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Private Antitrust Litigation

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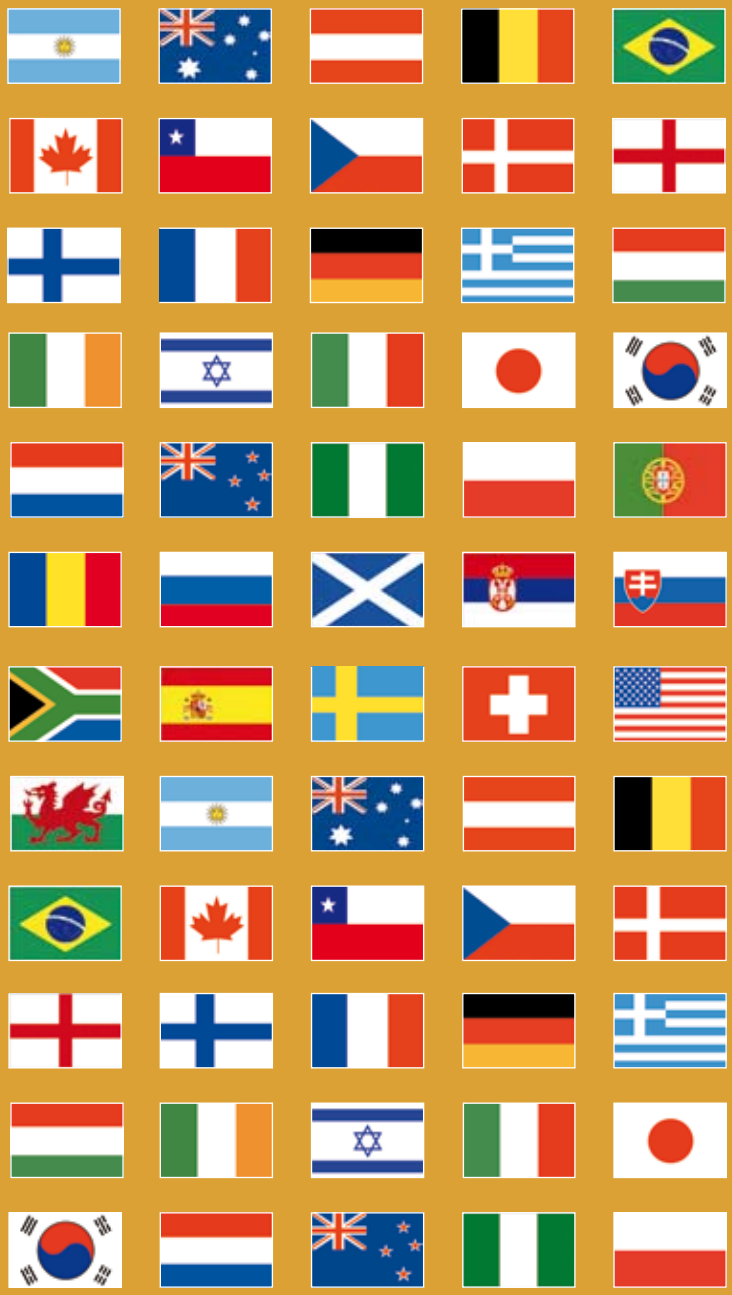
2009



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Legislation and jurisdiction

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

In general, private antitrust litigation is somewhat undeveloped in Serbia.

The issues of unfair competition and 'monopolistic' behaviour have received special attention under Serbian law in the sense that protection from unfair competition and anti-competitive behaviour were regulated by specific legislation relatively early (in 1930).

One of the earliest antitrust regulations in force in Serbia explicitly stipulates that a damaged individual trader, a chamber of commerce, traders' associations, consumers and other interested bodies and organisations can, in the case of monopolistic action, file with a competent court, within the stipulated timeframe, 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), or a lawsuit remedying the situation caused by the illegal actions or to compensate damage caused, or both.

Furthermore, Serbian legal practice 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. As some legal experts state, this mostly referred to the possibility of launching civil law proceedings claiming the absolute nullity of restrictive agreements between commercial subjects. Later antitrust laws did not specially regulate special civil law protection in the case of violation of the 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.

The new Law on Protection of Competition, which came into force on 24 September 2005 (the Competition Law), defines in great detail prohibited agreements between participants in the market which materially prevent, restrict or distort competition (hereinafter referred as the restrictive agreements), the abuse of a dominant position and exceptions in its application. Further, for the first time Serbian legislation regulates the procedure for controlling concentrations for the purpose of preventing the appearance of undertakings that could greatly limit competition. Therefore, the Commission for Protection of Competition (the Commission) was established as an independent regulatory organisation, introducing rules for the administrative procedure before the Commission for establishing violations of the Competition Law and stipulating sanctions for failure to observe it.

