GLOBAL LEGAL INSIGHTS

Cartels

Enforcement, Appeals & Damages Actions

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Serbia

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Brief overview of the law and enforcement regime relating to cartels in this jurisdiction

The principal source of antitrust and competition law in Serbia, applicable to cartels in particular, is the Law on Protection of Competition ("*Official Gazette of the Republic of Serbia*", Nr. 51/2009 and 95/2013, hereinafter referred to as: the "**Law**").

Some important aspects of the antitrust enforcement regime in the area of cartels are additionally regulated in several governmental decrees and guidelines of the authority competent for the public enforcement of the Law – the Serbian Commission for Protection of Competition (in original Serbian wording – "*Komisija za zaštitu konkurencije*", hereinafter referred to as: the "**CPC**"), such as:

- the Decree on Setting of Competition Protection Measures and Procedural Penalties ("*Official Gazette of the Republic of Serbia*", Nr. 50/2010 – in original Serbian wording, "*Uredba o kriterijumima za određivanje visine iznosa koji se plaća na osnovu mere zaštite konkurencije i procesnog penala, načinu i rokovima plaćanja i uslovima za određivanje tih mera*");
- the Decree on Conditions for Immunity from Competition Protection Measures ("*Official Gazette of the Republic of Serbia*", Nr. 50/2010 – in original Serbian wording, "*Uredba o uslovima za oslobađanje obaveze plaćanja novčanog iznosa mere zaštite konkurencije*");
- the Guidelines on the Application of the Decree on Setting of Competition Protection Measures and Procedural Penalties (in original Serbian wording, "*Smernice za primenu Uredbe za određivanje visine iznosa koji se plaća na osnovu mere zaštite konkurencije i procesnog penala*"); and
- the Guidelines on the Application of Article 69 of the Law on Protection of Competition and the Decree on Conditions for Immunity from Competition Protection Measures (in original Serbian wording, "*Smernice za primenu člana 69. Zakona o zaštiti konkurencije i Uredbe o uslovima za oslobađanje obaveze plaćanja novčanog iznosa mere zaštite konkurencije*").

In addition to the above-mentioned national rules, the EU competition law principles are indirectly applicable in Serbia as well. Namely, Serbia is party to the Stabilization and Association Treaty with the EU, which generally requires the Serbian authorities, including the CPC, to assess practices that may affect the trade between the EU and Serbia in accordance with the principles developed in the application of the EU competition rules. Although there are no clear guidelines from the CPC or other Serbian authorities on the application of the Association and Stabilization Treaty, it may be confirmed that Serbian competition law is for the most part harmonised with EU competition law and that the CPC

resorts to EU competition law principles in its everyday practice.

The CPC is an independent regulatory body, which has a wide spectrum of different enforcement authorities. In particular, the CPC has the authority to issue guidelines, instructions and official opinions on the implementation of the Law, to initiate proceedings, to carry out inspections, to decide on both the merits and procedure as well as to issue fines. The CPC is also competent to conduct sector enquiries and to receive and decide on third party complaints, the latter being the most frequent source of information regarding antitrust infringements. The CPC cooperates with other Serbian authorities and other NCAs.

The CPC decides in an administrative procedure regulated under the Law and the Law on General Administrative Procedure ("*Official Gazette of the Republic of Serbia*" No. 33/97, 31/2001 and 30/2010 – in original Serbian wording, "*Zakon o opštem upravnom postupku*"). The CPC's decisions are binding and enforceable but can be appealed against through the Administrative Court (in original Serbian wording, "*Upravni sud*"). Against the decisions of the Administrative Court, an extraordinary legal remedy may be submitted to the Supreme Court (in original Serbian wording, "*Vrhovni kasacioni sud*"). The CPC is responsible for its work to the National Assembly of the Republic of Serbia.

