

What's New in Western Balkans?

by

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Abstract

Western Balkan jurisdictions (Serbia, Montenegro, Bosnia and Herzegovina, and Macedonia (FYROM)) are often outside the focus of the competition community in the EU. This paper aims to rectify that, by providing an overview of the most interesting competition law developments in these jurisdictions during 2017. The overview will show that, despite similarities in their competition legislation, the observed jurisdictions differ when it comes to their priorities in competition law enforcement: while for some the accent is on merger control, for others it is on antitrust. The paper also highlights certain peculiarities of the observed jurisdictions, even though they are all based on the EU model. These include the existence of a notification system with respect to individual exemptions of restrictive agreements in three out of the four observed jurisdictions.

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Résumé

Les juridictions des Balkans occidentaux (Serbie, Monténégro, Bosnie-et-Herzégovine et Macédoine (ARYM)) souvent ne sont pas au centre du débat sur la concurrence d l'UE. Cet article vise à remédier à cela, en donnant un aperçu des plus intéressants développements du droit de la concurrence dans ces pays au cours de 2017. La vue d'ensemble indique que, en dépit des similitudes dans leur législation sur la concurrence, les juridictions observées diffèrent en ce qui concerne leurs priorités en matière d'application du droit de la concurrence: alors que pour certains l'accent est mis sur le contrôle des concentrations, pour d'autres il est sur la concurrence. L'article met également en évidence certaines particularités des juridictions observées, même si elles sont toutes basées sur le modèle de l'UE. Ceux-ci comprennent l'existence d'un système de notification en ce qui concerne les exemptions individuelles des accords restrictifs dans trois des quatre juridictions observées.

Key words: Western Balkans; EU; competition law; individual exemption; merger control; antitrust; restrictive agreements; abuse of dominance.

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I. Introduction

Competition law developments in Western Balkan jurisdictions¹ are usually outside the focus of EU observers in this field. This is understandable – individually, all these countries are fairly small, especially in terms of their economic strength. Nevertheless, interesting things are going on there as well, as this short overview will show.

The competition laws of all four countries are very similar, in particular with respect to substantive rules. This comes as no surprise, as all these countries have based their competition legislation on the EU model, as part of their proclaimed goal of joining the EU. As part of the EU accession process, each of these countries has concluded a Stabilization and Association Agreement with the EU, which, inter alia, provides a legal basis for the approximation of local competition regimes with the EU model.²

¹ For the purpose of this article, these are: Serbia, Montenegro, Bosnia and Herzegovina, and Macedonia (FYROM).

² On this topic, see more in: Kojovic T. & Gajin D. (2012). Vertical Restraints under Serbian Competition Law: A Comparison with EU Law, *European Competition Law Review* 33(8), 357–366.

Another factor which connects these four jurisdictions is that they all used to be part of Yugoslavia, a fact that additionally contributes to the similarities of their legal systems. Specifically, while after the break-up of the former Yugoslavia the legal systems of Yugoslav republics started diverging, this divergence has not been dramatic, since all of them (at least declaratively) are focused on bringing their legislation in line with the EU acquis.

Despite all the similarities, the competition laws of the Western Balkan jurisdictions also have their peculiarities, especially when it comes to the way the competition rules are applied in practice. For instance, in some of the jurisdictions the focus of the local national competition authority (hereafter, NCA) is on antitrust, while in others it is on merger control. Also, some of the jurisdictions provide for self-assessment of restrictive agreements, while others still require a notification to the NCA.

A period of one year is a good interval for providing an overview of what is going on in a specific jurisdiction and that is what this article will focus on. Specifically, the article will present an overview of the 2017 activities of Serbia's Commission for Protection of Competition (hereafter, Serbian NCA), Montenegro's Agency for Protection of Competition (hereafter, Montenegrin NCA), Bosnia and Herzegovina's Competition Council (hereafter, Bosnian NCA), and Macedonia (FYROM)'s Commission for Protection of Competition (hereafter, Macedonian NCA). Certain developments from 2018 will also be mentioned, though they will not constitute a focus of this paper.