The Competition Law does not contain special provisions regarding the legal protection of individuals that suffer damage due to violation of said law. Thus, in cases where an individual has suffered damage through actions constituting violation of the Competition Law, the general rules of the Serbian civil material and procedural law on damage compensation are applied. The Competition Law explicitly stipulates that certain restrictive agreements are prohibited and null and void. In this case, concerning private enforcement, the general rules on nullity of agreements are also applied for the purpose of annulment before a relevant court.

Before a competent court, the plaintiff in an action for damages must prove that the defendant violated the Competition Law through its actions, that the plaintiff suffered damage and that the damage suffered is a consequence of such action.

The Competition Law does not contain explicit provisions regarding the exclusive jurisdiction of the Commission in establishing that certain actions and deeds of a participant in the market constitute a violation of the Competition Law; that is, it does not exclude the possibility of such a legal issue being brought before the competent court of law in an action for damages or in an action for the annulment of an agreement. Therefore, it could be concluded that if there is no prior decision of the Commission on whether a certain participant in the market violated the Competition Law, the court will, in an action for damages (or for the annulment of a restrictive agreement), firstly decide on the question of the illegality of the defendant's action, which court decision would cause effect only in the respective lawsuit.

Following the enactment of the Competition Law, 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 also no court practice regarding the issue of the binding force of the Commission's decision (in cases when the Commission resolved that a violation of the Competition Law was or was not committed in a specific case), namely whether such a decision of the Commission on the existence of a violation of the Competition Law constitutes an irrefutable determined fact that does not need to be proved before a civil court. Furthermore, there is the issue of whether the court would be bound solely by the decision of the Commission's finding of an infringement of the Competition Law which is subsequently confirmed by the Supreme Court under the procedure of court verification of the legality of administrative acts (final decision).

We are of the opinion that in cases where there is a final decision of the Commission on violation of the Competition Law, the court would still be empowered to establish whether the specific actions of the defendant are contrary to the Competition Law, and would not be bound by the resolution of the Commission.

However, considering the inexperience of the 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, so that the illegality of the actions or deeds of the defendant would not need to be proven before the court. In the best case, the Commission's final decision would create 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 Competition Law is silent as to whether individuals injured as a result of anti-competitive behaviour have the right to bring actions for damages before the courts.

The general principles governing liability for damages will apply, without any difference being made for competition based actions for damages. The basis for suing for damages follows the general rules laid down in the Serbian Law on Contracts and Torts, stipulating that the party causing damage shall be obligated to compensate the said damages, unless it proves that the damages were caused through no fault of their own.

Concerning restrictive agreements, general rules of the Law on Contracts and Torts stipulate that an agreement that is contrary to imperative rules, public order or good business practice is null and void. The court resolves nullity issues ex officio, and nullity can be claimed by any interested party.

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

The provisions of the Serbian Law on Litigation Proceedings are applied to disputes regarding actions for damages and the annulment of agreements due to the violation of competition law, and as this law does not contain special provisions for disputes regarding such actions, the general rules relating to litigation proceedings are applicable.

According to the provisions of the Serbian Law on Constitution of the Courts, the Commercial Court rules in the first instance on abuse of monopolistic and dominant position on the market and the conclusion of monopolistic agreements. The law does not provide precise provisions on whether this is the competent court in cases where damages were not suffered through relations between commercial subjects or other legal entities in the conducting of the business of the commercial subjects. However, it could be concluded from the wording of the aforementioned law that in this case competence would also lie with the Commercial Court.

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 sue 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 law protection is 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 law explicitly stipulates that it shall be applied to actions and deeds committed in Serbia and to actions and deeds that arise as a consequence of actions or deeds committed in the territory of a foreign country by which competition in Serbia is violated.

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

The following may act as plaintiffs and defendants before Serbian courts in civil matters (including actions for damage compensation and for the annulment of an agreement):

- any natural person; and
- any legal entity.

Special regulations may also provide that other entities can act as parties in civil proceedings, but there is no such regulation with respect to actions for damages related to the violation of competition law.

Pursuant to the Law on Litigation Procedure, 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, particularly if it has property at its disposal that an enforcement procedure could be conducted over.

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 in the case that the defendant has its seat or permanent residence in Serbia.
- In the case that 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 and if the damages occurred in the Serbian territory.
- In the case of contractual damages, Serbian courts are also competent in that 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 in a case that any 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 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 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 (whose amount 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.

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 as provided for in common law legal systems 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 put to the court during or before bringing the action that this evidence should be admitted.

In the motion for presenting the evidence the proponent is obligated to state the facts to be proven, the evidence to be presented and the reasons for which 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 has the power to decide which of the proposed evidence should be presented during the proceedings, by deciding which of the proposed evidence contentious yet relevant facts can be established, and to reject proposals for presenting other evidence as unnecessary.

The court will present evidence by 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 inspection is 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 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 one another.

The Penal Code of the Republic of Serbia provides for the crime of abuse of a monopolistic 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.

