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CHARACTERISTICS OF ANTI-MONOPOLY POLICY AND THE EFFECTS OF ITS APPLICATION IN SERBIA

Karakteristike antimonopolske politike i efekti njene primene u Srbiji

Abstract

This paper gives the analysis of the effects of anti-monopoly policy in Serbia in the period 2006-2012. It analyzes the work of the Commission for Protection of Competition in terms of good practice that should be continued, improper practices which should be modified, and practices that should be introduced. Serbia's position was analyzed according to the indicators of the effectiveness of anti-monopoly policy and the reasons for poor ranking. Finally, the paper deals with the practice of the companies in Serbia with regard to their treatment of anti-monopoly regulatory risk and stresses the need to introduce antitrust compliance programs.

Key words: *anti-monopoly policy, effects, Serbia, antitrust compliance programs*

Sažetak

Rad se bavi analizom efekata antimonopolske politike u Srbiji u periodu od 2006-2012. godine. Analiziran je rad Komisije za zaštitu konkurencije u pogledu dobrih praksi koje treba nastaviti, neodgovarajućih praksi koje treba izmeniti i praksi koje bi trebalo da se uvedu. Analizirana je pozicija Srbije prema indikatorima efektivnosti antimonopolske politike i razlozi lošeg ranga. Konačno, rad se bavio praksom kompanija u Srbiji kada je reč o tretiranju antimonopolskog regulatornog rizika i ukazao na potrebu uvođenja *antitrust compliance* programa.

Ključne reči: *antimonopolska politika, efekti, Srbija, antitrust compliance programi*

Introduction

It is a well known fact that anti-monopoly laws are designed to protect competition and to promote free and fair competition. This regulatory framework is based on the idea that wherever there is free and open competition, the markets function efficiently, and the consumers benefit from high-quality, cost effective and yet affordable products and services.

The subject of this paper is the analysis of the anti-monopoly policy in Serbia from 2006 until present. The focus of this analysis is on the practice of the Commission for Protection of Competition, as the key regulatory body in this area. Another focus of the analysis is on the companies operating in Serbia and their treatment of the anti-monopoly regulatory risk.

The paper consists of several parts. The first part quantifies and describes the results of the Commission in the past. The second part measures the effectiveness of anti-monopoly policy as measured by standard indicators from secondary sources. The third part highlights a specific aspect of anti-monopoly practices concerning the relationship between the level of market concentration and the height of entry barriers. The fourth part deals with the anti-monopoly practice of domestic companies, while indicating the need for introducing modified antitrust compliance programs. The final part summarizes the main conclusions and makes recommendations to the regulators and companies.

The work and results of the Commission for Protection of Competition practice

The implementation of the Law on Protection of Competition in Serbia is the exclusive responsibility of the Commission for protection of Competition, which began its activities in 2006. Based on the annual reports that the Commission regularly publishes (http://www.kzk.org.rs/), we have made a summary of the Commission's activities so far (Table 1).

Table 1 shows that the largest number of cases, presented before the Commission for Protection of Competition in Serbia, was related to concentration complaints. During the reporting period, the Commission initiated a total of 28 cases involving the abuse of a dominant position. In 10 cases, it was determined that there was the abuse of dominant position. Of 33 initiated procedures relating to prohibited agreements, the presence of prohibited agreements was determined in 17 cases. The Commission decided on 46 cases regarding exemption from the prohibition of restrictive agreements, while claims for exemption were declined in 13 cases.

A relatively small number of cases, 6% of the total number of initiated procedures, are directly related to the protection of competition. In other words, the Commission is predominantly exhausted by the cases of approval of concentration, and quite often ignores cases of abuse of a dominant position and restrictive agreements. One of the reasons for this type of practice by the Commission's is actually the fees that have to be collected in the approval procedures. According to the Tariff [25], the Commission, in a simplified procedure for each conclusion that enables concentration, charges 0.03% of the total overall revenue of all concentration members obtained in the previous report year. The maximum fee amount may not surpass EUR 25.000. Representatives of UNCTAD have underlined these fees as one of the highest in Europe, considering the revenues that companies achieve [26, p. 37]. This type of fee can be considered as a tax or duty of some sort. Considered this way, the Commission's role on the market of Serbia is mainly focused into collecting tax rather than being an actual market regulator that provides protection to consumers on the market, from abuse of dominant market position or implementation of cartels or other kind of restrictive agreements.

The Commission should devote more attention to cases involving the abuse of a dominant position, as well as

Table 1: Activities of the Commission for Protection of Competition in the period 2007-2011

	2007	2008	2009	2010	2011	Total
Concentrations						
Initiated procedures	125	137	116	75	114	**567**
Completed procedures	105	133	115	73	101	**527**
Abuse of dominant position						
Initiated procedures	13	3	2	6	4	**28**
Completed procedures	7	3	2	3	1	**16**
The existence of abuse	2	2	2	3	1	**10**
Prohibited Restrictive Agreements						
Initiated procedures	4	6	13	2	8	**33**
Completed procedures	2	2	7	4	7	**22**
Determined existence of a prohibited agreement	1	2	4	4	6	**17**
Individual exemptions from the Prohibition of Restrictive Agreements						
Initiated procedures	4	14	10	4	14	**46**
Completed procedures	3	10	8	5	8	**34**
Declined claims for exemption	1	7	2	1	2	**13**
Total number of initiated procedures	146	160	141	87	140	**674**
Cases that distort competition	4	11	8	8	9	**40**
Share	3%	7%	6%	9%	6%	**6%**
Number of staff members						
Total	15	21	26	29	31	**31**
Working on cases	9	13	17	17	20	**20**
Number of cases per staff member	10	8	5	3	5	

