Institutional Design, Efficiency and Due Process in Competition Enforcement: Lessons from Slovenia and Serbia

by

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Abstract

The article compares the institutional designs and historic legacy of the Slovenian and Serbian competition enforcement framework, and discusses the advantages and drawbacks of each model. Slovenia implemented a mixed model, where the competition enforcement procedure is divided into functionally separate investigation and misdemeanour administrative procedures for the imposition of sanctions.

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The Slovenian model has generally been perceived as inefficient, with specific difficulties arising from the unclear relationship between the administrative and the misdemeanour procedures. On the other hand, Serbia significantly changed its institutional design in 2009 from its Austrian-inspired roots to a single administrative procedure. The new system appears to have been more effective, but strong judicial safeguards are necessary. The Authors further review the matter from a national and international point of view, considering the ECN+ Directive and the case-law of the Court of Justice of the European Union and European Court of Human Rights.

Résumé

L'article compare les conceptions institutionnelles et l'héritage historique du cadre slovène et serbe d'application des règles de concurrence, et examine les avantages et les inconvénients de chaque modèle. La Slovénie a mis en œuvre un modèle mixte, dans lequel la procédure d'application des règles de concurrence est répartie entre des procédures administratives d'enquête et de sanction fonctionnellement distinctes. Le modèle slovène a été généralement perçu comme peu efficace, avec des difficultés spécifiques dues au manque de clarté des relations entre les procédures administratives et les procédures pénales. D'autre part, la Serbie a considérablement modifié sa conception institutionnelle en 2009, passant de ses traditions d'inspiration autrichienne à une procédure administrative unique. Le nouveau système semble avoir été plus efficace, mais de solides sauvegardes juridictionnelles sont nécessaires. Les auteurs examinent la question d'un point de vue national et international, en tenant compte de la directive ECN+ et de la jurisprudence de la Cour de justice de l'Union européenne et de la Cour européenne des droits de l'homme.

Key words: antitrust; competition law; Central and Eastern Europe; efficiency; competition enforcement systems; judicial review; Slovenia; Serbia.

JEL: K21, K23, K49, L49

I. Introduction

The Former Director-General for Competition at the European Commission, Johannes Laitenberger (2017), once stated that the robust, independent and even-handed enforcement of competition rules is one of the public policies that contribute to making our society more sustainable, more inclusive and more future-proof. The need for enforcement which is both effective and procedurally even-handed in antitrust is repeatedly hammered home by competition authorities, undertakings and academics, almost without distinction. As is often

the case, difficulties arise when these two lofty principles clash; when efficiency can be gained at the expense of legal certainty, or when procedural fairness leads to protracted proceedings that ultimately serve little purpose to effectively curtail infringements, but might benefit the parties to the proceedings.

Different lawmakers have tried to approach the tension between these principles in institutional design by different means. Most national systems in Europe have copied the European Commission's institutional setup, where an administrative authority simultaneously has the roles of the investigator, the prosecutor and the adjudicator, while a minority have tried to separate the investigatory function from the decision-making role by granting their competition authorities the right to investigate whether an infringement had been committed, but leaving the final decision either on substantive matters or only on the sanctions to the judiciary. Some, like Slovenia, opted for a mixed approach, by trying to functionally separate investigation from deliberations within the same authority. In each instance, the underlying choice involved a similar trade-off between the level of discretion and power granted to an administrative authority in exchange for faster resolution of cases.

Indeed, efficiency has long been the driving principle behind antitrust regulation and enforcement, and this imperative has only intensified with the rise of digital markets. Market changes and disruptions are now faster than ever and, if enforcement lags behind, decisions run the risk of being rendered irrelevant by subsequent developments. Inefficiency in enforcement was one of the guiding principles behind the European Commission's Directive 2019/1 (hereinafter; ECN+ Directive).[1] As noted in Recital 5 of the ECN+ Directive, national law prevents many national competition authorities from having the necessary enforcement and fining powers to be able to enforce Union competition rules effectively, which undermines their ability to effectively apply national competition law in parallel to Articles 101 and 102 of the Treaty on the Functioning of the European Union[2] (hereinafter; TFEU). However, simultaneously, the right to a fair trial and the necessity for firm procedural guarantees have expanded alongside the scope of enforcement of competition rules worldwide, with concerns related to the severity of potential consequences caused by infringement decisions[3] and fundamental rights being underlined repeatedly by parties to the proceedings.

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[1] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (2019) OJ L 11.

[2] Consolidated version of the Treaty on the Functioning of the European Union (2012) OJ C 326.

[3] Not only with respect to the ever-increasing administrative fines and/or behavioural remedies, but increasingly with respect to follow-on damage claims and criminal liability.

Even though it has been a member state of the European Union for fifteen years now, Slovenia has a system of competition rules enforcement which is often perceived as inefficient.[4] Its national competition authority, the Slovenian Competition Protection Agency (hereinafter; the Slovenian NCA) is empowered not only to establish the infringement of competition rules, but also to impose fines. It does so, however, in two formally separate procedures (an administrative procedure and a misdemeanour procedure).[5] Even though high-profile investigations against major local companies have been both initiated and concluded,[6] the final outcome of subsequent misdemeanour procedures was generally perceived as unsatisfactory from a regulatory point of view. Conversely, Serbia, itself still only a candidate country for EU accession, adopted a single administrative procedure already in 2009, where the competition authority both investigates and imposes fines on companies suspected of wrongdoings within the same proceeding. Since 2011, the Serbian Commission for Protection of Competition (hereinafter; the Serbian NCA) initiated many high-profile investigations against major market players across numerous industries – from dairy to tobacco, telecoms to electricity, baby care products to motor vehicles – and imposed total fines in tens of millions of euros over the period. Compared to the overall development level of the country, the Serbian NCA is widely considered as an active and relatively competent enforcer[7]. This article intends to examine the

[4] According to publicly available information, less than EUR 1 million fines have been imposed by final decision and paid since the formation of the Slovenian national competition authority in 1993 (Krašek, 2019, p. 6). Other indicative examples include the Slovenian NCA's own Annual Report for the Year 2014, June 2015, as well as numerous media claims (e.g. Finance, newspaper article dated 22 May 2008: Intervju: Za kaznovanje tajkunov ni prepozno! and Ius-Info, article dated 12 July 2012: Novela zakona o preprečevanju omejevanja konkurence čez matični odbor). Problems in relation to duplication of procedures, which are generally aimed at a single goal, were also raised by judges of the Constitutional Court of the Republic of Slovenia (e.g. Partly Dissenting Opinion of Judge Mag. Miroslav Mozetič of 22 April 2013, No. U-I-40/12).

