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IMPROVEMENTS OF THE COMPETITION PROTECTION POLICY IN SERBIA: SET OF RECOMMENDATIONS BASED ON EXPERIENCE OF SELECTED COUNTRIES

Unapređenje politike zaštite konkurencije u Srbiji:
set preporuka na bazi iskustva odabranih zemalja

Abstract

The aim of this paper is to offer recommendations for improving the system of competition protection in the Republic of Serbia, which are possible to implement in a relatively short time period. The implementation basis for these recommendations already exists, so they are to be considered as the means to "subtly" adjust the competition policy already present in Serbia for six years. The recommendations are given based on the comparative analysis of the competition protection systems of the EU, USA, as well as some EU member countries which have a longer tradition in dealing with competition protection policy compared to Serbia. The institutional core of the competition protection system is the Commission for competition protection, authorized to carry out the Law on competition protection and the Administrative court which carries out judicial control of the Commission's decisions. The paper primarily deals with the questions of better efficiency and effectiveness in the functioning of the mentioned core, but also with the core connection with other system elements. Seven recommendations given in the paper include the issues of Commission independence empowerment, strengthening the professional Commission structure by increasing human resources and reducing the number of processed subjects during the year. Besides these recommendations, there are those indicating the need to strengthen the professional capacities of the Administrative court, since it turns out that the judicial lack of understanding of the economic essence of the Competition law can become a problem point in implementing the right decisions of the Commission. The recommendations also indicate the necessity of the Commission to communicate and cooperate more intensively with other governmental and non-governmental bodies with significant influence on the competition conditions of the domestic market. Finally, the last recommendation concerns the importance of information and education of wider audience about the importance of competition protection.

Key words: *competition protection policy in Serbia, competition protection commission, administrative court, comparative multiple-country analysis, improvement recommendations*

Sažetak

Cilj ovog rada je da pruži preporuke za unapređenje sistema zaštite konkurencije Republike Srbije koje je moguće implementirati u relativno kratkom vremenskom periodu. Osnova za implementaciju ovih preporuka već postoji, tako da ih treba shvatiti kao način da se izvrši „fino“ podešavanje politike konkurencije koja je već šest godina prisutna u Srbiji. Preporuke su date na osnovu uporedne analize sistema zaštite konkurencije Evropske unije (EU), Sjedinjenih Američkih Država (SAD), ali i sistema zaštite konkurencije pojedinačnih zemalja članica EU sa dužom tradicijom u bavljenju politikom konkurencije u odnosu na Srbiju. Jezgro sistema zaštite konkurencije u institucionalnom smislu čine Komisija za zaštitu konkurencije, nadležna da sprovodi Zakon o zaštiti konkurencije i Upravni sud koji vrši sudsku kontrolu rešenja Komisije. U radu se primarno bavimo pitanjima bolje efikasnosti i efektivnosti u funkcionisanju pomenutog jezgra, ali i veze jezgra sa ostalim elementima sistema. Sedam preporuka u radu obuhvataju i bave se pitanjem jačanja nezavisnosti Komisije, te jačanjem stručne i kadrovske strukture Komisije povećanjem ljudskih resursa i redukovanjem broja predmeta koje Komisija procesira tokom godine. Pored ojačavanja stručnih kapaciteta i nezavisnosti Komisije, preporukama će biti obuhvaćeno i jačanje stručnih kapaciteta Upravnog suda, jer se ispostavlja da sudijsko nerazumevanje ekonomske sadržine prava konkurencije može postati kamen spoticanja ispravnih rešenja Komisije. Preporukama će se ukazati i na potrebu za intenzivnijom komunikacijom i saradnjom Komisije sa drugim državnim i nedržavnim telima čije delovanje ima značajan uticaj na uslove konkurencije na domaćim tržištima. Konačno, u poslednjoj preporuci ukazaćemo na važnost informisanja i edukacije široke javnosti o značaju zaštite konkurencije.

Cljučne reči: *politika zaštite konkurencije u Srbiji, komisija za zaštitu konkurencije, upravni sud, uporedna analiza više zemalja, preporuke za unapređenje*

Introduction

Competition is not a goal in itself, but it is more an irreplaceable element of the partial markets functioning. It enables efficient usage of limited social resources, technological development and innovation, lower prices, better quality, product variety and generally larger productivity of an economy as a whole [5, p. 2]. The result of competition is the improvement of consumer surplus on different markets, enabling them a higher life standard. Seen from a broader perspective, stimulation and protection of competitive pressure on the markets enable strong and sustainable economic growth, thus improving the national competitiveness and creation of new work places. In the context of EU integration, in April 2008 Serbia signed the Stabilisation and Association Agreement (SAA) with the EU, which is currently in the ratification phase. When this Agreement comes to power, Serbia becomes obliged to effectuate obligations imposed by the Agreement. Among other obligations, the Agreement gives instructions for the development of the competition protection policy in Serbia. This firstly refers to articles 81, 82, 86 and 87 of the Constitutional agreement of the EU¹ and instruments of their interpretation, adopted by the EU institutions.

Generally, four areas of competition protection policy are considered basic and on a supranational EU level are coordinated by the EU commission. These areas must also be covered within the boundaries of individual country-members, relaying on the set of guidelines given by the EU commission. These four areas are: *(i)* stopping cartel behavior (restrictive agreements), *(ii)* stopping the abuse of dominant market position, *(iii)* control of mergers, acquisitions and company joint ventures, *(iv)* control of indirect and direct state aid to companies. The aim of this paper is to offer recommendations for possible improvements in the domain of competition protection policy in Serbia as well as to explain their influence, based on the analysis of present state of functioning of this policy both in our country and other selected referent countries. The paper offers a limited set of essential recommendations,

with possible effects that can be expected in a short time period (3 to 4 years). The implementation of these recommendations has been facilitated by the already established foundations, thus not demanding significant capital expenditures.

