

BUSINESS AND CORPORATE LAW COMMITTEE

In view of its core mission – to improve corporate and business law and business practices in Serbia, and to promote greater efficiency, transparency, and consistency in the implementation of regulations – AmCham’s Business and Corporate Law Committee has identified the enhancement of judicial efficiency as a key priority. According to the latest research, dating from 2019, 76 percent of all AmCham member companies believe an efficient judiciary and the rule of law are key institutional preconditions for improving the business environment, whilst as many as 80 percent see excessive length of court procedures as a major impediment to doing business. As such, the Committee has placed the greatest emphasis on improvements to the judiciary, whilst other areas of interest include application of the Enforcement and Security Law, Bankruptcy Law, Corporations Law, and Public Procurement Law, as well as amendments to the Competition Law.

OBJECTIVE 1: ENHANCE JUDICIAL EFFICIENCY

...BY DIGITALISING THE JUDICIARY, IMPROVING ORGANISATIONAL ARRANGEMENTS, AND INTRODUCING PERFORMANCE-BASED REWARDS

CHALLENGE: Poor service of process is a major issue in court proceedings. According to some estimates, as many as 30 percent of instances where service of process fails are due to inaccurate addresses, which leads to repeated attempts to serve documents and delays hearings. There is much room for improvement with drafting, processing, sending, and registering legal documents, as well as with monitoring service of process performance.

RECOMMENDATION: Automate service of process and make service of process information available online, whilst allowing accurate reporting and tracking performance of process servers, court clerks, and other court staff. Greater service of process success rates will lead to substantial savings to the national budget, businesses, and members of the public.

CHALLENGE: The *e-Sud* web application, intended to allow online case management, is currently not available to parties in any proceedings other than those before the Administrative Court.

RECOMMENDATION: Allow use of *e-Sud* in all civil and enforcement cases, including for online access to case files. Online case management ought to be promoted more widely, and amendments to procedural legislation should be considered so as to permit online service of process. Broaden the use of *e-Sud* so parties can use it to communicate not only with courts but also with enforcement officers (who exercise devolved public authority in enforcement cases) and allow one-click access to case files.

CHALLENGE: Poorly systematised case law and difficulties with accessing it in electronic format hinder understanding of courts’ legal positions. Even where case law bulletins are published online, they are not searchable by keyword or legal concept, which reduces their usability and adversely affects legal certainty and predictability of the business environment.

RECOMMENDATION: Regular online publication of anonymised higher courts’ judgments (with identifying particulars deleted), with a serviceable keyword search option, would promote not

only efficiency but also consistency of the judiciary, thereby increasing trust in judicial authorities. Artificial intelligence and machine learning should be deployed to enable the use of multiple search criteria, independent of grammatical case or verb tense, which would produce the most relevant results for users.

CHALLENGE: Judges face a heavy burden of administrative work that reduces their efficiency. The lack of judicial assistants, whose importance to the system is not properly recognised, also hinders any improvement to judges' performance. An absence of clear and uniform criteria regarding the status, appointment, and advancement of judicial assistants makes the profession unattractive to prospective entrants and promotes negative selection.

RECOMMENDATION: All courts should employ at least one judicial assistant for each judge. A career advancement system should be put into place that would involve dedicated judicial assistant training programmes.

CHALLENGE: Limited incentives and rewards for over-performing judges.

RECOMMENDATION: Legislate a framework of incentives and rewards for over-performing judges to broaden the range of possible performance scores, introduce additional criteria, and permit more objective evaluation, and introduce arrangements and processes for rewarding top performers. Also consider publishing judicial performance reports to additionally motivate the finest judges.

OBJECTIVE 2: HARMONISE CASE LAW

...BY EMPLOYING MORE EFFICIENT ALIGNMENT MECHANISMS AND SETTING CLEAR RULES FOR MANDATORY APPLICATION OF CASE LAW

CHALLENGE: Existing case law alignment mechanisms are inefficient, and the Court Rules of Procedure are unclear as to when case law must apply. Courts generally keep no general or special registers of legal opinions even though these are envisaged by the Court Rules of Procedure.

