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The Promotion of Competitive Neutrality by Competition Authorities

Competitive Neutrality in Serbian Competition Law[1]

– Contribution from Serbia –

1. Introduction

1. Competitive neutrality is a concept of high importance for the Republic of Serbia. It is recognised in the Serbian Constitution, which guarantees the equal treatment of all undertakings, irrespective of whether they are publicly or privately owned, either by a national or foreigner. The principles of competitive neutrality are enshrined in Articles 82, 84 and 86 of the Constitution, which state that the economic system in Serbia is based, among others, on equality of private and other types of assets; everyone has equal legal status on the market; foreign persons are treated equally on the market; and all types of assets have equal legal protection (Constitution of the Republic of Serbia, "Official Gazette of the RS", 98/2006). The Constitution also stipulates that acts, which are contrary to the law and restrict free competition by the creation or abuse of a monopolistic or dominant status, are strictly prohibited.

2. The neutrality principle is also reflected in the application of the Law on Protection of Competition ("Official Gazette of the RS", 51/09, 95/13), which mandates the Commission for Protection of Competition of the Republic of Serbia (hereafter, Commission) to take action to ensure competition in the national market, both in the context of enforcement and advocacy. Therefore, the fundamental role of the Commission is to ensure a level playing field between all undertakings, meaning that Serbian competition law is an important tool for dealing with competitive neutrality problems. In general, Serbian competition law is neutral in terms of both the ownership and nationality of undertakings.

2. Application of the competition rules to state-owned enterprises

3. The most basic step in enabling undertakings to compete on an equal footing is the equal application of competition rules to both state-owned enterprises (SOEs) and private enterprises in order to ensure that no business entity is advantaged (or disadvantaged) solely because of its ownership. In line with Article 3, the Law on Protection of Competition applies to all undertakings, including: 1) domestic and foreign companies and entrepreneurs; 2) state authorities, bodies of territorial autonomy and local government; 3) other natural and legal entities and associations of undertakings (unions, associations, sports organisations, institutions, cooperatives, holders of intellectual property rights, etc.); 4) public enterprises, companies, entrepreneurs and other undertakings that perform activities of public interest, or those that have been given a fiscal monopoly through an act

[1] Prepared by Ivana Rakić, PhD (Commission for Protection of Competition, Republic of Serbia, Institute of Comparative Law in Belgrade, Serbia). The usual disclaimer applies.

of the competent state authority, unless the implementation of this Law would prevent them from performing these activities or delegated tasks.

4. In addition to the above, since 2008, the Republic of Serbia and its competition law have been formally exposed to the influence of the EU acquis, including the relevant case law, because, under the Stabilisation and Association Agreement with the EU (hereafter, SSA), Serbia has formalised its commitment to gradually approximate and harmonise its legislative framework with that of the EU. The SAA, among other things, imposes an obligation upon Serbia to treat designated monopolies and state-owned enterprises in such a way as to ensure a level playing field to the extent practicable. Thus, Article 74 requires that public undertakings and undertakings to which special and exclusive rights have been granted are subject to competition law, expressly referring to Article 106 of the Treaty on the Functioning of the European Union.

5. Consequently, when assessing the conduct of SOEs, the Commission does not distinguish between SOEs and other firms when applying rules concerning restrictive agreements, abuse of dominance and merger control to firms in all sectors of the economy, and when using the range of its investigative and repressive powers.

6. The Commission has dealt with numerous cases of enforcement of competition rules to SOEs, with a great experience with mergers where SOEs where one of the merging parties, in particular in the context of privatisation. But, in Serbian Competition law there is no public interest clause. The weight of the SOEs is still relevant in the Serbian economy, especially in the public utilities sector at a local level. The reasons for this are that they are often significant market participants, they hold a monopoly or they have emerged from former monopolies in key sectors of the economy (e.g., energy, railways, telecommunication, postal services, public utilities, etc.).

7. CPC had few cases on abuse of dominance and all cases ended with commitments - energy sector, thermal energy supply services, railways and telecommunications. These cases illustrate the risk that SOE incumbents try to keep a tight hold on their market. For example, Railway case was case against Joint Stock Company “Serbian Railways” who was the only company running the railway traffic in Serbia and was accused for not providing access and use of rail infrastructure to other undertakings interested in carrying out railway transport services. By fulfilling commitments and prescribed obligations, “Serbian Railways” enabled access and use of rail infrastructure to other undertakings that fulfil necessary preconditions, where the effective competition on the relevant market of rail infrastructure management is established.

