# COMPETITION CHECKLISTS

## Competition Checklist - Dominant position and abuse

**STEP ONE – Does the company have a dominant position?**

A dominant position is held by a market participant who, due to its market power, can operate on the relevant market to a significant extent independently of actual or potential competitors, customers, suppliers or consumers.

A dominant position can exist regardless of whether the company is classified as a small, medium or large enterprise, regardless of the number of employees and depends on the specific market in which the company operates, which is why it is necessary to carefully assess whether the company can, for some parts of its business, to be considered a dominant participant in the market.

Companies that operate in several relevant markets may be in a dominant position in some markets, while in other markets they are not in such a position. For these and other reasons, it is necessary to correctly determine the relevant market on which the position of the company and its market power (strength) are assessed. For this purpose, it is necessary to apply the Law on Protection of Competition[[1]](#footnote-1) and the Regulation on Criteria for Determining the Relevant Market.[[2]](#footnote-2)

The wording: "to a significant extent independently..." should be interpreted as a situation in which some market participant, starting from his market power, makes business decisions regarding market performance and commercial conditions under which he operates, especially decisions regarding prices, volumes production and marketing of their products, without fearing the outcome and consequences of their decisions that could occur due to competitive pressure and market response from competitors, suppliers, customers or consumers.

Market shares, volume of turnover and revenues from operations on the relevant market are not the only parameters on the basis of which it is estimated whether a company is in a dominant position. A market share of 40 percent or more in the relevant market does not create a legal assumption of a dominant position, but it is a significant indicator that points to the need to carefully determine whether a specific company has or does not have such a position on the market by analyzing and evaluating other parameters.

The importance and necessity of assessing the existence of a dominant position of a company is significant when it is taken into account that companies in a dominant position have a special responsibility, when it comes to competition protection, for their business decisions and business policies that they implement in the market/markets where they operate.

In the analysis and assessment, it is necessary to pay increased attention to other markets in which the company operates, but in which it is not in a dominant position, because there is always the possibility that the effects of dominance from one market "spill over" to other markets and that they manifest the negative effects of abuse of dominance.

For all the above reasons you need to check whether the company has such market power/market position that it can be considered a company in a dominant position.

Answers to the following questions can help in such an analysis and assessment:

|  | YES | NO |
| --- | --- | --- |
| Is the structure of the relevant market such that the company is the only one on the market or significantly larger than its competitors? |  |  |
| Does the company have greater economic and financial strength than competitors? |  |  |
| Is the company the largest company in the particular market? |  |  |
| Is the company a market leader? |  |  |
| Can it be said that the company has more than 40% market share? |  |  |
| Is the company, unlike its competitors, vertically integrated (it has its own resources for production and further distribution - its own sales network), so that it competes with its customers on the downstream market? |  |  |
| Are there significant (legal, economic or other objective and realistic) obstacles for another participant to enter the same market? |  |  |
| Does the company have significant advantages in accessing supply and distribution markets compared to competitors? |  |  |
| Does the company have significant technological advantages (in terms of production technologies, R&D, innovation, etc.) compared to competitors? |  |  |
| Does the company have intellectual property rights that are significant in the market in which it operates? |  |  |
| Are the buyers or suppliers predominantly medium or small companies that operate on the market completely independently (mutually unconnected in some form of association of buyers or suppliers)? |  |  |

If the answer to one or more questions is YES, and especially to one of the first five questions, there is a possibility that the company has a dominant position, and in that case it is desirable to make a risk exposure assessment in terms of the risk of abuse of a dominant position.

If the company operates in several markets, these questions need to be examined for each market and each level at which the company operates (for example: manufacturing, wholesale, distribution, retail, after-sales service and spare parts).

If the conditions in the first step are met, that is, if the company is likely to have a dominant position, the next step should be taken.

If it is assessed that the company does not have a dominant position, until the eventual change of circumstances, 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.

