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Contribution from Serbia**

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Interactions between Competition Authorities and Sector Regulators

– Contribution from Serbia¹–

1. The institutional design and scope of competencies of competition authorities, as well as sectoral regulators, around the world vary. While the legal framework of a particular country sets the boundaries in which cooperation and interaction between them can play out, the quality and the dynamics of such interaction further depend on practical matters, such as the political and socio-economic conditions and climate within the country, the approach of the relevant institutions to mutual cooperation and the tools which have been developed to that end.

2. Inherent to sectoral regulation is the limitation on the free conduct of the market and its participants, which could hinder competition. In order to alleviate such potential effect, sectoral laws often proclaim that regulation is to be based on the principle of competition and/ or that it ought to ensure effective market competition. At the same time, the goal of competition protection is economic progress and welfare of the society. It is this overarching need which creates space for mutual cooperation and interaction between competition authorities and sectoral regulators. However, the means available to them to reach the respective goals of competition protection and sectoral regulation are very different. Sectoral regulation tends to be based on the ex-ante principle while competition law enforcement occurs ex-post. Also, while regulatory authorities may possess more information and knowledge about a particular sector of the economy, the competition authorities are better placed to analyse such information in the context of application of competition rules. For this reason, cooperation between competition authorities and sectoral regulators and a certain level of synergy between their actions is desirable, if not proclaimed by the laws.

1. Serbian Competition Authority

3. In the Republic of Serbia, there is an independent and autonomous competition authority, which applies competition rules, pertaining to antitrust and concentrations, in all sectors of the economy. This is the Commission for Protection of Competition of the Republic of Serbia (hereinafter: the **CPC**), founded by the Law on Protection of Competition from 2005² (*“Official Gazette of the Republic of Serbia”*, No. 79/05) and operational since 2006³.

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² Prior to 2005, an Antimonopoly Commission existed based on the provisions of the Antimonopoly Law from 1996. However, the aforesaid Commission was not an independent competition authority in the present sense.

³ 2006 was also the year in which the new Constitution of the Republic of Serbia (*“Official Gazette of the RS”*, no. 98/2006 and 115/2021) was adopted and created preconditions for the introduction

4. The Law from 2005 was a modern law in the field of competition, following many of the solutions existing at the time in the European Union. According to that Law, the CPC was granted public competencies and made accountable to the National Assembly of the Republic of Serbia. The independence of the CPC from the executive power was secured both through the prescribed manner of election of its bodies (the President of the Commission and the members of the Council) by the National Assembly and through financial independence of the Commission (financed from its own revenues).

5. Those main pillars of functioning of the CPC have been retained in the law which is currently in force, the Law on Protection of Competition from 2009, with amendments from 2013 (*"Official Gazette of the Republic of Serbia"*, No. 51/2009 and 95/2013, hereinafter: **the Law**). This Law and its amendments were adopted for purposes of further harmonisation with the EU acquis, but also in order to introduce some improvements to the procedural framework for application of competition rules and address the remarks from the EC Progress Report for Serbia for 2012.

6. According to the Law, the **goal of protection of competition** is the achievement of economic prosperity and well-being of the society, especially for the benefit of the consumers (Article 1 of the Law). Its territorial application is based on the "effect principle", i.e. the Law applies to those acts and practices which affect or could affect competition on the territory of the Republic of Serbia, whether they take place on its territory or outside (Article 2). When it comes to personal application rules, the Law applies to all natural and legal entities which (directly or indirectly, permanently, temporary or on one-term basis) participate in the trade of goods and services, regardless of their legal status, ownership, citizenship or state affiliation (Article 3). This includes domestic and foreign undertakings, associations of undertakings, but also state authorities, territorial autonomy and local self-government bodies, and public enterprises and other undertakings which perform activities of public interest (unless the implementation of the Law would prevent them performing these activities or delegated tasks).

