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Serbia

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Regulatory overview

The main piece of legislation concerning antitrust matters in Serbia is the Competition Law (2009). The law is modelled after the EU competition law, encompassing standard competition law institutes – restrictive agreements and practices, abuse of dominant position and merger control. It also sets out the mandate of the Commission for the Protection of Competition, and prescribes certain specific procedural rules.

The law was drafted in close cooperation with and under the guidance of the European Commission. For the most part, it is congruent with the key principles of the EU competition law. Together with the law governing general administrative procedure, the implementing regulations (nine in total), several guidelines published by the Commission, a fee tariff and non-binding opinions issued by the Commission pertaining to specific matters, constitute the bulk of competition law in Serbia. Some institutes reveal the influence of the German Competition Act as a form of tribute to German experts engaged in renovating the framework from the 2005 Competition Law. As an example, the law features the definition of dominant position, which is a clear translation of its German counterpart.

From 2008, the Serbian competition rules have been formally exposed to the influence and case law of the European Union. Under a Stabilization and Association Agreement (the SAA) with the European Union, Serbia formalised its commitment to harmonising its legislative framework with that of the EU (article 72) and furthermore stipulated that the criteria for interpretation used in the EU will be implemented insofar as the SAA is concerned. The SAA stipulates that the EU law should be applied to certain cases concerning inter-party trade. While no practice of this sort has occurred thus far, it means that, concerning the territorial scope of certain infringements (ie, export bans, or selective distribution systems), the trade between Serbia and the EU would be treated in a similar manner to the EU interstate trade. Furthermore, the Commission readily accepts the decisional practice of the European Commission and the courts as a persuasive authoritative source of law. The authority's citing of EU practice has become rather common; however, it will appear to a trained eye that the Serbian Commission cites the practice more often when it supports it views; and not so often when it contradicts it.

Certain specific rules and regulations, including the occasional deviation from the general competition law regime, are contained in the appropriate sector legislation, such as banking regulations (specific merger thresholds that concurrently have to be approved by the National Bank), telecom rules (ex ante regulation and SMP operators), public health norms (maximisation of drug prices), the media laws ('prohibited media concentrations') and even local ordinances in certain cases (fixing local taxi and public transport fares).

The decision makers

Commission

The Commission is the main body entrusted with applying the competition law. Established by law, it is an independent expert administrative body, with a mandate to investigate, prosecute (in administrative proceedings) and sanction competition infringements on the Serbian market.

The previous legal framework (the 2005 framework) prescribed a two-tier system, with the Commission being in charge of determining that an infringement had taken place, and the misdemeanour courts (traditionally in charge of sanctioning minor offences) actually imposing fines. The current legislation, however, had empowered to Commission to be a one-stop enforcement shop. The Commission is headed by a chairperson and decides on cases in a five-member Council. In 2010, Ms Vesna Janković became head of the Commission.

As for enforcement capacity, the Commission has around 30 employees and extensive investigative powers, inspired by Regulation 1/2003. It can inspect business documents, question witnesses at public hearings, oblige (and penalise) companies to provide information and conduct dawn raids. The Commission may also make sector inquiries and render expert (if non-binding) opinions on the application of Competition Law. The Commission regularly consults and cooperates with other public institutions, in order to investigate market conditions or inquire about particular issues or industries.

Judicial oversight

Administrative Court

The Administrative Court is in charge of deciding upon administrative disputes initiated by parties disaffected by a decision of the Commission, acting as an appellate court and providing the bulk of judicial oversight for antitrust matters. The court has the authority to annul a particular decision and remand it to the Commission for revision, or decide on the case on its own. Almost without exception, if it finds that a claim is founded, the court will remand the decision to the Commission for review. The prescribed deadline for the court to reach a decision is two months. However, due to its somewhat hindered capacity, this deadline is rarely honoured and proceedings may be prolonged by up to two years. A new resolution of the Commission may then again be appealed against, further delaying the procedure.

