

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES

Contribution from Serbia

- Session III -

29-30 November 2018

This contribution is submitted by Serbia under Session III of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/rca.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

JT03438728

Regional Competition Agreements: Benefits and Challenges

-- Serbia¹ --

1. Introduction

1. In a world where geographical distances have come to mean very little and the economic flows affect continents apart, the mention of globalisation and ‘international element’ have become quite common. This is because they truly characterise many areas of the modern-day social, political and economic human activity. Nonetheless, some important areas and state policies remain in the national domain, at least in terms of their legal set-up and face value. This may sometimes be an advantage, as the country at stake may be able to define its own steps in implementing a policy, but it may also pose challenges, especially for smaller countries dependent on foreign assistance and those which do not form part of certain regional or supranational organisations, such as the European Union.

2. When it comes to the European Union (EU), competition law lies at the heart of the single European market. For that reason, primary responsibility for application of competition rules to cases with an appreciable effect on competition and trade between Member States or with a ‘Community dimension’ rests with the European Commission. On the other hand, the European Commission is not the sole enforcer of the EU competition rules. Since 2004, following the adoption of the Regulation 1/2003, a system of parallel enforcement of EU competition rules (Art. 101 and 102 of the Treaty on the Functioning of the EU) by the Commission and the national competition authorities (NCAs) of the Member States has been introduced. This has brought about the possibility (and even desirability) of direct application of the EU competition rules, in addition to the application of national competition laws by the NCAs. It is this system of parallel enforcement, which has made the functioning of a new platform- European Competition Network (ECN), indispensable. Namely, under the auspices of the ECN, the European Commission and NCAs exchange information and co-operate closely in order to determine which authority is well placed to conduct an investigation.

3. Serbia, on the other hand, is a candidate country for EU membership and as such, lies outside the ECN circle. Yet, in addition to the national competition rules, which are based on the Constitution of the Republic of Serbia², such as the Law on Protection of Competition (“Official Gazette of the RS”, no. 51/2009 and 95/2013) and the relevant bylaws, Serbia is to apply the Stabilisation and Association Agreement (SAA), signed with the EU. An excerpt from the article pertaining to competition- Article 73 of the SAA states the following:

¹ The views expressed herein are those of the author and may not necessarily reflect the views of the Commission for Protection of Competition of the Republic of Serbia.

This contribution was written by Ms. Nina Vasić, LL.M., Senior Adviser, Division for Competition Advocacy and International Affairs, Commission for Protection of Competition of the Republic of Serbia.

² “Official Gazette of the RS”, no. 98/2006.

1.1. Competition and other economic provisions

4. The following are incompatible with the proper functioning of this Agreement, insofar as they may affect trade between the Community and Serbia:

(i) all Agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

(ii) abuse by one or more undertakings of a dominant position in the territories of the Community or Serbia as a whole or in a substantial part thereof;

(iii) any State aid which distorts or threatens to distort competition by favouring certain undertakings or certain products. 2. 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.

5. The Parties shall ensure that an operationally independent authority is entrusted with the powers necessary for the full application of paragraph 1(i) and (ii) of this Article, regarding private and public undertakings and undertakings to which special rights have been granted.

6. Bearing this in mind, as well as the fact that Serbia carries a legacy of a directed rather than free market economy, it is easy to see how important it is for Serbia to observe best practices in the EU and further, as well as to be able to engage directly with its counterparts and gain insight into the application of competition law to specific cases. This insight is often secured through several means, such as research by the CPC staff, constant education, participation in conferences and seminars, but no less importantly through competition agreements, whether of a bilateral or multilateral kind.

2. The CPC and Competition Agreements

7. The first independent and autonomous authority entrusted with the task of protecting competition in the local market and upholding competition rules in the Republic of Serbia is the Commission for Protection of Competition (CPC). It has been in existence since 2006, following the enactment of the first modern Law on Protection of Competition from 2005. Beside the Commission, there are other relevant state institutions which form part of the Serbian ‘competition world’, such as the Serbian Ministry of Trade, Tourism and Telecommunications, which deals with matters of competition policy, and administrative courts, which are to interpret competition rules in case of dispute and exercise judicial control over the decisions of the Commission.

