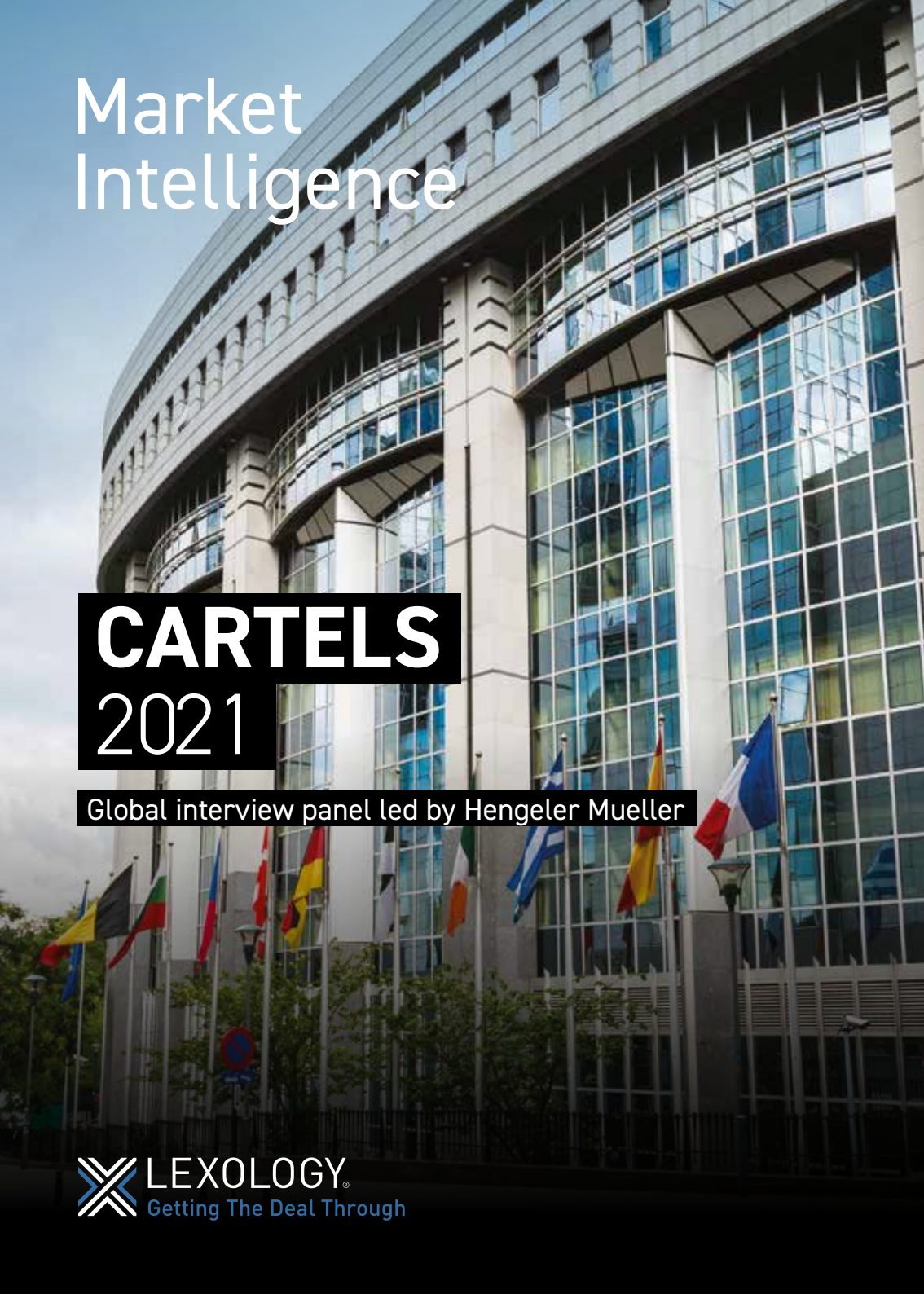

Market Intelligence

CARTELS 2021

Global interview panel led by Hengeler Mueller

