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**INVESTIGATIVE POWER IN PRACTICE – Breakout session 2: Requests for
Information – Limits and Effectiveness**

Contribution from Serbia

- Session IV -

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This contribution is submitted by Serbia under Session IV 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/invpw.

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Investigative Powers in Practice

Breakout session 2 - Requests for Information Limits and Effectiveness

Requests for Information in Serbian Competition Law – Limits and Effectiveness¹

- Contribution from Serbia –

1. Legal framework

1. In the Republic of Serbia, system of protection of competition in the market is regulated by the Law on the Protection of Competition, which was adopted in 2009, and thereafter, the amendments to that Law in November 2013 (hereinafter the Law). In order to carry out the duties assigned to it by the Law, the Commission for Protection of Competition of the Republic of Serbia (hereinafter the CPC) has extensive powers to investigate suspected competition law breaches, as well as in the context of merger cases and sector inquires (market studies). The CPC has broad powers to investigate by ordering inspections (including dawn raids), hearing the parties, and requesting information. It does so either on its own initiative or as a result of complaints filed by third parties. In general, these competencies are in line with the best comparative practice, which shows an expansion of competition authorities' investigative powers.

2. As one of the main CPC's investigative instruments, the request for information is the most frequently used form of investigation enabling the CPC to address the undertakings and associations of undertakings, in order to obtain all information necessary to conduct its investigations. The CPC may request undertakings which are suspected of an infringement or the merging parties, but also any third party that can supply useful information (e.g. customers, competitors and other undertakings), to supply information, documents and other materials which are relevant to the case under investigation. Such a request may be imposed under penalty of an administrative fine for failure to adhere to the CPC's request for information.

3. In line with Article 44 of the Law, the parties in the procedure are obliged to submit or to provide for inspection relevant data kept in written, electronic or other form, documents, items that contain information as well as other items that may be a subject to presenting evidence in the procedure, and which are considered to be obligatory for the party to possess, or the possession is reasonably assumed. In the event of party's failure to deliver, or make available for inspection the requested documents, data, or items until the conclusion of procedure, the CPC shall make a decision according to the state of available

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evidence in the case, that is, the suspicion which has occurred as a result of the lack of mentioned evidences, shall be detrimental to the party that did not act upon the order.

4. In line with Article 48 of the Law, if it is reasonably assumed that the requested information, belongings or documents are in the possession of the third party, the CPC will issue a request for their submission, or for enabling inspection. Parties who receive this request are obligated to submit, or make information, documents or belongings that are the subject of the request available for inspection. The request for provision of information contains, in particular, assertion to whom and on what data are referring, deadline for acting, in addition to a warning of the consequences of withholding of information or giving false information.

5. The CPC may impose large fines for failure of an undertaking to supply information in response to an information request, by decision. Under Article 70 of the Law, against undertaking acting contrary to the orders issued by the CPC in the respective proceeding, or which fails to comply with these orders, a procedural penalty measure will be imposed in the amount between 500 EUR and 5.000 EUR per day, for each day of such conduct, if it fails to comply with the CPC's request to submit, disclose, make available or provide access to the requested data, disables the entry into premises, or disables investigation in other manner, that is, delivers or provides incorrect, incomplete or false information.

6. However, the CPC's power to request information is not limitless, irrespective of the value or relevance of the information to the case under investigation. The principle is permanent: request for information must be circumscribed and limited only to information that could be relevant to the investigation, and should not extend beyond the rules on legal professional privilege and the privilege against self-incrimination.

7. At the same time, the CPC faces one particular limitation when it comes to handling large amounts of complex information during and after competition investigations. Setting aside the issue of transparency, it should be highlighted that the CPC faces a recurring challenge that has an influence on the effective use of power to request information. This challenge concerns the issue of balancing confidentiality of information and transparency practices, in terms of the inapplicability of confidentiality rules when rules on the right of access to public information have to be applied. In fact, with regard to the treatment of confidential information, the CPC is constrained by the rules on the right of access to public information because such rules do not recognise exception stipulated by the Law on the Protection of Competition as exception to the right of access. The law governing free access to information of public importance and transparency practices are therefore significant barriers to treatment of confidential information by the CPC.

2. Issues of confidentiality of information

8. In the course of performing its competences under the Law, the CPC uses its power in particular to obtain business information on firms (sales, output, imports, exports, price lists and general terms of sale) or details on agreements, contracts or other internal documents. This information comes from a variety of sources, including complainants, competitors, suppliers and customers. Therefore, the CPC comes into possession of significant amounts of undertakings' confidential and commercially sensitive information, principally through the use of power to request information.

9. Given the significance of submitted information and the essential role of requests for information as investigative tools, the CPC acknowledges that undertakings may have a strong interest in the confidentiality of information that is produced to the CPC as a part of an investigation. It is therefore important that in this process the CPC must have at its disposal effective means for protection of submitted information in order to ensure a high level of confidentiality.

10. In order to protect confidential information and business secrets, the recipients of a request for information have a right to claim confidentiality for information contained in their submission. Under Article 45 of the Law, at the request of a party in the procedure, the applicant of the initiative for investigation of a competition infringement or the third party who has submitted or made available the requested information in the procedure, measures on protecting the source of information or specific data (protected data) may be determined, if it is evaluated that the interest of that applicant is justified and substantially more important than the public interest in terms of the subject of the request. The applicant of the said request is obligated to present the possibility of substantial damage plausible due to the disclosure of the source of information that is, information specified in the request. In addition, protected information does not have the status of information of public importance in terms of the law governing free access to information of public importance.

