COMMENTS ON THE DRAFT STATE AID CONTROL ACT

We are pleased to bring you analysis of the changes contained in the Draft State Aid Control Act ("**Draft Act**").

In regulating the protection of free competition in the market and ensuring transparency in granting State aid, the act is a piece of legislation key for the proper functioning of the Serbian market economy and planned accession to the European Union. As pointed out in the Draft Act, the reasons behind its adoption are the refinement of existing and introduction of new legal institutes, but also alignment with the General Administrative Procedure Act and harmonization of national legislation with the EU acquis. Proper market regulation, as an indispensable part of competition law, is necessary for both creating an optimal business climate and providing consumers with high-quality products and services.

In addition, the Republic of Serbia is globally recognized as a leading country in attracting foreign investment.[1] In this respect, all issues in this field should be regulated so as not to jeopardize the incentives policy and to facilitate legal certainty of the national legal system. This primarily refers to the protection of fundamental human rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Constitution of the Republic of Serbia.

Accordingly, we appreciate and welcome the initiative by the Ministry of Finance to conduct a public consultation on the Draft Act, thus enabling all interested parties to submit their comments and proposals after they become acquainted with the contents of the Draft Act.

Please find below our comments on and proposed amendments to the Draft Act.

I. PARTY'S STANDING TO BRING AN ACTION IN PROCEEDINGS BEFORE THE COMMISSION

1. In this section, we propose changes in regards to eligibility to be a party to the proceedings, *i.e.*, such provisions would protect the rights and interests of all interested parties in the proceedings.

2. The Draft Act in Article 26 provides for the following:

   "A party to proceedings before the Commission [for State Aid Control] *shall be the State aid grantor or applicant.*

   Within the meaning of this Act, a beneficiary or a petitioner of an ex ante and ex post control procedure shall not be considered a party."

3. It is clear from the cited provisions that the party to proceedings is the State aid grantor or the applicant. On the other hand, the Draft Act stipulates that a beneficiary, i.e., petitioner of an *ex ante* or *ex post* control procedure shall not be considered a party.

4. Analyzed in light of provisions on *ex-ante* and *ex-post* control of State aid, we arrive at the conclusion that it may be controversial in the context of *ex-post* control procedures. Namely, it follows from Articles 30-38 of the Draft Act that the intention was to regulate in greater detail the institute of *ex-ante* control. This issue was considered crucial in the wake of the latest European Commission progress report on Serbia, which states, *inter alia*, that "[d]*ecisions to grant State aid are not regularly notified ex ante to the CSAC by granting authorities*".[2] However, we believe that the

[1] *Source: Financial Times: Greenfield FDI Performance Index 2019: Serbia storms to the top*

[2] European Commission, Brussels, 29 May 2019, Report for 2019 accompanying the Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.

proposed stipulation may be controversial in the context of the implementation of the *ex-post* control procedures, as further explained below.

5. Furthermore, the Draft Act in Article 25 stipulates that procedure before the State Aid Control Commission ("**Commission**") is a special administrative procedure and provides for subsidiary application of the General Administrative Procedure Act.[3] In addition, Article 3 provides that special laws enacted in different administrative matters may not reduce the level of protection guaranteed by the General Administrative Procedure Act, nor may they contain provisions contrary to the principles of the General Administrative Procedure Act.

6. In this respect, the General Administrative Procedure Act in Article 44, paragraphs 1 and 2 defines the parties to the proceedings, as follows:

> *"(1) A party to an administrative proceeding is a natural or legal person whose administrative matter is the subject of an administrative proceeding and any other natural or legal person whose rights, obligations or legal interests may be affected by the outcome of an administrative proceeding.*
>
> *(2) A party to an administrative proceeding may also be an authority, organization, settlement, group of persons and other non-legal persons, under the conditions under which a natural or legal person may be a party, or when specified by law."*

7. Therefore, the Draft Act also considers a party to be a natural or legal person whose rights, obligations or legal interests may be affected by the outcome of an administrative proceeding. By analyzing the position of State aid beneficiaries, it can be unequivocally concluded that they fall within the concept of a party under the aforementioned act. Namely, the State aid recovery procedure essentially places an obligation on the aid beneficiary. In addition, given that it is decided upon *rights, obligations or legal interests* of the beneficiary, and that such obligation is of a financial nature, and, depending on its amount and the statutory default interest, enforcement of the recovery decision may trigger bankruptcy proceedings against the beneficiary. Although Article 52(4) of the Draft Act makes provision for discretion on the part of the Commission to waive repayment of default interest, there is no requirement for it to do so, and above all, the amount of the principal to be recovered may put the beneficiary into a substantially difficult position.