Source: Annual reports on the work of the Commission for Protection of Competition 2007-2011

detecting and preventing cartel agreements. It is therefore essential that the thresholds for reporting concentration are raised in order to relieve the administrative capacity of the Commission. In this case, it would create more room for the investigation of precisely these cases which restrict competition and which are inherently much more complex and extensive. By analyzing the many previous cases led by the Commission for protection of competition, the following conclusions can be made. Breaches of competition such as restrictive agreements have mostly been related to direct or indirect determination of purchase and selling prices. On the other hand, when it comes to abuse of dominant position, most of the uncovered breaches can be described as imposing of unfair business conditions and implementation of unequal terms of business on the same businesses with various members on the market.

We will analyze the work of the Commission's Council in 2012 based on provided daily agendas of all meetings that were held by the Commission's Council during 2012, in which 60 meetings were held (http://www.kzk.org.rs/sednice). At first, all activities of the Commission were divided into four categories: protection of competition, international cooperation, opinions and initiatives, while all other activities were categorized as current operations (see Figure 1). Most of the items, a total of 138, were about issues of competition protection (conclusions of restrictive agreements, dominant positions, exclusion from these articles and other). The second authority, for which the Commission's Council spent most of its time, 51 items and practically every fifth decision, was actually the field of international cooperation (participation at conferences, trainings abroad, reports from these events). Current operations (rent of space, financial reports) were items for which the Commission spent a tenth of its time and it brought conclusions for 23 items of the agenda related to this field.

Since 2009, the Commission for Protection of Competition has implemented (directly or through independent institutions) sector analyses, which allow it to monitor the situation on the market continually and systematically. In this way, the conditions of competition are examined and actions that may be contrary to the rules of the competition are registered. So far, the Commission has carried out the following analyses:

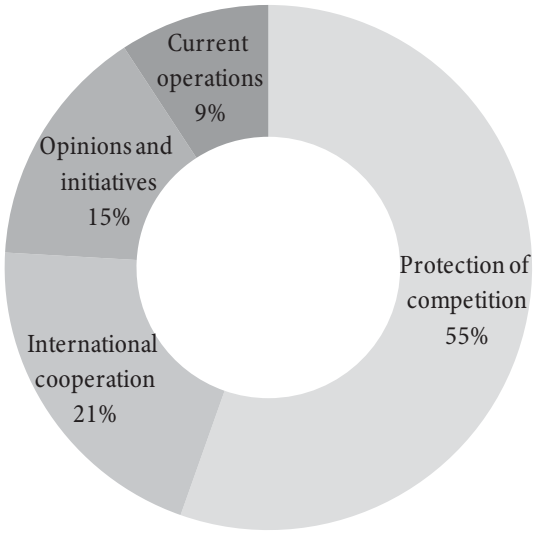
- Analysis of the conditions of competition in the liquefied petroleum gas market,
- The advertizing market analysis in Serbia,
- Market research of non-specialist retail sales, mainly of food, beverages and tobacco in the territory of the town of Kragujevac,
- Market analysis of cross-border money transfer services for individuals in the Republic of Serbia,
- Market analysis of import, processing, wholesale and retail of oil and petroleum products,
- Analysis of the state of competition in the dairy sector.

This is a good practice of the Commission and must be intensified and carried out continuously in the future.

During the analyzed period 2007-2011, the administrative capacity of the Commission increased significantly, which is encouraging. On the other hand, the process of administrative capacity building has still not been completed since the systematization provides for 54 jobs. Therefore, it is necessary to continue hiring new employees, especially from the field of economics, which should be given much more room in the analysis of specific cases of violated or restricted competition.

Transparency of the Commission's work increased significantly. On their official website, they regularly publish

Figure 1: Analysis of the Competition's Council activities in 2012



Source: http://www.kzk.org.rs/sednice

annual reports on their work, as well as all the procedures in progress. The only criticism related to reporting could be directed to the publication of the final decisions of the Commission, which are given in an abbreviated, not in their integral form. The Commission is also very active with respect to international cooperation with relevant organizations and regulatory bodies in various countries. The employees of the Commission are regularly sent to various trainings abroad, which significantly increases their expert capacity.

Although there were a large number of cases of concentration approval, none were effectively blocked. In the case of "Primer C" – "C market", the Commission initially adopted a negative decision regarding the implementation of the concentration. The court annulled the Commission's decision and remanded the case for retrial. Later, the Commission approved the concentration of the company Delhaize "The Lion" Nederland B.V. from the Netherlands affiliated with "Delta Maxi" d.o.o. from Belgrade [18], which also approved the previously mentioned concentration. Another decision of the Commission, which prohibits concentration in the case of "Sunoko" – "Hellenic" [20], was canceled by the Administrative Court. The court decision was officially criticized by the Commission, which does not constitute good practice.

