PROTECTION OF COMPETITION

1.44

COMPETITION LAW

WHITE BOOK BALANCE SCORE CARD

Recommendations:	Introduced in the WB:	Significant progress	Certain progress	No progress
Adoption of the new Competition Law as soon as possible	2020			√
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 proposed documents.	2010		√	
The fees in the Tariff Rules should be decreased to a reasonable sum, especially in the merger control area.	2009			√
The Commission should publish issued opinions and decisions on individual exemptions, i.e. to altogether improve transparency and predictability of decisions.	2018		√	
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			√
The Commission should invest more resources into further digitalisation of its processes in order to ensure undisrupted and efficient work in the COVID-19 pandemic.	2020		√	
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 must allow legitimately interested third parties to comment on procedures which affect their business, for the complete and correct determination of facts.	2019			√
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		√	

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 in place 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.

In 2020, there were no developments in the field of the adoption of the new law and bylaws that started in 2017, most likely due to the coronavirus pandemic.

Given that the annual report of the Commission has not yet been published at the time of writing this text, the information below is presented in accordance with the information available on the Commission's official website. The number of notified concentrations dropped significantly due to a general decline in economic activity caused by COVID-19 pandemic. Out of 106 resolved concentrations, 103 were cleared in summary proceedings, one was cleared after

Phase III in-depth investigation while the Commission opened three Phase II in-depth investigations.

The Commission was very active in enforcement of competition rules in 2020 as it initiated nine new investigations in total. The Commission has continued the trend of launching investigations after conducted sector inquiries and analysis of specific conditions on the relevant markets. It is noticeable that the Commission put special emphasis on resale price maintenance since the Commission launched even six new resale price maintenance investigations. Two investigations are initiated against manufacturers/wholesalers of milk and beer and their retailers on the market of sale of daily fast-moving consumer goods. The Commission started three separate investigations against major manufacturers/wholesalers and their significant customers/retailers on the market for sale of consumer electronics. The Commission opened an investigation against wholesaler of motor vehicles and its distributors/retailers on the market for sale and maintenance of motor vehicles as well. The Commission continued the trend of opening investigations for abuse of dominance on the market for provision of bus station services since it had already fined local bus station services operators for this type of infringement. The Commission has kept an accent on ex officio examination of concentrations that were implemented without the clearance of the Commission. This time the Commission opened an investigation against a pharmacy chain owned by natural persons for the alleged implementation of a concentration without the approval of the Commission based on a concession agreement. It is an indicator that the Commission closely observes all concentrations falling within its scope irrespective of the size of an acquirer and a target, their ownership, and the legal basis of the concentration.

The Commission imposed fines in four restrictive agreements cases, one fine in an abuse of dominance proceedings. The Commission terminated two antitrust proceedings in 2020 for resale price maintenance against numerous smaller retailers having a weaker market and financial power who could not influence the content of restrictive resale price provisions imposed by the suppliers due to its weak bargaining power. This is a significant step towards aligning the practice of the Commission with the fining practice in the EU case law in resale price maintenance cases.

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

POSITIVE DEVELOPMENTS

There is a noticeable improvement in the number of opened investigations and the Commission resumed trend of opening investigations after sector inquiries and analysis of the conditions of competition on the relevant markets.

In 2020, the results of sector inquiries:

- for the fast-moving consumer goods market for 2017-2018,
- for the rail freight transport for 2016-2018, and
- for the wholesale market for synthetic mineral fertilizers for 2017-2019 were published.

The Commission should be praised for including the representatives of the World Bank in the work on the sector inquiry for the rail freight transport within the Project for improvement of business environment in Serbia by which cooperation of the Commission and business environment is strengthened. However, the Commission in the sector inquires evidently does not present clear conclusions about possible competition law infringements (except many useful economic parameters) which prevents market undertakings to act preventively and comply their behaviour with competition law.

In 2020, 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 cause for particular concern is that the Commission in 2020 stopped publishing decisions in individual exemption proceedings (in 2020, no single decision in individual exemption proceedings was published). The Commission published on its webpage a video about the possibility of usage of leniency programme with the aim of further application of this institute in practice.

The Commission has published a guidance on the parties to concentration and merger filing thresholds. It clarified who is considered a party to a concentration and how merger filing thresholds are calculated, since these questions raised significant doubts in practice.

REMAINING ISSUES

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 entire lack 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 the decision on such initiatives have been made. Annual reports are published with delay.

The need for further digitalisation of the process and work of the Commission has become evident during the COVID-19 pandemic and remains an issue up to date. The Commission should apply more resources in digitalisation which would ease and simplify their work in the given situation (e.g. holding meetings of the Council electronically, holding meetings with the parties electronically even when it is not possible to meet in person etc.).

