

Serbia: Overview of most notable draft amendments to the Serbian Law on Protection of Competition

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Introduction

Various experts in the field of competition legislation recently came together to comment on a draft proposal (“**Draft Proposal**”) for the first ever amendments to the 2009 Law on Protection of Competition (the “**Competition Law**”). Although there is general agreement that the Competition Law contained major deficiencies (especially regarding rules of procedure), it is debatable whether the proposed amendments present adequate solutions. This article aims to provide an initial overview of the most notable changes that have been proposed to the Competition Law. However, it should be noted that the Draft Proposal is still subject to extensive debate and is likely to be changed.

Amendments to substantive rules

Change to the definition of “dominant position”

In order to adequately address and sanction abuses of dominant position, the authors proposed a novel definition of “dominant position” in an attempt to further align it with EU legislation and case law (e.g. with *Guidance on the Commission's Enforcement Priorities in Applying Article 102 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* and the European Court of Justice's decision in the *Hoffmann-La Roche & Co. AG v Commission of the European Communities* case). Accordingly, under the Draft Proposal, “dominant position of an undertaking” would be determined on the basis of its market influence and ability to act in the relevant market independently of its actual or potential competitors, buyers, suppliers or consumers.

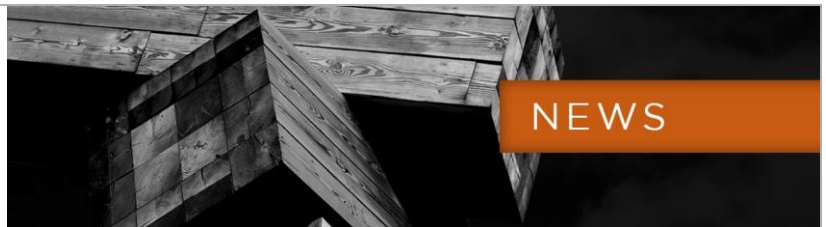
The Draft Proposal provides a non-exhaustive list of indicators which should be examined by the Competition Authority in order to determine the market influence exercised by the undertaking in question, such as: the structure of the relevant market; the undertaking's market share; the undertaking's actual or potential competitors; the undertaking's economic and financial power, the degree of vertical integration; advantages enjoyed by the undertaking *vis-à-vis* access to sources of supply and distribution; legal or factual barriers to other undertakings seeking to enter the market; and technological advantages, intellectual property rights and related rights enjoyed by the undertaking.

Even though the Draft Proposal restates the presumption that an undertaking must enjoy a market share of 40 per cent. or more on the relevant market in order to have a dominant position, such presumption does not relieve the Competition Authority of the duty to assess the dominant position of such an undertaking by referring to the aforementioned indicators. Such obligation on the part of the Competition Authority also applies when determining the degree of “collective dominance” enjoyed by two or more legally independent undertakings which possess a collective share in the relevant market of 50 per cent. or more, if (on the basis of their economic relations) the undertakings concerned act jointly or act as a single undertaking in the relevant market.

Amendments to rules of procedure

Extension of deadlines in relation to an investigation of a concentration

Although the deadline of one month within which the Competition Authority is bound to issue its ruling on concentration upon notification was criticised as insufficient (especially in respect of analyses of complex



mergers), the Draft Proposal restates this one-month deadline, but notes that it starts running from the date on which the complete notification is submitted.

However, the Draft Proposal stipulates four months (instead of three) deadline for the Competition Authority to issue its decision in proceedings involving an investigation of an alleged concentration that was initiated *ex officio*.

The "commitment decision" concept

The Draft Proposal aims to introduce the concept of "commitment decisions" and stipulates that the Competition Authority may issue a decision on the suspension of *ex officio* proceedings in the event that the party in question, either within the period of one year from the commencement of proceedings or within the period in which the party should submit its statement of objections (whichever lapses first), prepares a draft proposal of commitments (i.e. proposed steps aimed at removing potential infringements to competition) and terms and conditions for complying with such commitments.

In the event that the Competition Authority decides that the proposed commitments will eliminate or prevent a repeat of the competition infringement in question, it will issue a decision stipulating measures that must be taken in order to ensure the future protection of competition. However, the Draft Proposal differs from the aforementioned concept to a large extent, since in determining such measures the Competition Authority is not bound by the submitted proposal.

The suspended proceedings will resume if, within a period of five years from the act cited as an infringement of competition (or the most recent action constituting such an infringement), the circumstances forming the basis for the decision on the suspension of proceedings substantially change, or the party fails to fulfil its commitments or fails to submit evidence of compliance therewith, or the decision on the suspension of proceedings was based on inaccurate or false information.

Extension of the statute of limitations

The Draft Proposal stipulates the separate calculation of the statute of limitations for the imposition of fines (which starts running as of the date when the last action constituting an infringement has been performed) and enforcement of fines (which starts running from the date on which the relevant decision of the Competition Authority setting the penalty or in case the administrative proceedings were initiated, the relevant court decision, become enforceable), as well as extends such period to five years (the Competition Law provides for three years period).

The Draft Proposal also introduces the concept of the suspension of the statute of limitations period should the Competition Authority undertake any action for the purpose of investigating an infringement or imposing fines. Upon the occurrence of an event that results in suspension, the statute of limitations commences again. However, upon the expiry of a period which amounts to twice that of the statute of limitation, fines may not be imposed or collected.

Judicial review

The proposal that a Commercial Appellate Court should replace the Administrative Court and become a court of second instance for the review of decisions made by the Competition Authority comes as a surprise. This provision seems to be problematic since the Commercial Appellate Court does not have any extensive experience in evaluating administrative acts, such as decisions issued by the Competition Authority. In addition to this, such change will certainly result in the need to train judges in respect of complex competition matters in which previously they did not have any say and subsequently create new practice which may differ from the admittedly undeveloped but nevertheless relatively stable practices of the Administrative Court.

Conclusion

While the accompanying notes to the Draft Proposal state that the amendments were made in an attempt to bring the Competition Law closer to its counterpart in other EU states and to address the recommendations contained in the fairly comprehensive UNCTAD Report on the State of the Competition Protection in Serbia of 2011, it is notable that the Draft Proposal mainly afford breathing space to the Competition Authority. Recommendations which criticise low thresholds for merger filings, as well as the high fees paid for such notifications, seem to have been overlooked. Nevertheless, the open nature of the process of preparing the draft amendment is rare in Serbia and deserves praise.

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