[5] The Slovenian NCA was given the role of the misdemeanour authority on 1 January 2005. Prior to that, only judges were allowed to render decisions in misdemeanour procedures, whereby the Slovenian NCA was allowed to file a motion for the initiation of the misdemeanour procedure. The objectives pursued by extending the competence of the Slovenian NCA included a more appropriate placement of misdemeanours in the system of criminal law and resolving court backlogs (Repas, 2010, p. 99).

[6] For example, investigations in relation to construction cartels, pharmaceutical companies and media companies.

[7] "In a short timespan since its establishment and start of operations in 2006, the Commission for Protection of Competition has grown into a respectable national competition authority. At the moment, the Commission has significant expert, organizational, technical and financial capacity. During the study, stakeholders have noted that the Commission has through its practice and professionalism of its expert service gained respect not only on the Serbian market, but that it represents a model for institutions in the region" (Lazarević and Protić, 2015, p. 62). Per the European Commission's 2019 Progress Report on Serbia, Serbia

institutional design of the Serbian and Slovenian competition framework and see how divergences in the original approach may have contributed to the evolution of their enforcement practice. We will look at whether a conscious choice has been made between efficiency and procedural fairness, what the advantages and disadvantages of each model may have been, and what lessons can be learned for the institutional design in other jurisdictions in Central and Eastern Europe, most of which faced similar economic, socio-political and cultural challenges in their development, which naturally reflect on the wider competition landscape.

II. Global Overview of Public Competition Enforcement Systems

In relation to how the tasks of investigation, prosecution and decision-making are allocated, public competition enforcement systems can be divided into two broad groups: administrative and judicial systems. In judicial enforcement systems, the competition authority is authorized only to investigate cases and identify competition concerns, but then has to bring the case before a court, which then renders the decision. In this framework, the authority essentially acts as a prosecutor, which has to convince the court on the merits of its claim. In a pure judicial model, the court renders the decision on both substance and fines. In a mixed judicial model, the competition authority adopts the decision on substance, and the court is only responsible for determining and imposing an appropriate sanction.

On the other hand, in an administrative enforcement system, the competition authority is empowered to investigate cases and issue binding and final decisions, usually subject to judicial review, which is supposed to provide additional legal certainty and allow the parties to appeal the decision. In practice, within the administrative model, further distinction can be made between the monist model and the dualist model. In the monist administrative model, the competition authority is empowered to investigate cases and render decisions directly within a single procedure, where the authority simultaneously investigates the facts of the case, considers the arguments of the parties to the proceedings and relevant stakeholders, applies the rules to the determined facts and ultimately discontinues the proceedings or imposes fines should it consider that

is considered to be moderately prepared in the area of competition policy, with the European Commission noting that: "The CPC's investigations of large private and public companies further contributed to improving its credibility and public image." EU principles are applied as a matter of course: "National competition law significantly overlaps with EU rules. Within EU accession, not only legal harmonization, but interpretation of domestic rules based on the criteria of EU competition law is necessary" (Danković-Stepanović, 2014, p. 90).

a competition infringement had been committed. In a dualist administrative model, the tasks of investigation and decision-making are divided between two administrative bodies, which may or may not be placed within the same authority (one body is in charge of the investigation of the case, which is later referred to the other body responsible for deciding the case). In practice, there can be significant differences in how a case is handled even within nominally similar administrative models: as an example, Bosnia and Herzegovina has a significantly more adversarial approach in contrast to most of the Western Balkans, with the competition authority's role being more akin to a *de facto* arbiter between competing claims of the complainant and defendant than to the more conventional inquisitorial approach prevalent in most other jurisdictions.[8]

III. Institutional Design: Looking at Slovenia and Serbia

Under the applicable legislation, the Slovenian NCA conducts two types of procedures: an administrative procedure for the investigation of infringements of the Prevention of Restriction of Competition Law (hereinafter; Slovenian Competition Law)[9] and Articles 101 or 102 of TFEU, and a misdemeanour procedure where the Slovenian NCA imposes sanctions. Accordingly, the Slovenian system is trying to have it both ways to a certain extent: there is functional separation, but set under the umbrella of the same administrative institution,[10] so it is not structural. The Slovenian NCA does not have jurisdiction to impose a fine within the same procedure where it establishes that a competition infringement had been committed. It should be borne in mind that the imposition of a fine is generally considered as one of the most important tools in the repertoire of NCAs, with mere administrative decisions not having a preventive effect on market participants (Grilc et al., 2009). The Slovenian system has several other specific features, which have been subject to avid debate and not a small amount of criticism over the years.[11]

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[8] Law on Competition, Official Gazette of BiH, no. 48/05, 76/07 and 80/09.

[9] Prevention of Restriction of Competition Law (2008) Official Gazette of the Republic of Slovenia, No. 36/08, as amended.

[10] Slovenia is not the only jurisdiction in the former Yugoslavia where this setup has been put in place: North Macedonia operates a similar scheme (Law on Protection of Competition, Official Gazette of Macedonia, no. 145/2010, 136/11, 41/14, 53/16 and 83/18).

