The Procedural Aspects of the Application of Competition Law

Although substantive competition law has been largely "Europeanized", procedural law comes, for the most part, under the autonomy of the Member States and, for a long time, thinking on the procedural aspects of competition law's application had not been in the focus of the European scholarship. Nonetheless, recently, "procedure" became one of the most topical issues of European competition law and came to the fore of the scholarly discourse. This edited volume addresses the above subject's pan-European framework and its Central European perspectives with the purpose of channelling the region's experiences into the European discourse. The book's first part (Section 1) examines the general issues of the procedural aspects of competition law's application, while Sections 2 and 3 analyse the administrative competition procedure (and judicial review) and the legal consequences of breaching competition rules in the Czech Republic, Hungary, Poland, Romania and Slovakia.

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European Frameworks – Central European Perspectives

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CHAPTER 8

Administrative (Competition) Procedure and Judicial Review in Serbia

Dragan Gajin & Zoltan Vig

1 The preconditions of launching a competition proceeding

The Serbian competition authority (the Commission for Protection of Competition) has significant discretion when it comes to launching antitrust investigations. The legislation provides that the Commission shall launch an investigation regarding restrictive agreements and abuse of dominance when it reasonably assumes that an infringement of competition occurred.[1] The Commission may open an investigation either upon initiative of an interested party or based on information it obtained from another source.[2]

Related to interested parties, it should be emphasized that (i) interested parties do not have the right to formally request an opening of an investigation, but may only turn to the Commission with an initiative that an investigation be opened; (ii) the Commission does not have the obligation to launch an investigation based on an initiative submitted by a third party – the Commission's duty is limited to notifying the submitter about the outcome of the initiative within 15 days of the receipt of the initiative.[3]

Therefore, the standard for opening an investigation is a "reasonable assumption" that an infringement of competition occurred, and it is upon the Commission to interpret whether this standard has been met. Due to the vagueness of this standard, the Commission has significant leeway when it comes to choosing the matters in which it will open an investigation – and in this respect, it is possible that the Commission also weighs whether it would be in the public interest to start a case.

2 Relationship between EU and national law

First of all, it should be mentioned, that Serbia has signed the Stabilisation and Association Agreement with the EU in 2008[4] (hereinafter 'SAA'). The SAA entered into force on September 1, 2013, following ratification by Serbia, the EU, and all of the EU Member States. This Agreement is significant for the Serbian competition law in two aspects.[5] First, by September 1, 2019, Serbia

1 Competition Act, Art. 35 para. 1. *See also*: Boris Begović, Vladimir Pavić, Uvod u pravo konkurencije, Pravni fakultet Univerziteta u Beogradu, 2012.

2 *Id.*, Art. 35 para. 1.

3 *Id.*, Art. 35, para. 4.

4 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part, available at: <http://ec.europa.eu/enlargement/pdf/serbia/key_document/saa_en.pdf> (last visited May 30, 2015).

5 For a further analysis concerning the relevance of the SAA in the context of Serbian competition law, see: Tijana Kojović & Dragan Gajin, *Vertical Restraints under Serbian Competition Law: A Comparison with EU Law*, 33(8) European Competition Law Review 358 (2012); Boris Begović, Vladimir Pavić, *Jasna i neposredna opasnost – prikaz novog zakona o zaštiti konkurencije [Clear and Present Danger: An Overview of the New Law on Protection of Competition]* 57(2) Anali Pravnog fakulteta u Beogradu 70 (2009); Dijana

must harmonize its laws (including those in the field of competition) with the EU.[6] Second, the SAA contains substantive competition law provisions, thus Article 73.1 (i) and (ii) of the SAA reads as follows:

> The following are incompatible with the proper functioning of this Agreement, insofar as they may affect trade between the Community and Serbia:
>
> (i) all Agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
>
> (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or Serbia as a whole or in a substantial part thereof.