Until relatively recently, due to procedural errors, the courts have annulled all of the decisions of the Commission. This had not been the case in several cases in 2011 and 2012, however, as the court had upheld a number of decisions. It is noticeable, however, that the Administrative Court's decisions often lack a detailed statement of reasons and proper economic and legal analysis of each case, making the decisions seem arbitrary and ill-considered (both to the Commission and the infringing party). The Supreme Court of Cassation sanctioned such practice in a pivotal recent case.

Supreme Court of Cassation

The Supreme Court of Cassation is in charge of deciding on extraordinary legal remedies against the rulings of the Administrative Court. Such a request may only be initiated if the lower court violated the law or another legal act, or committed a violation of procedural rules that might affect the outcome of the proceedings.

In practice, the most prominent of such violations has been the Administrative Court's over-reliance on the economic arguments and interpretation of facts as presented by the Commission, which the parties feverishly contested, and the refusal to provide a proper statement of reasons. The decisions of the Supreme Court of Cassation are very well regarded and set guidelines for all the lower-ranked decision-making bodies.

Sector regulators

As mentioned, in particular sectors there are certain competition law-related competences reserved for state bodies in charge of regulating certain industries. Such institutions are the National Bank, the Republic Agency for Electronic Communications, the Republic Broadcasting Agency, and so on. These regulators usually work in coordination with the Commission, monitor the conditions in a particular sector or decide on related issues, but only the latter has the authoritative decision and competence in antitrust matters.

Restrictive agreements and practices

Restrictive agreements and practices are defined in the same way as in the EU law. The relevant provisions are outright translations of article 101 of the TFEU.

With regard to restrictive agreements, the Serbian framework lags behind the EU framework. The law still adopts the system of block exemption and individual exemption, which may in many instances hinder multi-jurisdictional horizontal and vertical arrangements that include Serbia. Additionally, the rules are slightly different from those in the EU. As an example, the threshold for block exemption is set at 25 per cent market share, as well as specific rules on exemption of specialisation and research and development agreements.

Should a block exemption not be available to the parties, they may apply to the Commission for an individual exemption. Such exemption shall be granted if it fulfils the criteria laid down in article 101 – in other words, if an agreement contributes to the improvement of production and distribution, such as by facilitating technical or economic progress, while allowing consumers a fair share of the resulting benefits, under the condition that they do not impose non-indispensable restrictions on the concerned undertakings for achieving the objective of the agreement (ie, do not eliminate competition in the relevant market or its substantial part).

The law also contains the de minimis rule, which is applicable in situations where the total market share does not exceed 10 per cent for horizontal agreements, 15 per cent for vertical agreements and 30 per cent for combined agreements, should each participating undertaking have a less-than-5 per cent market share of the effects' market. Naturally, hard-core restrictions may not be exempted and may not benefit from the de minimis rule.

The Commission dealt with restrictive agreements in many cases, including several leniency-initiated cases, with the overwhelming majority of them being for price-fixing. It chiefly analysed the general retail, transportation, pharmaceutical and insurance sectors. The fines imposed for restrictive agreements hovered between 1 per cent and 2 per cent of the total annual turnover of the infringing undertaking in the year prior to the infringement taking place.[1]

Abuse of dominant position

The rules on dominance and abuse are very similar to those in the EU. The definition of dominance is based on the one contained in the German Competition Act: an undertaking is considered to have a dominant position if it faces no competition, if it faces only insignificant competitors, or if it has a significantly better position than its competitors, taking into account the size of its market share, its financial and economic power, its access to supply or distribution markets, as well as the legal or factual barriers to access to the market.

The threshold required for the rebuttable presumption of a dominant company to kick in is a market share of at least 40 per cent on the relevant market (50 per cent for collective dominance).

