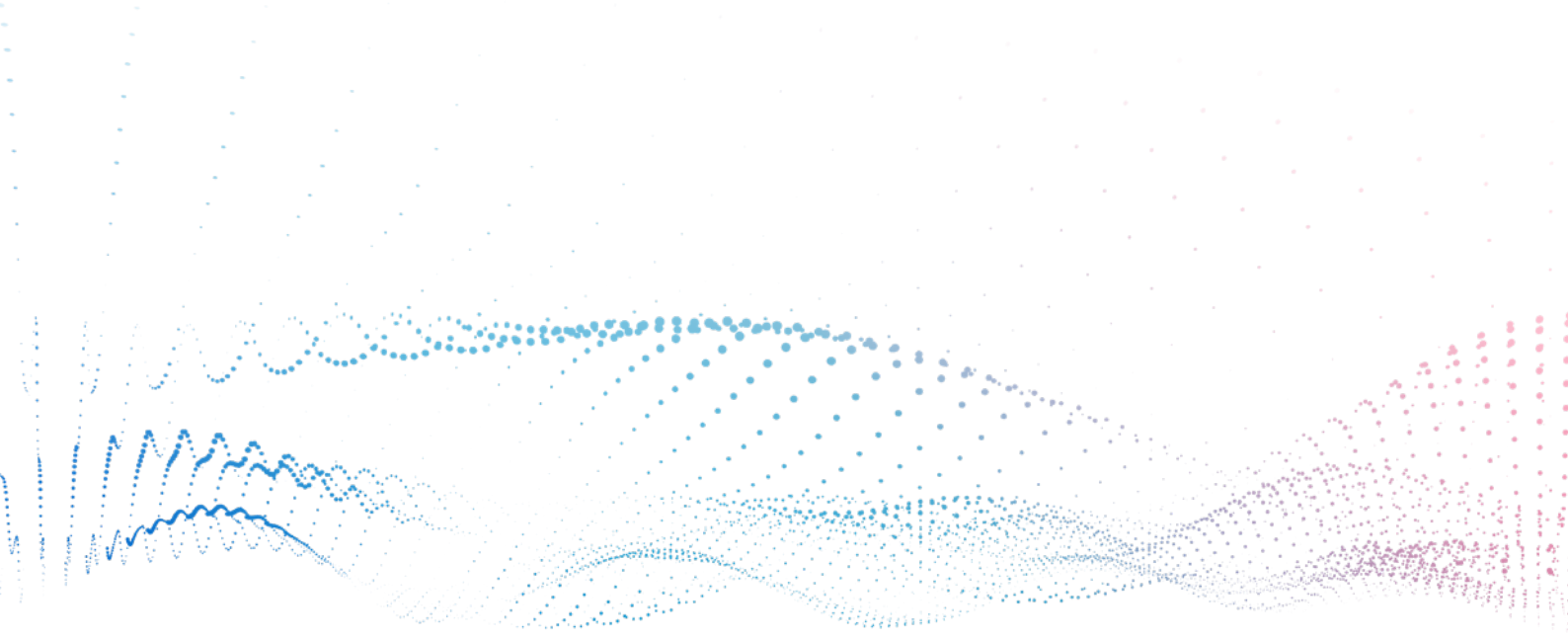
On the organizational level, constructive work has been done in other departments on developing the new public communication strategy that will provide a better reflection of the activities of the State Service. From the start of the year, more than 15 meetings and training programmes have been held with the members of the public on raising awareness of competition issues and the respective role of the State Service. The State Service recognizes the importance of transparent cooperation with the public and its role in improving the competitive environment in the country. Additionally, memorandums of cooperation were signed with local universities on implementing joint projects, conducting research, and organizing conferences, training and seminars to accelerate innovative activities in the competition sphere.

Moreover, to increase professionalism among journalists operating in the economic sphere, trainings on "Market economy and competitive environment" and "Consumer rights and responsibilities" were held for local mass media representatives. The State Service regularly holds meetings with representatives of non-governmental organizations and media outlets, too. At the initiative of the State Service, several topics on the protection of consumer rights were included in the curriculum of candidates for judges. Moreover, online training programs aimed at increasing the knowledge and skills of mediators, lawyers and future advocates were held, focusing on consumer market control measures, state control over natural monopolies, and quality and safety standards of consumer goods.

Extensive work is carried out by the remodelled departments in cooperation with international competition organizations and national competition authorities from other countries to improve the competitive environment in the country. For instance, the Korea International Cooperation Agency (KOICA) conducted special training courses for the experts of the State Service on various aspects of competition policy. The research documents and materials produced by OECD have been used for educating the employees of the State Service and raising public awareness, while the RCC OECD-GVH seminars provide useful information on the theory and practical experience of international competition authorities. Additionally, officials from the State Service have visited International Competition Network 2022 in Berlin, where contemporary competition issues and developments were discussed in great detail. Finally, the working group has been seconded to Turkey to facilitate cooperation and exchange experiences in the field of competition with the Turkish Competition Authority and other government organizations of Turkey.

On a slightly different note, the State Service has recently modernized its website (www.competition.gov.az). The website now provides detailed transparent information on the activities of the competition authority and has a simplified process for applications, complaints and reporting of violations of competition laws. Additionally, the public and the news outlets can now freely obtain information on current competition cases and their details, which are publicly available on the website. The English version of the website is currently being constructed and is expected to be available within a few months. The State Service continues to actively monitor the developments in the competitive environment of the country and consistently works on improving the public perception of the organization.

Last but not the least, this year the State Service will celebrate its 30th anniversary. The State Service approaches its anniversary with extreme optimism. Recent activities encourage the belief that the State Service could become an essential pillar to ensure sustainable economic development in Azerbaijan.



New challenges and a new vision for the Moldovan Competition Council

The current President of the Moldovan Competition Council, Mr. Alexei GHERȚESCU, was appointed by Parliament on February 17, 2022; just the day after the competition authority in the Republic of Moldova had marked fifteen years of its existence.

The initial National Agency for the Protection of Competition was established in Moldova in 2007. In its current form, the Competition Council was created in 2012, when the new Law on Competition was adopted. The law aimed at aligning Moldovan legislation with major EU rules on competition as well as creating a new competition authority that was to substitute its predecessor. Thus, in 2022, there are two anniversaries: 15 years since the creation of the first competition authority in Moldova, and 10 years since the adoption of the current Law on Competition and the creation of the Council in its existing format.

Alexei Gherțescu
President of the Competition Council of the Republic of Moldova

Despite a lot of criticism directed at the Council over the last 10 years, a number of recent achievements should nevertheless be noted. The Council passed multiple substantial regulations on various aspects of competition and state aid (7 regulations in the field of competition and 24 regulations in the field of state aid, thus transposing a range of substantial rules in these fields into Moldovan national law). The Competition Council also managed to complete several high profile investigations on cartel and abuse of dominance cases which resulted in sanctioning decisions on such markets as TV advertising, access to the Chisinau airport facilities, fertilizers trade, etc. The decisions of the Council have become more complex providing for more in-depth analysis of the relevant markets and alleged violations.

The Competition Council played its role in reducing the value of the Product market regulation (PMR) indicators from 2.48 (in 2016) to 1.55 toward 2020. According to OECD's international estimate of the aggregate PMR indicator, a reduction of that indicator by 0.5 points generates, under comparable conditions, an average annual GDP-per-capita growth rate of 0.3%.

Nevertheless, there is still a lot to do in order to make the Moldovan Competition Council a truly modern and efficient competition authority which would be able to meet high expectations of consumers and the business community. Strengthening its institutional capacities, ensuring higher transparency, improving efficiency of investigations and conducting better market studies, finding proper means of communication with diverse groups of interested parties – all these constitute only a small number of the issues that we should improve on.

Beside the need of developing the institutional capacities of the Council, with the start of the war in Ukraine, we have also had to deal with the challenges and pressures caused by it. The war has had a huge impact on the majority of industries and sectors of the Moldovan economy. Most of the markets in Moldova, situated just at the border with Ukraine, have been affected or even completely distorted as a result of military actions in the neighbouring country. The task of the Competition Council in this situation is to monitor the markets and identify potential anti-competitive practices and actions by companies trying to obtain unjustified gains under the pretext of the war taking place 'next door'.