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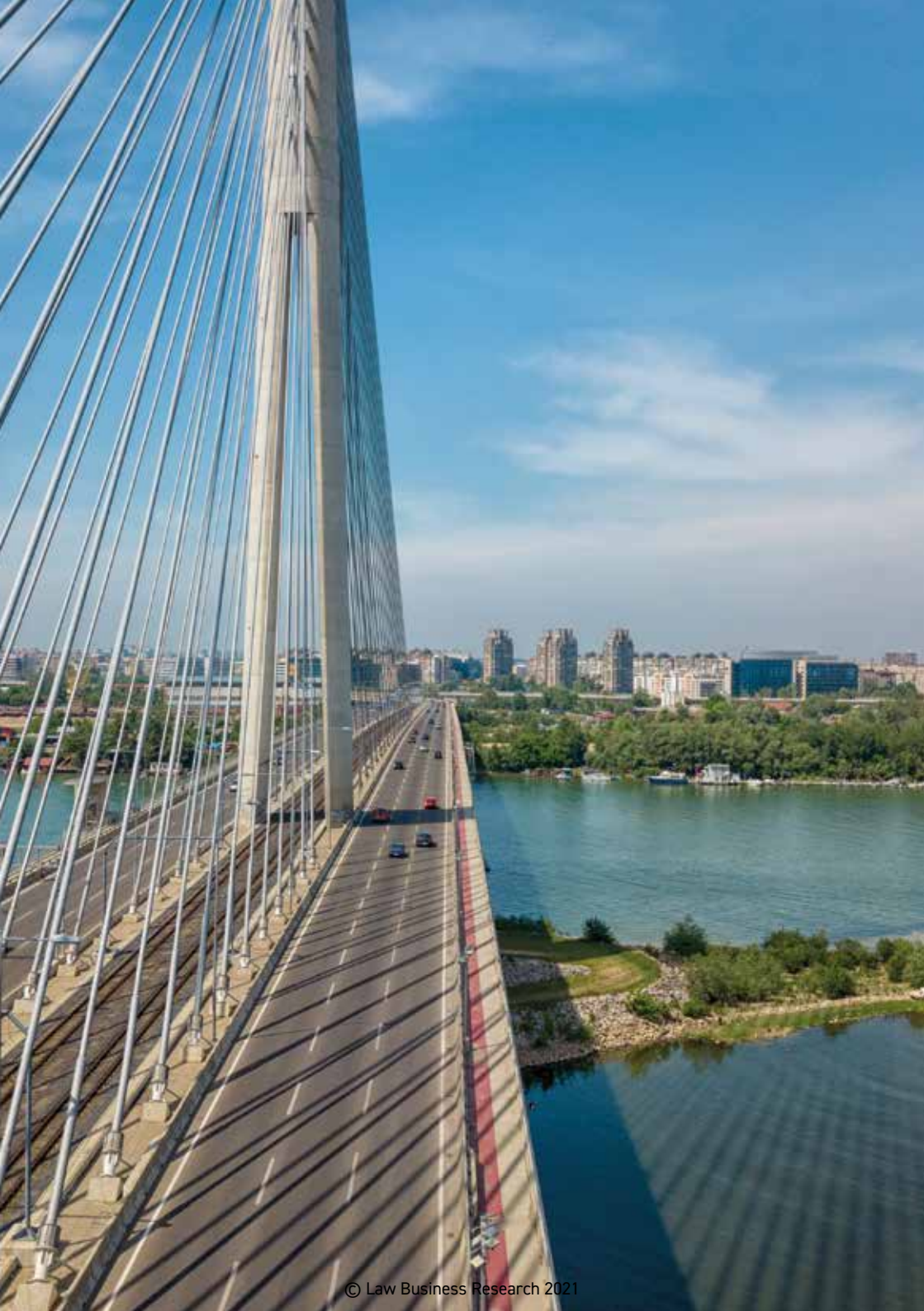