Analyzing current practice of the Commission, we have observed a lot of weaknesses, both with regard to the procedure, and in terms of the content of the adopted decisions. Under the old Law on Protection of Competition, which was in force until 1 November 2009, the judicial control over these cases was exercised by the Supreme Court of Serbia. Thirteen cases were resolved unfavorably for the Commission [26, p. 51]. The Supreme Court always annulled the Commission's decision based on procedural deficiencies. The causes of the failure of the Commission before the Court may originate from the lack of clarity in the division of responsibilities between the Commission' Council and other organizational units of the Commission, as well as from the fact that the records on how the Council deliberated and voted were not submitted. In addition, certain cases did not contain statements from all the documents submitted by the parties. The Commission's decisions were most often criticized for their vagueness. Under the old law, only the Magistrates Court could impose fines of between 1 and 10% of the total annual turnover of the market participants. However, no fine was imposed by the judiciary. After 2009, the Commission has the right to directly impose measures aiming at protection of competition, and the Administrative Court takes over the function of judicial review. A significant number of the Commission's decision was annulled before the Administrative Court and the Supreme Court of Cassation so that only a small percentage of measures have actually been charged.

A great number of conclusions that had been brought by the Commission were canceled due to the 3 year obsolescence rule. According to 20 analyzed cases held before the Commission for protection of competition, we can conclude that the average time needed for completing each case in front of the Commission is longer than 3 years. The duration of a case can be divided into three phases (see Figure 2): time between commitment and first decision of the Commission for protection of competition, time between the Commission's decision and the Administrative Court's verdict and the time between the Administrative Court's verdict and the Commission's second decision. In average, it takes about the same amount of time to complete a process by the Commission and by the Administrative Court. However, additional weight to each case is the time needed by the Commission to bring a new conclusion after the Administrative Court's verdict. Even in cases in which the Court had just confirmed measures concluded by the Commission – another five months in average are necessary for each case. Out of this period of time, almost a month is necessary for each verdict to be officially delivered to the Commission.

The decisions adopted by the Commission show that they greatly focused on the intent or aim of the companies to distort or limit competition, and much less on measuring the effects of the alleged anti-monopoly practices. Also, the Commission has not executed postmortem analysis of its decisions, i.e. analyzed the effects the application of its measures on the competitive dynamics in a particular market.

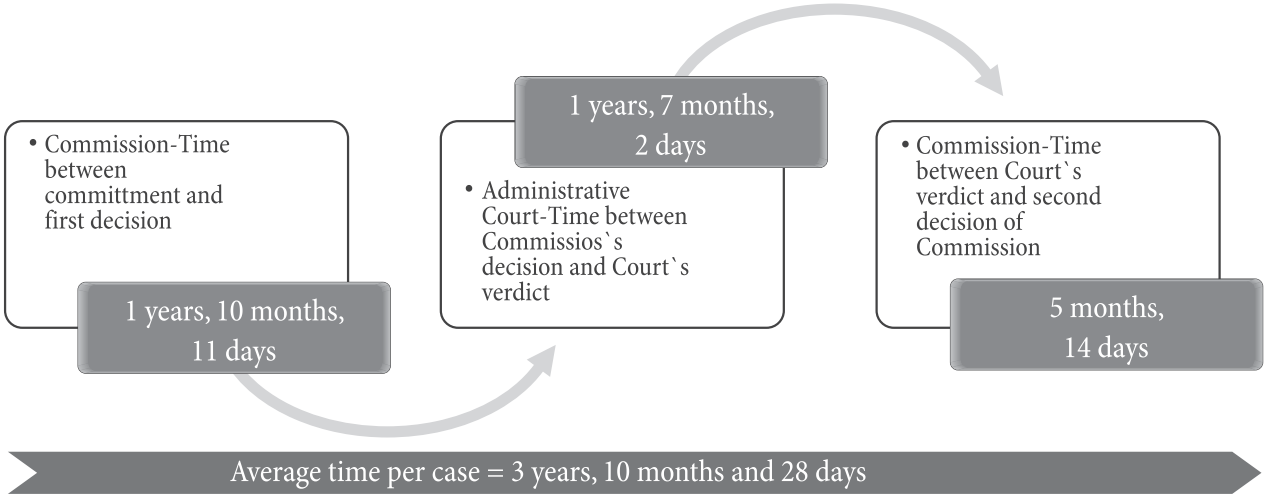
The Commission for Protection of Competition should be more active regarding the initiatives to have

special training for the judges of the Administrative Court who will be deciding on the matters relating to the protection of competition. Under the new law, which came into force on 1 November 2009, the review of the decisions made by the Commission for Protection of Competition is executed by the Administrative Court, and the higher instance court being the Supreme Court of Cassation. However, the possible cause for significant problems in completing the procedures for protection of competition is the lack of judges who specialize in issues related to competition. The judicial procedure of court investigation is performed in accordance with the provisions of the Law on Administrative Disputes. Therefore, the Court investigates the legality of the Commission's decisions. Since the scope of judicial review is not defined by the Law on Protection of Competition, but by the Law on Administrative Disputes, it is unclear whether it also includes the assessment of complex economic analyzes performed by the Commission for Protection of Competition.

The Commission can be criticized for failing to react when Serbian government limited the trade margin for certain foodstuffs to only 10%. It can easily be determined that this percentage is not enough to cover the costs, and that in this case, small merchants are doomed to bankruptcy. Such a limitation by the Government can be seen as a form of institutionalized cartel. A similar case occurred in Hungary when the Ministry of Rural Development concluded an agreement with leading marketers not to sell watermelons above the price of 99 forints per kilogram in their retail stores. Hungarian body for protection of competition reacted only a month after the publication of such agreements and launched a formal investigation in relation to this case [24, p. 3].

