

NEW COMPETITION LAW IN REPUBLIC OF SERBIA COMES INTO EFFECT AS OF NOVEMBER 1st, 2009

As of November 1st 2009 in the Republic of Serbia will be applied a new Competition Law, published in Official gazette of RS no. 51/2009 (hereinafter referred to as the “Law”) adopted by the National Assembly on July 13, 2009. the Law will replace the currently effective law. Below please find listed the main features of the Law.

a) General provisions and Commission for Protection of Competition

By General provisions are defined subject, territorial and personal application, what is considered related undertakings, relevant market – issues commonly regulated as in comparative practice.

Competences of the Commission for Protection of Competition (hereinafter referred to as “Commission”) were expanded and Commission is entitled to initiate procedures *ex officio*, to carry out analysis of the state of the competition in the section of market (sector analysis), to search premises and temporarily confiscate the documentation and materials, and even to carry out inspections without announcement if necessary.

b) Breaches of competition

Following the provisions of Article 81 of the Treaty on European Union (hereinafter referred to as TEU) the Law has foreseen that as breaches of competition are considered *restrictive agreements* and *abuse of dominant position*.

Restrictive agreements are defined literally as in Article 81 (1) of TEU and the grounds to declare the provisions of Article 81 (1) as inapplicable are the same as those set forth by Article 81 (3) of TEU. In respect of the duration of individual exemption of the restrictive agreements it is set forth to be up to 8 (eight) years. The content of the request for exemption shall be regulated in detail under by-laws which should be adopted subsequently. Deadline for passing the decision on individual exemption is 60 days as of the day of application to the Commission.

The Law introduces the institute of *agreement of minor importance* and sets forth a general exemption for restrictive agreements under the terms which are practically the same as those set forth in Articles 7 and 8 of the EU Commission notice on agreements of minor importance which do not appreciably restrict competition under Article 81 (1) of TEU (Commission Notice 2001/C 368/07). According to the Law, agreements of minor importance are agreements between the market participants whose aggregated market share in the relevant market of products and services in the territory of the Republic of Serbia does not exceed:

- 1) 10% of the market share for horizontal agreements (the ones between the parties being on the same level of the chain of the production and distribution);
- 2) 15% of the market share for vertical agreements (the ones between the parties being on the different level of the chain of the production and distribution);

- 3) 10% of the market share if the agreement is such that it is difficult to determine whether it is horizontal or vertical;
- 4) 30% of the market share if the agreements have similar effects to the market and it is concluded between different participants and if the market share of each of the participants does not exceed 5% of each separate market affected by the agreement.

Under the Law, entering into agreements of minor importance is generally allowed except in cases whereby agreements of minor importance contain provisions for fixing prices or limiting the production or sale.

Definition of *dominant position* as well as the examples of what an *abuse* may consist are practically the same as those set forth in Article 82 of TEU. A substantial difference, however, is in the *presumption* that a market participant has dominant position when its share on the relevant market exceeds 40%, i.e. 50% for “collective dominance”.

c) Concentration of market participants (Merger & Acquisitions control)

The Law lists all statutory or other changes affecting the structure of undertakings which would be considered concentration including M&A, joint ventures etc. On the other hand, it shall not be considered a concentration of undertakings:

- 1) in case when a banking or other financial institution temporarily acquires share or participating interest for further resale provided that it offers them for resale at the latest within one year from the date of acquiring them and provided that during that period the ownership status has not been used in order to influence undertakings business decisions that concern its conduct;
- 2) when the investment funds and companies managing investment funds acquiring participation in a market participant, provided that all rights arising out of that participation are achieved only for maintenance of the value of the investment and that such participation does not influence the competitive actions of the company at the market,
- 3) in case when joint venture is aimed at coordination of market activities between two or more undertakings maintaining their legal autonomy,
- 4) when acquisition of control by bankruptcy administrator.

Notification of the Commission and application of the provisions of the Law is mandatory when the following threshold is exceeded:

- 1) total annual income of all participants of concentration acquired on the foreign market in previous year exceeds EUR 100 million, and where at least one member of concentration has income in Serbia of more than 10 million EUR;
- 2) total annual income of at least two participants of concentration acquired on Serbian market is above EUR 20 million in previous year, where at least two members of concentration have income on a Serbian market of at least EUR 1 million each.

Pursuant to the Law, the Commission is entitled to examine concentration *ex officio* under the terms prescribed by the Law. Participants to the concentration operations shall submit notification to the Commission 15 days upon the first of any of the following actions:

- 1) conclusion of the contract or the agreement,
- 2) announcement of a public invitation, or bid or closing the bid,
- 3) acquisition of control.

d) Measures for protection of competition

As the measures for protection of competition, the Law provides the following measures:

- 1) the market participant shall be fined with up to 10% of its total annual income (calculated in accordance with Law) for the infringement committed, if abuses dominant position on relevant market, concludes or applies agreement which is null and void, fails to act in accordance with the decision of Commission, pursues the activities relating to the implementation of the concentration without authorization for concentration. The Law has foreseen conditions for release of this obligation under special conditions.
- 2) in the event of delay in filing the notification of a concentration, refusal to deliver to Commission data that were requested or disturbance of interim measures, a fine of EUR 500 to EUR 5.000 per each day can be levied, but it shall not exceed 10% of total annual income calculated in accordance with the Law.

Nikola TOMASEVIC

STUDIO LEGALE SUTTI

Tadeusa Koskuska, 8

Belgrade, Serbia, 11000

Telephone: + +381 11 30 31 227

Fax: ++381 11 30 31 229