[11] One of the major criticisms of the Slovenian competition procedure in the past concerned its independence. "At the beginning, the [Slovenian NCA's] powers were limited as it lacked independence being an office within the ministry. It was also severely understaffed (consisted of the Director, a couple of assistants and a secretary) and notoriously lacking professionals. These negative factors, which prevented it to be more than a passive observer, were amplified

The administrative procedure is normally carried out by a panel, which consists of all members of the Council of the Slovenian NCA and the chair of the panel, whereas the decision on fines is adopted by a (three member) misdemeanour panel, chosen for each individual case among the council members and officials employed by the Slovenian NCA. Consequently, while the persons actually deciding in both procedures are not necessarily the same, they will usually work together. Moreover, the mentioned proceedings are governed by different rules – whereas the administrative procedure is governed by the Slovenian Competition Law and, subsidiary, by the General Administrative Procedure Law,[12] the misdemeanour procedure is governed by the Minor Offences Law.[13] Each of these rulesets stipulate that in both the administrative and the misdemeanour procedure, the Slovenian NCA has to examine the facts of the case and determine the infringement of substantive law. It is clear that these two proceedings are formally separated and independent from one another.

The Slovenian Competition Law does not include detailed guidelines regarding the relation between the two aforementioned proceedings,[14] nor does it strictly determine whether they shall run simultaneously or successively, or which one of them is superior to the other. Therefore, many questions are unanswered and left to the discretion of the Slovenian NCA (Valter, 2015). However, according to the Slovenian Competition Law and the Minor Offences Law, the Slovenian NCA has to exercise relevant procedural guarantees and safeguards in both proceedings and must, separately and independently, examine the facts of the case and establish the infringement of the competition rules. As is logical and confirmed by the Slovenian NCA's interpretation and established case-law, only the final decision, in which an infringement of the competition rules is established, represents the legal basis for the initiation of the misdemeanour procedure. In such way, a problematic scenario in which an administrative decision is repealed only after the fine was imposed can be avoided (Grilc et al., 2009). Since competition investigations are often complex

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by the absence of specialized procedural rules for actions entrusted to the [Slovenian NCA,] preventing it to tackle competition law cases efficiently." (Fatur, Podobnik, Vlahek, 2016, p. 77) This nevertheless significantly changed in 2012/13 when it was reorganized into an agency. (Fatur, Podobnik, Vlahek, 2016, p. 77).

[12] General Administrative Procedure Law (2006) Official Gazette of the Republic of Slovenia, No. 24/06, as amended.

[13] Minor Offences Law (2011) Official Gazette of the Republic of Slovenia, No. 29/11, as amended.

[14] The formal distinction of an administrative and a misdemeanour decision, while in practice these two procedures are necessarily interconnected, has been subject to criticism by constitutional judges as well. See Partly Dissenting Opinion of Judge Mag. Miroslav Mozetič of 22 April 2013, No. U-I-40/12.

and time-consuming, in practice that means that the Slovenian NCA will initiate the misdemeanour procedure several years after the administrative procedure was originally initiated and the alleged offence committed. In order to increase efficiency, the Slovenian NCA relies on evidence used in the administrative procedure in the misdemeanour procedure as well.[15] Such approach has been given the green light by the Constitutional Court of the Republic of Slovenia.[16]

Following an investigation procedure, which is very much in line with the usual scope of authority of competition enforcers,[17] the Slovenian NCA is only entitled to render a decision by which it establishes an infringement of competition rules (a declaratory administrative decision). As a follow-up to this administrative decision becoming final, the Slovenian NCA can then initiate a misdemeanour procedure. The procedure is carried out in accordance with the rules for expedited proceedings in the Minor Offences Law by sending an information letter on the offence to the offender. The purpose of the information letter is to inform the offender on the offence and to enable him to respond to the allegations. This is a very peculiar approach, as the offender should have already been informed about the offence twice: firstly, on a preliminary basis via the Statement of Objections (which it would have already responded to), and hopefully, via a clear statement of reasons incorporated in the administrative decision. In line with the Minor Offences Law, the Slovenian NCA must *ex officio* and without delay, promptly and briefly establish the facts and collect evidence necessary to decide on the offence. Problems inevitably occur in determining the intent or negligence involved as a fundamental element of a misdemeanour, which is not necessarily relevant in the context of an administrative proceeding. Ultimately, the Slovenian NCA would impose a fine within the misdemeanour decision. Judicial protection against the administrative decisions is provided by the administrative court and the Supreme Court,[18] whereas judicial protection against the decisions adopted by the Slovenian

[15] The decision of Slovenian Competition Protection Agency of 21 July 2014, No. 3063-3/2014-35, pt. 60.

[16] The decision of the Constitutional Court of the Republic of Slovenia of 11 April 2013, No. U-I-40/12-31, pt. 35 and 37.

[17] The scope of the powers conferred on the Slovenian NCA in the investigation procedure (which is part of the administrative procedure), has been subject of criticism and even constitutional review. Since the majority of the evidence obtained in the administrative procedure are used in the misdemeanour procedure as well, the Constitutional Court in its judgment established that the powers of the Slovenian NCA shall be assessed as powers conferred on a public authority for the conduct of criminal proceedings, given the high possibility that the evidence obtained within the administrative procedure can be used also in the following criminal procedure. See: The decision of the Constitutional Court of the Republic of Slovenia of 11 April 2013, No. U-I-40/12-31, pt 37.

[18] In cases where violations of different human rights are claimed, the Slovenian Constitutional Court also confers a certain degree of legal revision.

