PROTECTION OF COMPETITION

1.33

COMPETITION LAW

WHITE BOOK BALANCE SCORE CARD

Recommendations:	Introduced in the WB:	Significant progress	Certain progress	No progress
In order to enhance transparency and legal certainty, the Commission should issue clear guidelines and instructions containing the manner of application of certain provisions of the Law, with the involvement of interested parties in commenting on proposed documents.	2010		√	
The Commission should publish issued opinions and decisions on individual exemptions.	2018		√	
Judges of the Administrative Court should complete advanced training in both competition law and economics. All rulings of said court should be made publicly available, and explained in detail in terms of the substantive issues of the Commission's decisions.	2010			√
The Commission's practice should be consistent with respect to all market players. Considering the penal nature of decisions in the area of competition protection and the significant powers of the Commission, predictability as well as consistency and legal certainty are of crucial importance for all market players.	2017			√
The fees in the Tariff Rules should be decreased to a reasonable sum, especially in the area of merger control.	2009			√
The Commission should issue publications of the relevant definitions of product markets grouped by industries every six months, with the aim of harmonizing practice.	2018			√

CURRENT SITUATION

The harmonization with EU competition rules in Serbia began with the adoption of the currently applicable Competition Law in 2009 (the "Law"). The Law set material and technical preconditions for the independent work of the Commission for the Protection of Competition (the "Commission"). The Law was amended in 2013, whereas the corresponding by-laws were adopted back in 2009 and 2010 and the new Regulation on the Content and Manner of the Submission of Merger Notifications ("Merger Control Regulation") in 2016.

During 2017 the Ministry of Trade, Tourism and Telecommunications, as the authorized proposer, and the Commission began drafting a new competition law. We greatly appreciate the decision of the Ministry and the Commission to invite representatives of the business community in Serbia, including the FIC, to take part in the preparation of comments to the draft law.

Based on the annual report of the Commission for 2018, out of 166 resolved mergers, 158 were cleared in summary proceedings, 1 was cleared with conditions, 1 was terminated, while in 6 cases the notifications were rejected. Therefore, still a vast majority of the Commission's decisions on merger control were adopted in summary proceedings. Short-form merger notifications are primarily convenient for those mergers taking place abroad which have no impact or have insignificant impact on competition on the Serbian market, but which have historically taken up a significant portion of the Commission's activities. However, even though the Merger Control Regulation has introduced this form of merger notification, the Commission is also entitled to request submission of a full merger notification when the circumstances indicate that the conditions for allowing the merger have not been fulfilled, granting the Commission a considerable amount of discretion in this regard.

According to its Annual Report for 2018, the Commission decided on 294 cases and transferred 50 cases to the period

that followed (2019). The Commission issued 70 opinions concerning the interpretation of competition regulations and their application. In the previous period, the Commission used to a greater extent some of the more complex competencies at its disposal under the Law, which included significantly relying on dawn raids for the purpose of collecting evidence, while there is a noticeable decrease in use of certain other procedural powers such as the suspension of the antitrust proceeding upon accepting the commitments proposal by a party to the proceeding. The Commission terminated certain antitrust proceedings in cases where it determined that there was no significant infringement of competition in the market, but also imposed penalties in other cases in which a violation was established. In the one case of merger control that was subject to investigation, the Commission imposed conduct measures as conditions for carrying out the transaction.

The Commission's fees have not changed and they are still very high in the area of merger control.

POSITIVE DEVELOPMENTS

The scope of the Commission's activities in various fields of its competences, as well as its readiness to use complex mechanisms provided for by the Law, represent significant progress.

In the area of the harmonization of competition regulations with the EU standards and rules (alignment with the acquis), there has not been any significant progress with regards to previous year, given the fact that there was no adoption of several other by-laws, which should regulate in more detail the exemption of restrictive agreements in sectors such as the sale of spare parts for motor vehicles, insurance, transfer of technologies, and road, rail and inland waterway transport. The relevant by-laws addressing the exemptions of restrictive agreements in the abovementioned sectors were drafted back in 2017 – however, in 2018, none of these by-laws was adopted, probably due to intensified work on the adoption of the new competition law. The work on the new competition law is entering its finishing stages, with the FIC actively participating by providing extensive comments on the proposed draft. In the latest publicly available version of the draft law, approximately 60% of the FIC's comments were adopted either fully or partially.

In 2018, the results of sector inquiries in the retail sale of petroleum products, the market for replacement tires, the production and sale of cement and the wholesale and retail sale of baby equipment were published. Additionally, in mid-2018, the first phase of the analysis of retail trade was concluded, with the report published at the beginning of 2019, which shows significant progress in the development of the competition protection policy, i.e. monitoring of these markets by the Commission.

