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in 27 jurisdictions worldwide

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Serbia

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Legislation and jurisdiction

- 1** How would you summarise the development of private antitrust litigation?

The issues of unfair competition and ‘monopolistic’ behaviour have received special attention under Serbian law in the past, since the respective regulations were introduced relatively early (in 1930).

One of the earliest antitrust regulations in force in Serbia explicitly stipulated that a damaged individual trader, a chamber of commerce, traders’ associations, consumers and other interested bodies and organisations could, in the case of a monopolistic action, file with a competent court, within the stipulated time frame, a lawsuit for discontinuance of such action (in cases when the action caused damages and in cases where such action may only pose a threat of potential damage), and a lawsuit remedying the situation caused by the illegal actions or to compensate damage caused.

Furthermore, Serbian legal practice at that time accepted the viewpoint that by application of the general rules of civil procedural law on declaratory legal protection, a person with a valid legal interest may request a court decision that certain behaviour was in violation of the relevant provisions of antitrust regulations. However, antitrust laws did not specifically regulate civil law protection in the case of a violation of competition rules before the competent courts.

Regardless of the developed legislation, court cases regarding the abuse of a dominant position in the market and the conclusion of restrictive agreements were not frequent, considering the political and economic system in Serbia at the time.

After its enactment in 2005, the Competition Act regulated in great detail prohibited agreements between participants in the market that materially prevented, restricted or distorted competition (the restrictive agreements), the abuse of a dominant position and exceptions in its application. Further, for the first time in Serbian legislation, a merger control regime had been introduced. In line with this law, the Commission for Protection of Competition (the Commission) was established as an independent regulatory organisation and rules for the administrative procedure before the Commission for establishing violations of the Competition Act were stipulated.

However, this Competition Act did not contain special provisions regarding the legal protection of individuals that suffer damage due to violations of said law. Thus, in such cases, the general rules of the Serbian civil material and procedural law on damage compensation applied. In July 2009, the Serbian Parliament enacted a new competition act (the Competition Law). Such Competition Law applies as of 1 November 2009. To a certain extent, the Competition Law introduces private enforcement. It stipulates that compensation for damages caused by competition infringements that are assessed by the Commission shall be determined during litigation proceedings before the competent court. In addition, the Competition Law states that the Commission’s decisions do, as a general rule, not establish the occurrence of specific damages, but the damage has to be proven during court proceedings.

Similarly to the Competition Act previously in force, the Competition Law does not contain explicit provisions regarding the exclusive jurisdiction of the Commission to establish that certain actions constitute a violation of the Competition Law. On the basis of the relevant provisions, it is not clear whether the possibility for an injured party to bring such issues before the competent court, in regard to damages claims or to the annulment of an agreement, is still available prior to the decisions of the Commission.

Following the enactment of the Competition Act in 2005, to the best of our knowledge the Serbian courts have not yet ruled in private lawsuits for damages or annulment of a restrictive agreement due to violation of said law. Furthermore, there is no court practice regarding the issue of the binding force of the Commission’s decisions either (in cases when the Commission assessed that a violation of competition regulations was or was not committed in a specific case). We are of the opinion that in cases where there is a final decision of the Commission on violation of the competition regulations, the court would still be empowered to establish whether the specific actions of the defendant are infringing the competition regulations, and would not be bound by the resolution of the Commission.

However, considering the lack of experience of the competent courts in such disputes, as well as the court practice regarding similar issues, it would be realistic to expect that the courts would take the final decision of the Commission to be an irrefutable fact, and thus the illegality of the actions or deeds of the defendant would not need to be proven before the court. At most, the Commission’s final decision would only establish a presumption that an infringement existed.

- 2** Are private antitrust actions mandated by statute? If not, on what basis are they possible?

As mentioned above, the new Competition Law explicitly provides for the possibility of direct civil law actions for damages arising from competition law infringements.

- 3** If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Apart from the Competition Law, the Serbian Law on Litigation Proceedings is applied to disputes regarding actions for damages and the annulment of agreements due to the violation of competition law.

According to the provisions of the Serbian Law on Constitution of the Courts, the Commercial Court rules in the first instance on the abuse of monopolistic and dominant positions on the relevant market and the conclusion of monopolistic agreements. The law does not provide for precise provisions on whether this is the competent court in cases where damages were not due to commercial subjects or other legal entities acting as commercial subjects. However, it could be concluded from the wording of the aforementioned law that in this case, the Commercial Court would also be competent.