13 Can the evidence or findings in criminal proceedings be relied upon by plaintiffs in parallel private actions?

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.

14 What is the applicable standard of proof and who bears the burden?

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.

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.

When one party refers to a document and claims that it is located with the other party, the court will instruct the other party to submit the document, giving it a fixed period of time to do so.

A party may not refuse to submit a document if, during the proceedings, the party itself claimed the document as evidence of its allegations, or if it is a document that must be submitted or shown by law, or if the document, considering its content, represents a joint document for both parties.

When a party instructed to submit a document denies that it has the document, the court may admit evidence to establish this fact. The court will, considering all the circumstances, determine at its own discretion the significance of the fact that the party holding the document refuses to act in accordance with the decree of the court instructing it to submit the document.

15 What is the typical timetable for class and non-class proceedings? Is it possible to accelerate proceedings?

The customary 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.

16 What are the relevant limitation periods?

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

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

17 What appeals are available?

Decrees 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.

In cases provided for by the Law on Litigation Proceedings, the Supreme Court of the Republic of Serbia rules upon extraordinary legal remedies against rulings of the Superior Commercial Court.

Class proceedings

18 Are class proceedings available in respect of antitrust claims?

The Law on Litigation Proceedings does not recognise the legal institution of class proceedings as in common law legal systems.

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, they are in legal community or if their rights or obligations arise from the same factual and legal grounds; or
- when the subject of the action is claims or obligations of the same nature founded on materially the same factual and legal grounds, and if there is subject matter and local jurisdiction of the same court for each claim and for each defendant.

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.

19 Are class proceedings mandated by legislation?

Not applicable.

20 If class proceedings are allowed, is there a certification process? What is the test?

Not applicable.

21 Have courts certified class proceedings in antitrust matters?

Not applicable.

22 Are 'indirect claims' permissible in class and non-class proceedings?

According to non-class proceedings, the rules follow the general provisions of the Law on Contract and Torts, which in general do not permit indirect claims. Class proceedings are not applicable.

23 Can plaintiffs opt out?

Not applicable.

24 Do class settlements require judicial authorisation?

Not applicable.

25 If the country is divided into multiple jurisdictions, is a national class proceeding possible?

Not applicable.

26 Has a plaintiffs' class-proceeding bar developed?

Not applicable.

Remedies

27 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 to the state prior to the damage arising. 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.

If it is not possible to restore the previous state, or if the court believes that this is not necessary, the court shall rule that said party shall pay the damaged party the appropriate sum of money as compensation in damages. If the damaged party so requests, the court shall award pecuniary damages unless the circumstances of the case justify restoration to the previous state.

In assessing the amount of pecuniary damages, the sum is determined in accordance with prices at the time the court renders its decision and the damaged party is entitled to compensation of actual damage and compensation of lost profit that it could reasonably have expected according to the regular course of affairs or special circumstances, the realisation of which profit was prevented by the actions of the party that caused damage

Should the court find that the party is entitled to damages but the amount or quantity cannot be determined, or can only be determined with disproportionate difficulty, the court will assess the amount of the damages at its own discretion.

28 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, both before initiating, during and also upon completion of the proceedings, until enforcement.

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 defeated or greatly hindered, or when the proponent renders it probable that the relief is necessary to prevent use of force or occurrence of irreparable damage.

29 Are punitive or exemplary damages available?

Punitive or exemplary damages are not available under Serbian law.

30 Is there provision for interest on damages awards?

Should the court instruct one party to compensate damage to the other party within a certain period of time, upon expiry of the said period the party in default of its obligation is in delay. 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.

31 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, and restitution or pecuniary compensation is compensation to private subjects stipulated by the Law on Contracts and Torts.

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

Each party first bears the costs incurred 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 period of time stipulated by the court, the court shall not proceed with the presenting of evidence. In this case the court will, considering all the circumstances, determine at its own discretion the significance of the fact that the party failed to deposit the amount necessary for settling the expenses within the given period of time.

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, award that each party shall bear its own costs or that one party shall compensate the other for a proportionate amount of the costs.

The plaintiff shall compensate the defendant for the costs of the action if the defendant gave no cause for the action and if it recognised the particulars of claim in its response to the action at the preparatory hearing, and if there is no preparatory hearing, then at the main hearing before entering into argument on the main subject matter.

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

33 Is liability imposed on a joint and several basis?

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

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

34 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 pay the whole damages, such defendant may recover respective proportions of the damages from the other authors of the damage.

35 Is the 'passing-on' defence taken into account?

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 these concepts.

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

No.

37 Is alternative dispute resolution available?

There is the possibility of parties amicably resolving a dispute in accordance with their interests through one or more intermediaries 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 force of an out-of-court settlement, if made out in writing and not contrary to the public order. An agreement taken on record by the judge shall have the force of a court settlement.

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