



**Competition Policy in Serbia**  
*What is the Problem?*

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## Summary

The aim of the study is to explore the current state of competition policy in Serbia, identify and consider the key obstacles and shortcomings that hinder the full and adequate implementation of the rules of competition protection, and to make recommendations for improvement of competition policy. The recommendations are primarily intended for decision makers in competition policy and legislation, as well as for those who are responsible for the proper implementation of the legal framework. The study is focused on the rules of the competition and their application, while the state aid control section is included to the extent necessary for the understanding of its importance in the context of a functioning system in line with EU standards.

The basic methodological approach in our research within this study was qualitative, while quantitative method had the additional function. The research methodology is actually consisted of collecting data through semi-structured interviews, focus groups, supported by document analysis. Semi-structured interviews were conducted with representatives of public authorities, business entities, attorneys in the field of competition and representatives of consumer organizations. Analysis of the documents has provided additional information, which are considered at all stages of research, from the development of an analytical framework, through sources of basic questions for interviews until the final thematic framework of analysis and presentation of recommendations.

It should be noted that competition law and policy in Serbia are entirely derived from EU competition policy and competition law, to which they „owe“ their emergence, identity, substantial rules and most part of the institutional and procedural legal solutions. The process of transposition of the competition rules and building a modern legal framework in this area began in 2005, with the adoption of the first law in this area, and that moment coincided with the official start of European integration process of Serbia.

In the first decade of the development of competition policy, great progress was made, particularly on the legislative front. An appropriate institutional framework has been established for the Commission for Protection of Competition (CPC), the initial steps in all relevant matters were defined and a basic level of awareness of the importance of this matter was achieved within the public. However, numerous challenges remain in order to build a modern and efficient system, fully harmonized with its European model.

Research indicates that there is an inadequate development of the policy process in the field of competition. That is a general problem that Serbia faces which therefore has a wider scope of competition policy. Specific challenges are related to the non-recognition of policy formulation as a separate phase that precedes the drafting of regulations, a lack of coordination between relevant state authorities and lack of government consultation with non-state actors.

From the formalistic perspective, it should be noted that the existing legislative framework can generally be positively assessed in terms of its substantive compliance with EU law. However, there are certain normative issues that pose a dilemma in practice: a low threshold notification of concentrations, the application of the act for procedure termination, the issue of the direct application of EU law on the basis of the SAA, the methodology of defining the relevant market and the measurement of the market concentration, and the existence of individual exemption of restrictive agreement. Objections of the European commission to the legislation on the state aid were related to

the area of state aid control, particularly in terms of the rules of exemptions for the companies in the privatization process. It is pointed out to the need of modernising the existing criminal law in the context of the competition. Also, there are certain legal uncertainties regarding the use of a special legal regime of private law for the suppression of competition violations. In addition to the regulations that are directly related to the competition policy, there is a significant number of sectorial regulations (traffic, infrastructure, postal and telecommunications services, broadcasting, agriculture, environment and energy) that have an impact on the state of market competition in Serbia, mostly in undesired direction (regulatory constraints involved, distortion and even the exclusion of competition in a particular market sector).

With regard to the application of the existing competition law, we should start with the practice of the Commission for the Protection of Competition that is the subject of debate among the professional and business community practitioners. It's work has often been criticised depending on the interest orientation of the evaluator. On the other hand, it should be noted that in a short period of time, the CPC has grown into a respectable institution among the countries in the region. Noticeable progress has been made in the area of parliamentary oversight in comparison with the period of first selection of the members of the Commission (2006). It may, however, be noted that there is significant need for improvement of the institutional capacities of the Commission.

In other words, the institution has been built and defined, as well as the procedures and organisation of the work. The current practice testifies to its possibilities and limitations in terms of the scope and quality of the implementation of its functions, and mainly the supervisory function. The capacities of the Commission are regularly assessed as insufficient in terms of its powers, in particular related to its structure and available resources. It has been noted that the Commission practice is quantitatively modest, and in qualitative terms unreliable and inconsistent. That points to the need of raising the capacities of economic analysis, regulatory policy, and cooperation with other supervisory bodies. It is significant to point out that relatively small number of cases appears in the matter of the infringement, and almost none *landmark case*.

That also raises the question of the possibility of CPC to achieve its functions as an independent body. The possibilities of achieving an appropriate level of independence in its work are brought into question by the fact that the Government has authorisation to approve the annual financial plan of the Commission and its Statute.

CPC has provided relatively high degree of transparency in its work, which is an important requirement for competition advocacy. However, there is room for improvement of the technical solutions in order to ensure adequate, accurate and reliable transparency in the work of the Commission. An important observation is that there is no specialised professional newsletter or other permanent platform for exchange of knowledge and experience in matters related to the protection of competition. The Commission has no training programs or other forms of raising the professional capacities that could raise the culture of competition in government agencies and the business community.

Through the years of dealing with the competition cases, Administrative court has gradually built a practice in this field, which is not reliable enough. However, it seems that there is a missed opportunity for purposeful legislative solution and a higher degree of legal protection that could be provided by the court with greater professional capacity in the cases related to the market and relations among business operators. We can still hear objections related to the court legal opinions and the absence of specialisation within the Administrative Court in connection with these cases, as well as problems regarding time limits for courts to make a decision, bearing in mind that this is the most burdened court in the country. On the other hand, based on the discussions with the relevant stakeholders, it can be concluded that this issue, in terms of the legislative solutions, is not topical anymore. The most common complaints in the interviews regarding court practice in the matter of competition are uncertainty, inconsistency and lack of promptness. It is estimated that the testing procedures of the Commission acts take too long, sometimes for several years, which is an important legal uncertainty factor for all the participants in the process. Also, the court practice is built without sufficient prior knowledge and experience in this field within the complex context of judicial reform. Examination of

the Commission's decisions on the merits and on the question of the legality of the reasons for the application of substantive competition rules, have not found an adequate place in the previous court practice.

Recently, closer cooperation can be noted between the Commission and the Court, there is an exchange of knowledge and experience in this matter, including the participation of judges in conferences and events organised by the Commission. However, a common estimation of the interviewees is that there is no systematic approach to capacity building of the judiciary in the investigation of acts in matters of competition. On the other hand, it has been noted that cooperation between the court and the Commission is too close and problematic in terms of independence of the court. The Commission may decisively influence the court opinion, especially if they are persistent in their opinion and standpoints. This problem occurs in the circumstances where the courts have not adopted a special legal aspects of the matter.

In the business community, there are various levels of awareness about the importance of the competition. Economic actors, who are traditionally associated with the domestic market showed less knowledge of this matter and its importance, in comparison with the larger economic actors that arrive from foreign markets.

Inadequate knowledge of the rules of competition can be noted among actors of consumer protection, including representatives of consumer organisations. That being said, one can not identify the cooperation between the Commission and consumer organisations, through the exchange of data and analytically processed initiatives for the infringement of competition law. The Commission does not communicate with consumer organisations, while the other side does not have professional capacities that are necessary for the relevant participation in the institutional forum in order to combat violations of competition. Based on interviews with actors, critical attitude occurred towards the media presentation of this topic, which usually is not at the desired level.

Based on the identified condition and challenges, following can be recommended for the improvement of the existing competition policy in Serbia:

- ***A greater degree of independence of institutions, further strengthening of capacity:*** an adequate level of financial independence of the CPC has to be provided. In terms of CSAC, full operational independence has to be established, as well as an appropriate organisational model that supports such status.
- ***Improvement of the court capacity:*** specialisation in the field of competition protection is necessary in the Administrative Court, as well as the training of acting judges of the Court. It is also necessary to consider the possibility of establishing a separate organisational units (for example, specialised council of judges). Also, planning and implementation of specific judicial training is required.
- ***Ensure consistency of practice:*** it is necessary to intensify the practice, especially in the matter of the infringements, and improve the quality of decisions, in particular by providing adequate reasons based on reliably established facts and the relevant economic analysis.
- ***Strengthening the functions of economic analysis:*** to carry out a sectorial analysis in markets that are considered to be particularly vulnerable in light of the risks of competition distortion (telecommunications, energy, transport, banking sector and the market of financial services).
- ***Strengthening the normative, consultative-instructive and coordination function of the Commission:*** action toward other state agencies, the Government and ministries, policy-makers and legislation proposers, through a strong normative and consultative functions and instruction, giving opinions on draft regulations, participation in the policy development process and the preparation of legislation.
- ***Increasing culture of professional dialogue level:*** further opening of the Commission to the public, especially to the professionals and the business community. It is necessary to create a forum for exchange of views and experiences regarding the consideration of the Commission

practice, the reasons for making certain decisions, procedural and organisational issues, but also the relevant phenomena in the market.

- **Competition advocacy:** designing and undertaking continuous activities aimed at raising awareness about the importance of competition policy. Strengthening of the competition culture causes changes on the market - the changes of the market actors behavior, the harmonisation of their business practices and acts with the competition rules, and finally, improvement of the conditions of competition on the internal market of Serbia.

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## I. Introduction

The competition policy, in legal and political context of the European Union, includes rules and institutional mechanisms of action that ensure protection of competition in the market, and competitive market structure, by sanctioning cartels and abuse of dominant position, providing merger control, as well as rules on the limitation of state aid to market participants.<sup>1</sup> Starting with the establishment of EU, the competition policy had a central place in the legal and institutional order of the European Union, and that position has maintained until today. The reasons for this lie in its specific nature, which should at the same time ensure the smooth functioning of the internal market throughout its territory in relation to all its participants, but also to intervene through the mechanisms of its protection of anti-market occurrence behavior of economic operators and Member States. Thus, competition policy is the paradigm of relations between the key pillars of a modern democratic order - free market and the rule of law. The balance between the freedom of the market, at one hand, and intervention on it, the form of regulation or sanction violations of the market for his own protection, on the other hand, are *sedes materiae* in the area of competition.

The aim of competition law can be exposed in three parts: first, improving the economic efficiency of market players and optimisation of resource allocation, starting from classic economic theory according to which the production and trade of goods and services in the most efficient perfect competition, and functional competition. The second objective is related to the protection of consumers and small market players of the procedures of large and powerful market players, which are the result of a dominant position on the market, or their agreements that restrict the market. The third, and specifically to EU competition law, is its effect on the design and construction of the EU single market, and to prevent the emergence of distortions of the market by some of its actors.<sup>2</sup> With the process of the complexity of the political context and the expansion of the EU, especially the inclusion of new national markets into a single markets, EU competition policy has undoubtedly gained in importance as a key mechanism to sanction the violation of anti-competitive conduct in the EU market, but also ensures the preservation and strengthening of its integration.<sup>3</sup>

For the past ten years of Serbia's path to European integration significant improvement has been made in the process of legal harmonisation with EU legislation.<sup>4</sup> Getting the legal regulation in the area of the protection of competition coincides with the first steps in the field of European integration, more precisely with the adoption of the first modern Competition law in 2005. This law is completely an expression of the process of legal harmonisation, in the defining of the concept of competition and in terms of the reception of key legal concepts. In the past ten years, through the prism of the flow of development of competition policy and, in particular, the effects of these policies and the application of laws which are its legal expression, may be considered a gap between desires and possibilities, between making formal rules and their application in the real context of the market and its actors,

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<sup>1</sup> Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Ltd. v Commission* (2009), par. 63.: "Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such."

<sup>2</sup> P. Craig, G. De Burca, *EU Law: texts, cases and materials* (4th ed.), Oxford University Press, 2008, str. 950-951.

<sup>3</sup> R. Whish, *Competition Law* (6th ed.), Oxford University Press, 2009, str. 22: „(...) Competition law plays a hugely important part in overriding goal of achieving single market integration. The very idea of the single market is that internal barriers within the Community should be dismantled and the goods, services, workers and capital should have complete freedom of movement.“

<sup>4</sup> Feasibility study, Serbia and Montenegro, April 2005

and finally achieving the level of awareness about the importance of competition for market development and overall social progress.

The aim of this study is to identify and discuss the current situation regarding the development of competition policy in Serbia, as well as key obstacles and deficiencies that impede the full and proper implementation of the rules of competition. The study is focused on the competition rules and their implementation, as the core of competition policy, while the field of state aid control, which forms its integral part, is covered to the extent necessary to understand its place and importance in the context of a functioning system according to the requirements and standards of the EU. Based on the exposed research findings, the study provides recommendations for improvement in this area, addressed to the holders of responsibility for deciding on the definition of policies and legislation to protect competition, as well as those responsible for the proper implementation of the existing legal framework.

The main discourse of this study is the real context of the institutional, legal and market environment in Serbia, and it does not pretend to examine certain doctrinal issues of competition law, nor to examine the current legal solutions in an academic setting, but is aimed at highlighting the shortcomings and opportunities given the legal and institutional order. Therefore, it is a study focused on policy advocacy to strengthen the enforcement of competition policy in practice by competent authorities and relevant stakeholders.

## I.1 Methodological approach of the research

The main methodological approach in our research was qualitative method, in order to provide insight into the substance of the relevant issues, as well as the reasons that occur after the given findings and proposed recommendations. Quantitative analysis of numerical data that were available or provided in the study was used as a secondary and supplementary method. The analytical framework for the study includes the development of a research problem and defining the key issues to be explored.

The research methodology is consisted of qualitative techniques of data collection as the main source of factual data, supported by archival research and analysis that enable certain quantitative considerations. The semi-structured interviews were conducted with representatives of public authorities, businesses, attorneys in the field of competition and representatives of consumer organisations. The involvement of these four target groups of interviewees should provide multisided and profound vision on competition policy problems and the application of the rules in practice of state authorities and businesses.

The analysis of documents provided additional information, which were considered at all stages of research, from the development of the analytical framework, through sources of basic questions for the interviews, to the final thematic framework of analysis and presentation of recommendations. Having in mind the *iterative* nature of qualitative methodological approach,<sup>5</sup> it was important to repeat the consideration of study findings obtained from different techniques and stages of research, to establish connections and relationships between them, in order to attain insight into the essence of the problems that are the subject of research.