7. The competencies of the CPC, which enable it to fulfill its mandate, are listed in Article 21 of the Law. Among them are the "core" competencies of the CPC to decide on the rights and obligations of undertakings and impose administrative measures upon them in proceedings for establishing competition infringements and assessing concentrations.⁴ In the context of cooperation with sectoral regulators, the competency of the CPC listed in Article 21, par. 1, item 10 is particularly relevant: **the CPC can cooperate with state authorities, as well as territorial autonomy and local self-government bodies, in order to create conditions for the implementation of the Law and other general legal acts which regulate matters of importance for protection of competition.** Furthermore, in line with Article 49 of the Law, the CPC may submit a **request for information** to other state bodies and organizations. Such requests of the CPC have an obligatory nature in that the requested organizations have a duty to cooperate and act upon the request within the time set, by providing information, documents or other requested evidence they possess, or providing a reasoned statement on the subject matter of the request.

of a market economy by, *inter alia*, guaranteeing free competition within the Serbian market. The backdrop of the adoption of the new competition law, as well as the new Constitution were important changes in the name and administrative-territorial organisation of the country (from a union of Serbia with Montenegro to a single state), as well as a continued commitment toward joining the European Union.

⁴ Competition infringements are generally forbidden by the Law, whereas concentrations are allowed, unless they would significantly restrict, distort or prevent competition on the Serbian market or its part.

8. In addition to the above stated, the Commission also has a competence to **issue opinions** to competent authorities on draft laws and regulations, as well as current laws and regulations, which affect competition on the market (Article 21, par. 1, item 7). Since those opinions are not obligatory for the institutions and bodies they are addressed to, in practice they are often used by the CPC to advocate for more pro-competitive laws and regulations, which are proposed by sectoral regulators, line Ministries or other public bodies and organizations competent in certain sectors of the economy. Furthermore, the CPC is entitled to issue opinions on the implementation of competition rules (Article 21, par. 1, item 8).

9. It can be seen from the above that the Law on Protection of Competition entitles the CPC to apply competition rules across all sectors of the economy and to a wide range of natural and legal persons, so long as their acts and practices affect or could affect competition on the territory of the Republic of Serbia. Thus, no particular sector is singled out and placed in the hands of a sectoral regulator when it comes to the enforcement of competition rules.

10. In carrying out its mandate of protecting competition on the Serbian market from acts and practices of market participants which have or could have as their goal or effect significant restriction, distortion or prevention of competition (competition infringements and anti-competitive concentrations), the CPC has at its disposal a wide array of tools. **Those tools include cooperation with sectoral regulators through memoranda/protocols on cooperation, requests for information and issuance of opinions on draft or existing laws and regulations they propose.**

2. Serbian sectoral regulators

11. Sectoral regulators are state authorities founded in order to administer and regulate sectors of particular social and economic importance, such as energy, transport, financial system, media and communications, etc. In line with developments in Europe and the USA related to economic liberalization, deregulation and decentralization over time, their development has gone in the direction of greater level of independence from the executive power. As part of that process, the practice of adopting separate laws which form the basis of foundation of a special regulatory agency and endowing them with public competencies has become quite common. Nonetheless, although a necessary legal prerequisite for at least some level of independence, such practice does not always lead to elimination of political influence on those agencies.

12. In the Republic of Serbia, there are sectoral regulators in the fields of energy, financial system, telecommunications, etc. Additionally, there are other agencies endowed with public competencies, which have been founded for specific purposes, such as preventing corruption, which is a horizontal issue pervading all economic sectors.

13. According to the Energy Law ("Official Gazette of the RS", no. 145/2014, 95/2018- other law and 40/2021), **the Energy Agency** is an autonomous legal entity, independent from the executive branch. It is founded as a regulatory body with the aim to improve and direct the development of the electricity and natural gas market on the basis of principles of non-discrimination and efficient competition, through the creation of a stable regulatory framework, as well as for the performance of other activities defined by the Law.⁵ **The Energy Law also expressly provides for cooperation of the Energy Agency with the Commission for Protection of Competition.** According to Article 64 of the Law, in discharging its duties, the Energy Agency shall cooperate with state and other

⁵ See Article 38 of the Law.

bodies and organisations, consumer protection associations, **the organisation dealing with matters of competition protection** and other regulatory bodies in the Republic of Serbia and abroad. Furthermore, the Energy Agency and the CPC shall continuously exchange information and data with the aim of improving and directing the development of the electricity and natural gas market on the basis of principles of non-discrimination and efficient competition. The Agency also has a duty to notify the competition authority, immediately upon becoming aware and without delay, of an agreement which limits the right of a buyer (who does not have the right to guaranteed supply) to enter into simultaneous agreements with more than one supplier or their choice of suppliers.