3. Application of the competition rules in the context of the economic crisis and declining markets

8. Application of the competition rules in the context of the economic crisis and declining markets represents an additional challenge for the Commission. There is a need to maintain the level playing field as one of the tools to path the way to economic recovery, as it was the case after the 2008 financial crisis or should be the case in the age of a current coronavirus disease (COVID-19). In this sense, although not directly addressing the point, the Commission is aware of that the application of principles of competitive neutrality by competition law should not be mitigated.

9. A question arises as to whether the competition policy and its requirements should possibly be relaxed since the financial and economic crisis may place a large number of firms in financial distress. From the standpoint of the Commission, there are no exemptions to Serbian competition rules, that is a position very much in line with comparative practice,

even in times of crisis. The Commission applies the competition rules strictly independently of economic crisis and declining markets.

10. For instance, despite the economic crisis, in the course of 2008 and 2009, the Commission did not review a number of mergers directly associated with the financial and economic crisis. The Commission has received one merger notification referring to the crisis, including arguments raising the issue of the failing firm defense. In that case, the Commission considered that failing firm defense criteria should not be relaxed in times of crisis and did not accept failing firm argument.[2]

11. To conclude, the economic crisis and declining markets do not directly affect the criteria of the failing firm defense in merger control. The Commission does not favor a more lenient approach to the failing firm defense or more generally a more lenient SIEC test, particularly does not distinguish between SOEs and other firms when applying these criteria and test.

4. Competition advocacy activities

12. In addition to its enforcement work, the Commission promotes the principle of competitive neutrality in its advocacy work, as a complementary method of dealing with such issues. In instances when a decision by the government or legislator favoured an SOE over its competitor from the private sector, the Commission has the opportunity to recommend changes in legislation and sub-statutory regulation in the field of economic activity performed by those SOEs.

13. According to the Law on Protection of Competition, the Commission has at its disposal different means to deal with the issue of competitive neutrality depending on the particular case in question. However, the variety of advocacy instruments suggests that there is no one best advocacy technique to create a competitive environment and improve the overall quality of legislation. This paper focuses on the part of the advocacy experience of the Commission related to competitive neutrality.[3]

14. In line with the Article 21 of the Law, the Commission is authorised to:

- take part in the preparation of regulations enacted in the field of protection of competition;
- propose to the Government passing regulations pertaining to the implementation of the Law;
- issue instructions and guidelines for implementation of the Law;
- monitor and analyse competition conditions in individual markets and sectors;
- give opinions to competent authorities on draft regulations, as well as on current regulations that have an impact on market competition;
- give opinions regarding implementation of regulations in the field of protection of competition;

[2] See www.kzk.gov.rs/kzk/wp-content/uploads/2011/08/lufthanza.pdf.

[3] For more information on the Commission's advocacy activities, see Ivana Rakić, "The Role of Competition Advocacy: The Serbian Experience", in: Begović B., Popović D. (eds) *Competition Authorities in South Eastern Europe. Contributions to Economics*, Springer, 2018, 111-132.

- establish international cooperation in the field of protection of competition, for the purpose fulfilling international obligations in this area, and collect information on the protection of competition in other countries;
- cooperate with national, provincial and local authorities in order to ensure implementation of the Law and other regulations that regulate issues of importance to the protection of competition; and
- undertake activities to raise awareness on the need to protect competition.

15. The Commission can thus exercise competition advocacy through assessment of the compliance of draft legal acts and legal acts in force with the principles of the competitive environment for economic activities, as well as through proposals to competent state authorities to revise their restrictive acts. Opportunities for discovering advocacy are numerous: government and ministries can consult the Commission before issuing laws or regulations (based on prior working relationships or prior considerations of competition issues or particular concerns); the Commission can undertake competition screening of legislation or legislative proposals on its own initiative, as part of conducting enforcement activities or investigating individual markets/sectors, or based on information from third parties, etc.

16. In the area of competition impact assessment, the Commission is authorised to give opinions to competent authorities on draft regulations, as well as on current regulations that have an impact on market competition. It can carry out such assessments at the request of the relevant state authorities, on its own initiative, or based on information from third parties. The assessments mostly focused on mapping administrative authorization proceedings and granting exclusive rights that may result in barriers to entry, as well as evaluating other restrictions with regard to market access. The Commission has no jurisdiction on state aid.