This article will cover antitrust (restrictive agreements and abuse of dominance) and merger control, with State aid remaining a topic for an article of its own. Further, Serbian developments will be given most attention, as it is by far the largest of the four countries and with, arguably, the most active NCA in the region.

II. Serbia

In the field of antitrust, the Serbian NCA was active both with respect to restrictive agreements and the abuse of dominance.

Restrictive agreements

During 2017, the Serbian NCA issued three infringement decisions in the area of restrictive agreements and opened three new cases.³ This represents

³ The statistical data concerning the activity of the Serbian NCA is based on information available on the NCA's website (<http://www.kzk.gov.rs/>).

a slight increase in the NCA's activity compared to 2016, when the watchdog issued two infringement decisions and opened three investigations.

Infringement decisions

In March 2017, the NCA issued a decision establishing that two Serbian cooking oil producers, Vital and Victoriaoil, had entered into a restrictive agreement.⁴ The watchdog found that a cooperation agreement between the parties was restrictive as it limited and controlled the production of cooking oil in Serbia. The case is particularly interesting since it did not concern a restriction by object and so the NCA undertook to show that the agreement produced negative effects on the market. Both producers were fined 0.33% of their respective annual turnover (in absolute terms, the fine for Victoriaoil was approximately EUR 200,000 and for Vital EUR 70,000).

The other two infringement decisions both came at the very end of the year.

The first concerned the imposition of minimum resale prices of sportswear.⁵ Apart from the distributor N Sport, the NCA also investigated (and fined) 14 retailers which had an agreement with N Sport with a minimum resale price obligation. The distributor was fined approximately EUR 140,000 (0.62% of its relevant annual turnover), while the retailers were fined between 0.2% and 0.29% of their respective annual turnovers (in absolute terms, the highest of those was approximately EUR 130,000).

Finally, the NCA established the existence of bid rigging concerning the overhaul of rail vehicles.⁶ Specifically, four service providers had agreed on the terms of their bids in order to ensure that each of them was awarded at least a part of the tender. Famously, the collusion between the parties included a meeting at a cafe in Belgrade. Each of the undertakings was fined 2% of its respective annual turnover on the Serbian market (in absolute terms, the fines ranged between approximately EUR 12,000 and EUR 42,000).

New investigations

Apart from closing pending investigations, during 2017 the NCA also opened some new ones.

The first case the watchdog opened last year concerned alleged bid rigging in public tenders for the supply of hygiene products to the Serbian Ministry of Defence.⁷ Five companies in total have been included in the investigation so far.

The NCA also started investigating Imlek, the largest Serbian dairy, and Kruna-Komerc, a Serbian dairy products trader.⁸ The authority is alleging that

⁴ Resolution of the Serbian NCA No. 4/0-02-58/2017-1 of 13 March 2017.

⁵ Resolution of the Serbian NCA No. 4/0-02-89/2017-31 of 1 December 2017.

⁶ Resolution of the Serbian NCA No. 4/0-02-76/2017-21 of 8 December 2017.

⁷ Conclusion of the Serbian NCA No. 4/0-02-402/2017-1 of 22 May 2017.

⁸ Conclusion of the Serbian NCA No. 4/0-02-418/2017-1 of 31 May 2017.

the companies had engaged in bid-rigging by coordinating their commercial behaviour with respect to a public procurement bid.

Finally, the NCA opened an investigation concerning vertical price-fixing by an importer of Škoda cars to Serbia and 19 of its dealers/repairers.⁹ According to the watchdog, the agreements between the importer and the dealers all contain a provision which maximizes the rebate which the respective dealer is allowed to grant to the buyer when participating in public tenders.

Individual exemption: towards self-assessment?

