

LEGISLATIVE DEVELOPMENTS AND CASE LAW REVIEWS

Overview of New Soft-Law Materials Designed to Promote Competition Law Compliance in Serbia

by

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Abstract

The last three years have been very dynamic for the competition authority in Serbia. The newly elected Council and President of the Commission for Protection of Competition (Serbian NCA) have brought a much-needed change to competition enforcement in Serbia, shifting the focus of enforcement from solely individual cases, to looking at the bigger picture and promoting competition law compliance as the preferred business model. During this period, the Serbian NCA has published

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several soft-law instruments, issuing its first Guidelines for Drafting compliance programmes, accompanied by a Template compliance programme and two compliance Checklists, aimed at identifying competition law related risks. These materials, meant to raise competition law awareness, were accompanied by vigorous advocacy activities in promoting competition law compliance. The overall aim was to foster voluntary compliance with competition law, promoting competition as a positive value in doing business, and ensuring compliance from the bottom up.

Resumé

L'Autorité de la concurrence serbe a été particulièrement dynamique durant ces trois dernières années. Le Conseil et le président nouvellement élus de la Commission pour la protection de la concurrence (ANC serbe) ont apporté un changement indispensable à l'application du droit de la concurrence en Serbie en mettant l'accent non plus sur les seuls cas individuels mais sur une vision plus globale et en promouvant le respect du droit de la concurrence en tant que modèle d'entreprise à privilégier. Au cours de cette période, l'autorité nationale de concurrence serbe a publié plusieurs instruments juridiques non contraignants, notamment ses premières lignes directrices pour l'élaboration de programmes de conformité, accompagnées d'un modèle de programme de conformité et de deux listes de contrôle de la conformité, visant à identifier les risques liés au droit de la concurrence. Ces activités, destinées à sensibiliser au droit de la concurrence, ont été accompagnées de plaidoyers vigoureux promouvant son respect. L'objectif global était de favoriser le respect volontaire du droit de la concurrence, de promouvoir la concurrence en tant que valeur positive dans la conduite des affaires et d'assurer le respect ascendant (bottom-up) du droit de la concurrence.

Key words: competition law; guidelines; Serbia; competition compliance.

JEL: K21, L4

I. Introduction

Since 2021, competition enforcement by the Serbian National Competition Authority (the Commission for Protection of Competition, hereinafter: the Serbian NCA or NCA) has taken a proactive approach to promoting competition compliance and creating a competition culture. These activities were based on the premise that general competition law education of undertakings and stakeholders, as well as raising awareness of competition rules, can promote voluntary compliance and mitigate ex-post enforcement of competition rules, to help strengthen the overall competitive outlook.

Although more than fifteen years have passed since the establishment of the Serbian NCA and the adoption of the first modern competition law in Serbia, the NCA found an evident lack of awareness of undertakings across economic sectors, regardless of their size, when it comes to the powers and competences of the Serbian NCA, competition rules in general, and competition compliance. What is more, most of the infringement cases in Serbia have been the result of negligent actions of undertakings with insufficient knowledge or understanding of competition law.¹

Even though competition rules are applicable across all sectors of the economy and to all undertakings (all entities involved in the trade of goods and services in the Republic of Serbia),² when it comes to actual awareness of competition rules, there are significant discrepancies across company structures and regions. Multinational companies doing business in Serbia tend to have compliance programmes, often imported from their parent companies or copied from other jurisdictions. However, these programmes are mostly modelled on EU law and often refer to competition law issues in just a few provisions, outlining the most basic principles related to competition infringements.

On the other hand, over 99% of companies in Serbia are classified as micro, small and medium-sized enterprises (SMEs),³ scattered across the national territory, often family-owned and, almost always, doing business without a legal department or ongoing legal aid (except in the areas of labour law or permits). For this second group of smaller, local companies, competition rules and the need for compliance have been largely overlooked, leaving them exposed to the risks of negligent infringements of competition law.

After identifying a pattern that amounts to an overall widespread lack of competition law awareness, the Serbian NCA decided that individual enforcement alone would not be sufficient to tackle all of the market problems and anti-competitive conduct, which occurred as a consequence; hence, proactive steps would be required to remedy this.

Starting from the final quarter of 2021, the Serbian NCA engaged in extensive advocacy activities, ranging from the publication of new materials, to lectures and presentations made to the general public throughout 2022.