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<sup>5</sup> Dey, I. (1993). *Qualitative data analysis: A user-friendly guide for social scientists*, p. 273

## I.2 The structure of the study

The study is divided into eight chapters: after the introduction, the second chapter provides a brief analysis of the legal and political conditions for the emergence and development of competition policy and law in Serbia. The Chapter III provides an overview of the essential questions regarding development of the legal framework for the competition protection and harmonisation with EU legislation. The institutional framework which defines competition policy, passed regulations and performance of their application is explored and explained in the Chapter IV. The Chapter V provides an overview of outstanding issues in relation to the creation of competition policy in the context of public policy and issues concerning legislation in this area. The functioning of the relevant institutions, their practices and other relevant issues regarding the application of competition rules, are exposed in Chapter VI. In this part of the study, special attention was paid to the practice of the Competition Commission, as well as the court practice. In addition, business practices and understanding of competition policy, as the building blocks of the culture of competition, will be presented in this part of the study. The most significant observations and evaluation of exposed findings are presented within the discussion of the research results in Chapter VII.

Finally, Chapter VIII reviews the conclusions of the study and recommendations for the development of competition policy in Serbia.

## II. The historical background of competition policy in Serbia

Serbia began the transition process with the new Constitution in 1990, which established a new legal, economic and political order, based on the freedoms and rights of person and of the citizen, the rule of law and social justice.<sup>6</sup> In the context of this study, this means transition from a socialist-type economy to a market economy, liberalisation of the legal framework of trade of goods and services, and business in general, as well as the privatisation of state and public business entities.

Similarly to other post-socialist countries of Eastern and Central Europe, the transition has left a deep mark on the economic structure: a drastic decline in industrial production, increased unemployment and the impoverishment of the population, the loss of previous markets and slow win of new, difficulties in integration into the global flows of goods and services, insufficient inflow of foreign investment are the consequences of that process. However, despite these general characteristics, the period of transition in Serbia also had some specific features that had another aggravating character. In this regard, it is enough to mention the United Nations economic sanctions against Serbia (and Montenegro),<sup>7</sup> which resulted in additional insulation and a weakening of its economy, including the emergence of hyperinflation in 1993, as well as the military intervention of NATO in 1999, during which has been hit a significant part of the road, energy and telecommunications infrastructure in Serbia. Therefore, Serbia began the 2000s with important political changes, democratisation and integration into global trends, especially in the process of European integration, on the one hand, but also with a large burden of structural economic distortions from the previous period and the loss of its economic potential. This kind of development had its consequences on the slow flow of economic growth compared to other countries in transition.

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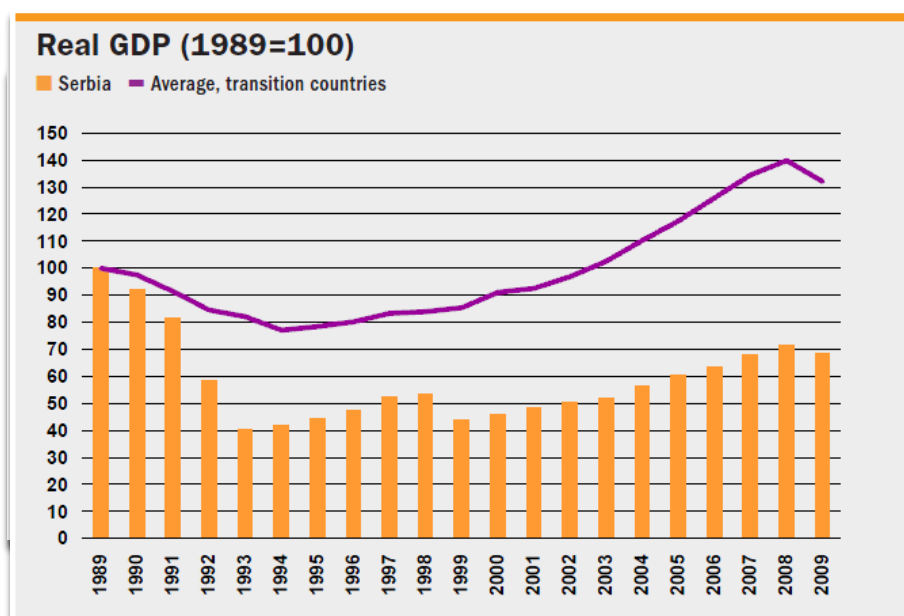
<sup>6</sup> Art. 1 of the Constitution RS (1990)

<sup>7</sup> UN Security Council Resolution No. 757, May 30, 1992

The privatisation process, which was mainly completed before the introduction of the legal regime of competition in 2005, had great impact on the state of the market competition in Serbia. This phenomenon is particularly important in certain sectoral markets, because it caused the formation of conglomerates without the mechanism of concentrations control, especially in agriculture, the food industry and retail trade of consumer goods.

Nevertheless, in the context of the introduction of modern rules of competition, we should bear in mind the specificity of the socialist economic model of Yugoslavia. It was not a classic state planned economy of real-socialist type, but the so-called socialist self-management model, whose essential characteristic is anti-competitive agreement making in the operation of business enterprises. This "agreement" element, according to the estimates of interviewees, still occurs in the business practices of local businesses, as a part of the tradition and business practices in this area.

*The index of growth of the gross domestic product of Serbia in relation to the average of countries in transition<sup>8</sup>*



Building of the competition protection system in Serbia began with the adoption of the Antimonopoly Law in 1996, which was the basis for the establishment of the Antimonopoly Commission of the former federal state and its administration<sup>9</sup>. This organisation was responsible for taking measures against the abuse of monopoly or dominant position of economic entities on market.<sup>10</sup>

However, the first act that implemented the concept of competition policy, which is a part of the legal and political order of the European Union, is the Law on Protection of Competition in 2005.<sup>11</sup> In this period, intense legal and institutional changes in this area happened, starting with the establishment of the Commission for Protection of Competition, as the first independent and autonomous body responsible for the supervision of violations of competition in the Serbian market. At that time, practice of the application of the competition rules has started. The whole process of examination

<sup>8</sup> Source: EBRD Transition Report 2009

<sup>9</sup> Federal Republic of Yugoslavia (Serbia and Montenegro)

<sup>10</sup> Antimonopoly Law ("Off. Gazette FRY", no. 29/96)

<sup>11</sup> The Law on Protection of Competition ("Official Gazette" no. 79/2005)

and sanctioning of the competition violations has been reviewed and revised. The jurisdiction of courts was changed in matters of competition, and further harmonisation with the competition acquis was conducted.

Competition Law, which was passed in 2009 is an expression of the effort to further improvement of the level of compliance with EU law. In terms of the rules of competition, the legal reception of authoritative rules of EU legislation was conducted, in accordance with the commitments made in the EU accession process. In fact, the provisions on prohibition of restrictive agreements and practices, abuse of dominant position, the block exemption regulation, the control of concentrations, as well as a key procedural rules were transposed.<sup>12</sup>

This law has provided the answer to the problems of the previous practice of applying the Law. In fact, during the period of validity of the Law in 2005 there have been no sanctions against the perpetrators of violations of the competition, and any act of the Commission in the process of judicial review have not been endorsed. With this in mind, the Law of 2009 has improved procedural powers of the Commission in the collection of relevant data and evidence in the investigation procedure.

Particularly important is the abolition of the previous duality of procedures for establishing infringement of the competition, which included succession of administrative and judicial procedures, then parallelism of proceedings investigating the legality of acts passed in both proceedings (administrative dispute and appellate proceedings in misdemeanor proceedings). These defects are removed by reduction of the test procedure for determining violations and administrative measures to protect competition, as part of a unified administrative proceedings pending before the Commission, and whose legality is then tested in an administrative dispute before the Administrative Court. It is so called *monistic process model*, most commonly used in the European Competition Network (ECN),<sup>13</sup> which means that the same authority as part of the administrative procedure examines and makes decisions.<sup>14</sup>

In addition to *stricto sensu* competition rule, which are implemented in legislation in the previously described manner, the Law on State Aid was enacted in 2009. This law transposed the rules of the system of state aid control of the European Union. It is the first regulation in Serbian legal system regarding this field, and it introduces a mechanism of control, approval and sanctioning of illegal financial and other benefits that are directly or indirectly allocated from public resources. Based on these mechanisms, users of the aid can acquire a more favorable position in the market compared to its competitors, thus distorting or risking distortion of competition in the market. Based on this law, starting from March 2010, Commission for State Aid Control was founded, consisting of representatives of relevant ministries and Commission for Protection of Competition.

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<sup>12</sup> Art. 101 i 102 TFEU, Council Regulations 1/2003 i 139/2004, Commission Regulation 802/2004, 773/2004, etc.

<sup>13</sup> The European Commission and national competition authorities in all EU countries mutually cooperate within the European Competition Network (ECN)

<sup>14</sup> ECN working group cooperation issues and due process, *Decision-making powers report*, 31 October 2012

### III. The legal framework and harmonisation with the competition law of EU

The Law on Protection of Competition includes a system of standards that protects market competition and rules of the game in the market contest opened to all interested parties. The goal of the competition rules is the suppression of prescribed forms of violations of market behavior by market distortions, restriction, closing, deformation, such as restrictive agreements and abuse of dominant position, as well as preventive action through control of concentration. All actions are oriented on interest of consumer, who bears the burden of the lack of competition through higher prices and lower quality of goods and services.

A lot has been done in the field of development of the legal framework for the protection of competition in Serbia, since the enactment of the first law in 2000. First of all, the concept of the model of the European model of the system of competition is defined, which is in force in the legal field of the European Union, and built on the basis of Articles 81 and 82 of the Treaty of Rome, as well as the later regulations on the control of concentrations.<sup>15</sup>

Primarily, the Law on Protection of Competition represent efforts in relation to the process of EU accession and legal harmonisation, with the aim of implementing the correct and precise transposition of the competition rules of community law, their adequate incorporation into the legal system of the Republic of Serbia, and the definition of an efficient and effective institutional mechanism that will ensure the proper and effective implementation.

In the process of completing the legal framework for protection of competition, on the basis of this law, following bylaws have been adopted:

- 1) Regulation on the criteria for determining the relevant market ("Off. Gazette of RS" no. 89/09)
- 2) Regulation on the criteria for determining the amount to be paid on the basis of merger remedies and procedural breaches, and deadlines for their pay and conditions for the determination of such measures ("Off. Gazette of RS" no. 50/10)
- 3) Regulation on the form and content of the official identity card of the Competition Commission officials ("Off. Gazette of RS" no. 89/09)
- 4) Regulation on the content and notification of concentration ("Off. Gazette of RS" no. 89/09)
- 5) Regulation on the content of the application for an individual exemption of prohibition on restrictive agreements ("Off. Gazette of RS" no. 107/09)
- 6) Regulation on agreements between market participants which operate at different levels of the production or distribution that are exempt from the prohibition ("Off. Gazette of RS" no. 11/10)
- 7) Regulation on agreements on research and development between market participants which operate at the same level of production or distribution that is exempt from the prohibition ("Off. Gazette of RS" no. 11/10)
- 8) Regulation on specialisation agreements between market participants which operate at the same level of production or distribution that is exempt from the prohibition ("Off. Gazette of RS" no. 11/10)
- 9) Regulation on conditions for the release of the obligation to pay monetary amount of measure of competition protection ("Off. Gazette of RS" no. 50/10)
- 10) Statute of the Commission for Protection of Competition ("Off. Gazette of RS" no. 49/10)

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<sup>15</sup> Council Regulation No. 4064/89 on the control of concentrations between undertakings

11) Tariff on fees for activities within the competence of the Commission for Protection of Competition ("Off. Gazette of RS" no. 49/11)

In addition, the Commission in accordance with its authority under Art. 21, page 1, items. 5 of the Act, adopted Guidelines on the application of Article 69 of the Competition Law and the Regulation on conditions for the release of the obligation to pay monetary amount merger remedies, as well as guidelines for the implementation of the Regulation for determining the amount to be paid on the basis of merger remedies and procedural penalty.

The transposition of relevant substantive and procedural rules of primary and secondary EU legislation was conducted within the Law on Protection of Competition. In the first place, the Law in terms of the concept of competition protection, as well as its basic rules, based on the provisions of the Competition of the founding treaties. In addition, the Law is compliant, fully or with some partial alignment with the following secondary legislation:

1. Regulation of the Council (EC) 1/2003 of 16 December 2002 on the implementation of the competition rules that have been laid down in Articles 81 and 82 of the EC Treaty;
2. Regulation of the Council (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation);
3. Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of the Article 101, paragraph 3 of the Treaty on the functioning of the European Union to categories of vertical agreements and concerted practices;
4. Commission Regulation (EC) 773/2004 of 7 April 2004 on the procedures which the Commission takes under Article 81 and 82 of the EC Treaty;
5. Commission Regulation (EC) 802/2004 of 7 April 2004 on the implementation of Council Regulation (EC) 139/2004 on the control of concentrations between undertakings;
6. Commission Regulation (EU) 1217/2010 of 14 December 2010 on the application of Article 101, paragraph 3 of the Treaty on the Functioning of the European Union to certain categories of agreements on research and development;
7. Commission Regulation (EU) 1218/2010 of 14 December 2010 on the application of Article 101, paragraph 3 of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements;
8. The Commission Notification on the definition of the relevant market for the purposes of Community competition (97 / C 327/03);
9. Regulation on conditions for the release of the obligation to pay a sum of money merger remedies ("Off. Gazette of RS" no. 50/10)
10. Guidelines on the method of determining the sanctions in accordance with Article 23 (2) (a) of Regulation 1/2003 (2006 / C 210/02);
11. Commission Notification on agreements of minor importance which do not restrict competition significantly in accordance with Article 101 (1) of the Treaty on the Functioning of the European Union (*de minimis*).

