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**INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES**

**Contribution from Serbia**

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Ms. Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division  
Tel: +33 1 45 18 77, Email: [lynn.robertson@oecd.org](mailto:lynn.robertson@oecd.org).

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## INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES

### -- Serbia --

1. Competition authorities around the globe operate in very diverse socio-economic, political and cultural environments and may be entrusted with different tasks (antitrust and mergers policy, consumer protection, state aid, etc.). However, one characteristic which is considered important for them all and towards which they (should) strive, so as to have a fully meaningful role, is independence. While independence of a competition authority can be analysed from different perspectives, a broad consensus exists with regard to the fact that such independence may be *de jure* or *de facto* (and at best, both). This paper will examine some aspects of independence of the Serbian competition authority- Commission for Protection of Competition of the Republic of Serbia.

#### 1. Introduction

2. The Commission for Protection of Competition of the Republic of Serbia (hereinafter the **CPC**) was first established as an independent body by the Law on Protection of Competition from **2005** (“*Official Gazette of the Republic of Serbia*”, No. 79/05) and began with its operations in **2006**. The latter was the same year in which the new Constitution of the Republic of Serbia was adopted, which has elaborated further on the principles of market economy (compared to the previous Constitution) and guaranteed free competition on the Serbian market explicitly for the first time. The backdrop of the adoption of the new competition law, as well as a new Constitution were very important changes in the name and administrative-territorial organisation of the country (from a union with Montenegro to a single state), as well as the commitment of the Republic of Serbia toward joining the European Union.

3. Prior to 2005, instead of an independent body in charge of competition matters, Serbia had an Antimonopoly Department, first within the Federal Government of Serbia and Montenegro and then, as of 2003, within the Ministry of Trade, Tourism and Services of the Republic of Serbia. However, the aforesaid department mainly dealt with prices and was not a competition protection body in the present sense, as a consequence of the provisions of the Antimonopoly Law from 1996.

4. The Law from 2005, which introduced a separate competition authority, was a modern law in the field of competition, following many of the solutions already existing in the European Union. According to that Law, the CPC was an autonomous and independent body which exercises public powers and which is accountable to the National Assembly. The CPC’s independence from the executive power was secured both through the manner of election of its bodies (the President of the Commission and the members of the Council) and through financial independence of the Commission. Namely, the Commission was to be financed from the revenues earned from its activities, especially from: 1) the fees which are paid in accordance with the Law on Protection of Competition; 2) donations, unless the donation is from undertakings to which the Law applies; 3) revenues from the sale of the Commission’s publications; 4) other sources in accordance with the Law. The Commission was also envisaged to adopt its own annual financial plan, which would be subject to government approval.

5. While the above mentioned has remained a constant since 2005, in order to achieve further harmonisation of national legislation with *acquis communautaire* in the field of competition, as well as secure conditions for greater efficiency in the implementation of competition policy within the Republic of Serbia, a new Law on Protection of Competition was adopted in 2009 and thereafter, the amendments to that Law in November 2013 ("*Official Gazette of the Republic of Serbia*", No. 51/2009 and 95/2013, hereinafter: **the Law**). The major novelties resulting from the adoption of amendments to the Law were related to the improvement in the procedural framework for application of competition rules, as well as implementation of the remarks from the EC Progress Report for Serbia for 2012 and the identified shortcomings in the practice of the CPC since the period of implementation of the Law adopted in 2009.

6. Since then, the CPC has become a reputable institution, having developed and coming to use all the powers available to it (dawn raids, merger control, commitments decisions in competition infringement cases, etc.). On this path, the CPC has benefited significantly from the European Union and other assistance. According to both the bilateral screening process with the European Commission, which was completed in 2015, and the European Commission progress reports for Serbia for 2015 and 2016 (in the field of competition policy), the national competition authority is well equipped and the national legal framework is largely aligned with the EU *acquis*. What remains to be completed is further alignment of national legislation with secondary EU legislation, such as regulations providing for block exemptions in certain industry fields, and focusing on strengthening the enforcement activities of the Commission, in terms of fine levels and intensified promotion of the leniency programme. On a more general level, though, it remains for other institutions and bodies, especially courts, within the Republic of Serbia to develop their level of knowledge and understanding of competition law, as well as the role of the Commission.

## 2. De jure independence

### 2.1. Structural independence

7. According to the Law, the CPC is an independent and autonomous body which exercises public competences entrusted to it by the Law. In other words, the CPC does not form part of any other Serbian administrative or public body, but has a status of a separate legal entity, with its own premises, human and financial resources and decision-making powers.