As far as the law is concerned, the definition of abuse is the translation of article 102 of the TFEU, to the letter. In practice, the authority is mostly concerned with foreclosure effects common in cases of exclusive dealing.

The Commission has been active in pursuing different kinds of dominance abuse infringements – related to exclusivity arrangements, margin squeeze, tying, pricing practice, and so on. The sectors under particular scrutiny here were telecommunications, financial services and the food and drink industry. The fines imposed for dominance abuse hovered between 1.9 per cent and 2.7 per cent of the total annual turnover of the infringing undertaking in the year prior to the infringement taking place.

Merger control

Thresholds

Merger filings are mandatory in Serbia if either:

- the total annual turnover of all the parties to the concentration realised on the global market in the previous accounting year exceeds €100 million, whereby at least one of the parties to the concentration had an annual turnover exceeding €10 million on Serbian market; or
- the total annual turnover of at least two parties to the concentration on the Serbian market exceeded €20 million in the previous accounting year, whereby at least two of the parties to the concentration each had an annual turnover exceeding €1 million on the Serbian market.

Intra-group turnover is not taken into account. Furthermore, takeover bids must be notified, even when the relevant thresholds have not been met. Although the law is not completely precise in this regard, this provision should pertain to local public companies only. Furthermore, as mentioned above, additional rules apply for certain sectors (eg, banking, insurance, telecommunications and media). The law prescribes a suspension obligation (ie, the parties must suspend the implementation before the clearance is issued, or before the statutory deadlines have expired).

Exceptionally, the Commission may institute an ex officio merger control procedure if an unnotified concentration results in the merged undertakings having a market share above 40 per cent. The market share (40 per cent) threshold is not a jurisdictional threshold (ie, the parties are not obliged to file a notification with the Commission if their combined market share in any relevant market exceeds 40 per cent). However, to avoid a situation of ex post analysis, it may be advisable to notify the Commission of the intended merger if the parties' market shares do exceed this threshold (in Serbia). Since the enactment of the Competition Law, the Commission has not initiated any ex officio merger control procedures. Foreign-to-foreign mergers are reviewed under the Serbian competition rules if the parties fulfil the jurisdictional thresholds, which are no different for such transactions.

Deadlines

The merger notification must be filed with the Commission within 15 calendar days of entering into the agreement, announcing the public offer or acquiring of controlling shares, whichever takes place first. The filing can be made based on a letter of intent or any similar document showing both parties' serious intent to enter into the transaction. The Commission has so far been reluctant to accept unilateral declarations or commitments as valid proof of this.

The length of review depends on whether the Commission decides in summary (Phase I) or inquiry (Phase II) proceedings. For Phase I, the statutory deadline is one calendar month from filing a complete merger notification. Phase II can only be initiated after the Phase I has expired; the Commission has a three-calendar-month time frame to issue a decision in this case. If the Commission should not issue a decision either clearing (conditionally or unconditionally) or prohibiting the merger within these deadlines, it is considered cleared.

Fees and Penalties

A significant hurdle in Serbia is the amount of the fees due to the Commission in merger control proceedings. Namely, the applicant is obliged to pay a fee for the issuance of the clearance in summary proceedings in the amount of 0.03 per cent of the total annual income realised by the merging parties, capped to €25,000. The issuance of the merger clearance in the inquiry proceedings sets the fee at 0.07 per cent of the total annual income realised by the merging parties, capped to €50,000. If the Commission rejects the notification on procedural grounds, the fee is €500; should the Commission prohibit a transaction, the fee for issuance of such a decision is €1,200.

Implementing a concentration that was not notified or cleared can result in a fine, as for a regular infringement. According to public information, no fine has yet been imposed in Serbia for an omission to file a merger notification. Furthermore, the Commission may cancel an already implemented concentration (de-concentration), which can be effected by way of a split-off, sale of shares, cancellation of the agreement or performance of any other action that would lead to restitution of the status prior to implementation of the concentration. The Commission has not implemented any de-concentrations to date.