17. However, the Commission does not have a legal mandate to intervene against anti-competitive state actions and prohibit certain practices because Commission's advocacy opinions are not binding for the competent state authorities, including regulators. Moreover, competent state authorities are not obliged to explain the reasons for their decisions if they diverge from the Commission's opinions, although in practice they usually provide an explanation. The law allows them to decide whether to conform to the Commission's opinions or not, or to conform to it only to a certain extent.

18. The possibility of issuing binding opinions would be an effective way of extending influence, but it would also effectively create veto power and introduce distinctive incentives to the Commission and legislator, which could have adverse effects. At the same time, the law does not provide a basis for such binding opinions. Therefore, the success of this advocacy activity depends on the Commission's ability to influence relevant authorities whether its opinions are considered in the regulation and policy making activity of the authority concerned, or to ensure sufficient political support. At any rate, the Commission should be able to assess legislation before it is introduced because policymakers are then more likely to conform, and ex post assessment, i.e., reviewing existing laws, is less effective than reviewing draft legislation.

4.1. Opinion on the Draft Law on Amendments to the Law on Public Utilities

19. In the meanwhile, the Serbian Commission has to use persuasion, rather than coercion, to provide political support and convince the government to enhances consumer welfare and choice. One such situation followed the adoption of the Law on Amendments to the Law on Public Utilities when the Commission issued the Opinion on the Draft Law on Amendments to the Law on Public Utilities.

20. The Commission stressed the importance of providing equal conditions for all undertakings in the public utilities market, and in this context drew attention to the negative effects of the creation of a statutory monopoly. It expressed concern that the Ministry of Construction, Transport and Infrastructure opted for solutions that would further limit the potential for competition in the public utilities market and noted that only competition between competitors, through quality and price, can lead to economic progress and the well-being of society, especially for the benefit of consumers. Due to good media relations the result was successful.

21. The Ministry eventually accepted the comments and suggestions of the Commission, expressed in the Opinion and amended the Draft Law. In the final version of the Draft Law, the Ministry also included the Commission's suggestions that certain services that can be performed independently and are related to the utility services, be clearly defined as commercial services (e.g. burial service) that can be provided by registered enterprises, under equal conditions, and not exclusively by public companies or companies in which the Republic of Serbia or local authorities own a minimum 51% stake.

4.2. Advocacy with local authorities

22. Promoting competitive neutrality throughout the country is a difficult task for the Commission because achieving this aim requires it to encourage negotiations at the local, i.e. municipal level and to obtain additional political support, as well as to increase the awareness and knowledge of competition principles. Furthermore, economic reforms in Serbia, like in other developing and transition countries, often result in ownership of communal service facilities (assets) by local authorities which causes a conflict of interest in situations where the local authority is also entitled to adopt decisions regarding those facilities. Under competition law, in such cases, the Commission cannot legally intervene, through enforcement, against the local authorities and their decisions. Thus, competition advocacy is the only tool that can be used to change such anticompetitive practices and achieve competitive neutrality.

23. The Commission nonetheless succeeded in influencing some local authorities to change their policies on providing utility services of burial and cemetery management in order to enable the provision of certain burial services to all interested parties, i.e. not only to the public utility company, but also other companies, entrepreneurs, and business entities.

24. Following analysis of the initiative for the assessment of possible competition infringements, the Commission sent opinions to the assemblies of the City of Novi Sad and the City of Pančevo in which it stressed the necessity for the amendment of provisions of their decisions regulating burial and cemetery management utility services, in order to prevent the distortion of competition and the creation of monopolies for the public utility companies in those cities. The assemblies of both the City of Novi Sad and the City of Pančevo positively reacted and informed the Commission that they had drafted amendments to modify the provisions of the disputed decisions regulating public utility burials and cemetery management services, which they would be adopting.

4.3. Competitive neutrality in the context of public procurement

25. The Republic of Serbia also faces the challenges in the public procurement sector considering the strong interface between the public sector procurement (or the state) and private sector (or the market).

26. In order to develop best practices rules for public procurement, the Commission adopted the Instructions for Detecting Bid Rigging in Public Procurement Procedures (in line with the OECD Guidelines for fighting bid rigging in public procurement), whereby allowing the Commission to require assistance of the Public Procurement Office. The Instructions are directed mainly to the contractors of public procurement procedures, and are published on-line by the Commission and the Public Procurement Office. The Commission also releases Serbian translation of the OECD Guidelines for Fighting Bid Rigging in Public Procurement and the Recommendation of the OCED Council on Fighting Bid Rigging in Public Procurement. These documents (also published online) offer a comprehensive overview of potential strategies employed by contracting authorities to prevent bid rigging by one or more bidders.