South East Europe Overview

Srđana Petronijević heads the competition and corporate investigations and crisis management practices at Moravčević Vojnović and Partners, in cooperation with Schoenherr. She has been involved in numerous high-profile multi-jurisdictional merger control proceedings before competition authorities, particularly in the former republics of Yugoslavia. In addition, she advises clients on all aspects of antitrust law, including infringement proceedings with respect to alleged anti-competitive practices, providing full coverage in Serbia, Bosnia and Herzegovina, Montenegro, North Macedonia, Croatia and Albania. She has designed a number of compliance programmes for our larger corporate clients, tailor-made to their individual needs. Her long-standing clients include world-renowned companies.

Zoran Šoljaga is focused on competition and antitrust matters in Serbia and the wider region. Before joining Schoenherr, Zoran worked for seven years as a senior legal adviser in Serbian Commission for Protection of Competition. During his time in the Competition Authority in Serbia, he was working on competition cases involving companies in energy, food production and retail, telecommunications, transport, pharmaceutical, public services and other relevant industries, with respect to restrictive agreements, bid-rigging, abuse of dominant position and merger control proceedings. At Schoenherr, he has represented clients in proceedings before Serbian and other regional competition authorities and has advised client on various complex competition, antitrust and state aid matters.

1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

Competition enforcement in the South East Europe (SEE) region (Serbia, Croatia, Bosnia and Herzegovina, Montenegro, North Macedonia, Albania and Kosovo) remains at previous years' level. The Serbian competition authority still leads with the number of cases initiated and resolved, while the authorities in the other jurisdictions conduct a more limited number of cartel investigations.

The most authorities in the SEE region are not experienced, so they lack of sufficient expertise that is necessary to set clear enforcement priorities. Priorities are not set or not published and the authorities, in most cases, take the cases that appears to be an 'easy catch', regardless of the impact of the alleged infringement on market competition, key sectors of the economy or on consumer welfare.

The focus in Serbia is on detecting and sanctioning resale price maintenance (RPM) and bid rigging infringements. The beginning of 2020 saw the initiation of several proceedings against a leading brewery and leading dairy producer in Serbia and their customers (a retail chains) in relation to suspected RPM practice. In the second half of the year, the Serbian Competition Commission (the Commission) initiated several RPM investigation proceedings in the consumer electronics sector and one investigation in the motor vehicle sales sector (distribution of Audi vehicles). In the past year, the Commission rendered a long awaited ruling in an RPM investigation related to the sale of baby care products, which attracted a lot of media coverage. Although the Commission established an infringement and sanctioned the suppliers and several retailers, the fines only ranged from 0.05 per cent to 0.6 per cent of the companies' overall turnover. Thus, although the guideline on the calculation of fines describes RPM as the most severe competition infringement, the fines are still low. Somewhat higher fines were imposed in a decision sanctioning several vehicle inspection stations in a price-fixing case. In this case, the Commission imposed fines in the amount of 1 per cent of the companies' turnover. The conclusion that we draw from the Commission's prior practice is that it mostly focuses on medium and small-sized local companies. We believe that the reason for this is the fact that competition awareness is not yet very well-spread and small and medium-sized companies do not have compliance programmes in place, such as the ones set up by international and regional companies.

The Croatian Competition Agency (the Agency) rendered no infringement decisions in the past year. It mostly focused on vertical restraints and conducted several investigations in the beer industry, but these investigations ended with commitments decisions. The Agency conducted sector inquiry in brewery sector, which showed that suppliers imposed exclusivity obligations and influenced the

customers' sales policy companies in the hotel, restaurant and catering sector. One of the proceedings was suspended, while in two of the cases the Agency accepted commitments proposed by the parties.