NCA in misdemeanour procedures is provided by the local court and then by the higher court specializing in misdemeanour matters. With regard to judicial review of the administrative procedure, the choice of the administrative court as the reviewing body has been subject to some criticism.[19]

It is important to mention that Slovenian Competition Law includes several special provisions that deviate from general (administrative law) rules, with the stated aim to improve the efficiency of the Slovenian competition procedure.[20] However, they seem to have resulted in additional inconsistencies in the Slovenian legal system. Administrative judicial review proceedings in competition law cases are partially regulated in the Slovenian Competition Law, which encompasses only a limited number of specific provisions; meanwhile, Administrative Dispute Law[21] applies *mutatis mutandis* with regard to all other procedural aspects. In line with the Slovenian Competition Law, a judicial review of the administrative procedure without a hearing is enacted as a general rule. This rule clearly intervenes with the general rule of the Administrative Dispute Law whereby the hearing is the default manner of deciding administrative disputes, unless specifically listed exceptions apply (see Fatur, Podobnik, Vlahek, 2016, p. 217). Since the wording of the Slovenian Competition Law "is extremely vague as it does not provide the reasons for the explicit exclusion of the hearing in competition matters, […] is thus to be

[19] In 1999, in the process of adoption of the previous Slovenian Competition Law, several recommendations were submitted for judicial review to be performed by a specialized panel (e.g. senate of Supreme Court which would consist of judges from both the commercial and administrative unit). The purpose of such recommendations was that competition law deals with many economic and commercial issues, regarding which the judges from the commercial unit have more knowledge and experience. Regardless of these recommendations, the judicial review of administrative procedure is, until today, in hands of the administrative court (see Galič, 2000). Between 1993 and 1999, judicial review was ensured by filing a civil claim. In the period from 1999 and 2008, judicial review was regulated in the same manner as it is today. This was amended in 2008, when the initiation of an administrative dispute before the Supreme Court of the Republic of Slovenia was enacted as the only available legal remedy against the decision issued in the administrative procedure (see Fatur, Podobnik, Vlahek, 2016, pp. 208–209). This rule remained in force until 2013. Even though different approaches were tested, judicial review has never been assigned to commercial law judges in Slovenia.

[20] "The [Slovenian Competition Law] provides for the following competition law-specific rules on the court review proceedings: as a rule, the review court is to decide without a hearing, cases subject to judicial review procedure are to be considered urgent and are to be handled by the court as priority; the plaintiff may not introduce new facts or present new evidence; the court is to test a decision of the [Slovenian NCA] (in some cases also its orders) within the limit of the claim and within the limits of the grounds stated in the action, and is to pay attention ex officio to essential infringements of procedure; access to case file documents before the court is allowed under the same ground as before the [Slovenian NCA], as of 2019, the [Slovenian NCA] must publish all review judgements on its webpage." (Fatur, Podobnik, Vlahek, 2016, p. 209).

[21] Official Gazette of the Republic of Slovenia, No. 105/06, as amended.

interpreted as directing the review court to, first and foremost, always analyse whether the general conditions to omit the hearing […] are met." (Fatur, Podobnik, Vlahek, 2016, p. 217).

Under the legal framework originally put in place in 2005, and considered as the first modern national competition law,[22] Serbia instituted a mixed judicial system for competition infringements, with the Serbian NCA investigating and determining that an infringement had been committed, and the misdemeanour courts liable for the subsequent imposition of fines. This was originally inspired by the Austrian legal framework, and is still operated as an exception in a few other EU member states.[23] In theory, the system is supposed to maintain both the rights of defence and efficiency through a form of structural separation: an administrative enforcer would determine the factual questions and apply specialized rules in a streamlined procedure, while imposing sanctions in a distinct judicial procedure, supposed to safeguard the procedural rights of defendants, which face severe consequences for their actions. As in Slovenia, the Serbian NCA would determine that an infringement had been committed within an administrative procedure and issue a declaratory administrative decision. When the decision became final, the Serbian NCA would file a misdemeanour complaint to the competent misdemeanour court, which would decide on fines. Also akin to Slovenia, the appeal route was separate: against the infringement decision, one would appeal to the Administrative Court, and then the Supreme Court of Cassation (potentially the Constitutional Court), while the misdemeanour decision would be appealed before the higher misdemeanour courts.

However, as preparation for a more vigorous enforcement of competition rules, the new Serbian Law on Protection of Competition[24] (hereinafter; Serbian Competition Law) was adopted in 2009, drastically changing the earlier institutional framework by empowering the Serbian NCA to both investigate infringements and directly impose fines. Nowadays, misdemeanour courts have long been eliminated from the game – the Serbian NCA identifies an infringement and imposes sanctions within a single administrative proceeding,

[22] "If we disregard the regulations which were intended to protect the permitted tinges of a market economy, the first law which tried to regulate this field was adopted by the Federal Republic of Yugoslavia in 1998. After years of unsuccessful and ad hoc enforcement, it was replaced by the Competition Law of 2005, and Serbia got its latest law regulating this field in 2009. … The Laws from 2005 and 2009 follow the European framework and regulate restrictive agreements, dominance abuse and merger control" (Begović, Pavić, Popović, 2019).

[23] At times, Sweden, Finland and Ireland operated similar systems. In the former Yugoslavia, this approach is still in force in Montenegro, while Croatia switched over to a monist administrative system in 2009.

[24] Serbian Law on Protection of Competition, Official Gazette of the Republic of Serbia, No. 51/09 and 95/13.

where it allows the parties to make their case (especially through responding to the Statement of Objections). Following the Serbian NCA's decision, the parties can appeal it directly to the Administrative Court in a regular administrative dispute[25] and appeal upwards to the Supreme Court of Cassation and/or the Constitutional Court.

Unlike Slovenia, the only specific procedural rules in Serbia involve instructive (and relatively short) deadlines for both the Administrative and the Supreme Court of Cassation to decide in competition law-related cases, which are commonly not adhered to in practice. Additionally, if the court decides that the appeal had merit only with respect to the amount of the fine imposed, it is principally obliged to amend the decision itself. An appeal does not suspend the execution of the decision, but the party to the proceedings is allowed to request the Serbian NCA to suspend execution, if it would cause irreparable damages, and if it is not contrary to the public interest (per the general legal framework, this competence is reserved for the court). Therefore, the framework of the Law on Administrative Disputes is mostly applicable to competition law-related cases.