11. Consequently, the information or documents that are not requested to be treated as confidential are accepted as non confidential and may have the status of information of public importance. In practice, the CPC states and advises the undertakings on claiming confidentiality and consequences of failure to make such a claim.

12. Therefore, undertakings must request confidentiality from the CPC in writing and justify their reasons for the confidentiality of the information or documents that are requested to be treated as business secrets or other confidential information. In order to claim confidentiality, undertakings need to provide a non-confidential version of such documents in which they blackout the information considered confidential. If the CPC decides to accept the request for confidentiality, it will make available only non-confidential version of the documents that it has obtained during the course of its investigation, as part of the “Access to file” procedure (including access to an electronic version of all documents contained in the CPC’s file). In addition, the CPC will conceal confidential information from public version of its decision and in the related publications and will not disclose it publicly in terms of the rules on the right of access to public information.

13. However, at the same time, the regulation on transparency and the right of access to public information, including the practice of the Commissioner for Information of Public Importance and Personal Data Protection (hereinafter the Commissioner),² gives cause for concern in terms of handling confidential information based on how the Commissioner treated such information in the procedures for exercising the right of access to public information. Hence, the CPC faces the confidentiality issues vis-à-vis third parties and the public at large because the Commissioner rules as the authority of second instance on individual complaints relating to violations of the freedom of information.

² The Commissioner’s mandate is to protect and promote the right to free access to information of public importance and the right to personal data protection, and to supervise the lawfulness of personal data processing by public authorities and all other entities that process personal data.

14. When it comes to practice of the CPC with regard to requests to exercise the right of access to public information, the Commissioner mostly acts upon complaints for violation of the rights of access to information, in order to determine if such information may or may not be made available upon such requests. The CPC still receives requests to access to information claimed as confidential but it refuses to disclose protected confidential information because, under Article 45 of the Law, protected information does not have the status of information of public importance. In order to justify its refusal, the CPC therefore relies on the exception to the right of access explicitly laid down in the Law.

15. However, the Commissioner disclaims the CPC's argumentation noting that such exception is not stipulated by the law governing the right of access to public information. Its reasoning is as follows – limits on the access to public information must be imposed only by the law governing a general right of access. The Commissioner also demands that the CPC apply the so-called harm and public interest test, which is necessary for determining the overriding interest – whether it is the public's right to know or the interest to protect another right or public interest that is protected as secret and that could be seriously jeopardised through disclosure of information. In addition, in the most recent procedures for exercising the right of access to public information it can be seen how the Commissioner treated information that the CPC protected as confidential. For example, regardless of competition rules on confidentiality and the CPC's decisions on confidentiality of information, the Commissioner has so far requested by its binding decisions from the CPC the perusal and disclosure of the confidential information requested by the applicants. Finally, before the Constitutional Court of the Republic of Serbia, the Commissioner instituted proceedings for an assessment of constitutionality of Article 45 of the Law.

16. From the above given, the question that arises in the CPC's practice is whether the disclosure of confidential information in accordance with the Commissioner's request would undermine the effective enforcement of the Law by the CPC and the importance of protecting information that the legislature and the legal system sought to guarantee. The Commissioner's request to disclose confidential information goes hand in hand with the CPC's guarantee of increased protection of confidential information. If persons other than the undertakings involved in competition proceedings were able to obtain access to protected confidential information on the basis of the general rules on the right of access to public information, the scheme instituted by the rules on protection of competition could collapse. Confidentiality protections are absolutely necessary for the protection of the legitimate interests of undertakings and to ensure its cooperation with the CPC during investigations because without such protection the CPC cannot effectively use requests for information.

17. The CPC hence needs to foster a reputation for respecting confidentiality to ensure the continued supply of information from undertakings and third parties. This is particularly important in the context of protection of confidentiality of the leniency applicant statements which is commonly seen as a cornerstone of leniency regimes. This means that the CPC must protect as much as possible the confidentiality and reputation of the investigated parties, as long as it does not interfere with the CPC's duty to respect the rules on transparency. This is not to mean that the CPC wants to keep certain information "secret" or to abuse its investigative powers and deny the right of access to public information.

18. The CPC constantly seeks to prevent overly broad confidentiality claims and to resolve the systemic tension between broader public access to confidential information and the confidentiality rules that apply to information obtained by the CPC during its investigations. This tension is compounded by the important role that confidential information can have in competition proceedings which means that the proper protection

of confidential information is directly relevant for effective use of the requests for information whether the request relates to an ongoing or closed investigation. The CPC also has a statutory duty to conduct its investigations in private and to maintain the confidentiality of information it receives pursuant to the Law in terms of the rules on professional secrecy.

3. Conclusion

19. It may be concluded from the foregoing that the general right of access to public information must yield whenever the refusal to disclose submitted information is supported by a supreme and justified interest of confidentiality, whether it is or not stipulated by some specific law provisions. The general right of access to public information could be disabled by the standard interpretative tool of *lex specialis derogat legi generali* in order to keep that information confidential.

20. The CPC also advocates that it would be a welcome clarification to the rules governing the right of access to public information to provide exceptions that protect confidential information obtained in competition law enforcement contexts from disclosure. The CPC recommends such a clarification, particularly, having in mind similar examples from the best comparative practice and increasing reliance on large amounts of complex information and internal documents obtained by using the requests for information.

21. This solution would be also in line with the ICN Guidance on Investigative Process which acknowledges that respecting confidentiality is important to ensure continued cooperation and the submission of information from parties and third parties during investigations. Subsequently, any legal framework for competition law enforcement should include protection of confidential information submitted during investigations, covering not only disclosures to parties and third parties, but also to the public.