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. In certain merger control cases, the Commission extensively used its right to ask for additional information as it required information not relevant for the assessment of a concentration. If the Commission uses its broad discretionary powers in requests for additional information, the Commission must elaborate the aim and purpose of the requested information and its relevance for the assessment of the concentration.

As for dawn raids, the Commission's decisions on dawn raids still 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. In the previous period, it was evident that the Commission has 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 only to repeating the Commission's findings and consideration of the basic procedural issues, without analysing the arguments of the parties in 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 the 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 continued efforts concerning the promotion and development of this institute by publishing the video on its website to acquaint market participants with the possibility of using the leniency programme. However, the use of this institute is unlike in the EU still 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, i.e. are not published.

It is noticeable that the Commission has been applying a more complex methodology in analysing the individual exemption of restrictive agreements, It is essential that complex analysis in individual exemption proceedings should not adversely affect the efficiency of the Commission's decision-making process, in terms of avoiding any unjustified delay. In practice, the review period of individual exemption requests is

often prolonged beyond the 60 days deadline as envisaged by the Competition Law (and in some cases even lasts for 4-5 months). This is causing practical problems to the business community when it comes to implementing agreements and business policies which require prior approval of the Commission. The economic reality requires swift action from all parties including the Commission. 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 European Union 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 previous situation.

FIC RECOMMENDATIONS

- Adoption of the new Competition Law and relevant bylaws as soon as possible.
- 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 proposed documents.
- The fees in the Tariff Rules should be decreased to a reasonable sum, especially in the merger control area.
- 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.
- Sector inquiries should contain more precise findings related to possible infringements of competition and competitive concerns to enable market participants to immediately comply behaviour in accordance with the findings of the Commission.
- Judges of the Administrative Court should complete advanced training in both competition law and economics. All rulings of the Administrative court and the Supreme Court of Cassation 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 with detailed reasoning in relation to exceptions from the previous practice and the EU practice. In merger control cases, requests for additional information must be related to the assessment of the concentration having in mind broad discretionary powers of the Commission. 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 2.60

WHITE BOOK BALANCE SCORE CARD

Recommendations:	Introduced in the WB:	Significant progress	Certain progress	No progress
Increasing and strengthening personnel capacities of the CSAC.	2009	√		
Securing a timely adoption of the relevant bylaws that are aligned with the EU acquis (especially with regards to companies in the process of privatization), as well as a proper implementation of the Law in the area of transparency (registries, reports).	2020	√		
Effective state aid control – utilizing different mechanisms envisaged in the Law in order to monitor granted state aid and also impose measures for incompatible state aid.	2016		√	
Consistent application of state aid rules, EU standards and practices and the harmonization of the fiscal schemes with the EU acquis.	2011		√	
Continued advocacy efforts towards aid grantors, beneficiaries and third parties alike.	2020	√		

CURRENT SITUATION

The legal framework regulating the granting of state aid in the Republic of Serbia consists of the Law on State Aid Control – newly adopted in October 2019 (the"Law"), and its bylaws.

The total absolute amount of state aid granted in 2019 amounted to RSD 110,724 million (EUR 939.6 million) while its share in gross domestic product was 2.0%.

Of this amount, in 2019 the agricultural sector was granted state aid in the absolute amount of RSD 33,983 million (EUR 288.4 million), which compared to 2018 represents an increase of 29%. State aid was granted to the industry and services sector in 2019 in the absolute amount of RSD 76,741 million (EUR 651.2 million). The share of this aid in the total state aid granted in 2019 was 69.3%, while in 2018 it was 71.6%, and in 2017 it was 72.6%.

Although in relation to the absolute amount the aid records an increase, in relation to the GDP, the aid granted to the industry and services sector in 2019 amounted to 1.4% remaining at the same level as in 2018, while in a slight decline compared to 2017.

The most common instrument for granting state aid in 2019 were subsidies, with a share of 55.4% in total state aid, to encourage the achievement of goals in both agriculture and industry and services, followed by tax incentives with a share of 22.2%.

The COVID-19 pandemic was fought on the State aid front too, through financial measures of the Government aimed at helping the affected businesses stay afloat. This also led to an increased activity of the CSAC in the first half of 2020.

Following the footsteps of the European Commission, in March 2020, the CSAC issued a Notice on the application of Article 5 of the Law, thereby harmonizing its interpretation with the position of the European Commission regarding the interpretation of Article 107 of the Treaty on the Functioning of the European Union to the new circumstances. In addition to the Law, this notice was the first step towards harmonization with the EU acquis and its interpretations.