The competition policy framework is set by the laws in this area and the institutional bodies in charge of implementing these laws. The Law on competition protection has been in power in Serbia since 2009 (in further text LCP), as well as a certain number of bylaws, additionally defining certain guidelines of the Law. The Law assumes the existence of an expert commission in charge of its implementation. The Law also defines its organizational structure and its jurisdiction (in further text the Commission). Also, the Law assumes that the Administrative court solves the disputes based on company charges against the solutions introduced by the Commission. The Supreme court of cassation is in charge of the claims against the verdicts proclaimed by the Administrative court. The paper analyzes legal aspects of these issues, but also the practical ones, referring to the possibility of laws being efficiently and effectively implemented in the domestic market milieu.

Thereby, we have to bear in mind that the Commission, as an independent body for carrying out the Law, and official courts can not be considered the only responsible side when dealing with competition conditions on the domestic markets. The system of competition promotion and protection, in a broader sense, is comprised of the ministry in charge of trade, independent regulatory bodies for the control of public procurement and state aid, sector regulators but also NGOs working with the goal to protect the customer interest, and finally the broader public (microeconomic entities: companies and customers). Of course, the quality work of the independent Commission can be considered the essential link in the protection of competitive pressure on partial markets and public promotion of competition significance for the consumer welfare. In that sense, the Commission and the Administrative court are considered the system core. In other words, these two independent bodies comprise the system in a narrow sense and for that reason this analysis

¹ After the Lisbon contract revision, articles 81, 82, 86 and 87 have been renumbered into 101, 102, 106 and 107, respectively. Thereby, their contents did not change.

shall first focus precisely on that core, respecting the connections of the core with other elements.

By making a comparative analysis of the best global systems of competition protection (USA and EU on a supranational level), but also the systems of those countries which, as well as Serbia, have been dealing with this issue for a relatively short time, but have made more progress (Croatia, Hungary, Czech Republic, Bulgaria, Romania and Slovenia), we shall point out the main system shortcomings and give suggestions for their elimination. Table 1 gives a summary of the basic characteristics of these countries, needed to scan the conditions in which the competition protection policy is carried out. By basic characteristics we mean the time of Commission establishment, i.e. the time of regulation introduction to this area and the size of the inner market which is the subject of regulation and the country (non)participation in the EU integral market. Also, we state the value of the Anti-monopoly policy efficiency index, by which the selected countries are listed by the World Economic Forum (in further text WEF). This index is a useful indicator of the extent of development of competition protection mechanism. The number of inhabitants and GDP per capita are included as an additional illustration of the market size.

All recommendations shall be divided into two segments. Within the first segment we give recommendations for which the implementation assumes changes in legal solutions, while the other segment is devoted to solutions which do not demand the change of existing regulations and are in the exclusive jurisdiction of institutional entities: the Commission, the Administrative court and the Government.

Recommendations which assume the change of existing legal solutions

Modern history of the competition protection policy in Serbia began in 2005 with the introduction of the Law on competition protection (LCP) [16], which for the first time introduced the formation of the competition protection Commission as an independent and competent body authorized for the Law implementation.² The Law on competition protection from 2005 has been changed by the updated version in 2009 [19]. This version of the Law made significant progress in the introduction of European standards in the field of competition protection. However, there is still room for improvements and they are needed to be realized in the time to come. Besides LCP, as the basic regulation on competition protection, there are also a few bylaws foreseen by the Law, additionally explaining particular relevant articles. We are talking about the regulations imposed by the Government.

According to the Law on competition protection, the Commission deals with three out of four key areas within the competition protection policy and they are: (i) stopping restrictive agreements, (ii) stopping the abuse of dominant market position and (iii) control of market concentration. Thereby, the control of state aid, as one of the four basic pillars of competition protection is not in the jurisdiction of the competition protection Commission, but another regulatory body, the Commission for the control of state aid.

In the first part of the paper we shall give recommendations for the improvements of the existing regulations, which should increase efficiency and effectiveness of the

² The Commission started with its activities in 2006

Table 1: Basic country and market characteristics

Country	Year of Commission establishment	No. of inhabitants (last census)*	GDP per capita PPP (in USD)**	Size of domestic market (index, 1-7)***	Size of domestic market (position among 144 countries)***	Effectiveness of anti-monopoly policy (index 1-7)***	Effectiveness of anti-monopoly policy (position among 144 countries)***	EU membership
Serbia	2006	7,120,666	10,528	3.5	67	2.8	142	No
Croatia	1995	4,290,612	14,457	3.4	72	3.8	90	No
Hungary	1991	9,942,000	19,591	3.9	55	3.8	83	Yes
Czech Rep.	1991	10,512,208	18,337	4.2	45	4.3	48	Yes
Bulgaria	1992	7,364,570	7,308	3.6	66	3.5	108	Yes
Romania	1997	19,043,767	12,838	4.3	44	3.4	120	Yes
Slovenia	1997	2,060,382	28,648	3.1	82	4.1	64	Yes

Source: *data from the last official country census, **IMF (<http://www.imf.org>), ***WEF (2012).

Commission in carrying out the LCP, firstly referring to the strengthening of the institutional capacities and Commission independence.

Most recommendations given in this paper are also present in the expert analysis of UNCTAD for 2011, carried out within the project *Peer Review*, with the aim to help Serbian efforts to increase efficiency and effectiveness in carrying out the competition protection policy [see 13]. The form of stating and explaining the recommendations in this paper follows the system “theory then proof”, and has been adopted from the mentioned expert analysis, since we consider it to be both effective and concise manner of formulating a document which has the goal to help understand the needed changes of one policy. The crucial difference compared to the UNCTAD study is more in the “proof” than in “theory”. This is so, since the comparative analysis of chosen countries confirms the assumed attitudes, making a basis for precise calibration during implementation. This analysis also formulates much less recommendations compared to UNCTAD paper, since we consider some recommendations not to be the relevant core of the problem solution in short or mid-term period.