RECOMMENDATION: Appropriate statutory and technical preconditions must be created for alignment of case law, including a regularly updated online case law register based on a list of legal rules (descriptors) maintained by the Supreme Court of Cassation. Presidents of higher courts should play a greater role in overseeing hierarchically subordinate courts, and the Court Rules of Procedure should be amended to clarify how case law should be aligned at the level of each individual court.

OBJECTIVE 3: ENSURE GREATER SPECIALISATION AND BETTER TRAINING OF JUDGES

...BY EITHER INTRODUCING SPECIALISED COURTS (SUCH AS TAX TRIBUNALS) OR DEDICATED GROUPS OF JUDGES ('PANELS') AT EACH COURT, AND OFFERING TRAINING IN AREAS OF GREATEST NEED

CHALLENGE: Most Serbian courts are not specialised. The Administrative Court has jurisdiction to hear more than 80 types of administrative disputes, where cases vary widely in terms of difficulty and

complexity, and adjudicating some disputes requires specialised knowledge in a broad range of disciplines, including tax law, competition law, public procurement, restitution and indemnification, and the like.

RECOMMENDATION: Consider introducing functional specialisation in courts where this is possible. Such specialisation would not mean that the new units will exclusively handle a particular issue: rather, specialised teams would be created for particular types of cases but would also hear a certain percentage of other cases as well. Such specialised teams of judges should be offered regular training by the Judicial Academy for topics they specialise in.

CHALLENGE: Judges lack training in the application of procedural laws, effective case management, and drafting explanatory statements to judgments, which hinders efficient case management and means judgments are insufficiently informative.

RECOMMENDATION: Special attention ought to be accorded to training for judges. According to the High Judicial Council, there is nothing preventing judges from being trained by experts and practitioners in highly specific areas, regardless of whether these are consultants, academics, or civil servants (in other words, regardless of whether they could conceivably appear in court as parties to a dispute), since such training would serve to convey practical knowledge and experience rather than influence the course of any particular court case. Additional training should also be offered to panels specialising in tax issues, competition, and other topics that require specialist knowledge.

OBJECTIVE 4: ENHANCE APPLICATION OF THE CIVIL PROCEDURE LAW TO PROMOTE PROCEDURAL EFFICIENCY

...BY STREAMLINING EVIDENTIARY HEARINGS, ALLOWING COURTS AND PARTIES TO COMMUNICATE ONLINE, AND PROMOTING COMMUNICATION BETWEEN PARTIES

CHALLENGE: Submissions made by parties often lack clear factual allegations or fail to link these with any evidence proposed, even though such aspects are crucial for efficient management of cases and appropriate adjudication. As such, courts often require presentation of evidence regardless of the position they may have taken on the merits of a claim, which unduly extends cases and increases their costs.

RECOMMENDATION: Identification of disputed facts at a preparatory hearing is crucial for deciding which evidence to present so as to ascertain these facts. It would be desirable to separate the stage in which the merits of a claim are evaluated from that where the amount of the claim is assessed, including by rendering an interim judgment, where statutory conditions for doing so are met.

CHALLENGE: Online service of process remains unavailable, even though it is allowed under Article 129 of the Civil Procedure Law.

RECOMMENDATION: The *e-Sud* web application would doubtlessly expedite civil cases by facilitating service of process and allowing use of a whole range of additional benefits, such as online access to case files and hearing calendars, text message reminders, and the like. Consider introducing incentives for using *e-Sud*, such as prioritising cases in which courts and parties communicate online, and other means of promoting online service of process.

CHALLENGE: Article 130 of the Civil Procedure Law allows parties to exchange submissions and other documents directly with one another. In practice, even though one party may have received a document directly from the other, the courts are petitioned to require that party to respond formally, and commonly accede to such requests.