The experience of the commissions worldwide shows that they are very actively involved in the idea of prevention of infringement of competition by promoting the development and implementation of corporate compliance programs. Some of the commissions, as is the case with the commissions of Australia, Canada, Japan or the Netherlands, print special guides for the introduction of compliance programs. Thus, for example, the Australian Commission in its ACCC guide suggests the introduction of compliance culture through three steps [13]. The first step is the decision to change the practice by showing a clear willingness to identify problems and allocate resources. The second step is to develop compliance know-how infrastructure. This includes training specialists (e.g. a compliance officer) responsible for the development and implementation of compliance programs. The third step is to promote the practice introduced as a regular part of all business decisions and processes. Other Commissions (Brazil, Korea) even have a certification program for good compliance programs, with subsequent regular monitoring of the implementation of such programs.

Figure 2: Average time needed for completing process of one competition case



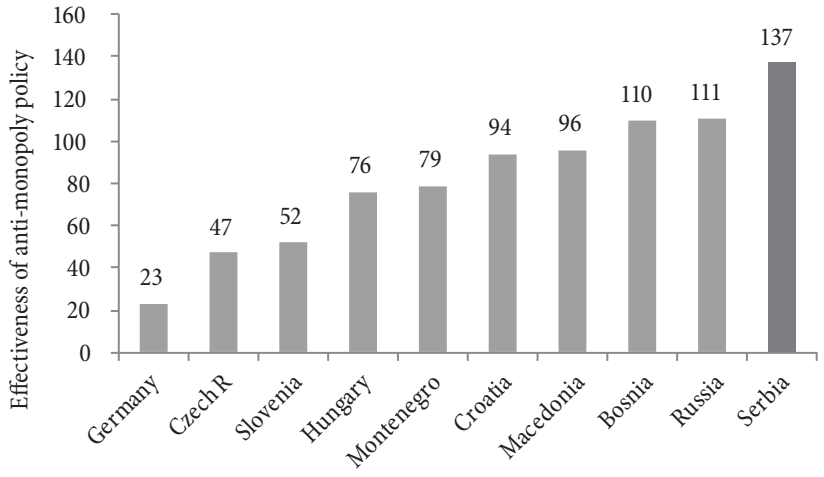
Source: http://www.kzk.org.rs/odluke/tipovi/povreda-konkurencije

Analysis of the effectiveness of anti-monopoly policy in Serbia

For the purposes of comparative analysis of the effectiveness of anti-monopoly policy, we have used the ranking indicators from the following sources: Global Competitiveness Report 2011-2012 [29], the Global Innovation Index 2012 [12] and Doing Business Report 2013 [28]. From these reports, we have selected a total of 15 indicators, which in some way reflect the competitive dynamics [21, p. 5]. One indicator relates directly to the evaluation and ranking of the effectiveness of anti-monopoly policy. Other indicators may in some way be related to market competition in the surveyed countries. These include: the existence of market dominance, the intensity of local competition, the rate of introduction of innovation, the room for cluster development and other. Our goal is to show which of the observed indicators has the highest correlation with the indicator of effectiveness of anti-monopoly policy in the surveyed countries.

Besides Serbia, the analysis also includes neighboring countries and a few developed countries in Europe. From the above listed reports, we first took individual rankings for each country according to the analyzed indicators. What we can notice immediately is that Serbia has the lowest ranking of the countries observed, when it comes

Figure 3: Effectiveness of anti-monopoly policy in the surveyed countries



Source: [29]

Table 2: Comparative analysis results

No.	Indicator	Germany	Czech R	Slovenia	Hungary	Montenegro	Croatia	Macedonia	Bosnia	Russia	Serbia	Correlating Effectiveness of anti-monopoly policy
	Effectiveness of anti-monopoly policy	1	2	3	4	5	6	7	8	9	10	
1	Intensity of local competition	1	2	4	3	7	6	5	9	8	10	0.93
2	Extent of market dominance	1	2	5	4	3	8	6	9	7	10	0.89
3	Global Innovation Index	1	3	2	4	6	5	9	10	8	7	0.87
4	Property rights	1	5	3	4	2	6	7	9	10	8	0.85
5	Judicial independence	1	5	4	3	2	7	8	6	9	10	0.84
6	Capacity for innovation	1	2	3	5	6	7	8	10	4	9	0.79
7	Prevalence of trade barriers	5	2	3	1	4	7	8	6	10	9	0.79
8	State of cluster development	1	2	3	6	9	5	8	4	7	10	0.75
9	Efficiency of legal framework in settling disputes	1	6	5	3	2	9	4	7	8	10	0.70
10	Ease of doing business	1	6	3	5	4	7	2	10	9	8	0.68
11	Regulatory environment	2	4	1	3	10	5	8	7	9	6	0.67
12	Business environment	4	8	2	5	6	3	1	10	7	9	0.38
13	Favoritism in decisions of government officials	1	9	7	5	2	6	4	3	8	10	0.33
14	Burden of government regulation	3	6	4	9	1	10	2	5	7	8	0.27

Source: Authors' calculations based on [29], [12] and [28]

to the effectiveness of anti-monopoly policy (see Figure 3). It occupies the 137th place out of 142 countries observed. Further analysis has determined the origin of such a low ranking for Serbia and has identified the areas that need the most work in order to improve the effectiveness of Serbian anti-monopoly policy.

For the purposes of easier analysis and reasoning, we have restricted the ranking to 10 countries observed. The rankings taken from these reports were recalculated in the manner that the country that occupies the worst position according to the specified indicator gets the worst ranking 10. We have then performed correlation analysis for these rankings to determine which indicators have the strongest correlation with the effective implementation of anti-monopoly policy indicator in the countries observed. The results of the analysis are presented in Table 2.