In 2018, the Commission continued making progress in competition advocacy and public relations. The Commission regularly informs the public on its activities, and publishes a great majority of its decisions on its official website. However, it is noticeable that the Commission does not publish all the decisions in relevant areas or that it publishes them with significant delays, which does not contribute to either transparency or legal certainty. The Commission published on its website the Guidelines on Rights and Obligations of the Parties during Dawn Raids, as well as the Leniency Policy Leaflet. This positive development concerning competition advocacy is important as it contributes to the overall improvement of the current legal framework and to better understanding on the part of the general public and the media of competition rules and activities and the importance of the Commission's role.

Finally, it is commendable that the Commission increasingly applies advanced economic analyses in inquiries into competition infringements and complex mergers. Also in 2018, the Commission started using new econometric software (e.g. STATA software) which should improve the quality of economic analyses in cases before the Commission.

REMAINING ISSUES

The Commission publishes a majority of its decisions, in large part or to an extent, on its website (especially merger clearances), which is seen as progress. However, relevant court decisions issued in the process of control of the Commission's decisions are not publicly available at all since such decisions are not published on the Commission's website. The noticeable decrease in the number of opinions and individual exemptions published represents a step back given that this poses a significant obstacle to transparency and free access to information on key decisions of the Commission. Another shortcoming is the fact that the database of the Commission's decisions does not allow for advanced search (with more detailed criteria). Additionally, the Commission does not publish information on submitted initiatives, even after decisions on such initiatives have been made.

The proceedings before the Commission still do not sufficiently guarantee all procedural rights of the parties, such as the rights of the parties to have access to the case file and powers of the Commission in terms of the treatment of privileged communication. Additionally, over the past year, scheduling meetings with the Commission's representatives has become somewhat more difficult than in the previous period, which is a step back in the Commission's work. The Commission has on a few occasions rejected parties' meeting requests, in antitrust cases in which it is especially important to have continuous, clear and open communication with the Commission. The rejection of meeting requests, coupled with the rejection of access to case files, significantly hampers the parties' legitimate right to defence. Certain cases in the Commission's practice indicate potential concerns with regards to a privileged treatment of state companies in proceedings before the Commission, which was also pointed out by the European Commission in its annual progress report for Serbia.

As for dawn raids, it seems that the Commission's decisions on dawn raids lack explanations of reasonable suspicion that evidence will be removed or altered, which is a statutory condition for carrying out dawn raids. Although the Commission has made serious efforts to improve the quality of economic analyses, it is necessary to consistently apply economic analyses in all proceedings before the Commission, taking into account the specifics of each particular case, and further work is needed in improving the quality of reasoning behind the Commission's decisions. Over the past period, the Commission has evidently issued contradictory decisions with regards to its previous practice in certain cases, without proper reasoning for doing so.

On the other hand, judges of the Administrative Court still lack comprehensive knowledge in the areas of competition law and economics to be able to interpret the Commission's arguments and decisions properly. Decisions of the Administrative Court often lack a detailed reasoning and consideration of the merits of the case, limiting their scope to repeating the Commission's findings and consideration of the basic procedural issues, without analysing the arguments of parties in a dispute. This is a serious shortcoming, as it prevents a confrontation of opinions, a comprehensive and adequate control of the Commission's decisions, and the development of practices, while it also jeopardizes further appeal proceedings in cases when an extraordinary legal remedy is lodged. A detailed reasoning of decisions of the Commission and the court, with a particular consideration of arguments and evidence presented by the parties to the proceedings, is of considerable importance for establishing judiciary oversight of the Commission's work. Otherwise, the Commission would be in the position to misuse its powers and independence.

As for the leniency programme, the Commission made efforts concerning the promotion and development of this institute with an additional education of its employees. However, the use of this institute is hardly noticeable in practice and is still fairly underdeveloped.

Some legal uncertainty is also caused by a lack of clarity in the application of merger control rules to transactions that involve the acquisition of control over parts of undertakings, as well as the acquisition of control on a short-term basis. These problems often arise in the interpretation of the term "independent business unit", usually related to the acquisition of control over real estate, where the business community needs a clear and timely guidance from the Commission in respect of future practices, which still do not exist.