¹ Commission for Protection of Competition, 2021. 'Guidelines for Drafting Competition Compliance Programs' <<https://www.kzk.gov.rs/kzk/wp-content/uploads/2011/08/Compliance-guidelines-CPC.pdf>> accessed 29 March 2023.

² Article 3 of the Serbian Law on Protection of Competition (LPC), Official Gazette of the Republic of Serbia, No. 51/2009 and 95/2013.

³ OECD, 2022. 'SME Policy Index: Western Balkans and Turkey 2022: Assessing the Implementation of the Small Business Act for Europe, SME Policy Index'. Paris, OECD Publishing <<https://www.oecd-ilibrary.org/sites/6b999674-en/index.html?itemId=/content/component/6b999674-en>> accessed 29 March 2023.

The NCA also made competition related materials freely available to a wider business community in Serbia. Advocacy activities are one of the core competencies of the Serbian NCA in accordance with Article 21 of the Law on Protection of Competition (“Official Gazette of the Republic of Serbia”, No. 51/2009 and 95/2013, hereinafter: LPC). Among other things, the NCA is authorized to undertake activities to raise awareness on the necessity to protect competition.⁴ In earlier years, advocacy activities have often been aimed at governmental bodies and only sporadically to promoting general awareness of competition rules. However, the last two years show significant progress when it comes to the activities of the Serbian NCA in raising this kind of awareness, and strengthening voluntary competition law compliance and advocacy activities aimed at the wider public. This has been one of the first attempts the NCA has made in promoting compliance programmes as a form of voluntary application of competition law.

II. Soft-law instruments aimed at increasing the level of awareness

To raise awareness and promote a healthy competition culture, the Serbian NCA took proactive steps in two directions – firstly, by drafting and publishing soft-law instruments and, secondly, by engaging directly with representatives of companies in Serbia, through interactive workshops. These activities were combined and developed over time, culminating with the publication of relevant competition law materials online and distribution of these materials through the Serbian Chamber of Commerce (hereinafter: Chamber of Commerce).

It is important to note that all of these activities have been carried out free of charge for any undertakings subject to competition rules, and that both the workshop materials as well as the competition law compliance materials have been made available online for free. This attempt of the Serbian NCA was made primarily with the purpose of providing free general clarifications to companies, which are most likely unable to afford specialized lawyers, and to enable smaller companies to assess their exposure to competition law related risks, and to take steps to mitigate these risks.

⁴ Article 21, par. 1, point 11, LPC (n 2).

1. Guidelines for Drafting Competition Compliance Programmes

The activities of the Serbian NCA of using soft-law instruments as a tool for promoting compliance, began in December 2021, when the NCA published its Guidelines for Drafting Competition Compliance Programs (hereinafter: Compliance Guidelines) on its official website.⁵ The Compliance Guidelines are intended to help undertakings in Serbia in assessing their exposure to competition law related risks, and to help them draft customized compliance programmes to ensure that businesses comply with competition rules. To help undertakings, particularly those without sufficient resources at their disposal, the Serbian NCA provides a general description and clarifications of the individual “steps” to be taken when adopting such programmes and an outline of the key risks to consider.

In addition to providing a simple and comprehensive overview of existing competition rules, the Compliance Guidelines introduce concepts which have been overlooked in the past. One of these is stressing the need for “public distancing” when a company partakes in a meeting that entails the exchange of information, which could be anticompetitive, as a standard established in EU case law. In addition, the Compliance Guidelines clarify for the first time the standards for refusal to deal as well as collective boycott, which have yet to be implemented in the decisional practice of the Serbian NCA. From a more practical point of view, the Compliance Guidelines contain links to comprehensive materials available for competition law training in Serbian, and clarify what companies need to be aware of in conducting their daily business activities.

1.1. Information exchange

In the section on “horizontal agreements” posing competition law risks, the Compliance Guidelines reiterate an older opinion on the exchange of information under the headline “When does an exchange of information give rise to competition concerns”. The Compliance Guidelines clarify that although the exchange of commercially sensitive information allows companies to adapt their commercial policy to their competitors’ strategy better and in a more timely manner but, at the same time, such information exchanges increase the probability of creating anticompetitive effects on the market, or raise concern about increased coordination in the future market scenario.⁶

⁵ Compliance Guidelines (n 1).

⁶ Commission for Protection of Competition, 2015. ‘Annual Report 2014’ <http://www.kzk.gov.rs/kzk/wp-content/uploads/2015/04/godisnji_izvestaj_kzk_2014.pdf> accessed 30 March 2023.