8. After 12 years of operations of the CPC, a line can be drawn as to the achievements made and the challenges identified. The main achievements can be seen from the track record of the CPC (available on its website in the Annual Report Section) and are summed up in the evaluation of the European Commission from 2016, which states that “*Serbia is relatively advanced as regards the alignment with the rules on antitrust and mergers, and their enforcement*”³. The main challenges, on the other hand, remain the same as before,

³ European Commission Progress Report for Serbia, 2016, Chapter 8: Competition policy (page 38).

but have gradually changed in their degree or extent. They are mainly related to the level of competition culture and awareness of competition rules, including the recognition of the role of the competition authority and its mandate (i.e. protecting competition rather than competitors, acting in antitrust cases and case of concentrations, not state aid or public procurement *per se*, being different from the Anti-corruption Agency and so on) and the limited capacities of the courts to deal with competition law cases. Namely, it is the administrative courts which exercise judicial control over CPC's decisions, but they do not possess specialised chambers or judges for competition law and they are chronically burdened with a large number of cases, where competition cases represent only a fraction.

9. Going back to achievements, the CPC has recently been described as:

*'...an operationally independent authority whose four members and President are appointed by the parliament, the CPC acts upon a complaint, notification (e.g. for mergers) or on its own initiative. Its decisions may be appealed before the Administrative Court. Regarding enforcement capacity, the CPC has enough staff (46, including 29 case handlers). On implementation, the number of antitrust cases and the relative size and significance of companies under investigation has increased. The CPC adopted five decisions on restrictive agreements in 2016 and 2017 each. There were also three decisions on abuse of dominance cases in 2016 and 2017 each. The level of fines imposed over the past two years was twice that of the previous three years (2013-2015) at over EUR 3.5 million in 2016 and 2017...'*⁴

10. In addition to the above quoted evaluation of the European Commission, the CPC has also been recognised as one of the better enforcers of competition law in the ex-Yugoslav region, by its relevant peers. It is not an overstatement to say that a very important role in the up-to-date achievements of the CPC is played by the intensified co-operation of the CPC with other competition authorities from Europe and around the world, as well as with organisations set up with the particular aim of increasing capacities of the NCAs for competition law enforcement and assisting them in the process of exchange of practices and information.

11. In the case of Serbia and CPC, such co-operation is usually based on **bilateral competition agreements**, in the form of Memoranda of Understanding or Cooperation. As a rule, the Memoranda entail sharing of existing legislative provisions and non-confidential information. The performance of study visits and organisation of joint conferences or seminars is another usual element of such Memoranda, in order for the relevant NCA staff to gain hands-on exposure and become truly acquainted with one another. Nonetheless, in the practice of the CPC over the years, co-operation with other NCAs through **regional organisations and platforms**, such as the Sofia Competition Forum or the OECD-GVH Regional Centre for Competition in Budapest, has proven to be of special importance.

12. **The Sofia Competition Forum (SCF)** is a regional initiative which strives to foster co-operation and the development of regional ties in the Balkan region, thus ensuring a uniform application of competition rules.⁵ It was established in 2012, at the initiative of

⁴ European Commission Progress Report for Serbia, 2018, Chapter 8: Competition policy (page 60)

⁵ <https://unctad.org/en/Pages/DITC/CompetitionLaw/ccpb-PubsPage08.aspx>

* This designation is without prejudice to positions on status and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

the Bulgarian Competition Authority and UNCTAD, when the nine SCF members (the competition authorities of Albania, Bosnia and Herzegovina, Bulgaria, Kosovo*, the FYR of Macedonia, Serbia, Croatia and Montenegro and UNCTAD) have signed a joint Statement. Later on, the SCF came to include Georgia.

13. In the case of Serbia, joining the initiative for setting up the SCF came about at a time when UNCTAD had completed Voluntary Peer Review of its competition law and policy in 2011. Thus, joining the SCF seemed like the natural step in the process and perhaps as an instrument to reach a faster implementation of some of the recommendations from the UNCTAD peer review.

14. In practice, the SCF has created a permanent platform for capacity building assistance and policy advice in the field of competition. The work of the Forum is centred around annual meetings in Sofia, where important competition law and policy topics are discussed, but which are preceded by significant effort on part of the NCAs who are members of the Forum toward providing written contributions to the SCF reports and Newsletters. Thus, the main utility of the annual meetings, apart from maintaining a dialogue between the Forum members (those from EU Member states and non-EU member states), is to be found in the provision of comparative perspective on the legal regimes of members of the SCF and their effects in practice. One example is the 9th SCF meeting from November 2016, for which the Forum members had to invest a significant amount of effort in order to produce a comparative overview of different legal regimes in the field of procedural fairness, based on national contributions. This came about as result of the fact that one Member was entrusted with the task of compiling answers to one question each, on behalf of all the SCF regimes.