**STEP TWO – Is there behaviour that could constitute abuse?**

Abuse of a dominant position on the market is prohibited. There is no unequivocal and definitive list of behaviours that can represent abuse, but abuse can be considered the behavior of a dominant market participant who competes on the market with methods different from those that represent normal competition. Abuse of a dominant position is an objective concept that refers to the behaviour of a dominant participant in the market, which affects the structure of the market in which, due to the presence of such a participant, the degree of competition is weakened and whose behaviour hinders the maintenance of the level of competition that still exists or the growth of that competition.

Check whether the conduct of a company that has or may have a dominant position can be considered abusive, through the following questions:

|  | YES | NO |
| --- | --- | --- |
| Does the company directly or indirectly impose unfair buying or selling prices? |  |  |
| Does the company directly or indirectly impose other unfair business conditions? |  |  |
| Does the company conclude exclusive contracts with customers or suppliers? |  |  |
| Does the company achieve long-term customer loyalty or retention in other ways (eg, high loyalty rebates)? |  |  |
| Does the company undertake business strategies aimed at excluding competitors from the market? |  |  |
| Does the company limit production, market or technical development in any way by its business decisions? |  |  |
| Does the company apply unequal business conditions to the same transactions with different market participants? As a consequence of this, are certain market participants put at a disadvantage compared to their competitors? |  |  |
| Does the company condition the conclusion of agreements by imposing on the other party additional obligations that by their nature or according to commercial customs unrelated to the subject of the contract? |  |  |
| Does the company refuse, without objective justification, to do business with a business partner regarding a product or service that is objectively necessary for market participants to compete effectively in a downstream market? |  |  |
| Does the company charge excessive prices (prices that are not based costs)? |  |  |
| Does the company apply predatory pricing (below the level of unit or marginal cost, knowingly making a loss), in order to squeeze out of the market competitors who are unable to operate at such a low price? |  |  |

If the answer to one or more questions is YES, there is a possibility that the company is exposed to the risk of abuse of a dominant position. In that case, for each of the business policies that represent a risk, it is necessary to assess whether there is an objective reason that could justify the actions of the dominant company.

## Competition Checklist - Restrictive agreements

Restrictive agreements are agreements between market participants (undertakings) that have as their object or effect significant prevention, restriction or distortion of competition in the territory of the Republic of Serbia. They can be contracts, individual contractual provisions, express or tacit agreements, concerted practices, as well as decisions of associations of undertakings.

Any company can enter into restrictive agreements, so antitrust provisions should be included in any compliance program. Same or different types of behavior may be more or less risky in different commercial relationships, so it is necessary to identify and distinguish risks that occur in relations with competitors and risks that occur in relations with customers or suppliers.

**PART ONE - Horizontal relations - relations with competitors**

A horizontal agreement is an agreement between competitors, that is, participants who are at the same level of the production or distribution chain. Competitors include actual competitors (a market participant who currently operates in the same relevant market) and potential competitors (a market participant who could in a short period of time bear the necessary additional investments or other necessary costs to enter the relevant market due to a small but more permanent increase the price).

Check whether the company is exposed to **risk in relation to competitors,** through the following questions:

Does the company (or any employee of the company) with competitors (or any employee of a competitor):

|  | YES | NO |
| --- | --- | --- |
| fix prices? |  |  |
| talk about price ranges, fixed prices, minimum or maximum prices? |  |  |
| exchange price lists that have not yet entered into force? |  |  |
| talk about recommended prices? |  |  |
| discuss pricing parameters or pricing policy? |  |  |
| discuss increasing or decreasing margins or rebates? |  |  |
| discusses price increases or decreases? |  |  |
| announce planned price increases or decreases at meetings or gatherings with competitors? |  |  |
| discuss and/or agree a change in the volume of production or sales? |  |  |
| agree not to produce or sell more than the agreed quantity? |  |  |
| agree to reduce the production of some/all products or the provision of services? |  |  |
| arrange activities aimed at certain competitors leaving the market? |  |  |
| negotiate the necessary consent or approval from competitors to expand/reduce the scale of production? |  |  |
| coordinate the scope of sales, territory in which, or customers/groups of customers to whom, goods or services will be sold? |  |  |
| agree on industry standards? |  |  |
| agree on forfeiting a part of the market to competitors? |  |  |
| agree on participation in public procurement procedures? |  |  |
| coordinate future outcomes of the public procurement procedure? |  |  |
| agree on mutual non-competition in certain territories or with regard to certain customers or categories of customers? |  |  |
| agree to boycott a customer or supplier together? |  |  |
| exchange business sensitive information (strategic business information)? |  |  |
| communicate about prices, especially future prices? |  |  |
| communicate intended business strategies? |  |  |