8. The aforementioned suggests that an aid beneficiary is a person/entity whose rights, obligations or legal interests may be affected by the outcome of an administrative proceeding and has the right to be heard on the facts or circumstances which are being investigated, and to participate in the proceedings.

9. Thus, the Draft Act should be amended so as to harmonize it with the General Administrative Procedure Act and grant the beneficiary, as a person/entity bound in the in the recovery procedure, the status of a party.

10. The Draft Act fails to recognize an aid beneficiary as a party by justifying that "*the Commission does not decide on the rights and obligations of State aid beneficiaries, but assesses whether the aid is aligned in the procedure of ex-ante or ex-post control*". Therefore, the proponent of the Draft Act

[3] Official Gazette of the RS, No. 18/2016 and 95/2018 - Authentic Interpretation

("**proponent**") makes the preliminary assumption that the aid compliance assessment does not affect beneficiaries' rights and obligations.

11. Furthermore, the proponent supports its stance on a party's standing to bring an action by reference to the relevant stipulations in EU Council Regulation 2015/1589 ("**EU Regulation**"). Namely, the EU Regulation states that aid beneficiaries are entitled to make declarations in the procedure but are not entitled to a standing to bring an action. The proponent, therefore, avails of the EU Regulation to justify the absence in the Draft Act of a beneficiary's standing to bring an action. We consider this reasoning specious.

12. The fact that an aid beneficiary does not have standing to bring an action (further elaborated below), should not preclude its involvement in the procedure, *i.e.*, deprive it of all procedural guarantees. Also, regardless of the fact that the proponent relies on the EU Regulation, which explicitly prescribes the right of aid beneficiaries to submit comments, the Draft Act fails to afford them any such right.

13. It is important to emphasize that an aid beneficiary under the aforementioned regulation is defined as an interested party, with clearly regulated rights and obligations. One such right corresponds to the explicit obligation of the European Commission, where the latter, by its decision, requires the interested party to provide certain information. In such a decision the European Commission must refer the interested party to further judicial protection before the Court of Justice of the European Union. It is clear that the EU Regulation, while not granting the beneficiary the status of a party to proceedings, still provides it with a proper range of rights, both in administrative and in judicial proceedings, unlike the Draft Act.

14. It is possible that the proponent took the preliminary assumption that the grantor's and beneficiary's interests coincide, so that by granting standing to bring an action to the grantor, the beneficiary's legal interests are also protected. However, not only do a grantor's and beneficiary's interests not necessarily coincide, but they may be at odds. For example, in contrast to the grantor, the beneficiary might find a State aid repayment decision to be inadequate and unlawful. In that instance, the Draft Act does not provide the beneficiary with any avenue to participate in the proceedings.

15. Interestingly, in Article 10 of the Draft Act the proponent stipulates that it is within the Commission's remit to decide on beneficiaries' rights and obligations, while in the statement of reasons accompanying the Draft Act it assumes the opposite stance. Given that "*the Commission does not decide on rights and obligations of State aid beneficiaries*", it cannot grant them the standing to bring an action. Therefore, it is unclear what kind of procedural role the aid beneficiary has, since on the one hand the Commission decides, *inter alia*, on the rights and obligations of aid beneficiaries, and on the other, it does not afford the beneficiary the status of a party or any other type of status.

16. It should also be noted that the national legal system provides for guarantees to all persons whose rights, obligations or legal interests may be affected by the outcome of an administrative procedure. Such protection is achieved through broadening the definition of a party in the administrative procedure, and through an intervener in litigation[4].

[4] Articles 215-219 of the General Administrative Procedure Act.

17. It follows from the foregoing that the provisions of Article 26 of the Draft Act are directly contrary to Article 44 of the General Administrative Procedure Act by failing to afford beneficiaries the status of a party to proceedings. It is also contrary to Article 3 of the General Administrative Procedure Act, since the level of protection is not only reduced but completely denied. Furthermore, by not allowing beneficiaries to participate in proceedings, as a party or in any other capacity, to adequately exercise their rights, such provisions are also contrary to the EU Regulation.