Serbia still has a system of individual exemptions of restrictive agreements which requires a prior notification to the NCA – comparable to the system which existed in the EU under Regulation 17/62. Over the last couple of years, the number of exempted agreements has been around 20 annually. The trend continued during 2017, with 21 individual exemptions.¹⁰

However, individual exemptions based on a notification may soon be a thing of the past. Specifically, the NCA has hinted in 2018 that the new Competition Act, which is currently being drafted, will eliminate the notification system and instead introduce self-assessment of restrictive agreements. Since this possibility has also been mentioned before, it remains to be seen whether this time it will actually be realized.

Abuse of dominance

Closed cases

During 2017, the Serbian NCA closed two abuse of dominance cases: in one instance it established an abuse of dominance while in the other it closed a case which had been earlier suspended based on commitments.

The infringement case concerned excessive pricing by a company operating a bus station in central Serbia.¹¹ The company was vertically integrated, in that it also acted as a bus operator. The NCA established that the price which the station operator was charging bus operators for station services was excessive, as the costs which could be allocated to the service in question justified a price of only a little more than half of the price actually charged.

The NCA also definitely closed an investigation it had launched against the Serbian state railways back in 2013, which was suspended in 2016 based on commitments offered by the railways.¹² The alleged infringement consisted of the investigated company preventing access to its railway infrastructure

⁹ Conclusion of the Serbian NCA No. 4/0-02-417/2017-1 of 31 May 2017.

¹⁰ According to the Serbian NCA's annual report for 2017 (available at: <http://www.kzk.gov.rs/kzk/wp-content/uploads/2018/05/Godisnji-izvestaj-KZK-za-2017-godinu.pdf>).

¹¹ Resolution of the Serbian NCA No. 5/0-02-90/2017-131 of 23 October 2017.

¹² Conclusion of the Serbian NCA No. 5/0-02-57/2017-4 of 22 September 2017.

to other undertakings. In November 2017, the watchdog confirmed that the railway company has fulfilled its commitments and accordingly definitely closed the abuse of dominance probe.

New investigations

In 2017 the NCA opened three new abuse of dominance investigations.

In May 2017, the NCA launched an investigation against Frikom, the largest Serbian ice cream manufacturer.¹³ The NCA alleged that Frikom had been giving incentives to its customers to purchase ice cream exclusively from Frikom. The incentives allegedly consisted of rebates and money payments to retailers in order to keep them from purchasing ice cream produced by Frikom's competitors.

Then, in September 2017, the NCA started investigating the operator of a bus station in northern Serbia for illegal discrimination.¹⁴ The bus station operator is a vertically integrated undertaking, owning not only the bus station but also a bus company. It appears that the watchdog is treating the bus station operator as a dominant undertaking, which was charging its related bus company more favourably than the competitors of this bus company.

Finally, in November 2017, the NCA started another bus station case, this time against the operator of a bus station in southern Serbia.¹⁵ This company also serves as a bus operator. Here as well, the NCA alleged illegal discrimination by the bus station, in that the service fees charged by the bus station favour its own bus operator compared to non-related operators.

Merger control

The first fine for gun-jumping in Serbia

Perhaps the most important event related to merger control in Serbia during 2017 was that the NCA issued its first ever fine for gun-jumping. Specifically, the fined undertaking had failed to notify to the watchdog a change from joint to sole control in a transaction where the Serbian merger notification thresholds were exceeded.¹⁶

The NCA fined the infringing company EUR 56,000 or 0.25% of the undertaking's turnover in the relevant year, which was far below the ceiling of 10% of the turnover. It remains to be seen whether this was an isolated case of the NCA going after gun-jumping or whether this trend will continue in 2018 as well.

The number of merger decisions once again surpasses 100

¹³ Conclusion of the Serbian NCA No. 5/0-02-414/2017-1 of 29 May 2017.

¹⁴ Conclusion of the Serbian NCA No. 5/0-02-581/2017-1 of 22 September 2017.

¹⁵ Conclusion of the Serbian NCA No. 5/0-02-724/2017-1 of 17 November 2017.

¹⁶ Resolution of the Serbian NCA No. 6/0-03-23/2017-11 of 12 July 2017.