5. Market studies

27. Market studies provide the Commission with an in-depth understanding of the functioning of the market and its structures (number of players, barriers to entry, substitute markets, etc.). Therefore, it helps carry out more effective advocacy activities, especially when they are carried out in conjunction with regulators and through public consultations.

28. The Commission uses market studies as an advocacy tool, with the clear objective of carrying out an effective advocacy program, pursuant to the Law on Protection of Competition. The Commission is authorised to monitor and analyse conditions of competition in individual markets and in individual sectors, as well as to analyse the state of competition in a particular sector of the economy or certain categories of agreements in various industries (sectoral analysis) in cases where the price dynamics or other circumstances suggest the possibility of restriction or distortion of competition (Law on Protection of Competition, Art. 21. and 47).

29. Concerning the legal mandate to use market studies, there is interesting example of study that is done in cooperation with the World Bank. It is The Sector Inquiry into the Rail Freight Transport Market in the Republic of Serbia. The subject of the inquiry is the market for cargo transportation by railway, providing an in-depth analysis of the competition environment of this market along the value/supply chain, market structure and dynamics, regulatory environment and market performances, in addition to identifying practices and rules that can distort the level playing field and facilitate non-competitive market outcomes.

30. The inquiry found no material elements that would indicate an infringement of the competition rules, but some recommendations were carefully designed in order to change regulation to ensure more competition on the freight market. The main reasons for insufficient market development established in the Commission’s Report are as follows: low quality of rail infrastructure, outdated train path allocation procedures, and the lack of intermodal transport terminals, constituting substantial barriers to entry and business growth.

31. It is established that the cargo transportation market in the Republic of Serbia is still in the early stages of development since it is open to competition only since 2016 which is connected with the previously mentioned Railways case. As one of the reasons for such suboptimal situation, the authors also state the domestic price regulation policy in force, noting that the fixed tariffs for national transportation services as provided by the Government of the Republic of Serbia hinder price competitiveness.

6. Cooperation with sector regulators

32. In the coming years, as the sector regulators in Serbia also become experienced in regulating the relevant markets, the success of competition advocacy could depend on the Commission's cooperation with regulators. The Commission should more actively influence regulators to create a competitive environment in the regulated markets, particularly in markets such as telecommunication and energy.

33. The Commission constantly undertakes activities to ensure continuous dialogue and provide an information exchange system with regulators and other state authorities in order to develop competition in the market. This cooperation with the regulators is covered by signed protocols of cooperation during previous years (National Bank of Serbia, Energy Agency of the Republic of Serbia, Regulatory Agency for Electronic Communications and Postal Services of the Republic of Serbia, Regulatory Authority for Electronic Media of the Republic of Serbia). It is, in Commission's view, assessed as useful, primarily in the case of data exchange, but also in exchanging opinions on all current topics and proceedings conducted before the Commission or other authorities and institutions. It provides the possibility to use market analyses and other studies and findings by regulators, to obtain new sources of information and new initiatives, exchange information, etc.

7. Building public awareness of competition neutrality

34. The Commission consider very important to create public awareness about competition and explain the benefits of open competitive markets to the public. This would include dissemination of information on competition law to enterprises, particularly widespread adoption of knowledge about the effects of non-competitive market structures and behaviour. However, the Commission should be aware that it might take a long time for such efforts pay off, thereby it should continue its competition advocacy efforts.

35. Therefore, the Commission conducts advocacy activities also through select communication means (seminars, working groups, business meetings, articles in magazines), through the media (e.g. radio and TV broadcasts, newsletters, electronic media), publication of guidelines and reports, on its website, and other tools— video, social networks, etc.

36. Guidelines and reports are published on-line, such as the Annual Report of Commission (in which there is a part devoted to competition advocacy activities) and the Commission's opinions on drafts and current regulations affecting competition in the market. All decisions enacted by the Commission in the proceedings instituted on submitted notifications or ex officio, are also available to experts and the general public, via the website.

37. To conclude, it is difficult to make the promotion of competition policy consistent due to the fact that competition advocacy faces a number of challenges and changes caused by political and economic developments. The nature of the Commission's competition advocacy has changed over time, shifting from advocating general competition issues and increasing public awareness of the benefits of competition, towards playing an increasingly important role in special sector industries. During its formative stage advocacy activities were used to inform stakeholders of the existence of the competition law and policy and to provide opinions in the domain of privatisation. As time passed, advocacy evolved further, towards carrying out activities related to sector regulation and other policies, and being more active in competition advocacy and strengthening its role in building public confidence in competitive markets.