PROTECTION OF COMPETITION

2.00

WHITE BOOK BALANCE SCORE CARD

Recommendations:	Introduced in the WB:	Significant progress	Certain progress	No progress
Adoption of the new Competition Law and relevant bylaws 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 Commission must decide in all competition cases efficiently and timely. Lack of a clear legal deadline in certain instances must not be an excuse for an inefficient review e.g. in Phase I merger case and individual exemption cases.	2023	√		
The fees in the Tariff Rules should be decreased to a reasonable sum, especially in the merger control area.	2009			√
The Commission should publish decisions on individual exemptions within the shortest possible period from their issuance, 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			√
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.	2021	√		
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.	2010			√
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 the 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.	2021		√	

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 Submission of Merger Notifications ("Merger Control Regulation") in 2016.

In 2023, there were no developments in the field of the adoption of the new law and bylaws. It appears that there might have been a lack of legislative initiative by the Commission to bring about changes and improvements in regulations within this area during that time.

However, the Commission continued its activities regarding the adoption of acts within its competence. Following the Model Program of Compliance with the Rules on Protection of Competition, the accompanying Guidelines on Competition Compliance Programs and the Instruction concerning bid rigging practices in public procurement procedures adopted in 2022, the Commission introduced the new Instruction on content and manner of submission of the request for protection of the confidential information in 2023. This new Instruction clarifies certain practical aspects of confidentiality claims in proceedings before the Commission.

The Foreign Investors Council welcomes the fact that the Commission published on 4 July 2024 the draft bylaws concerning vertical agreements, transfer of technology, maintenance of motor vehicles and sale of spare parts, as well as the categories of agreements in rail and road transport. The Foreign Investors Council has been for years indicating in the White Book the need for issuing of the new bylaws since the current Law on Protection of Competition was adopted back in 2009.

Nonetheless, the Foreign Investors Council expresses its disappointment that the general public and all the relevant stakeholders have been granted with only nine days to provide their comments to the draft bylaws. With such a short deadline the public consultations concerning the new bylaws have effectively been excluded, in particular having in mind that the new bylaws have been published during July when most of the stakeholders are on their annual leaves. The Foreign Investors Council reminds on a good practice during preparation of the comments to the draft Law on Protection of Competition and the Decree on Submission of the Merger Notification (which Decree was enacted in 2016) when the Commission provided reasonable time for all the stakeholders to provide their comments. The Foreign Investors Council sincerely regrets with respect to such a misconduct concerning the four new bylaws having in mind an enormous impact that the four bylaws, in particular the Vertical Block Exemption Regulation, can have on business of all the undertakings active in Serbia, both foreign investors and the local companies.

Given that neither 2022 nor 2023 annual report of the Commission have 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. However, the Commission significantly reduced its activities in publishing the concentration decisions in 2023 – namely, the Commission published only 33 decisions on resolved concentrations from 2023, all of them cleared in summary proceedings. Also, based on publicly available information the Commission opened one Phase II in-depth investigations in 2023, in relation to the merger of two biggest coffee manufacturers in Serbia (which was eventually approved with commitments on 28 February 2024).

The delays in publishing of the annual reports for 2022 and 2023, as well as the Commission's decisions, have led to a lack of transparency that negatively affect the overall legal certainty. This is especially concerning as the Commission grounds its decision on its previous practice, which currently remains unknown to the public. Namely, companies rely on legal clarity to make informed decisions, and uncertainty about the enforcement of competition laws can lead to increased compliance costs and higher risks, deterring investment (particularly from foreign investors who may perceive the jurisdiction as risky) and stifling innovation.

In 2023, the Commission initiated two new procedures for investigation of the competition infringements, for alleged entering into restrictive agreements.

The Commission's focus on investigating restrictive agreements involves one case on bid-rigging and one case where resale price maintenance ("RPM") clauses in vertical agreements were suspected. In any case, it appears that RPM provisions remain a significant focus of the Commission in relation to restrictive agreements as RPM clauses are one of the most investigated types of antitrust violations historically in Serbia.