This way, the legal framework for the protection of competition, ten years after its construction, is almost completed. According to the current plan of the adoption of the Commission by-laws, in preparing the remaining group of four block exemption (the spare parts of motor vehicles, technology transfer agreements in the insurance sector and road, rail and inland waterway traffic) as well as a new regulation on the content and notification of concentration.<sup>16</sup> However, the current legal

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<sup>16</sup> Annual report of CPC, 2014

framework goes through more complex and harder checking by practices on a daily basis, both in the Commission practice and from the perspective of judicial control, while at the same time the relevant EU rules and jurisprudence of the European Court of Justice and the Court of Justice of the EU are changing. Based primarily on the demands of practice for implementation of the Law, and in particular on the basis of observations and comments from the EC Annual Report and subsequent communications, the modification of certain legal provisions amended in 2013 was carried out.

It is important to note that the question of competition rules transposition is not similar with the issues in the process of legal harmonisation in other areas. Legal harmonisation is part of a political process, which is monitored and directed within mechanisms of the negotiation process, its bodies and activities, such as analytical review and assessment of harmonisation of national legislation of candidate country with the EU acquis (screening), a statement of acceptance of the EU acquis in the given field or seeking transitional periods for the full alignment and implementation of such harmonized legislation is taking place in this process.

However, in the case of the competition protection, the obligation of full and proper adoption of relevant standards, including the realisation of full complementarity of the system application, has the legal character, because the fulfillment of those commitments actually has already been taken under the Stabilisation and Association Agreement,<sup>17</sup> and in this sense, it has the effect of obligations under international law. This conclusion is important from the aspect of the hierarchy of legal norms, constitutional rule which predicts that national legislation may not be in noncompliance with the ratified international treaties and generally accepted rules of international law.<sup>18</sup>

### III.1 The substantive competition rules

In terms of substantial rules, the Law assumes the definition of restrictive agreements in accordance with the Art. 101 paragraph 1 TFEU, and determines them as agreements between undertakings which have as their object or effect a significant restriction, distortion or prevention of the competition in the territory of the Republic of Serbia. In addition, restrictive agreements are defined as contracts and individual contractual stipulations, explicit or tacit agreements, concerted practices and decisions of associations of market participants, and that in particular:

- 1) directly or indirectly fix purchase or selling prices or other trading conditions;
- 2) restrict and control production, markets, technical development or investment;
- 3) apply dissimilar conditions to equivalent transactions with respect to various market participants, which put undertakings at a disadvantage in relation to competitors;
- 4) make the conclusion of contracts or agreements by acceptance of supplementary obligations which, given its nature and trade customs and practice, have no connection with the subject of the agreement;
- 5) divide markets or sources of supply.

Restrictive agreements are prohibited, and thus constitute a violation of the competition being tested, and which are determined by the prescribed measures to protect competition in the proceedings before the Commission.

In addition, restrictive agreements are considered null and void before the Law. Exemptions from the prohibition and nullity of restrictive agreements predicted by the Law are the individual exemption and

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<sup>17</sup> Art. 73 SAA

<sup>18</sup> Art. 194 Constitution of RS



exemptions by categories of agreements (block exemption). In the first case, a special procedure is carried out at the request of an interested market participant, in which a decision on an individual exemption is adopted if the legal conditions are met. In the second case, the exemptions are *ex lege*, on the basis of complex special rules which are regulated with by-laws (the Regulation on block exemption), and adopted by the Government on a proposal from the Commission, again in the process of legal harmonisation with the relevant laws of the European Commission. The third aspect of the exemption from the prohibition of restrictive agreements is the *de minimis* rule, which applies to agreements of minor significance, considering the size of the market share of the participants in the agreement and their position in the production and marketing chain.

The condition for the exemption of restrictive agreements by individual or block exemption is the existence of their contribution to the improvement of production and trade, and fostering technical or economic progress, while providing consumers a fair share of benefits, under condition they do not impose restrictions on market participants which are not indispensable to achieve the objective of the agreement, or that does not exclude competition in the relevant market or in a substantial part of it. Prohibition of abuse of dominant position under Art. 16 of the Law takes over a provision in Art. 102 TFEU, and stipulates that under the abuse of dominant position, in particular considered:

- 1) directly or indirectly imposing unfair purchase or selling prices or other unfair business conditions;
- 2) limiting production, markets or technical development;
- 3) applying dissimilar conditions to equivalent transaction with other trading parties, thereby placing them on the market put in an unfavorable position in relation to competitors;
- 4) conditioning the contract that the other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contract.

However, the legal criteria for determining a dominant position have undergone a certain evolution, from the first day of the Law from 2005. In that period, a dominant position in the relevant market was held by market participant who operates independently of other market participants, or who make business decisions without taking into account business decisions of its competitors, suppliers, customers and / or end-users of its goods and / or services. In doing so, there was a legal presumption of a dominant position for the participants with a market share exceeding 40% in the relevant market.<sup>19</sup> The novelty to the Law of 2009 brings somewhat different formulation: "the dominant position in the relevant market holds a market participant who has no competition or the competition is insignificant, or that has a significantly better position in comparison with competitors, taking into account the size of the market share, economic and financial force, access to markets, supply and distribution, as well as legal or factual barriers for access to other market participants. "<sup>20</sup>

In addition, the Law maintained the provisions of the assumption of the existence of a dominant position of the parties with a market share of 40% or more, only this assumption is explicated, and the burden of proof on that market participants that there is no dominant position is provided.

Amendments to the Act in 2013, based on the comments and suggestions of the European Commission, have given the new formulation of criteria for determining a dominant position. As a general criterion of dominant position, now lays down the requirement that the property that market participant has because of its market power may operate in the relevant market to a large extent on the independent or potential competitors, customers, suppliers or consumers. Thus defined rule is

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<sup>19</sup> Art. 16. Law on Protection of Competition 2005.

<sup>20</sup> Art. 15 Law on Protection of Competition 2009.

designed on the basis of the relevant jurisprudence of European courts.<sup>21</sup> As supplementary elements, we defined the parameters relating to the structure of the relevant markets, actual and potential competitors, economic and financial power, the degree of vertical integration, the advantages in access to supplies and distribution, legal and factual obstacles to access to other market participants, and others. One indicator is the market share in the relevant market of 40%, provided that no more characteristic of the legal requirements of a dominant position. In addition, the Act provides that the burden of proving the existence of a dominant position on the relevant market is always established within the Commission, regardless of the defined indicators or market share of the market participants.

## III.2 Control of concentrations

Control of concentrations (Merger control) represents, in addition to control over violations of competition, the basic control function of the Commission for Protection of Competition. The Law provides for the obligation of notification to the participants in the concentration of which is:

- 1) the total annual turnover in the global market in the preceding year exceeds EUR 100 million, provided that at least one participant in the concentration in the market of the Republic of Serbia has an income of more than ten million;
- 2) the total annual income of at least two undertakings concerned in the market of the Republic of Serbia in excess of 20 million euros in the preceding year, provided that at least two undertakings concerned in the market of the Republic of Serbia have revenues in excess of one million euros in the same period.

The concentration which is implemented through a takeover bid pursuant to the regulations governing the takeover of joint stock companies must be registered and you have not met the conditions quoted.

The Commission may conduct a test of concentration *ex officio*:

- if it finds that the combined market share of the parties to concentration in the market of the Republic of Serbia amounts to at least 40%;
- if reasonably assumes that the concentration does not meet the legal conditions prescribed;
- if it determines the existence of concentration which is not approved in accordance with the Law.

If during the test procedure of a notification requirements for the *ex officio* testing procedure are found, the procedure will continue officially. The duration of the test procedure of concentrations is limited to four months from the date of initiation of proceedings. During the testing procedure, parties involved in concentration are obliged to stop its implementation until the adoption of the act of the Commission. The concentration is approved if such a decision is passed in summary proceedings, after conducting a test procedure or after the expiry of one month from the date of receipt of the notification, or absolute period of four months from the initiation of the proceedings *ex officio*. The Commission may issue a conditional approval if based on the submissions of the applicant estimates that the proposed special conditions under which the applicant is willing to accept similar conditions for the exercise of the authorization. For tasks of issuing acts in the course of merger control, the benefits provided by the Tariff adopted by the Commission, with the prior approval of the Government. Under current Tariff, these fees amounted to 25,000 euros, while issuing approvals in

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<sup>21</sup> *Case 85/76 Hoffmann-La Roche v. Commission (1979) ECR 461.*

summary proceedings, or up to 50,000 euros in issuing approvals in the test procedure with conditional approval.

### III.3 Procedural Provisions

Procedural legal regime of the Law provides for specific rules in relation to the general administrative procedure, as well as in relation to the earlier legislation. In the first place, a special provision of the party in the process of competition that only gives capacity to the market participant who submitted the application concentration (notification) or a request for an individual exemption (operations per request), or against whom the investigative procedure in the control of concentrations or injury competition (*ex officio* proceedings). At the same time, explicitly excluded as a party in the proceedings in relation to the applicants initiative to examine violations of the competition, are providers of information and data, experts and organizations whose analyzes are used in the process, as well as in relation to other state bodies and organizations that cooperate with the competent authorities in during the proceedings. The reasoning for this legal solution is tied to the essence of the process of competition, that is the situation that different market participants, competitors have a conflicting interests, and they are ready to use all available legal, economic and other resources for their struggle. According to the previous legal solution, answering the possibility of abuse of procedural rights of parties with opposing interests, and requires procedural actions and the use of procedural powers contrary to their aim and meaning, and that is to examine the specific situation that is relevant in terms of competition, but the purpose of harming reputation competitor, loading costs associated with the process, attempts to access data on the operations of a competitor, etc. Bearing in mind that the process of competition does not take place in order to secure or protect private interests, or the interests of a particular competitor, which may be expressed as a request for protection from unfair competition but to protect the public interest, namely the prevention of violations of the competition, the legislator has justifiably opted for that legal solution. Second, the Law provides for a number of specific instruments in order to create possibilities for unimpeded and unrestricted access to information available to the parties and third parties, then the specific forms of the crime scene and searched the rooms and stuff, and temporary seizure of items and documents containing relevant information. As a specific procedural rule, the Law defines that the Commission has authority to carry out unannounced on-site investigation (ie. *dawn raid*) if there is reasonable suspicion that there is a danger of disposal or altering evidence in the hands of a party or a third party, and is carried out by sudden control rooms or data, documents and things that are in this place, which is notified party and holder of premises and things at the moment of the crime scene on the spot.

Special attention is paid to the cooperation of the Commission and other state bodies on various grounds when they have information relevant to the proceedings of the infringement, in order to create the legal preconditions for efficient operation of the procedure and the complete determination of the relevant facts, and in this sense, the Law contains provisions on obligation of cooperation, including the obligation of police assistance, measures non-public and public warnings, etc.

In the procedural part of the Law is being implemented clear delineation procedures are carried out *ex officio*, of the procedures at the request of the parties, participants in the market. The process takes place at the request of a party, in the process for approval of concentration, and in the process of individual exemption. In this way, defined the legal consequences of failure to adopt the Commission's decision within the prescribed deadline (*silence of the administration*), and provided a positive legal presumption of approval of the application process requires concentration. In the case of missing the deadline for notification of concentration, the procedure is carried out *ex officio*, with all the legal consequences that follow such a procedural regime. In the infringement procedure, before taking a decision, the Commission is obliged to inform the client of relevant facts, evidence and the elements

on which to base a solution (statement of objections), in order to enable the party to a statement about it. Finally, all acts which authoritatively decided in the proceedings before the Commission shall have the status of an administrative act and the legal form of solutions. These are decisions on the question of the existence of harm to competition, individual exemption and approval or prohibition of a concentration.

### III.4 Administrative Measures

If in the infringement procedure its existence is determined, the Commission has authority to order commitments at the expense of the party, in terms of the payment of a sum of money or obligations of certain behavior. It is clear that such a legal solution fundamentally changes the legal nature of the sanctions, which according to the previous legal solution, the misdemeanor penalties, and has the property according to the current administrative measures. These measures to protect competition and measures to eliminate violations of the competition have the greatest significance in terms of achieving the overall objective of the Law. Administrative measures to eliminate violations of the competition are determined in the case of establishing an infringement of competition, and the aim is to eliminate the identified violations, and to prevent the possibility of its occurrence. There are two basic forms of these measures: behavioural measures, which contain tasks to undertake certain behavior or prohibition of certain conduct; and structural measures, which have the status of character, focused on the goal of changes in the structure of market participants, in order to eliminate the danger of a repetition of the violation of competition, establish the structure as it existed before the violation.

The purpose of the merger remedies is conditional on the overall aim of the Law, and to the economic development and welfare of society, especially the benefit of consumers. This is a particular object of the Law since it has a high degree of generality and not an easy enable concretization in connection with the determination of individual measures. The Law does not specify the specific purpose of the measures that were laid down, so that task belongs to the Commission through its administrative practice, to enable its closer definition. As important elements, in this sense, could be extracted proportionality in relation to the effects of the violation, and preventive measures impact.

On the basis of the relevant bylaw, that was passed on a proposal from the Commission, specific scope of the subjective character of criteria is however provided, such as intentions, recovery and incitement, in addition to the objective character, such as weight, implications and duration of the infringement<sup>22</sup>.

### III.5 Leniency Programme

The Law implements leniency program, under the provision of Art. 69, which stipulates that the restrictive agreement participant, which first reported to the Commission the existence of an agreement or submitted evidence on which the Commission has made a decision on the violation of the competition, shall be relieved from the obligation to pay a sum of money remedies. In this case, exemption from sanctions (administrative measures) will apply provided that the Commission, at the time of submission of evidence, had no previous knowledge of the existence of an agreement or had knowledge of, or did not have enough evidence to make a decision on the initiation of proceedings.<sup>23</sup>

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<sup>22</sup> Decree on criteria for determining the amount to be paid on the basis of measures to protect competition and procedural penalty, manner and deadlines for payment and conditions for determining those measures (Official Gazette no. 50/10).