A high fine imposed by the Kosovo Competition Authority drew particular attention in the past year. Undertakings on the oil and oil derivatives retail market were fined with a total of €4 million on charges of price-fixing. This young competition authority has had a very modest practice so far, so this decision is likely to both boost the authority's activities and promote competition awareness among undertakings, leading to stronger competition enforcement in the forthcoming period.

The other competition authorities in the region have had no notable practice in cartel cases. The Albanian Competition Authority opened an investigation in the pre-medical products distribution sector, but according to available information, this did not result in the institution of formal investigations against market participants.

"All the authorities enabled the filing of submissions and other communication to take place unhindered via email and other appropriate channels."

2 | What do recent investigations in your jurisdiction teach us?

As far as focus of competition enforcement is concerned, the newly elected Council of the Serbian Competition Commission continues the previous council's practice. Investigations are mainly aimed at RPM and bid-rigging conduct, with a fairly lenient fining policy and fines averaging below 1 per cent of the total turnover. Investigations are usually launched as a result of individual complaints or analyses of publicly available data. Recently launched proceedings in the consumer electronics sector were initiated ex officio as a result of a comparison by the Commission of product prices in the European Union and Serbia, which found that Serbian prices were higher by around 13 per cent. The preliminary review also indicated that product prices in online and retail stores were, for the most part, comparable. The Commission conducted dawn raids in several companies' premises. This goes to show that, absent the leniency applications, the Commission actively seeks new cases and does not shy away from dawn raids even without concrete indications in its hands. We should emphasise that the search warrant for a dawn raid, which is unappealable, is issued by the President of the Commission. The warrant may only be challenged before the Administrative Court along with the Commission's final decision in the case.

Unlike the Commission, which conducts dawn raids on a regular basis, the other competition authorities in SEE either do not or only do so in a small number of cases. One of the consequences of this is a smaller number of both investigations and competition infringement decisions in the other SEE jurisdictions. These competition authorities mainly rely either on complaints received from undertakings on the market and third parties, or data obtained in market studies.

Last year was difficult in terms of direct communication between the parties and competition authorities due to the covid-19 pandemic. Nevertheless, all the authorities enabled the filing of submissions and other communication to take place unhindered via email and other appropriate channels. The competition authorities in the SEE region are not yet sufficiently open either to the exchange of opinions and consultation during investigations, or to consultations between the parties and the authorities themselves on various relevant matters in this area. Communication is fairly formal and only takes place in the manner prescribed by the competition and administrative procedure laws, while the holding of state of play meetings in the course of the investigation is not regulated.

3 How is the leniency system developing and which factors should clients consider before applying for leniency?

Leniency programmes have not yet taken root in the SEE region. Although all the jurisdictions have implemented the EU model, this is currently all that has been done and the concrete effects of any practice are still lacking. The possible reasons for this are manifold and include poor information dissemination among market participants, lenient fining policy of the competition authorities and ineffective cartel detection. Leniency programmes are regulated by competition acts and implementing regulations. There are leniency application and marker systems in place. The leniency only applies to the first-in applicant presenting evidence of cartel conduct, provided they are not the cartel initiator. Each subsequent applicant is only eligible for a reduced fine, depending on the order in which the applications were received.

The Serbian Competition Commission only conducted one investigation launched by a leniency application, which resulted in the imposing of a fine (2019). According to available information, there have been no decisions based on leniency applications in other jurisdictions.

Some competition authorities opened a special phone line and web page on their site to inform market participants of their leniency programmes and attract a larger number of applications. However, we can conclude that the leniency programmes in the SEE countries still exist only on paper.

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure) and what are your experiences in this regard?

There are no specific tools to speed up the investigation. Settlement has not been formally introduced in most jurisdictions in the region. Thus, competition authorities have no legal basis to reduce a fine in a cartel case, as is the case in the EU jurisdictions. Authorities have the option to impose a lower fine by taking into account mitigating circumstances, but these cases do not involve a proper settlement procedure comparable to that defined in the EU legislation.