Further, the Commission continued to examine failures to notify allegedly notifiable concentrations and initiated one new investigation in merger control matters, claiming that there was a change of control that was not notified to the Commission despite the legal thresholds being met.

In relation to merger control, the Commission's fees for merger control have remained unchanged and are still very high.

The Commission imposed five fines in 2023, in total amount of more than EUR 2.2 million. The two biggest fines were imposed in the case concerning two biggest coffee producers, which were individually fined EUR 1.6 million and EUR 400,000. Hence, the fine of EUR 1.6 million is the highest individual fine imposed in 2023 and the largest fine in the last couple of years.

POSITIVE DEVELOPMENTS

The trend of opening more investigations continued as well as drafting of the sector inquiries and analysis of the conditions of competition on the relevant markets.

In 2023, two sector inquiries/analyses have been completed and their results were published on the Commission's website, these being:

- a sector analysis of the state of competition in the market of digital platforms for intermediating in the sale and delivery of predominantly restaurant food and other products, from 2018 to 2021,

- a sector analysis of the state of competition in the markets of cement and concrete in the Republic of Serbia, in the period 2018-2021.

Through the findings of sectoral inquiries/analyses, the Commission can provide clear and practical guidelines to market participants, helping them understand competition rules, potential pitfalls, and areas that require improvement. This guidance promotes compliance and reduces the risk of anti-competitive behaviour. Therefore, the need for clear and practical guidelines is paramount. The Commission, however, sometimes does not present clear conclusions about possible competition law infringements and identified concerns that prevent market participants to act proactively and align their behaviour with competition law.

Furthermore, the Commission's Model Program of Compliance with the Rules on Protection of Competition and the accompanying Guidelines were published on the webpage of the Serbian Commercial Chamber and are published in English language as well.

In terms of the events that took place in 2023 and the activities in the area of international cooperation, it can be pointed out that the Commission participated in the International Conference on Competition and Consumer Protection in Georgia and signed the memorandum on cooperation with the national competition protection authority from Georgia. Furthermore, the Commission took part in the Annual Conference of the International Competition Network (ICN) hosted in Barcelona by the Spanish competition authority.

Finally, as previously mentioned, in April 2023, the Commission adopted a new Instruction on content and manner of submission of the request for protection of the confidential information .

REMAINING ISSUES

Lack of transparency in the Commission's work

The lack of transparency in the Commission's work is indeed a significant concern. Transparency is crucial in ensuring accountability, promoting fair competition, and building trust among stakeholders, including businesses and the public. When decisions are not promptly and comprehensively published, the ability of interested parties to understand the reasoning behind the decisions and assess their implications is hindered.

It is, therefore, of foremost importance that the Commission's decisions are published on the Commission's webpage to ensure transparency and provide timely information about its decisions as well as to maintain legal certainty. Delays in publishing decisions or not publishing decisions at all raise concerns about accountability and legal certainty in enforcing competition law. Even though the Commission should regularly publish its decisions, 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. This has been an issue in previous years, but in 2023 only 33 decisions in merger cases were published, which is only a third of the merger decisions published in 2022. The cause for particular concern is that the Commission, in continuation of the trend from 2022, did not publish any decision in individual exemption proceedings in 2023 (except for one decision on rejection of the individual exemption request that was published on the Commission's website in November 2023).

Additionally, the Commission does not publish information on submitted initiatives, even after the decision on such initiatives has been made. Even in cases of submitted initiatives, Commission delays its mandatory notification to the applicant, which should be done within 15 days as of the submission – certain initiatives were never responded.

Annual reports are published with a significant delay (at the time of writing of this chapter in June 2024 we were still awaiting 2022 annual report to be published), while the relevant court's 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. Another shortcoming is the fact that the database of the Commission's decisions does not allow for advanced search (with more detailed criteria).

Observance of deadlines and efficient review by the Commission

The efficient and timely decision-making process by the Commission is of the utmost importance to the business community. Delays in both merger control and antitrust cases can have far-reaching consequences for the parties involved and the overall market dynamics. The parties are often not allowed to proceed with their transactions or business operations until they receive the Commission's decision due to the standstill obligation, therefore, any delay in rendering decisions is postponing regular business operations which may cause substantial damages to the parties.