Further, pursuant to Article 73.2 of the SAA "any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles [101, 102, 106 and 107 TFEU][7] and interpretative instruments adopted by the Community institutions".

The effect of Article 73 of the SAA has been disputed between legal scholars.[8] In practice, the Serbian Commission often relies on the EU legislation and case law cited by the parties in order to interpret general provisions of the Serbian law.

3 The National Competition Authority's (NCA) information-gathering tools

In some European countries, like Hungary, informants' awards have been introduced for encouraging informants to share their information with the NCA, however, this is not available in Serbia.

However, there are other ways of acquiring information, like leniency. Under certain conditions, a party to a restrictive agreement may be afforded immunity from a fine or qualify for a reduction of a fine. The leniency regime is available

Marković-Bajalović, *Preti li jasna i neposredna opasnost od novog Zakona o zaštiti konkurencije? [Is there a Clear and Present Danger from the New Law on Protection of Competition?]* 58(1) Anali Pravnog fakulteta u Beogradu 304 (2010); Boris Begović, Vladimir Pavić, *Jasna i neposredna opasnost II:* čas *anatomije [Clear and Present Danger II: A Class of Anatomy]* 58(2) Anali Pravnog fakulteta u Beogradu 338 (2010). *See also* Siniša Rodin, *Requirements of EU Membership and Legal Reform in Croatia* 38(5) Politička misao 87 (2001); Bojana Vrcek, *Croatian and EC competition law: state and problems of the adjustment process* 5(2) Eur. Bus. Org. L. Rev. 363 (2004).

6 SAA, Art. 8.1 in connection Art. 72 para. 1.

7 Regarding these articles see: Richard Whish, Versenyjog, HVG-Orac, Budapest, 2009, p. 146-250; Giorgio Monti, EC Competition Law, Cambridge University Press, 2007, p. 25-52.

8 Tijana Kojović & Dragan Gajin, *Vertical Restraints under Serbian Competition Law: A Comparison with EU Law,* 33(8) European Competition Law Review 358 (2012).

not only to horizontal cartels but also to vertical and combined horizontal-vertical restrictive agreements.

Pursuant to the Competition Act[9] and the Leniency Decree,[10] a party to a restrictive agreement may be granted immunity from fines in the presence of the following nine cumulative conditions:

- the applicant is the first to report the agreement to the Commission;
- the Commission was not aware of the agreement, or was aware but did not have sufficient evidence to initiate proceedings;
- the applicant delivers to the Commission available evidence on the restrictive agreement, or points to the place where evidence is located or the person holding evidence;
- the applicant did not compel or incite other undertakings into the conclusion or implementation of the restrictive agreement;
- the applicant was neither the initiator nor the organizer of the restrictive agreement;[11]
- the applicant signs a statement whereby it agrees that it will fully and continuously cooperate with the Commission in good faith, until the decision on the imposition of fine becomes final;
- the applicant must deliver all information in its possession or otherwise available to it, including documents and other evidence in connection with the reported agreement;
- the applicant must immediately cease its participation in the restrictive agreement, except based on the Commission's approval, which may be granted for the purpose of the conduct of the proceedings and gathering evidence;[12]
- the applicant must undertake not to take actions which may endanger the conduct of the proceedings, in particular not to communicate information from the application to a third party without the Commission's approval or destroy or conceal evidence.[13]

An undertaking which does not fulfil the conditions for immunity from fine may, upon its request, have its fine reduced if it:

- was neither the initiator nor the organizer of the restrictive agreement;
- did not compel or incite other parties to conclusion or implementation of the restrictive agreement;
- delivers to the Commission evidence which prior to that was not available to the Commission, and which enables the Commission to complete the

9 Law on Protection of Competition (*Zakon o zaštiti konkurencije, Službeni glasnik RS* 51/2009).

10 Decree on the conditions for release from liability to pay the pecuniary amount of measure of protection of competition (*Uredba o uslovima za oslobađanje obaveze plaćanja novčang iznosa mere zaštite konkurencije, Službeni glasnik RS* 50/2010).