The commitments procedure is often used in practice to speed up the proceedings and to allow the parties to avoid fines. The Croatian Competition Agency in particular makes use of this mechanism to conclude proceedings in both vertical agreement and abuse of dominance cases. According to Croatian regulations, the parties may offer commitments within six months of initiation of the proceedings in order for their proposal to be taken into consideration and possibly adopted.

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The Agency rendered commitment decisions in three vertical restraint cases in the past year. The Serbian Commission also applies the commitment mechanism in a large number of investigations, however mostly in abuse of dominance cases. The Commission does not accept commitments in restrictive agreement cases, particularly in cases of RPM conduct. In the *Visa* and *Mastercard* antitrust proceedings, the Serbian Commission accepted a commitment proposal as a means to ending the investigations and conducted a market test. But, according to the latest available information, the investigations were resumed and the commitment proposals were finally dismissed.

Bosnian competition law does not regulate the procedure for ending an investigation when a party offers commitments. However, unlike other jurisdictions, the law does prescribe the maximum time for investigation, so that, in case of restrictive agreement investigations, the Competition Council may render a decision within six months of issuing the act launching the investigation, provided, however, that this time limit may be extended by another three months in exceptional (complex) cases.

Proceedings may be sped up through parties' cooperation with the competition authority, in which case the cooperation may be taken as a mitigating circumstance

"Our approach is to establish good communication with the competition authority during investigation in order to enable efficiency of the proceedings."

when imposing a fine. The parties are always advised to fully cooperate with the authority and not take any action that may unduly impede the authority's work. The Serbian Competition Commission, in particular, has been noted to appreciate cooperation and the fines it imposes on parties who cooperate are considerably lower than where parties refuse to do so. In several of its decisions, the Commission implicitly took the position that the decision of the party to the proceeding not to challenge the Commission's allegations expressed in the statement of objections was in itself a form of cooperation, which may be taken as a mitigating circumstance.

Our approach is to establish good communication with the competition authority during investigation and to duly comply with all its requests in order to shed light on the facts and enable efficiency of the proceedings, because lengthy proceedings damage the client's business and reputation.

5 Tell us about the authority's most important decisions over the past year. What made them so significant?

As mentioned before, except for the Serbian Competition Commission and the Croatian Competition Agency, the competition authorities in the SEE region have not been particularly active. In the previous year, the Commission rendered several decisions and imposed fines of €216,613 in total.

The most important decisions concerned investigation of RPM practice, imposed by two suppliers (Keprom and Yuglob) for the resale of baby care products. The Commission investigations lasted for 2.5 years and were completed in late 2020, when the Commission rendered decisions imposing fines on both the suppliers and several retailers. Fines were imposed in amounts ranging from 0.05 to 0.6 per cent of the companies' respective turnovers. In these decisions, the Commission expressed several views and changed its fining practice concerning retailers to some extent.

First and foremost, it was the Commission's first case interpreting a provision imposing a ban on consumers to sell bellow purchase price. The Commission rendered an RPM finding, regardless of the economic and other arguments raised by the suppliers, that the objective of the relevant provision was RPM. Further, the Commission rejected all the commitment offers proposed by the parties because, as it explained in the rationale of its decision, the Commission believed that the commitments is not appropriate to RPM cases. Thus, parties to proceedings should not expect the Commission to accept commitment offers in RPM proceedings. In addition, this investigation and its decision are important in terms of the treatment of customers and retailers in RPM investigations. Namely, the Commission dismissed the proceedings against most of retailers, mainly small companies (pharmacies, locally-owned businesses, among others) and only fined a small number of retailers. Unlike its previous practice, which was to fine all retailers as well as suppliers, in this case the Commission distinguished between retailers based on their size, financial standing, scope of trade in the relevant product and contribution to the anti-competitive conduct. It is, therefore, expected that retailers will continue to be fined in RPM cases, but the Commission will only conduct proceedings against retailers having greater market shares and financial strength. It is precisely the recent RPM investigation cases in the consumer electronics sector that point to such practice of the Commission, which only investigated the largest retail chains and, even then, only several months after proceedings had been initiated against the suppliers.