14. The Law on the National Bank of Serbia (“Official Gazette of the RS”, no. 72/2003, 55/2004, 85/2005- other law, 44/2010, 76/2012, 106/2012, 14/2015, 40/2015- decision of the Constitutional Court and 44/2018) prescribes that **the National Bank of Serbia (NBS)** is autonomous and independent in carrying out its tasks envisaged by the law and is accountable to the National Assembly for its work, which exercises oversight over it. The primary goal for which the NBS has been founded is the achievement and maintenance of price stability. The secondary goal is the maintenance and strengthening of the stability of the financial system. Thereafter, but without prejudice to the first two goals, the Law prescribes that the NBS shall support the execution of economic policy of the Government of the Republic of Serbia, while operating in accordance with the principles of a market economy. **When it comes to cooperation with the competition authority, there are no express provisions in the relevant sectoral law, like in the case of the Energy Agency.** Nonetheless, Article 10 of the Law on the National Bank of Serbia envisages that in the performance of its tasks, the National Bank of Serbia shall cooperate with the Government **and other state bodies.**

15. **The Regulatory Agency for Electronic Communications and Postal Services (RATEL)** has been established by the Law on Electronic Communications (“Official Gazette of the Republic of Serbia”, no. 44/2010, 60/2013, 62/2014 and 95/2018- other law), which defines the agency as “an autonomous regulatory organization with the status of a legal entity, which exercises public competencies with the aim of effective implementation of the policy set in the area of electronic communications, **spurring competition in electronic communication networks and services**, enhancing their capacities and/or quality, contributing to the development of electronic communications market and protecting the interests of electronic communications service users...”. Furthermore, the Agency is defined as functionally and financially independent from state authorities, as well as organizations and persons performing electronic communication and postal service activities. At the same time, the Agency is under the supervision of the line Ministry (Ministry of trade, tourism and telecommunications), in terms of lawfulness and appropriateness of discharge of its entrusted tasks. **When it comes to cooperation with the competition authority, the Law on Electronic Communications (Article 8, par. 1, item 3) contains an express provision that the Agency ‘shall cooperate with bodies and organizations competent in the fields of broadcasting, competition protection, consumer protection, personal data protection and other bodies and organizations on issues relevant to the field of electronic communications’.** Also, in line with Article 60 of the Law, the Agency conducts the analysis of relevant markets at least once in three

years and, if necessary, additional analysis of other markets, while taking into account the European Union recommendations on market analysis and determination of significant market power. In this process of market analysis, the Agency is obliged to cooperate with the competition authority. The Law on Electronic Communications contains numerous other provisions where competition plays an important role, such as in the case of determining a market which is susceptible to ex-ante regulation, as prescribed by Article 59.

16. The Law on Electronic Media (“Official Gazette of the Republic of Serbia”, no. 83/2014, 6/2016- other law and 129/2021), by way of which the **Regulatory Authority for Electronic Media (REM)** has been founded, defines the authority as “an autonomous independent regulatory organization with the status of a legal entity, which exercises public competencies with the aim of effective implementation of the policy set in the area of provision of media services in the Republic of Serbia, the improvement of quality and diversity of electronic media services, contribution to preservation, protection and development of the freedom of thought and expression, in order to protect the public interest in the field of electronic media and protection of users of electronic media services...” (Article 5). Among the competencies of REM set out in Article 22 is its competency **to cooperate and coordinate its work with** the authority in charge of electronic communications and **authority in charge of competition protection**, as well as other regulatory authorities in accordance with that Law (Article 22, par. 1, item 18). The express cooperation provision is also contained in Article 27, par. 2 of the Law on Electronic Media, which envisages that REM cooperates with bodies and organizations competent in the field of public informing, electronic communications, **competition protection**, consumer protection, etc. **Further still, the pertinent Law envisages cooperation with the Serbian competition authority when REM performs analyses of the relevant media market** (Article 22, par. 1, item 16) or **when REM establishes the Proposal of a strategy for development of radio media services and audio-visual media services in the Republic of Serbia for a period of 7 years** (Article 23). The Law also includes other provisions where competition rules are relevant.