18. Therefore, we are of the opinion that paragraph 2 of Article 26 of the Draft Act should be amended so as to afford State aid beneficiaries standing to be a party to proceedings.

19. As for the other changes we have proposed, the remaining provisions need to be aligned with the introduction of State aid beneficiaries as a party.

20. Namely, Article 42, paragraph 2 of the Draft Act requires a State aid grantor, as a party, to forward the Commission's request for information to the beneficiary without delay. However, by introducing the beneficiary as a party, the Commission could directly communicate with the beneficiary, which would inevitably streamline the procedure. Therefore, we believe that this provision should be deleted.

21. Finally, the proposed amendment to Article 42, paragraph 6[5] of the Draft Act, which requires the Commission to notify the Government of a party's failure to act on the Commission's orders, refers to the State aid grantor. Should the concept of a party be expanded to include beneficiaries, this provision should be aligned so that the Government should only be notified in cases where a State aid grantor is a party. In any event, the Draft Act stipulates sanctions for beneficiaries in the form of a procedural penalty if they obstruct procedure.

II. STANDING TO BRING AN ACTION IN DISPUTES AGAINST DECISIONS BY THE STATE AID CONTROL COMMISSION

22. In accordance with the previous section, we propose clarification of the provision relating to the possibility of bringing an action against Commission decisions, by explicitly stating that a party may initiate an administrative dispute.

23. Article 10 of the Draft Act regulates the Commission's competence to, *inter alia*, decide on rights and obligations of State aid grantors and beneficiaries, and to render decisions and conclusions in *ex-ante* and *ex-post* control procedures.

24. An action against the final decision of the Commission may be brought before the Administrative Court. The Draft Act does not explicitly stipulate who may initiate an administrative dispute. However, given that an action must be filed within 30 days of the date of the decision being served on the party, it can be inferred that the proponent only intended for parties to the administrative proceedings to have standing to bring an action.

25. Pursuant to the Draft Act, State aid beneficiaries have no recourse to administrative disputes since they are not classed as parties to proceedings before the Commission.

[5] Article 42, Paragraph 6 of the Draft Act: *The Commission may notify the Government of the failure of a party to comply with an order issued by the authorized official referred to in paragraph 1 of this Article.*

26. Finally, the provisions of the Administrative Disputes Act will apply to this issue, depending on the nature of the proceedings against the Commission's decision.[6] Pursuant to Article 11, paragraph 1 of the Administrative Disputes Act, a plaintiff in an administrative dispute may be a person/entity who considers that an administrative act infringes his rights, obligations or lawful interests.

27. Such determination of the standing to bring an action is in accordance with the constitutional guarantees of the right to equal protection of rights and legal remedy. Namely, Article 36 paragraph 2 of the Constitution of the Republic of Serbia provides that:

> *"Everyone shall have the right to an appeal or other legal remedy against any decision on his rights, obligations or lawful interests"*.

28. In addition, Article 6 of the European Convention on Human Rights ("**Convention**") provides:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law* […]*".*

29. The wording proposed by the Draft Act may be problematic in case of *ex-post* control, but it is also typical of the existing judicial review mechanism in the field of competition law. We refer to Article 71 of the Competition Act, which, identical to the Draft Act, provides for judicial review, without specifying the persons entitled to bring an action and initiate an administrative dispute. Given that the provisions on judicial review of acts rendered by the Commission for the Protection of Competition, or the Commission for State Aid Control, are very similar, the answer as to how to implement Article 54 of the Draft Act may be found in Competition Act case law. Namely, standing to bring an action against decisions rendered by the Commission for the Protection of Competition has been considered by both the Administrative and the Supreme Court of Cassation.

30. For example, in a proceeding initiated by undertakings directly affected by the agreement concluded between Telekom Srbija a.d., Belgrade and Centrosinergija d.o.o., the Administrative Court found and the Supreme Court of Cassation upheld that the plaintiffs did not have standing to bring an action. The Court held that '*the contested act does not manifestly affect the plaintiffs' rights or their legitimate interests*'. The Court therefore held that only the parties to the agreement which was the subject of an individual exemption have the standing to bring an action against the decision of the Commission for Protection of Competition.