The soaring inflation also creates additional pressures on the Council from all sides: the Government, various political parties, civil society, and the business community. The rising prices are a major concern for the whole society and have a negative impact on consumer welfare. As a result, there are permanent claims that the Council should intervene promptly in order to stop the ever-increasing prices, impose price caps or even force the companies to reduce them, to conduct investigations and punish undertakings violating the rules of competition in record times, within just a couple of weeks. Although such pressures can be understandable, the Council should resist the temptations of getting overzealous in order to not abuse its powers which can result in even greater harm to markets and individual companies, and ultimately damage the reputation of the Council as an independent and impartial institution.

Nevertheless, despite the challenges of the current moment, we shall not look for excuses for avoiding the necessary reforms within the Competition Council.

We shall continue the work on aligning the Moldovan national legislation with the EU acquis. At the moment of writing this article, the European Commission has recommended granting Moldova (and Ukraine) EU candidate status. Whether it happens or not, we shall intensify the work on bringing the Moldovan regulatory framework in the field of competition and state aid in line with European standards. In 2022, the alignment of existing state aid schemes shall be finalised (except for the schemes relating to free economic zones, which shall be completed by 2024). This is not just a general task, but an actual obligation of the Republic of Moldova under the Association Agreement with the EU.

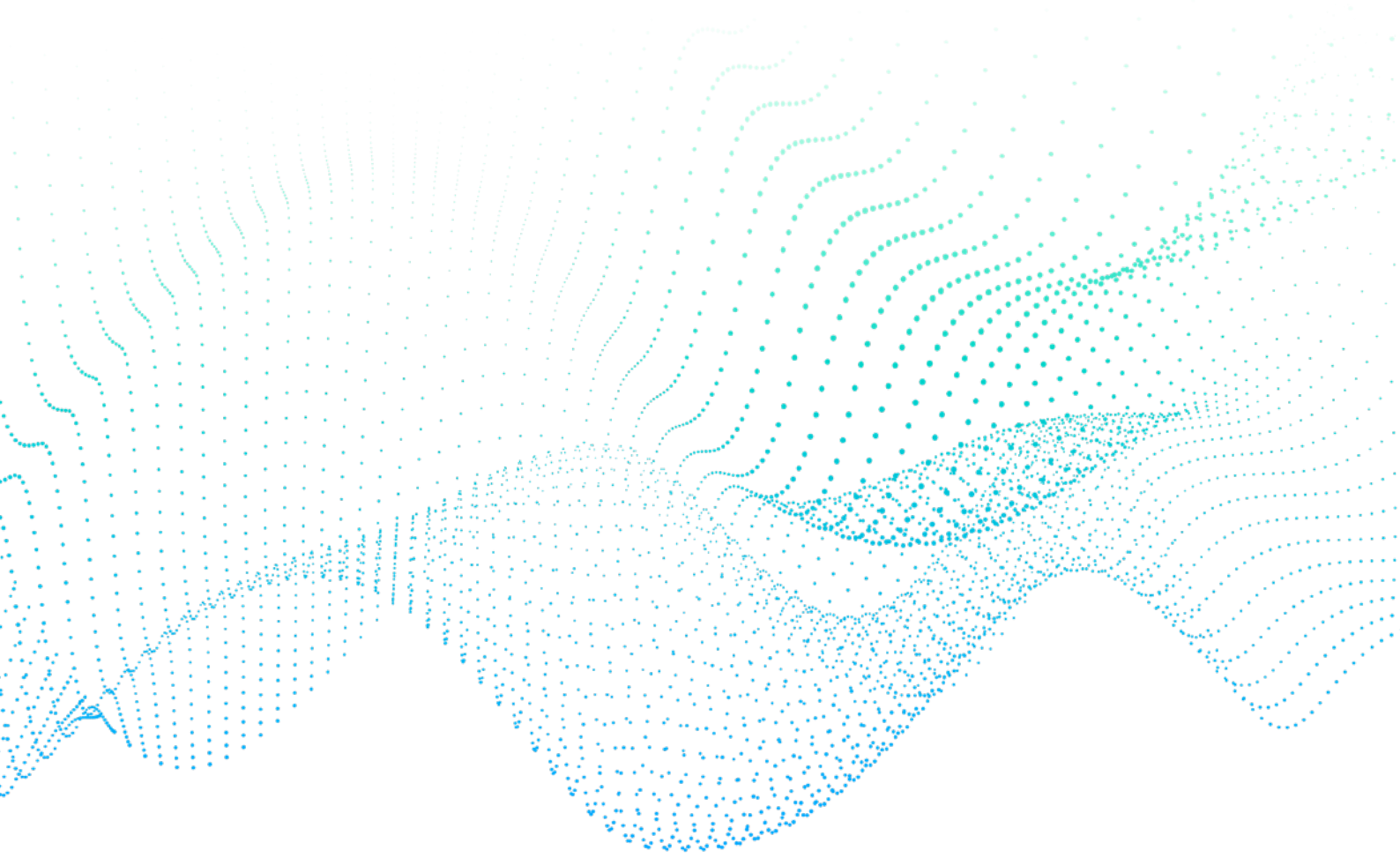
The new legislative amendments should, among others, provide for additional instruments for protecting whistle-blowers, increase maximum fines (the current maximum limit on fines is 5% of the annual turnover), provide the framework for using new forensic tools in competition investigations, remove obstacles to effective criminal prosecution of the parties involved in

cartels, etc. Likewise, alongside aligning the actual laws and regulations with EU standards, we shall also work on implementing at the national level the existing European case law, without which the application of the EU-modelled laws will be irrelevant and useless.

Besides obtaining new additional powers, the staff of the Council will also have to learn how to properly use them in order to conduct efficient investigations of alleged violations of competition legislation. We will have to learn how to identify the signs of potential violations, how to respond to them promptly, plan investigations, secure and obtain relevant evidence, successfully complete investigations, and then defend the results achieved in courts of law.

Over the last couple of months, talks have resumed with various international development partners that support reforms in the Republic of Moldova. However, the support provided by any international donors or peer institutions from other countries will not produce the desired effect if there lacks a vision of the results that the authority wants to achieve and a clear understanding of the changes that should be produced within the Council.

We can say that such understanding does exist. Currently we are finalising a list of development priorities for the Competition Council, based on which further reforms will be implemented in order to develop the Moldovan competition authority into a modern, professional and efficient institution.



New President elected in Kosovo[86]

In June 2022, Ms. Neime Binaku-Isufi was elected as the new President of the Kosovo Competition Authority. Ms. Isufi graduated in Economics at the University of Pristina. Before taking her position at the Kosovo Competition Authority, she served as Head of the Audit Office within the Ministry of Finance and worked in the private sector and international organizations.

"The Kosovo Competition Authority is committed to expand regional cooperation and to improve effective enforcement of competition culture in our markets, by sharing best practices and experience", declared Ms. Isufi. "In this respect, I would like to thank the OECD-GVH Regional Centre for Competition for its efforts to provide capacity building assistance and policy advice through workshops, seminars and training programmes on competition law and policy for the officials of its beneficiary competition authorities".

86. This designation is without prejudice to positions on status and is in line with UNSCR 1244 and the Advisory Opinion of the ICJ on Kosovo's declaration of independence. Hereafter referred to as Kosovo.

OECD RCC OECD-GVH HUNGARIAN COMPETITION AUTHORITY

NEWS FROM THE OECD

A glimpse of the OECD Competition Week, June 2022

Thaiane Abreu
Junior Competition Expert, OECD

After two years of virtual meetings, the OECD Competition Committee meeting along with its two working parties occurred in a hybrid form from 20 to 24 June 2022. The COVID-19 crisis has brought about serious changes in recent years. On the one hand, it had the power to advance the digital economy even further, and on the other hand, it brought about a resurgence of problems such as severe recessions and inflation. In this sense, the meeting of competition authorities to discuss key issues of competition policy and its enforcement is of paramount importance for the exchange of experiences and best practices.

