



REPUBLIC OF SERBIA
COMMISSION FOR PROTECTION OF COMPETITION

CONFERENCE ON INSTITUTION-BUILDING OF THE COMPETITION
AUTHORITIES IN SOUTH-EAST EUROPE

**INFLUENCE OF AND INFLUENCE ON THE EXECUTIVE
BRANCH: COOPERATION AND INDEPENDENCE**

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INDEPENDENCE OF COMPETITION AUTHORITIES

- ❖ Regulation 1/2003, Article 35: Member States must designate a competition authority... “in such a way that the provisions of the Regulation are effectively complied with”
- ❖ Requirement under the EU-Serbia SAA: Article 73(1)(3) requires that a “operationally independent authority” be established by Serbia
- ❖ What is “operational independence”?
- ❖ US Federal system: distinction between “executive agencies” that are a means of “outsourcing” Executive work vs. “independent agencies” that are meant to operate independently of the Executive, usually as quasi-judicial entities (e.g. FTC)
- ❖ Serbian CA: similar to the US “independent agency model”

WHY INDEPENDENCE?

Specific nature of CAs:

- ❖ ***Both administrative and “judicial”***: CAs grant administrative approvals but also decide *controversies* and, unlike courts, create *policy*
- ❖ ***Neutrality***: business needs to perceive the competition rules as neutral and predictable, not subject to the hazards of daily politics
- ❖ ***Unique powers***: under the European model, CAs have investigation and punishment powers that are unusual, perhaps unique in Continental European administrative systems (large, deterrent fines, search and seize on office premises without a warrant)
- ❖ ***Why not just leave it all to the civil courts?*** Difficulty of collecting evidence, “inequality of arms” between big and small players, suits motivated by private, not public interest

INFLUENCE OF THE EXECUTIVE ON A CA

Two main types:

- ❖ Direct influence (on the CA itself)
- ❖ Indirect influence (on the competitive process)

DIRECT OR INSTITUTIONAL INFLUENCE

CAs can be influenced directly by the Executive in numerous ways; the basic ones are:

- ❖ Influence over appointments
- ❖ Influence over expenditure: directly, by keeping the CA on the general budget or indirectly, by imposing limitations or issuing directions
- ❖ Influence over relevant legislation, including secondary and subsidiary legislation (e.g. general administrative law), which can affect the CA's ability to act
- ❖ Influence through failure to cooperate or difficult cooperation

INDIRECT OR OUTPUT-RELATED INFLUENCE

Less commonly mentioned but quite important is indirect influence, through influence on the competitive process:

- ❖ Influence through state-owned undertakings that behave anticompetitively (discrimination, monopoly rent)
- ❖ Influence through administrative barriers to entry
- ❖ Influence through price regulation (esp. minimum price fixing)
- ❖ Influence through exemption from competition rules (esp. through international agreements)

INFLUENCE OF THE CA ON THE EXECUTIVE

Three main types:

- ❖ Direct influence on the legislative process
- ❖ Indirect influence on the legislative process
- ❖ Indirect influence on Executive “targets”

INFLUENCE ON LEGISLATIVE PROCESS

CAs can influence legislative proposals and secondary legislation issued by the Executive (Article 21(1)(7) LPC) directly, through:

- ❖ Ex ante Involvement in the legislative process:
 - ❖ CA approval required or
 - ❖ CA opinion required

Or indirectly, through:

- ❖ Ex post advocacy (“name and shame”)

INDIRECT INFLUENCE

CAs can influence the Executive indirectly, through:

- ❖ Antitrust proceedings against state undertakings, etc.
- ❖ Merger control that affects the realization of major projects
- ❖ Partial economic “targets” envisaged by the Executive are affected; the Executive often sees one side of the picture (employment, wealth generation in *one* sector), whereas the CA must take into account the “bigger picture” (welfare loss through anticompetitive market structure or conduct, which may create job losses and wealth destruction in other sectors)

THE NEED FOR COOPERATION

An independent CA and the Executive are therefore linked to each other and must co-exist. In that respect, they must:

- ❖ Cooperate in a constructive manner
- ❖ While retaining their lawful roles and
- ❖ Presenting a transparent and coherent *system* to business and consumers, where the Executive and the CA understand and respect each other's roles

KEY AREAS OF COOPERATION

Cooperation is key in two main areas:

- ❖ Cooperation in enforcement: CA and Executive provide each other with information in a timely and lawful manner, coordinate application of various regulatory frameworks (e.g. competition and tax, competition and fraud investigations)
- ❖ Cooperation in forming competition policy: within the framework of the law, the CA and the Executive should share the same general idea of how the market economy, develop and design a system that avoids conflicting roles

POLICY COORDINATION

- ❖ Overall policy should be coordinated with the Executive, within the limits of the law, e.g. through representation of the CA in the relevant Government Committee (e.g. Committee on the Economy), that meets before legislative proposals go to the Government for a vote
- ❖ Difficulty: the LPC states (Article 21) that the Serbian CA shall advise on legislation that “affects competition”
- ❖ How does one define, *ex ante*, which legislation can “affect competition?”
- ❖ Solution: consultations should be conceived broadly, as a matter of “economy” or “competitiveness”

THANK YOU FOR YOUR ATTENTION!

The views expressed in this presentation are those of the author
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