17. In addition to the above, there are other relevant public authorities and organizations in certain fields which the CPC cooperates with. This is the case, for example, with the Republic Commission for Protection of Rights in Public Procurement Procedures, Business Registers Agency and the Public Policy Secretariat. Nonetheless, as they are not regulatory authorities, they are not analyzed in this contribution.

3. Interaction between the Serbian competition authority and sectoral regulators

18. As has been illustrated in Section II above, the interaction between the CPC and sectoral regulators is often prescribed by law. In the practice of the CPC, this interaction is usually complemented by instruments, such as Protocols on cooperation, signed with sectoral regulators on a bilateral basis and representing a token of both parties’ mutual interest in enhancing their cooperation. In addition to the Protocols, the sectoral regulators and the CPC can exchange requests for information and assist one another in certain aspects of their own tasks and competencies. Furthermore, the CPC can issue opinions: 1) on draft and existing laws and regulations which affect competition on the market of the Republic of Serbia (when sectoral regulators act in their capacity of proposers of laws and regulations), 2) on the application of competition rules and 3) on other acts (i.e. acts which are not laws and regulations), such as draft reports and negotiating positions. Although legally non-binding, such opinions do carry weight, especially where cooperation with the

sectoral regulators has been developed and enhanced through other aforementioned means. Last, but not least, the staff of the CPC and sectoral regulators may partake in joint workshops and/or conferences, which is important for their interaction and exchange of knowledge through means which are less formal.⁶

3.1. Protocols on Cooperation

19. Since its founding, the CPC has adopted the practice of entering into bilateral agreements with other public authorities, including competition authorities from other countries and national sectoral regulators. Those agreements provide a framework for mutual cooperation and set out in detail different aspects of it, with the overall aim of achieving efficient cooperation and efficient implementation of the respective laws (Law on Protection of Competition and sectoral laws). For example, the Protocol on Cooperation between the CPC and the NBS was signed in 2008. Thereafter, the CPC has signed protocols with the Energy Agency in 2010, RATEL in 2011 and REM in 2017.

20. The common element of these protocols is that they envisage the exchange of information between the signatories, approximation of stances on matters of mutual interest and joint participation in activities which contribute to the affirmation of policies implemented by them. As a rule, the protocols also envisage meetings to be held at least once a year to discuss matters of mutual importance.

21. Another integral part of the protocols is the duty to notify the other signatory (unless prevented by material reasons envisaged by the signed protocols) of acts or practices which are relevant for the work and discharge of their respective tasks. By way of example, in accordance with the relevant Protocol, the CPC has agreed to notify RATEL, in case it establishes a competition infringement or attains knowledge about acts or practices which could constitute a competition infringement on the relevant market in the area of electronic communications, of that fact and submit information to RATEL which may be relevant for the discharge of its own tasks. In turn, RATEL has undertaken to submit to the CPC the information on potential competition infringements or other irregularities in the business conduct of operators, as persons performing activities in the field of electronic communications, which may be relevant for the discharge of the tasks of the CPC.

22. Some Protocols on cooperation go beyond the duty of the signatories to keep each other informed about the facts relevant for the other side, in that they envisage the possibility for them to participate jointly in proceedings for determining competition infringements. Namely, in case of doubt that a competition infringement has occurred on a (regulated) market and the relevant investigation proceedings have been initiated (by the CPC), the signatories may appoint designated staff who will contribute to the proceedings, provide all available information relevant for them and otherwise assist the other side in information gathering, delivery and handling.