Recommendation 1: Commission financial independence

Since the Commission financial independence is crucial for its functional independence in adequate carrying out of the LCP, it is necessary to enable the Commission stable, foreseeable and sufficient sources of financing. The current law determines that (article 31) the Commission financing should be mostly from own income, generated from fees paid by companies which are the subject of Commission inquiries. The fee amount is determined in the Tariff book [11], set by the Commission, with the approval of the Government. Thereby, we should state that the fees paid by the companies determined to have broken the rules set by the Commission are added to the budget of the Republic of Serbia.

In case of income surplus during the accounting year, the Commission is obliged to transfer the surplus funds onto the account of the budget, which *de facto* enables

it to form reserves [19, article 32]. On the other hand, in case of a deficit, there is a possibility to balance incomes and expenditures from the budget, if the Government approves of such a decision [19, article 32]. Although there is a possibility of covering the deficit from the state budget, this option does not oblige the Government to really do so, which puts the Commission in an unfavorable position. Income collected on the basis of fees by the Commission can not be characterized as foreseeable as the expenditures. In that manner, the Commission, whose capacities and thus income does not significantly change on an inter-annual level, can not plan with certainty the coverage of those expenses with income which is variable *per se*, since it depends on the Commission’s activities which are externally determined.

It is needed to say that fees paid by companies for the notification of mergers (concentration) are the most significant part within the entire set of fees, and thus income. The analytical procedure for concentration approval is the most demanding, and thus represents the biggest task for the Commission capacities, and therefore the biggest fees. According to the mentioned Tariff book, the concentration fees approved in a shortened procedure go up to 25 thousand Euros, while the procedures carried out in a full scale, where the capacities are significantly engaged can cost up to 50 thousand (per approved concentration). These are too high amounts and burdens for companies planning to merge. These fees are the highest compared to the focused group of countries, which without exception finance their commissions from the state budget. It is evident that with the self-financing model the Commission is stimulated to maintain a relatively high level of fees, which makes the business of the companies more expensive. On the other hand, due to the impossibility of controlling and foreseeing income, the Commission can be stimulated to reduce the level of its activities, thus also reducing its expenditures, which is a bad solution as well.

Table 2 gives a total amount of income of the selected countries’ commissions based on latest available Activity reports. Also, income shall be stated in a relative form compared to the number of employees within Commissions,

Table 2: Commission income according to the number of employees for 2010

Countries ³	Number of employees	Income (absolute amount)	Income (per employee)	Control of state aid as a function within the Commission
Serbia	27	1,198,218	44,378	no
Croatia	45	2,265,219	50,338	yes
Hungary	125	9,300,000	74,400	yes
Czech Rep.	126	5,420,511	43,020	yes
Bulgaria	130	4,601,627	35,397	yes
Romania	295	8,551,158	28,987	yes
		Average	46,086	

Source: Official commissions' activity reports⁴

thus surpassing the differences between countries, in the matter of regulatory body capacities.

Based on data in Table 2, it is evident that the income of the Serbian Commission in absolute figures is significantly lower compared to other countries, which also refers to the total number of employees. We must bear in mind that in the selected list of countries only the Serbian Commission does not incorporate in its activities the control of state aid, since there is another body established with that purpose. Therefore, it is logical that partially for that reason it generates less income but also employs less people. Based on the average income per employee, we can see that Serbia is just beneath the group average. According to the activity reports from the Serbian Commission from the last two available years, it turns out that it has generated surpluses, which were transferred to the state budget. Also, increased exposure of the Commission to the risk of uninterrupted financing is influenced by the article 57 of the LCP. This article assumes that all financial fees gathered from firms to annulate competition damages, and which should be set by the Commission are paid in favor of the account of state budget. If there are additional annulations or decreases of the declared measures, funds are paid back from the state budget up to the level of nominal fee amount, while the accumulated interests and other expenses are to be paid in full by the Commission. This kind of a decision exposes the Commission to excessive financial risk. In this manner the Commission is not only unable to predict its income, but its expenditures as well. In this case, it is up to the official courts to determine whether the Commission's

decisions will be altered, increasing or annulling the stated fees, and additionally burdening the Commission with the cost of this decision alteration. Generally, there are two options as possible solutions for the implementation of this recommendation.

The first option would be to follow the example of countries stated in our analysis, but also present in numerous European countries. This means that it is needed to secure a sufficient amount of budget funds for financing the Commission. Thereby, the Commission would still be able to collect fees, but the amount of these resources would be considerably lower compared to funds obtained from the budget. This way of financing would enable the change of the present Tariff book, thus significantly lowering the fees for concentration notification. Based on [19] it is foreseen that the decrease of fees for concentration notification should be for about 50%, bringing it down to the European standards, assuming that at least 80% of income should come from the state budget. The Commission financing plan should be formulated by the Government based on a three-year activity plan of the Commission, taking into account the needed human and financial resources for full implementation of the LCP. The implementation of this measure would assume the change of existing LCP, i.e. the article referring to the Commission financing (article 31). This article in an altered version would clearly state that the amount of planned Commission expenditures is covered by the state budget. This option however should not jeopardize the Commission's independence. In other words, the Law should eliminate the possibility of the Government to influence the decision making in the Commission, and thus the specification of the costs deriving from those decisions.

The other solution refers to the possibility of enabling

³ Data for Slovenia were not available at the time of paper preparation.

⁴ available on internet pages: Serbia (<http://www.kzk.org.rs>), Croatia (<http://www.aztn.hr>), Hungary (<http://www.gvh.hu>), Czech Rep. (<http://www.compet.cz/en>), Bulgaria (<http://www.cpc.bg>), and Romania (<http://www.consiliulconcurrentei.ro>).

the Commission to form reserves in case of achieved surplus, from which it could draw funds in case of support lack from the state budget during the years of deficit. The realization of this measure would assume the change of the mentioned article 32 of the LCP in the part in which it is stated that surplus funds are transferred to state budget. Compared with the possibility of financing the Commission from the state budget, this option could be considered the second best solution. Of course, the change of the problematic article 57 of the LCP, i.e. the repeal of the obligation of the Commission to compensate interests and other costs connected to annulling or diminishing stated measures of the Administrative court, should certainly be done, regardless of the chosen financing option.