RECOMMENDATION: Existing rules that permit requiring one party to indemnify the other for any costs caused through its fault should be applied more stringently in these cases to ensure procedural discipline. Presenting evidence by submitting written testimony is another under-utilised option in civil cases that could shorten cases and make them more efficient.

OBJECTIVE 5: MONITOR IMPLEMENTATION OF THE ENFORCEMENT AND SECURITY LAW

CHALLENGE: Amendments to the Enforcement and Security Law have introduced major changes designed to make enforcement more efficient and address issues identified in practice. The most important of these changes have moved case management online by introducing online auctions for movable and immovable property, online notice boards, e-filing of motions to enforce, and online service of process.

RECOMMENDATION: In the immediate future, emphasis will be placed on the full implementation of provisions that govern online auctions and expedited procedure in commercial cases. The Ministry of Justice is collecting relevant information it will discuss with AmCham, whose representative serves on the working party tasked with monitoring implementation of the amended legal framework.

OBJECTIVE: 6 ENHANCE THE LEGAL FRAMEWORK FOR COMPETITION

...BY ADOPTING A NEW COMPETITION LAW THAT IS ALIGNED WITH EU LAW AND PRACTICE AND ADDRESSES ISSUES IDENTIFIED OVER THE TEN YEARS THAT THE CURRENT LAW HAS BEEN IN FORCE

CHALLENGE: The current law envisages exempting restrictive agreements from prohibition on a case-by-case basis, an approach abandoned in the EU in 2004. Under Serbian legislation, agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition in the territory of Serbia ('restrictive agreements') are prohibited except where exempt, either as whole categories or individually. The exemption process is lengthy, and companies awaiting approval must suspend implementation of the agreements in question; in addition, the approvals are usually limited to just a couple of years.

RECOMMENDATION: Remove both the requirement for companies to notify restrictive agreements and the Competition Commission's power to penalise parties for failing to notify a restrictive agreement that qualifies for exemption. The current arrangement has caused much confusion; moreover, many restrictive agreements are actually conducive to competition and qualify for exemption but are not notified due to the ambiguous rules and the evolving state of competition law in Serbia, where no clear views exist on a number of issues.

CHALLENGE: Concentrations that meet the requirements of Article 61(1) of the current law must be notified to the Competition Commission for approval; those concentrations may proceed only after such approval has been granted. In addition to mandating notification of concentrations that meet the financial

requirements, Article 63(3) of the law also obliges any company acquiring control over another firm by means of a takeover bid (within the meaning of legislation governing takeovers of joint-stock companies) to notify that transaction, even in cases where the financial thresholds of Article 61(1) are not met.

RECOMMENDATION: Raise the notification threshold to 200 million euros of annual global revenue in the preceding year, whilst also requiring at least two companies involved to have total revenue in Serbia exceeding 15 million euros. In addition, remove the notification requirement for concentrations by means of takeover bids if the relevant financial thresholds are not met.

CHALLENGE: The current law does not envisage settlements as option in competition infringement cases. This feature is available in the EU and would save time for the Competition Commission and companies and contribute to procedural efficiency.

RECOMMENDATION: Amend legislation to allow settlements and stipulate that, where the companies involved admit responsibility for infringing competition law, the Competition Commission may immediately make a decision and the fine is reduced by 20 percent of the intended amount.

CHALLENGE: The current law does not regulate any ancillary restraints (additional restrictions) on parties to a concentration (these are restrictions contained in a concentration agreement necessary for the completion of the concentration and directly related to it). This compels the parties to seek individual exemptions, which significantly extends the decision-making procedure and means the transaction cannot be completed until these individual exemptions are made, even though a general decision approving the concentration has been issued. This state of affairs has an adverse effect on the speed and costs of the transaction.

RECOMMENDATION: Stipulate that a party can seek a decision on ancillary restraints when notifying the concentration, which would allow the Competition Commission to rule on these restrictions as part of its primary decision on the concentration.