It is noticeable that the Commission has been applying a more complex methodology in analysing the individual exemption of restrictive agreements. While the need for a detailed examination of complex cases is clear, the speed of business developments and the fact that parties to proceedings cannot implement a restrictive agreement without the Commission's decision, it is essential that this practice should not adversely affect the efficiency of the Commission's decision-making process, in terms of avoiding any unjustified delay. Additionally, the rather restrictive and formalistic approach of the Commission is more evident, as well as deviations from the comparative EU practice in the interpretation of certain procedural legal institutes, which is especially relevant in the procedures of individual exemptions. It is necessary, in the context of preparations for the new competition law, to examine the acceptability of the concept of individual exemption, which the EU abolished several years ago. In the last version of the draft law, the legal institute of self-assessment was introduced, whereby the system of individual exemptions was also retained, which was the proposal of Foreign Investors Council.

Finally, the method of determining penalties is characterized by inconsistency and unpredictability in the application of the Law. For example, a substantial part of the

existing guidelines is not in compliance with the law, the methodology for determining coefficients for individual factors in meting out the penalty is unclear, the Commission's decisions often do not include an overview of the established coefficients for individual factors nor a proper reasoning, and total revenues of the party to proceedings is taken as a basis for the calculation of the fine, instead of calculating the fine based on revenues derived from only the relevant market where competition was infringed. In the last version of the draft law it was provided that penalties will be calculated based on the relevant turnover, i.e. turnover generated on the relevant market on which the competition infringement was made, which is a significant progress with regards to the previous situation.

FIC RECOMMENDATIONS

- In order to enhance transparency and legal certainty, the Commission should issue clear guidelines and instructions containing the manner of application of certain provisions of the Law, with the involvement of interested parties in commenting on proposed documents.
- The fees in the Tariff Rules should be decreased to a reasonable sum, especially in the area of merger control.
- The Commission should publish issued opinions and decisions on individual exemptions, i.e. to altogether improve transparency and predictability of decisions.
- The Commission should issue publications of the relevant definitions of product markets grouped by industries every six months, with the aim of harmonizing practice.
- The Commission should be open to, in short term and based on a party's request, meet with parties for the purpose of providing clarifications, guidelines and necessary information, and allow access to case files within a reasonable term after requested, especially in antitrust cases.
- Judges of the Administrative Court should complete advanced training in both competition law and economics. All rulings of said court should be made publicly available, and explained in detail in terms of the substantive issues of the Commission's decisions.
- The Commission must allow legitimately interested third parties to comment on procedures which affect their business, for the complete and correct determination of facts.
- The Commission's practice should be consistent with respect to all market players. Considering the penal nature of decisions in the area of competition protection and the significant powers of the Commission, predictability as well as consistency and legal certainty are of crucial importance for all market players.

STATE AID 1.33

WHITE BOOK BALANCE SCORE CARD

Recommendations:	Introduced in the WB:	Significant progress	Certain progress	No progress
Strengthening the independence and personnel capacities of the Commission for State Aid Control.	2009		√	
Effective state aid control – utilizing different mechanisms in order to monitor granted state aid, and also impose sanctions for non-compliant state aid.	2016			√
Consistent application of state aid rules (especially with regards to companies in restructuring and privatization), as well as EU standards and practice in the state aid control regime and the harmonization of the fiscal policy with the EU acquis.	2011			√

CURRENT SITUATION

The legal framework regulating the granting of state aid in the Republic of Serbia consists of the Law on State Aid Control, the Regulation on the Rules for Granting State Aid, and the Regulation on the Rules and Procedure for State Aid Notification. In 2017 and 2018 there were no changes in these regulations.

The latest publicly available edition of the Annual Report of the Commission for State Aid Control (CSAC) is for 2017. In 2017, the total amount of state aid in Serbia was EUR 807 million, a 4% increase compared with 2016. In 2017, Serbia's state aid expenditure as a percentage of GDP was 2.15%, which was a decrease against 2016, when this percentage was 2.2%. By comparison, in 2017 EU Member States spent EUR 116.2 billion, or 0.76% of the EU's GDP, on state aid.

In 2017, 27.4% of the total state aid went to the agricultural sector and the remaining 72.6% to industry and services, a decrease compared with 2016, when this percentage was 75.1%. The largest chunk of the total aid to industry and services was horizontal aid (32.1%), followed by sectoral and regional aid, with 9.4% and 31.1%, respectively.

The share of subsidies in the total state aid continued to increase in 2017, reaching 66.8% (compared to 60.6% in 2016), while tax incentives accounted for 27%, soft loans 1.6% and guarantees 0.1%.

De minimis aid increased threefold in comparison to 2016, which had to do with the change of legislation regulating the financing of public information projects, which now treats all co-financing of public information projects as de minimis aid.