Cartels may be sanctioned in different, cumulative ways. First, cartels are null and void and cannot be legally enforced. Second, the CPC may impose penalties ranging up to the maximum limit of 10% of the Serbian turnover of the undertaking concerned. Third, the companies involved in a cartel and their responsible representatives may be also criminally prosecuted. In this respect, the company may be fined in an amount ranging from approx. €16,000 to €42,000 and its business activities relative to the cartel temporarily suspended in duration of one to three years, whereas the responsible representatives may be sentenced to imprisonment in duration from six months to five years. According to the available information, it appears that several criminal investigations were initiated in recent years – four in 2009, three in 2010, one in 2011 and three in 2013. Finally, the Serbian Chamber of Commerce may impose different measures on its members involved in a cartel, the most important being suspension of business activity and public monition, however this is still not tested in Serbian practice.

Overview of investigative powers

Since the entry into force of the Law at the end of 2009, the CPC has gained in authority and, most importantly, large investigative powers. On one hand, the CPC is allowed to informally investigate third party complaints with the aim of establishing the probability of an antitrust infringement. On the other hand, the CPC may initiate sector enquires. In both cases, the CPC may ask for information, explanations and documents from undertakings concerned as well as from their competitors and other companies that may have knowledge on the subject under investigation. In this respect, the CPC may also approach state authorities that may have relevant information, such as, for example, the Statistical Bureau, different ministries and trade registries.

If the CPC reasonably suspects a cartel activity, it may open a formal investigation and, during the investigation, conduct announced inspections and dawn raids, examine companies' representatives and ask for information, explanations and documents from undertakings concerned, competitors and other companies that may be affected by, or that may have knowledge of, the suspected cartel activity. During the dawn raid, the CPC is allowed to enter the business premises, vehicles and private apartments (the latter only with the search warrant issued by the court), review, copy, scan and seize business documents

and electronic files, seal the business documents and premises and examine companies' representatives and employees. Above all, the CPC may impose interim measures aimed at prevention of further unlawful activities.

According to the available information, the CPC has not made any dawn raids so far. As there are no guidelines issued by the CPC on the conduct of such inspections, it remains unclear what a dawn raid would look like in Serbian practice. Considering the constrained capacities of the CPC, it is furthermore also questionable whether the CPC will make use of this investigative authority in the near future.

For impairing the conduct of the inspection, the CPC is allowed to issue procedural penalties ranging from €500 to €5,000 per day of breach. This measure may be imposed in particular when the companies subject to the CPC's inspection refuse to provide documents and information requested by the CPC, provide misleading, incomplete or false information or documents, or prevent the entry of the CPC's officials into business premises subject to inspection. The CPC has so far issued the procedural penalty only once, i.e. against a third party (competitor) which was asked to provide information during the Phase II merger control proceedings but has failed to do so in due time.

An overview of cartel enforcement activity

While the CPC started making some of its decisions and opinions entirely publicly available, which is a positive development, the fact that not all relevant court rulings on the CPC's decisions are publicly available remains a major impediment in ensuring transparency and wide access to the information related to, and reasoning behind, certain key decisions.

Based on the available information, since 2005 the CPC rendered decisions in around eight cases against cartel participants in different sectors: pharmaceuticals, insurance, transportation and veterinary services. The highest fine ever imposed in a cartel case was 7%. To our knowledge, the CPC is currently running five investigations relating to suspected cartel activity, three of which were opened in 2014. These investigations relate mostly to bid rigging cases, however. Considering the scarce capacities and the fact that competition law is a relatively novel discipline in Serbia, the CPC may be regarded as a fairly active enforcer.

However, the success of the CPC's past enforcement activity in cartel cases is relatively modest. The great majority of CPC's fines in cartel cases were finally annulled. The actual reasons for this negative score are the ambiguities that emerged in transition from the previous regulation to the Law, the extremely short duration of the statute of limitations that existed under the previous version of the Law (meanwhile amended in October 2013), and the long duration of the appellate court proceedings.