The Commission may also impose both behavioural and structural measures on the merging entities in order to alleviate antitrust concerns. While the former has been used in a few cases in which the Commission issued conditional clearances, structural measures have never been used in practice, although they were suggested in one case. Furthermore, special sanctions might be applicable in particular sectors (ie, banking or telecommunications), such as additional fines or non-registration.

In one notable case in 2012 (and in two cases in total since 2005), the Commission blocked a merger. While the case is being reviewed by the courts, it is important to note that the authority made an attempt to remedy the effects of the merger by imposing price caps, which diverges significantly from the relevant EU practice, as well as the aforementioned structural measure (sale of a particular factory).

In several cases, the Commission has showed that it is ready to consider the relevant geographic market as being wider than just Serbia. According to the Commission's practice, even if the parties' market shares on the Serbian market are above the presumed dominant position limit of 40 per cent market share, the concentration would be cleared if the relevant geographic market was widely set (for instance, CEFTA, Europe or worldwide). The market would, in particular, be considered larger than Serbia if the market is not regulated by a national regulator (such as, for instance, the Agency for Electronic Communications); if there are no legal, administrative or economic barriers to entry into Serbia; and if the transport costs are low.

Merger control represents the most significant part of the Commission's practice, accounting for a vast majority of its decisions. Most of these were concluded in summary decisions (for example, around 88 per cent in 2010). However, there have been a few Phase II proceedings, and particular scrutiny was applied to fast-moving goods retailers, medical institutions and media outlets. It should be noted that local assets need not be the decisive factors in the estimation of the necessity of an inquiry. Besides market shares, the merger is always estimated in light of the effects that it can cause after its implementation, so high market shares do not automatically mean that a merger shall be thoroughly investigated or conditioned.

Sanctions

Fines

An undertaking that infringes competition may be fined up to 10 per cent of the total annual turnover of the previous business year. These penalties are tied to the total turnover of an undertaking, not income derived from the relevant market or from the infringing agreement itself. Furthermore, the wording of the law could allow for penalties to be determined on a group level; however, the Commission had in all decisions thus far reserved fines strictly for the infringing companies themselves. The fine determination process (governed by the Competition Law, a regulation, and the Commission's Guidelines on Fines) envisions a host of circumstances that factor into the final amount, the primary ones being the severity and duration of the infringement. From the Commission's practice, the authority seems to have a slight bias against retailers over producers, treating the former with greater scrutiny than warranted. According to publicly available information, the Commission had issued fines in the amount of about €23 million in 2011, and another €15.7 million in the first half of 2012. However, due to extensive appeals and annulments of the Commission's decisions, these have had a relatively limited real effect, with many cases held up at court or reaching the statute of limitations.

Another important facet of the enforcement mechanism lies in the procedural penalties. In order to facilitate deliberation, the Commission is empowered to sanction a party to the proceedings for €500 to €5,000 for each day that they violated a procedural decision (ie, not complying with the Commission's information request or not acting upon an injunction) or for delayed mergers. The Commission's fining guidelines are not quite clear on the manner of calculation of this amount, which likely plays a part in the fact that the minimum amount of €500 per day has primarily been opted for so far.

A peculiarity of the antitrust system in Serbia is that no fines may be imposed or enforced three years after the last day of an infringement taking place – for example, after an agreement has been terminated. In theory, this means that the Commission must be efficient and expert in the proceedings, and that the potential judicial control should be swift. If an appeal is raised against a resolution before the Serbian Administrative Court, and then possible extraordinary legal remedies to the Supreme Court of Cassation, the required time to reach a decision could be so long as to make this statute of limitations work in favor of the infringing party.[2] In practice, this provides an incentive for delay tactics, as the parties to the proceedings prolong them as much as possible, hoping that the deadline will expire.