If the answer to one or more questions is YES, there is a possibility that the company is exposed to the risk of colluding with competitors. Agreements between competitors pose the most serious risks of infringement of competition and generally fall under the most serious infringements of competition.

If the risks described above have been identified, you can find out about the conditions for exemption from the payment of measures for infringement of competition (Leniency program): https://www.kzk.gov.rs/en/leniency-program

**PART TWO - Vertical relationships – relationships with suppliers or customers**

Vertical agreements are agreements between undertakings who are not mutual competitors, that is, concluded by market participants who, for the purposes of the agreement, operate at different levels of the production or distribution chain. These agreements refer to the terms under which companies can buy, sell or resell certain goods and/or services.

Check whether the company is exposed to risk in terms of relationships **with suppliers or customers,** through the following questions:

|  | YES | NO |
| --- | --- | --- |
| Does the company directly or indirectly limit the rights of the buyer/distributor to freely determine the price of the product in resale? |  |  |
| Are the sales incentives used by the company aimed at maintaining a certain price level? |  |  |
| Do buyers/distributors suffer negative consequences if they do not adhere to prices or receive benefits if they maintain recommended prices in further sales? |  |  |
| Does the company in its relationship with its suppliers have a direct or indirect limitation of the right to freely determine the price of the product in resale? |  |  |
| Does the company have negative consequences from its suppliers if it does not adhere to the prices or does it get benefits if it maintains the recommended prices in further sales? |  |  |
| Does the company limit the territory in which the buyer/distributor can sell the products that are the subject of the agreement? |  |  |
| Does the company in its relationship with its suppliers have a territory limitation in which it can sell the products that are the subject of the agreement? |  |  |
| Does the company restrict the buyer/distributor to sell the contract products only to a certain group of end customers? |  |  |
| Does the company have a restriction in its relationship with suppliers that it can only sell contractual products to a certain group of end customers? |  |  |
| Does the company have an established selective distribution system (distribution system in which the seller undertakes to sell contractual products or services, directly or indirectly, solely to distributors selected on the basis of special criteria, and the distributor undertakes not to wholesale those goods or provide services to distributors outside established distribution system)? |  |  |
| Does a company operating under a selective distribution system restrict members operating in the retail market from actively or passively selling the contract product to end users? |  |  |
| Does a company operating within a selective distribution system restrict members from mutual supply between members of a selective distribution system, including supply to members who do not operate at the same level of sales? |  |  |
| Does the company restrict a parts seller who sells those parts to the company to build a new product from selling those parts as replacement parts to end users or repairers or other service providers not authorized by the company to repair or service its products? |  |  |
| Does the company operate as an exclusive distributor or seller? |  |  |
| Does the company have an exclusive distributor or seller? |  |  |
| Does the company have a non-compete agreement with a supplier or customer for a period longer than five years? |  |  |

Typical restrictions in vertical agreements are listed in the Regulation on agreements between market participants operating at different levels of production or distribution that are exempt from the ban ("Official Gazette of RS", No. 11/2010), which refers to vertical agreements.

In the event that the answer to one or more questions is YES, it should be checked whether the conditions stipulated by the said regulation for the block exemption of agreements from the prohibition are met, and if they are not, the possibilities of individual exemption of the agreement from the prohibition should be considered.

1. See Art. 6 of the Law on Protection of Competition [↑](#footnote-ref-1)
2. (“Official Gazette of the RS”, No. 89/2009) [↑](#footnote-ref-2)