Considering the amendments to the Law from November 2013 which, most importantly, reaffirm the importance of competition law in the overall legal framework in Serbia, as well as introduce certain procedural novelties (e.g. commitment procedure) and extend certain time limits (e.g. the statute of limitation for initiating proceedings has been extended from three to five years), it may be expected that the CPC will increase its success rate in cartel cases.

What are the key issues in relation to enforcement policy generally?

The application of Serbian competition law in general seems to be characterised by a strictly formalistic approach in different aspects. On one hand, the Law does not enable a self-assessment of agreements that are outside of respective block exemptions. As a

consequence, many agreements need to be formally notified to and cleared by the CPC before their implementation (even in cases where only the market share-related condition for block exemption is not fulfilled). This approach increases the parties' costs associated with the conclusion of such agreements and ties up the CPC's limited resources.

On the other hand, based on the CPC's practice, it remains questionable whether and to what extent the ancillary restraints doctrine is applicable in Serbia. According to the CPC's recent activity in cases involving tender procedures, joint bids, which are indispensable for bidding companies to offer their services and/or goods, have to be notified to and cleared by the CPC before they are submitted, even though the tender would, in the absence of such a joint bid, have turned out unsuccessfully. Although this might represent on its face an overly formalistic approach in application of the Law, it may be the case that the CPC intends to closely scrutinise tender procedures, which from the consumer's point of view is a positive development, yet a potentially unnecessary burden for business.

Finally, with respect to merger control, the CPC does not seem to officially accept the effects doctrine. Although the Law provides for a sound legal basis for arguing that transactions without any effects on the Serbian market do not need to be notified with or cleared by the CPC, it seems that the CPC is not willing to provide any official guidelines or legal opinions on this issue. Moreover, the CPC regularly examines all concentrations even in the absence of any foreseeable, direct and substantial effects on the Serbian market.

Trends in the CPC's enforcement activity

As regards cartel cases, the CPC has so far investigated clear and easily recognisable cartel forms. The majority of cartel cases have concerned agreements on prices between members of different trade associations. According to the recently opened CPC investigations and some public announcements, the bid rigging cases seem to represent the priority in the CPC's current enforcement activity against cartels.

As regards other antitrust infringements, the cases of resale price maintenance and dominance abuse in the form of discrimination and exclusive dealing represented the majority of the CPC's cases in the past, compared to other types of antitrust infringements. As regards dominance abuse cases, the investigations were mostly initiated following third party complaints, which predominantly came from competitors or trading parties. Compared to other industries, the CPC appears to be particularly active in the food and drinks industry, as the number of enforcement proceedings in this sector is much higher than in any other sector in Serbia.

What are the key issues in relation to investigation and decision-making procedures?

The CPC has the authority to investigate, prosecute, decide and impose fines. Thus all these authorities are integrated into a single body. In accordance with the generally accepted view of the public, the proceedings before the CPC seem not to provide for a sufficient guarantee of all procedural rights of the parties. Furthermore, the lack of requisite economic knowledge and respective methods is still apparent, but this should improve, as the Commission has hired several economists in recent years. In addition, the courts have played a major role in the reinforcement of legal certainty in the business community when it comes to the highly disputed retroactive application of the Law in certain of the CPC's cases, which makes an overall positive impression as to what the parties in the CPC's proceedings may expect in future. Still, the courts have to increase their capacities in the areas of competition law and economics in order to be able to interpret arguments, and the CPC's decisions, properly.

One of the greatest impediments to the CPC's more active prosecution of antitrust infringements in general is the lack of information. The most valuable source of information for revealing antitrust infringements, and particularly cartels in the past, were third party complaints coming mostly from competitors or aggrieved customers. Besides the third party complaints, the CPC also actively monitors and reacts to publicly available information such as press releases. Information collected during the sector enquiries is also considered a valuable input for the CPC's intelligence. The cooperation with the authority competent for public tenders seems to have become another important source of information for the CPC.

