

REFORMS FOR ECONOMIC GROWTH AND BUSINESS RESILIENCE 2024

BUSINESS & CORPORATE LAW COMMITTEE



AMCHAM SERBIA
A LEADER IN CHANGE

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, in 2023, 59 percent of all AmCham member companies believed an efficient judiciary and the rule of law were key institutional preconditions for improving the business environment, whilst as many as 84 percent saw excessive length of court procedures as a major impediment to doing business. Most European countries are well on their way to digitalising their judiciaries: 18 of the 27 EU member states have digitalised case opening procedures, 19 have online arrangements for court filings, 16 allow online service of process (particularly for judgments) to parties, and 14 have digitalised opening actions in contract enforcement cases. 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, Company Law, and Public Procurement Law, as well as amendments to the Competition Protection Law.

OBJECTIVE 1: ENHANCE JUDICIAL EFFICIENCY

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

CHALLENGE: The *e-Sud* (‘e-Court’) 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: Amend the Civil Procedure Law and the Court Rules of Procedure to allow the use of e-Sud in all civil, enforcement, and bankruptcy 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 to permit online service of process and enable parties to represent themselves or be represented, if they so choose, remotely without having to physically attend a court hearing. 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: 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, monitoring service of process performance, and allowing parties to attend hearings or be represented online (when not physically present in courthouses).

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. Incentivise courts to use options already offered by the Civil Procedure Law by: (i) producing electronic service of process instructions; (ii) ensuring technical requirements are in place for electronic service of process; and (iii) building human capacity (through training of court clerks). Greater service of process success rates will lead to substantial savings to the national budget, businesses, and members of the public.

Moreover, allowing parties to opt for online attendance at hearings will additionally facilitate their involvement and streamline court operations by allowing parties to be present at multiple hearings across the country in a single day (where, for instance, hearings take place in courthouses in Novi Sad, Niš, Subotica, and Kragujevac), which will result in savings of money and time and promote efficiency, economy, and greater access to justice.

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 updating of the online Case Law Database, online publication of comprehensive 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 and other court staff 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. Judicial assistants should have their remit broadened so they are able to take some procedural actions associated with case management, under the supervision of judges. The performance assessment system for judicial assistants ought to focus more on quality than on quantity (as measured by the number of rulings drafted).

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 devoted 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 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, FOSTERING COMMUNICATION BETWEEN PARTIES, ENHANCING SECOND-INSTANCE PROCEDURE RULES, AND ADDITIONALLY PROMOTING PROCEEDINGS BEFORE COMMERCIAL COURTS

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. Civil cases heard by commercial courts ought to be made more expeditious, including by facilitating assessment of evidence, mandating electronic service of process and exchange of documents between parties and the court, and shortening procedures once a judgment has been overturned. Additionally, rules of second-instance procedure should also be enhanced for greater efficiency of these cases.

RECOMMENDATION: Identification of disputed facts at a preparatory hearing is crucial for deciding which evidence to present 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. Proceedings before commercial courts must be enhanced by requiring courts to hold hearings no more than 30 days apart and ensuring that the first-instance court rules on a complaint within no more than nine months if the judgment had previously been overturned. In addition, the rule that a judgment can be overturned only once should be extended to also apply to the Supreme Court of Cassation. Second-instance appeal provisions should be clarified to require a second-instance court to indicate why it has chosen to overturn a first-instance judgment and provide an exhaustive list of actions the first-instance court must take in a retrial, whilst the first-instance court should be required to take all procedural actions and review any and all issues identified by the second-instance court and provide an exhaustive list of the deficiencies it has corrected, facts it has found, and evidence that has been presented as ordered by the second-instance court.

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 the requirement for companies to seek exemption of restrictive agreements but allow firms looking for more legal predictability to exercise this option and obtain exemption rulings. All other businesses that do not wish to formally seek such exemptions would have access to a self-assessment procedure.

CHALLENGE: (1) 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. (2) 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. (3) As it currently stands, the law requires concentrations to be notified to the Commission within 15 calendar days after a concentration agreement is signed. Practice has revealed this period to be excessively short to allow for data collection, preparation of a complete and detailed notice, translation of the documents, and actual notification.

RECOMMENDATION: (1) 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. For the avoidance of doubt, the alternative requirement of Article 61(1)2) of the Competition Law should be retained (either as it currently stands or with an appropriate increase in the thresholds described in this recommendation. (2) In addition, remove the notification requirement for concentrations by means of takeover bids if the relevant financial thresholds are not met. (3) Completely remove

the 15-day period (this would be the preferred solution, as no concentration can proceed anyway without the Commission's approval) or extend it (to, say, 30 days).

CHALLENGE: The current law does not envisage settlements as option in competition infringement cases. This feature is available in the EU (where it is reserved for cartel cases, the most serious breaches of competition law) 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.

On the other hand, it would be advantageous to retain the option available under Article 58(1) and (2) of the current law whereby the Commission is able to suspend an investigation into a breach of competition law if one of the parties undertakes to voluntarily perform a set of actions to remedy the breach of competition law, as described in the decision to open the investigation and determined in the course of the investigation, and suggests the relevant requirements and timeframe. This option is applicable to both cartel cases (horizontal restrictive agreements) and all other investigations into breaches of competition law.

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.

CHALLENGE: Case law of the Competition Commission is currently poorly available online, which hinders the ability to understand the Commission's opinions, in particular regarding restrictive agreements.

RECOMMENDATION: Publishing all the Commission's rulings online after anonymisation (where any sensitive information would be redacted) and allowing keyword searches would promote efficiency and legal certainty for businesses and help align practice.

CHALLENGE: Article 53(1) of the Competition Protection Law allows the Competition Commission to 'perform an unannounced inspection (...) if there are grounds to believe evidence in the possession of a party or a third person may be removed or tampered with'. However, the Commission's rulings instituting these inspections contain no explanation as to why the Commission believes 'evidence in the possession of a party or a third person may be removed or tampered with'. In fact, the Commission seems to show no regard whatsoever for this requirement.

RECOMMENDATION: The new law ought to strictly require the Commission to explain why seeks to perform an unannounced inspection. A statutory instrument should also be enacted,

to include guidelines for the Competition Commission or an official opinion, to clarify when the Competition Commission may perform an unannounced inspection.

CHALLENGE: In the course of an inspection as part of its investigation into breaches of competition, the Competition Commission will generally download a complete record ('forensic copy') of e-mail correspondence for the relevant staff of the inspected company. After the inspection, the Commission will review this forensic copy without inviting or notifying the parties to the proceedings. Such forensic copies can often comprise hundreds of thousands, or even millions, of e-mails, with some possibly relevant for the investigation but others completely unrelated to those issues, including correspondence that may contain commercial secrets, personal data, and privileged communication (between staff and legal counsel). This treatment of information is at odds with the basic tenets of the General Administrative Procedure Law and does not guarantee the Commission will safeguard the parties' procedural rights.

RECOMMENDATION: Explicitly legislate the procedure of examining forensic copies and stipulate that parties to the proceedings are entitled to attend the examination.