The first roundtable focused on competition and regulation in the provision of local transportation services. This theme is a recurrent topic in working party 2, as this is a difficult market for achieving both competition in the market and for the market. The session covered issues related to competitive tendering in local transport, such as dealing with incumbent advantages, and the development of 'Mobility as a Service' platforms, which provide a one-stop-shop service combining different public and private modes of transport.

As regards the organisation of the service and competitive bidding, some countries shared their organisation models in the roundtable discussion, which included the concentration of all local transport services of a given region in a single company, franchises, subsidies to private companies, and others. Another concern discussed was the management of an incumbent advantage. For instance, between 2006 and 2016, the number of public tenders in Europe with only one bidder almost doubled to 30%. Thus, before tendering, providers should be restructured to avoid failure of bidding.

The development of mobility as a service and the reorganisation of local transport was the focus of the second part of the discussion. MaaS allows passengers to choose, using a single platform, all the transport needs from going to one destination to another, without the necessity of contacting multiple service providers individually. For this to happen, a co-ordination between a number of players (public and private) must occur. It also involves allowing passengers to be informed of the total cost of their journey and to buy all the necessary tickets as well. There are many competition issues associated with the development of such a platform. In this regard, several countries exposed competitive risks experienced by them, such as possible price fixing, market sharing or sharing of sensitive data, and abuse of dominance by denying access to mobility as a service platform or applying discriminatory conditions.

Finally, financing local public transport was also covered in the discussion. Public transport has been (and still is) heavily subsidised by local or national governments, which have been motivated by social considerations and the push for alternatives to car use. The big question in this regard was how to fix the amount of public resources going into public transport. The principal lesson was to adjust budgets over time and to include base prices in case of open tender procedures.

The second roundtable explored interim measures on antitrust investigations. The debate concerning the effectiveness of antitrust enforcement in fast-moving digital markets turned the spotlight on interim measures also in jurisdictions where their use has been rather limited in the past. This discussion focused on three different aspects of interim measures.

First, it explored the conditions to impose interim measures. Some agencies discussed their respective standards, revealing substantial differences in the assessment of such measures in the jurisdictions present at the roundtable. In addition, an invited expert presented an economic model for the optimal use of interim measures, while another outlined the balance between under-enforcement and over-enforcement as regards to this mechanism.

Second, the target point covered procedural aspects and interplay with main proceedings, as well as the effect of judicial review of these tools. Some delegations described the relationship between interim measures and negotiated resolutions of antitrust appeals, and the lengthy appeals that delayed investigation. Others shared their intention to review the appeals framework, limiting appeals to focus on the merit decisions.

Finally, the roundtable's final part discussed the types of cases that could benefit most from interim measures, and if digital markets were good candidates in this regard. The delegations had different views on whether these tools were better suited to traditional or novel theories of harm. To assist the dialogue, agencies with experience in enforcing these measures in digital markets revealed their insights through their cases.

The main conclusion of this roundtable was that interim measures are conservative in nature and the risks of under-enforcement and over-enforcement must be analysed on a case-by-case basis. In addition, it was emphasised that judicial review of these measures is natural and is part of the principle of procedural fairness.

The third roundtable addressed purchasing power and buyers' cartels. Competition law and enforcement often focus on sellers and the conditions upon which they sell their products or services to buyers. However, competition also impacts how buyers interact with markets when purchasing goods and services. These matters can range from co-ordinated conduct by buyers, such as cartels that conspire to lower purchase prices, to unilateral conduct by buyers that hold substantial market power, i.e. monopsony or oligopsony power, rather than the more common assessment of monopoly or oligopoly.

The first part of the debate focused on the definition of buyer power and the harm that it may produce. The delegates discussed how competition authorities should treat purchas-

ing power, which refers to situations where there is ineffective competition between buyers for the purchase of a product or service. This part also involved invited experts who provided insights related to the rationale for intervening if purchasing power is closely related to the welfare standards employed and the ultimate goals of antitrust.

In the second section of the roundtable, the case when purchasing power is exercised by firms unilaterally was discussed. Different delegations expressed a wide range of approaches to tackle these conducts, including some countries that have extended rules beyond traditional abuse of dominance laws, to cover situations where purchasers hold a superior bargaining position. Some of these specific regulations appear to deal with purchasing power particularly in the grocery sector, raising questions if there is a particular issue in this sector.

Finally, the roundtable dealt with purchasing power and co-ordinated conducts. As well as buyers' cartels (the most obvious example), coordination between buyers takes also the form of joint purchasing agreements, sometimes also known as retail alliances or collective bargaining. Jurisdictions explained their experiences with these agreements in the recent past. In addition, a point as regards the need for authorities to develop more detailed economic theory and models in relation to buyer power and to consider investing in better understanding which sectors are most susceptible to buyers' cartels was also raised.

This discussion showed that despite significant differences in domestic legal systems for dealing with purchasing power unilaterally, there was a high-level of agreement on the need to consider competition issues in purchasing markets in general, and significant convergence on the treatment of buyers' cartels and joint purchasing agreements.

The evolving concept of market power in the digital economy was the topic of the fourth roundtable. Market power is a key concept to competition law and policy. However, this definition has been often questioned in digital markets as regards its assessment and application. This roundtable explored these questions, and the new analytical approaches and concepts related to market power that have been applied, or proposed, in response to digitalisation.

The competition authorities agreed, supported by invited experts, that it is necessary to have a better adapted definition of market power when it comes to digital markets. The delegations indicated that market shares are usually good indicators of market power, but they should be complemented by an assessment of data, network effects (direct and indirect), and lack of interoperability. Special consideration was given to behavioural barriers: consumers' stickiness with pre-installed applications challenges the competitive dynamic. Throughout the debate, it was possible to observe jurisdictions diverging on how to deal with the adaptation of the concept of market power. While some of them believe that there is no need for legislative or internal guidelines reforms, others are proposing new regimes to better deal with the market power definition.

For certain jurisdictions, the enactment of new regulation concerning digital markets is key to tackle systemic issues prominent in some digital sectors. These countries believe that competition law has not proved to be effective enough to cure unfair conduct by digital companies possessing high market power. According to these nations, this particular regulation is necessary due to the peculiar characteristics of the digital sector, such as network, data and ecosystem effects.

The fifth roundtable encompassed disentangling consummated mergers. This session explored the remedial actions available to competition authorities when they have the power to review mergers which they have already reviewed and approved ex ante, but later resulted in anticompetitive effects, and mergers which fell below notification thresholds (i.e. they were not notified) and that also resulted in anti-competitive effects once consummated.

In the past few years, some jurisdictions acquired the power of ex post merger review and others are considering adopting laws about it. Some delegations considered that authority to review mergers ex post is a way to correct concentration even if the harms should have been blocked before. On the other hand, a point of the necessity of predictability and legal certainty was also raised, adding that disentangling consummated mergers should be limited to no notifications or when competition authorities have been provided with incorrect information. Overall the discussion highlighted that these powers have proven useful in specific circumstances, such as transactions in small jurisdictions.

The discussion then focused on the design and implementation of appropriate remedies in consummated merger review. Some competition agencies shared their experiences with the implementation of remedies, highlighting the difficulty to impose conditions ex post.

Some conclusions can be drawn from this roundtable. First, there is a need for proportionality when assessing these mergers. Second, it is important to have a reasonable timeframe in which competition authorities can look at the merger after it is consummated.