Recommendation 2: Organizational structure and Commission capacities

In order for the Commission to perform the inquiry activities legally put under its authority, it is necessary to optimize the Commission's organizational structure and to enlarge its human, and thus expert capacities. This would assume the opening of new workplaces for experts of legal or economic profile, specialized for the area of competition protection. Also, the Commission should employ experts for information and communication technologies.

In order to explain this recommendation, it is necessary to emphasize that the Competition law is specific, since its implementation often demands the knowledge of economic analysis, which certainly surpasses the possibilities of complete legal codification of this area. The connection of law and economics is an unavoidable link in solving issues from the domain of competition protection, which demands permanent Commission employees with these skills. The employee fluctuation within the expert Commission service should be brought down to a minimum, since continuity in work and experience is the essence of improving quality implementation of this policy. Besides the quantity of human resources, for the implementation of LCP, quality is also needed as well as a specific structure of an expert employee profile.

We shall start by analyzing the quantitative dimension of human resources available within the Serbian Commission

(see Table 3). We shall compare these data on the number of subjects analyzed by the regulator during a calendar year with the data for Croatia and Czech Republic, as the most likely countries for comparison. In order to make the comparison, we shall focus on the number of employees for the three key sectors: (1) concentration control, (2) competition damages (cartel behavior and abuse of dominant market positions), and (3) sector analysis, but on the number of subjects dealt by the Commission departments during a year.

The number of subjects per employee in the sector for concentration control is specially an illustrative dimension of overburdening the regulatory body. The adequate relation should be 1(S)/1(E), since the concentration control (mergers, acquisitions, alliances etc.) is the analytically the most complex, since it involves detailed economic analyses in order to foresee the effects of mergers onto the competition conditions, which have not yet been realized. However, the value for 2010 in Serbia for this ratio is 13.4 whereas the same ratio values in the same year for Croatia and Czech Republic are 1.88 and 1.45 respectively. Based on these values it turns out that the sector for concentration control of the domestic Commission has been seven times more overburdened by subjects compared to the Croatian commission and over nine times more than the Czech one. Comparing the results of Serbia and Croatia for 2011, this ratio is even more unfavorable for Serbia (difference of more than 16 times), mostly due to evident increase in the number of notified concentrations and minor capacity increase in the department of concentration control in Serbia. Comparing the total number of subjects from stated sectors with the total number of employees in these sectors, 1-3(S)/1-3(E), we can also note the excessive burdening of the capacities of the domestic Commission. In 2010, the burden of one employee engaged on subjects compared to Croatia was 4.5 times greater, and even 10 times more than in Czech Republic. In that sense, we would expect our experts to have a multiple higher productivity in processing subjects. Since that is not the case, we shall analyze how this problem should be solved. In order to minimize this ratio to acceptable European country standards, it is necessary to increase the number of employees in the expert service of the Commission,

Table 3: Subject and employee structure of three comparable commissions for competition protection

Country	Data	2010	2011	
Serbia	Subjects (S)	1(S) Concentration	67	106
		2(S) Competition damages	15	12
		3(S) Sector analysis	3	3
		Total 1-3(S)	85	121
	Employees (E)	1(E) Concentration	5	6
		2(E) Competition damages	7	7
		3(E) Economic analysis	2	3
		Total 1-3(E)	14	16
	Relative values	1(S)/1(E)	13,40	17,67
		1-3(S)/1-3(E)	6.07	7.56
Croatia	Subjects (S)	1(S) Concentration	15	12
		2(S) Competition damages	2	7
		3(S) Sector analysis	3	2
		Total 1-3(S)	20	21
	Employees (E)	1(E) Concentration	8	11
		2(E) Competition damages	4	6
		3(E) Economic analysis	3	4
		Total 1-3(E)	15	21
	Relative values	1(S)/1(E)	1.88	1.09
		1-3(S)/1-3(E)	1.33	1.00
Czech Republic	Subjects (S)	1(S) Concentration	45	
		2(S) Competition damages	1	
		3(S) Sector analysis	1	
		Total 1-3(S)	47	
	Employees (E)	1(E) Concentration	31	
		2(E) Competition damages	33	
		3(E) Economic analysis	16	
		Total 1-3(E)	80	
	Relative values	1(S)/1(E)	1.45	
		1-3(S)/1-3(E)	0.59	

Source: Official commissions' activity reports⁵

but also to downsize the number of subjects, especially concerning notified concentrations. For example, in order to level with Croatia, the Serbian Commission needs to enlarge the capacity of employees engaged on subjects for at least 30%. Besides, the Commission must pay more attention to the structure of expert profiles being employed, since there is a need to balance between the number of economic and legal profiles. However, in Serbia we have an evident domination of legal over the economic experts within the Commission.

One of the main organizational shortcomings of the Commission, when it comes to human resources, is also the lack of the position *chief economist*, which exists in, for example, Hungary and Croatia, but also on a supranational level of competition protection in the EU

within the DG COMP. The role of the chief economist is to monitor and control all economic analysis performed by the Commission, and thus to form the methodology and procedures in order for the Commission to follow during inquiry processes which demand economic analysis. The Commission Council should take into consideration the opinion of the chief economist in every case where the economic argumentation is used in the process of proving potential or actual competition damage. For example, within the General directorate for competition, the main economist has a mandate to form his/her personal team of experts in the field of economics, which are a part of the chief economist's office. We thus imply that the selection process for experts of economic profile should be under guidance of the chief economist within the Commission. While selecting the chief economist, it is suggested that he/she possesses the highest professional level in the area

⁵ available on internet pages (see: <http://www.kzk.org.rs>, <http://www.aztn.hr>, <http://www.compet.cz/en>).

of economics, a PhD degree with focus on the field of competition protection. This expert should be specialized in the domain of game theory and industrial organization, with focus on competition protection, which would assume the person to have relevant research experience within the field or to have worked for some time, for example 10 years, in some developed foreign commission on the subjects of economic analysis. Additionally, one of the basic needed skills of the chief economist should be the proficiency in knowledge of econometric tools, as their usage is crucial within the processes of inquiry of the Commission. Certainly, the chief economist should possess the highest level of expertise compared to other economic experts within the Commission, and thus an indisputable authority in decision making on all relevant questions.