The general principle of territorial jurisdiction in Serbia is jurisdiction according to the seat or permanent residence of the defendant; however, there are also other principles: among others, in cases of non-contractual damages, the plaintiff can also file an action at the court where the damaging act was committed or at the court where the damage occurred.

4 In what types of antitrust matters are private actions available?

Civil actions are available in the following cases:

- where horizontal or vertical agreements of participants in the market, or certain segments thereof materially prevent, restrict or distort competition; and
- abuse of a dominant position, when the participant in the relevant market holding the dominant position prevents, restricts or distorts competition through its actions.

5 What nexus with the jurisdiction is required to found a private action?

Regarding territorial application, the Competition Law explicitly stipulates that it shall be applied to actions and deeds committed in Serbia and to actions or deeds committed in the territory of a foreign country by which competition in Serbia is affected.

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Any natural person and any legal entity may act as plaintiffs and defendants before Serbian courts in civil matters (including actions for damage compensation and for the annulment of an agreement).

Pursuant to the Serbian Law on Litigation Proceedings, the court may recognise the capacity of a party in cases where the form of association or organisation would not normally have standing as a party, should it find that, considering the subject of the dispute, the association or organisation essentially fulfils the material conditions for acquiring the capacity of a party.

In the case of cross-border litigation, Serbian rules on private international law contain the following rules on territorial jurisdiction:

- Serbian courts are generally competent if the defendant has its seat or permanent residence in Serbia.
- If a number of defendants are sued and at least one of them has a permanent residence or seat in Serbia, Serbian courts are competent where such defendants are in a legal relationship or the claims against them are based upon the same legal and factual grounds.
- In the case of non-contractual damages, Serbian courts are also competent if the damaging act has been committed within Serbia or if the damages occurred in the Serbian territory.
- In the case of contractual damages, Serbian courts are also competent if the place of performance of the obligation in question is Serbia.
- If a foreign entity has a branch office in Serbia or has an entity entrusted with the performance of its business in Serbia, Serbian courts are competent concerning a dispute arising out of the operations of such branch or person in Serbian territory.
- Serbian courts are also competent if any of the defendant's property is located in Serbia, if the plaintiff's seat or permanent residence is in Serbia or if the plaintiff proves that the defendant's property in Serbia is likely to be sufficient for the execution of the judgment.

7 If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

Private action procedure

8 May litigation be funded by third parties? Are contingency fees available?

Attorneys' fees are regulated by the attorneys' tariff adopted by the Serbian Bar Association. In accordance with the attorneys' tariffs, besides the fee (which is precisely defined by the attorneys' tariff depending on the complexity and value of the dispute), the attorney and client can also agree in writing a fee as a lump sum or percentage, which in civil and administrative lawsuits can amount to no more than 30 per cent of the value of the lawsuit.

To our knowledge, as yet, there exists no litigation funding by third parties in Serbia.

9 Are jury trials available?

Jury trials are not available in actions before commercial courts.

10 What pre-trial discovery procedures are available?

Pre-trial discovery procedures are not available under Serbian law. However, the Law on Litigation Proceedings stipulates that if there is a justifiable fear that certain evidence will not be able to be presented or that its subsequent presentation will be hindered, a motion can be filed to the court during or before bringing the action that this evidence should be presented.

In such motion, the proponent is obligated to state the facts to be proven, the evidence to be presented and the reasons why it believes that the evidence will not be able to be presented at a later time or that the presenting thereof will be hindered.

11 What evidence is admissible?

The Law on Litigation Proceedings prescribes five evidentiary means: on-site inspection, documents, the hearing of witnesses, expert witnesses and the hearing of parties.

The court decides which evidence is to be presented to establish the relevant facts. The court may present only the evidence proposed by the parties and has no power to present other evidence (principle of procedural truth). The court can decide which of the proposed evidence should be presented during the proceedings, by determining which of the proposed pieces of evidence is necessary for the assessment of the facts.

The court will permit the testimony of an expert witness when expert knowledge is not available to the court and is necessary for the establishment or clarification of a fact.

On-site inspections are conducted when the direct observation of the court is necessary for the establishment of a fact or the clarification of a circumstance.

The court will decide on admitting evidence by hearing the parties when there is no other evidence or when it finds that this is necessary, along with other presented evidence for the establishment of relevant facts.