POSITIVE DEVELOPMENTS

According to the European Commission's Progress Report on Serbia for 2019 ("EC Progress Report"), there has been no progress in the harmonization of laws and enforcement rules on state aid, however, in October 2019 the National Assembly adopted a new Law on State Aid Control which has an aim to harmonize the local state aid control system with the EU acquis and address some of the concerns the European Commission repeatedly highlights in its progress reports. Bylaws that will regulate this area of law in more detail should be passed within one year from the adoption of the new Law.

The preparation of the new Law was supported by an EU-funded project for the capacity building of the (CSAC) officially started in March 2019. One of the most prominent changes brought about by the new Law is the foundation of a new CSAC which shall function as an independent and autonomous body, accountable for its work to the National Assembly. In this way, one of the major concerns surrounding the current state aid control system in Serbia – the fact that up until now CSAC operated as part of the Ministry of Finance which brought its independence into question, should be removed.

REMAINING ISSUES

According to the European Commission's Progress Report, a number of existing state aid schemes in Serbia, includ-

ing fiscal ones, still need to be aligned with the EU acquis. The European Commission reiterated the remarks from previous reports regarding non-compliance with the Stabilization and Association Agreement (SAA), particularly highlighting the harmful practice of exempting companies in the process of privatization from the rules for granting state aid. In addition, at the normative level, Serbia has not yet adopted regional state aid maps.

The trend of a lack of aid for research and development remains notable, whereas an increase in state aid granted for environmental protection is a positive sign (8.3% in 2017 compared to only 2.2% in 2016), but nevertheless leaves plenty of room for improvement.

Individual state aid (direct granting of state aid to individual enterprises) is principally a significant challenge for the Serbian budget and market competition, in particular in the case of companies that cannot successfully compete on the market, even with such aid. Such allocation of state aid has a tendency of putting other market participants in an unequal position and also leads to imprudent spending of limited budgetary resources (i.e., taxpayers' contributions).

In 2017, the CSAC adopted 40 decisions on the permissibility of state aid – in 20 cases the CSAC found that the aid was compatible with state aid regulations, while in the same number of cases it launched a subsequent control, which is a visible improvement compared to previous years, when the proportion of subsequent controls was negligible. The CSAC has not yet ordered the return of granted state aid – although this is not entirely atypical for a relatively young authority in the pre-EU accession period, it could also bring the independence and integrity of the CSAC into question. From the institutional point of view, the fact that CSAC had the status of a governmental body primarily composed of representatives of different ministries, rather than an independent authority, brought its decision-making independence into question. Although certain steps have been taken, the CSAC's current capacity is still not sufficient for its important role.

State aid policy must become predictable and consistent. Clear plans and programmes, based on which companies and the public can be informed about the said policy, have to be adopted. Attracting investments in the development of underdeveloped regions, as well as pinpointing areas to strengthen competitiveness, are essential starting points for achieving a clear and cost-effective granting of state aid.

On its website, the CSAC is not updating the information on its activities as frequently as expected – the last publicly available annual report, which is the only available and relevant source of statistics on the activities of the CSAC, was published for 2017, even though the deadline for the publication of annual reports is 30 June of the current year for the previous year until now (according to the new Law this deadline was moved to third quarter of the current year for the previous year). Publishing the CSAC's decisions on its website regularly is necessary in order to establish transparency and strengthen legal certainty. Specifically, the general lack of transparency regarding contracts and negotiation procedures in relation to capital infrastructure investments enables a potential misallocation of budgetary funds and possible disruption of market competition and creates legal uncertainty regarding the role and responsibility of the state on the Serbian market. The new Law introduces mechanisms that should increase the level of transparency (yearly reports, registries of granted aid) and incentivize grantors to cooperate with the CSAC.

The inclusion of both state aid beneficiaries and the general public in drafting state aid policy is of great importance, so as to be able to jointly reach specific, predictable, and effective solutions. Certainly, the most important issue in building an efficient state aid system is the control of state aid granting, in order to prevent abuse and increase transparency. An independent CSAC is key for the realization of these goals.

FIC RECOMMENDATIONS

- Strengthening the independence and personnel capacities of the Commission for State Aid Control (CSAC) esp. through adequate application of the new Law on State Aid Control.

- Effective state aid control – utilizing different mechanisms in order to monitor granted state aid, and also impose measures for non-compliant state aid.
- Consistent application of state aid rules (especially with regards to companies in the process of privatization), as well as EU standards and practice in the state aid control regime and the harmonization of the fiscal schemes with the EU acquis.