<sup>23</sup> Detailed conditions of application of leniency program arranged Regulation on conditions for the release of the obligation to pay a sum of money merger remedies (Official Gazette no. 50/10).

## III.6 Instructions and Guidelines

The Law, among the powers of the Commission, cites the possibility of adopting instructions and guidelines for the implementation of the Law. It is one of the rare situations when the Serbian legislation provides for the adoption of *soft law* regulations. At the same time, it is the only direct regulatory functions of the Commission, bearing in mind that most of its powers related to proposing regulations (bylaws for the implementation LPC), participation in their development (regulations to be adopted in the field of competition) or giving opinions (u regarding the implementation of the LPC, other competent authorities on draft regulations and the applicable regulations having an impact on competition in the market).

The Commission has so far adopted the following instructions:

1. The decision on the method of publication of the Commission's acts, or omission (anonymization) data in the documents of the Commission for Protection of Competition;
2. Instruction for the detection of set up tenders in public procurement procedures;
3. Instruction on work with clients;
4. Instruction on the content of the initiative for the infringement of Article 16 of the Law on Protection of Competition, together with the Form for the submission of the initiative;
5. Instruction on the application of competition rules on associations of undertakings;
6. Instruction on the method of calculating the total revenue undertakings concerned in cases where control is acquired over the work of the company;
7. Instructions for calculating the total annual income under Article 23 of the Law on Protection of Competition in conjunction with Article 5 of the Law.

In addition, the Commission has adopted the following guidelines:

1. Guidelines for the application of Article 69 of the Competition Law and the Regulation on conditions for the release of the obligation to pay a sum of money merger remedies
2. Guidelines for the implementation of the Regulation for determining the amount to be paid on the basis of measures to protect competition and procedural penalty.

Legal nature and effects of these regulations, and primarily with regard to guidelines, is not entirely clear in the context of the legal system of Serbia, and yet to be determined in practice of the Commission and the competent court on the legality of its decisions, institutions, position and effects of these acts in relation to the mandatory regulations (laws, by-laws) and to the individual acts within the jurisdiction of the Commission. The Law on State Administration defines an instruction as one of the regulations (ie. legal acts of external character) which is brought by the state authorities, and in this case independent, specific administrative organization, which determines how to execute certain provisions of the Law or other regulation<sup>24</sup>. On the other hand, the guidelines do not have adequate grounds in the legal system, so it can be a thesis, based on the practice of the European Commission and the European Court of Justice in respect of similar instruments (recommendations, opinions, guidelines etc.), it is instructive, legally non-binding act, which does not exempt from judicial administration, especially in terms of the interpretation or justification of compliance with the act<sup>25</sup>. These are the instruments in order to increase the efficiency of the competent authorities, which "obliges its participants in a common cognitive framework, which does not require coercion."<sup>26</sup> These acts certainly have no direct legal effect on the approach in practice.

On the other hand, regarding the effect of these acts, their knowledge is required by market participants and behavior is desirable and necessary in order to harmonize their actions, both in the business, which is the subject of legal substantial rules and the procedure before the Commission.<sup>27</sup>

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<sup>24</sup> Art. 15 of the Law on State Administration ("Off. Gazette of RS", no. 79/2005, 101/2007, 95/2010 and 99/2014)

<sup>25</sup> P. Craig, G. De Burca, *EU Law: texts, cases and materials* (4th ed.), Oxford University Press, 2008, pg. 86.

<sup>26</sup> M. Dawson, *New Governance and the Transformation of European Law*, Cambridge University Press (2011), pg. 6

<sup>27</sup> ECJ, Case T-148/89 Trefilunion SA v. Commission (1995): "The Court considers that (...) it is desirable for undertakings in order to be able to define their position in full knowledge of the facts to be able to determine in detail, in accordance with any system which the Commission might consider appropriate, the method of calculation of the fine imposed upon them".

That review policies and guidelines adopted by the Commission so far, gives a confusing picture because it is not clear according to which criteria are defined for one or the other form of the act. Based on the definition of front directions in this category would certainly fall within any of these acts (instructions on anonymization, on the work of the parties, on the calculation of income), while the remaining more attached to material issues regarding the application of certain rules, like the adopted guidelines. In addition, based on discussions with stakeholders, we can see that there is significant untapped space for these instruments, particularly in the field of merger control, where there is a series of questions of a technical character which require a closer explanation or consistency to bear in mind the doctrine of legitimate expectations (eng. legitimate expectation), the institution that was created in the jurisprudence of the European Court of Justice as a special aspect of the principle of legal certainty, which has yet to find its place in the practice of national institutions.<sup>28</sup> In the context of competition law and soft law instruments of the European Commission, the application of the principle of legitimate expectations is determined that the institution that makes such acts simultaneously sets the limits of the discretion to decide, and that such acts under certain conditions and depending on the content, can have legal effect.<sup>29</sup>

### III.7 The current situation in the EU accession process

In the context of the accession negotiations with the EU, the area of competition is the subject of Chapter VIII, which includes *acquis* of three parts: the protection of competition, state aid control and liberalization. Negotiating Group for Competition was formed by a Government decision, and is run by representatives of the competent Ministry of Commerce and its members include representatives of relevant ministries, the National Bank and other organizations and bodies, with the technical assistance of the Serbian European Integration Office<sup>30</sup>. Negotiating Group has the responsibility to participate in the process of screening of the legislation to prepare a draft negotiating position for the corresponding chapter, to monitor the implementation of the National Programme for the Adoption of the *Acquis*, and other tasks related to the process of accession to the relevant authorities.

Up to this point in Chapter VIII, as well as in all other areas, the process is completed with regard to explanatory and bilateral screening. The next step is the preparation and submission of the official report of the EC for this chapter (Screening report), which contains an assessment of the achieved level of compliance of the legal order of the candidate countries with the EU *acquis*, the current level of implementation, and evaluation of the success of plans for future compliance. Bearing in mind the

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<sup>28</sup> P. Craig, G. DeBurca, *op.cit.*, str. 554: "The general principle is that protection of legitimate expectations extends to any individual who is in situation from which it is clear that, in giving precise and specific assurances, the Community institutions caused that person to entertain justified hopes"; D. Chalmers, *European Union Law: texts and materials*, Cambridge University Press, 2 ed. (2008), str. 455: "(The doctrine of legitimate expectation) It requires that if Community institution induces a party to take a particular course of action, the institution may not then renege on its earlier position where to do so would cause the other party to suffer loss"

<sup>29</sup> ECJ, Case C-189/02 P *Dansk Rørindustri A/S* (2005): "In adopting rules of conduct designed to produce external effects, as is the case of the Guidelines, which are aimed at traders, and in announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects".

<sup>30</sup> The decision on the establishment of a coordinating body for EU accession process RS ("Off. Gazette of RS", no. 84/2013, 86/2013, 31/2014 and 79/2014).

importance of competition policy has a legal and institutional order of the EU, it is considered that Chapter VIII is one of the most complex, and according to current practice, the negotiation process, it opens and closes one of the last.

At the screening, detailing the legal and institutional framework for the protection of competition and state aid control, then the general and specific procedural frameworks from CPC and CSAC, the results of implementation of substantive rules of competition within the jurisdiction of the CPC (enforcement record), including the presentation of individual cases from the relevant authorities breaches of competition and merger control, as well as the practice of CSAC. Based on the questions and explanations given, and subsequent communications, it can be concluded that the legal framework for the protection of competition undisputed that contains no open issues, and that in the field of state aid appear certain regulatory issues. However, much more attention is devoted to practice primarily in the field of state aid, capacity and position of CSAC or other problems identified in the implementation of the prescribed legal framework. Finally, in addition to the above mentioned issues, the focus of the bilateral screening and follow-up activities were also individual cases of state aid control.

European Commission report on Serbia's progress in 2015, states that competition legislation is largely aligned with the *acquis*, and that the Serbian moderately ready to open negotiations on Chapter VIII. Remarks related to the progress that is necessary to achieve further harmonization of legislation on the control of state aid and *dajim* steps in the direction of independent and effective CSAC<sup>31</sup>. Based on the above, it can be concluded that it is possible to expect a set criteria for opening negotiations on this chapter, especially regarding the status and / or practice of state aid control.

## IV. The division of roles and responsibilities: the institutional framework for competition policy

Competition policy includes activities and measures under the jurisdiction of a broader institutional framework, in which in particular the important role of the Government, as the bearer of responsibility for establishing and managing policy, the Competition Commission is a key institution for the application of the competition rules, the competent courts, as well as other relevant institutions and bodies with different scope of authority and responsibility in this matter.

### IV.1 Government, Ministries and Government Bodies

The government has executive authority and responsibility for establishing and managing policies in the Republic of Serbia, in the framework of the Constitution, laws and other general acts of the National Assembly<sup>32</sup>. Ministries and other state administration bodies take part in policy-making by preparing draft laws, other regulations and general acts for the Government, and proposing development strategies and other measures to formulate government policies<sup>33</sup>, in accordance with

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<sup>31</sup> European Commission Progress Report on Serbia for 2015

<sup>32</sup> RS Constitution, the Law on Government ("Off. Gazette of RS", no. 55/2005, 71/2005 - corr., 101/2007, 65/2008, 16/2011, 68/2012 - decision of the US, 72/2012, 7/2014 - decision and 44/2014).

<sup>33</sup> The Law on State Administration ("Off. Gazette of RS", no. 79/2005, 101/2007, 95/2010 and 99/2014).



the scope to be regulated by law.<sup>34</sup> Therefore, the government is the sole holder of the authorization for the determination of the policy, including sectorial public policies, and the relevant ministries and other government bodies have the authority and duty to its development and conceptualization as part of the draft acts and legislation prepared within its jurisdiction. The Prime Minister leads and directs the Government, ensures the unity of political action of the Government, coordinates the work of members of the Government<sup>35</sup>, and the Government may, by its acts to guide public administration bodies in the implementation of policy and enforcement of laws and other general acts, coordinates their activities and ministries and special organizations determined deadlines for the adoption of regulations which are not prescribed by law or general act of the Government.<sup>36</sup>

According to this legal framework, the policy development process is not specifically separated from the legislative process, that is completely consumed within the activities of preparation and drafting of legislation in a particular area.<sup>37</sup> In practice of ministries and other state bodies, it is common that questions of development of the policy changes are discussed in the framework of existing legislation, and viewed in the context of its implementation and possible new or different normative solutions, without defining possible alternative policy options or clear picture of such functionality solutions and analysis of these options from the point of view of efficiency of achieving the desired objectives in the given context, needs and possibilities.

On the other hand, although the process of defining public policy is not transparent and specially developed in the work of the Government, the law recognizes and specifically allocates a specific policy document which is called development strategy, whose adoption is competence of the Government. This act establishes situation within the jurisdiction of the Republic of Serbia and the measures to be taken for its development.<sup>38</sup> The adoption of strategies in a particular area, as well as supporting planning documents (such as action plan for the implementation of the strategy) is relatively frequent in the work of the Government, and at the moment there are more than 100 of such acts that are within the period of its validity. Even though these are documents of public policy, their relations with the legislation, concrete measures and activities of state bodies is not entirely clear, except that the Rules of Procedure of the Government requires special supplement explaining relationship between draft act that line ministry proposes to the Government and the strategic document (Strategy, action plan, etc.) with which it is aligned.<sup>39</sup> At the moment, there is not current single strategic document to refer to competition policy, both in general, and at the sectoral level. The holder of jurisdiction in the field of competition, the legal framework governing the scope of ministries, is the ministry responsible for trade.<sup>40</sup> As part of such authorization, the competent ministry takes care of the implementation of the legal regulation of the field of competition, which in this case is done by creating for the first time the Law of 2005.

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<sup>34</sup> Law on Ministries ("Off. Gazette of RS", no. 44/2014, 14/2015 and 54/2015).

<sup>35</sup> Art. 12 Law on Government.

<sup>36</sup> Art. 62 Law on Public Administration.

<sup>37</sup> M. Lazarevic, M. Obradovic *Map of Policy Cycle at Central Government Level in Serbia*, GIZ, 2014.

<sup>38</sup> Art. 45 Law on Government.

<sup>39</sup> Art. 39 and the Rules of Procedure of the Government ("Off. Gazette of RS", no. 61/2006 - consolidated text, 69/2008, 88/2009, 33/2010, 69/2010, 20/2011, 37/2011, 30/2013 and 76 / 2014).

<sup>40</sup> The new administrative authority was first defined within the scope of one of the ministries of the Law on Ministries of 2004, and the then Ministry of Trade, Tourism and Services; Since then, the area is within the scope of the continuity of the same ministry or ministry that is in a period of time took over the activities of the ministry.



When drafting the Law on the protection of competition, coordination with relevant bodies, institutions and participation of representatives of the academic community, was achieved at the level of the working group for the preparation of the Law.<sup>41</sup>

At the level of the Government, relevant ministries and government bodies, in this moment a special mechanism of coordination is not developed in the context of the development of competition policy and coordination of sectorial policies with the requirements of a unified policy of opening markets and strengthening the conditions of competition in it. The absence of such mechanism provides for the phenomena of political regulation of markets through the allocation of resources, definition of dissimilar conditions for individual participants or creating barriers to market entry of new participants, encouraging existing market structures that prevent increased competition or other adverse phenomenon from the point of raising the level of competition.