After the analysis, we can conclude that from a total of 14 indicators observed, which reflect the competition and market dynamics to some extent, 9 have a strong positive correlation with the effective implementation of anti-monopoly policy indicator. This analysis confirms that the poor position of Serbia in relation to the effectiveness of anti-monopoly policy is not coincidental, and that there is ample room for improvement of the practice of the anti-monopoly commission in Serbia.

Is high concentration of market power always harmful?

The key question to be asked is – what is the source of competitive success of one company in relation to all other companies. In other words, is the source of a company's competitive success its competence, which is valued in the form of high market and financial performances gained through measures of fair competition, or is the source of its competitive success unauthorized practice which crowds the competitors out of the market, raises entry barriers in the industry and directly threatens the interests of final consumers.

Such an analysis requires in-depth approach to the effects or consequences of alleged violation of competition practice in terms of historical strategic dynamics between the competitors, cost trends, margins and selling prices, the companies' investment trends in research and development, marketing, capital goods and employees. Namely, if a company has invested significantly more money in the development of its businesses for years on end, and thus significantly improved its market position, the analysis of its alleged abuse of a dominant position must acknowledge that fact. At the same time, if the main competitors contributed to the strengthening of its market leader position through their own business mistakes, the leader cannot be charged with abuse of a dominant position and crowding the competitors out of the market. In other words, if competitors were not equally efficient competitors [9], the leader cannot be accused of crowding out competitors and abuse of dominant position.

Gaining leadership positions based on skills, knowledge, investment and risk taken is an appropriate reward for the company [11, p. 461]. Global anti-monopoly practice supports the idea that companies that have earned a dominant position retain the accrued value and are not inhibited in its creation. Economic reasoning lies in the idea of dynamic efficiency. Namely, dynamic effective anti-monopoly policy is the one that encourages companies to continuously invest in their businesses, to develop new products and services and to increase the efficiency of their transactions. This approach creates significant long-term benefits for the society in general. In the event of its absence, companies would not be motivated to invest and innovate. Perhaps a good example of this is patent protection in pharmaceutical industry, as a kind of legalized temporary monopoly, which in the short term is not in the interest of promoting competition, but in the long run stimulates large pharmaceutical companies to invest money in the development of new drugs.

A related question is whether it makes sense to apply carbon copy strategy in Serbia in terms of copying the European Commission practices. In fact, given the stage of the life cycle of Serbian economy and still fresh reflection of the privatization process, the question is who is responsible for the fact that there is a dominant player in almost every branch and is it possible to stimulate policy competitive fragmentation at this stage of the economy's life cycle and the narrowness of the market. In our opinion, each branch should be approached following the logics

of a blank sheet of paper and see how radical trends (for example, privatization) influenced the creation of the current market situation. In other words, if the state has privatized a natural monopoly company or close to a natural monopoly company, is the purchaser guilty for becoming a dominant player in the market by purchasing the leader. Another related question is whether it makes sense to force fragmentation in certain branches, especially considering that narrow market, the logics of economies of scale and high entry barriers for investment allow only big players willing to take the risk to pass through the filter. Answers to these questions depend on the specific context of the business or industry being reviewed.

Also, in an attempt to answer this question we have used the logics of resource-partitioning theory. The essence of this theory is that there is a correlation between the growth of market concentration in mature industries and the emergence of a number of smaller specialists, which seems counterintuitive at a first glance [4]. This theory explains the simultaneous pairing of two trends within the same sector. General explanation is that generalists compete with heterogeneous resources while specialist position in the market by using homogeneous resources and that they are attracted by saturated markets dominated by generalists. A good example of how realistic this theory is can be found in the analysis of the beer market in the USA by Carroll and Swaminathan [3]. Namely, this study showed that the concentration ratio of the four leading companies in the sector rose from 10% in 1910 to 80% in 2000. In the meantime, a number of specialists or nichers appeared in the industry, covering the segments of micro-breweries, contract local breweries and small pubs.

If, for example, we observe the banking sector in Serbia, we can conclude that the level of concentration in this market has been on constant faster or slower growth path in the last ten years. Along with the impending consolidation of the banking market in Serbia [22], we can expect a higher level of specialization with the existing or new participants in the financial market.

The current situation in the banking sector is such that practically most players operate as universal banks, which means that they all offer commercial banking services to all groups of clients. Only Findomestic and ProCredit Bank are specialized to a certain extent, because the former operates mainly with private entities and offers them services and products specifically tailored for this retail segment, while the latter specializes in small businesses. The leading players (Intesa, Komercijalna banka, Raiffeisen, SoGe, Greek banks, Unicredit) are classic universal banks. Given the characteristics of the market (too small in scale compared with Western Europe, and the region), specialization has not been a rational option so far. An additional reason for this practice is the fact that they have invested heavily in the development of the branch network and if, for example, some banks decided to close the retail segment due to unprofitability, it would mean that a significant part of the investment was actually turned into sunk costs. However, a lot of pressure on the fixed costs side and drastically reduced amount of work since 2008 impose the need to explore all strategic options, including specialization, especially for smaller banks.