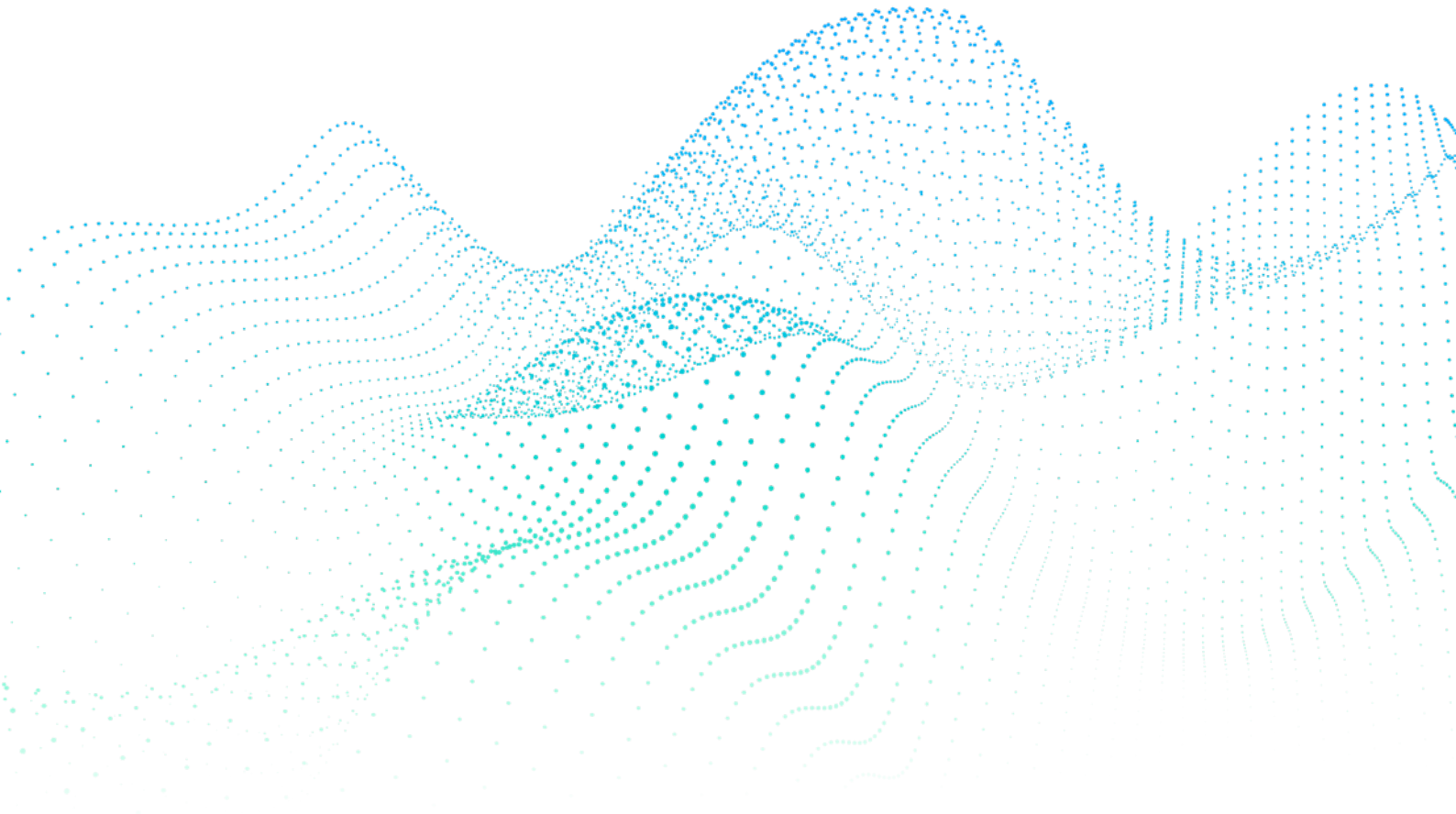
Finally, the last roundtable dealt with behavioural insights in competition enforcement. This session was the first opportunity for competition authorities to share existing experiences on the use of behavioural economics in competition cases, drawing not only from the experience in competition cases but also from the extensive expertise that consumer protection agencies have developed in their enforcement practice. In traditional economics, it is assumed that consumers know their preferences, the latter are stable and consumers use available information to make rational decisions. However, particularly after the growth of digital platforms, competition authorities became more aware of the importance of the actual behaviour of consumers, rather than their expected behaviour, in their analysis.

The delegations agreed that insight into the behaviour of consumers, to know their taste, is crucial to delineate relZsofiant markets in some sectors. Some competition authorities are already using behavioural economics in merger investigations through the use of consumer surveys. These tools can help agencies to discover behavioural biases that may prevent consumers from making informed choices in specific markets. In this scenario, authorities can assess the cases more accurately.

The competition agencies also stressed that the exploration of possible consumer biases can also be useful to establish competition violations. For instance, self-preferential default settings can leverage consumers' default bias to entrench the market power of incumbents and increase barriers to entry for

rivals. The main conclusion in this section was that companies are increasingly using behavioural insights to shape conduct and compete in markets, and competition agencies need to be doing the same.

The popular saying "many hands make light work" clearly defines the first Competition Week of 2022. It demonstrated the importance of exchange of views between the competition authorities around the world to better understand how to tackle old and new challenges. The one-week event comprised not only discussions on solutions to deal with new dynamics in markets, but also sharing the knowledge of more experienced competition authorities on specific topics.



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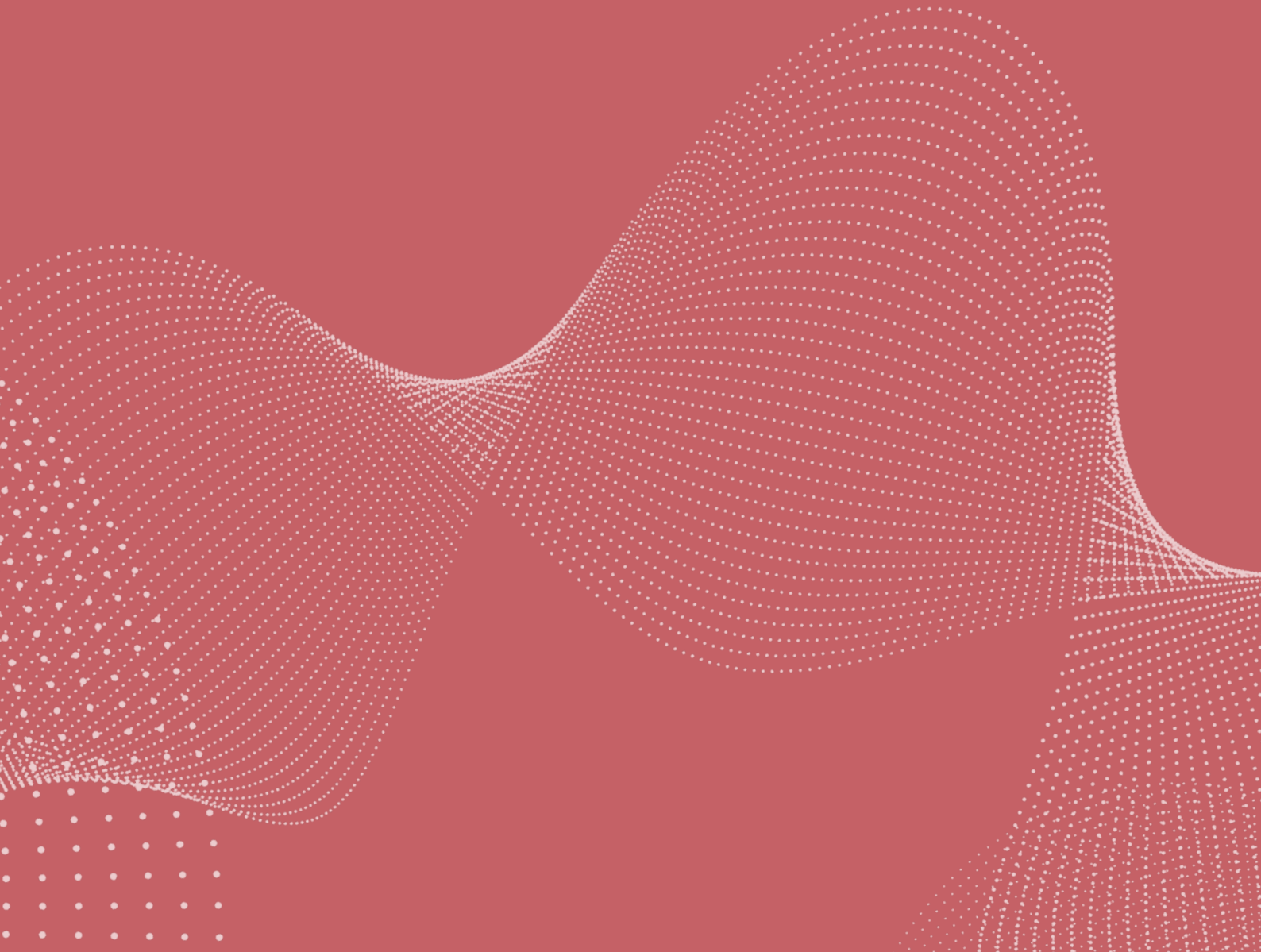
INSIDE A COMPETITION AUTHORITY: SERBIA



Agency Questionnaire

1. The institution - Commission for Protection of Competition of the Republic of Serbia

Chairperson

Mr. Nebojša Perić, lawyer, elected President of the Commission for Protection of Competition by the National Assembly of the Republic of Serbia at its session held on November 14, 2019 for a five-year term.