IV. Putting Theory into Practice

If the mixed judicial system was supposed to offer the best of both worlds,[26] it might seem odd that the Serbian Competition Law would have so drastically departed from the previous institutional setup, let alone in the early stages when the country is developing a competition compliance culture. After all,

[25] As in Slovenia, in the local legal community, occasionally disputes arise on whether the Commercial Court would have been a more appropriate forum for appeal, irrespective of the procedure used, as this court is perceived as more versed in dealing with commercial entities in general: "Although the Administrative Court has slowly built up practice over the years in competition cases (which is still insufficiently reliable), there is an impression of a missed opportunity for a more comprehensive solution and a higher degree of judicial protection which might have been provided by a court with more expert capacity in commercial cases and with respect to the market. There are still criticisms concerning the court's positions or lack of specialization, as well as deadlines for deliberations, since this is the most burdened court in the country" (Lazarević and Protić, 2015, p. 7).

[26] "The vast majority of competition authorities of the EU Member States as well as the EU Commission itself combine investigative, prosecutorial and decision-making powers in one institution. The risk of prosecutorial bias is an obvious corollary of this institutional design. … With its institutional separation of powers between an investigating authority and a decision-making court, Austria's system of public competition law enforcement is very much the exception within the EU, and is sometimes regarded as a gold standard in terms of institutional design. From the point of view of undertakings concerned by an investigation, the Austrian system indeed has significant advantages over the EU model" (Böhler-Grimm and Kühnert 2017, p. 69).

in just a few short years since the start of the economic transition and the introduction of credible competition law, with practical enforcement in its infancy, the country would radically pivot and reshape a significant part of the institutional framework, by excluding an important part of the setup in the misdemeanour courts.

In practice, to a large extent, the system as such was seen as problematic, and a deterrent to the development of effective enforcement practice, with literature being overwhelmingly against the institutional setup.[27] Procedural missteps in the early days of the Serbian NCA's practice led to the judiciary annulling most of its' decisions; reopening proceedings and repeated appeals were the rule rather than an exception. By the time the case ended up with the misdemeanour courts (themselves notoriously overburdened), the statute of limitations would have often expired, and no decision on sanctions would have been made. Furthermore, misdemeanour courts had proven to be ill-prepared to handle complex economic assessments and analysis that competition law presupposes: a judge might decide on traffic penalties in the morning, while considering multi-million euro fines for a corporate conglomerate in the afternoon. The sheer novelty of competition rules, and lack of direct agency in defining a broader compliance policy, meant that judges were eager not to misstep and impose any fines which might significantly rock the boat. The results were predictable: from 2005 to 2009, effective competition enforcement in Serbia was *prima facie*

[27] "Specifically, during the application of the 2005 Law, there have been no sanctions collected against competition infringers, and no acts of the Commission were confirmed in judicial review. Bearing this in mind, the 2009 Law improved the Commission's procedural tools with respect to gathering the relevant data and evidence in investigations. The discontinuation of the previous duality in competition investigations, which included successive administrative and judicial-misdemeanour proceedings, and then parallel judicial review over both kinds of acts (administrative dispute and appellate misdemeanour proceedings) is especially important. This flaw was removed by introducing a single and comprehensive administrative proceeding before the Commission, which is then judicially reviewed before the Administrative Court" (Lazarević and Protić, 2015, p. 37). Also: "The 2009 Law made a drastic shift towards improving the efficiency of competition proceedings. In order to overcome the constitutional problem of entrusting sanctioning to an authority which is neither a court, nor a classical administrative body, the sanctions have under the 2009 Law been garbed in the guise of administrative measures. … The second important novelty in regulating the investigation procedure in the 2009 Law is reflected in the fact that both the determination that a competition infringement had been committed and the imposition of corresponding sanctions, including the administrative, i.e. monetary fine, are decided in in a single proceeding, with a single resolution. Thus, the unnecessary duality of proceedings, seen in the 2005 Law, is now eliminated. … Efficiency in competition protection is achieved with a quick response to competition infringements observed by the authority in charge, through the identification and simultaneous imposition of corresponding remedies and sanctions". (Marković-Bajalović, 2012, p. 70). Furthermore: "A significant advantage of the new model concerns the comprehensiveness and uniformity of acting within the single competition protection process by the same authority. Judicial review is separate." (Danković--Stepanović, 2014, p. 284).

non-functional. The Serbian NCA pursued investigations and decided that infringements had been committed, even in high-profile cases, but consequences failed to materialize, and the business community remained relatively unaware of the importance of competition rules. However, this markedly changed following the adoption of the Serbian Competition Law.

One of the guiding principles of the new legal framework was efficiency: if the courts have proven not to be up to the task, the lawmakers would do away with them and transfer their power to the Serbian NCA, which would be the sole responsible entity for advocacy and enforcement of competition rules. The system would be simplified: there would no longer be two separate tracks of appeal, but a single authority applying the rules to a set of facts determined only once. There were vocal critiques of the potential ramifications on legal certainty and due process at the time of the amendments, undermining the right of the courts to decide on such severe sanctions, but legal purism gave way to expediency.