8. In discharging its tasks and responsibilities in the field of protection of competition (including antitrust and mergers, but excluding stated aid and other fields) and implementing the Law, the CPC is entrusted with the following competences:

- deciding on the rights and obligations of undertakings;
- imposing administrative measures;
- participating in preparation of regulations enacted in the field of protection of competition;
- proposing to the Government passing of regulations for implementation of the Law;
- issuing instructions and guidelines for implementation of the Law;
- monitoring and analyzing conditions of competition in individual markets and in individual sectors;
- providing opinions to competent authorities on draft regulations, as well as on current regulations which have an impact on competition in the market;

- issuing opinions regarding implementation of regulations in the field of protection of competition;
- establishing international cooperation in the field of protection of competition in order to fulfill international obligations in this area, and collect information on the protection of competition in other countries;
- cooperating with state authorities, territorial autonomy and local self-government bodies in order to ensure implementation of the Law and other regulations which regulate issues of importance for protection of competition;
- undertaking activities to raise awareness on the necessity of protection of competition;
- keeping records on notified agreements, undertakings which have a dominant position in the market, as well as on concentrations, in accordance with the Law;
- organizing, undertaking and supervising implementation of measures which secure protection of competition;
- performing other duties in accordance with the Law.

9. It is worthwhile mentioning that in the discharge of its competences listed under points 3) and 4) above, i.e. preparation of regulations in the field of protection of competition and proposing to the Government of regulations for implementation of the Law, the CPC consults and works closely with the Serbian Ministry of Trade, Tourism and Telecommunications. While the said relation is one of cooperation and interaction, which can be seen from the fact that the CPC coordinates with the Ministry until a consensus on the final proposal of a draft regulation is reached, the CPC finds that, from the aspect of its position as an independent authority, there is room for improvement of the legal provisions in that regard.

10. With respect to the discharge of the CPC's competences listed under point 10) above, i.e. cooperation with state authorities and organizations entrusted with public competences, the CPC has the right to request information from them. In turn, they are obliged to cooperate, as well as to reply to the Commission's request for information. Should they not reply within the deadlines set in the CPC's request, the Commission may inform the supervising body accordingly and may eventually publish information about the lack of cooperation or failure of the institution to respond to the Commission's request publicly.

## **2.2. *Financing***

11. Unlike in some other jurisdictions, the CPC finances its operations from its own revenues. According to the Law, sources of CPC's revenues are the following:

- fees payable in accordance with the Law;
- donations, except for donations made by undertakings to whom the Law applies;
- revenues from the sale of Commission's publications; and
- other sources in accordance with the Law.

12. For each financial year, the CPC must adopt a financial plan and submit it to the Serbian Government for approval, no later than November 1st of the current year for the following year. Should the financial plan not be approved by the Government before the start of the next fiscal year, the financing of the CPC would be made in the amount of total expenditure incurred in the previous year, in proportion to the period which lapses until the approval has been obtained. Bearing in mind that the Commission's bodies are elected by the National Assembly of the Republic of Serbia and that the Commission is accountable for its work to that same, highest representative body within the country, it would seem more purposeful that the National Assembly be in charge of approval of the Commission's financial plan, as well.

### **2.3 Internal organisation and accountability**

13. Internal organisation of the CPC, as envisaged by the Law, is such that it has two decision-making bodies (Council and the President) and a Professional Service, comprising employees performing duties within the CPC's competences and run by the Secretary of the Commission.

14. The Council consists of four members and the President of the Commission, all of whom are in a public contest by the National Assembly of the Republic of Serbia, at the proposal of the Assembly committee in charge of trade, for a renewable term of 5 years. To be considered for, the candidates for the position of a Council member and/ or the President, have to fulfill the professional and ethical criteria set out in the Law. Namely, they can be elected only among distinguished experts in the field of law and economics possessing at least ten years of relevant experience. Additionally, they must have achieved significant and recognized work or practice in the relevant field (particularly, in the areas of protection of competition and European law) and enjoy a reputation of objective and impartial persons. *During their term in office*, the President and the Council members are subject to rules which guarantee their impartiality: they cannot perform other public functions or professional activities (with some narrow exceptions set out in the Law, e.g. academic work) and they cannot be members of political parties' bodies or publicly advocate the programme of such parties. In much the same way, the Law enumerates the reasons for which the term of the members of the Council and the President may be *terminated*. Those reasons are expiration of the term for which the officials were elected, dismissal of the official(s) for reasons specifically provided in the Law (i.e. candidacy information having been inaccurate or gross violations of the Law or Code of Ethics having been made, etc.) and inability of the officials to perform their duties due to legal or factual reasons (resignation, fulfillment of the statutory retirement age, loss of legal capacity, serious health condition which prevents fulfillment of duties, etc.). Even *after* the mandate of the Council members and/ or President has expired or otherwise been terminated, those persons are subject to rules which serve to prevent conflict of interest on their part, i.e. they cannot represent a party to the proceedings before the CPC for at least two years after the termination of their mandate.