11 The first five conditions are prescribed by Article 2 of the Leniency Decree.

12 The conditions 6-8 are prescribed by Article 3, paragraph 1 of the Leniency Decree.

13 Leniency Decree, Art. 3 para. 2.

proceedings and render an infringement decision; and
- fully and continuously fulfils all other obligations of cooperation with the Commission.

According to the Leniency Guidelines,[14] a party to the restrictive agreement wishing to acquire immunity from a fine may approach the Commission anonymously or by identifying itself.[15] The party seeking immunity may turn to the Commission anonymously (e.g., via proxy), by delivering a notice with a short description of the content of the restrictive agreement, the list of evidence and information in its possession, and a short explanation of the content of evidence. The Commission will inform such party whether the restrictive agreement had already been reported, and/or whether the Commission already possesses sufficient evidence to initiate the proceedings.[16] If the Commission is not aware of the existence of such agreement or does not possess sufficient evidence for the launch of the proceedings, it will refer the party to report the agreement and apply for immunity from fine.[17] If, however, the Commission already has evidence sufficient for the launch of the proceedings, it will refer the applicant to the possibility of submitting a request for a reduction of the fine.[18]

Alternatively, the party may reveal its identity to the Commission by reporting the restrictive agreement and submitting an application for immunity from fine. The party can do so either by applying for a marker or by submitting a formal immunity application. A marker must include basic information on the content of the restrictive agreement, information on participants to the agreement, a list of evidence in possession of the applicant, information on other evidence in possession of other participants or third parties, description of the content of evidence and an assessment on the time needed to submit a formal application for immunity.[19] Upon receipt of the marker and review and assessment of the allegations contained therein, the Commission will inform the applicant on its place in the queue for immunity and the deadline within which the marker needs to be perfected (this deadline cannot be longer than one month from the receipt of the marker).[20] If the party submits a formal immunity application within the prescribed deadline, the day of the submission of the

[14] Guidelines for the application of Article 69 of the Law on Protection of Competition and the Decree on the conditions for release from liability to pay the pecuniary amount of measure of protection of competition (*Smernice za primenu* člana 69. *Zakona o zaštiti konkurencije i Uredbe o uslovima za oslobađanje obaveze plaćanja novčanog iznosa mere zaštite konkurencije*).

[15] Leniency Guidelines, point 6.

[16] *Id.*, point 7.

[17] *Id.*, point 8.

[18] *Id.*, point 9.

[19] *Id.*, point 12.

[20] *Id.*, point 13.

marker will be considered as the day of the submission of the formal application for immunity from the fine.[21]

Instead of applying for a marker, the applicant may submit a formal immunity application from the outset. The content of such application is prescribed in the Guidelines.[22] Upon receipt of a formal immunity application, the Commission examines, 'within a reasonable time', all allegations contained in the application, analyses and assesses evidence supplied with the application, examines and assesses compliance with the requirements for immunity from fine, and, if needed, takes other actions (such as ordering the applicant to supplement/clarify its application). Thereafter, the Commission informs the applicant in writing on whether the conditions for immunity from the fine are met.[23] The Commission takes into account the order of the applications, and does not examine a later application until it has first decided on the earlier application.[24]

The party who applied for immunity from fines, but does not fulfil the conditions for immunity from it, has two options. It may, within five working days from the receipt of the Commission's notice informing it that it does not satisfy the conditions for complete immunity, withdraw evidence it submitted to the Commission.[25] This does not prevent the Commission from requesting delivery of such evidence in the course of the investigation based on its powers from the Competition Act. Alternatively, the party, within the same deadline, may submit a request for its application to be considered as an application for reduction of fine (request for reclassification).[26] In this case, the date of the initial application for full immunity shall be considered as the date of the submission of the application for reduction of fine.[27]