Members of the Board

In accordance with the Law, the Council of the Commission consists of the President of the Commission and four Council members:

- Mr. Čedomir Radojčić, lawyer, re-elected Council member of the Commission for Protection of Competition by the National Assembly of the Republic of Serbia at its session held on December 29, 2021 for another five-year term.
- Ms. Miroslava Đošić, lawyer, elected Council member of the Commission for Protection of Competition by the National Assembly of the Republic of Serbia at its session held on November 14, 2019 for a five-year term.
- Ms. Danijela Bokan, economist, elected Council member of the Commission for Protection of Competition by the National Assembly of the Republic of Serbia at its session held on November 14, 2019 for a five-year term.
- Mr. Siniša Milošević (PhD), economist, elected Council member of the Commission for Protection of Competition by the National Assembly of the Republic of Serbia at its session held on November 14, 2019 for a five-year term.

Head of staff

The Professional Service is managed by the Secretary. This position is currently vacant.

Appointment system for the Chairperson and other key roles

According to the Law on Protection of Competition ("Official Gazette of the Republic of Serbia", no. 51/2009 and 95/2013, hereinafter the Law), the bodies of the Commission for Protection of Competition (the President and the Council) are elected by the National Assembly of the Republic of Serbia for a renewable term of 5 years in a public contest, at the proposal of the Committee of the National Assembly in charge of trade matters (Art. 23 of the Law).

The public contest is announced by the President of the National Assembly, at the latest three months before the expiry of the mandate of the relevant officials or termination of their functions (discharge by the National Assembly, retirement or similar). The contest is published in the Official Gazette of the Republic of Serbia, as well as on the webpage of the National Assembly. It contains the conditions for election stipulated in Article 23 of the Law, which relate to education, professional experience and reputation of the candidates.

Decision-making on competition cases

In line with Article 22, paragraph 2 of the Law, the Council enacts all decisions and acts on matters within the competence of the Commission, unless otherwise stipulated by the Law and the Statute of the Commission. According to Article 25, paragraph 1 of the Law, the Council decides by a majority vote of all members.

Agency competences in terms of competition

- Antitrust (agreements and abuse of dominance)
- Mergers and acquisitions
- Advocacy to other public bodies
- Market studies
- Other (specify) International cooperation

Relevant competition legislation

The Commission for Protection of Competition applies the competition rules contained in the main legislative act in this field, the Law on Protection of Competition ("Official Gazette of the Republic of Serbia", no. 51/2009 and 95/2013, hereinafter the Law). The Commission also applies regulations adopted on the basis of this Law, as pieces of secondary legislation. For a full list of those regulations, see the dedicated section of the Commission's website: https://www.kzk.gov.rs/en/uredbe. The Serbian legislative framework in the field of competition is modelled upon EU competition law.[87]

Bearing in mind that the Commission decides on the rights and obligations of the parties in administrative proceedings, the Commission applies the rules of the Law on General Administrative Procedure ("Official Gazette of the Republic of Serbia", no. 18/2016 and 95/2018), unless otherwise provided by the Law.

Other competences

The Commission engages actively in international cooperation, which is one of its competences under the Law (Article 21, paragraph 1, item 9), in order to fulfil international obligations in this area and collect information on the protection of competition in other countries. Such cooperation consists of active participation of the Commission's representatives in learning and knowledge-sharing conferences and seminars/webinars of international organizations and fora (such as UNCTAD, OECD, ICN, etc.), as well as provision of contribution to various projects, questionnaires and reports of those organizations.

87 The Commission also applies the relevant provisions of the Stabilisation and Association agreement signed between Serbia and the EU, which has been ratified by the Serbian Parliament and thereby became an integral part of the domestic legal order. Namely, according to Article 73, paragraph 2, any practices contrary to that Article (such as restrictive agreements and abuse of dominance) shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community (in particular, from Articles 81, 82, 86 and 87 of the EC Treaty) and interpretative instruments adopted by the Community institutions.

Staff of the authority

As at April 8, 2022, the Commission had 56 employees in total, including 5 members of the bodies of the Commission (the President and four Council members), 3 employees within the Office of the President and 48 employees within the Professional Service of the Commission. Out of the 48 employees within the Professional Service, 33 were case-handlers.

Number of staff working on competition

For the case handlers/managers, please complete the following table.

Competence	Number of case handlers/ managers
Antitrust	**9**
Mergers and acquisitions	**10**
Market studies	**5**
Advocacy to other public bodies	**7**
State aid	**/**
Other	**17** (2 case-handlers from the Division for normative-legal, HR and general affairs and 15 administrative/support staff)
TOTAL	**48**

Accountability

In line with Article 20, paragraph 3 of the Law, the Commission is accountable for its work to the National Assembly of the Republic of Serbia, to which it submits an annual report by the end of February of the current year regarding the preceding year.

This accountability is also seen through the fact that the bodies of the Commission are appointed by the National Assembly, and may only be dismissed by the National Assembly.

2. Antitrust enforcement over the last 24 months

Cartels

Number of cases

Infringement decisions	3
With fines	3
Without fines	/
Non-infringement decisions	4
Other (specify)	5 ongoing cases
TOTAL	7 closed (plus 5 ongoing)

Fines

In total, over the period of 24 months, the Commission imposed measures of protection of competition in the amount of RSD 14,045,894, i.e. around EUR 119,456.

Leniency applications

N.A.

Dawn raids

In 3 closed and 3 ongoing cases (total: 6 cases).

Main cases

Below is a description of the cartel case completed in the period under observation, as well as one case which is ongoing:

- The proceedings for establishing a competition infringement, which was initiated by the Commission based on the reasonable assumption that the parties to the proceedings, as mutual competitors, have colluded to fix prices for the provision of roadworthiness testing and vehicle classification services for various categories of motor vehicles on the territory of the City of Čačak. During the proceedings, the Commission obtained statements and business documentation of the parties, adduced evidence based on expert reports and witness hearings and held an oral hearing. In its decision, the Commission established that the parties to the proceedings reached a direct agreement on the sale price of roadworthiness testing services and thus entered into a restrictive agreement. The Commission has imposed a measure for protection of competition on the parties concerned and prohibited any future behaviour that would allow for identical or similar infringements of competition law by way of restricting, distorting or preventing competition.
- The Commission initiated proceedings in order to examine the existence of a restrictive strategic agreement, based on the reasonable assumption that Atlantic Grupa and Strauss Adriatic, as the two largest participants on the wholesale market of ground coffee, and therefore the two largest competitors, have coordinated their business strategies related to prices of ground coffee in the Republic of Serbia. In this way, the parties to the proceedings would have replaced mutual competition by cooperation. For purposes of the proceedings, the Commission carried out unannounced investigations (dawn raids) at four different locations, while the analysis of the collected data and determination of the relevant facts is still ongoing.

Non-cartel agreements

Number of cases

Infringement decisions	4
With fines	4
Without fines	/
Commitment decision	/
Non-infringement decisions	1
Other (specify)	2 ongoing cases
TOTAL	5 closed (plus 2 ongoing)

Fines

In total, over the period of 24 months, the Commission imposed measures of protection of competition in the amount of RSD 90,427,372.50, i.e. around EUR 769,057.