The results had much to do with other factors as well, but were undeniable: within a few short years, the Serbian NCA had built-up a relatively impressive track record, to a large extent attributed to the change in the institutional framework.[28] Another key reason behind this was that the authority was not afraid to utilize its newfound power and experiment – unlike elsewhere, the Serbian NCA did not kick off its practice with gentle rebukes or cautionary fines, but immediately initiated proceedings against some of the most prominent market players and imposed hefty multi-million euro fines.[29] There were a number of missteps along the way, and the Serbian NCA was forced to admit defeat in more than a few cases. However, over time and with increased experience, successes also started piling up, and the competition awareness of the business community on one side, and the sophistication of the cases pursued on the other, evidently improved. The Serbian NCA now boasts a developed track record and represents a clear example of the benefits in terms of efficiency of an administrative system in contrast to the judicial enforcement system.

What are the disadvantages? The costs of the Serbian NCA's education have had to be borne by someone – often enough, these have been either the parties to the proceedings or the harmed complainants, especially in cases where market awareness may justifiably not have necessarily followed the authority's eagerness

[28] "Probably the successful transition to the procedural and institutional model of the 2009 Law was crucial for facilitating development of competition protection, formation of the Commission's relevant practice, building the credibility of the authority among undertakings, as well as preventive effects, all related to a successful model connecting investigation and sanctioning." (Lazarević and Protić, 2015, pp. 83–84).

[29] Over the years, the Serbian NCA conducted proceedings against the largest dairy in Serbia, major retail chains, the leading ice cream producer, the national electricity company, the Bar Association, a number of major pharma companies, both major telecom operators (SBB and Telekom Srbija), the entire local tobacco industry, the largest brewery in Serbia etc.

to strictly apply the law. A prosecutorial administrative authority working under the imperative of efficiency has a natural tendency of bias against suspected infringers, which can lead to a willingness to more easily disregard their procedural rights or inconvenient arguments. Again, the key is judicial oversight, which needs to be effective in order to prevent overreach by the administrative authority – this requires expert judges, who are unafraid to go an into in-depth review of the authority's argumentation and insist on the strict following of procedural guarantees, bearing in mind the nature of the proceedings. The importance of judicial review has been clearly highlighted by the practice of the European Court of Human Rights (hereinafter; ECtHR) in *A. Menarini Diagnostics S.R.L. v. Italy* (hereinafter; *Menarini Diagnostics*),[30] which conditioned the possibility for administrative authorities to combine their procedural roles with review by a court having full jurisdiction to examine the decision. Sadly, this has still been lacklustre in Serbia, with the judiciary still lacking sufficient expertise for proper case review and hesitant to robustly challenge the NCA, especially with respect to the substance of the cases[31]. This is dangerous, as it allows the authority to wield disproportionate power and grants it a substantial advantage in the proceedings.

Simultaneously, in Slovenia, the unclear relationship between the administrative and misdemeanour procedure results in certain crucial discrepancies, including the very definition of persons covered by the rulesets governing each of the procedures. According to the Slovenian Competition Law, the concept of an undertaking is defined very broadly, exceeding the definition of a legal entity as defined under the Minor Offences Law. Consequently, in practice, the Slovenian NCA can establish an infringement of competition law in administrative procedure towards a given undertaking, but it might not be able to impose a fine upon such undertaking, if it does not fall within the definition of a 'legal entity' under the Minor Offences Law. More importantly, the ambiguous relationship between the procedures themselves leads to confusion concerning the scope and content of the misdemeanour decision and its conformity with the administrative decision (Krašek, 2019, p. 1). Not only does this creates concerns in relation to the prohibition of double jeopardy, but also considerably hampers the efficiency of the Slovenian NCA and its ability to fully enforce competition rules.[32] Additional elements of misdemeanours, not necessarily integral to the

[30] See *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, ECLI:CE:ECHR:2011:0927 JUD004350908.

[31] "Examination of the decisions of the Commission in meritum, concerning legality of the reasons for application of substantive rules, did not find its place in the judicial practice thus far" (Lazarević and Protić, 2015, p. 7).

[32] In practice, it is not uncommon for the misdemeanour procedures to be time-barred. See: Judgement of the Supreme Court of the Republic of Slovenia of 21 September 2010, No. IV Ips 129/2010.

original proceedings (e.g. the establishment of intent or negligence), further frustrate proceedings. The separation of the two procedures has proven to be especially time consuming due to procedural safeguards and fundamental guarantees concerning fair trial.

According to the ECN+ Directive, the exercise of the powers should be subject to appropriate safeguards, in particular in the context of proceedings which could give rise to the imposition of penalties. These safeguards include the right to good administration and the respect of the undertakings' rights of defence, an essential component of which is the right to be heard. This means that both the Slovenian Competition Law and the Minor Offences Law have to provide for the right to be heard, which then would not corelate to efficient enforcement. The fact that the Slovenian NCA must examine facts and establish an infringement of competition rules separately and (formally) independently in both procedures, and exercise all procedural guarantees and safeguards twice, while the facts and evidence are identical, has proven to be unreasonable and inefficient. There are also practical problems in relation to such duplication, especially considering the potential time-barring of misdemeanour procedures[33] (which was a common procedural strategy pursued by defendants in Serbia under the previous regime). In relation to the judicial review of the misdemeanour decision, judges of the Slovene local courts have interpreted their tasks and powers in different ways. Some are of the opinion that the facts are adequately determined in the Slovenian NCA's administrative decision, and that it is not their place to question them, while more commonly, judges examine and assess all the evidence once again and independently from the interpretation of the Slovenian NCA in the administrative procedure. As an example, the higher court in Ljubljana explicitly ruled that the courts are independent when deciding and therefore must deliberate autonomously in each case and are not bound by decisions made in other administrative proceedings.[34]

There is a comprehensive case-law by the ECtHR on judicial review and standards of review of competition decisions issued by national competition authorities, which questions the above described confusion of Slovenian courts, since it appears that the ECtHR has already settled the opinion that full judicial review of competition decision as determined under Article 6 of the European Convention on Human Rights (hereinafter; ECHR) has to be granted. Article 6 of ECHR stipulates: "In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to fair and public hearing

[33] See the judgement of the Supreme Court of the Republic of Slovenia of 23 November 2010, No. IV Ips 148/2010.