What are the possible directions of specialization? The organizational structure of banks follows two main lines: the type of client and the service/product that banks offer. Banks are generally divided into three major segments: Corporate (businesses) Retail (micro enterprises and individuals) and the Treasury (asset management, liquidity, FX, Money Market Operations and the like). The Corporate segment is further divided into Large, Middle and Small business, with the criteria being the turnover of the businesses and exposure of the bank to a particular client. The Retail segment is divided into the PI (Private individuals) and Micro Enterprises (entrepreneurs, shops, small businesses). The PI segment is further segmented into the so-called Affluent Clients (individuals with higher incomes or significant deposits) and Regular Clients (everyone else). Within each of the above listed groups of clients, there are specialized departments to deal with the development of products and services offered to these types of clients. Thus, for example, in Retail there are departments that deal with cash credits, then consumer loans, mortgages and the like. Then, in Retail, in the part related to Affluent Clients, there are Private Banking departments, which offer specially designed products and services to this group of clients, from loans and

deposits, to managing their money in terms of advising on investments. In the Corporate segment, there are also departments that deal with Project Financing, Factoring, Trade Finance and the like. Specialization can occur on any of the lines listed above – that is, both according to the type of clients and according to specific products that are offered to a specific group of clients.

We should bear in mind the fact that the top banks in our market are foreign-owned and that strategic decisions about specialization should be made in their parent banks. This is important to note because most of these banks have already decided on their strategies. For example, Intesa San Paolo is the dominant retail bank in its domestic market and it would be logical to expect that their expertise in that part is premium and that they will try to use the know-how mostly in this segment. Another example is Sber bank, which acquired Volks International and will most likely primarily turn to financing infrastructure projects, where the Russians have their shares, even though they are primarily a retail bank in Russia.

In conclusion, the growth of market concentration and market power of individual players may not a priori mean restricting or crowding out competition, nor does it mean that this threatens the interests of the consumers in the long run.

Antitrust compliance programs

It is very important that all the employees in one company have at least basic knowledge and understanding of the anti-monopoly legislation and possible repercussions various practices can have on the position of the company itself. Except for a few multinational companies in Serbia, which automatically take their parent companies practices, other companies in Serbia do not pay sufficient attention to synchronizing their business practices with the good principles of competition protection. Many companies, including their legal departments, ignore the anti-monopoly regulatory risk, until the Commission for Protection of Competition becomes interested in the competitive practices of a specific company. And even then, many companies do not really understand what serious reputational and financial consequences can arise from the practices that directly or indirectly threaten or restrict competition in the market.

If companies are to develop antitrust compliance programs, they need to know what competitive practices are prohibited. From the perspective of regulation of competition, all the clauses in agreements can be divided into three groups: white, black and gray clauses. Based on this division, the decisions are made in terms of which agreements or clauses belong to block exemption, and which agreements or clauses are prohibited per se and are not exempt from the application of competition law [5, p. 138]. Black clauses are those relating to those agreements and practices that represent hardcore restrictions of competition. Black clauses generally involve practices such as price fixing, market division between competitors and bid rigging.

White clauses are those related to agreements or practices which are presumed not to prevent, restrict or distort competition in the market and are therefore generally in compliance with competition law [7, p. 50].

There are also clauses that are not prohibited per se (do not fall into the category of black clauses), but there is a possibility that in the particular circumstances they distort competition in the relevant market. These are clauses such as tying sales, blackmailing buyers to act according to our demand or there will be refusals to deal with such buyers, and price discrimination on different buyers of the same product or service. Such clauses are usually called gray clauses [6, p. 205] and require specific economic and legal arguments in order to prove in a procedure that they do significantly threaten competition in the relevant market.

Generally, recommended practices are the following. First, it is a participation in the competitive dynamics based on the skills and competitiveness, but without crowding out competitors or raising entry barriers in the industry. Second, promotion of honest and fair treatment of competitors, suppliers, customers and consumers. Third, encouraging contacting the legal department regarding those practices that can be regarded as a violation or threat to competition (whistleblowing) and the protection for those pointing to auspicious practices. Also, consultations with the legal department are recommended when preparing

all important agreements or during the implementation of larger transactions (merger, acquisition, joint venture).

Practices that can be problematic from the point of view of anti-monopoly policy are as follows. First, it is not permitted to make agreements with competitors regarding prices, sales territory, customer base, distribution practices and exchange of information that may affect independent decisions. Second, it is not recommended to attend meetings with competitors at which prices are discussed. In such cases it is recommended to leave the meeting quickly and visibly to other meeting participants. Third, it is not permitted to try to harm a competitor by false statements about his products or services or other business practices. Fourth, any misrepresentation of products, prices and other characteristics of goods or business performance can be considered a violation of competition, but also misleading customers and end consumers. Fifth, it is advisable to be careful when communicating with the public and avoid statements such as "our new product will beat the competition" or "we will be able to raise prices whenever we want because of our dominant position in the market and high entry barriers." Sixth, industrial espionage and any other illegal channels to collect material non-public information about competitors are prohibited. Seventh, exclusive deal clauses should be avoided, especially to the extent where they significantly limit competition. Eighth, price, tariffs or rates fixing practices should be avoided at all cost, as well as an agreement to use the same pricing methodology, to limit the offer, and to postpone or abandon the introduction of new capacity to the market by one of the competitors. The practice of sending signals about what kind of pricing policy we are planning to lead in the near future is also problematic. Ninth, any resale price maintenance is illicit practice. Tenth, it has previously been stated that any division of market and customers among competitors would constitute black clause. The same goes for its version bid rigging by creating a virtual competition in a bidding procedure. Eleventh, we do not recommend collective boycott of an economic entity. Although the companies are allowed to choose who they work with, an agreement between companies to boycott the same customers is a prohibited practice. This would, for example, be an agreement between two manufacturers to boycott the same dealer who works with a third manufacturer in the industry. Twelfth, tying and bundling arrangements are not recommended. Tying is the situation when a vendor conditions the customer to purchase an additional product (tied product) if they wish to purchase their desired product. Bundling is the situation when a vendor requires simultaneous purchase of more products in a package, by offering a collective discount or rebate. Thirteen, pricing or promotional discrimination can be allowed if the categorized pricing conditions are known in advance to all categories of customers. Fourteenth, predatory pricing is not allowed. This is the practice of lowering prices below cost price, which wears the competitors out in the medium term. It is a practice usually used by larger competitors who have higher pricing umbrella and greater reserve to modify prices from other lines of business. Many other practices such as offering commercial bribery, intimidating competitors, suppliers or customers, and giving special incentives to dealers to exclude competitors from the range of products or services they offer are also prohibited or not recommended.