During 2016, the Serbian NCA reached an important milestone, as the number of merger decisions since its formation surpassed 1,000.¹⁷ Annually, the watchdog examines around 100 mergers, and 2017 was a continuation of this trend, with as many as 139 merger clearances.

Such a large number of merger decisions is down to the fact that Serbia has extremely low merger notification thresholds, which are triggered even in the case of extraterritorial concentrations with little or no effect in Serbia. To put this into perspective: during 2017, almost half of the clearance decisions concerned transactions where the target was either not at all present in Serbia, or its presence was negligible.

One Phase II opened, one closed, one abandoned

During 2017, the NCA opened only one Phase II merger investigation, pertaining to the planned acquisition of a Serbian yeast producer (owned by the American Alltech) by the French giant Lesaffre.¹⁸ The in-depth investigation came due to a market overlap in Serbia. The watchdog eventually cleared this transaction in February 2018, though with some strings attached.¹⁹

Earlier in 2017, the NCA had also closed one Phase II investigation that it had started back in 2016. Specifically, the NCA conditionally approved the takeover of I.KOM, a Serbian cable operator, by its rival Serbia Broadband (SBB).²⁰ The most important condition was for SBB to divest the parallel secondary network infrastructure in areas where the networks of the parties overlapped.

Finally, during 2017 the NCA abandoned its *ex officio* investigation into a potential gun-jumping by the Serbian subsidiary of Banca Intesa.²¹ When opening the investigation, the NCA alleged that the bank should have notified the acquisition of an office building in Belgrade.²² In the end, however, the NCA did not find any wrongdoing by Banca Intesa and abandoned the case.

III. Montenegro

During 2017, the activities of the Montenegrin competition authority continued to be focused on merger control, with antitrust enforcement a bit in the shadow. In the authority's own words, one of the main obstacles towards

¹⁷ Based on data available in the annual reports of the Serbian NCA.

¹⁸ Conclusion of the Serbian NCA No. 6/0-03-653/2017-1 of 10 October 2017.

¹⁹ Resolution of the Serbian NCA No. 6/0-03-94/2018-6 of 6 February 2018.

²⁰ Resolution of the Serbian NCA No. 6/0-03-01/2017-26 of 13 March 2017.

²¹ Conclusion of the Serbian NCA No. 6/0-03-80/2017-4 of 27 January 2017.

²² Conclusion of the Serbian NCA No. 6/0-03-191/2016-1 of 12 February 2016.

a more effective competition law enforcement in Montenegro is the procedure for imposing fines for competition law infringements.²³

Antitrust: NCA performs a dawn raid

Perhaps the most exciting event in Montenegrin antitrust during 2017 was a dawn raid performed in March by the NCA. Based on scarce information the NCA provided about the event, the targeted company was Sava Trans, based in Cetinje.²⁴ The official NCA statement revealed only that the company was cooperative during the raid, but did not provide further information what the raid was about.

The NCA's annual report for 2017 is still to be published, and so it is not known at the moment how many antitrust proceedings the watchdog started during 2017 (if any). Presumably, the NCA started at least one official investigation during this period (in the case where it performed the dawn raid).

Also related to antitrust: same as in Serbia, there is no self-assessment in Montenegro for individual exemptions of restrictive agreements – you need to notify such agreements to the NCA in advance to be able to escape a prohibition. On this front, it seems 2017 was a quite year in Montenegro, with only one individual exemption published so far.

Lack of power to impose fines hampering the effectiveness of NCA activities?

One of the issues the NCA has consistently complained about is the perceived ineffectiveness of the system for imposing fines. Specifically, the Montenegrin NCA does not have the power to impose fines – it can only initiate misdemeanour proceedings before a misdemeanour court. And competition law enforcement before such courts has so far had mixed effects – to say the least.