The Croatian Competition Agency adopted no decisions imposing fines in the past year, but instead ended proceedings by issuing commitments decisions. An interesting case was the investigation by the Agency of the exclusivity provision in the lease agreements used by Croatia Osiguranje, the insurance market leader.

Although the proceedings did not result in a final decision and a fine, it can still be said that the Agency does not favourably view exclusivity provisions in lease agreements entered into by market leaders.

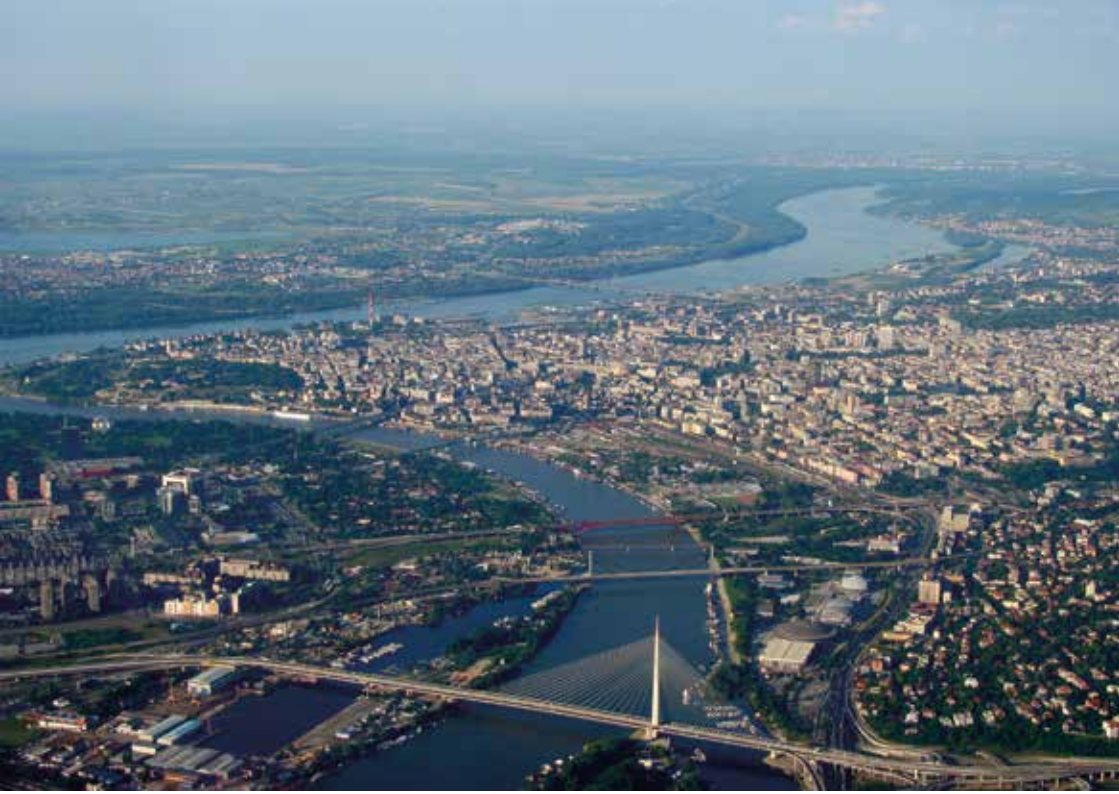
The Kosovo Competition Authority adopted a landmark decision imposing fines on oil derivatives market participants. The authority determined that, in November and December 2018, the oil derivatives prices on the Kosovo market did not follow the fluctuations on the global market. It conducted an investigation and found collusive behaviour between 14 undertakings, which were fined in the amount of €4 million.