15. Whereas the Council is the main decision-making body, the CPC has a Professional Service, which is responsible for the direct execution of the professional tasks and duties within the competences of the Commission. The Professional Service is headed by the Secretary of the Commission and its employees are subject to both general labour regulations (in terms of the rights and duties of the employees) and public administration regulations (in terms of requirements for legality, professionalism, political neutrality, impartiality, the use of official language and script, professional education and training of the employees and performance of office tasks). There are also requirements which the Secretary of the Commission must fulfill, in terms of education and professional experience, in order to be considered for appointment by the CPC Council, to whom the Secretary is responsible.

16. As can be seen from the above, at all levels of the CPC, there are requirements which serve to guarantee the *ex ante* independence and professionalism of its officials and staff. *Ex post*, the Commission is held accountable for its work to the National Assembly, to which it submits an annual report by the end of February of the current year for the preceding year. However, in a broader sense, the Commission is also

accountable to the general public, through transparency of its work and through the instrument of judiciary review, as all of the final decisions of the CPC may be subjected to review of the Administrative court and exceptionally, the Supreme Court of Cassation (extraordinary legal remedy).

### **3. De facto independence**

#### **3.1 Transparency**

17. Even though transparency indirectly contributes to independence of a competition authority, by providing an additional venue for accountability, which is usually considered part of institutional or legal independence, in this paper, transparency will be mentioned under the heading of *de facto* independence. This is for the reason that even though the CPC is obliged by the Law to publish some of its decisions (those determining a competition infringement and initiating *ex officio* proceedings), as well as sector inquiry reports<sup>1</sup>, it has taken this obligation further and raised it to the level of voluntary and general transparency of its work.

18. General transparency in the case of CPC is achieved through many different means: announcements made on the CPC's website, organisation of and participation in public events, appearances and media releases, acceptance of general inquiries and complaints, etc. With regard to the CPC website, in addition to publishing reports of completed sector inquiries and decisions adopted in the proceedings, the CPC has made available a full set of laws, regulations, instructions and guidelines relevant to the competition field, and regularly informs the public about a whole range of its activities (seminars, workshops, public events, initiated proceedings, interpretation of certain legal acts, international and domestic cooperation matters, etc.). The CPC also publishes the opinions it issues to other competent bodies on draft laws and regulations and in that sense opens them up to public scrutiny. Last, but not least, it publishes on its website the annual report for each year, which provides a detailed overview and insight into the Commission's activities.

#### **3.2 Enforcement record- enhanced independence through expertise**

19. The enforcement record of the CPC has been one of steady progress over the years, especially in the fields which can be considered 'traditional', such as ruling on competition infringements and concentrations, issuing legal opinions and engaging in advocacy and other activities, such as international and domestic cooperation.<sup>2</sup> Nonetheless, it must be said that a significant turning point came with the enactment of the new Law in 2009 and amendments thereof in 2013, when the CPC became entitled to set fines independently (without a separate court decision) and to carry out unannounced inspections (so-called 'dawn raids'), with extensive powers in that domain. While very useful for dismantling cartels, the aforementioned tool of unannounced inspections could not be put to much use before the CPC had obtained adequate forensic software and before its staff was properly trained for its use. Once those conditions were in place, owing also to EU-funded projects, the CPC started conducting its first dawn raids, which proved to be very successful. This initial success from 2015 has continued, which can be seen from the fact that 3 more dawn raids were conducted at 7 different locations in Serbia since December 2015 to the present date.

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<sup>1</sup> The aforesaid decisions have to be published both in the Official Gazette of the Republic of Serbia and on the Commission's website, whereas sector inquiry reports have to be published in an 'appropriate manner', i.e. on the Commission's website or in some other way.

<sup>2</sup> Full enforcement record of the Commission for each of the previous years can be found in the annual CPC reports on the Commission's website and following link (complete content available in Serbian and some in English): <http://www.kzk.gov.rs/izvestaji>.