Therefore, the position of the chief economist should be defined by law, giving precise qualification needed for his/her selection. The selection should be done by a public competition, where the candidate with the best qualifications should be elected. The problem that might occur with this position refers to the (im)possibility of the domestic Commission to finance it. The stressed fluctuation on the position of the chief economist is something that needs to be avoided at all costs, which is impossible to do in the conditions of current compensation and reward system used by the Serbian Commission, similar to the rest of public administration. Redefining the system of compensation and rewards is narrowly connected with the issue of securing stable, foreseeable and sufficient financing sources of the Commission, as we have indicated in the first recommendation.

The position of the chief economist is additionally important for the domestic Commission bearing in mind the number of staff of legal profile, which, in current call, are all members of the Commission. This fact is especially troublesome knowing that the regulation area is both of legal and economic nature. Following that logic, the Commission members should be of both profiles. In order to secure continuity at work and in knowledge accumulation, thus also in efficiency and effectiveness of the Commission functioning, the Government should opt to leave the same or at least the majority of Commission members through two mandates, which is allowed by the

law. The discontinuity caused by changes on every five years is connected to losses of time needed to set up the new Commission council from scrap. This is something that a responsible State, aware of the competition influence on the welfare of all citizens should avoid. Besides, such practice is present in the majority of EU countries.

In the context of previous discussion about the Commission Council, we consider that it is needed in due time to change the article 23 of the LCP which refers to the selection of Commission organs (the Commission president and Council members). This article leaves the possibility of forming the Council only both by people of legal and education in economics, but does not limit the extreme solutions which assume only one of these educational profiles. Also, it is needed to additionally work out principles of Council member selection, in order for the selected experts to have a business career closely connected to law and economics of competition. If we are talking about economists, similar principles of selection as with the chief economist should be chosen. As for the members of legal profile, the Commission should opt for people of highest academic ranks, with professional focus on competition law. If the Commission opts to choose members outside of the academic community and without highest ranks, they can only select candidates with long-year experience (at least ten years) in some respectable foreign competition protection commission.

Finally, in the era of rapid development of information and communication technologies, the Commission must think in the direction of employing experts in this area, need foremost to carry out inquiries about cartel agreements. In order to determine the cartel agreement, every proof of its existence can help the Commission solve the case. For example, collecting evidence during the unannounced inquiry is foreseen by the article 53 of LCP and assumes collecting data from memories of electronic devices from the company premises where the inquiry is effectuated, but also from the physically remote devices connected with the company by communication networks. Taken copies of found electronic memories are the subject of further "forensics" in the Commission headquarters, with the aim of finding the correspondence with other market participants as proof of unauthorized cartel agreements.

The role of IT experts in this process is vital. According to the analysis presented in [13], the real measure for strengthening the IT capacities of Serbian companies assumes two additional experts in this domain.

Recommendation 3: Decrease in the number of competition concentration cases

In order to decrease the burden placed on the Commission, it should be able to focus on significant cases of competition conditions on partial markets of the Republic of Serbia. Therefore, the total number of reported concentrations should be reduced by lifting the limits for the obligation of concentration report.

The company concentration control (horizontal mergers and acquisitions) represents the most analytically complex subjects faced by the regulatory bodies in the domain of competition protection. The unnecessarily big number of concentrations (see Table 3) is the result of the fact that the limits for the obligation of concentration report (“notification thresholds”) are set too low [19, article 61]. That way a lot of concentrations of minor importance are obliged to be reported. The orientation towards low thresholds can be explained by the fact that fees on the basis of concentration represent significant income for the Commission.

We need to state that the thresholds for the obligation of concentration report represent a mix of objective and easily understandable conditions, which cumulative completion, bounds the relevant parties to report that concentration. These conditions are based on the amount of annual income of the concentration participants, which is an understandable and easily checkable data. Setting cumulative conditions has the goal to secure reports of only those concentrations with dimensions important for the market of the Republic of Serbia. Thereby, besides total concentration size, thresholds should be set in that manner in order to relieve of the obligation of concentration report for quite asymmetric participants (for example, “where a giant takes over a dwarf” [1, p. 33]), because in those cases the market situation does not change significantly.

Based on the three latest annual reports of the regulatory bodies of Serbia and countries covered by

the analysis, it turns out that Serbia has a much greater number of concentrations reported compared to the value of other countries. With an annual average of 96.33 Serbia is way ahead compared to other analyzed countries. For comparison, the average annual number of concentrations for other countries in the analysis besides Serbia is 40.67. Such overburdening of the Commission with concentrations, due to the fact of needed level of income secured in that manner, obliges that the majority of subjects be approved by a short procedure, thus without a detailed economic analysis of market structures in which the subjects of concentration operate. In such conditions, when the Commission is obliged to make approval based on the “rule of the thumb”, without the accompanying quantitative analysis, the so-called error of *false positives* dramatically rises – as a final result, the Commission may approve of a concentration which will affect negatively the market competition level. In 2011, from 100 closed subjects only two were solved in a regular inquiry procedure (2% of the total number). For example, compared to Croatia and Czech Republic, where 10% and 50% of the inquiries respectively, were solved in a regular procedure, we come to a conclusion that this percent in Serbia is too low.