## IV.2 Commission for Protection of Competition

Commission for Protection of Competition is competent for the control over the infringements of competition and merger control in the market of Serbia. It was founded in the status of administrative organization that exercises public powers, on the basis of the Law of 2005, and commenced operations in 2006, when the first composition of the Council and the Commission was elected. Although the Commission is not the first body in the field of competition in recent years, in Serbia,<sup>42</sup> it is the first institution of its kind whose organization and operation are based on the standards of European law in this area, as a body that has legal personality, autonomy and independence in the work and all public authorities needed to effectively and efficiently implement their basic control and monitoring functions.

Responsibilities of the Commission can be classified into the following groups of functions:

1) *Control-supervision*: control over the acts and actions of market participants Serbia concerning the existence of illegal violations of the competition, control of concentration of market participants, under the conditions provided by law;

2) *Normative*: participation in drafting regulations adopted in the field of competition and proposing to the Government the adoption of regulations to implement the Act; adoption of policies and guidelines for the implementation of the Law;

3) *Consultative-instructive*: to give opinions to competent authorities on draft regulations and the applicable regulations having an impact on competition in the market; giving opinions regarding the implementation of regulations in the field of competition; activities to raise awareness on the need to protect competition;

4) *Analytical*: monitoring and analysis of the conditions of competition in individual markets and in individual sectors; keeping records of notified agreements, on undertakings which have a dominant position in the market as well as the Merger;

5) *Coordination-cooperation*: cooperation with state authorities, territorial autonomy and local self-government, to ensure the conditions for the application of the Act and other regulations governing issues

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<sup>41</sup> The working group for the preparation of the 2009 Act, in addition to representatives of ministries, and had the participation of representatives of the Committee on the Protection of Competition, the Serbian European Integration Office and Project support work of the EU Commission. The same group was also working group for amendments to the Law in 2013, with what the procedure is started based on an initiative by the Council of the Commission.

<sup>42</sup> Antimonopoly Law of the FRY in 1996. Competition Commission is formed within the authority of the federal government.

of importance for the protection of competition; international cooperation in the field of competition, in order to fulfill international obligations in this field and collect information on the protection of competition in other countries.

In fulfillment of its control and monitoring functions, the Commission brings individual legal acts on the rights and obligations of market participants (undertakings) in administrative proceedings, that appear as a party to the infringement and/or concentration control procedure.

Commission is chaired by the President, who is also a member and chairman of the Council. The Commission President has mainly organizational and procedural authority: adopts a decision on initiating the infringement procedure, issues a decision in summary proceedings of concentration control, brings the decision on the procedure (as determined by official of the professional staff that will be authorized to take official actions in the process - case handler, establishes the implementation of inspection and expertise, decides on applications on data protection and privileged communication, etc.), and represents the Commission and performs other duties in accordance with law and the Statute. The Council of the Commission's authority is to make decisions on the infringement procedures and concentration control, as well as on individual exemption, to issue instructions and guidelines, to prepare proposals for secondary legislation implementing the Law adopted by the Government, gives opinions on the proposals of regulations and applicable regulations that have an impact on competition market, as well as in connection with the implementation of the Act, that makes all the decisions and acts of the Commission on which the president does not decide.

In addition to these bodies, the Commission is consisted of professional staff, that carries out expert tasks under the responsibility of the Commission in accordance with the Law and internal acts of the Commission, headed by the Secretary of the Commission.

The Commission reports to the National Assembly and submits an annual report on the work. The National Assembly is authorized to elect a president and members of the Commission to the Council, under a special procedure prescribed by the Law. The President of the Commission and the Council members are elected from the ranks of distinguished experts in the field of law and economics with at least ten years of relevant professional experience and/or who have made significant and recognized works or practices in the relevant areas, especially in the field of competition and European law and who enjoy the reputation of being objective and impartial personalities, and following the procedure of public competition by the Chairperson of the National Assembly. Selection procedure and determining the list of candidates for president and members of the Council of the Commission takes place in a transparent manner in the relevant parliamentary committee.

The term of office of the President of the Commission and the Council members is five years, with the possibility of re-election.

### IV.3 Commission for State Aid Control

Commission for state aid control is established on the basis on the Law from 2009. The Commission is a body established by the Government, which appoints the members of the Commission, on a proposal from the ministries responsible for finance, economy and regional development, infrastructure, environmental protection, and the Competition Commission. President of the Commission is appointed by function representative of the ministry responsible for finance. Professional, administrative and technical tasks for the Commission as well as other conditions for its operation, also provides the Ministry of Finance.

The primary responsibility of the Commission is to carry out ex-ante control permissibility reported, as well as ex post control of state aid granted and to pass acts in these proceedings. In addition, the Commission shall submit an annual report on state aid published it on its website, maintains a database of schemes and individual state aid, and performs other tasks in accordance with the Law. The Law provides for so-called operational independence in its work, on the basis of which the Commission should be fully independent in decision-making in matters under its competence. However, bearing in mind its status as a body established by the Government with its act, as well as a composition comprising representatives of ministries that have a direct or indirect powers in programming, nominating or establishing a state aid scheme, and in making decisions about individual state aid, it may be concluded that prescribed operational independence to a large extent conditioned by the aforementioned status and organizational solutions. This is supported by the fact that the professional, administrative and technical tasks for the Commission is handled by the Ministry of finance, through specially organized unit for these activities.

## IV.4 Judiciary

### IV.4.a Courts

Judicial review of acts of the Commission for the Protection of Competition and the Commission for State Aid Control is carried out via an administrative dispute. In this process the legality of forth mentioned acts are being examined, based on the complaint filed by the person who believes that his or her rights or interests, recognized by law, have been violated, and in accordance with the rules of administrative dispute.<sup>43</sup> In the context of judicial protection against the acts of the Commission for the Protection of Competition, the LPC provides for certain special rules for court proceedings in respect of the authorization for the delay of the application of the disputed final decision of the Commission and postponement of the deadlines for specific actions in court.

The competence to decide in the administrative dispute belongs to the Administrative Court, being a court of special jurisdiction, which began its operations on 1 January 2010. The Administrative Court does not have specialized panels to act in certain matters, including the cases pertaining to competition.

Against the judgment of the Administrative Court, an extraordinary legal remedy may be lodged, i.e. a request for review of court decision. In cases of competition protection, both parties in administrative dispute have a right to bring this legal remedy, the forth mentioned party is the one against whom the administrative act was adopted and the Commission for Protection of Competition. This right also belongs to the competent public prosecutor. Although this is the extraordinary legal remedy, in matters pertaining to competition, it is always allowed, since the appeal before the Commission is not provided in the administrative procedure; this is one of the conditions for the permissibility of the extraordinary legal remedy. The Supreme Court of Cassation is competent to decide upon a request for review of court decisions.

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<sup>43</sup> The Law on Administrative Disputes ("Off. Gazette of RS ", no. 111/2009).

## IV.4.b Public Prosecution and Criminal Court

The Criminal Code includes the specific criminal offense of abuse of monopolistic position, which carries a sentence of up to five years of prison and a fine.<sup>44</sup> Up until now, there are no information on the initiation and conduct of criminal proceedings for this criminal act, nonetheless, it is necessary to ascertain the existence of dualism of sanctions, at least in formal terms.

## IV.4.c Misdemeanor Court

During the period of validity of the Law on Protection of Competition in 2005, the sanctions for breach of competition identified in the proceedings before the Commission, had the character of penalty for misdemeanor. The Misdemeanor court was in charge of the procedure and competent to impose penalties. Following the adoption of the Law of 2009 and the introduction of a system of administrative measures, instead of penalties for misdemeanor, to protect the competition, the competence of the misdemeanor courts in the cases of competition ceased to exist.

## IV.5 Other Relevant Institutions and Bodies

### IV.5.a Business Associations

In Serbia, a system of chambers, in which the Chamber of Commerce and Industry of Serbia (PKS) is an umbrella organization, has a long tradition and a high level of development. In recent years, due to changes in the normative framework, the emergence of the new forms of business associations, as well as the current economic situation, a certain reduction of the importance and influence of PKS can be observed. Nonetheless, PKS continues to be a primary forum in which the largest economic entities are being gathered. Apart from PKS, there are also professional and sectorial business associations, organizations of foreign investors, business clusters and other forms of associations of Serbia's undertakings.

Environment of a business association generally poses a certain risk to competition, because it is a fertile ground for the emergence of the restrictive agreements. Therefore, these are communities that require intensive work on the competition advocacy, in order to prevent such phenomena and, simultaneously, raise awareness of the competition rules and their adequate implementation. Bearing that in mind, a training program which is conducted within the PKS organized under IPA project "Strengthening the institutional capacity of the Commission for Protection of Competition (CPC) in the Republic of Serbia", in the period 2013/14, is worth of the attention.

### IV.5.b Academic Institutions

The network of academic institutions in Serbia is comprised of over 100 accredited institutions, 15 of which are related to the social sciences in the field of law, economics or business studies. At some of the most important institutions, the curricula of primary studies includes the relevant subjects (eg.

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<sup>44</sup> Art. 232 of the Criminal Code ("Off. Gazette of RS ", no. 85/2005, 88/2005 - corr.-, 107/2005 - corr.-, 72/2009 , 111/2009-, 121/2012-, 104/2013 and 108/2014).

Competition law, economic analysis and public policy) or competition related topics covered within other subjects. In this way, a basic introduction to academic matter with regard to competition is provided.

#### IV.5.c Civil Sector

With regard to non-governmental organizations, within the scope of this study, a certain number of research organizations (think-tanks) ought to be highlighted, which possess a certain capacity or potential for the implementation of the relevant research and analysis, and already have a pool of published studies in the field of competition and state aid control.

In addition, it is important to refer to several professional associations (Association of Lawyers of Serbia, Association of Economists of Serbia), which ensure the exchange of experiences and knowledge in their field of activity. In this regard, organization of conferences is particularly important, which is traditionally conducted by these associations, where works pertaining to the field of competition are regularly presented.

As part of the EU integration process, a special structure has been formed which should provide a platform for the participation of civil society in this process, the National Convention on the European Union (NKEU). In the context of this permanent body, a thematically structured debate is being conducted with the representatives of public administration, political parties, NGOs, experts, businesses, trade unions and professional organizations, concerning the EU accession. A thematic dialogue takes place within the working groups that follow the structure of the negotiating bodies and chapters. This model of development of participatory dialogue between the public and the public sector has proven to be successful, including a thematic unit which monitors the competition policy (negotiation chapter 8), particularly in terms of consideration of horizontal issues and improvement of the quality of public policy which is being considered and developed in conjunction with the fulfillment of the conditions regarding the EU accession process.

## V. Identification of Limitations of the Policy Making Process and the Normative Framework

### V.1 Policy Making Process

The process of defining and implementing the competition policy ought to be considered within a broader institutional framework of determination of public policies and the preparation of sectorial regulations. It is therefore necessary to consider the situation in terms of the cycle of planning, formulation and coordination of public policies at the Government level. Precisely in this, systemic level, can significant gaps in the forth mentioned process be observed.

Policy planning is an underdeveloped function, which is almost entirely based on the activities and the initiatives of line ministries and informal prioritization by the Prime Minister's cabinet office. The existing policy planning instruments (Annual Operating Plan of the Government, the National

Programme for the Adoption of the Acquis - NPAA) and financial planning instruments (in accordance with the budgetary system) are not adequately linked nor complementary. The policy formulation is mainly absorbed by the process of legislative initiatives of the relevant ministries and is often not recognized as a separate process, especially not as a process that is carried out on the basis of the previous analysis. Regulatory initiatives are not based on Policy papers nor analytical documents. The most important process of coordination and participation, therefore, takes place within the legislative process, i.e., the process of preparation and drafting of laws and other regulations, public consultations regarding the legislative drafts and within the inter-ministerial consultations prior to adoption of these acts by the Government.<sup>45</sup>

It can be concluded that the logical consequence of the forth mentioned is the insufficient development of competition policy, particularly with respect to its horizontal character. As in the story of the blind men and the elephant, the sectorial divisions of the ministries lead to piecemeal approach to the problem of the sectorial markets, from the energy market to the market of school textbooks. In each ministry, the problem of the insufficient competition manifests itself differently. The competition policy aspects extend throughout multiple sectorial areas, or through the respective areas of several ministries, and permeate the corresponding vertical policies related to conditions at the individual, sectorial markets, the rights and duties of individual market participants or individual fiscal policy measures, or other issues with direct consequences in relation to the (in)equality of the market participants.

In addition to this systemic problem, there is another possible reason for the lack of adequate articulation of competition policy in the light of sectorial regulations - insufficiently active role of competition policy stakeholders in these processes. In the first place, this role belong to the relevant line ministry, which is the Ministry of Trade.<sup>46</sup> In practice, in the work of this ministry, competition policy is equated to the legislative activity. This is confirmed by the fact that for the issues of competition policy in the ministry, up until recently, there were no immediate organizational tasks, and now the area is indicated in the title of one organizational unit (Division of trade, services and competition policy), however, without adequate professional capacity for this tasks. The consequence of such situation is "a silent voice" of the key stakeholders in the Government policy formulation and the full equalization of competition policies with the Laws governing the protection of competition.

Based on the interviews with the actors that are directly related to the application of the competition rules, the Commission for Protection of Competition was recognized as the main authority in the area of competition policy. Constitutional and legal powers in terms of policy development are precise – these belong to the government and ministries and other state administration bodies involved in policy development. However, the Commission has certain competences under the Law, especially in terms of provision of opinions on sectorial regulations that have an impact on market competition, and it can be the basic instrument for the realization of influence within the policy making cycle and in the process of adoption of laws and other regulations. In the absence of an effective platform for inter-institutional cooperation in this area, it appears to be a logical and a practical solution that the

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<sup>45</sup> M. Obradovic, M. Lazarevic, *Map of Cycle Policy at Central Governemet Level in Serbia* , GIZ , 2014.