While the Competition Law might not always provide precise or rigid deadlines, it is still important for the Commission to conduct its reviews efficiently and effectively. The absence of specific deadlines should not be used as an excuse for unnecessary delays or inefficiencies in the review process. That is particularly important in the summary proceedings (Phase I), i.e. cases of no-issue concentrations and individual exemption procedures without competition effects on the Serbian market.

Furthermore, 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. This is causing practical problems for 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 almost twenty years ago. In the 2019 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 the Foreign Investors Council.

Due process rights

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 to the assessment of a concentration, which caused unnecessary delays. If the Commission uses its broad discretionary powers in requests for additional information, the Commission must elaborate on the aim and purpose of the requested information and its relevance for the assessment of the concentration.

Lack of an effective judicial review at the second instance

Judges of the Administrative Court, as a second court instance, 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 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 and harmonization of practices with EU standards (which is a requirement of the Stabilization and Association Agreement), while it also jeopardizes further appeal proceedings in cases when an extraordinary legal remedy is lodged. Detailed reasoning of the decisions of the Commission and the court, with 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 a position to misuse its powers and independence.

Calculation of penalties

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 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 Competition 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 significant progress with regards to the previous situation and which is also in line with the EU rules.

A clear and consistent methodology for calculating fines is essential to ensure fairness, transparency, and effective enforcement of competition law, especially considering that fines under competition law can be significant. Non-compliant guidelines, unclear coefficient determination, lack of reasoning, and the use of total revenues instead of relevant market turnover, can all lead to legal uncertainty and undermine the credibility of the enforcement process.

Improvement of economic analysis

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 regard to its previous practice in certain cases, without proper reasoning for doing so.

Lack of clarity in the application of merger control rules

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 clear and timely guidance from the Commission in respect of future practices, which still do not exist, i.e. are not published.

Leniency severely underused in practice

As for the leniency programme, the Commission published that the decision in bid-rigging case from December 2023 is the first ever partial leniency granted in Serbia.

It is concerning to see that the leniency program is not being effectively utilized in practice. The leniency program is a vital tool in antitrust enforcement, designed to encourage companies to come forward and report their involvement in anti-competitive activities in exchange for reduced penalties or immunity. Its successful implementation can lead to the detection and deterrence of cartels and other anti-competitive behaviour while, at the same time, building trust between the business community and the Commission.

Further digitalisation

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 to 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.).

New Competition Law and the relevant by-laws

Finally, it appears that the work on the preparation of the new Competition Law has been on hold since 2019. The Foreign Investors Council has been an active member of the Working Group for preparation of the new Competition Law and believes that the whole process of preparation and adoption of the new Law should be continued, as the draft of the new Competition Law provides various legal institutes which already exists within the EU acquis communautaire and which could be beneficial for the purpose of strengthening of the legal certainty in the Serbian competition law framework, such as negative clearance, calculation of fines on the basis of the relevant turnover, etc.

Also, a number of by-laws (e.g. on vertical and horizontal agreements) are severely out of date and need to be amended in order to reflect the economic reality and developed practice on the local and the EU level.

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 Commission must decide in all competition cases efficiently and timely. Lack of a clear legal deadline in certain instances must not be an excuse for an inefficient review e.g. in Phase I merger case and individual exemption cases.
- The fees in the Tariff Rules should be decreased to a reasonable sum, especially in the merger control area.
- The Commission should publish decisions on individual exemptions within the shortest possible period from their issuance, 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 increase the activities on the promotion of leniency.
- 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'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 the 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 1.50

WHITE BOOK BALANCE SCORE CARD

Recommendations:	Introduced in the WB:	Significant progress	Certain progress	No progress
Transparency of the procedure - introduction of the registry of state aid and effective control of the compliance with the obligation to report to the aid grantors.	2021		√	
Continuous and effective control of compliance with the law– utilizing different mechanisms envisaged in the Law in order to monitor granted state aid and also impose measures for incompatible state aid.	2021			√

CURRENT SITUATION

The legal framework regulating the granting of state aid in the Republic of Serbia consists of the Law on State Aid Control from October 2019 (the "Law"), which entered into force on 1 January 2020, and the relevant bylaws.

