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# JUDICIAL PERSPECTIVES ON COMPETITION LAW

**Contribution from Serbia**

**-- Session II --**

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# *Judicial Perspectives on Competition Law*

## – Serbia --

## The Serbian Experience[1]

## 1. Legal framework

1. In the Republic of Serbia, modern system of protection of competition in the market was established in 2005, when the first Law on the Protection of Competition was adopted. The Commission for Protection of Competition of the Republic of Serbia (hereinafter the CPC) was also established in 2005 by the same Law and began with its operations in 2006, as an independent body. Prior to 2005, instead of an independent competition authority, 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 modern competition authority, as a consequence of the provisions of the Antimonopoly Law from 1996.

2. The Law from 2005 followed many of the legal solutions already existing in the European Union law according to which the CPC was an autonomous and independent body which exercises public powers and which is accountable to the National Assembly. According to the Law, 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.

3. In order to achieve further harmonisation of national legislation with *acquis communitaire* 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. 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.

4. In the context of institutional set-up of the CPC, it is worth pointing out that Republic of Serbia has adopted the most common institutional model among the national competition authorities – administrative enforcement model, where the investigative and decision-making powers are integrated within a single institution. Considering the legal and constitutional context in which CPC should operate, the CPC was designated as national administrative authority in charge of competition law enforcement, i.e. responsible for the (effective) application of competition rules, retaining the same role

[1] Prepared by Ivana Rakić, PhD, Commission for Protection of Competition of the Republic of Serbia. The findings, interpretations, and conclusions expressed in this paper are those of the author and do not necessarily reflect the views of the Commission for the Protection of Competition of Republic of Serbia

since its establishment – it conducts an investigation of the facts relevant for a possible violation of the law (i.e. it investigates cases) and subsequently adopts a decision (which is subject to judicial control), based on the results of its investigation. In terms of judicial control, national "review" court is empowered by ordinary means of complaint to review decisions of the CPC.

5. Considering that there is no separation of investigation and decision-making powers between two different authorities in Serbia, the internal structure of the CPC involves a functional separation between these activities whereby the investigation is carried out by the Professional Service of the Commission and the final decision is adopted by two decision-making bodies (Council and the President). Therefore, the investigation and decision-making functions are carried out separately by two bodies – one body is in charge of the investigation of the case and another is responsible for deciding on the case. The Council (as the main decision-making body) consists of four members and the President of the Commission, all of whom are elected in a public contest by the National Assembly of the Republic of Serbia. The Professional Service of the Commission is responsible for the direct execution of the professional tasks and duties within its competences, and is run by the Secretary of the Commission.

6. Respective competences of the investigative and decision-making bodies are carried out independently from one another, but during the procedure of investigation of infringement of competition, a rapporteur among the members of the Council is determined, who in cooperation with the official party appointed to lead the procedure, prepares a draft decision and reports to the Council on the reasons and all relevant facts and circumstances of the case. Nonetheless, the final decisions are always adopted by majority votes of all members of the Council.

## 2. Judicial Review of Competition Cases

7. Under the Law on Protection of Competition from 2005, judicial control of the Commission's decisions was exercised by the Supreme Court of Serbia. During this period, the CPC did not have much success in court cases. There were 13 cases which were not decided in favour of the Commission. The Supreme Court quashed cases always on the basis of procedural issues. In most cases, the CPC corrected those procedural issues and took a similar decision to that of the Supreme Court.

8. The most common criticism of the Law from 2005 was the lack of clarity of the cases. Under the Law, the CPC did not have the ability to seek the imposition of administrative fines for the breach of competition rules. Instead, only the Misdemeanour Court could apply fines ranging from 1 to 10 per cent of the turnover of the undertakings concerned. However, no fine has ever been imposed by the Court. Other important issues which arose in practice during the implementation of the Law from 2005 were the complexity of competition cases, the large number of other cases in courts and sometimes the lack of understanding of the substantive competition issues by the judges.

9. Under the new Law on Protection of Competition from 2009, as amended in 2013, the control of decisions of the CPC is exercised by the Administrative Court. This was a new Court that resulted from the judicial reform in Serbia. It started with operations in January 2010 and was composed of 38 judges. However, already then it was overwhelmed with the number of pending cases. There was also a need for the training of the judges in the area of competition law, which was addressed under a new project that

was being prepared with the support of the European Commission. In view of the number of cases and the way cases were allocated to judges (by lottery), the Court did not intend to have judges specialized in competition matters.

10. Legal action against the decisions of the CPC may be brought before the Administrative Court within 30 days from the date on which the decision of the CPC was submitted to the party concerned. The filing of a legal action shall not postpone the execution of the decision, which may, however, be suspended by the CPC or the Court upon the request of the plaintiff in order to prevent irreparable damage to the plaintiff, provided that such postponement is not against public interest. This is a very important provision that reinforces enforcement capacity.