<sup>46</sup> The jurisdiction of the Ministry of Trade in the field of competition policy was first prescribed by the ministry in 2004 , and that formulation that the Ministry performs state administration relating to the " prevention of monopolistic activity and unfair competition " ; there is undoubtedly a case of archaic terminology, which dates from the previous period , as well as the confusion regarding the protection of competition and unfair competition , as well as two different categories, each of which does not fall into this area within the framework of national legislation is the subject of the Trade Act , or the this formulation persisted in all subsequent amendments to the Law on ministries , ending with the current of 2015.

key institution for the application of the competition rules and the main expert authority functions as a facilitator and a catalyst for dialogue with the public policy stakeholders, aiming to create a comprehensive and coherent framework for competition policy.

## V.2 Problem issues related to the legislative framework

During the survey most respondents marked legal framework of the competition as a success, with a reference to particular issues or opportunities for further improvement. In the first place, a common estimate is that the process of legal harmonization is being carried out successfully, that the terms of substantive rules of competition are in full compliance with the relevant EU legislation and that it considers accession process in which Serbia currently is. These ratings were given in the progress reports of the European Commission, since 2009, when considerable progress was noted on the adoption of a new competition law, to the last report for the year 2015 which shows progress in the area of competition.<sup>47</sup> In addition, in the process of bilateral screening under Chapter 8 - Competition policy, legislation in the field of competition was rated favorably, with no significant objections to influence the further work in the coming negotiation process.

It is the result of a process which started in 2005. by making the first Act, that got the momentum by making the current Law in 2009, and after its modification in 2013. Certain sensitivity regarding to the objections of the European Commission and its bodies was noted, which are given on the occasion of certain specific legal provisions, especially in the framework of the report for the year 2012 and subsequent communication with representatives of the Ministry and the Commission for Protection of Competition.

Precisely on the basis of these comments and suggestions were the changes to the Law relating to extension of the limitation period for the proceedings infringement of the competition from three to five years implemented, charging interest on refunds measures implemented by debiting the Competition Commission, an extension of time to conduct the test concentrations of duty from three to four months, and the most significant changes, the abolition of the legal requirements of a dominant position in the relevant market participants with a market share of 40% or more. Legal definition of a dominant position was changed in order to harmonize with relevant sources of EU law. Notorious requirement of 40% market share is reduced to one out of several parameters.<sup>48</sup> Among the efforts in the field of legal harmonization, efforts to achieve transparency in the legislative process, high level of participation of stakeholders in public debates and other activities related to the process of preparing and drafting the Law were also evaluated positively.

### V.2.a Outstanding issues of the substantive competition law

In terms of substantive rules, their legal formulation and elaboration of by-laws which on the basis of legal authority Commission prepares and proposes to the Government, there are no significant outstanding issues. Last intervention in this regard is cited harmonization of criteria for establishing a

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<sup>47</sup> Progress Report on Serbia for 2014, among other favorable estimates further harmonization with the EU acquis, which was conducted Amendments Act autumn 2013.

<sup>48</sup> Amended provision art. 15. LRA, based on the concept that is based on determining the market power of the participants, accepted the decisions of the European courts ( Case 85/76 Hoffmann -La Roche v . Commission (1979) ECR 461)

dominant position of market participants. At the same time it is necessary to conclude that the substantive rules of competition are extremely general in nature and comparing to standards in other areas of law, despite the introduction of quantitative, measurable criteria, the rules still remain essentially dependent on the application within the practice of the competent bodies.

Front observations, however, relate to the current situation at a given stage of EU accession, because there are a number of outstanding issues related to the legal harmonization with the rules of the competition and the procedure for applying these rules, which will be ongoing in the next steps of accession, and especially at the time of inclusion in legal territory of the EU and on the immediate jurisdiction of its institutions in this matter. One of the issues that arise in connection to inconsistency with existing EU law is the existence of the institute of individual exemption, which is not applicable in the EU, but is in regime of selfassessment. The direct impact of this legislative solution is the nullity of the contract which are not subject to individual exemption and collision in relation to the application of this block exemption. In addition, there is a question of the possibility of applying legislation which provides for the restrictive property "of individual provisions of the contract"<sup>49</sup>, or a partial invalidity of such an agreement,<sup>50</sup> while on the other hand regulation on block exemptions do not recognize this possibility and thus extend the effect of the nullity of any provision that provides that one party will not perform as competition against another person (non-compete clause), through the entire contract. Furthermore, the rules on agreements of lesser importance have been implemented in the Law and have the effect of peremptory norms, although the source of this rule is actually Commission notice.<sup>51</sup> Although we are facing high degree of harmonization with EU competition law, particularly with regard to the general legal framework, each step in the practice of application opens specific issues and brings demands for further improvement of legislation.

On the question of the methodology for determining the relevant market, as well as the measurement of the concentration in the relevant market, applicable bylaws do not define an imperative manner obligation to use an existing analytical instruments. This normative solution was the subject of criticism of the academic public, which indicated the need for standardizing the use of standard analytical devices, such as the test of a small but significant and permanent increase in price (SSNIP test), or in the context of the measurement of the concentration in the relevant market, the Herfindahl-Hirschman Index (HHI).<sup>52</sup> However, although the Law and regulations are left to the Commission to decide independently in this methodological sense, such behavior can not be arbitrary, and fulfilling the requirements of legality in terms of general and specific administrative procedure involves giving the reasons for the use of a screening instrument in this case.

As an issue of regulatory character it is necessary to notify the provisions on individual exemption of restrictive agreements. Although the mechanism of individual exemption under EU law ceased to be implemented in 2004, the institute was taken into national legislation by the Law of 2005, and remained in effect after the enactment of the new law and its revision. The reasons for this procedure is most often cited the need for the Commission to build practice and acquire specific knowledge and

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<sup>49</sup> Art. 10 par. 2 ZZK

<sup>50</sup> Jurisprudence ESP recognizes this principle as severability of the restrictive effects of the defunct labor agreement; see: A. Jones, B. Sufrin, *EU Competition Law: texts, cases and materials*, Oxford University Press, 4th ed. (2011), p. 1198

<sup>51</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (2001/C 368/07)

<sup>52</sup> Examples: L. Hungarian, "Competition policy as a factor of integration of Serbia into the EU," *Business School*, Br. 3/2011, M. Kostic, "Testing the limits of the relevant market in competition policy," *Economic Horizons*, Jan.-April 2014, Vol. 16



experience in relation to the matter of restrictive agreements in terms of the gradual raising of the system of protection of competition and relatively new legal framework, as well as more legal certainty for market participants. The main condition for the approval of individual exemption is a general condition for exemption from the prohibition of agreements for its elements has characteristics restrictive, and therefore, such an agreement should not be a violation of competition in the relevant market. However, it must be noted that it is a formal non-compliance with the EU acquis, and therefore a violation of the obligations under Art. 73 of the SAA, although this circumstance has not been the subject of attention in the course of the screening process or reporting on progress.

In addition, more significantly from aspect of the practice, the question arises whether the selfassessment system is applicable for restrictive agreements or not and the answer to that question should be that the Commission through its practices and/or opinions on the application of regulations, depends on legal certainty in business practices of market participants.<sup>53</sup>

In the matter of State aid control, the Law on State Aid Control and regulations rules are transposed and criteria of the EU acquis in this area. Commission for state aid control was founded and defined as operationally independent body, whose work for the professional and the Administrative capacity is provided by the Ministry of Finance. The regulatory framework is completed by the adoption of by-laws on the rules for granting state aid, on the manner and procedure of reporting state aid, the methodology of compiling the annual report on state aid granted, as well as the application of state aid rules to subsidies from the Law on regional development.<sup>54</sup>

State aid control was not sufficiently subject of interest in the local public in the past, so relatively low level of understanding of the conditions and obligations imposed by the undertakings can be noticed. Much greater attention to building a legislative framework and establishment of appropriate institutional mechanism is dedicated to the European Commission, which regularly in the annual reports followed the development of the system of state aid control, and gave its comments and remarks. In those remarks, at the regulatory level, special attention was paid to the provisions of the by-law on the rules for granting state aid, which are exempt companies in the privatization process, as well as in terms of improving the mechanism of determining and calculating the de minimis rule and further harmonize the rules on aid to the provision of services of general economic interest.<sup>55</sup> On the basis of these observations regarding de minimis aid have been undertaken certain alignment of the Regulation on the rules for granting state aid in late 2014, but the exception to the companies in privatization is still in force.

## V.2.b Procedural Legal Issues

In relation to the substantive rules, in terms of procedural legal framework, the situation is somewhat different. Again, in conversation with respondents, current institutional process model is mainly assessed as successful, with a few reservations or criticisms, which will be further discussed. The

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<sup>53</sup> Note in the public debate on the draft study (13.10.2015).

<sup>54</sup> Regulation on rules for the allocation of state aid ("Off. Gazette of RS", no. 13/2010, 100/2011, 91/2012, 37/2013, 97/2013 and 119/2014), the Decree on the manner and procedure of reporting state aid ("Off. Gazette of RS", no. 13/2010), Rules on the methodology of compiling the annual report on state aid granted ("Off. Gazette of RS", no. 3/2011), the Regulation on the application of state aid rules to subsidies from the regional development Act ("Off. Gazette of RS", no. 116/2012).

<sup>55</sup> EC Progress Report for Serbia in 2013.

problem of applying the rules of competition, however, from the very beginning was much more complex than the legal reception for the rules and within the normative regulation of this area, it is necessary to find appropriate institutional and procedural solutions, and particularly sanctioning the violations of competition, in order to achieve effective legal protection.

The meaning of the administrative procedure is a concretization of abstract norms of objective law in the relevant individual situation, and in this area that standard is very abstract. At the same time, the success of the entire legal framework depends on the success in the transmission to the plane of individual cases, the situation of certain behavior of market participants, the conditions and consequences of such action in a given market environment. It is the second segment of trichotomy legal and institutional model rule - a process - a practice in which the success of the practice of implementing rules conditional access procedural mechanism in the context of the national legal order. Regarding to that, the relative success that has been achieved in the field of legal harmonization with the EU acquis in the field of competition rules, in the first crucial next step depends on the success in the design process mechanism.

Having that in mind, it is noted that the procedure of applying the competition rules in whole administrative and legal character, from the moment of its initiation before the Commission for Protection of Competition, pending the infringement or concentration, ending with determining the administrative measures as well as specific administrative-criminal character. Such procedural framework is unique in the legal order of Serbia, and therefore, in the beginning of its application, it challenged the certain doubts and uncertainties. However, after several years of administrative practice of the Commission, as well as the jurisprudence of the competent courts, positive assessment can be given. After giving the general assessment in advance, particular issues that arise in practice or poses a dilemma for the individual actors should be considered.

In connection with the above issues of procedural nature, opinions of practitioners, both from the ranks of lawyers, and professional services of the Commission can be heard, and they think that the importance of individual situations which are not regulated, or not adequately regulated by the procedural provisions of the LRA, or GAPA which is subsidiary to apply is in fact of such a character that deserves considering the possibility of concluding an entirely independent process framework, which would fully edit a special administrative procedure before the Commission.<sup>56</sup> These requirements will eventually grow in importance, in connection with the development of practice of the Commission and its confrontation with the more specific challenges, caused by striking the specifics of the nature of the proceedings (which contains both criminal and administrative characteristics) and material character.

According to this legal procedural framework, the powers of the Commission in the examination procedure is extremely broad, and include evidentiary actions taking statements of the parties, witnesses, expertise, acquiring the data, documents and things, inspections and provisional seizure of things. In practice of the Commission, based on interviews with representatives of professional services, as well as with lawyers who shall represent the party in these proceedings, most of doubt arises regarding the possibility for the Commission to exercise specified powers adequately and fully, due to its capacity. In this regard, the question that is particularly important is the question of dawn raid as one of the most important evidentiary actions in cases which deal with cartel. The first case of conducting unannounced inspection, however, gave encouraging results, which suggest a continuous growth of the capacity of the Commission. On that occasion, in reviewing the restrictive agreement

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<sup>56</sup> Public Discussion on Draft Study (13.10.2015.).

participants in the market of electronic cigarettes, successful control room of two companies was carried out in purposes of collecting data, documents and items. On this occasion special computer forensic equipment, which the Commission has, was used for the first time.<sup>57</sup>

On the occasion of the current procedural legislation, most questions cause threshold notification of a concentration, which was deemed too low. This provision, which refers to the amount of the total annual turnover of all undertakings concerned made on the global or the market of the Republic of Serbia, was not subject of change within the audit in 2013, but remains a part of the criticism in the business community. In this sense, mark that could be heard in conversations with lawyers in this field was quite characteristic, and it says that especially the provision on so-called national threshold was considered to be problematic.<sup>58</sup> It is believed that it complicates the particular sale of small and medium-sized businesses (eg. Petrol pumps, mills, refrigerators and the like.) to larger business systems, when the associated costs are at least 25,000 euros, which is the fee for notification of concentration, not counting the costs of representation of lawyers, which significantly affects the cost of acquisition. In addition to that, there is a remark that the legal rule does not fully implement the relevant provision of the EU Regulation, which provides that, when the concentration consists of the acquisition of parts, regardless of whether they have legal personality or not, or one or more undertakings, only the turnover that refers to parts that are subject to the concentration should be taken into account when calculating the total value of the concentration.<sup>59</sup> In any case, defining the threshold notification that the optimal term relevance of an impact on competition in the market of the Republic of Serbia represents a significant regulatory challenge, and every legal decision may be subject to criticism in terms of expediency.