In case the party neither withdraws evidence nor submits a request for reclassification, evidence may be used in the proceedings before the Commission.[28]

The party to the restrictive agreement may submit to the Commission an application for reduction of a fine at any time until the Commission issues its statement of objections.[29] Upon receipt of the application, the Commission will, within a reasonable time, re-examine all allegations contained therein, analyse and assess evidence provided with the application, assess their probative value, examine and assess the fulfilment of all conditions for reduction of a fine to the applicant and, if required, take other actions within its powers, including order-

[21] *Id.*, point 14.

[22] *Id.*, point 22.

[23] *Id.*, point 15.

[24] *Id.*, point 16.

[25] *Id.*, point 17.

[26] *Id.*, point 17.

[27] *Id.*, point 19.

[28] *Id.*, point 18.

[29] *Id.*, point 20.

ing the applicant to supplement or clarify the content of its application.[30] The Commission will then inform the applicant on its order of filing and whether the applicant meets the conditions for reduction of the fine.

The fine can be reduced in the following ranges:

- between 30% and 50%, if the applicant was the first among the parties to the agreement to apply for reduction of the fine;
- between 20% and 30%, if the applicant was the second among the parties to the agreement to apply for reduction of the fine;
- up to 20%, if the applicant was the third (fourth etc) among the parties to the agreement to apply for reduction of the fine.[31]

During the investigation initiated based on a leniency application, the Commission monitors the fulfilment of the conditions for immunity, or, as the case may be, reduction of the fine, and the fulfilment of the applicant's obligations under the leniency program.[32] If the Commission establishes that the applicant does not meet the requirements or is not fulfilling its obligations, it shall immediately inform the applicant thereof, and the party to the restrictive agreement, who is next in line, shall become eligible for immunity.[33] Before concluding the proceedings, the Commission assesses the applicant's compliance with the conditions and the obligations, cooperation with the Commission during the proceedings and the contribution made by the applicant to the successful, efficient and economical completion of the proceedings. Based on these assessments, the Commission decides on immunity from fine and/or reduction of fine in the resolution in which it establishes the infringement.[34]

If the Commission's decision establishing an infringement of competition is annulled by the court and remanded to the Commission, the party to the restrictive agreement, who secured immunity from fine or a reduction of fine, retains these privileges provided that it continues to fully meet the requirements of the leniency regime.[35]

4 Dawn raids

In Serbia the Commission also has the power to perform dawn raids, or 'unannounced inspections', on the party's or third party's premises. The Commission can perform an unannounced inspection if there is a danger that evidence will be removed or altered.[36] The persons occupying the premises are informed of the inspection on the spot.

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[30] *Id.*, point 21.

[31] *Id.*, point 36.

[32] *Id.*, point 31.

[33] *Id.*, point 32.

[34] *Id.*, point 33.

[35] *Id.*, point 34.

[36] Competition Act, Art. 53 para. 1.

The first dawn raid in Serbia was conducted during July 2015 in Belgrade, related to the distribution of electric cigarettes. There was the suspicion that market players have agreed on the minimal price of these products in retail. According to the information of the Commission, affected parties were cooperative with the authorities during the raids.[37]

5 Data-conveyance

During an investigation, the Commission may request information and documents from the investigated party(ies) as well as from third parties. This means that the Commission may request from the party relevant data, documents and items reasonably believed to be in its possession or which the party is obliged to possess.[38] In case the party fails to comply with the request, the Commission may render a decision based on evidence on the record and make adverse inferences from the behavior of the recalcitrant party.[39] If it has reasons to believe that required data, documents or items are in possession of a third party, the Commission may order delivery or inspection thereof.[40] Unless the subject-matter of the request is privileged, the request is binding upon the third party.[41] If the addressed person so requests, the Commission may perform inspection and collection of data on the premises of the addressee.[42]

6 Structure of the administrative competition procedure

In Serbia there are five phases of the administrative competition procedure:

- conclusion on initiation of proceedings
- conduct of investigation
- issuance of statement of objections
- response by the party to the statement of objections
- final decision.

