

# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy in 2021 – Western Balkans

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This post aims to present the main competition law developments in four Western Balkan jurisdictions – Serbia, Montenegro, Bosnia and Herzegovina, and North Macedonia. Rather than being an exhaustive review of everything that happened in 2021, the post will focus on what really mattered in these jurisdictions during the previous year.

### A) The four Balkan jurisdictions: What connects them?

When it comes to competition law, the four Balkan jurisdictions discussed here are often grouped together due to the similarities that connect them.

To start with, all used to be part of Yugoslavia, which means they all belonged to the same legal system for decades. Further, there is no language barrier between at least three jurisdictions (Serbia, Montenegro, Bosnia and Herzegovina). Finally, all four countries are on the (long) road to the EU, each having signed a Stabilization and Association Agreement (SAA) with the bloc. Each of these SAAs, *inter alia*, contain competition law provisions and open the door to aligning the local competition regulations with the EU model.

That said, it is by no means that these four jurisdictions have uniform competition regulations and a common competition policy. Rather, each country has devised its own legislative and enforcement setup, which in practice often leads to quite different areas in the focus of the respective competition authorities. This will also be evident from this review.

### B) Serbia

Competition law enforcement in Serbia was in full swing in 2021, with new antitrust cases, gun-jumping investigations, and a first incompatibility decision in the area of state aid.

#### B.1) Antitrust: NCA is resolute in bringing down prices of consumer electronics

The Serbian national competition authority (NCA) had a busy year, closing as many as six antitrust cases. Four of these were based on commitments offered by the investigated parties, which shows

the NCA's readiness to close its investigation in that way rather than by issuing an infringement decision.

In the remaining two cases, the NCA did, in fact, issue infringement decisions. Specifically, the NCA established that some of the leading distributors of consumer electronics in Serbia had engaged in unlawful resale price maintenance. Interestingly, when launching those two cases back in 2020, the NCA noted that one of the aims of the probes was to establish: [how come consumer electronics are cheaper in Hungary than in Serbia?](#) It remains to be seen what effect the NCA's decisions will have on consumer prices in Serbia.

Apart from closing cases, the Serbian NCA in 2021 was also active in opening new antitrust investigations. Concretely, it opened two new probes. In the first, [the NCA is investigating the two largest suppliers of ground coffee in Serbia](#), probing whether the companies have coordinated their business strategies concerning the wholesale of ground coffee on the Serbian market. In the other new case, the NCA is probing whether a publisher of textbooks had abused its alleged dominance on the market for primary school textbooks in Serbia.

Finally, a review of antitrust developments in Serbia would be incomplete without turning to the individual exemption practice of the Serbian NCA. Specifically, Serbia still has not introduced self-assessment for individual exemption of restrictive agreements; rather, in order to benefit from an exemption, the agreement needs to be notified to the NCA in an administrative procedure. In this arena, by far the most prolific case concerned the agreements between two Serbian telecom operators, Telekom Serbia and Telenor, regarding the use of telecom infrastructure. The NCA granted an exemption for a period of seven years, though with some strings attached.

## **B.2) Merger control: Gun jumping in the focus**

The previous year did not bring exciting new Phase II probes. Nevertheless, the NCA was still fairly busy on the merger control front, as it usually is, due to a high number of merger filings in Serbia. In 2021, the number of merger decisions of the Serbian NCA once again exceeded 100 – how many decisions there were exactly, we will know once the NCA publishes its annual report. In any event, considering that during 2020 the number of decisions fell significantly due to COVID-related reasons, it is reasonable to expect this number will bounce back [to the pre-pandemic level](#).

Also, concerning merger control, the Serbian NCA was active in pursuing undertakings for not notifying their transactions in Serbia (gun jumping). To be precise, the NCA in 2021 published one new gun-jumping decision, [in which it fined Croatian group Fortenova for implementing a transaction without obtaining clearance in Serbia](#). In addition, the NCA last year launched at least two other gun-jumping probes, including [an investigation against Ernst & Young concerning the takeover of Zilker Technology](#). This indicates more NCA activity on this front in 2022.

## **B.3) State aid: First incompatibility decision**

As a background, like the other three jurisdictions, Serbia has a national state aid control system based on the EU model. Unlike some other countries in the region, where the local competition authority is also in charge of state aid enforcement (such as in Montenegro and North Macedonia), Serbia has a specialized body for state aid enforcement – the Commission for State Aid Control. Moreover, during 2021, that body produced some interesting case law.

By far, the biggest highlight in Serbia's state aid enforcement was that the country's state aid

authority [had issued its first state aid incompatibility decision](#). The decision concerned aid received by a Serbian subsidiary of Italian fashion company Geox. It remains to be seen whether this incompatibility decision will remain an isolated event or is a herald of more such decisions in the future.