As to the treatment of confidential information, the Law clearly enables the protection of confidential information of parties involved in investigations by the CPC. In this respect, the Law requires the CPC not to disclose such information to third parties, provided that the interests of parties that request the protection of confidential data outweigh the interests of the public in getting acquainted with such information. This means in practice that parties involved in the CPC's investigations have to submit an appropriate request for data protection and demonstrate the confidentiality of the respective information, as well as the probability of damage in case the confidential information would be revealed to third parties. In this respect it is worth noting that the CPC's standards of proofs are increasing. Therefore, although many different documents and data used to be protected as confidential in the past, this is not the case any more and requesting protection of confidential data requires substantial argumentation.

When it comes to legally privileged documents, the situation is not that clear. The Law defines legally privileged documentation as any correspondence between the party to the CPC's proceeding and its authorised representatives, which directly relates to the subject proceeding. What is striking is that the Law actually stipulates that the rules applicable to confidential documents apply respectively also for legally privileged documents, without clearly explaining what this actually means and, most importantly, whether the CPC may or may not review the legally privileged documents during the investigation.

Leniency regime

Cartel participants may apply for leniency with the CPC. Unlike in the EU and the majority of EU countries, the leniency regime in Serbia applies not only for cartels but also for all other agreements having the appreciable restriction of competition as their object or effect. Therefore, the leniency application may be submitted also for vertical restraints, and this has several times been the case in Serbian competition law practice.

According to the Serbian leniency regime, a cartel participant may receive full indemnity from fines provided that: it was the first to apply for leniency; the complete leniency application was filed before the CPC became aware of the cartel or before the CPC has collected necessary evidences to open the formal investigation; the leniency applicant has confirmed that it shall cooperate with the CPC; and it ceases any further infringing activities, i.e. terminates its participation in the cartel. The leniency application must provide sufficient evidences that enable the CPC to render the infringement decision.

Other cartel participants may receive a reduction in fines (between 30% and 50% for the first applicant, between 20% and 30% for the second applicant, and up to 20% for the third and following applicants), but only if, until the CPC has issued its statement of objections, they provide further evidences, which were not otherwise obtained and which enable the CPC to complete the investigation and render the infringement decision, and as long as they fully cooperate with the CPC.

However, there are some important limitations: the undertaking that initiated the conclusion of the restrictive agreement can get neither the full indemnity nor reduction in fines; joint applications for either full indemnity or reduction in fines are not possible and will not be taken into consideration by the CPC; and the Serbian leniency regime does not cover criminal liability of the leniency applicant and its responsible representatives.

Before submitting the full leniency application, cartel participants have the option to request the marker, i.e. to ask for the statement of the CPC whether the prospective applicant would be the first to apply for leniency for the respective cartel. Following this request and the CPC's statement, the prospective applicant has to submit a full leniency application within the deadline set by the CPC, which cannot be longer than one month, however. The day when the request for the market was submitted is regarded as the day of leniency application, provided that the leniency application was complete.

After the full leniency application is submitted, the CPC will inform the leniency applicant whether full indemnity from fines is possible or not. The leniency applicant that does not fulfil the conditions for full indemnity may within five calendar days decide to withdraw the evidences provided in support of the leniency application, or to apply for reduction in fines. However, even if the unsuccessful applicant withdraws the evidences provided in support of its leniency application, the CPC may, based on its investigative powers, regain those evidences. Thus, one has to be careful even when requesting the marker, considering that this request has to contain the list of evidences in support of a prospective leniency application.

Leniency applications are still not much used in Serbian practice. For example, in 2013 only one leniency application was filed. The great majority of the CPC's proceedings were and are still being initiated following third party complaints. There have been only a few leniency applications so far, but according to the available information, they related predominantly to agreements containing vertical restraints and only two of them related to cartels. Furthermore, due to lack of sufficient practice in this area, some important issues relevant for the assessment of risks associated with the leniency applications remain unclear. For instance, it is unclear whether access to the files and, most importantly, evidences provided by the leniency applicants in relation to third party actions for damages, are allowed – and if so, under what conditions.