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

All competition authorities in the SEE region have competence to adopt final decisions, subject to review only by the competent courts. Ministries and other administrative bodies cannot annul competition authority's decisions. As concerns fines, only the Montenegrin Agency has no competence to directly impose fines, which is within the remit of the Misdemeanour Court, while other jurisdictions vest this power with the competition authorities.

The inefficiency of competition authorities goes hand in hand with even greater ineffectiveness of the courts. The courts competent for competition matters in all SEE jurisdictions are administrative courts, which are vested with the power of judicial review with respect to the majority of decisions of government, state bodies and local administrations and have no specialised panels to address competition matters. There is a notable lack of experience and qualifications of the courts to analyse complex competition cases. In the annual EU progress reports, the judicial system is largely assessed as inadequate. There are various support programmes in place to enhance the judicial review process, financed from international sources, and improvement is expected in this area.

In addition to the lack of appropriate case law and expertise, a particular challenge is presented by the lack of transparency of the courts' work, as courts routinely fail to inform market participants of their decisions and opinions. Administrative courts do not publish their competition review findings or only do so infrequently. On the other hand, the competition authorities themselves fail to publish information on the judicial review process and the relevant rulings on their website. This negatively affects the raising of awareness of the competition rules and practice of the competent authorities, impeding the market participants' compliance with the competition rules in the region.



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7 | How is private cartel enforcement developing in your jurisdiction?

Private enforcement is at a very early stage and lacks relevant case law. Except for Croatia, an EU member state, the other jurisdictions have not implemented Directive 2014/104/EU, which governs private enforcement, and have no clearly defined rules on how to achieve this. There exist general statutory provisions in the national competition laws that provide for the possibility to file actions for damages for infringements of the competition law provisions, but there are, as yet, no separate regulations governing this area. This means that matters such as access to the antitrust authority's file are currently unregulated. In principle, access to the antitrust authority's file may be requested on the basis of the rules governing access to public interest information. However, if an item of evidence is marked as confidential, such document will not be provided to third parties (the parties claiming damages). This is expected to change in the near future. The draft of the new Serbian Competition Act was prepared without a section governing actions for damages, as it was decided that the drafting of the act would be coordinated and carried out by the Ministry of Justice. As for the other

"In terms of the regulatory framework, we expect the harmonisation with EU law to continue."

jurisdictions in the SEE, there is still no information how private enforcement would be regulated.

8 | What developments do you see in antitrust compliance?

There are no statutory requirements for the companies to introduce a compliance programme. However, we noticed that, in the previous years, there has been evident increase in the level of knowledge and awareness of the importance of competition compliance. However, it is, nonetheless, still significantly lower than in EU jurisdictions. The example from Serbia of a case, in which several Serbian vehicle inspection stations signed an agreement on prices and announced it on television, goes to show that many companies are still not aware of the rules they are required to comply with.

As concerns the treatment of compliance programmes by competition authorities, we would like to point out the rather interesting developments in two investigations conducted by the Croatian Competition Agency. Namely, as mentioned in question 5, the Agency accepted commitment offers in investigations concerning vertical agreements containing alleged RPM and other vertical restrictions provisions in the beer

distribution sector. The parties offered commitments that contained an obligation for the parties to introduce a compliance programme and annual training of their employees in a period of five years and to provide the Agency with their employee training programme. These decisions made the Compliance Programme binding for the parties. Although the Agency showed considerable leniency towards the parties, its decision is nonetheless likely to contribute to the promotion of compliance programs and the raising of awareness about competition law rules.

In no jurisdiction is the existence of the compliance programme treated as a mitigating circumstance in imposing fines. It remains to be seen whether other institutions in the region will follow the Croatian Competition Agency's lead and impose on the parties the obligation to introduce compliance and training programmes through commitments or other decisions. This would be particularly useful in investigations concerning small and medium-sized local businesses (which are most frequently investigated) lacking the modern compliance tools to prevent competition law infringements.