Each compliance program must emphasize that the above practices are prohibited or not recommended. Some unwritten rules say that a successful compliance program should have the following characteristics [27].

First, the program should have realistically defined goals. Many programs do not have clearly defined goals and a copy of the peremptory norms of the Law. It is very important to define user segments of such a program, i.e. whether they come from top management, sales operation or, say legal department. For example, clearly defined objectives of the program could be the education and training for sales staff, defining the relevant regulatory and reputation risks in the form of a special risk register and encouraging whistleblowing.

Second, the program should be justified from the perspective of the ratio between the expected effects and the costs borne. Good programs insist on personal responsibility and exposure, use the language of recommendation, as opposed to threats only, and identify anti-monopoly risks and real costs arising from a company's inadequate practice. Their core function is to make employees aware of possible consequences of their inappropriate behavior and actions.

As far as the costs for improper competitive behavior are concerned, they can be very high. If we consult the data from the US Department of Justice Antitrust Division, the fines paid in 2011 alone amount to over a billion dollars (see Figure 4). In 2011, one company alone, the Furukawa Electric, paid a fine amounting to 200 million dollars.

Third, a compliance program should be tailored to the specific needs of the company in question. Companies make a mistake by taking someone else's program, without any adjustments. Adjustments are important particularly in the identification of specific risks for a given type of company in a given industry. For example, for a company engaged in wholesale, specific risks are associated with contractual relationships with customers-retailers in the part related to formulating pricing and rebate policies, tied or bundle sales or giving free-on-loan refrigerators/freezers or racks. These, and other specific elements of business cooperation, should be included in a compliance program.

Fourth, the program should be supported by the top management of the company, not only in terms of verbal support, but also in terms of their active involvement in its implementation.

Fifth, the program should not be just a list of things that are prohibited. The program should include good practices that should be encouraged, especially in the area of fair treatment of the competitors, customers, consumers, suppliers and other relevant stakeholders.

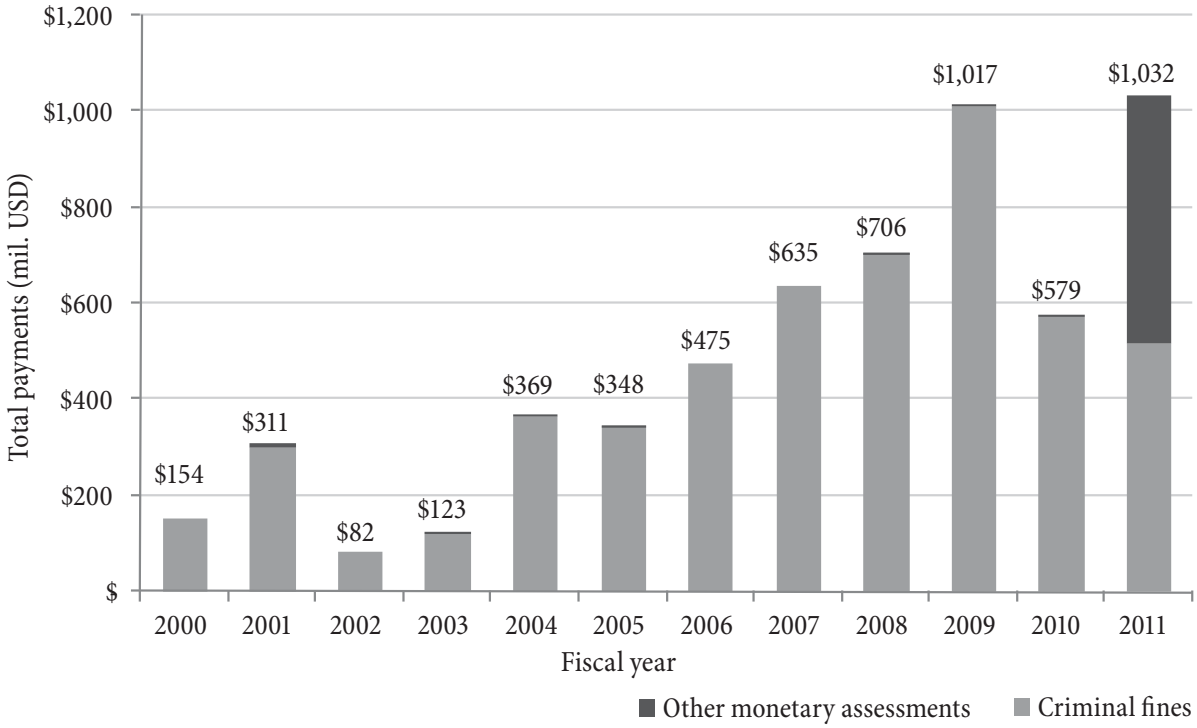
Sixth, the programs should reflect the multidisciplinary nature of the problem. It is a common mistake that compliance programs are written by legal advisors and that the economic assumptions and consequences of the practices which violate competition are completely ignored.