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37 Source: <http://www.kzk.gov.rs/komisija-za-zastitu-konkurencije-izvrsila-nenajavljene-uvidaje> (last visited August 10, 2015).

38 Competition Act, art. 44 para. 1.

39 *Id.*, Art. 44 para. 2.

40 *Id.*, Art. 48 para. 1.

41 *Id.*, Art. 48 para. 2.

42 *Id.*, Art. 48 para. 4.

It should be also mentioned, that Serbia has a unitary system, that is to say, the Commission is responsible for both conducting an investigation and making a decision in the proceedings.[43]

7 Right of defense

Before issuing a decision in the proceedings initiated in order to investigate an alleged infringement of competition, the Commission shall inform the party of the relevant facts, evidence and other elements on which the Commission intends to base its decision.[44] In essence, the statement of objections represents a draft of the Commission's final decision and its delivery to the party allows the party to respond to the allegations.

In the statement of objections, the Commission has to set a deadline for a response. The actual deadline will depend on the circumstances of the case.[45] Although the law does not prescribe any minimum deadline for a response, in practice the Commission grants no less than fifteen days. Upon a reasoned request of the party, the Commission may extend the initially determined deadline for the response to the statement of objections, provided that there are justifiable reasons for the extension and that the request for the extension is submitted before the expiry of the initial deadline.[46]

There is no case-law dealing with self-incrimination.

All violations that find their way into the final decision must be addressed in the statement of objections, in order for the party to be able to exercise its right of defense.

8 Establishing the facts and admissibility of evidence

In Serbia there is a so-called free evidencing system, that is to say, the NCA is not bound by rules when it comes to establishing the facts of the case. There are also no rules on evidence that is not admissible.

Regarding client-attorney communication directly relating to the proceedings, it is treated as privileged communication[47] and the rules on protected data apply accordingly.[48] There is no case law on what constitutes communication *directly* related to the proceedings. However, the status of privileged communica-

43 See also: Ljubodrag Pljakić, *Upravno-sudska zaštita konkurencije*, http://www.informator.rs/upravno-sudska-zastita-konkurencije.html (last visited August, 2, 2015).

44 Competition Act, Art. 38 para. 2.

45 Law on General Administrative Procedure, Art. 89 para. 2.

46 *Id.*, Art. 89 para. 3.

47 Competition Act, Art. 51 para. 1.

48 *Id.*, Art. 51 para. 2.

tion can be removed if it is suspected that this status has been abused.[49] The law does not specify what can be considered as abuse in this context.

The issue of attorney-client privilege is further regulated by the legislation on the legal profession. Pursuant to of the Law on Attorneys, an attorney at law has the duty to keep information learned in the course of attorney-client relationship confidential.[50] This duty is not limited in time.[51]

9 Prescription of administrative liability

The statute of limitations for imposition of a fine is five years from the last action constituting the infringement.[52] The statute of limitations is tolled every time the Commission takes an action towards establishing the infringement,[53] subject to the absolute statute of limitations of ten years from the last action constituting the investigated infringement.[54]

The Competition Act lays down a separate five-year statute of limitations for the collection of a fine.[55] In case the party challenges the Commission's decision before the court, the five-year limitation period starts running from the date when the court decision on the challenge becomes final. Otherwise, the statute of limitations starts running from the date when the Commission's decision becomes enforceable (i.e. from the date when the deadline for the payment of the fine set by the Commission expires[56]). This statute of limitations is tolled every time an action towards collection is undertaken, subject to the absolute ten-year statute of limitations.[57]

Before the 2013 amendments to the Competition Act, both imposition and collection of fines were subject to a three-year statute of limitations, which started running from the last infringement. No tolling was prescribed under the old legislation. The infringements investigated in the pending proceedings that were initiated prior to the entry into force of the 2013 amendments to the Competition Act remain subject to the shorter statute of limitations from the old legislation.[58]

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49 *Id.*, Art. 51 para. 3.