31. The European Court of Human Rights, in the case *Sporrong and Lönnroth v. Sweden* observed the party's right to a remedy in administrative proceedings and found that there had been a violation of Article 6 of the Convention:

> "[...] *in the case of Le Compte, Van Leuven and De Meyer, of 23 June 1981, it was pointed out that Article 6 (1) does not apply only to an ongoing procedure: anyone who believes that interference with the exercise of one of his (civil) rights may be invoked is illegal and claims that he has not been able to go to court under the conditions laid down in Article 6 (1) (Articles 6-1)* [...]. *It is not of*

[6] RS Official Gazette, No. 111/2009.

particular importance that the procedure (dispute) concerned an administrative measure taken by a competent authority in the exercise of public authority […]."[7]

32. Finally, it should be noted that, not only is the Republic of Serbia, pursuant to Article 16, paragraph 2 of the Constitution, required to apply case law of the European Court of Human Rights, , but it is required to apply criteria arising from the application of the competition rules of the European Union, as well as the instruments of interpretation adopted by the institutions of the European Union[8]. Therefore, when considering the standing to bring an action in disputes against Commission decisions, it is necessary to also consider the interpretative instruments and criteria applicable in EU law, *i.e.*, settled EU case law.

33. In Case *169/84 Cofaz and others v Commission*, the Court of Justice of the European Union held that the right of an interested party to bring an action should not be interpreted restrictively:

"According to settled case-law, the provisions of the Treaty concerning the right of interested persons to bring an action may not be interpreted restrictively. Therefore, in the absence of a specific provision of the Treaty, it cannot be assumed that there are restrictions in this respect. In addition to those who are affected by the decision, those who are influenced by the decision due to their specific characteristics or due to circumstances that make them different from other potentially interested persons may be considered directly interested". [9]

34. EU Case law states that, under Article 263 (4) TFEU, any natural or legal person may institute proceedings against an act addressed to that person who can demonstrate their direct and individual interest to bring proceedings against decisions taken in administrative proceedings.

35. For example, such direct and individual interest in a case where the plaintiff was not a party to the administrative proceedings was recognized in several cases before the EU courts, namely *Metro SB-Großmärkte GmbH & Co. KG v Commission and Metropole Télévision SA and Others v Commission*.

36. All persons who demonstrate their interest are entitled to exercise their rights in administrative disputes, as per EU case law. The Administrative Disputes Act contains a similar provision. However, the Draft Act unreasonably fails to afford party status to State aid beneficiaries. Also, Serbian courts tend to restrictively interpret the provisions on standing to bring an action. Therefore, there is a risk that State aid beneficiaries will be left without recourse to challenge the recovery decision, irrespective of the fact that the ultimate burden of the recovery is placed on the beneficiary. This will result in a violation of the fundamental human rights of beneficiaries, namely the right to a fair trial as guaranteed by the Constitution of the Republic of Serbia and the Convention.

37. Finally, it should be borne in mind that the Draft Act clearly states that the Commission is authorized to decide on rights and obligations of, not only grantors, but also beneficiaries of state aid. Therefore, in order to align the Draft Act with the provision concerned, beneficiaries should be given appropriate rights, including the right to bring an action.

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[7] Sporrong and Lönnroth v. Sweden, No. 7151/75; 7152/75, of 23 September 1982, paragraph 80.
[8] Article 73 (2) of the SAA provides: '*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 81, 82, 86 and 87 of the EC Treaty and interpretative instruments adopted by the Community institutions.*'.
[9] The Court also took the same view in Joined Cases T-528/93, T-542/93, T-543/93, T-546/93, Métropole Télévision SA and Others v Commission (paragraph 60) and Metro SB-Großmärkte GmbH & Co. KG KG v Commission (paragraph 20).

III. OBLIGATION TO RESOLVE ADMINISTRATIVE MATTER BY A JUDGMENT - FULL JURISDICTION

38. In line with the statement of reasons accompanying the Draft Act, in this section we propose clarification of the types of decisions rendered by the Administrative Court.

39. Article 54 of the Draft Act in paragraph 6 stipulates that the Administrative Court shall rule on an administrative matter by way of a judgment. The statement of reasons accompanying Draft Act states that "*in disputes initiated against Commission decisions, the court* […] *shall rule on the matter with full jurisdiction"*.