Apart from this, the most interesting part of state aid enforcement in Serbia was decisions to clear large sums of subsidies as investment aid to new projects. For instance, during the previous year, Serbia's state aid authority cleared such aid EUR 10 million for the construction of a spa complex, EUR 28 million to Continental Automotive for an investment in Serbia, and EUR 15.5 million for support to German company Hansgrohe, concerning the construction of a plant for the production and installation of faucets, faucet parts, and sanitary products. We can expect more such subsidies, and accompanying state aid clearances, in the new year, too.

## **C) Montenegro**

While a small country, Montenegro has quite a lively competition policy in all classic areas of competition law – antitrust, merger control, and state aid. The previous year brought some interesting decisions in all three of these areas.

### **C.1) Antitrust: RPM in the sale of motorcycles, price-fixing between competitors**

In the area of antitrust, the Montenegrin NCA rendered two infringement decisions in 2021, both concerning unlawful restrictive agreements. In the first decision, the NCA established illegal RPM regarding the resale of Peugeot motorcycles in Montenegro. On the other hand, the second decision concerned illegal horizontal agreement between 10 providers of technical inspection services in Montenegro. Specifically, the NCA established that the providers had agreed on a joint price list for their services.

The Montenegrin NCA does not have the power to impose fines for antitrust infringements. However, it duly reported these two infringements to the competent misdemeanour court, which may still impose fines on the infringing undertakings.

Apart from issuing these two infringement decisions, the Montenegrin NCA also opened one new antitrust probe in 2021. The NCA is investigating Montenegrin company DMD Delta doo Podgorica, probing whether the company's acts may have amounted to a restrictive agreement that limits or controls production, markets, technical development, or investment. No additional information about the case is available at this moment.

Finally, like Serbia, Montenegro as well is still to introduce self-assessment for individual exemption of restrictive agreements – to get an exemption, the parties need to notify their agreement to the NCA. In that context, the Montenegrin NCA during 2021 individually exempted five restrictive agreements – two between insurance companies, two in the pharma industry, and one in the retail sector. The duration of the exemptions ranged between four months and five years (the latter being the maximum exemption term under Montenegrin law).

### **C.2) Merger control: NCA swamped by merger filings**

As has become ordinary in Montenegro, the NCA rendered by far the largest number of decisions

in the area of merger control. This is a small wonder considering that, as in [Serbia and North Macedonia](#), in [Montenegro](#), too, it is not required that the target be present on the local market in order for the filing thresholds to be exceeded.

As a result of such filing thresholds, the Montenegrin NCA in 2021 dealt with as many as 70 merger filings. In a predominant number of cases (68), the NCA had an easy task and unconditionally cleared the transactions in Phase I. In the remaining two cases, the NCA issued clearances with strings attached – in one case after a Phase I and in another after a Phase II probe. Since the filing thresholds remain unchanged as we enter the new year, we can expect more of the same on this front in 2022.

Furthermore, while busy with ongoing filings, the Montenegrin NCA did not overlook its duty to pursue gun-jumping offences. What is more, a look back at the track record of the Montenegrin NCA in detecting failures to notify concentrations reveals [a surprisingly high number of gun-jumping decisions in Montenegro](#). Considering this trend, we can expect more gun-jumping probes in the coming period.

### **C.3) State aid: Montenegro Airlines finally grounded**

Montenegro is another jurisdiction in the region (apart from North Macedonia) in which the NCA is also charged with state aid control. Over the last few years, the most interesting state aid decisions in Montenegro concerned the country's (former) flag carrier airline, Montenegro Airlines, which had regularly been in line for subsidies from the Montenegrin government.

In 2021, the story of Montenegro Airlines, at last, got its state aid finale – [on the back of a state aid decision of the Montenegrin NCA challenging the legality of subsidies the state had granted to the airline](#), the carrier was forced to halt its operations. Such high-profile cases certainly give additional weight to the Montenegrin state aid enforcement – it remains to be seen how the NCA will build on this foundation in the year to come.

## **D) Bosnia and Herzegovina**

Bosnia and Herzegovina probably has the most reasonable merger filing thresholds of the four Western Balkan jurisdictions, [which require the target's presence on the Bosnian market](#). Due to this, merger control is not the main focus of the Bosnian NCA, as it is to its counterparts in the region.

### **D.1) Antitrust: Quasi-private enforcement in action**

Bosnia has a peculiar antitrust system, in which the gist of antitrust investigations is started not *ex officio* by the NCA but based on a request of the interested party (claimant). In such cases, rather than actively investigating the alleged infringement, the NCA generally relies on the claimant showing that the respondent violated the law. In this light, Bosnia's antitrust setup could even be characterized as [quasi-private antitrust enforcement](#).

In 2021, the Bosnian NCA rendered two antitrust decisions of note, in both cases upon request of private claimants.