3.2. Requests for information

23. Requests for information may be formal or informal, depending on their basis in a particular case (whether based on a certain legal provision or falling under the general

⁶ The CPC publishes a great deal of information on its website, including its annual Work Reports, the list of signed cooperation agreements (both international and national) and its opinions on draft or existing laws and regulations which affect competition on the Serbian market, as well as opinions regarding the implementation of competition rules.

cooperation framework) and on the level of interaction and cooperation between the authorities at stake. Even when the requests are formal, there is no prescribed form; instead, it is understood that they should be composed of clear and particularly targeted questions so as to enable the other institution to respond in the appropriate manner. As for deadlines, they are usually prescribed by the requesting party and are not preclusive, unless the requests are obligatory like in the case of a request for information which the CPC may submit to other state bodies and organizations in line with Article 49 of the Law on Protection of Competition.

24. Such requests of the CPC have an obligatory nature in that the requested organizations have a duty to cooperate and act upon the request within the time set, by providing information, documents or other requested evidence they possess, or providing a reasoned statement on the subject matter of the request. In case of failure of the party to whom the request is addressed to take timely, complete or any action, the CPC may inform accordingly the body which exercises oversight over it or to the body to which that party is accountable, and request the oversight body to take the necessary measures in order to collect the requested data. In case of a failure by that body (or the requested party) to cooperate, the CPC may publish information about it and in other words, exercise public pressure. This is in line with the nature of the requests for information and inter-institutional cooperation. Namely, they are meant to be voluntary means rather than the means of coercion.

25. It should be noted that in practice, requests for information are particularly important in the context of certain investigation proceedings conducted by the CPC or sector inquiries performed by the CPC in line with Article 47 of the Law. It is in this process that the regulators may be approached with a view to submitting data to the CPC which they possess by virtue of being the regulator of a particular market. This has been the case, for example, when the CPC performed the Sector inquiry into the insurance market of the Republic of Serbia for the period from 2012-2015. On that occasion, the NBS was requested to submit certain statistical data to the CPC and data on the particulars of the Serbian insurance market necessary for the completeness of the analysis. Similar requests for information remain relevant in the context of both sector inquiries and investigation proceedings conducted by the CPC, as may be necessary. The same is true the other way round, i.e. when observing the requests received by the CPC from the sectoral regulators.

3.3. Opinions of the CPC

26. In accordance with Article 21 of the Law on Protection of Competition, the CPC is competent to issue two main kinds of opinions:

- on draft and/or existing laws and regulations which affect competition on the Serbian market, and
- on the implementation of competition rules.

27. Both of these types of opinions are relevant in the context of CPC's interaction with the sectoral regulators. Their common element is that they are **not obligatory** for the institution they are addressed to. Thus, their level of "success" depends on the pre-existing level of cooperation of the CPC with the institution they are addressed to, their understanding of the matter (and competition rules in general) and the willingness of the sectoral regulator in question (regardless of the pre-existing cooperation) to take the opinion into account, thus, going forward.

28. The difference between these two types of opinions is that the first type is issued by the CPC when a sectoral regulator acts in its capacity of a proposer of a certain law or

regulation. The second type of opinions is issued by the CPC when there is a need to clarify the application of certain competition rules. This sometimes occurs at the request of a sectoral regulator, in which case it is in their interest to take the opinion into account. Thus, these two types of opinions have a different nature and the incentives of the institutions they are addressed to may be very different.

29. In the CPC's experience, its opinions are usually taken into account, but this practice could be improved, especially when it comes to the advocacy efforts of the CPC's opinions aimed at procompetitive or competition neutral laws and regulations. To that end, the CPC and the Public Policy Secretariat have developed a Competition assessment checklist, which is based on the OECD Competition Assessment Toolkit and designed as a tool to help other institutions, including sectoral regulators, to determine whether a certain proposal/draft law or regulation can distort competition on the market.⁷

30. In addition to two main types of opinions listed above, the CPC also issues opinions on other acts (draft reports of sectoral regulators, proposals of negotiating positions, etc.) when approached with the relevant request. One very recent example is the Opinion of the CPC on the Draft Report on Analysis of the Wholesale Market for Local Access to Network Elements, provided at a fixed location. This Opinion was issued by the CPC in December 2021, at the request of RATEL and as part of the public consultation procedure prescribed by Article 34 of the Law on Electronic Communications mentioned above. The opinion is available in the English language on the CPC's website, at the following link: <chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://www.kzk.gov.rs/kzk/wp-content/uploads/2022/06/Misljenje-Ratel-11.01.2022.-godine-eng.pdf>.