Inadequately short limitation periods for competition law infringements are another problem perceived by the Montenegrin NCA. According to the authority, combined with the procedural rules allowing parties to challenge not only the final decision but also other decisions the NCA renders during a proceeding, the current limitation periods hinder the effective enforcement of competition law and should be extended.²⁵

²³ See Montenegrin NCA's Annual Report for 2017 (available at: <http://www.azzk.me/1/doc/ostala%20dokumenta/Izvjestaj%20o%20radu%20AZZK%20za%202016.pdf>).

²⁴ Statement of the Montenegrin NCA of 22 March 2017 (available at: <http://www.azzk.me/novi/joomlanovi/171-saopstenje-ovlascena-lica-agencije-sprovela-nenajavljeni-neposredni-uid>).

²⁵ See Montenegrin NCA's Annual Report for 2017 (available at: <http://www.azzk.me/1/doc/ostala%20dokumenta/Izvjestaj%20o%20radu%20AZZK%20za%202016.pdf>).

Phase I clearances continue to dominate merger control

Unlike the antitrust sphere, in the field of merger control the NCA renders decisions on a regular basis. Based on what has been published so far, the Montenegrin NCA rendered 37 merger decisions during 2017. All decisions were unconditional Phase I merger clearances.

Such a high number of merger decisions (in comparison to the size of the economy) is the result of low merger notification thresholds applicable in Montenegro, which lead to around 30 merger cases each year. For instance, the NCA issued 33 merger decisions in 2015, 28 in 2016, and, as mentioned, that number reached 37 in 2017.²⁶

NCA to assume State aid powers

Until recently, apart from its NCA, Montenegro also had a watchdog in charge of the enforcement of State aid rules. The special State aid authority was abolished in 2018, and State aid powers were transferred to the NCA.²⁷ It remains to be seen how this will affect the watchdog's enforcement zeal in the 'traditional' competition law spheres – restrictive agreements, abuse of dominance, and merger control.

IV. Bosnia and Herzegovina

NCA gets new members

In Bosnia and Herzegovina, perhaps the most significant event of 2017 was the appointment of new members of the Competition Council, the country's competition authority. The NCA has six members, appointed for a period of six years, with each member presiding over the Council during one of those six years.²⁸

²⁶ According to the information available on the website of the Montenegrin NCA (<http://www.azzk.me>).

²⁷ Law Amending the Law on Protection of Competition (Official Gazette of Montenegro, No. 13/2018).

²⁸ Law on Competition (Official Gazette of Bosnia and Herzegovina, Nos. 48/05, 76/07 and 80/09 (hereafter, Bosnian Competition Act), Article 22).

Focus remains on antitrust

Quasi-private antitrust enforcement?

Bosnia and Herzegovina is an interesting competition law jurisdiction, with a focus on antitrust rather than on merger control. This is in contrast with Serbia, Montenegro, and Macedonia, where merger decisions dominate – due to the low merger notification thresholds applicable in those jurisdictions.

Also, what contributes to the high level of antitrust activity of the Bosnian NCA is that, in Bosnia and Herzegovina, an antitrust proceeding can be initiated not only *ex officio* by the NCA, but also upon request of an interested party (complainant). In practice, the majority of the cases is initiated by complainants, and this state of affairs could even be qualified as quasi-private antitrust enforcement (which deserves to be addressed in more detail on some other occasion).

Infringement decisions are a rare animal

Despite the relative ease when it comes to initiating infringement proceedings, infringement decisions are quite rare in Bosnia and Herzegovina. For instance, based on information available on the NCA's website, the NCA initiated as many as eight restrictive agreements proceedings in 2017, while it did not establish any infringements in the form of a restrictive agreement.

The situation is similar with respect to the abuse of dominance: seven such proceedings were started in 2017, but only one infringement decision was rendered.

Individual exemption: notification

Like Serbia and Montenegro (and unlike Macedonia), Bosnia and Herzegovina still has a notification system for individual exemptions of restrictive agreements.

According to information available on the NCA's website, during 2017 there appear to have been at least two such notifications: one was granted and the other rejected. The latter was rejected on procedural grounds, since the NCA found that the agreement was not restrictive, as it was between related parties.