Leniency

Leniency has been introduced into the Serbian antitrust rules. A company is automatically granted leniency if it notifies the prohibited agreement to the Commission or provides evidence that an infringement has occurred, if the Commission was not aware or did not have enough evidence to initiate proceedings. The company must not be an instigator of the prohibited agreement. If an undertaking does not fulfil the requirements for leniency, the fine may be reduced if it provides evidence that was not available to the Commission and that contributes to the closure of the case. The Commission does not have a stellar track record with lenience: when the enforcement of the current Competition Law was near, many companies applied for leniency since the criteria under the 2009 Competition Law were harsher than in the previous regime. The Commission ignored or did not act in any manner whatsoever to the great majority of such pleas (although it did note a 'pervasive practice of illicit conduct on the market' in one case, even citing the number of prohibited agreements), and in a few of the cases it did initiate, it even penalised the leniency applicants themselves. Many companies are now reluctant to apply for leniency, expecting the Commission to restore the credibility lost.

Practice and other consequences

While it is apparent that the Commission has been learning from its European counterparts, its proceedings have not been without flaws. A common complaint in the first few cases conducted under the 2009 Competition Law was that the Commission had been too eager to try out its newfound fining authority, breaching a fundamental legal principle by applying the Competition Law retroactively and sanctioning the infringers itself, a matter that the Supreme Court of Cassation is currently deliberating on. Detailed reasoning and arguments are often lacking in the Commission's decisions; it is prone to disregard the arguments of the parties with sparse explanation, and the economic methodology is still not quite adequate, with the Commission occasionally failing to use even the most basic economic tests, such as the SSNIP test. Its analysis of market conditions often appears to be superficial and merely 'scratching the surface'. In a few cases, the Commission seems to have arbitrarily interpreted the all-important deadlines for the statute of limitations, and issued fines even though the proceedings were time-barred. There is a general perception of the Commission being 'trigger-happy' concerning private undertakings, with a much more tolerant attitude towards public enterprises (which still play a significant role in the Serbian economy), opting for education instead of a 'fine first' approach. Such blunders by the Commission cast unnecessary doubt over the impartiality or expertise of the authority and make its decisions vulnerable before the appellate bodies.

The Serbian legal framework allows for private proceedings for civil damages claims to be initiated based upon competition infringements. However, the practice in this field is still undeveloped, there is only a single case currently on the table of the commercial courts and many potential issues are still unresolved, least of all the issue of actually proving the sufferance of damages and their amount. So far, the Commercial Court has decided to 'freeze' proceedings until a final decision is made on the existence of an infringement.

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The Serbian Criminal Code contains a wide provision sanctioning the person responsible for the 'abuse of a monopolist or a dominant market position or the conclusion of a monopolistic agreement'. This means that the responsible person could be criminally prosecuted and may be sentenced from six months to three years in prison, together with a pecuniary fine. However, the provision is rather vague, and only one proceeding had ever been initiated for this crime, though the charges were dropped. Criminal responsibility for competition infringements had never really taken hold in Serbia.

Notes

1 The minimum fine issued was 0.6 per cent against a local bus company; the maximum was a 7 per cent fine imposed against the Veterinary Chamber of Serbia, which amounted to just around €11,300.

2 The reservation of the funds required to cover the penalty may present a heavy burden for regular operations in itself.

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Mr Petaković graduated from the Belgrade Faculty of Law in March 2003. He joined Karanović & Nikolić in 2005. Having completed his traineeship he successfully entered the Bar in 2007 and became head of the competition department. In December 2009, Mr Petakovic was promoted to partner.

Mr Petaković advises clients on all competition, antitrust, trade and telecom matters in Serbia, and is ranked by independent directories as the best competition lawyer in the country. He was a member of the team in many transactions in Serbia, Montenegro and Bosnia-Herzegovina. Rastko is co-author and editor of the publication *Focus on Competition*, Karanović & Nikolić, Belgrade (2007–2011).

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