15. While the SCF activities are primarily geared toward its members and the Balkan region, the SCF annual meetings are also usually open to competition authorities, which are not members of the Forum, such as those of Russia, Romania and Ukraine, and other institutions or individuals from the business community, academia and international organisations. This adds a particular value to the Forum and secures informal input from the more developed countries or those with a longer tradition of applying competition law.

16. Similarly to the SCF, the OECD-GVH Regional Centre for Competition in Budapest (**OECD-GVH RCC**) is a joint initiative of a competition authority (Hungarian competition authority- *Gazdasági Versenyhivatal* or **GVH**) and an international organisation- the Organisation for Economic Co-operation and Development (**OECD**). Secondly, it also functions as a learning and sharing platform in the field of competition. However, that is where similarities between the SCF and RCC seem to end. First of all, the RCC has been established as early as 2005, at a time when Serbia had just received a first modern Law on Protection of Competition. Secondly, Serbia is not a member country of the OECD, as is the case with UNCTAD. Therefore, the RCC represents a sort of a bridge between the pool of data and knowledge acquired within the OECD, on the one hand and the Serbian competition authority, on the other hand. Thirdly, the RCC can be said to have a wider reach, owing to the fact it has four main target groups: 1) competition authorities of South-East Europe and the majority of the CIS countries, 2) judges, 3) competition authorities of countries belonging to the Central European Competition Initiative - Austria, the Czech Republic, Poland, Slovakia, Slovenia and Hungary, and 4) the GVH itself. Fourthly, the role of the RCC, according to its website is to ‘...*provide capacity building assistance and policy advice through workshops, seminars and training programmes on competition law and policy for officials in competition enforcement agencies and other*

parts of government, sector regulators and judges. The RCC also works to strengthen competition law and policy in Hungary and in the GVH itself.’⁶

17. From the practice of the CPC, the main value and contribution of the RCC is in the educational component (seminars for young staff of competition authorities) and knowledge-sharing on a wider regional level. Namely, while the CPC is a beneficiary of the RCC and not a signatory of the Memorandum of Understanding based on which the RCC operates, it has gained a lot from the functioning of this platform. One example is to be found in the fast and easy adaption of the CPC’s young staff to the work requirements at the CPC, after undergoing the relevant competition law training in Budapest. The second example may be found in the application of competition assessment toolkit and checklist developed by the OECD in the analysis of existing and proposed legislation in the Republic of Serbia. A third example still can be found in greater comprehension on part of the case-handlers from different NCAs regarding particular cases solved in the EU, through discussion and comparison with cases solved in the national jurisdictions which are beneficiaries of the RCC.

3. Going forward- the New regional initiative

18. As has been illustrated above, both bilateral co-operation agreements and the regional co-operation mechanisms have proven extremely useful in the practice of the CPC. Nevertheless, 12 years of operations and a more frequent exchange with colleagues from the Western Balkan region have highlighted the need to work together even more closely on matters which concern those competition authorities.

19. This is because most of the countries identified as part of the region share the same socio-economic, historical and legal tradition. Additionally, they share contemporary market characteristics and market players. Yet, the national competition law regimes and deadlines, as well as their application may differ, even in the case of identical market players and similar case features. This all points to a need for some level of coordination and increased level of co-operation, including on an *ad-hoc* basis when there is a need for immediate action.

20. For the reasons described above and upon consultation with the national competition authorities of the region, the CPC has approached the European Bank for Reconstruction and Development (**EBRD**) to explore the possibilities of obtaining financial, technical and other support. To the great satisfaction of the CPC, the EBRD has welcomed the idea and thereupon embarked on a project which is aimed at finding the best possible design for the Forum and making it fully functional. In agreement with the EBRD, the Region has been defined as the Republic of Albania, Bosnia & Herzegovina, the Republic of Croatia, Kosovo*, FYR Macedonia, Montenegro, the Republic of Serbia and the Republic of Slovenia. Currently, the project is in the last preparatory stages and the first meeting of the Forum is expected to take place toward the end of this year or at the beginning of the next year, at the latest.

21. This permanent regional forum of competition authorities, as envisaged so far, would consist of two and a half pillars. The first pillar of the Forum would consist of the heads of competition authorities in the Region (as defined above). Together, they would

⁶ http://www.oecdgvh.org/menu/about/about_rcc_folder.

comprise the Management Board of the Forum, which would have regular meetings (with the possibility of *ad-hoc* meetings).⁷ The second pillar would consist of case-handlers who would meet from time to time and discuss matters which are of special importance for all the competition authorities, members of the Forum. The half-pillar would consist of stakeholders, such as sectoral regulators in the region, international and regional organisations (EU, GIZ), business associations and law firms. They would have the role of observers and would be entitled to provide their feedback on public matters discussed at the Forum meetings.