[34] The judgement of the Higher Court of Ljubljana of 12 December 2016, No. PRp 142/2016, par. 6.

within a reasonable time by an independent and impartial tribunal established by law." Per *Menarini Diagnostics*, as the characteristics of a judicial body with full jurisdiction, the ECtHR referred to the power to quash in all respect, in fact or in law, the decision rendered by the lower body. It must, in particular, have jurisdiction to consider all questions of fact and law relevant to the dispute which was before it (Murg-Perlmutter, 2012). The impact of *Menarini Diagnostics* stretches beyond EU courts and, therefore, when national courts review fining decisions of their national competition law authorities, they should make sure to exercise full jurisdiction as well[35].

In line with the above, since the main purpose of misdemeanour procedure is to impose (usually relatively high) fines, it is very probable that the ECtHR would consider such a procedure as a type of a criminal procedure and require full judicial review. Therefore, the position of the Slovenian courts in relation to judicial review of the misdemeanour decisions would not be contrary to international law and practice, but it does additionally procrastinate the procedure.

In Slovenia as in Serbia, the trickle-down of criminal elements into the administrative procedure and its specific rules has been subject to criticism. In this regard, regardless of the related constitutional issues[36], the legal solution by

[35] Contrary to the ECtHR, the view of the Court of Justice of the EU on whether the competition procedures in which fines are imposed are to be qualified as 'criminal', and whether the Commission's decision on antitrust shall be the subject of full judicial review by CJ EU has not been clear. The CJEU recognizes the broad definition of the Commission's margin of discretion in assessing technical economic matters and does not review its assessments and conclusions if they were based on sufficient evidence and followed due process. However, it seems the CJEU has restricted the implication of the margin of discretion when it ruled in case *Commission v. Tetra Laval* that "Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it" (Case *Commission vs Tetra Laval BV*, C-12/03 P, EU:C:2005:87, par. 39). According to OECD's Directorate for Financial and Enterprise Affairs Competition Committee (2019): "...effective review by courts is a necessary complement to the internal checks and balances that competition authorities put in place to ensure due process" (p. 4). Moreover, "In any competition enforcement system, whether judicial or administrative, and independently of that system's characteristics, the effectiveness and credibility of enforcement requires that there is, in addition to the ex ante internal checks and balances and procedural guarantees for parties that competition authorities put in place, access to ex post review of competition cases by an independent generalist or specialised court or tribunal" (OECD, Directorate for Financial and Enterprise Affairs Competition Committee, 2019, p. 19).

[36] The Slovenian Competition Law was adopted on 1 April 2008 and has already been subject to constitutional review. The disputed provision conferred power to the Slovenian NCA to issue decisions on the initiation of an investigation of legal entities' premises, even when

which the investigation department of the District Court of Ljubljana (and not the Administrative Court) was entitled to assess whether there are reasonable grounds to suspect that the party has committed an infringement has been considered as unreasonable as well. According to the ECN+ Directive, such judicial review is allowed. However, judges of the District Court of Ljubljana are usually not familiar with the specific features of competition law, and per the Slovenian NCA's experiences, tended to apply the stricter procedural and material standards of criminal law, further slowing down the efficiency of the investigation proceedings. According to the Slovenian NCA's opinion, this role should have better been left to the judges of the Administrative Court (Krašek, 2019, p. 3).

The results in Slovenia have not been encouraging either. Arguably, no cases have been completed in less than a year and a half, whereas some last longer than five years. Since court proceedings can (and usually do) last a few years, and the Slovenian NCA has no legal power to initiate the misdemeanour procedure before the decision in the administrative procedure is final, it is quite common that decisions on fines are not rendered at all for several years. In 2016 and 2017 no fines were imposed at all, even though several administrative procedures were initiated. And while this does not necessarily speak of the robustness of the institutional design, it is indicative that the total fines in Slovenia have been several times smaller than in Serbia over a longer period of time.[37]

V. Repainting the Shed: Legal Amendments in the Observed Jurisdictions

Coincidentally, changes to the institutional design are simultaneously considered in both Slovenia and Serbia. On some level, the two systems seem to be converging: on another, variance in experience seem to indicate different concerns by the relevant stakeholders and branching paths of further development.

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such investigation was conducted against its will. The Constitutional Court of the Republic of Slovenia repelled the disputed provision due to violation of the second paragraph of Article 36 (Inviolability of Dwellings) and Article 37 (Protection of the Privacy of Correspondence and Other Means of Communication) of the Constitution of the Republic of Slovenia.

[37] Of course, that determination of the level of the penalty is not a simple task and has several important effects on the overall lawfulness of the decision (Whish and Bailey, 2012). However, the determination of the fine might be conducted more appropriately, if it would be ascertained at the onset, when the information and evidence is relatively fresh and arguably more relevant.

In February 2019, the Slovenian Ministry of Economic Development and Technology issued proposals for amendments to the Slovenian Competition Law, introducing one version of an 'ideal' single administrative procedure. Although the new solutions are welcome from the standpoint of simplifying the current procedural minefield, some of the changes appear to be ill-advised. Regrettably, it would appear that the Slovenian NCA was not significantly involved in the drafting, leading to justified concerns about future implementation and the fitness for purpose of the rules. Furthermore, the proposal is contrary to some of the main tendencies of the new ECN+ Directive, which clearly advocates that efficient and effective competition systems shall include as little criminal elements as possible. Recital 40 of the preamble to the ECN+ Directive stipulates: *To ensure the effective and uniform enforcement of Articles 101 and 102 TFEU, national administrative competition authorities should have the power to impose effective, proportionate and dissuasive fines on undertakings and associations of undertakings for infringements of Article 101 or 102 TFEU, either directly themselves in their own proceedings, in particular in administrative proceedings, provided that such proceedings enable the direct imposition of effective, proportionate and dissuasive fines, or by seeking the imposition of fines in non-criminal judicial proceedings.*