The negative effect of setting low thresholds for the report of concentration, and thus a too great number of concentrations is twofold. On the one hand, the Commission is overburdened with cases of minor importance, losing the possibility to focus on significant concentrations, which bear a great risk of jeopardizing the free market game. On the other hand, many companies with concentration of minor importance are faced with the obligation to report a concentration, which increases the uncertainty in business planning of such a venture and postpones its realization. The realization of the Recommendation 3 should reduce the average number of reported concentrations up to 50%, which would certainly bring Serbia closer to the values identified in the focused group of comparable countries. Certainly, the precondition of this realization is the implementation of recommendation 1. In order for the reduction to take place, it is needed to raise the threshold for the obligation of concentration report, which would assume the change of the article 61 of the LCP.

How can we carry out this correction? The first

possibility assumes the analysis of total income level of all participants in the concentration process and the structure of income by individual participants of every separate concentration on an annual level. Thus, we can find the break-even point of cumulative thresholds leading up to the desired level of reduction. This analysis is needed to be performed for more successive years (for example, since the time of Commission establishment) in order for the break-even point to be the most representative for the conditions on the Serbian market. The other possibility assumes the correction of thresholds according to their levels within other comparable countries, which is the average number Serbia should tend to obtain (the mentioned reduction of 50% would bring Serbia closer to the mentioned average). In that sense, since the recommendation assumes the convergence towards the average of analyzed countries, the threshold correction should follow this average. The third, and maybe the most fundamental possibility is the correction of thresholds according to the recommendations of the first two stated models of correction. Since the laws in this area are not generally desirable to be often changed, the threshold correction should be approached with due attention.

In order to illustrate the disproportion in the level of thresholds (Serbia compared to analyzed countries) we illustrate one component of the thresholds, "Achieved income of each of at least two participants within the country territory", which is comparable to the level of country group covered by this analysis, among which Serbia.

According to Table 4, it is evident that, apart from Slovenia, all other countries have set this component of the threshold on a much higher level, and in some cases, that is multiple compared to Serbia. For example, Croatia

and Hungary have set values over ten times bigger than Serbia. Bearing in mind that one of the suggested solutions is that Serbia evens its threshold or at least makes it closer to the average of country group, this component sets two scenarios. According to one scenario which includes all stated countries except Serbia, the thresholds should be lifted over five times. According to the other scenario, which is milder and thus more realistic, where besides Serbia, the average excludes Hungary and Croatia as extreme examples, the thresholds should be lifted for about 100%.

Recommendations which do not assume the change of existing legal solutions

The implementation of the following recommendations does not assume changes in the LCP and the corresponding bylaws. It will turn out that the dominant actor and initiator of their execution, among other relevant parties will be precisely the Commission for competition protection.

Recommendation 4: Creation of "guidelines" by the Commission

In order to increase transparency of the Commission's actions in cases of inquires, mostly referring to concentration and abuse of dominant position cases, it is necessary for the Commission to create guidelines which will contain practical steps of action explaining the implementation of the LCP. The increase of transparency would have a positive effect on legal certainty during company business planning. In that sense, it is necessary to develop guidelines for the regulation of horizontal company mergers and guidelines for the definition of relevant market.

Table 4: Thresholds for the obligation of concentration report

Countries and averages	Achieved income of each of at least two participants within the country territory (in Euros)
Serbia	1,000,000.00
Croatia	13,326,394.72
Hungary	1,795,848.00
Czech Republic	10,050,251.26
Bulgaria	1,533,875.64
Romania	4,000,000.00
Slovenia	1,000,000.00
Average (without Serbia)	5,284,394.94

Source: Competition protection laws of selected countries

Besides the law and bylaws, the set of rules also includes guidelines prescribed by the Commission, which, although without legal weight, have a significant role in the functioning of the competition protection system. The guidelines define practical steps of action of the Commission in the inquiries carried out. In the developed systems of competition protection, firstly referring to the supranational systems of EU and USA, the role of guidelines is crucial. That role is specially emphasized in the American system of customary law, where, due to the importance of the regulatory body, the guidelines practically have the legal-biding strength when cases get a court epilogue. The guidelines represent and describe those actions which are practically not meant to be within the laws and bylaws regulating this area.

Setting guidelines by the Commission, a level of legal awareness is raised in the businesses which might become the subject of analysis of the Commission. These guidelines also help to better understand this issue area when it comes to courts which are obliged to decide on charges against the solutions set by the Commission. The legal framework of competition regulation is the needed basis for constructing the system of competition protection, while the very implementation of this policy assumes much more interpretation and management of the articles of the law.

Defining the relevant market, closely explained in [14, article 6], represents the key step in regulating horizontal concentrations, determining the dominant company position and thus the possibilities for its abuse. The definition mostly assumes the use of quantitative economic-econometric tools and principals of definition based on which the same are carried out. Referring only to the mentioned article of the law and the bylaws concerning the precise definition of the relevant market, it is not possible to understand what is taken as the criteria of definition, thus making it impossible to understand the limits of this market. One of the possible principles of definition with a very spread use and numerous modes of implementation is the so-called “test of the hypothetical monopolist”, which should take into consideration and adopt its mechanism to the conditions of functioning of the domestic markets while forming guidelines.

The Commission’s steps of action while inquiring the horizontal company mergers (concentration) should also be codified by guidelines, which up to now, as far as the relevant market is concerned, has not been done. Only by interpreting the actual Law it is not possible to understand how the Commission carries out the inquiry process. Setting guidelines for horizontal mergers would increase the possibility of the companies to plan their external growth, i.e. to estimate whether their venture is according to the law. That way, these companies would avoid unnecessary costs connected to making a choice which bares a great possibility to be blocked by the Commission’s decision. The guidelines of this type would have to contain a simple quantitative concentration test, based on *Herfindahl-Hirschman* index of market concentration. This test offers a very useful preliminary indication of the potential influence of concentration onto the conditions of competition on the determined relevant market. Thereby, the test should be calibrated in accordance with the dominant levels of concentration of the domestic markets, in order not to be too restrictive or too mild towards those concentrations. In the majority of inquiry procedures carried out by the Commission in the domain of concentration control, this quantitative test is used in order for its formalization within the guidelines not to represent an unknown fact for the Commission.

