

COMPETITION LAW

CURRENT SITUATION

Overview

The new Competition Law has been enacted by the Serbian Parliament in July 2009. It will be applicable from November 1st 2009. Similarly to the Law on Protection of Competition from 2005, it constitutes the basic legal framework for the area of competition in Serbia.

Overall, the enforcement tools of the Serbian Commission for Protection of Competition (hereinafter: the Commission) are enhanced, with the introduction in Serbian competition legislation, of the power of the Commission to impose fines as well as to conduct fully fledged dawn raids. As regards merger control, the notification thresholds have been revised and the procedure improved. From a material law perspective, the new Competition Law basically does not bring about major changes.

New procedural rules when investigating Competition Law infringements

One main novelty is that proceedings for investigating competition legislation infringements may be initiated only *ex officio*, when the Commission reasonably assumes the existence of the breach. Thus, the decision to initiate proceedings will be in the sole discretion of the Commission's Chairperson. Third parties will no longer be entitled to formally request the initiation of proceedings and will not be considered as parties to the proceedings, as it was the case with the previous Law. The new legislation establishes for the first time a leniency program, where transparent rules should grant immunity from, or reduction of, fines for whistleblowers in cartel cases. However, appropriate leniency guidelines are yet to be enacted by the Serbian Government.

As of November 1st 2009, the Commission will be empowered to conduct on-site investigation of premises, vehicles, land and other sites at which undertakings or third parties are engaged in their business, without the necessity to obtain a prior court decision. Unannounced investigations are to be performed in case of the risk of removal or change of evidence. In addition, if an undertaking unjustifiably opposes to the Commission's entry, forced entry with police assistance

and without court order will be possible. When conducting on-site investigations, the Commission has the right to seal premises and books or records, to ask questions, etc.

For the first time in Serbian legislation, a right to privileged communication between the parties and their legal counsels is provided in the new Competition Law. However, it is unclear if it relates only to the attorney at law (external counsel) or also to in-house counsels. Statement of Objections, by which the Commission informs the parties of the preliminary established facts in order to ensure the parties' right to due process, are also newly introduced.

The most significant change is Commission's competence to directly impose fines on undertakings after having decided on the existence of a violation. Pursuant to the legislation from 2005, a breach of competition legislation represented a misdemeanor, in which case the Commission was authorized only to file a request for initiation of misdemeanor proceedings before the relevant court. Moreover, the power to impose certain new procedural penalties has been given to the Commission. Concerning the measures aiming to remedy the competition infringement, besides behavioral remedies that might be imposed in line with the legislation from 2005, the Commission will be entitled to order de-mergers and other structural measures.

Merger control

The new Competition Law brings a significant increase of the turnover thresholds decisive for the obligation to notify a concentration in Serbia. Instead of the current thresholds of 50 million EUR of combined worldwide turnover or 10 million EUR of combined Serbian turnover, when undertakings participating in the concentration are registered in the Republic of Serbia, the following new turnover thresholds (always in relation to turnover achieved in the preceding business year) will be introduced:

- worldwide turnover of all undertakings concerned exceeds 100 million EUR of total worldwide turnover, and Serbian turnover of at least one of the undertakings concerned exceeds 10 million EUR or
- Serbian turnover of at least two undertakings concerned exceeds EUR 20 million, under the presumption that minimum two undertakings concerned have

Serbian turnover exceeds EUR 1 million within the same time period.

The deadline to notify a concentration has been extended from 7 to 15 days. A takeover bid can be implemented before clearance is given, provided that specific conditions are met. The concentration is deemed to be approved if, within 30 days after filing, the Commission neither approves the concentration nor expressly decides to proceed with an investigation procedure. In addition, pursuant to the new Competition Law, in cases of problematic concentrations, the parties will have the right to propose commitments/merger remedies. Finally, if the concentration has been implemented before clearance is given or imposed merger remedies have been violated, the Commission will be explicitly entitled to order a de-merger.

Other relevant changes

From a material law perspective, the new Competition Law basically does not bring about major changes (e.g. in relation to restrictive agreements and abuse of a dominant position). However, it introduces *de minimis* rule when assessing restrictive agreements and puts in place a new definition of dominance and collective dominance. The new Competition Law further contains special provisions concerning compensation for damages when an individual has suffered damages due to competition legislation violations, and consequently, to a certain extent, introduces private enforcement in Serbia.