11. The procedure of judicial review of competition cases is governed by the Law on Administrative Disputes, unless the Law on the Protection of Competition stipulates otherwise. Pursuant to the Law on the Protection of Competition, the Administrative Court reviews the legality of the Commission's decision. The scope of such legal control is not defined in this law, but in the Law on Administrative Disputes.

12. The legality of decision of the Commission, in part referring to the monetary amount of the administrative measure (fines), shall be examined in relation to the conditions for that decision envisaged by the Law on the Protection of Competition and bylaws. If the court determines that the disputed decision of the Commission is unlawful only in part related to the monetary amount of the administrative measure, the ruling shall, as per usual practice, overturn the disputed decision in that part, under the conditions envisaged by the law governing administrative procedures.

13. Appeals against decisions of the Administrative Court can be made to the Supreme Court of Cassation and are limited to errors in the application of the law.

14. Pursuant to the general rules on administrative disputes, the Administrative Court is allowed to review the CPC decisions in disputes of full jurisdiction if it finds that the challenged CPC decision should be annulled and reaches the decision to resolve an administrative matter, where that decision entirely replaces the annulled act. The dispute of full jurisdiction is possible if the nature of the matter allows it and if the factual situation provides a reliable basis for it. Such possibility implies that the Court shall, by virtue of its own decision, resolve the dispute on the merits of the case based on all the evidence and the facts on which the disputed decision is grounded. To conclude, in the current situation, the Administrative Court has an option to decide in a full jurisdiction dispute (i.e. may resolve the protection of competition legal matter on its own).

15. However, in spite of the fact that the Administrative Court has an explicit power when it comes to disputes of full jurisdiction, it has not used this authorisation in deciding on the legality of the CPC decisions yet. Such exercise by the Administrative Court of a 'limited' review of competition cases is not fully justified since the Court is allowed not only to annul the challenged decision, but also to reduce or increase the fine or periodic penalty imposed, by taking into account all of the factual circumstances. In other words, this is not just a control of the lawfulness of the penalty, but also a control of the merits, which empowers the Administrative Court to substitute the appraisal of the CPC by its own appraisal. At the same time, it needs to be emphasized that such practice of the Administrative Court is not entirely surprising because it seems that the relatively new specific area of competition law and the decision-making manner of the CPC also present an obstacle for thorough and final resolution of the dispute in full jurisdiction, as the Administrative Court is by default set to rule in "classic" judicial procedures (namely,

administrative procedures), and competition law procedures certainly do not belong to this category. The position of the Administrative Court thus seems to be restrained because of the nature of competition law enforcement, which involves the necessity of making complex economic assessments in competition cases (market definition and assessment of competitive effects may require extensive use of economics).

16. Having in mind such practice of the Administrative Court, it is difficult to make general statements regarding the presentation and evaluation of evidence in competition cases in Serbia. The CPC has no experience with presenting complex economic theories and evidence to the Court but it could be said that CPC is in a better position to evaluate that evidence. Given this poor court practice in terms of disputes of full jurisdiction, it seems that evaluation of evidence poses particular challenges for the Administrative Court – competition policy is grounded in economics, whereas the judges might not fully understand the complex competition issues and evidence presented by the CPC and plaintiff, and the standards of proof might be highly demanding. Therefore, it would be useful to analyze how the Court would handle the economic estimates and other increasingly complex issues in disputes of full jurisdiction and what the reasons to accept or reject them as evidence would be.

17. Such difficulties in competition cases raise a question of principle, but also a question of how to get the technical expertise if judges are faced with a lack of economic methods and evidence and of understanding these methods and analysing the evidence. The Court's expertise and experience in procedural and substantive issues of competition law and in economics are needed for an effective implementation of competition policy, so there obviously could be a role for an expert lawyer or economist as witness or advisor to the court in a competition case. Such experts could also cross examine each other which obviously could help the Court to understand the issue at stake and could be apparently an efficient way of getting expert testimony.

18. Another method for increasing the expertise of the judges consists of further specialization of judges in competition law and economics, including economic methodology in order to develop judges' analytical skills and education. Judges of the Administrative Court must have more competence in economics and competition issues or should develop it through technical capacity building since modern competition law enforcement should be based on a clear and objective assessment of effects as identified or measured by sound economic analysis. Although the training in competition law and economics was already provided to the judges of the Administrative Court,[2] additional action of increasing awareness of competition law should be undertaken because competition law in Serbia is legitimately entrusted to judges with a generalist background, including matters of fundamental rights and formal procedural character. It is thus important to encourage the Administrative Court to accept economic methodology and improve knowledge about competition issues considering the general impression that judges still want to understand better the economic issues and solidly ground theirs decisions in economics.