While forming the guidelines, besides own experience based on the implementation of the LCP, we should take into account the results from [2], [3] and [6] (on a supranational level), but also the guidelines of comparable EU country members with longer experience in the competition protection policy than Serbia. Revising other best practices conjoint with own experience is the model to be followed when forming the missing guidelines. Of course, integral copying of guidelines formed by others is inappropriate if the steps of those guidelines are not possible to be realized in precise cases. Besides guidelines for defining the relevant market and concentration control in near future (for 3 or 4 years), it is necessary to define guidelines for the determination of the abuse of dominant market position. This is valid under the condition that in a certain time period there is enough experience accumulated in solving cases in this domain, but also to

master the technique of determining the relevant market, which is the basic precondition for the determination of the dominant position existence. This period surpasses the limits of our analysis, so we do not consider these guidelines necessary to be adjoined to the set of our given recommendations stated in this paper. Why is that so? Namely, this form of guidelines, as a codification of successful practice of the Commission in this domain comes on a higher level of its development, when the Commission mostly surpasses the problems connected to the definition of relevant market. This statement is confirmed by the fact that there is a relatively significant time lag between guideline introduction of this type and the previous two, even in the practice of the European Commission [4].

Recommendation 5: Education training for judges of the Administrative Court in the domain of economics

In order to improve the understanding of the competition protection policy in the domain which assumes the economic-econometric argumentation whilst proving the made or potential damages to competition, it is necessary to educate the judges of the Administrative court.

The direct control of the final Commission's decisions is, according to the article 71 of the LCP in the jurisdiction of the Administrative court. Therefore, all potential claims by the companies against the final decisions of the Commission are directed to the Administrative court for consideration. The Administrative court has the possibility to confirm the solution of the Commission, to cancel it or to order the Commission to re-inquire the case. The last two possibilities assume that Administrative court, as an independent body, does not agree with the Commission's solution, i.e. with its argumentation which confirms the influence of the precise company onto the competition conditions of the market. This of course means that the Administrative court is competent to understand the argumentation stated in the final solution of the Commission. There is however, a problem when it comes to the argumentation of economic nature.

Parallel with the strengthening of the expert capacities of the Commission, it is also needed to strengthen the expert

capacities of the Administrative court, by permanent judge education. The adoption of needed economic knowledge from the domain of game theory, industrial organization and econometrics is essential for the functioning of the Administrative court in this area. Certainly, we can not expect the judge of the Administrative court to analyze the given economic problems with the same level of expertise as the very Commission, which does this as single job. However, the judges should be able to understand the logic of the economic argumentation in the Commission's solutions, but also of the sides which press charges. The court should be enabled to estimate which side has more arguments to be right, since in this domain there are no absolutely correct solutions.

The point is that the majority of the most important cases carried out by the Commission, have never been approved by the Court (example of the concentration of company Delta from 2006 is especially illustrative in that sense). The last in a row of significant cases where a negative opinion of the Commission was not accepted refers to the concentration of the domestic sugar producer, company *Sunoko* over the company *Hellenic Sugar Industry*. Due to this solution, the Commission addressed the public with the text entitled "Why does the administrative court ignore the public opinion?" [8].

Comparing Serbia and Croatia, from 27 Commission results which gained a court epilogue in a two-year period (2010-2011), the court did not accept the solution from the Commission in 4 cases, while in Croatia one solution was not accepted out of 29 in the same period. Generally, absolute numbers in this case are not equally important as with competition. Thereby, it is good to mention that an almost standard practice of the domestic courts is to not accept the Commission's solutions due to legally-processing or procedural reasons, and thus the time expiry of solution actions. As an example which is most recent, we can mention the cartel deal between the seven greatest drug producers and six biggest drugstores which was not accepted by the Court due to the time expiry of actions set in the Commission's solution. On the other hand, we can conclude that it is unacceptable for the Commission to let such things happen. Besides permanent education of the judges of the Administrative court on the subject of the

economics of competition, we consider the competition law to be an extremely complex area which deserves the formation of a special department of judges, specialized in the subjects of this domain.

Recommendation 6: Cooperation of the Commission with other elements of the system for promotion and competition protection

In order to increase efficiency in the competition protection system it is needed to strengthen the communication and cooperation of the Commission with entities which, besides Government and courts, form the system for promotion and competition protection in a broader sense. Under other entities we assume all regulators of specific sectors, but also the entities for the control of public procurement and state aid, as well as customer protection associations.

When we refer to regulators of specific sectors, we firstly mean the National Bank of Serbia (NBS), the The Republic Broadcasting Agency, the Securities Commission, the Energy Agency of the Republic of Serbia as well as the Republic Agency for Electronic Communications (RATEL). The institutional cooperation of the Commission with sector regulators is crucial for a more efficient implementation of the LCP in the sectors under the jurisdiction of these regulators. Namely, the sector regulators, with actions defined by special laws should also synchronize their activities with the LCP. When that is not the case, the sector regulator should inform the Commission of such circumstances. On the other hand, many activities of the sector regulators within branches which are the subject of regulation can have indirect effects onto other connected branches, i.e. other connected markets. To adjust activities of the Commission's actions and sector regulators is one of the crucial links for the functioning of the system of promotion and competition protection in the seen broader sense.

In order to strengthen the relationship between sector regulators and the Commission, it is necessary for the Commission to sign protocols of mutual cooperation with all stated regulators with strong mutual will to respect those protocols. Up to now, the protocols have been signed with the National Bank of Serbia, the the Energy

Agency of the Republic of Serbia as well as the Republic Agency for Electronic Communications. According to that dynamics, two additional protocols with important regulators remain.