Accordingly, despite the broader practice of the CJEU and ECHR, it is reasonable to note an EU-wide institutional preference for efficiency and an attempt to move away, where possible, from criminal guarantees in competition enforcement. This of course does not mean that even though wide investigative powers would be given to the NCAs, any procedural and material rights of the market participants, and especially undertakings under investigation, should not be duly respected (Jones and Sufrin, 2004). However, the proposed amendments to the Slovenian Competition Law introduce many criminal elements into the single administrative procedure, such as elimination of evidence, rules on sentencing and the prohibition of double jeopardy. Since criminal elements in the competition procedure have tended to hinder its efficiency, it remains to be seen whether they would actually offer a tangible benefit with respect to the rights of the parties, without unduly burdening the expediency of the proceedings. However, it is evident that Slovenia finally recognized that separate procedures do not represent an optimal approach to effective enforcement.

Serbia offers a marked contrast with the legislative process: the Serbian Ministry of Trade, Tourism and Telecommunications has pursued legislative changes for some time now, working closely in order to engage the wider competition community. Not only has the Serbian NCA spearheaded the efforts, but a number of relevant stakeholders have actively been engaged (e.g. other competent ministries, representatives of business associations etc.).

Originally, there was a vocal minority within the corporate sector which extolled the virtues of a judicial enforcement system and demanded that it is reinstated, which was not accepted thus far in the drafting process, with the relevant authorities signalling that efficiency concerns and past experience should preclude this[38]. The current draft, however, makes an attempted concession to the necessity for stricter separation between prosecution and decision-making, by making the Council of the Serbian NCA responsible for ultimate deliberations and independent from the conduct of the investigation (as quasi-judges within the administrative authority), while prosecution is handled by the authority's expert service.[39] Therefore, following the development of practice and greater wisdom, Serbia seems willing to revise its institutional framework to somewhat mitigate the concerns about the concentration of functions within the national competition authority, but without entirely moving away from the single administrative procedure.

VI. Conclusion

Ironically enough, one of the important figures involved in setting up Serbia's current institutional framework was a former head of the Slovenian NCA. The key factors which impact market competition are not substantially different in Slovenia and Serbia. However, design choices have unquestionably

[38] "In practice, certain questions have been raised concerning the Commission's position related to protecting the fundamental rights of undertakings, and proposals have been made to introduce a system for protection of competition which would, allegedly, contribute to better protection of rights of the undertakings in the proceedings before the Commission. … However, we are of the opinion that the role of the Commission as the national competition authority does not need to be changed, as its scope of authorities and role are in line with best comparative practice and the principles of protection of the fundamental rights of parties to the proceedings. … The question of choice between institutional models for the Commission should not be reopened after a decade of practice in enforcement of competition protection legislation in Serbia, especially since it is widely known that the entire expert and academic public acknowledged that the one of the main deficiencies in the 2005 Competition Law concerned the fact that the Commission was not authorised to issue sanctions against competition infringements, which was entrusted to the misdemeanour courts at the time. … In order to ensure the right to a fair trial in Serbia, the Administrative Court should effectively exercise its authority to rule in disputes of full jurisdiction in practice, and in that sense it would certainly be desirable that judges continue with training and specialization in competition law, since the relevant cases are often complex and specific, requiring applying economic know-how." (Obradović, 2017, p. 5)

[39] The current draft even includes a public hearing before the Competition Council, where the expert service (as the prosecutor) and the defendant would each present their case.

contributed to a difference in the results between the authorities. Institutional design which discourages efficiency significantly hampers the build-up of a competition law-compliant culture, and efficiency has substantial value of its own for the rule of law. This is not the only factor in the equation: the deterrent effect of high-profile cases, courage to experiment (even if mistakes will be made) and fortitude to impose substantial fines has proven to be a powerful tool for advocacy. It is much easier to convince a CEO to prioritise competition compliance if his peers have suffered significant consequences for failure to do so.[40] From a regional practitioners' perspective, it seems self-evident that high fines and effective proceedings fostered *know-how* and compliance and that a more cautious and gradual approach tended to encourage negligence among the business community. In both Serbia and Slovenia, a conscious choice has been made towards the institutional design, with significant and evolving consideration being given to both efficiency and procedural fairness.

The ECN+ Directive clearly specifies that the design of procedural safeguards should strike a balance between the respect of the fundamental rights of undertakings and the duty to ensure that Articles 101 and 102 TFEU are effectively enforced.[41] Putting up opportunities for deadlocks and stalling does not, on its own, contribute to better protection of due process: only robust and careful judicial oversight can do this. Focusing on judicial review might be a boring response, but it is an unavoidable and integral part of proper deliberations and safeguarding rights of defence, and need to be significantly bolstered in tandem with any push towards procedural efficiency.

That being said, one shouldn't set aside efficiency for the sake of legal purism. The cocktail of enforcement systems across the Western Balkans seems to demonstrate that in most instances, a single administrative procedure has the best chance to foster effective competition enforcement. Checks and balances and due process must be studiously observed, which means that an overhaul of an institutional design has to be followed by a significant investment in judicial capacity, involvement and control. While the rights enshrined in the European Convention of Human Rights are ultimately too important to sacrifice at the altar of efficiency, they are best served by continuous and comprehensive effort, and not by obstructive procedures. In building a credible and fair public enforcement system, institutional design is only the first step on the way, with the more difficult path still ahead in much of Central and Eastern Europe.

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[40] Of course, as recent experiences in the United Kingdom show, criminal liability also tends to have a significant deterrent effect – generally speaking, although a number of jurisdictions in the region criminalize competition infringements, there haven't been many high-profile cases personally involving corporate management.

[41] Recital 14 of the preamble of the ECN+ Directive.

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