Dawn raids

In 4 closed and 1 ongoing cases (total: 5 cases).

Main cases

Vertical agreement: Resale price maintenance in consumer electronics of Tesla brand

Through the analysis of competition conditions on the wholesale and retail market of consumer electronics and through the insight into the publicly available data on prices, it was noticed that products of the Tesla brand were offered per identical or almost identical prices in retail facilities and online shops of retailers. A reasonable presumption was formed that the supplier and its buyers (a total of 5) jointly formed retail prices of the Tesla brand, thus the procedure included determination of existence of a restrictive agreement that directly or indirectly set purchase or sales prices or other conditions of trade, specifically, the existence of an infringement known as "resale price maintenance" (RPM).

The Commission performed unannounced inspections at the business premises of the supplier and the buyers and collected a large quantity of relevant electronic mail on that occasion.

The Commission determined that the supplier and its buyers sold Tesla brand products at almost identical prices which were the result of application of prices the supplier had delivered to its buyers in the form of recommended retail prices (RRP). The fact that those were not recommended prices the application of which was non-mandatory was deduced from the fact that there had been a developed mechanism which included submittal of pricelists containing RRP, delivery of requests that the prices lower than RRP be aligned with the prices from the RRP pricelist, as well as the publishing of RRP prices on platforms which listed and presented only products with a RRP price from the pricelist. The buyers applied the RRP prices almost immediately upon reception of information. In case the buyers would not apply the RRP price, orders were repeated and change of price would be insisted upon, and if the buyer would not change retail prices in the manner requested (where it has been determined that the buyers mostly did change prices in the required manner), there was an option of penalty by cancelling rebates and bonuses and refusing to deliver goods.

The Commission imposed a behavioural measure (measure of elimination of competition infringement) and a measure of protection of competition in the form of an obligation to pay a monetary amount.

Abuses of dominance

Number of cases

Infringement decisions	1
With fines	1
Without fines	/
Commitment decision	3
Non-infringement decisions	/
Other (specify)	1 ongoing
TOTAL	4 closed (plus 1 ongoing)

Fines

N.A.

Dawn raids

1 dawn raid in an ongoing case.

Main cases

The Commission established that Niš-ekspres held a dominant position in the relevant market for the provision of platform services at bus stations in the territory of the City of Niš, and that it abused such position by charging different prices for equivalent bus station services in relation to bus ticket purchases, thus discriminating between individual ticket holders. A measure for protection of competition was imposed on Niš-ekspres and the company was ordered to provide the platform services at the Bus station Niš to all users in a non-discriminatory manner, prohibiting any further action that could prevent, restrict or distort competition by way of abuse of its dominant position. As evidence of performance of remedial measures, Niš-ekspres was obliged to submit to the Commission, on a biannual basis, starting from the date of notification of the decision in this case, a price-list for its services at the bus station in the territory of the City of Niš.

3. Judicial review over the last 24 months

Outcome of the judicial review by the Supreme Administrative Court

Entirely favourable judgements (decision entirely upheld)	10
Favourable judgements but for the fines	
Partially favourable judgements	
Negative judgements (decision overturned)	
TOTAL	10

Outcome of judicial review by the Courts of first instance

Entirely favourable judgements (decision entirely upheld)	14
Favourable judgements but for the fines	
Partially favourable judgements	
Negative judgements (decision overturned)	6
TOTAL	20

Main sentences

Some of the most important court judgments in the observed period, due to the legal reasoning, are as follows:

Regarding enforcement of the Commission measures against cartels, in its judgment the Supreme Court of Cassation has taken the position that the success of bidding in a public procurement procedure does not have a bearing on the existence of a restrictive agreement. Namely, a bidder who has agreed on prices with his competitors for the purposes of participating in a public procurement procedure is considered a participant in a prohibited restrictive agreement, even though his bid has been rejected as unacceptable, due to material deficiencies.

Regarding enforcement of the Commission measures against resale price maintenance agreements, in its judgment the Administrative Court has taken the position that when the contracting parties reach an agreement and conclude a contract setting resale prices, the circumstance that they did not intend or know that they were thereby infringing competition is irrelevant for the qualification of prohibited agreement, just as it is irrelevant whether the agreement in question has been applied by the parties.

Regarding enforcement of the Commission measures in the field of concentrations, in its judgement the Supreme Court of Cassation has taken the position that the right to file a lawsuit in administrative proceedings against a Commission decision on concentration may be held only by those undertakings whose competitive position in the market has been directly violated by the disputed act, through significant restriction, distortion or prevention of competition.

4. Merger review over the last 24 months

Number of cases

Blocked merger filings	/
Mergers resolved with remedies	1
Mergers abandoned by the parties	5
Unconditionally cleared mergers	378
Other (specify)	In addition to the above, the Commission enacted 2 decisions ex-officio in gun-jumping cases. One investigation procedure was suspended. Several notifications were rejected.
TOTAL CHALLENGED MERGERS	411

Main cases

The Commission conditionally approved a concentration resulting from an acquisition by the company Kingspan Netherlands, over the company Trimo, Slovenia, and its subsidiaries.

Based on the notification, the Commission concluded that the concentration would lead to a significant degree of horizontal overlap on the market of production and wholesale of mineral fibre sandwich panels, with significant market shares. This led to a competition concern, due to which the Commission launched an ex-officio investigation. The Commission established that the concentration could be approved only with appropriate conditions which would meet the presumptions of permissibility:

1. Kingspan shall undertake to, within four years from the Decision:
   (b) keep the businesses of Trimo Serbia and TeraSteel Serbia, and, in particular, refrain from decisions which for the effect would have:
      i. liquidation or other form of winding-up of Trimo Srbija or TeraSteel Srbija businesses;
      ii. change of the business activity, business name, brands and know-how of these companies;
   (c) ensure that the businesses of these companies remain separate;
   (d) prevent exchange of confidential business information in direct contact between these companies.
2. Where, within four years from the Decision, and caused by circumstances beyond control of Kingspan, Kingspan decides to liquidate or wind-up the capacities of Trimo Srbija or TeraSteel Srbija, Kingspan shall undertake to make a public announcement for sale of assets of Trimo rbija or TeraSteel Srbija or shares that Kingspan owns in these companies.

3. Kingspan shall undertake, within four years , to submit yearly reports:
(d) on the degree of manufacturing capacity utilization of Trimo Srbija and TeraSteel Srbija in Serbia;
(e) on the annual quantity and value of production of mineral fibre sandwich panels in the manufacturing capacities of these companies; and
(f) in case of decrease (more than 10%) in manufacturing capacity utilization of these companies, to provide explanation for such a decrease.

4. Opinion addresses several provisions of the Draft Law, among which those regulating criteria for…
Kingspan will appoint the Monitoring Trustee.

5. Advocacy over the last 24 months

Main initiatives

The Opinion on the Draft Law on Electronic Communications, issued upon request of the Ministry of Trade, Tourism and Telecommunications addresses several provisions, including:

- provisions regulating criteria for determining operators with significant market power, in regard of which the Commission pointed out that joint significant market power may be observed in the context of institute of collective dominance which is known in the area of competition law and which is defined in a similar manner. However, the content of the mentińoned provisions is not fully acceptable thus, an amendment to the provisions in question has been proposed, for the purposes of alignment with the Law on Protection of Competition. "Joint significant market power is held by two or more operators which are legally independent, if they are connected by economic ties, have a common business interest or act jointly or act as a single operator on the relevant market.
  Joint significant market power, in addition to explicit or implicit agreements, concerted practices or other legal, structural or economic ties, may be based on other types of their association and depends on economic assessment, especially the assessment of the relevant market structure."
- a provision of the article regulating the obligation to provide retail services under certain conditions by operators with significant market power upon whom a prohibition can be imposed, among others, to unjustifiably tie and bundle certain services and/or provision of formal consent of the Regulator as to the manner of forming and changing prices for services in case of tying and bundling such services into packages.

Results

The Commission is monitoring the effects of its opinion set out above bearing in mind the fact that the relevant Draft Law is currently in the legislative process.