3.4. Participation in joint conferences and/or workshops

31. Participation in conferences and workshops on topics of mutual interest represents a less formal mechanism for interaction, but one which has proven very useful in certain instances. The experience of the CPC in this regard has been positive in the past, but has also been maintained, as much as possible, during the corona virus pandemic. The latter occurred mainly owing to the EU-funded Twinning project "Further Development of Protection of Competition in Serbia", which the CPC had been implementing with the Italian Competition Authority for a period of 2,5 years until July 2021. The aforementioned project included joint workshops on the interface between competition rules and sectoral regulation for the staff of the CPC and sectoral regulators, such as the NBS, RATEL, REM, the Energy Agency, but also other public Serbian authorities, such as the Commission for State Aid Control and Directorate for Railways. Furthermore, similar joint workshops have been held with the sectoral regulators under the auspices of the EBRD project, entitled "Capacity Building for the Serbian Commission for Protection of Competition". The topics of those seminars were chosen based on the relevant training-needs analyses of the sectoral regulators and were thus highly relevant for the participants. Going forward, the CPC hopes that there will be more instances of joint brainstorming and learning through such means, including with a potentially higher degree of personal contact, which is relevant in the context of developing and maintaining trust between institutions.

⁷ If, by using the checklist, such impact on competition is established, the proposal/draft law or regulation should be submitted to the CPC for an opinion. Starting from January 2021, the checklist represents an annex to the Public Policy and Regulatory Impact Assessment Handbook, published on the webpage of the Serbian Public Policy Secretariat.

4. Concluding remarks

32. Cooperation between competition authorities and sectoral regulators and a certain level of synergy between their actions is desirable, if not proclaimed by law.

33. In the case of Serbia, there is an independent competition authority (CPC) in charge of enforcing antitrust and merger rules against practices of market participants which affect or could affect competition on the territory of the Republic of Serbia. There are also sectoral regulators (Energy Agency, NBS, RATEL, REM, etc) set up with the task of administering and regulating key sectors of the economy, such as the financial markets, energy, telecommunications, etc. As has been shown above, mutual cooperation and interaction between the Serbian competition authority and sectoral regulators is often envisaged and mandated by law. Both the Law on Protection of Competition and numerous sectoral laws envisage cooperation between those public bodies as part of the general legal provisions on cooperation between state authorities/ authorities with public competencies. Some sectoral laws go further in that they envisage specific cases where cooperation of a particular sectoral regulator with the CPC is necessary.

34. However, recognising the need to enhance mutual cooperation and set out in detail the various aspects of it and achieve efficient implementation of the relevant laws, the Serbian competition authority and sectoral regulators have entered into agreements on cooperation, such as protocols. Those protocols find their application and validity in practice, even though the circumstances surrounding the corona virus pandemic have changed the quality and dynamics of this process, which may hopefully be restored going forward.

35. In addition to the protocols, the practical interaction between the CPC and Serbian sectoral regulators takes place via requests for information and opinions of the CPC on different types of acts. Those "tools" have remained equally important during the corona virus pandemic as in the period preceding the pandemic, due to their nature (delivered and responded to in writing). Yet another tool, generally considered of a more informal character, is the participation of the competition authority and sectoral regulators' representatives in joint seminars and conferences. This tool may have suffered the most in practice, but its continuity has been enabled through the switch of format from in-person to the hybrid and online one. The reason why this tool has suffered is that the change of format brought along a loss of spontaneity and direct interaction, which further created barriers in the flow of communication and the quality of brainstorming.

36. Despite some challenges, all the tools mentioned above remain important for the interaction between the Serbian competition authority and sectoral regulators. However, as all other types of interaction, it is a live and moving category, which depends not only on the legal framework and legal possibilities, but also the socio-political and economic circumstances of the time and the approach of individual institutions to mutual cooperation.