On the issue of the threshold notification we should bear in mind the fact that the number of cases exceeded 100 annually for several years in continuity, and that the processing of these cases takes the most time in the work of the expert service of the Commission. By the structure concentration linked to foreign investment activity are the most dominant in connection with the takeover of domestic companies (75.70% of the total number of applications received in the previous year), mainly in the industries of electronic communications (mobile telephony, broadband internet, media content distribution, TV production etc.), chemical and pharmaceutical, agri-food sector, the oil industry, including banking and insurance. In the previous period, a significant amount of these items was accounted as items from privatization which in the last year completely disappeared from the practice of notification.<sup>60</sup>

The question of the threshold notification has to be regarded in relation to revenue from the Commission, which are realized in this way. The Commission is at the moment completely self financed by fees charged for its work on the basis of the Tariff and other own revenues, in which revenues from fees for issuing a decision on approval of concentration as high as 89.92%.<sup>61</sup> Accordingly, in consideration of the legal solution, it is necessary to balance the interests of reducing the operating costs of business entities and favorable investment climate, and especially the time factor of uncertainty which refers to certain business enterprise that carries with it the application process, consideration and eventual approval of concentration, with other matters, such as precautions for

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<sup>57</sup> Unannounced on-site investigation in the case Umbrella / New Great Vision, implemented in July 2015.

<sup>58</sup> The provision of Art. 61 st. 1 items. 2) The LRA asked the obligation of notification to the level of 20 million cumulative revenue, and at least one million individual income, in the preceding year.

<sup>59</sup> Art. 5.2 Regulation 139/2004

<sup>60</sup> The annual report on the work of the KPC for 2014.

<sup>61</sup> *Ibid.*

monitoring the state of competition in the market and the possibility of preventive action, and organizational and functional aspects of the Commission's work. Finally, the data and analytics that builds the practice of the Commission in connection with the subject of the application concentration, is of great importance for the understanding of the relationship and the situation in individual sectoral markets and the market as a whole, thereby forming a fund of expertise and capacity of the Commission.

Another question that often arises in relation to the recent legal decision is to end the procedure. We are talking about changing of the amendment provisions of Art. 58 LPC in 2013, that led to an attempt of implementing Institute adjournment on which basis of commitments the parties to the proceedings (Commitment decision). The Competition Commission may, within the framework of the procedure initiated due to infringement of the competition, to be bound by the party against whom the proceedings propose in order to eliminate a possible violation if the motion of a party based on the contents of the resolution on institution of proceedings or the facts established in the proceedings and submitted before the time of receipt of the notification of the relevant facts (statement of objections). Before consideration, Commission will publish on its website a notification of submission of the proposal to terminate a process , and will invite all interested parties to submit written objections, attitudes and opinions within 20 days from the date of publication. If the Commission accepts the proposed commitments, the party is obliged to fulfill these obligations and the Commission must determine whether commitments are met in full within the time period which was given. The Commission is not obliged to accept the proposed commitments, especially when violation of the Law is already established. The proposed commitments may be behavioral measures or structural measures, depending on the forms of possible injuries and a right way to correct them. The aim of this institute is the economics of the process, because the Commission is not obliged to establish violation before making a conclusion, meaning that the procedure is faster and more appropriate especially for dynamic sectors, in which way it is easier to resolve potential problems in the market more quickly. In addition, the Institute is beneficial for market participants who appears as a party whose business is the subject matter of the Commission, and gives the possibility to propose measures which it believes will eliminate doubts in the existence of breaches of the competition.

However, in practice the application of these provisions, a lack which reflects in too wide field of action of this provision is noticed. In particular, it is a fact that the wording of Art. 58 LPC opens the door for the implementation of a decision on the basis of commitments (Commitment decision) on restrictive agreements, including hard core cartels, and not only to cases which refer to abuse of dominant position. In addition, in the matter of restrictive agreements there is an overlap adjournment on the basis of commitment to the program of mitigation (Leniency program) under Art. 69 LPC, with no clear criteria of distinction. Based on these concerns, the Commission has given in accordance with its mandate an opinion on the application of the competition rules and also its interpretation of the possibilities and limitations of applying the adjournment of art. 58 LPC, *inter alia*, referring to the specific guidelines of the European Commission.<sup>62</sup>

Having all this in mind, it is necessary to say that this is one situation in which the Commission may directly affect the physiology of the norm, not just by providing opinions as non-binding, instructive instrument of interpretation, but also in the framework of the application of specific provisions, thereby defining certain practices. In the case of the cited articles of the Law, if the Commission's view

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<sup>62</sup> Opinion on the application of Art. 58 CFR since 13.05.2015. (<http://www.kzk.gov.rs/kzk/wp-content/uploads/2015/05/misljenje-primena-clana-58-zakona-o-zastiti-konkurencije-13052015.pdf>)

that its scope is too broad, and that there is no place for a decision on the basis of commitments in relation to cartel agreements, such a decision can be established at art. 73 par. 2 SSP, using interpretative instruments adopted by the Community institutions, including the Commission's guideline.<sup>63</sup>

More general question (possibility) of the direct application of EU competition law can be related to this, which sometimes occurs in discussion with the respondents.<sup>64</sup> The answer to this question is provided by provisions of the SAA, which says that any action contrary to the prescribed obligations to respect the basic rules of competition, in so far as they may affect trade between the EU and Serbia, assessed on the basis of criteria arising from the application of these rules as they are defined primary EU legislation and interpretative instruments adopted by the EU institutions.<sup>65</sup> Therefore, in situations that have an effect on their trade under this international treaty, which represents the basic jurisdictional criteria of these provisions, there is a possibility for domestic competent authorities to directly apply law and jurisprudence of the European Court of Justice, which is based on the cited provisions of the founding treaty (today art.101, 102, 106 and 107 TFEU) as sources of law, on the occasion of basic forms of infringement of the competition. However, this issue is far more academic nature, because the impression is that there is a restraint of relevant institutions to take over fully the powers that are available to them, including this direct application of EU competition law. This approach significantly reduces the "room for maneuver" in practice the application of competition law, because it is the largest fund subtle, nuanced norms contained primarily in the Court's jurisprudence. Diffidence of resorting to these sources of law, we remain deprived of and solutions to a situation in which the problem of application of the Law (or inadequacy nepotupnost domestic standards, and even a legal gap in some situations), but remains without a specified rule, that a clear physiognomy receives just under instruments of EU law.

On the issue of implementation of the program of mitigation, in a conversation with representatives of the Commission, can be heard objection that the application in strict terms, the provisions of Art. 69 LPC, can not be in the situation after the initiation of the infringement (restrictive agreements). In this case, there is the restrictiveness of the provisions, because it stipulates the obligation of delivery of evidence of the existence and content of a restrictive agreement before the moment of conclusion of the process of initiating the procedure, while on the other hand, for the adoption of this conclusion requires a standard of reasonable assumptions, ie significantly lower threshold compared the aforementioned evidence. It is obviously a contradiction that in relation to the needs of practice is hard to bridge barrier, and so far the program mitigation applied only in one case. However, unlike the previous questions commitment decisions, there is no possibility of a different interpretation, because it is an explicit provision in this respect, and in need of intervention in the legislative text.

In connection with insufficient registration of participants restrictive agreements to implement mitigation programs, talking with the actors, one can hear the opinion that one of the reasons why the existing legal dualism administrative sanctions and criminal nature - the existing rules on the implementation of mitigation programs include recognition of responsibility of market participants

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<sup>63</sup> Questions of application of commitments in the infringement procedure, occurring in Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011) Commission notice on remedies acceptable under Council Regulation (EC) No 139 / 2004 and under Commission Regulation (EC) No 802/2004 (OJ C 267, 22.10.2008) and the Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006).

<sup>64</sup> Public Discussion on Draft Study (13.10.2015.)

<sup>65</sup> Art. 73 par. 1 and 2 SAA

and thus the guilt of individuals in the company in light of criminal responsibility. Thus, providing information about the cartel runs the risk of self-incrimination, and the risk of criminal liability of the company, as a legal entity, which will continue to be discussed.

### V.2.c The right to defense

The Commission is obligated to enable the market participant, who is in the capacity of the party against whom the proceeding is conducted, to state his or her opinion of the facts and circumstances which are relevant for the decision making in that proceeding.<sup>66</sup> Additionally, a special conclusion on initiation of the procedure is submitted to the participant, which contains description of deeds or acts of the market participant that are considered to be in violation of competition, the legal basis and reasons for initiating the procedure and how to enable the party to present his or her defense. The Commission has a special obligation to deliver, prior to making decision in this procedure, the special notice of the essential facts, evidence and other elements on which to base a decision (statement of objections) and request the party to respond within the given time frame.<sup>67</sup>

Although generally being administrative in nature, proceedings before the Commission contain strong features of criminal proceedings, and measures that can be determined against a party are characterized as penal, which will be further discussed. Bearing this in mind, during discussion with some interlocutors, as well as in the public debate on research findings, the question of adequate protection of the right to defend in the proceedings before the Commission was raised, and in this regard possible repercussions of the application of the European Convention on Human Rights.<sup>68</sup> In this context, it is noticed that there is a connection between the right to a fair trial under Art. 6 of the Convention, as well as the jurisprudence of the European Court of Human Rights, which establishes the effect of this law on the related administrative procedures and emphasizes, in particular, that for the application of this right, it is crucial if the outcome of the proceeding is crucial for civil rights and obligations of the parties, and not only the characteristics of the pertinent legislation under the national law.<sup>69</sup>

The right to defend according to the Law on Protection of Competition was the subject matter of UNCTAD's peer analysis, and it is estimated that the Law contains improvements in terms of protection of the rights of the party in the proceeding, and that in this context it becomes closer to standards of the EU competition law.<sup>70</sup>

### V.2.d Administrative Measure for the Protection of Competition

Administrative measure to protect competition is the key instrument available to the Commission, as part of its surveillance function over the existing state of competition at the internal market and in relation to market participants. It is determined in the form of an administrative act, and it contains a

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<sup>66</sup> Application of the principle of hearing the party under Art. 9 of LAP.

<sup>67</sup> Art. 38 pg. 2 LCP.

<sup>68</sup> Public discussion on draft study (13/10/2015).

<sup>69</sup> *Ringeisen v. Austria* (1971), *H. v. France* (1989); more on practice of the European Court of Human Rights regarding this issue: N. Mol and K. Harby, *Right to a Fair Trial - Guide for the application of Article 6 of the European Convention on Human Rights*, Council of Europe, Office in Belgrade, 2007.

<sup>70</sup> UNCTAD, *Voluntary peer review of competition law and policy: Serbia*, 2011, pg. 29-30.

financial commitment of up to 10% of the total annual income of market participants in whose deeds or acts a violation of the competition is determined or can be determined. A specific legal instrument of mixed legal nature is at issue here, which predominantly contains features of administrative law, but whose effects contain criminal features, by determining the financial obligations of a party in a proceeding. The purpose of the competition protection measure is determined by the overall aim of the Law, and that is the "economic progress and welfare of society, especially the benefit of consumers," but this aim features a high level of generality. The Law does not specify the specific purpose of administrative measures prescribed. That task belongs to the Commission (in accordance with the by-laws and guidelines issued), to try to concretize it through its administrative practice, as well as in particular situations in which the Commission acts. The important elements in this case are proportionality in relation to the effects of the violation and the preventive impact of measure. However, the competition protection measure cannot be directly related to the rights or interests of competitors, both those against whom the proceeding is conducted, as well as their competitors in the relevant market, nor it aims at aggravation of position or business and material damage of the offender of competition, by which the advantage to the competition would be provided. The main landmark in determining the measures has got to be the public interest, which here in general terms is expressed as the protection of certain conditions or the level of competition in the relevant market. Thus, before accessing any intervention by certain measure which in its final authority contains the effect of limiting the market power of the individual or the individual businesses, it is necessary to properly measure the quality of competition in a given market, as the criteria of public interest to be protected by such measure<sup>71</sup>.

Competition protection measure, without any doubts, includes administrative-criminal features. In terms of content, it implies an obligation to pay a sum of money, which is measured in the amount up to the legally prescribed maximum, under the threat of enforced collection. Unlike the case of misdemeanor, conditions for imposing measures are objectified and include material link between the content of the measures and conditions to be achieved by intervention in the matter of competition infringement. The measure has an accessory feature compared to the decision in the main proceeding on the competition infringement, both in procedural and substantive terms. The effects of measures in relation to a particular business entity, approach the effects of a punishment, and in this regard include preventive properties. At the same time, starting from the administrative-legal character of the proceeding and measure, the subjective responsibility is not the element being examined in connection with the discovery of a violation of competition, and thus also not in connection with the determination of competition protection measure. In the administrative proceeding pending before the Commission, the causality between certain consequences in the market, and deeds and acts of the business entity in the case are being determined, and subjective questions of consciousness and will are abstracted<sup>72</sup>. On the other hand, some of the elements with subjective features are covered by the provision on criteria for determining the extent of competition protection measure and procedural penalty, such as intent and incitement, but in terms of the circumstances relevant for measuring the amount of the financial obligation, rather than the significance for the issue of responsibility for the infringement.<sup>73</sup>

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<sup>71</sup> D. Protic, O. Uzelac, "The Administrative Measure of Competition Protection", *Legal Life*, no. 3-4, 2012.

<sup>72</sup> *Ibid.*

<sup>73</sup> Decree on criteria for determining the amount to be paid on the basis of competition protection measure and procedural penalty, manner and deadlines for payment and the terms for determining such measures (Off. Gazette no. 50/10).

## V.2.e Legal Protection

Legal protection against acts of the Commission, is provided in an administrative dispute before the Administrative Court. The subject of the complaint, in accordance with the rules of administrative dispute, may be all the reasons pertaining to the legality of the act. In terms of competition protection measure, as an administrative measure contained in the administrative act by which the proceedings before the Commission, the review of legality in an administrative dispute may relate to the conditions for its determination, the reasons for the determination of the amount of fine, the application of the rules of procedure, as well as incomplete or incorrectly established facts or passed factual conclusion, on which the decision on the extent and its volume is based.