In the majority of EU countries, as well as those served for comparative analysis, the control of state aid is integrated into current activities of their competition protection commissions (stated in Table 2). Also, it is not rare that the control of public procurement in developed market economies is put in the control of the competition protection commission, such as the case in Czech Republic and Slovenia, for example. In Serbia, these activities are in jurisdiction of other regulatory bodies. Both stated areas are also regulated by special laws – for details see [17] and [18]. The goals of both mentioned laws are totally in accordance with the LCP, which makes their execution perfectly compatible.

It is evident that every set up tender represents a direct intent to eliminate competition between companies, as tender participants. The importance of public procurement is thus bigger bearing in mind that public procurement stands for about 16.7% of EU member countries' GDP, whereas this percent is even bigger when it comes to Balkan countries [13]. In order to have a more efficient control of public procurement, a closer institutional cooperation between the Commission and the Center for public procurement is highly needed.

The control of state aid is of essential importance when competition conditions are in question. Generally, every state aid has the potential to put some market participants into an unequal position by favoring others. Such state behavior endangers the competition conditions of the market, but in some cases can not be avoided. The role of regulators in this domain is to decide which kind of state aid is considered approved and which is not. The great extent of state activities on this field is characteristic for Serbia, and thus there is such a great interest of the EU to decrease this activity extent to an acceptable level. Currently, the biggest regulation problem in this domain is precisely the fact that the Commission for the control of state aid does not have the needed dosage of independence, since it is basically under the patronage of the Ministry of finance and economy. In other words, the Commission for

the control of state aid is directly under the influence of the aid giver, which is a bit paradox. On the other hand, the role of the Commission for the competition protection is minor when the functioning of the Commission for the control of state aid is concerned. The only role of the Commission for the competition protection is to address a suggestion for the selection of one member of the Commission for the control of state aid, which is insufficient for a more effective bonding of these entities in the process of law implementation with the identical goals.

Whether we are talking about state aid or public procurement, one of the solutions to these problems assumes a closer cooperation of the Commission for the competition protection with all mentioned official regulatory bodies. The other solution would be to place the control of public procurement and state aid within the authority of the Commission for the competition protection, which would maybe represent the most efficient solution when it comes to competition protection. Of course, the last mentioned suggestion would certainly involve serious commission capacity restructuring and enlargement.

Since the beginning of 2011 in Serbia we have in force the Law on customer protection [20]. This law protects the customer rights from unconscious producers and merchants. This area could be considered compatible with the area of competition protection carried out by the Commission. There is no formal regulatory body to carry out this law. The role of regulator is assumed by NGOs for customer protection, with the role to send the notifications to the public when the customer endangerment occurs. The cooperation between the Commission and these associations could be seen in the desire to impose subjects of interest to the public where both customer and competition protection are an issue.

Recommendation 7: The increase of the competition protection transparency importance

The Commission and Government must invest additional efforts in order to make the importance of competition protection more transparent and understandable to wider audience (companies and consumers). The public pressure, when it comes to competition protection, can be a strong

ally of the Commission. As stated in [13], the activities on competition advocacy in any state, represent a never-ending task. Serbia is only at the beginning of this task, since the public is quite scarcely informed about the subjects of competition protection. Public promotion of competition importance for the market participants would demystify the way of functioning of the market game, which would eliminate doubts connected to the implementation of the LCP and increase the business certainty, when it comes to companies. This promotion would also indicate the advantages of competitive pressure to both consumers and producers, which are practically the subject of regulation.

During the implementation of this recommendation it is essential to significantly engage the Commission in the field of promoting results of achieved activities during the year. If these activities are not promoted, an impression is formed that the Commission is not doing its job. Regular pointing out of all relevant decision and events in which the Commission takes part in, must be transparently published both on the internet page of the Commission and in all other relevant media (press and electronic). For those purposes, it is desirable for the Commission to have at least one person permanently engaged in PR. The presence of the Commission's president in public is also crucial for the quality of publically promoted activities of the Commission. For example, the low rate of Serbia, when it comes to the effectiveness of the anti-monopoly policy (Table 1) and the bad position for that criterion of total competitiveness on the list of WEF is mostly due to bad promotion of the Commission's activities and results. This can be determined bearing in mind that the value of the Index of anti-monopoly policy effectiveness is mostly based on the perception of Serbian top management which gives bad ratings to domestic competition protection policy, often not knowing its actual performance.

Conclusion

The implementation of measures given in this study should improve the competition protection system core functioning, which is a needed condition in order for the system to function as a whole. Recommendations form a connected system of actions needed to be implemented in

a “shorter” mid-term period (3-4 years) in order for the system of protection and competition promotion in Serbia to function according to comparative systems with longer tradition and more significant results in this area. We should bear in mind that the implementation of certain recommendations is a precondition for the implementation of others. That mostly refers to recommendation 1, which, once implemented, solves the main problem of Commission’s financing.

Within the paper we have analyzed seven relatively complex recommendations, divided into two homogenous groups, depending whether they demand or not the change of legal settings in order to be implemented. We have suggested possible ways to assure stable, foreseeable and sufficient funding sources of the Commission, which shall turn out as one of the basic conditions for its independence, but also the forming of optimum human resource structure needed to implement all elements of the Law. In order to diminish the overburdening of the Commission with the cases of little importance for competition terms, we have suggested performing serious reduction in the number of registered concentrations during the year by adequately lifting the legal thresholds for the obligation of concentration report.

In the part of the recommendations which does not refer to changing legal elements, we have suggested that the Commission sets up guidelines from the domain of defining the relevant market and concentration control. The guidelines describe the Commission activities while defining the relevant market and concentration control, thus decreasing the legal uncertainty which follows these essentially economic categories of the LCP. The education of judges of the Administrative court in order to better understand the economic topics from this generally legal area is also stated as an important element of implementation. Recommendations also include the cooperation of the Commission and other governmental and non-governmental entities which form the system of competition protection and promotion in a wider sense, but also the importance of promotion of competition to a wider audience. The central actor of these activities is, as we have seen, the very Commission for competition protection.

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