What is the procedure for third party complaints?

Although there is no obligation to initiate formal investigation upon third party complaint, the CPC is required to informally investigate third party complaints with the aim of establishing the likelihood of possible antitrust infringement and inform the third party within 15 calendar days on the outcome of its informal investigation. Third party complaints represent a frequent and common source of information for the CPC and the CPC regularly investigates companies on this basis. For example, in 2013 the CPC received 33 complaints, out of which 11 related to potentially restrictive agreements and 22 to dominance abuses. As a result, the CPC opened proceedings in four cases.

The CPC's authorities within the investigation of third party complaints, i.e. before opening of the formal investigation, are limited to information requests sent to the undertakings concerned, competitors and other companies that may have knowledge on the subject matter of the investigation, in practice being particularly the companies active in the upstream or downstream markets. In this respect, the CPC may also approach other state authorities that may have relevant information, such as for example the Statistical Bureau, different ministries and trade registries.

What are the key current issues in relation to (civil) penalties and sanctions imposed on the parties?

As stated above, cartels may be sanctioned in different, cumulative ways, whereas the most immediate and regular sanctions in Serbian practice are the nullity of agreements, and the CPC's penalties, which may range up to the maximum limit of 10% of the Serbian turnover of the undertaking concerned.

As regards the method of setting the fines by the CPC, the CPC applies the following method: as a starting point for the calculation of fines, the CPC uses 1% of the relevant Serbian turnover in the year preceding the investigation. This amount is then multiplied by a number of coefficients for gravity and duration and adjusted with coefficients for aggregating/mitigating circumstances and recidivism.

As to the gravity coefficient, cartels are classified as very grave infringements, for which a coefficient of between 2 and 3 applies. As to the coefficient of duration, for cartels lasting up to one year a coefficient of 1 applies; for cartels lasting between one and three years the coefficient of between 1 and 2 applies; and for cartels lasting longer than three years the coefficient of between 2 and 3.33 applies.

Should an undertaking be fined for practices similar to the ones for which it has previously been fined, the CPC would be allowed to use a recurrence coefficient for recidivism which amounts to 2. According to the past practice of the CPC, even in cases where it could have applied this coefficient, the CPC did not apply it.

When setting the amount of fine, the following circumstances in particular are considered aggravating: intent, recidivism, incitement of other undertakings to implement infringing practices, refusal to cooperate with the CPC, and prevention or disturbance of the CPC's investigation. The following circumstances are particularly considered as mitigating: negligent infringement, extremely short infringement (up to six months), the lack of any adverse effects of the infringement, cessation of infringing activities before the CPC became aware of the infringement, and taking measures aimed at addressing the consequences of the infringement and cooperation with the CPC.

According to available CPC decisions, the CPC has so far taken into consideration the following circumstances as either aggravating or mitigating: (i) intent; (ii) the lack of consequences/effects of the infringement; (iii) cooperation of the parties; and (iv) voluntary notification of the infringement. In instances where the CPC considered the voluntary notification of the infringement as a mitigating circumstance, it applied a 1.25 coefficient to diminish the fine. In cases where the CPC considered the fact that the infringement was only committed negligently as a mitigating circumstance, it applied a 1.45 coefficient to diminish the fine. Considering that the voluntary cessation of any infringement is considered as a mitigating circumstance, the implementation of compliance programs and the voluntary termination of the infringements would most likely be considered as a mitigating factor by the CPC in case of any infringement proceedings.

The CPC is generally entitled to impose one fine for each infringement. The case law is inconsistent on what behaviour forms a single and continuous infringement: one and the same type of infringement was treated by the CPC as a separate infringement in one case, but as a single infringement in combination with other infringements in another case. Should the CPC uncover more than one infringement of one and the same undertaking at once, it seems likely that according to the CPC's past practice, the CPC would initiate one proceeding and issue one fine for all uncovered infringements of the relevant undertaking

rather than initiating separate infringement proceedings for each conduct.