Bearing in mind that the report of the Commission for State Aid Control for 2023 has not yet been published, we will look back at the situation and data from 2022.

The total absolute amount of state aid granted in 2022 amounted to RSD 187.871 million (EUR 1.599 million) while its share in gross domestic product was 2.7% which is less compared to 2020 when the account of state aid in the GDP was 4.96%.

In 2022, the agricultural sector was granted state aid in the absolute amount of RSD 58.137 million (approximately EUR 495 million), which represents an increase for 39% and 42% comparing to 2021. and 2020. State aid was granted to the industry and services sector in 2022 in the absolute amount of RSD 120.439 million (approximately EUR 1.025 million). Compared to 2021 and 2020, this aid is recording significant growth.

POSITIVE DEVELOPMENTS

Under the Law, the Commission for State Aid Control ("CSAC") functions as an independent body and is accountable to the National Assembly, ensuring independence from the executive power from a formal-legal point of view. In the previous period, there have been improvements in the financial independence and personnel capacities of the CSAC.

A precondition for legal certainty is the assurance of transparency of CSAC's work. The 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. The registry of granted aid is still waiting to be deployed.

Many bylaws have meanwhile been adopted. The most important are the following ones:

- Decree on the content and form of the application for state aid;
- Decree on conditions and compliance criteria for state aid for environmental protection and in the energy sector;
- Decree on the conditions and criteria for the compliance of state aid for investment in sectors of importance for reaching a zero rate of greenhouse gas emissions;
- Decree on conditions and criteria for the compliance of state aid granted in the form of a guarantee and
- Decree on Amendments and Supplements to the Decree on Conditions and Compliance Criteria for State Aid for Culture.

REMAINING ISSUES

In the last report on Serbia's progress in the EU accession process for the year 2023, European Commission indicated that despite a solid legal framework on state aid control, consistent implementation of these policies remains weak. In this area, well-defined rules are not always implemented due to strong political pressure for financial assistance, channelled to SOEs and large foreign investors.

However, in 2023, there has been some acceleration of governance reforms, in particular in the energy sector.

The regulatory and administrative burden for doing business has been reduced, but the private sector continues to be affected by a lack of transparency and predictability in the way business-related legislation is adopted. Structural challenges remain for State aid, competition and public procurement. The State retains a strong footprint in the economy and the private sector is underdeveloped and hampered by weaknesses in the rule of law, in particular regarding the tackling of corruption and judicial inefficiency. Last year's recommendations have been partially implemented and remain partly valid.

The core obstacles to the further harmonization of national legislation with the European acquis:

- the lack of list of state aid schemes and of an action plan for their harmonization, especially of fiscal state aid schemes established in accordance with the Law on Corporate Income Tax,
- the lack of regional maps,
- the lack of a register of granted state aid,
- notification and the standstill obligations are still not being systematically respected and state aid is occasionally provided to economic operators, particularly foreign investors, without prior approval by the CSAC, and
- lack of strict enforcement with respect to agreements concluded with third countries.

In 2022, the CSAC adopted 127 decisions (according to the data available on the website of CSAC), of which 100 ascertain the existence of state aid and assess the compliance of state aid without any ex-post procedure being commenced or recovery decision being taken. There are 5 binding opinions on draft regulations adopted of which 2 opinions indicate that the state aid was partially compliant. Also, CSAC adopted 7 notifications with binding instructions on how to comply aid with the applicable rules.

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 certainty of state aid beneficiaries when allocating funds.

FIC RECOMMENDATIONS

- Transparency of the procedure - introduction of the registry of state aid and effective control of the compliance with the obligation to report to the aid grantors.
- Continuous and effective control of compliance with the law– utilizing different mechanisms envisaged in the Law in order to monitor granted state aid and also impose measures for incompatible state aid.
- Ensure a harmonised approach for prioritising and monitoring all investments and basing investment decisions on feasibility studies, cost-benefit analysis and environmental impact assessments, and apply to all projects the principles of competition, equal treatment, non-discrimination and transparency in State aid procedures in line with the EU acquis.