Seventh, the program should be written in plain language. Targeted trainings can help to clarify the doubts and uncertainties that employees may have in terms of what is allowed and in what situations such things may not be allowed. It is wrong to forward the program to the employees via circular e-mail, because this would then imply that the program bears no great significance for the company.

Eighth, the program should be supported by other company regulations, such as the rules on confidentiality, storage and archiving, email and Internet communication, the process of creating contractual clauses and the like.

Ninth, the program should be refreshed periodically due to changes in legislation and regulations or due to

Figure 4: Anti-monopoly fines in the USA



Source: [10]

changes in the competitive dynamics in the market. Periodical refreshments should be used to send a clear message to the employees that the program is extremely important for the company.

Tenth, the program should be sent to all the employees and be signed by all the employees. This gives it a higher profile and makes it more likely for the employees to read the document carefully and request clarification of relevant items.

Although compliance programs will not reduce the penalty due to possible distortion of competition, their value lies in preventing such things from ever happening [8]. On the other hand, the Commission should take as a mitigating circumstance the fact that the company had a compliance program that was not observed by one or more employees, although the company may not be relieved of responsibility due to the fact that it chooses its employees, gives them the authority to make appropriate decisions and monitors compliance with internal procedures [23].

The process of introducing a compliance program requires education and training in the first place. Commonly, the first step is to have an initial workshop with the top management and key employees. The aim of the initial workshop is to raise awareness of anti-monopoly risks and the consequences of their neglect. This is a good opportunity for everyone to get acquainted with all the key provisions of relevant legislation, jurisdiction of the Commission for Protection of Competition, allowed and prohibited practices in the field of cooperation with competitors, relationship with the suppliers and customers, pricing policies, and imposing the exclusivity principle.

The next step is to analyze the existing practices of the company and how adapted it is to the requirements of legislation. For example, the analysis may show that some of the contractual clauses that the company signs with its customers are problematic in terms of price discrimination, rebates or predatory pricing, which may indicate the need to correct the pricing policies and subsequently to adjust standard contracts.

The third step is to introduce regular reporting practices in the field of competition protection that would result from regular audits of the application of the compliance program. It is very important that there is an internal mechanism for reporting auspicious practices and that there is protection for the individuals pointing to such a practice.

Conclusion

The analysis of the anti-monopoly practice of our Commission has led to the following conclusions. First, the Commission is predominantly exhausted by the cases of approval of concentration, and quite often ignores cases of abuse of dominant position and restrictive agreements. The Commission should devote more attention to cases involving the abuse of a dominant position, and the detection and prevention of cartel agreements. Second, the Commission's good practice is the implementation of sector analyses. Namely, since 2009, the Commission for Protection of Competition has carried out, directly or through independent institutions, sector analyses, which allow it to monitor the situation in individual markets continually and systematically and, if necessary, to respond in a timely manner. Third, the Commission still lacks the employees skilled in economics. The existing economists in the Commission are still deeply overshadowed by the hegemony of the lawyers. However, the domination of legal interpretation of the economic analyses is not sufficient to defend the decisions in legal procedures before the court of law. On the other hand, the Commission's decisions do not comprise sufficiently deep analysis of the economic effects of the alleged prohibited practices. The decisions made by the Commission show that they greatly focused on the intent or aim of the companies to distort or limit competition, and much less on measuring the effects of the alleged anti-monopoly practices. Also, the Commission has not executed postmortem analysis of its decisions, i.e. analyzed the effects the application of its measures on the competitive dynamics in a particular market. Fourth, the transparency of the Commission's work has increased significantly, although there is still room to improve in the area of sharing important information with the public. Fifth, the Commission has been extremely active in terms of international cooperation, which should be further intensified given the fact that

our practice in the area of competition policy is quite limited when compared with the developed countries of the world. Sixth, the Commission, although occasionally dissatisfied with the work of the courts, is not sufficiently active in initiatives to carry out special training for the judges of the Administrative Court who will be deciding on matters relating to competition protection. Seventh, the Commission does not show activism in promoting the development and implementation of the antitrust compliance programs of the companies.

Along with the previous analysis, we have also performed the analysis of the effectiveness of anti-monopoly policy in Serbia by observing standard indicators used by relevant international institutions. In terms of the effectiveness of anti-monopoly policy, Serbia occupies the 137th place out of 142 countries observed, which is quite worrying. After further analysis which included 14 indicators, we concluded that Serbian positions according to most of these indicators are very unfavorable. In other words, objective competition indicators confirm that the anti-monopoly policy in Serbia has been ineffective so far.

The third question discussed in this paper dealt with was related to anti-monopoly practices of the companies operating in Serbia. Except for a few multinational companies in Serbia, which automatically take their parent companies practices, other companies in Serbia do not pay sufficient attention to synchronizing their business practices with the good principles of competition protection. Many companies, including their legal departments, ignore the anti-monopoly regulatory risk completely and do not have antitrust compliance programs. The paper presents the arguments in favor of introducing these programs. Although compliance programs will not reduce the penalty due to possible distortion of competition, their value lies in preventing such things from ever happening. The process of introducing compliance programs requires education and training for the employees, an analysis of the existing practices in the company and its adaptation, as well as introducing regular reporting on the practices in the field of competition protection, which would result from regular audit of compliance programs.

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