The Government's package of economic measures that followed in April 2020 was accompanied by the adoption of three regulations setting out the conditions and criteria for compliance with granted COVID-19 related state aid , which relate to liquidity, elimination of harmful consequences and recapitalization, thus fully transposing the European interim framework, including its further amendments. Applying these rules, the CSAC assessed the harmonization of economic measures during the pandemic, especially tax delays, subsidizing employees' salaries, guarantee schemes, as well as sectoral assistance in the field of catering and tourism, relying in many cases on the practice of the European Commission.

POSITIVE DEVELOPMENTS

The new Law which aims to regulate this area in more detail, align local rules with the EU acquis and remove some of the main concerns the European Commission previously flagged its Progress Reports.

Under the Law, the CSAC functions as an independent body and is accountable to the National Assembly. This amendment removes one of the European Commission's main objections to the previous framework, which brought into question the old CSAC's independence, bearing in mind that the members were elected as representatives of the state aid grantors, and the organizational structure as an occasional working body of the Government to which the Ministry of Finance represented a professional service. Significant budget funds and new premises for the work of the Commission have been provided, and the number of employees has doubled compared to the previous reporting period. However, the number of employees still does not meet the needs, bearing in mind the serious reforms that have been started in this area, according to which the CSAC should continue to work on increasing and strengthening its capacities.

The new CSAC has a duty to publish its decisions on its website and to maintain a registry of granted aid, including a separate de minimis aid registry. These rules, aimed at achieving a higher level of transparency of the CSAC's work and thus legal certainty too, seem to be yielding results - since its constitution in January 2020 the CSAC is more prudent with the publication of notices and decisions. The development of the aid register is financed from European funds provided by the technical support projectand has yet to be established.

The practice of introducing draft bylaws on the Commission's website in the form of public consultations before adoption has been introduced, which is a significant step towards the legal predictability of new control regulations and harmonization with the EU acquis. Many bylaws have meanwhile been adopted (upon the reporting period), repealing parts of the 2014 Regulation on State Aid Rules. It is necessary to continue further alignment with the EU acquis.

REMAINING ISSUES

Significant progress was highlighted in the annual report for 2019, which covers most of 2020. Progress was praised regarding the operational independence of the CSAC, the new legal and by-law framework, as well as co-operation with the European Commission in individual cases. However, the main obstacles to further progress have been the lack of a list of state aid schemes and an action plan for their harmonization, especially fiscal schemes, further harmonization with EU regulations as well as the lack of a regional map.

The CSAC adopted 39 decisions, of which 35 ascertain the existence of state aid and assess the compliance of state aid, while 3 decisions refer to the rejection of state aid applications due to the fact that the allocation of public funds does not constitute state aid.Also, 10 binding opinions on draft regulations were adopted, i.e., 4 binding notifications on the obligation to harmonize regulations. In the reporting period, the CSAC has not yet made a negative decision (prohibi-

tion of allocation, conditional allocation, or order of refund). Although this is not completely atypical for young state aid control bodies in the period before EU accession, given the same practice of all candidate countries prior to accession, but also the lack of awareness among grantors, full regulation of this area is achieved when fully self-assessing the behaviour of all grantors, while those whose behaviour is not harmonized are obliged to bear the consequences.

State aid policy must be predictable and consistent and primarily based on grantor schemes, while individual aid should be the exception. It is necessary to adopt clear plans and programs based on which companies and the public can be informed about that policy in a timely manner, and not from the decisions of the CSAC.

Attracting investment in underdeveloped regions, as well as defining a clear government strategy on investment areas (digitalization and green energy) with full respect for state aid rules, are key starting points for achieving a clear and cost-effective state aid allocation.

With the new Law and bylaws in force, the CSAC must actively work on developing the awareness of all relevant parties about these rules, especially state aid grantors and beneficiaries whose knowledge is limited. The stated is a precondition for the involvement of the economy and the general public in the drafting of state aid policy, targeting vulnerable categories or sectors of the economy, so that specific, predictable, and effective solutions can be reached jointly.

It is necessary to raise awareness and capacity of state aid grantors, thus increasing the legal legal certainty of state aid beneficiaries when allocating funds.

FIC RECOMMENDATIONS

- Increasing and strengthening personnel capacities of the CSAC.
- Securing a timely adoption of the relevant bylaws that are aligned with the EU acquis (especially with regards to companies in the process of privatization), as well as a proper implementation of the Law in the area of transparency (registries, reports).
- Effective state aid control – utilizing different mechanisms envisaged in the Law in order to monitor granted state aid and also impose measures for incompatible state aid.
- Consistent application of state aid rules, EU standards and practices and the harmonization of the fiscal schemes with the EU acquis.
- Continued advocacy efforts towards aid grantors, beneficiaries and third parties alike.