12 What evidence is protected by legal privilege?

For the first time in Serbian legislation, a right to privileged communication between the parties to the proceedings before the Commission and their legal counsels is provided in the new Competition Law. However, it is unclear whether such legal privilege also extends to in-house counsels.

13 Are private actions available where there has been a criminal conviction in respect of the same matter?

Yes, criminal and civil litigation proceedings are separate and independent from each other.

The Serbian Criminal Code provides for charges regarding the abuse of a dominant position. This crime can be committed by a legal entity or an entrepreneur who, by abusing a monopolistic or dominant position in the market or by concluding monopolistic agreements, causes a distortion of the market or brings the undertaking in question into a favourable position compared to others to acquire material gain for said undertaking (or for another undertaking) or causes damage to other commercial subjects, consumers or users of services.

In litigation proceedings, the court, with respect to the existence of a crime and the criminal liability of the perpetrator, is bound to the final verdict of the criminal court, finding the accused guilty.

14 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation?

There is no obligation to mandatorily accept evidence established in criminal or other proceedings. The court is free to determine which evidence or facts it shall accept as decisive in the rendering of its decision and, in any case, the court undertakes the evaluation of the evidence on which the decision is based. Relevant provisions of the Competition Law do not provide for a special protection of leniency applicants from follow-on litigation.

15 What is the applicable standard of proof for claimants and defendants?

In Serbian civil procedural law, there is no given standard of proof. Which facts shall be established as proven shall be determined by the court at its discretion on the grounds of careful and conscientious evaluation of each piece of evidence separately and all the evidence together, as well as on the grounds of the results of the entire proceedings. If, on the grounds of the evidence presented, the court is unable to establish a fact with certainty, the existence of the fact in question shall be determined by application of the rule of the burden of proof.

The burden of proof lies with the plaintiff (the party trying to establish the evidence). The party must lay out the facts and propose the evidence on which it bases its request or with which it disputes the allegations and evidence of the opponent. Proof includes all the facts that are relevant for rendering a decision. In the case that the defendant raises counterclaims, it is the defendant who carries the burden of proof in respect of such counterclaims.

It is further provided for that the party is obliged to submit any document it claims as evidence in support of its allegations. If the document is in the possession of a governmental authority, company or some other organisation entrusted with the conducting of public authorisation, and the party itself is unable to cause the document to be submitted or shown, the court will at the proposal of the party or ex officio obtain said document.

The question of passing-on defence is not specifically treated in Serbian civil law or in the court practice and therefore underlies the standard evaluation of proof by the court (see question 36 below).

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

The regular duration of proceedings is two years in the first instance and another year in the second instance. It is not possible to significantly accelerate the proceedings.

17 What are the relevant limitation periods?

Pursuant to the general provisions of the Law on Contracts and Torts, claims for damages expire three years from the date when the injured party learned of the damage and of the entity that caused the damage. In any event, such claim expires five years after the occurrence of the damage.

With regard to the annulment of a restrictive agreement, the right to claim nullity does not expire.

18 What appeals are available? Is appeal available on the facts or on the law?

Pursuant to the general rules provided in the Serbian Law on Litigation Proceedings, decisions of commercial courts can be appealed within eight days, and such appeals are ruled on by the Superior Commercial Court, which renders a final ruling as a court of second instance. Such appeals are available on the law and on the facts.

In cases provided for by the above cited law, the Supreme Court of the Republic of Serbia rules upon extraordinary legal remedies against rulings of the Superior Commercial Court. Such appeals are only available on the law.

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

The Law on Litigation Proceedings does not recognise the legal institution of collective proceedings.

However, pursuant to the provisions of the Law on Litigation Proceedings, several entities may sue or be sued in the same action if, with regard to the subject of the action, their rights or obligations arise from the same factual or legal grounds (as a general rule).

Each jointly interested party in the action is an independent party and each party's action or inaction neither benefits nor harms other jointly interested parties.

20 Are collective proceedings mandated by legislation?

Not applicable.

21 If collective proceedings are allowed, is there a certification process? What is the test?

Not applicable.

22 Have courts certified collective proceedings in antitrust matters?

Not applicable.

23 Are 'indirect claims' permissible in collective and single party proceedings?

In relation to single party proceedings, the rules follow the general provisions of the Law on Contract and Torts, which in general do not permit indirect claims. As indicated above, there are no collective proceedings in the strict sense.

