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Serbia: Law on Protection of Competition amended after four years

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Competition

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The new amendments of the Law on protection of Competition (*Zakon o zaštiti konkurencije*, „Off. Gazette of RS“ no. 51/2009 and 95/2013 – the Law) enter into force on 8 November 2013. Even though the Law has been in force for four years, and various proposals for its amendments have been voiced from different sides, it seems that the amendments fail to address most of the shortcomings which have become apparent during the aforementioned period.

The first change introduced by the amendments redefines the dominant position so as to remove the previously applicable presumption of dominance at the 40% market share level and to shift the burden of proof on the Commission for the Protection of Competition (the Commission) in all cases. The 40% market share threshold is now listed as one of the (non-exhaustive) factors to be considered (i.e. to be given special attention) in determining whether a market participant holds a dominant position in the relevant market. Further, collective dominance is no longer related to the joint market share of 50% or more, but only to the “economic ties” between two or more legally independent market participants which result in their acting jointly or acting as a single market participant.

The second notable change is related to the expansion of the definition of concentration which now (finally) explicitly includes acquisition of control over a part or parts of market participant(s) which may act as an autonomous commercial/business unit.

The amendments also introduce the concept of a statement of commitments in investigations of potential breaches of competition (previously this was only available in the context of conditional merger clearances) meaning that a market participant being investigated for a potential breach of competition may now offer a statement of commitments, up to the date of receipt of a notification from the Commission describing the facts, elements, and other evidence on which the Commission will base its decision, in order to have the Commission freeze/terminate the investigation proceedings against such participant.

The remainder of the amendments mostly deals with the internal organization of the Commission and certain procedural matters. The following is a list of other noteworthy amendments:

- the Commission now has four (instead of three) months to reach a decision in the case of a full merger investigation;
- it is now explicitly provided that the Commission’s deadlines for issuing a decision on approval of concentration / issuing a statement on initiation of full merger investigation start to run upon receipt of complete notification (as opposed to “from submission of a notification”) –this is simply codification of established practice of the Commission;
- the potential penalty of up to 10% of annual revenue of a market participant is now explicitly tied (i.e. limited) to such market participant’s revenue generated on the territory of the Republic of Serbia;
- the statute of limitations for ordering measures for the protection of competition is now five years as opposed to three under the previous version of the Law and it is much easier for the Commission to freeze/interrupt the running of the statute of limitations.

In conclusion, the amendments seem to bring a degree of clarity to certain ambiguous sections of the Law but, overall, they do not seem to address the most problematic issues which have arisen in practice (e.g. relatively low concentration thresholds, general lack of guidance with regards to assessment of restrictive agreements, and so on), while even introducing solutions which may be more problematic than their previous versions, as is the case with shifting the burden of proving the existence of dominant position onto the Commission in all cases. It will therefore be quite interesting to observe the Commission’s practice under the amended Law, especially with regards to the future abuse of dominance cases.