Unlike other competition authorities that use only the turnover generated with the sales of products to which the infringement directly or indirectly relates for "calculating" a fine, the CPC in the available case law so far appears to have applied this percentage to the turnover of the entire company. On the other hand, the CPC's case law so far has only taken into account the turnover generated by the company involved in the infringement without taking into account the turnover of the company's group/economic entity (although the statutory provision is ambiguous in this respect). In any event, any fine would be capped at 10% of the turnover generated in Serbia.

Is there a right of appeal against cartel infringement decisions and is it considered to be effective?

Infringement decisions of the CPC may be appealed against. The Administrative Court has jurisdiction to decide on the appeal. The appeal may be filed in particular if the law was not correctly applied by the CPC, the CPC has not correctly followed the procedure, the facts of the case were not correctly or completely determined, or were not correctly interpreted. The decisions of the Administrative Court may be also appealed against, by way of an extraordinary legal remedy, with the Supreme Court.

The Administrative Court has so far been reluctant to examine the CPC's decisions in material aspects and has mostly upheld the decisions of the CPC. Yet the decisions of the Administrative Court have been regularly overturned by the Supreme Court. In such cases, the Administrative Court has usually followed the instructions contained in the Supreme Court's decisions and annulled the CPC's decision.

It may be in general argued that neither the Administrative Court nor the Supreme Court are fully aware of competition law principles, and lack economic knowledge. Moreover, they seem also to be understaffed, which results in long court proceedings.

Private enforcement of antitrust laws against cartels

The area of private enforcement is underdeveloped and not sufficiently tested in practice. Aggrieved parties that suffer damages as a consequence of an antitrust infringement, including cartel, may in principle initiate follow-on actions for damages in front of the Serbian courts. The actions for damages may be submitted by several aggrieved parties but so-called "opt-out" class actions are generally not possible. The CPC's decision on infringement does not represent a proof of damage. The existence of damage has therefore to be separately demonstrated in the court proceedings.

Several follow-on individual actions for damages were submitted against companies that were found liable for antitrust infringements in the past, however not a single decision in this respect has been rendered yet. The reasons are numerous, however the most obvious one is the long duration of appellate proceedings against the CPC's decisions.

Cross-border issues

Considering the wording of the Law, the CPC has jurisdiction only in Serbia but may investigate antitrust infringements, including cartels, that are committed outside of Serbia if they produce effects on the Serbian market. The CPC so far has never made use of this authority and investigated or fined cartels outside of Serbia.

Although the CPC is not a member of the European Competition Network, it regularly

communicates with the Delegation of the European Union in Belgrade and European Commission − DG Competition within the framework of the Stabilization and Association Agreement between the EU and Serbia, but also in instances where it needs support regarding the assessment of certain infringements and procedural issues. The CPC is a member of the International Competition Network and the CPC's representatives regularly take part in international meetings and workshops such as the ones of the OECD's Regional Competition Network. The CPC has signed several bilateral cooperation agreements with national competition authorities of different countries including Austria, Bulgaria, Bosnia and Herzegovina, Croatia, Hungary, Kazakhstan, Romania, Russia and Slovenia.

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Raško Radovanović joined CMS Belgrade in January 2010, after completing his LL.M. studies at the Faculty of Law of Ludwig-Maximilians-University in Munich. Raško Radovanović is now mostly involved in competition, corporate and commercial legal areas and provides advice on competition and anti-trust matters to multinational clients operating in a wide variety of business sectors. He also advises German-speaking clients on all aspects of their everyday business operations in Serbia. Raško Radovanović is the author of several articles on competition law and has supported the development of the first Serbian university textbook on competition law. He is a Ph.D. candidate at the University of Vienna. Raško speaks Serbian, English and German.

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