In the section titled “Prevention”, the Compliance Guidelines state that, in principle, the exchange of information is allowed when it concerns (1) non-strategic information, (2) information exchanges among undertakings to create market statistics, depending on the market characteristics, provided the data is older than one year and is in an aggregated form, or (3) exchanges of recent commercial information intended to create statistical data of individual markets to be used by associations of undertakings, provided that individual undertakings can only access aggregated market data.⁷ The Compliance Guidelines continue to clarify which sources of information about competitors are allowed in principle, and which are prohibited.⁸

In the section on practical advice, the Compliance Guidelines contain the standard of “public distancing” as established in *Silec*⁹:

*“If you attend a meeting where competitors agree on pricing or other commercially sensitive information or exchange views on these issues, it is necessary to immediately disassociate (distance) yourself unequivocally from the discussion and reclude yourself from the conversation, i.e., leave the meeting in which they continue, by making it abundantly clear to others that you do not want to take part in any such agreement. Only under such conditions and in those circumstances can you avoid responsibility for the resulting competition violations. Adopting a passive approach during the meeting or subsequent non-application of an agreement following the meeting does not absolve you of responsibility.”*¹⁰

This topic was also one of the key points emphasized by the presenters in the workshops promoting competition compliance programmes. During the workshops, the participants were given examples of competition infringements, such as the recent Serbian NCA’s decision related to *VTI services*,¹¹ which was reviewed by the Administrative Court. The court delivered a ruling in its administrative dispute proceedings, clarifying the standard of proof when it comes to the exchange of information.

The Serbian Administrative Court found that identifying a single meeting where information was exchanged was sufficient to establish the existence of a restrictive agreement, and that such an agreement on prices was a competition

⁷ Compliance Guidelines (n 1).

⁸ *Ibid.*

⁹ Judgement of the Court of 14 November 2019, Case C-599/18 P *Silec Cable SAS v Commission*, ECLI:EU:C:2019:966.

¹⁰ Compliance Guidelines (n 1).

¹¹ Decision of the Commission for Protection of Competition of 30 November 2020, No. 4/0-02-56/2020-33 <<http://www.kzk.gov.rs/kzk/wp-content/uploads/2021/01/Decision-on-measures-for-protection-of-competition-vehicle-inspection-services.pdf>> accessed 29 March 2023.

restriction by object. The Court clarified also that the “incomplete application or non-application of the Price List by the plaintiff in the proceedings does not represent a factor influencing the existence of a violation of competition by object.” The ruling goes on to state that “this is due to the fact that it was established in the proceedings that a meeting was held where information on future prices was exchanged, so that the present representatives of the VTI companies did not make decisions on prices individually and independently, which is the basis of market competition, but in accordance with the information from the meeting, that is, at the agreed prices”.¹² Although this standard has been established in the case law of European courts, this is the first time a court in Serbia has explicitly acknowledged it; hence, the ruling is crucial for the further development of cases related to the exchange of information considered to be restrictive agreements.

1.2. Refusal to deal

The Compliance Guidelines introduced the standard for refusal to deal, which has not yet been clarified in the decisional practice of the Serbian NCA. Dealing with specific forms of abuse of dominance, the NCA notes that: “As a general rule, suppliers have the right to choose who they wish to deal with; however, in certain cases, refusal to deal/supply may be considered to be an abuse of dominance.”

The Compliance Guidelines go on to outline the elements required in order to establish and pursue a theory of harm based on alleged refusal to deal and list these conditions, aside from having a dominant position, as follows:

- “1. the refusal relates to a product or service that is objectively indispensable input, essential for the customers to be able to compete effectively in a downstream market;
2. the refusal is likely to lead to the elimination of effective competition in the downstream market;
3. the refusal is likely to lead to consumer harm;
4. the conduct concerned is not objectively justifiable.”

2. Template Compliance Programme

Following the positive public response to the Compliance Guidelines,¹³ the Serbian NCA identified a need for further clarification to facilitate the implementation of the Compliance Guidelines. As a result, the NCA drafted

¹² Judgement of the Serbian Administrative Court of 4 July 2021, No. I-7 U 24498/20.

¹³ Many law firms published positive critic and informed their clients through newsletters about the activities of the Serbian NCA.

a Template Compliance Programme (hereinafter: Template), published on its official website in June 2022.¹⁴ The Template provides practical guidance and examples of potential structures for compliance programmes, and gives further guidance on issues such as information exchange, business situations that can lead to competition infringements and general advice on implementing and monitoring competition compliance programmes.