20. The above mentioned activities required adequate organisation and human resources, which have also significantly improved over the years. The Professional Service of the CPC currently counts 45 employees, with a good balance of lawyers and economists, who work together across different departments to reach the best results. In addition to possessing general departments, such as HR, financial and legal, the CPC has departments dedicated to the main types of cases: competition infringements (restrictive agreements and abuse of dominance) and concentrations (mergers), as well as to economic analysis, which performs sector inquiries and provides extensive support to other departments. Furthermore, the CPC is well equipped for its advocacy activities, since it has staff dedicated to increasing the awareness of the competition law and policy in Serbia, with the aim of gradually creating a competition culture, characteristic of a truly functioning market economy. At the same time, the employees of the Commission are aware of the fact that they participate in advocating competition daily through their work operations and over the years, the CPC has come a great way in terms of achieving this task (through opening up to the general public, inviting for discussions, communicating directly with market participants in case of inquiries, etc.)

21. While in the following period, the CPC intends to further strengthen its enforcement record (which is, nonetheless, dependent on the level of competition culture in Serbia), it must be said that through its many-faceted activities carried out up to date, it has gained a reputation among Serbian institutions as a highly professional body and one of integrity, even though some still do not clearly understand its mandate. Thus, the CPC will strive to maintain the reputation achieved primarily through commitment toward high quality decisions (which are often confirmed by the courts), market analysis and legal opinions, and keep insisting on follow-up activities in those regards. At the same time, the CPC will continue raising awareness of its mandate and competition law and policy, since the level of competition culture in the Serbian society has repercussions both for the market development and the position of the Commission.

### **3.3. *Relations with other institutions and the public***

22. In the inter-connected world of today, where the same economic and other trends can affect even geographically remote areas, exchange and interaction have become a necessity, on the one hand, and an opportunity to learn and develop from mutual experiences, on the other.

23. The CPC is especially aware of the need to interact and cooperate, if not strike a fine balance, with both public and non-public institutions (the academia, business associations, lawfirm community, etc.) in the Republic of Serbia and abroad. Within the country, the CPC strives to maintain a cooperative role with other institutions by being accessible and open, but drawing up boundaries whenever necessary, so as to maintain integrity. It does so by including government ministries, regulatory agencies and various associations in the consultative process, keeping them informed of important activities, as well as initiating formal means of cooperation, through protocols or memorandums and/ or joint seminars. Outside the country, the CPC participates in conferences, roundtables and seminars jointly or under the auspices of different organisations (OECD, ICN, UNCTAD, etc.) and has also entered into many protocols and memorandums of cooperation or understanding with other competition authorities (Austria, Croatia, Romania, the Russian Federation, and many others). Within this international context, however, EU-funded projects and regional cooperation bear a special importance, partly due to the fact that many countries of ex-Yugoslavia share similar characteristics and market features, and partly due to the fact that the European Union often looks to the region as a whole.

24. In more general terms, the CPC is open to initiatives and questions, both from the professional community and the general public. For example, even though the CPC has published on its website instructions and a form for submitting an initiative for the assessment of competition infringements, it also accepts initiatives in other forms. Furthermore, it accepts general questions and remains at the disposal of the relevant stakeholders for clarification of guidelines and instructions it has published on its website.

#### **4. Concluding remarks**

25. Competition authorities in various jurisdictions may be entrusted with different tasks, but in order to complete those tasks according to the design and purpose for which they were set up, they ought to be furnished with adequate resources and at least some degree of independence. Such independence may be legal or factual, but provides best results as a combination of both.

26. As can be seen from this contribution, the Serbian competition authority has sound legal prerequisites for independence (structurally, financially and otherwise), which do not only exist in the hypothetical realm. To the contrary, even before obtaining the institutional set-up and the powers it has today, the CPC was active in decision-making and driving toward a change in certain legislative solutions, so as to be able to better carry out its role on the Serbian market, one of achieving economic prosperity and well-being of the society, especially for the benefit of the consumers. Thus, what holds true for any authority is that it is not only about the (formal or actual) competences it has, but the manner in which they are put to use.

27. Nonetheless, as with any other complex and systemic long-term task, there is always room for evolution and improvement. In that sense, the CPC intends to continue protecting competition by maintaining the acquired reputation and level of professional commitment, while taking on further activities in the field of harmonisation with the EU *acquis*, promoting the leniency programme and raising the awareness of the competition law and policy, as well as the general competition culture in the Republic of Serbia.