POSITIVE DEVELOPMENTS

Generally, by enacting new competition rules, Serbia has made considerable efforts to align its competition legislation with the body of EU legislation. Broader competence of the Commission, combined with increased merger notification thresholds should bring more efficiency in competition protection.

REMAINING ISSUES

The Commission does not have a good track record in terms of more complicated cases. Based on public knowledge, whenever its decision was challenged before the Supreme Court of Serbia, the court decided to take the claimant's view and annul the Commission's decision.

In all fairness, grounds for annulment have mostly been of formal nature. However, since the new law bestows a great deal of new powers for the Commission, market participants may face a whole new era of uncertainty. Most obviously, the Commission would be able to penalize market participants directly (up to 10% of global turnover), collect fines in a swift tax collection procedure and leave companies bankrupt, all on the basis of a potentially flawed decision (based on its previous track record with the Supreme Court).

Finally, the much needed legal certainty in the area of restrictive agreements will not have been met without block exemption regulations and other relevant interpretative guidelines.

FIC RECOMMENDATIONS

- When implementing its new powers, the Commission should take into account constitutional provisions, particularly the one related to the protection of the right on privacy and right to defence;
- Immediate enactment of Block Exemption Regulations is a prerogative for ensuring compliance with EU regulations – certain industries (automotive in particular) have been affected by the lacking of automatic exemptions for their distribution agreements;
- Timely enactment of appropriate leniency guidelines shall procure more efficiency when determining the existence of the cartel by the Commission;

- The Commission should apply European guidelines in assessing competition issues to avoid inconsistencies in its application;
- The Commission should make its practice consistent towards all undertakings, in order to remedy the current situation which leaves high legal uncertainty for undertakings;
- The regulation on tariffs before the Commission has to be decreased to a reasonable level appropriate for comparable jurisdictions (Croatia, Slovenia, Bosnia and Herzegovina, and Montenegro, etc).

STATE AID LAW

CURRENT SITUATION

July 2009, the Parliament enacted the first piece of legislation regulating state aid which will take effect as of 1 January 2010. The law emerges from the provisions of articles 85 and 86 of the Treaty establishing the European Communities (the Rome Treaty). In a nutshell, it is aimed at applying competition rules to state aid granted by state to market participants, with the aim of preventing distortion of competition.

POSITIVE DEVELOPMENTS

The adoption of the law is a positive development in itself. Namely, one of the prerequisites for the continuation of the European integration process is the establishment of free market, able to sustain competitive pressures which will start with the liberalization of trade with EU member states. State subsidies and other forms of state aid, will now face scrutiny by the authority designed to ensure the level-playing field among beneficiaries of state aid and their competitors. The new law is designed to put an end to practice which has become traditional in Serbia over the past 60 years – helping insolvent companies survive, paying no regard to how efficient and viable they are.

REMAINING ISSUES

- Appointment, as soon as possible, of the members of the new State Aid Commission.
- The development of sound practice by the new State Aid Commission in accordance with EU standards and established practice of the European Commission.
- Due to the introduction of a new state authority, it may be necessary to regulate the possible conflict of jurisdictions between the Competition Commission and the new State Aid Commission in respect of enforcement of general competition law.
- Adoption, as soon as possible, of the necessary secondary legislation by the Government of Serbia in order for the State Aid Commission to commence effective enforcement of the law.
- Amending the law as to ensure the status of the Commission as an independent agency, instead of a governmental body, formed and funded directly by the Government of Serbia. Thus, ensuring that the future performance of the Commission is not under the shadow of lacking of independence in decision-making.

FIC RECOMMENDATIONS

- Establishing the authority for the control of state aid with full capacity and authority, to enable consistent and unbiased enforcement of the law.
- More efficient and prompt harmonization with EU standards and regulations in the field of State aid control, especially in respect of the independence of the State aid control Commission and the potential conflict of jurisdictions with the Competition Commission.
- Establishing ongoing communication with the European Commission in order to most effectively adopt and implement the EC's established practice in the field of State aid control.
- Facilitate the organization of trainings and education seminars for members and technical staff of the Commission that are to be held by the European Commission.