24 Can plaintiffs opt out or opt in?

Not applicable.

25 Do collective settlements require judicial authorisation?

Not applicable.

26 If the country is divided into multiple jurisdictions, is a national collective proceeding possible?

Not applicable.

27 Has a plaintiffs' collective-proceeding bar developed?

Not applicable.

Update and trends

A new competition law was enacted in Serbia in 2009, explicitly providing for a statutory basis regarding private enforcement of damage claims due to competition law infringements (see question 1).

Remedies

- 28** What forms of compensation are available and on what basis are they allowed?

Pursuant to the provisions of the Law on Contracts and Torts, the person that caused damage is obligated to restore the situation as it was prior to the damage. If restoration to the previous situation does not cure the damage entirely, the party that caused the damage is obligated to provide pecuniary compensation for the remainder of the damage.

In case the restoration to the previous state is not possible, or if the court deems that it is not necessary, the court may compel the injuring party to pay damages to the injured party. Should the court find that the party is entitled to damages but the amount or quantity cannot be determined, or can the amount or quantity only be determined with disproportionate difficulty, the court will assess the amount of the damages at its own discretion.

- 29** What other forms of remedy are available?

Pursuant to the general rules of Serbian civil procedural law, for the purpose of securing a pecuniary or non-pecuniary claim, the civil court can award temporary relief, before initiating the proceedings, during the proceedings and also upon completion of the proceedings, until the enforcement of the decision.

Temporary relief (interim injunctions) can be awarded if the proponent renders the plausibility of existence of the claim and the danger that the enforcement of the claim will be hindered, or in case the proponent satisfactorily shows that the relief is necessary to prevent the use of force or the occurrence of irreparable damage.

- 30** Are punitive or exemplary damages available?

Punitive or exemplary damages are not provided for under Serbian law.

- 31** Is there provision for interest on damages awards?

The debtor in delay of fulfilment of its pecuniary liability owes, apart from the principal amount, the amount of interest on arrears at the rate determined by the Law on the Rate of Interest on Arrears. The rate of interest on arrears consists of the fixed rate of 0.5 per cent and the monthly rate of growth of retail prices.

- 32** Are the fines imposed by competition authorities taken into account when settling damages?

No, fines are not taken into account when settling damages. Fines are state income, while restitution or pecuniary compensation is awarded to private subjects.

- 33** Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Each party first bears the costs caused by its actions. When a party proposes the presentation of evidence, it is, pursuant to an order of the court, obliged to deposit in advance the amount necessary for settling the expenses incurred by the presenting of evidence, and should it fail to do so within the time stipulated by the court, the court shall not proceed with the presenting of evidence.

If the court ordered the presentation of evidence ex officio, it will order that the deposit be effected by the party bearing the burden of proof of the fact for which the evidence is being presented.

A party that fully loses an action shall be obligated to compensate the opposing party for the costs incurred. Should a party be only partially successful in an action, the court shall, considering this success, decide that each party shall bear its own costs or that one party shall compensate the other for a proportionate amount of the costs.

If the action ends in a court settlement each party shall bear its own costs.

- 34** Is liability imposed on a joint and several basis?

For damages caused jointly by several persons, all participants shall be jointly liable. Persons causing damages acting independently of one another shall also be jointly liable for the damage suffered if the respective damage caused by them cannot be determined.

If there is no doubt that the damage was caused by one of two or more specific persons mutually connected, but it cannot specifically be determined which of them caused the damage, they shall be jointly liable.



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35 Is there a possibility for contribution and indemnity among defendants?

If only one of several individuals or legal persons jointly liable for damages is sued and held liable to reimburse the entire amount of damages, such defendant may recover respective proportions of the damages from the other authors of the damage.

36 Is the 'passing-on' defence allowed?

Serbian law does not recognise 'passing-on' issues. As there is no case law in the field of competition-based claims for damages, it is very difficult to assess the manner in which Serbian courts might deal with this concept.

37 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

No.

38 Is alternative dispute resolution available?

There is the possibility of parties amicably resolving a dispute by means of negotiation (mediation). The mediator is not empowered to force a binding agreement upon the parties.

An agreement reached before commencement of the litigation proceedings or during the litigation proceedings shall have the same legal effects as an out-of-court settlement, if concluded in writing and not contrary to the public order. An agreement taken on record by the judge shall have the legal effects of a court settlement.

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