First, the Bosnian NCA established that the Government of the Federation of Bosnia and Herzegovina violated competition rules by adopting its subsidies program for private companies and sole traders engaged in the provision of veterinary services. The NCA found that the Government distorted competition in the segment of veterinary lab diagnostics. For this infringement, the NCA also imposed a fine on the government.

The second case is perhaps the most interesting antitrust decision in Bosnia and Herzegovina in 2021. The case concerned the games of chance sector. In its decision, the Bosnian NCA established the existence of a restrictive agreement in the games of chance sector in Republika Srpska (RS), finding as certain restrictive requirements prescribed by the Ministry of Finance of RS in connection with monitoring of the organizers of games of chance. It remains to be seen what effect the decision will have on competition in the sector concerned.

## **D.2) Merger control**

At least what we know from publicly available sources, the Bosnian NCA in 2021 issued 11 new merger decisions. However, only three of these decisions were on the merits, while the remaining eight were the NCA's procedural orders on dismissing the submitted merger notifications. How come?

As noted above, Bosnia's merger control thresholds are fairly reasonable in that they require the target's local presence to trigger the merger filing obligation. However, one of the thresholds also contains a market share element, which sometimes brings parties uncertainty as to whether they need to file in Bosnia and Herzegovina or not. Moreover, to eliminate that uncertainty, they often opt for filing to the Bosnian NCA as a precaution, dismissing such notifications.

## **D.3) State aid**

Bosnia and Herzegovina is one of the countries in the region which has a separate body for state aid control – the State Aid Council. Furthermore, following a lengthy hibernation, the Council in 2021 issued two interesting state aid decisions.

The decisions have a similar context, as both decisions involved state guarantees for bank loans. In both cases, the issue was alleged state assistance in the energy sector, and in both instances, the probe was started upon intervention by the Energy Community. In the decisions, the watchdog established that the guarantees provided to one of the energy incumbents in the country amounted to state aid, as the recipient had not paid a market premium for them.

Due to the high stakes and competition connected with the energy sector in Bosnia and Herzegovina, it would not be surprising if we see more interesting decisions of Bosnia's state aid watchdog concerning that industry this year.

## **E) North Macedonia**

At the end of this review of Western Balkan jurisdictions, we turn to North Macedonia, where merger control traditionally dominates the competition law landscape.

### **E.1) Antitrust: A quiet year in North Macedonia**

2021 was not an eventful year in North Macedonian antitrust – there were no new (published) antitrust investigations or decisions.

Further, of the four Western Balkan jurisdictions, North Macedonia is the only one that has opted for self-assessment of the parties when it comes to the conditions for individual exemption of prohibition. Due to this, the North Macedonian NCA does not deal with requests for individual exemption of restrictive agreements, as do its counterparts in Serbia, Montenegro, and Bosnia and Herzegovina.

### **E.2) Merger control: A large number of filings and a gun-jumping fine**

As in Serbia and Montenegro, respectively, in North Macedonia, the crux of the competition law enforcement is on merger control. This is since the North Macedonian filing thresholds regularly catch transactions where the target is not at all present on the North Macedonian market, the acquirer's turnover being sufficient to trigger the merger filing obligation in this jurisdiction.

That said, it is not surprising that as many as 80 merger filings were submitted to the North Macedonian NCA during the last year, up from 55 filings submitted in 2020. While the increase in the number of filings is sharp, one must take into account that 2020 was the year of strict COVID restrictions and a state of emergency in North Macedonia, which naturally reduced the workload of the NCA. During this year, the number of filings in North Macedonia is unlikely to fall – what is more, it would not be surprising if it would continue to rise.

While the number of filings in North Macedonia was high in 2021, no transaction the NCA examined during that period raised competition concerns – the NCA cleared all of them unconditionally in a Phase I procedure. This raises a question mark over the soundness of the filing thresholds in this jurisdiction, which caught 80 no-issue concentrations last year.

After all, the North Macedonian NCA did have one interesting decision in the merger control sphere last year – concerning gun-jumping. Concretely, the NCA established that a German company had acquired a Swiss target without notifying it to the NCA, although the merger filing obligation in North Macedonia was triggered. Upon this finding, the NCA also imposed a fine on the acquirer, the first for gun-jumping in North Macedonia after several years. This may herald an NCA more active in looking for and fining gun-jumping violators.

### **E.3) State aid: Attracting foreign investors by subsidies**

Like in Montenegro, in North Macedonia, too, the NCA is, in addition to antitrust and merger control, also entrusted with state aid powers.

And, in the area of state aid control, there was one notable decision in 2021 on clearing individual investment aid to DMM Dräxlmaier Manufacturing Macedonia. The investment concerned a EUR 16 million investment in North Macedonia, planned to create 1,000 new jobs in the country. It, therefore, seems the race is on between the Western Balkan jurisdictions who will attract more foreign investors – by paying them to come.

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