9 What changes to cartel enforcement policy or antitrust rules do you anticipate in the coming year? What effect will this have on clients?

In terms of the regulatory framework, we expect the harmonisation with EU law to continue. This is the aim of the new Serbian Competition Act, which has a first draft has already prepared. The process of adoption of the new act has been slowed down by the appointment of a new president and members of the Commission Council and the covid-19 pandemic. We expect the process to continue in the second half of 2021. In Bosnia, a working group has been formed to work on a new statute. In Croatia, there has been a public consultation concerning amendments to the current statute; the amendments intended concerning mainly the Agency's operation.

Amendments to regulations affect clients both in terms of the process required to bring into line and update the existing compliance programme and in terms of their market operation. It would be highly important that the market participants themselves, as well as lawyers and competition law experts, be involved in the preparation of the relevant legislation by way of public consultations or in other appropriate manner, in order to each put forward their own suggestions. Our law firm partakes in the working group on drafting the new Serbian Competition Act, thereby contributing to the further harmonisation of national competition rules with EU legislation and case law. We regularly update our clients on the ongoing legislative activities and provide advice on the appropriate manner to bring their companies into line with the new rules, relying largely on EU guidelines and case law, with which the competition authorities in the region are required to comply.

As concerns enforcement, we do not expect drastic changes in terms of intensity and priorities in the operation of the competition authorities. We believe that, due to this sensitive moment in time and the ongoing economic crisis, the competition authorities are likely to be more careful in their selection of the cases to be investigated and the relevant sectors that need to be investigated in more detail.

10 Has the antitrust authority recently adopted any covid-19 antitrust measures? To which industry sectors have they been they applied?

The Montenegrin Agency was the only competition authority to follow the EU example and adopt amendments to the rules on the manner of applying for individual exemptions, which reflect to the largest extent the EU Temporary Framework Communication. There is no publicly available information as to whether the amendments facilitated a closer cooperation and exchange of information between the undertakings in the pharmaceuticals and medical devices industry in practice. No covid-19 antitrust measures were adopted in the other jurisdictions. It was noticed that, in the period from February to July 2020, there was virtually no activity on the part of the competition authorities in the area of cartel and other restrictive agreement detection and sanctioning. Further, according to available information, there were no covid-19-related proceedings that would require a special approach by the competition authorities.

The Albanian Authority opened a market investigation due to an increase in prices at the beginning of the pandemic and adopted interim measures prohibiting the speculative rise in prices and establishing oversight over the industry. According to available information, the market analysis did not lead to individual investigations.

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The Inside Track

What was the most interesting case you worked on recently?

In addition to representing our clients in various investigations, we also represent clients in very interesting individual exemption cases before the local authorities. Unlike the European Union, most SEE jurisdictions still apply an individual exemption system. In the absence of competition infringement investigations, the largest number of proceedings before the regional competition authorities concerns individual exemptions. So, the case law of the local authorities concerning restrictive provisions in vertical agreements or horizontal cooperation agreements mostly develops through these cases. In one such case, we had the opportunity to represent a consortium of insurance companies insuring the incumbent electricity producer and distributor in Serbia. The Serbian Commission rendered a favourable ruling and granted an exemption for the period of two years. In Bosnia, we represent international companies active on the financial market in the individual exemption proceedings concerning an exclusive cooperation agreement. The proceedings are under way and will be the first case in which the Bosnian Competition Council will address the financial services market in greater detail.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

It would be to raise the level of transparency in the work of the competent authorities and courts in order to make their case law and opinions available to market participants. In addition, as most countries in the region (except for Croatia, which is already an EU member state) are in the process of EU accession, national legislation should be brought into line with EU law to a greater extent to enable the application of all the mechanisms that exist at EU level, in particular regarding settlement procedures. The process should also include a complete transposition of EU institutions' decisional practice, as it was noticed that, in some matters, local authorities deviate from EU case law, undermining legal certainty of market participants.

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