[2] For example, "Program of economic training of judges in the competition law" was designed for the judges and advisers of the Supreme Court of Cassation and the Administrative Court of Republic of Serbia. On this seminar, economic issues relevant for the competition law were discussed (theory of supply, meaning of competition, monopoly and its effects, economic foundation of restrictive agreements, economic incentives of abuses of dominance, economic consequences of concentrations etc.) and the judges with experience in competition law enforcement from relevant countries presented their cases followed by a Q&A session.

19. Nevertheless, the CPC acknowledges the willingness of the Administrative Court to process competition cases and that the Court's role is to control, not define competition policy or enforce competition law. Therefore, the CPC is trying to develop the sensitive link between the CPC and the Court, having in mind that deciding in a full jurisdiction dispute ("unlimited jurisdiction") does not alter the role of the Court. Anyway, the interaction among the CPC and the Administrative Court must remain appropriate since it is important to improve competition law enforcement without raising concerns regarding the separation of powers.

20. As it can be seen from the above, the CPC and the Administrative Court act in accordance with the principle of separation of powers and respect their competencies in terms of competition cases – competition enforcement is entrusted to the CPC, which acts as investigator, prosecutor and decision-maker, and the role of the Administrative Court is to verify the legality of the contested CPC decisions. In practice, there is little room for the CPC becoming the court and *vice versa*, since full jurisdiction of the Administrative Court means that the CPC continues to be responsible for investigating and pursuing any violation of competition rules, while the final decision whether there had actually been such a violation, in the context of full judicial review, remains with the Administrative Court.

21. Informal interaction among the CPC and the Administrative Court usually takes place in the context of conferences, seminars or workshops when these activities are organised by the CPC. Formal interaction between the CPC and the judiciary, outside the scope of public enforcement of the Serbian competition rules, takes place in the context of private damages actions in the competition law field. In such actions, the CPC may obtain a court order for the access to file and disclosure of evidence, but such practice is still poor.

22. To conclude, the role of the judiciary is very important in implementation of competition policy in Serbia, but this role is not assigned to specialised judicial bodies – once a decision has been formally taken by the CPC, the judicial competence is assigned solely to the administrative judge who is considered an ordinary judge, since judicial competence lies with the territorially competent ordinary judge, i.e. the court of appeal. Thus, Serbia did not establish specialised courts to deal with competition law matters and does not have experience regarding the use of such specialised courts.

23. However, it appears that competition law might be better enforced by specialised tribunals or at least specialised (commercial) chambers, whose members would be experts in economics or competition policy. It is expected that, when those judges have a competition case before them, processing such cases would be more efficient since specialist courts might have extensive knowledge on substantive issues of competition law and experience in economics in the form of accumulation of knowledge and skills in this matter. The general impression is that the specialisation of courts in the competition field could contribute to greater procedural efficiency, enhanced uniformity, better quality decisions, predictability, as well as understanding of the competition law and the impact of the court's decisions on the undertakings and on the overall economy.

24. Still, one should bear in mind that competition law and judicial review are applied in the context of a wider legal system and that judicial reform in regard of the court specialisation is constrained because of the organizational structure of the courts in Serbia and the amendments of the laws on court organization, as well as financial resources which would be necessary for such reform.

## 3. Conclusion

25. It may be concluded from the foregoing that the judiciary in Serbia has important roles in the implementation of competition policy since the Administrative Court, as the main judicial body in competition cases, ensures that procedural due process is observed (including that fundamental procedural rights are protected) and competition rules are applied in a correct and consistent manner. The current institutional framework in Serbia on which the protection of competition (including judicial review) is based is satisfactory and in accordance with the best comparative practice and practice of protection of fundamental rights. The CPC, which acts as investigator, prosecutor and decision-maker, should continue to play its role in that respect.

26. The right of juridical adjudication in matters of competition law is given to an independent court with all the tools necessary to perform a full review of CPC decisions. Formally, the Administrative Court has a power of full judicial review, but in practice, the control of the merits of a case has a limited scope. It is not fully comprehensible why the Administrative Court still would limit itself and perform only the narrow review. In order to achieve adequate protection of competition and comply with the standards of protection of fundamental rights, the Administrative Court should ensure that its decisions are made in disputes of full jurisdiction. In our opinion, the Administrative Court does not sufficiently use its power of full review of the CPC decisions.

27. The Administrative Court should not be reluctant to use the full review powers granted to it since only the exercise of unlimited jurisdiction can guarantee the principle of effective judicial protection. Judges should be encouraged to become more sophisticated in competition economics which means that competition law should play a role in the on-going education and courses attended by judges in Serbia.