22. The activities of the Forum would mainly be geared toward exchange of experience and information in the field of enforcement of competition law, for purposes of greater harmonisation of such practice and its alignment with best international or regional practices. The Forum would also serve as a vehicle for discussion of legislative solutions, especially with regard to by-laws and other sub-statutory texts which are within the competence of the members of the Forum. The third activity of the Forum would be dissemination of information discussed during the Forum meetings, which can remain in the public domain. The idea behind this is that the wider competition environment and actors should have the possibility to share their views and feedback on (public) matters discussed during the Forum meetings.

23. While the final steps for the launch of this Forum are being prepared, it is useful to note that the Forum would represent a tailor-made co-operation vehicle between countries in the Region, narrowly defined by similar traditions, market players and even language⁸. Thus, it would focus on matters which are of immediate importance for the practice of the national competition authorities from the Region, some of which belong to the ECN and some of which don't. This would also enable the competition authorities from countries who are not EU members to have direct exposure to the latest developments in the EU competition law practice and presumably tread faster on the path of accession to the EU, meanwhile applying their competition laws to similar cases in a more consistent way. Lastly, the Forum would not be burdened by matters of state aid, since in that field, not all the competition authorities of the Region have a legal mandate.

4. Conclusion

24. Co-operation between national competition authorities may be seen as indispensable in the globalised world of today, where economic flows and market players surpass national boundaries. The forms of such co-operation may vary, in their form, substance and extent.

25. One of the forms of co-operation in the field of competition is through regional agreements, which rest on the presupposition that cohesion and similar characteristics of a region vouch for a better mutual understanding, similar issues faced and economic savings (not to mention legal certainty) to be made with the adoption of a similar approach to

⁷ The Forum would also have an Advisory Board, consisting of two representatives of the EBRD and three representatives of the international academic community.

* This designation is without prejudice to positions on status and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

⁸ Except for Albania, all other countries of the Forum have shared the official language of ex-Yugoslavia in the past.

similar cases. The use in practice of regional competition agreements and a long list thereof provided by the OECD confirms that presupposition, even though the sheer number of agreements need not always be indicative of the quality of co-operation achieved. Yet, one is to hope, at least through example of the ECN and the necessity of intensified co-operation in the modern world that the quality follows, if it does not go hand-in-hand, with the quantity of the agreements entered into.

26. In the case of Serbia and its national competition authority- the Commission for Protection of Competition, which has been in existence for 12 years now, regional co-operation in the field of competition (anti-trust and mergers) functions mainly through soft-law mechanisms, such as the Memoranda of Understanding or Cooperation. In addition to the bilateral Memoranda it has entered into, the CPC has over time become a member or beneficiary of regional co-operation mechanisms in the field of competition law and policy, such as the OECD-GVH RCC and SCF, which have developed historically with the advent of transition of Central and South-East Europe economies to market economies.

27. Those modes of co-operation have proven very beneficial for the CPC, especially since they are adaptable and provide a platform for exchange of experience which otherwise may have been difficult to establish by the individual competition authorities at stake. Nonetheless, those regional mechanisms have also demonstrated that more attention and intensified co-operation are needed in the immediate ‘neighbourhood’ of Serbia, in order to achieve efficiencies and deal with similar cases and market players in a similar fashion. This could also bring about a greater understanding of the relevant market players’ reach and effect on the local market, which in reality may be wider than any of the competition authorities of the West Balkan region (including Slovenia and Croatia) could consider under its national law. Furthermore, co-operation between competition authorities of those countries would have the added value of keeping up to date with the latest developments in the EU competition law and practice, despite the fact some of the countries concerned are not EU-members and mark a different progress rate on their path toward the EU.

Bibliography

European Court of Auditors, Background paper: Enforcement of EU competition policy; Information on a forthcoming audit (September 2018),

https://www.eca.europa.eu/Lists/ECADocuments/BP_COMPETITION/BP_COMPETITION_EN.pdf

BryanCave law firm, Claimant’s Guide to Antitrust/Competition Litigation in the European Union,

<http://www.sipotra.it/wp-content/uploads/2017/03/Antitrust-Competition-Litigation-in-the-European-Union.pdf>

European Commission Progress Reports for Serbia for 2016 and 2018,

https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_serbia.pdf

and <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf>

Database of bilateral MoUs of the CPC and the Proposal for the Creation of the Regional Forum of Competition Authorities (EBRD/CPC).