50 Law on Attorneys (*Zakon o advokaturi, Službeni glasnik RS* 31/2011 and 24/2012), Art. 15 item 3 and Art. 20 para. 1.

51 *Id.*, Art. 20 para. 2.

52 Competition Act, Art. 68 para. 3.

53 *Id.*, Art. 68 para. 4.

54 *Id.*, Art. 68 para. 5.

55 *Id.*, Art. 68 para. 6.

56 Law on General Administrative Procedure (*Zakon o opštem upravnom postupku, Službeni list SRJ* 33/97 and 31/2001 & *Službeni glasnik RS* 30/2010), Art. 261 para. 5.

57 Competition Act, Art. 68 para. 7.

58 Law on Amendments to the Law on Protection of Competition, Art. 22 para. 2.

The statute of limitations for both imposition and collection of procedural penalties is one year from the actionable breach.[59] No tolling is possible.

10 Judicial review

The Commission's resolution can be challenged before the Administrative Court for error of law, error of fact, and breach of procedure.[60] In practice, plaintiffs commonly invoke all three grounds for the challenge.

The general rule is that the Administrative Court decides based on the facts established in oral hearings.[61] The court may decide without a hearing only if the parties agree thereto, or the subject-matter of the dispute does not require that the parties be heard and no special fact-finding is required.[62] A decision of the court not to hold a hearing must be reasoned.[63] In practice, however, the Administrative Court when acting in competition law cases holds hearings only exceptionally. When it is held, a hearing is, as a rule, open to the public.[64] The court may exclude publicity if this is required for the reasons of national security, public order, morals, protection of minors or protection of privacy of participants in the proceedings.[65] The court's decision on exclusion of publicity must be reasoned and published.[66]

If it finds against the Commission's decision (in whole or in part), the Administrative Court may either remand the case to the Commission for reconsideration[67] or decide the case on the merits.[68] The latter can be done only when the established facts provide a reliable basis for the Administrative Court's decision on the merits.[69] So far, unless it upheld the Commission's resolutions, the Administrative Court has, without exception, remanded them to the Commission.

An extraordinary appeal against the decision of the Administrative Court can be lodged to the Supreme Court of Cassation only for an error of law or for material breach of procedure (i.e. a procedural breach which could have affected the decision).[70] The Supreme Court of Cassation decides based on written briefs

59 Competition Act, Art. 70 para. 4.

60 Law on Administrative Disputes, Art. 24 para. 1.

61 *Id.*, Art. 33 para. 1.

62 *Id.*, Art. 33 para. 2.

63 *Id.*, Art. 33 para. 3.

64 *Id.*, Art. 35 para. 1.

65 *Id.*, Art. 35 para. 2.

66 *Id.*, Art. 35 para. 3.

67 *Id.*, Art. 42.

68 *Id.*, Art. 43.

69 *Id.*, Art. 43 para. 1.

70 *Id.*, Art. 49 para. 3.

only.[71] If it finds for the appellant, the Supreme Court of Cassation can either reverse or modify the Administrative Court's decision.[72] If it reverses the decision, the Supreme Court remands the matter to the Administrative Court for reconsideration with instructions which are binding upon the Administrative Court.[73]

Regarding trends of judicial review in Serbia, in the following we present some judgments of the Administrative Court, which show that the Court is ready to thoroughly analyze and inspect the reasoning of the Commission's resolutions.