The Template is not intended to serve as a mandatory form but as an example, with the aim of enabling undertakings, which decide to create their own compliance programmes, to actually go through with the decision to formulate and implement a compliance programme in their business. The Serbian NCA emphasises the need to tailor-make and customize compliance programmes to the needs of a particular company, and to have such programme adjusted to the market or markets where that specific company operates, as the competitive conditions may vary in different markets and industries.¹⁵

In order to ensure the effectiveness of compliance programmes, the recommendation of the Serbian NCA is to develop a culture of cooperation and trust within the company, aimed at solving problems, rather than focusing only on sanctioning employees for breaching such rules.¹⁶ The basic premise behind this recommendation is that problems tend to grow if kept in the dark, and that most competition law risks can be resolved through adequate and appropriate risk assessment and actions. The Template notes that it is in the best interest of the company for the risks to be identified, and for adequate measures to be taken, as soon as possible. It is better for the company to remove or reduce the perceived risks, rather than for its employees being incentivized to avoid reporting perceived problems, out of fear of internal sanctions that they might suffer themselves, which leaves the company itself exposed to risk.

The Template contains an indicative list of conducts to avoid, situations that may increase risks of competition law infringements, and sources of market information that can lead to collusion, and thus expose the company to risks related to competition law infringements. It also recommends for compliance programmes to contain internal mechanisms for cooperation with the Serbian NCA during its investigative procedures. Companies should also ensure that

¹⁴ More information about the Template are available at: <<https://www.kzk.gov.rs/en/komisija-pripremila-model-programa-u> and the full text in Serbian>; <<https://www.kzk.gov.rs/kzk/wp-content/uploads/2022/10/Model-programa-uskladjenosti-poslovanja-sa-propisima-o-zastiti-konkurencije.pdf>> accessed 30 March 2023.

¹⁵ Commission for Protection of Competition, 2022. 'Template Compliance Program', <<https://www.kzk.gov.rs/kzk/wp-content/uploads/2022/10/Model-programa-uskladjenosti-poslovanja-sa-propisima-o-zastiti-konkurencije.pdf>> accessed 30 March 2023.

¹⁶ Ibid.

employees are familiar with the obligation to submit data, the rights and obligations during the implementation of dawn raids, and the conditions for imposing procedural penalties in accordance with the LPC. The aim of this approach is to avoid risks that may arise due to ignorance of the rules of procedure before the Serbian NCA, such as procedural penalties. In the NCA's decisional practice, this has been identified as a problem, which often occurs out of negligence, and the NCA has already fined¹⁷ several companies for failing to submit requested documents and data. This is a procedural risk that can easily be avoided if companies are aware of the potential consequences of ignoring requests for information.

3. Competition Checklists

As a further step in aiding the business community in complying with competition rules, in October 2022, the Serbian NCA published two Competition Checklists (in the form of printed leaflets) to help identify risks related to competition law infringements – one for restrictive agreements and one for the abuse of dominance. The leaflets are designed as lists of specific YES/NO questions, phrased in simple terms, which companies can use in assessing their exposure to the risks of breaching competition rules and being held liable for competition infringements. The printed materials stress some of the key issues and risks to be taken into consideration in shaping market conduct, and should ensure an easier and faster risk assessment by companies as well as help speed up the compliance process.

The Checklists are the first instruments the Serbian NCA issued to assist companies in assessing individual competition law related risks.

3.1. Competition Checklist: “Dominant Position and Abuse”

The “Dominant Position and Abuse” Checklist contains two segments to be assessed. The first explains the concept of dominance and presents eleven “yes or no” questions to help companies assess whether they could hold a dominant position. In particular, it guides companies through questions related to the structure of the market, the various parameters associated with market power, and the role their company plays on the particular market.

After the first set of questions, the Dominant Position and Abuse Checklist provides guidance on how to assess the results of the aforementioned assessment, stating that if the answer to one or more of the above questions

¹⁷ Article 70 LPC provides for cases where procedural penalties of 500 to 5000 EUR per day can be imposed, including those related to failure to submit requested documents and data.

is “yes” (especially to one of the first five questions), there is a possibility that the company holds a dominant position. In that case, it is desirable to make a risk exposure assessment in terms of committing an abuse of a dominant position. However, if the company does not have a dominant position, until and unless its circumstances change, there is no greater need for the company to review and adjust its operations in terms of the risk related to potential abuse of a dominant position. The Dominant Position and Abuse Checklist advises companies to do this procedure for each market and each level at which the company operates.