6. Market studies over the last 24 months

Main initiatives

Over the course of 2020 and 2021, the Commission completed seven sector inquiries and 1 inquiry into conditions of competition. Below is a brief description of the 2 sector inquiries, completed in the observed period, which are equally important in their own merit.

1) The sector inquiry into the intercity bus transportation market was conducted in cooperation with the World Bank, within the framework of the Serbia Investment Climate Project. The aim of the inquiry was to identify the basic characteristics and structure of the market, to analyse the regulatory environment, performance and the state of competition in the intercity road transport market, as well as to identify structural barriers that hinder the development of competition, in order to give practical recommendations to appointed policy makers. This study recommended three actions to improve market functioning in Serbian coach services: first, the Government of Serbia should amend the Road Transport Passengers Act to relax licensing rules for bus companies and limit exclusive rights of bus operators and bus stations. Second, the Ministry of Construction, Transport and Infrastructure should collect and analyse data on intercity bus connections. Third, the Commission for Protection of Competition should continue to monitor large bus companies and bus station operators.
2) The main objective of the sector inquiry into the school textbooks market for primary education was to determine the way primary schools select textbooks and to analyse recent changes in the relevant legal framework and the impact of these changes on market structure and behaviour of market participants. For the purpose of the inquiry, a comprehensive analysis of the procedure of publishing and selling textbooks for primary education was conducted. The research encompassed all publishers of textbooks for primary education and their ten largest customers (distributors) that further resell books to primary schools and bookstores. Based on the findings of the analysis, the following recommendations were provided to the Ministry of Education: a) enable full transparency in the process of textbook selection b) formalize the issue of determining the retail price of textbooks, c) clearly and unambiguously define permitted promotional and marketing activities, with a ban on all other forms, d) prescribe clear, transparent and non-discriminatory criteria on the basis of which schools will select textbooks, and establish a mechanism for regular control of compliance.

Interview with the Chairperson

Nebojša Perić
President of the Commission

What are the main challenges that your authority is facing? What are your priorities for the near future?

The Commission for Protection of Competition has been actively implementing competition law in the Republic of Serbia for 16 years now. This period was marked by significant changes in the market, both in terms of liberalization and change of ownership structure, as well as in terms of the mode of operation of the market participants - in particular, an increasingly intense turn towards the online business. The coronavirus pandemic has only further accelerated this trend. The challenges for the Serbian competition authority have changed over time in line with the market developments, but I still see the detection of cartels and other forms of competition infringements as the main challenge. A particularly complex challenge is detecting competition infringements in the virtual space, both on digital platforms and by companies which base their business exclusively on the online model. In addition to the new tools for detecting possible infringements of competition within this segment, as well as training for the use of such new tools, which would be necessary, there are also issues related to the possible investigation of companies that usually do not have a registered presence in Serbia, but are important market participants, in terms of the income they generate. To that end, the issue of presenting evidence in another jurisdiction, submitting acts and the like, also arises. This, at the same time is the desired direction of the development of international cooperation - towards the creation of bases and mechanisms for cooperation in the investigation proceedings.

The priorities of the Commission for the next few years remain the same, namely the prevention and detection of the most serious forms of competition infringements in the market of the Republic of Serbia, continuous monitoring and harmonization of national rules with the EU acquis, as well as raising awareness of the importance of competition among all market participants. It is clear that the first priority is important for the benefit of the Serbian society, especially consumers, through lower prices, greater degree of innovation, more diverse offer and higher product quality. The second priority is of particular importance in the context of fulfilment of international obligations of the Republic of Serbia and achieving progress in the process of its accession to the European Union, as well as in the context of creating preconditions for the Commission to act in accordance with best practices of other European competition authorities. Finally, raising awareness of the competition rules, based on the principles of free competition, is particularly important in the context of prevention of violation of competition rules. Together, those means should contribute to the same goal, which is defined by the Law on Protection of Competition and which represents the very aim for the realization of which the Commission was established, as an independent and autonomous organization with public competencies.

What are the strengths and of weaknesses of your authority?

The main strength of the Commission for Protection of Competition lies in its human potential. This primarily refers to the Professional Service, which discharges professional tasks within the competence of the Commission, and which includes employees who have been with the Commission continuously, ever since its establishment. This is important, not only for the reasons of accumulation and distribution of knowledge, but also for the reputation and distinction of the Commission vis-a-vis other state bodies and the public with which the Commission interacts. A great deal of attention is paid to continuous training and improvement of the knowledge and skills of the Commission employees, which is necessary given the dynamics of development of competition protection. It is important to point out the fact that the National Assembly often elects members of the Council of the Commission from among the Professional Service staff of the Commission.

The institutional capacity of the Commission, its position as an independent and autonomous organization, which discharges public competences in accordance with the law and which is accountable to the National Assembly of Serbia for its work, are of key importance.

The main weakness of the Commission is the lack of legal means to influence decision-makers and legislators. Namely, the Commission's opinions on draft regulations, as well as on current regulations which affect market competition are not binding, and there are no legal sanctions in case of non-compliance with its opinions, as well as no obligation of public bodies and organizations to submit their acts or proposals to the Commission for opinion. Therefore, the Commission has done everything in its power to establish, within its field of competence, a framework and mechanism for cooperation with other institutions, which are of particular importance in the context of procedure for development and adoption of regulations. This is, above all, the Public Policy Secretariat. The Commission has signed a Memorandum of Understanding with this body, drafted a control checklist for assessing the impact of regulations on competition and is cooperating with it on a day-to-day basis to identify regulations on which it should give its opinion in a timely manner. In addition, the Commission cooperates with a number of regulatory bodies in the Republic of Serbia, with which it has mostly signed memoranda on mutual cooperation.

Over the last two years, what were the decisions adopted by the authority that make you particularly proud, and what were the cases that could have been conducted better?

We are proud of the proceedings administered against participants on the wholesale and retail market of consumer elec-

tronics, in order to establish the infringement of competition in the form of maintenance of resale prices.

The Commission conducted unannounced investigations at the premises of the parties, during which evidence was found and suspicions confirmed, based on which the Commission reasonably assumed the abuse of "recommended price" when initiating the proceedings. The supplier and the buyers used certain platforms to monitor retail prices, and there was even a mechanism of control and intervention by suppliers, i.e. sanctioning buyers if the price was not at the "recommended" level. The proceedings were conducted in a focused manner, without procedural omissions, for which there were possibilities because a large number of unannounced investigations were conducted.

As for the proceedings which could have been conducted better, those are the ones which were finalized by determining the infringement, but lasted longer than necessary. These are the proceedings in which we determined the existence of competition infringement, in the form of resale price maintenance (RPM), in the baby equipment market.

In one case, proceedings were initiated against 170 market participants, most of which were eventually suspended. When reaching the decision on suspension of proceedings against a large number of parties, the Commission considered their size, importance of the role of the buyer, as well as the minor market and financial strength, and consequently negligible bargaining power in relation to the supplier. However, such a large number of parties to the proceedings required greater engagement of resources than necessary, primarily in terms of procedure, and not the essence of the case.

What is the level of competition awareness in your country? Do policy makers consider competition issues? Is competition compliance a significant concern for businesses?

As mentioned above, one of the continued priorities in the work of the Commission is raising awareness about the importance of competition protection in the Republic of Serbia, among all stakeholders. Although the level of awareness has been raised over time, there is room for improvement, especially when it comes to small and medium sized enterprises operating on the market of the Republic of Serbia.

When it comes to policy makers, it can be noted that over time, and owing to the work of the Commission, as previously mentioned, they have become increasingly aware of the rules on protection of competition when drafting regulations. In that sense, the work of the Commission has been facilitated, its foundations have been laid, but it should definitely be continued.