In the Sunoko case, the Serbian Commission for Protection of Competition prohibited Sunoko, the largest Serbian producer and exporter of sugar, from acquiring Hellenic Sugar, a Greek company which, among others, owned two sugar refineries in Serbia. The Administrative Court quashed the Commission's resolution and remanded the case to the Commission for reconsideration. It quashed the Commission's resolution not because it was of the view that the intended concentration should be allowed, but because of certain deficiencies in the proceedings before the Commission. According to the view of the Administrative Court, there were two main deficiencies concerning the Commission's handling of Sunoko's request for the approval of the concentration. First, the Court found that the meeting between representatives of the Commission and Sunoko, in which minutes were not kept but only an official note was made, cannot be considered as a proper opportunity for Sunoko to be heard. Second, according to the view of the Administrative Court, the Commission did not provide adequate reasoning for its decision to refuse the proposed measures for a conditional approval of the concentration. In that respect, the court invoked article 192 paragraph 1 of the Law on General Administrative Procedure, according to which the competent body decides based on key facts established in the proceedings, and article 199, paragraph 2 of the Law on General Administrative Procedure, which states that a decision must, inter alia, contain the reasons which, taking into account the established factual situation, support the holding of the decision. In its ruling, the court noted that the reasoning of the Commission's decision prohibiting the concentration is not in accordance with the provisions of the Law on General Administrative Procedure, since the Commission in its reasoning only noted that the measures proposed by Sunoko were not suitable, without giving reasons for such a finding or stating which measures it would be ready to accept.

In another case, the parties, retail chain Idea and confectionary Swisslion, concluded a restrictive agreement. Both parties notified the disputed agreement to the Commission and made leniency applications before the new Law on Protection of Competition entered into force. However, the Commission started the proceedings after the new Law entered into force under the stricter provi-

[71] *Id.*, Art. 54.

[72] *Id.*, Art. 55 para. 2.

[73] *Id.*, Art. 55 para. 3.

sions of this law. The Commission established that the agreement concluded was a prohibited restrictive agreement because it determined minimum retail prices, and fined Idea on the ground that it did not qualified for amnesty as the initiator of the restrictive agreement. Idea challenged the resolution of the Commission disputing the authority of the Commission to impose a fine on it, and also revoked the general constitutional prohibition of retroactive application of laws. Actually, under the old Law the Commission did not have such authority. However, the Commission reasoned the application of the new Law with the fact that both laws provided that the proceedings before the Commission are deemed initiated by the enactment of the conclusion on the initiation of proceedings and not by the filing of a leniency application.[74] The Court quashed the resolution for breach of procedure on the ground that the reasoning of the resolution was unsatisfactory. It reasoned that the Commission should have determined whether, based on the provisions of the Old Law, Idea acquired the right to be exempt from the fine by the very filing of the leniency application, even if such filing did not amount to the initiation of the proceedings. Besides, the Court found that the reasoning of the Commission's resolution was inadequate in the part establishing the initiator of the agreement.[75]

In the Lasta/Europa Bus case, the Commission established that the bus pooling agreement between the two operators was a prohibited restrictive agreement because it established common tariffs on several intercity bus lines covered by the agreement, thus eliminating price competition. In the reasoning of the decision, the Commission also stated that the agreement facilitated the constant exchange of important business information, thus putting competitors in an unfavorable position. The Administrative Court annulled the Commission's decision for breach of procedural rules, and pointed out the inconsistency between the holding and the reasoning of the resolution. According to the court, the Commission did not properly establish why it deemed the agreement to be restrictive. If the Commission found the agreement to be restrictive because it enabled the exchange of important business information, it should have spelled-out the type of such information and how the exchange affected competition.[76]

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74 Igor Nikolić, Tijana Kojović, Breach of procedure as the basis for annulment of the decisions of the Commission for Protection of Competition, http://www.bdklegal.com/blogs/competition/competition-law-other-issues/59-breach-of-procedure-as-the-basis-for-annulment-of-the-decisions-of-the-commission-for-protection-of-competition (last visited August, 2, 2015).

75 *Id.*

76 *Id.*