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SERBIA: COMPETITION

Serbian Competition Commission imposes first fines

In a highly controversial decision rendered on 24 January 2011 ("**2011 Decision**"), the Serbian Commission for Protection of Competition ("**Commission**") fined two Serbian dairies owned by Danube Foods Group (Imlek A.D. and Mlekara Subotica A.D.) for abuse of dominant position committed in the period from April 2005 until 1 March 2008. Each of the two dairies was given four months to pay 1.92% of its individual business income generated in 2006, which amounts to an aggregate of EUR 3,000,000.

This is the first time that the Commission exercised its power to impose fines, granted to it by the 2009 Law on Protection of Competition (*Zakon o zaštiti konkurencije, Off. Gazette of RS no. 51/09*) ("**Law**").

The breaches for which the two diaries are fined were established by a Commission's decision rendered in 2008 ("**2008 Decision**") and, following a successful judicial challenge, reaffirmed in another decision issued in 2009 ("**2009 Decision**"). Both the 2008 Decision and the 2009 Decision were rendered under the former Law on Protection of Competition (*Zakon o zaštiti konkurencije, Off. Gazette of RS no. 79/2005*) ("**Former Law**"). The Former Law vested the Commission with the power to order behavioral measures, which the Commission used in the given case, but not with the power to issue fines. The 2011 Decision confirms that the two diaries complied with the ordered behavioral measures.

Article 74 of the current Law explicitly states that it applies to the proceedings initiated after its coming into force, i.e. after 1 November 2009. This implies that fines prescribed by the Law can be imposed only in the proceedings initiated after the above-mentioned cut-off date. This interpretation is reinforced by the provision of Article 38 of the Law which states that the decision on administrative measures (including fines) is an integral part of the decision determining the breach(es) of competition. It would follow that fines cannot be imposed in proceedings separate from and subsequent to proceedings that led to the decision establishing the relevant breach(es). The Commission, however, reached an opposite conclusion by engaging in a somewhat artificial quest for putative legislative intent.

The Commission's primary argument seems to be that it is entitled to order fines for the breaches established by its 2008 and 2009 Decisions because the breaches would otherwise remain unsanctioned, which the drafters of the Law could not have conceivably intended. However, this "legislative intent" theory can hardly stand in the face of Article 74 which explicitly limits the Law's temporal scope of application to the proceedings initiated after 1 November 2009. The

Commission's reasoning in this respect is also dubious in light of the fact that the anti-competitive behavior in question was sanctionable and indeed sanctioned under the Former Law, albeit with different types of administrative measures (behavioral).

The Commission also invoked the "more favorable law" rule by arguing that the fines stipulated by the Law represent "lighter" sanctions than those that could have been ordered by special misdemeanor courts under the Former Law. However, this argument directly contradicts the Commission's simultaneous finding that "the establishment of liability in misdemeanor under the Former Law was not possible because of lack of regulatory and institutional preconditions". Moreover, it is also fragile in the face of the explicit norm of Article 74 of the Law, which states that the Law applies to proceedings commenced after 1 November 2009.

In the less controversial part on of its 2011 Decision, the Commission held that the principle according to which related entities are considered a single market participant is of substantive rather than procedural nature. Accordingly, the fines were imposed on each of the diaries as separate party in the proceedings, taking into account its annual business turnover (and not the combined turnover of both of them or of the entire Danube Foods Group).

In each case, the Commission set the fine as a percentage of the total business income of the relevant dairy, and not of the portion of the business income directly related to the narrower segment of the relevant market (purchase of raw milk) to which the breaches were found to relate, arguing that such narrower market segment cannot be isolated for the purpose of determination of fines as the diaries purchase raw milk for further processing and not for resale.

The dairies have the right to challenge the 2011 Decision before the Administrative Court.

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