Merger control: dismissed notifications dominate

Unlike Serbia, Montenegro, and Macedonia, where a transaction can be notifiable even if the target had no turnover in the respective jurisdiction, in Bosnia and Herzegovina the target needs to be present on the local market in order for the merger notification duty to arise. Due to this, the number of merger decisions in Bosnia and Herzegovina is naturally lower than in the three other Balkan jurisdictions.

Specifically, judging from what is available on the NCA's website, during 2017, there seem to have been only two Phase I clearances; additionally, one clearance was granted after a Phase II probe. This number could be higher, since some merger decisions might have not been published on the NCA's website. Nevertheless, that number cannot rise dramatically and should be much lower than in the neighbouring jurisdictions (as noted, in Serbia there were as many as 139 merger clearances in 2017).

What is also characteristic about Bosnia and Herzegovina is that one of its merger notification thresholds is based on market shares.²⁹ Due to this, the parties might not always know with certainty whether their transaction is 'notifiable' or not. As a result, more careful parties notify their transactions and leave it to the authority to decide whether there is a notification duty or not. As evidenced by information on the NCA's website, the NCA dismissed during 2017 at least eight notifications as no notification obligation had existed.

An ethnic veto in Bosnian competition law enforcement?

A peculiarity of competition law enforcement in Bosnia and Herzegovina is what could be called an 'ethnic veto'. This is since, for a decision of the NCA to be adopted, at least one representative of each of the three major ethnic groups in Bosnia and Herzegovina must vote for it,³⁰ which can lead to a blockade in the watchdog's decision-making process.

Based on information from the NCA's website, at least two such blockades occurred during 2017, as the NCA failed to reach a decision in one merger control case and in one abuse of dominance case. As a result, the notified concentration was 'cleared' by virtue of the law and the abuse of dominance case had to be closed.

It remains to be seen whether we will experience this in 2018 as well, or whether the decision-making process will be changed in that respect.

V. Macedonia (FYROM)

Antitrust: breweries pay millions of euros in fines

According to the news section of the website of the Macedonian NCA, 2017 was the year for the Macedonian NCA to go after breweries. It fined two of them, both for hardcore vertical restraints.

²⁹ Bosnian Competition Act, Article 14, paragraph 1, item b).

³⁰ Bosnian Competition Act, Article 24, paragraph 2.

The first fine went to Pivara Skopje AD (Skopje Brewery). Specifically, the NCA ordered the brewery to pay EUR 5.8 million for having price-fixing clauses in contracts with its distributors in the period between 2012 and 2017.

The second fine was for Prilepska Pivarnica AD (Prilep Brewery). This brewery got a fine of EUR 2.7 million for vertical price-fixing and the use of non-compete clauses of indefinite duration. The Macedonian NCA considers both as restrictions by object.

Individual exemption: self-assessment

Unlike the three other Western Balkan jurisdictions, Macedonia has switched from a notification system to self-assessment of restrictive agreements. Will other countries in the region follow suit? It remains to be seen – the next country in line to adopt self-assessment appears to be Serbia (see the relevant section above).

Merger control: the highest number of decisions ever?

The Macedonian NCA publishes its decisions with a certain time lag. Due to this, until the annual report for 2017 is made available, it is not possible to perform an in-depth analysis of the authority's merger control activities. Nevertheless, what is indicative is a high number of merger decisions.

At the moment, the NCA's website features 38 merger decisions, all unconditional Phase I clearances. This number will certainly rise, since not all 2017 decisions have been published yet. So far, 2015 was the year with the highest number of merger decisions in Macedonia with 42. This number may well be surpassed in 2017 – only five additional clearances from 2017 will be sufficient for that.

State aid

Same as Montenegro, and unlike Serbia and Bosnia and Herzegovina, Macedonian NCA also has State aid powers. Nevertheless, as with the other observed jurisdictions, State aid developments in Macedonia deserve to be addressed separately.

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