When it comes to the business community, it can be said that there is still an insufficient level of awareness about the need and ways to harmonize their operations with competition rules. In order to raise the level of awareness, in the period before the coronavirus pandemic, the Commission had organized several events which were directed, inter alia, at the business community. During the pandemic, the representatives of the Commission participated in virtual conferences organized by the Serbian Chamber of Commerce, whereas under the auspices of the Twinning Project "Further development of protection of competition in Serbia"[88], several promotional leaflets have been prepared, regarding various topics of competition protection, including competition compliance programmes of businesses. Finally, in December 2021, the Commission adopted Guidelines for the development of competition compliance programmes, which were published on its website and are available in English at the following link; https://www.kzk.gov.rs/en/komisija-donela-smernice-za-izradu-pr. The Commission expects that these Guidelines will further raise awareness of the business community about the need to harmonize its operations with competition rules and, in particular, help market participants which lack sufficient resources, as held by large companies, to adopt internal acts and thereby harmonize their operations with relevant regulations and apply them in their conduct on the market.

If you could make one major change in your national competition law tomorrow, what would you choose?

It would be the amendment of the provisions of the Law governing the leniency programme. The amendments would be aimed at increasing overall legal certainty, as well as certainty for market participants who submit a complaint about a prohibited restrictive agreement, in order to make this program more attractive and create more favourable conditions, i.e. a starting point for detecting the most serious competition infringements.

The amendments to the provisions in question would, in particular, contain the following:

- determination of a clearer distinction between the two types of leniency programmes (type 1: when the authority has no knowledge of the infringement and type 2: when the authority has already initiated the proceedings, but has not established the infringement);

- prescription of conditions for the recognition of the right to exempt from or reduce the obligation to pay the monetary amount of the measure of protection of competition in the Law itself.

Do you find that international and regional cooperation is helpful? Is it working well?

International cooperation is not only of great importance in today's global world, but represents one of the legal competences of the Commission. For the Commission, international cooperation is extremely important, especially in the light of its multiple functions - primarily in the context of fulfilment of the obligations of the Republic of Serbia in the EU accession process, as well as other obligations undertaken at the international level (Energy Community, CEFTA, etc.), but also in terms of ensuring technical assistance to the Commission through projects. At this point, I once again have to emphasize the importance of exchange of experience with other competition authorities, primarily in the region, but outside as well, and the potential implementation of experiences of more developed competition authorities. The countries and economies of Southeast Europe have the same or similar legal, cultural and political-historical

88 This project was implemented by the competition authorities of the Republic of Italy and the Republic of Serbia, as Twinning partners. The project is funded by the EU, under the IPA II pre-accession assistance program.

heritage, similar market conditions, and very often the same companies present in them, which do business in the whole region. Therefore, it is necessary to develop cooperation with competition authorities in the region, through direct contacts and exchange of experiences, which may lead to a greater degree of alignment of their legal frameworks and practices of those authorities in the future. This would be in the interest of legal certainty for participants on these markets, as well as for the development of market economy and competition. When it comes to the potential for cooperation outside the Southeast Europe region and exchange of experience of the Commission with more developed competition authorities from around the world, it can be highlighted that the Commission provides a special contribution to the work of the International Competition Network (ICN) through, inter alia, participation of its representatives in the work of several working groups of this network, as well as the Organisation for Economic Co-operation and Development (OECD), through participation in projects and high-level conferences of this organisation, such as the annual Global Forum on Competition. Last but not least important for the Commission is the education of its young staff and provision of additional professional training for other staff of the Commission, through international cooperation and participation of the Commission in the work of various organisations, centres and networks. In this context, cooperation with the OECD-GVH Regional Centre for Competition in Budapest (RCC) is particularly useful for the Commission and dates back to the early days of its existence.

As for the success of international cooperation, the global coronavirus pandemic has shown that it is largely resistant to external shocks, due to the possibility of its virtual implementation. However, the scope of such cooperation in cyberspace remains limited by the lack of physical contact and personal acquaintance of its participants, so the Commission expects that in the future, the traditional way of holding conferences, meetings and trainings will be restored, whenever possible.

What is your opinion about the OECD-GVH Regional Centre for Competition? Do you have suggestions for improvement?

For the Commission, the work of the OECD-GVH Regional Centre for Competition in Budapest is very important. The Commission was established on the basis of the law from 2005, the same year in which this centre was established, by way of signing the pertinent Memorandum of Understanding. Over the years, the RCC has proven to be a reliable partner to competition authorities from the Western Balkans and Eastern Europe, contributing to the exchange of their mutual experiences, as well as the training of their young staff. Given the membership and its work methodology, the RCC creates the added value of strengthening and promoting bilateral cooperation between competition authorities, as a natural follow-up to the multilateral meetings and seminars organized by this centre.

The recommendation for the future is to continue the work of this centre on all three major fronts: 1) training of young staff of competition authorities, 2) exchange of experiences between case handlers on select topics of protection of competition, with a predetermined level of detail in the analysis and 3) organisation of seminars to discuss the results of requests for information from certain jurisdictions, which are of particular importance for the RCC beneficiaries.

Key competition topics explained in a few minutes: the online competition training course

Do not miss the online training course Key competition topics explained in a few minutes, created by the OECD-GVH Regional Centre for Competition. Short and engaging training videos explain key competition topics in just a few minutes, building on the discussion at our RCC seminars.

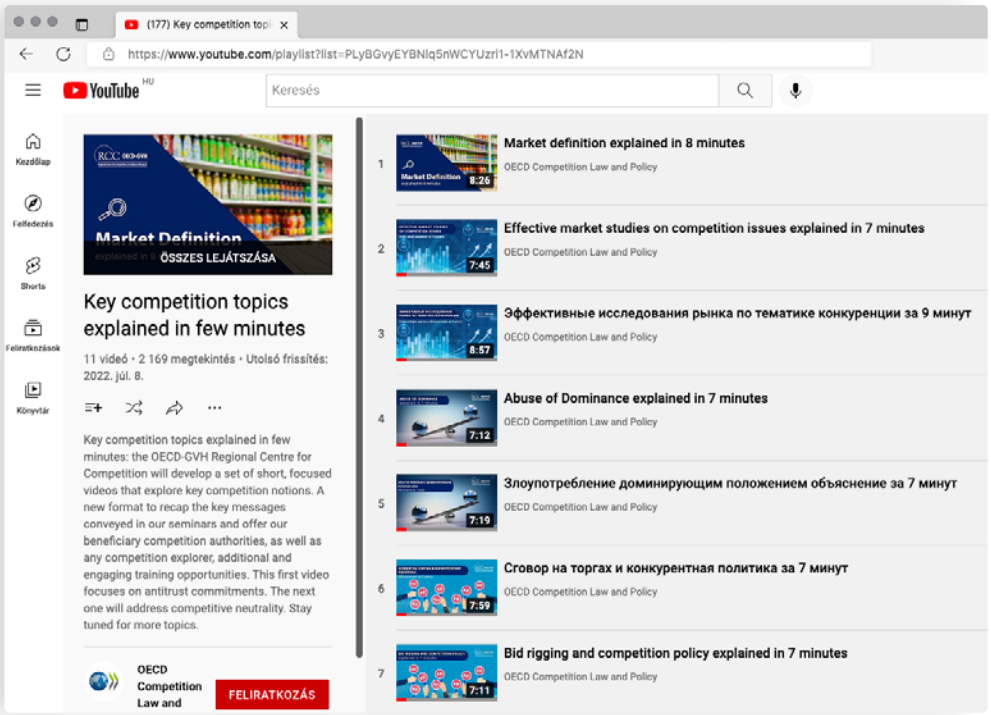
The six videos already released address the following topics: bid rigging, abuse of dominance, market definition, antitrust commitments, competitive neutrality and market studies. They have proven extremely successful, totalling more than 10 000 views altogether.

www.youtube.com/playlist?list=PLyBGvyEYBNlq5nW-CYUzri1-1XvMTNAf2N

Videos are available both in English and in Russian. Furthermore, thanks to the enthusiastic support of beneficiary competition authorities, our videos come with subtitles in up to 15 different languages, including Armenian, Azerbaijani, Bulgarian, Croatian, Georgian, Romanian, Serbian and Ukrainian, as well as Finnish, French, German, Italian, Portuguese, Spanish and Swedish.

Finally, the OECD-GVH RCC and the United Nations Economic and Social Commission for Western Asia have signed an agreement for the creation of Arabic versions of the RCC training videos.

The next video will be issued in summer 2022 and will tackle effective investigation in competition cases.



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