The second part of this Checklist is used to assess whether the conduct of a company that holds or may hold a dominant position can be considered abusive. This segment consists of questions related to individual forms of abusive behaviour, by scanning the companies’ market conduct for particular activities that can amount to an abuse of dominance. The eleven questions in the second part of the Dominant Position and Abuse Checklist relate to both exclusionary and exploitative conduct.

Once the second part of the self-assessment is completed, the Dominant Position and Abuse Checklist explains that if the answer to one or more of the questions listed in part two of this Checklist is “yes”, there is a possibility that the company is exposed to the risk that its market conduct amounts to an abuse of a dominant position. In that case, for each of the business policies that represent a competition law risk, it is necessary to assess whether there is an objective reason that could justify the actions of the dominant company.¹⁸

3.2. Competition Checklist: “Restrictive agreements”

The second soft-law document, the “Restrictive Agreements” Checklist, refers to restrictive agreements and is also divided into two parts, distinguishing between: risks that occur in business relations with competitors (horizontal agreements), and risks that occur in relations with customers or suppliers (vertical agreements). The first part of this Checklist helps companies self-assess potential risks of committing a competition law infringement when dealing with competitors. The Restrictive Agreements Checklist guides companies to assess whether their company (or any employee of the company) engages in various forms of information exchange, price fixing or other forms of horizontal collusion with its competitors (or any employee of a competitor).

The Restrictive Agreements Checklist indicates that if the company answers positively to one or more of the aforementioned questions, there is a possibility that that company is exposed to the risk of committing a competition law infringement by colluding with its competitors. Given that agreements

¹⁸ “Dominant Position and Abuse” Checklist.

between competitors are among the most serious competition infringements, the Restrictive Agreements Checklist goes on to inform companies about the Leniency Programme (conditions for exemption from the payment of fines for infringements of competition law).¹⁹

The second part of the Restrictive Agreements Checklist helps companies assess whether they are exposed to the risk of committing a competition law infringement in their dealings with suppliers or customers. The questions listed here relate mostly to individual forms of vertical restraints contained in the current Vertical Block Exemption Regulation²⁰ in Serbia.

Provided that companies respond positively to questions related to vertical agreements, the Restrictive Agreements Checklist advises them to consider whether the conditions stipulated by the Serbian vertical block exemption regulation are met, directing the companies to the relevant regulation. If they are not, this Checklist stresses that companies should consider the possibilities of an individual exemption of the agreement from the prohibition.

III. Conclusion

The Compliance Guidelines, the Template and the two Competition Checklists form a comprehensive soft-law package covering the Serbian NCA's activities aimed at promoting a healthy competition culture in Serbia. Following the cooperation between the NCA and the Serbian Chamber of Commerce in 2022, the compliance materials have been published online on a separate page of the website of the Chamber of Commerce²¹. Moreover, links to these materials have been distributed through the mailing lists used by the Chamber of Commerce to communicate with companies across regions and industry sectors. This solution significantly increased the transparency of competition law materials for all undertakings.

The new soft-law instruments issued by the NCA have been welcomed by the Serbian business community. The first results of its activities to promote competition compliance have already begun to show, and undertakings have already started using the compliance programme Template when drafting their compliance programmes. In addition, since the introduction of the soft-law

¹⁹ "Restrictive Agreements" Checklist.

²⁰ Regulation on agreements between market participants operating at different levels of production or distribution that are exempt from the ban, Official Gazette of the Republic of Serbia, No. 11/2010.

²¹ Materials are available in Serbian: <https://pks.rs/strana/poslovanje-u-skladu-sa-pravilima-konkurencije>

materials on compliance, there has been an increase in activities of law firms, consultants and law schools in promoting competition law and compliance as a topic.

In order to tackle the overall problem regarding the lack of awareness of competition rules, the Serbian NCA will need to continue its advocacy activities and strive to reach as wide an audience as possible when communicating messages related to competition law. For now, the existence of compliance-related materials on competition topics, as well as the ease of the availability of such materials, is a significant step towards ensuring that companies operating in Serbia have the possibility to become familiar with competition rules. Even though significant and systemic changes do not happen overnight, and progress requires a slow and steady pace, the previous three years have set the stage for an improvement when it comes to competition enforcement in Serbia.

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