40. It follows from the statement of reasons accompanying the Draft Act that the primary intention of the proponent was to ensure judicial control with full jurisdiction. Having in mind the proponent's intention, it may be concluded that the wording of Article 54, paragraph 6 is rather vague. Namely, a ruling in the form of judgment is not only inherent to judicial review with full jurisdiction, but also to limited jurisdiction.

41. To be more precise, the common difference between full and limited jurisdiction does not refer to the form of a court's ruling, rather the degree of a court's power in the proceedings.

42. Article 42 of the Administrative Disputes Act regulates the rendering of judgments in a limited jurisdiction and prescribes the following:

> *"If the claim is upheld, the court shall annul the contested administrative act in whole or in part and remit the case to the competent authority for reconsideration save where a new act is required in the matter.*
>
> *If the claim is upheld and the remedy sought was to establish the illegality of the act without legal effects, or the action seeks only to find that the defendant's new decision corresponds to the previously annulled decision - the court is bound by the claim at hand".*

43. It follows from the cited provisions that the review with limited jurisdiction entails rendering a judgment. However, unlike full jurisdiction, in this type of review, following annulment of the decision, the court may not render a decision on the merits, but must remit the case for reconsideration if there is a need to render a new decision in the matter at hand.

44. Based on the statement of reasons accompanying the Draft Act, we consider that the proponent's intention was to make provision for meritorious decision-making. Such a stipulation should prevent the most common outcome in an administrative dispute - to annul the act the legality of which is being challenged and to refer it back to the Commission. Judicial review with full jurisdiction is desirable in the context of principles of procedural economy and trial within reasonable time. Where the court is bound to rule on the merits of the dispute, its ruling overrides the Commission's decision in its entirety, hence there is no need for the Commission to subsequently render a decision or take any other action.

45. However, requiring the court to rule on an administrative matter by way of judgment does not necessarily translate to judicial review with full jurisdiction. A dispute in which the court has the power to rule on the merits, rather than reducing its jurisdiction to annulment of the act and remitting the case back to the Commission for reconsideration, may be terminated by both

judgment and ruling. Thus, for example, in Article 71, paragraph 3 of the Administrative Disputes Act, the proponent stipulates that the court "*shall issue a ruling which in all cases supersedes the act of the competent authority, if the nature of the matter permits so*". It follows that the judicial review with full jurisdiction may be resolved by a ruling. Accordingly, the common feature of "full jurisdiction" is not necessarily linked to the form of a court's ruling but rather to the rendering of a meritorious decision that will replace the act of the competent authority.

46. If the proponent's intention was to provide the parties with effective legal protection and prevent unnecessary procedural delays by remitting the case to the Commission for decision-making, it would be opportune if provision was made requiring the court in an administrative dispute to rule on the administrative matter in full jurisdiction.

IV. GOVERNMENT PRIOR APPROVAL OF THE COMMISSION STATUTE

47. In this section we propose that prior approval of the Commission's Statute come under the remit of the competent body of the National Assembly instead of the Government.

48. Article 17, paragraph 2 of the Draft Act regulates that the Statute of the Commission shall be adopted by the Council, with the prior approval from the Government.

49. It follows from the statement of reasons accompanying the Draft Act that the proponent's intention was to establish the operational independence of the Commission in the exercise of its public powers, as well as transparency in its work. In this regard, the Commission is accountable for its work to the National Assembly.

50. Therefore, it is unclear why the Government should be involved in enacting an independent institution's act, which regulates in detail the institution's internal organization, operations and the proceedings it conducts.

51. One may assume that the intention was to provide for the approval of the body competent for supervising the Commission. Therefore, we propose to amend this provision so that the approval of the Statute by the Council of the Commission requires approval from the National Assembly of the Republic of Serbia, as an institution to which the Commission is accountable for carrying out tasks within its remit, in accordance with Article 9, paragraph 3 of the Draft Act.

52. We note that a similar example exists in the national legal system. Namely, the Statute of the Securities Commission, as an independent organization - capital markets regulator in the Republic of Serbia, is approved by the National Assembly of the Republic of Serbia (Article 240 of the Capital Markets Act).

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