The legal solution regarding the jurisdiction of the court did not provide sufficient confidence to participants in the proceeding, especially in the beginning of the application of this legal regime. In the final version of the Draft Law in 2009, a different solution was proposed, jurisdiction of the Commercial Court of Appeals, starting from a predominantly commercially-legal nature of competition cases in terms of their content, but also in administrative dispute, as well as legal proceedings where the legality of administrative act is examined. Such proposed solution did not find its place in the final version of the Law, because the Ministry of Justice opposed it, so the jurisdiction of the Administrative Court was defined instead.

As described, starting from January 1<sup>st</sup> 2010, the Administrative Court has overtaken the jurisdiction in these matters as well, and at the same time started with the application of the new Law on Administrative Disputes, which further aggravated the commencement of proceedings with regard to competition. Although the Administrative Court has gradually built its practice during many years of treatment of these cases (which is still not reliable enough), it seems that the opportunity, for expedient solution and a higher degree of legal protection that would be provided the court with greater professional capacity in matters pertaining to relations between economic operators and market opportunities, was missed. Objections to the views of the court or the absence of specialization within the Administrative Court in connection with these cases can still be heard, as well as problems related to the time limits within which the court has to make a decision, considering that this is the most overburdened court in the country.<sup>74</sup> On the other hand, based on discussions with the relevant stakeholders, it can be concluded that this issue, in terms of the legal solution, is not topical.

## V.2.f The Criminal Accountability and Civil Liability

The Criminal Code contains special qualification of the abuse of monopoly position, which is punishable by imprisonment of six months to five years and a fine.<sup>75</sup> Additionally, the company itself may be criminally accountable for this deed, if the conditions for liability of legal entities are envisaged

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<sup>74</sup> According to the Report on the work of the Court for 2014, 18,125 new cases in all matters were received for a total of 35 judges in the Administrative Court.

<sup>75</sup> Art. 232 CPC: "Responsible person in the company or other business entity that is a legal entity or entrepreneur who through abuse of monopolistic or dominant market position or conclusion of monopolistic agreements causes market disruption or this subject is brought into a privileged position in relation to others, so that it obtains gain for that entity or for another entity or causes damage to other business entities, consumers or users of services, shall be punished with imprisonment from six months to five years and fine. "



in a special law.<sup>76</sup> So far, however, it is not known if there are cases of prosecution of this criminal offense.<sup>77</sup> At the same time, the existence of criminal sanctions and administrative measures to sanction the infringement of the competition is not only specific for Serbia, but also occurs in other European legislations (the UK, Germany, France, Slovenia, etc.), and more recently, a discussion has been launched on the introduction of criminal sanctions at the EU level for certain types of infringement of competition (in particular, bid-rigging). According to the estimates of public prosecutor's office representatives, it can be noticed that the normative formulation of the cited criminal offenses is problematic, which significantly complicates the application and presentation of evidence, particularly in the context of contemporary market conditions, and thus prevents the practical application.<sup>78</sup> Thus, in principle, there are no obstacles to the application of parallel administrative and criminal legal regime to sanction violations of the competition, but it takes the modernization of criminal law to create conditions for its application in practice.

Regarding the issue of compensation for damage, incurred as a result of the actions of competition infringement, a gap also occurs in judicial practice. A special legal regime of private law for the suppression of violations of competition (eng. private enforcement) and damages in connection to the acts of infringement is not prescribed, but there are no legal obstacles that according to the general rules of civil liability damage can be claimed in these matters, as well as the annulment of restrictive contract. Here, however, the question concerning previous treatment of Commission's decision on finding a violation of competition arises. LPC contains a provision which indicates a civil action before a court of general jurisdiction for the exercise of claims for damage, thereby implicitly excludes discussion of this issue in the proceedings before the Commission. Additionally, it is explicitly stipulated that the act of the Commission which establishes violation of competition does not assume the occurrence of damage, but the damage has to be proven on the Lawsuit for damage compensation<sup>79</sup>. However, this legal formulation leaves room for different interpretations in the judicial practice, especially regarding the effect of the Commission's decision: whether the finding of a violation of competition before the Commission arises as a preliminary issue in legal proceedings, whether the violation act in an administrative procedure has the effect that this specific provision excluded the possibility of a direct request for damages for infringement of the competition without prior decision of the Commission (*private enforcement*), what are the correlations between the facts established in the administrative proceedings and litigation, and other series of open questions.

So far, it can be concluded that the legal framework is insufficient and the judicial practice does not exist, so the improvement is certainly necessary in this area, and in the first place by opening the legal possibilities. The advantages brought by private enforcement, inter alia, include greater motivation, more available information and resources, than the proceeding carried out by a public authority.<sup>80</sup> In this regard, the recently passed Directive 2014/104 on Antitrust Damages Actions should be mentioned, which regulates facilitation of access to evidence for submission within litigation

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<sup>76</sup> Law on Accountability of Legal Entities for Criminal Offenses ("Off. Gazette of RS", no. 97/2008).

<sup>77</sup> M. Boskovic Matic, "Competition Protection in Serbia - the functioning of protection mechanisms", pCompetition Protection and Monopoly Suppression, Dobrasinovic D. et al., Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, 2014, pg. 19.

<sup>78</sup> M. Boskovic Matic, "Competition Protection in Serbia - the functioning of protection mechanisms", Competition Protection and Monopoly Suppression, Dobrasinovic D. et al., Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, 2014, pg. 19.

<sup>79</sup> Art. 73 LCP.

<sup>80</sup> K. Huschelrath, H. Schweitzer, ed., *Public and private enforcement of competition law in Europe*, ZEW, Springer-Verlar, Berlin, 2014, pg. 37.

procedure, regulates the effect of previous acts of the competent authority to examine violations of the competition (competition authority) in a lawsuit, the scope of damage compensation, statute of limitations and other relevant issues.<sup>81</sup> Considering the obligation of legal harmonization in the area of competition, the forthcoming transposition of this Directive should resolve the largest part of the above concerns, and until this moment, the relevant judicial practice in this matter should not be expected.

### V.3 Sectorial Legislation and Public Authority Measures

Legislation in the field of competition and state aid control, is largely in line with the relevant acquis, and is the focus of the implementation of these rules to the institutions responsible for their implementation. However, there is a significant number of sectorial regulations that have an impact (mostly negative) on the state of competition in the market of Serbia. Regulatory constraints involved, distortion, and even the exclusion of competition in a particular market sector, regularly appears in regulations within a range of fields, by granting exclusive or special rights in favor of certain businesses, price editing or price controls, the conditioning of mandatory membership in associations, preventing the entry of new participants into the market and the like.

In sectors such as transport, infrastructure, postal and telecommunications services, broadcasting, agriculture, environment and energy, there are restrictions of competition by exclusive rights or monopoly of certain subjects. These limitations fall within the scope of liberalization process that in addition to protection of competition and state aid control, constitutes the third unit of the issues covered in the negotiation chapter 8. These restrictions were continually pointed out in the EC progress reports, but except for some prominent cases, were not specifically addressed in the framework of the bilateral screening. In this connection, it is necessary to point out that liberalization in some areas (telecommunications, energy, transport) are subject to sectoral negotiations, and not the chapter 8.

In principle, regulation or allocation of special or exclusive rights on the basis of sectoral regulations is allowed by the EU rules. This can be carried out within the institute of services of general economic interest, in accordance with the requirements of Art. 106 (2) TFEU, as part of the legal regime of state aid control. With regard to income received from the service, operators of services of general economic interest fall under the regime of state aid control, but to the extent that the application of these rules would not be legally or factually hampered the performance of their public functions or entrusted public authority. The criteria for compensation awarded by the state enterprises for the provision of services of general economic interest that does not constitute the state aid, were developed the practice of the ECJ in the Altmark case: a) that the economic entity is actually entrusted with the obligation to provide services of general economic interest and that these services are clearly defined; b) that the parameters for calculating the compensation awarded to the undertaking is to be determined in advance and in an impartial and transparent manner, to avoid giving economic advantages to a subject in relation to the undertakings challenged by competitors; c) that the fee does not exceed the amount of expenses incurred in the provision of services, minus income, plus a reasonable profit; d) that the amount of compensation for economic entities providing services of general economic interest, and which was not selected in a public procurement procedure, is

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<sup>81</sup> Directive 2014/104 on Antitrust Damages Actions; deadline for harmonization for Member States is 27/12/2016.

determined by analyzing the costs that an average undertaking would have in providing the services concerned.<sup>82</sup> However, the uncertainty caused absence of the term SGEI, as well as criteria for determining which criteria fall within the domain of legislation of the Member States.<sup>83</sup>

As illustrative examples of sectoral restriction of competition, points to the legal solutions regarding the distribution of electricity and gas, certain issues regarding regulation of the market of petroleum products in the field of financial services and insurance, regulation of markets of financial instruments, certain forms of passenger transport, as well as the case of many other sectoral regulations. Scanning sectoral regulations from the aspect of risk assessment of distortion of competition (competition screening) is not specifically developed functions, either within the Commission or other relevant bodies, and on occasionally is the subject of some research or analysis.

Market financial services in recent years has particularly been exposed to the risks of distortion of competition. In the insurance market, there were cases that were the subject of attention of the CPC (cases of restrictive agreements under the auspices of the Association of Insurers in the field of auto-Casco and auto-insurance), but even so, situations have appeared that have provoked public attention with doubts concerning the violation of competition. In particular, the minimum tariff of insurance premiums from July 2014 has sparked a lot of controversy, due to the extraordinary increase in the price of compulsory auto-insurance premiums by an average of 45%. In addition, representatives of consumer organizations have pointed to this problem, pointing to indications that it is a "compensation" to the committed insurers with the approval of the regulator (the National Bank of Serbia), to cover the payment of damages on an entirely different basis (natural disasters).<sup>84</sup> However, it is noted that this activity is carried out in accordance with the sectorial law, so in that sense, it cannot be stated that the competition rules apply.<sup>85</sup>

Perhaps an even more illustrative case of restrictions of competition in the financial services market, was recorded in the fall of 2011, when there was an alignment of interest rates on deposits by banks on the market, and as a result of certain sectoral policies. In this case, this harmonization of business practices had no legal cover; it came in the form of invitation of the then Governor of the National Bank towards banks to reach an agreement on the level of interest rates for the "Savings Week".<sup>86</sup> The idea of sectorial regulators, rather unusually expressed, was to prevent the market instability that would cause a sudden withdrawal of deposits from the banks with lower interest rates, as well as previous practices it was precisely the banks mostly exposed to risks which were at the forefront of "unfair" competition via high interest rates to attract the depositors. Consequently, the public interest is contained in the protection of the market, but the consequences of forth mentioned measure was exactly the opposite, and was reflected in a drastic damage made to competition.

The sectorial regulations of particular importance to the issue of competition certainly pertain to public procurement. The sectorial nature of this legislation should be regarded in relative terms in comparison to competition rules, because it is actually another horizontal theme present throughout most of the public policy and vertical, sectorial legislation. Ensuring competition, transparency and equality of bidders are listed as public procurement principles under the applicable law governing this

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<sup>82</sup> CJEU, Case C-280/00 *Altmark Trans* [2003] ECR I-7747.

<sup>83</sup> See: Koen Lenaerts, „Defining the concept of ‘Services of General Interest’ in light of the ‘checks and balances’ set out in the EU treaties”, *Jurisprudence*, 2012, 19(4), p. 1247–1267.

<sup>84</sup> Statements by representatives of the National Consumer Organization of Serbia (UNOPS) in multiple media (eg. Daily "Blic" from 2.07.2014.)

<sup>85</sup> The Law on Compulsory Traffic Insurance ("Off. Gazette of RS", no. 51/2009, 78/2011, 101/2011, 93/2012 and 7/2013 - making US).

<sup>86</sup> The daily "Blic", 22.10.2011., as well as other media.

area.<sup>87</sup> The Law and practice of public procurement is, like most other areas, closely related to the process of legal harmonization with the EU law and is subject to the negotiation within chapter 5 of the acquis.<sup>88</sup> Series of issues overlap between public procurement and protection of competition, some of which are subject to concrete references in the Law on Public Procurement. The Law thereby stipulates the obligation of each bidder to submit a declaration that the offer is independent, that is submitted without consultation with other bidders or concerned parties. The contracting authority is, however, obliged to inform the CPC in case of reasonable suspicion of the truthfulness of statements with regard to the independence of the bid. In addition, any person concerned shall inform the Commission if he or she has any information about the violation of competition in the procurement process. The Law prohibits the supplier to subcontract a person who is not stated in the offer, under the threat of cancellation of contracts and realization of collateral. Supplier for whom the Commission establishes that he or she violates the rules of competition, may be placed on a "black list" of the customer, for a period of three years from the point of discovery of violation. Finally, the Law prescribes a special administrative measure within the competence of the Commission, which is the prohibition of the participation in the procurement procedure if it determines that the bidder or concerned person has violated the rules of competition in the procurement process. This prohibition is imposed with a duration of up to two years.<sup>89</sup>

It should be pointed out that in June 2011 the Commission passed the aforesaid Guidelines for detection of bid-rigging in the public procurement process, closely describing this phenomena and explaining it from the point of characteristic questions that can arise in practice, and thereby facilitate the identification of such cases and the pertinent.<sup>90</sup> On the other hand, to date, no bid-rigging agreement was processed before the Commission, but in this moment a number of procedures is ongoing.

It is precisely on the issue of sectorial regulatory restrictions of competition that the most obvious problem with regard to the deficit of strong horizontal competition policy presents itself, which was elaborated beforehand. As noted, the policy formulation and coordination by the Government, does not feel the impact of competition policy stakeholders. There is no impression that this policy is generally part of a political agenda, except on matters directly related to the protection of competition (and to some extent the the state aid control).

Regulatory restrictions do not constitute a violation of the competition and are not subject to review by the Commission. However, the Commission has the legal authority, and by all accounts, appears as the only institution that has the ability, the competence and the authority of an independent regulator, to draw attention to particular issues or deficiencies in sectorial legislation. Specifically, the Commission is competent to give opinions to competent authorities on draft regulations as well as

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<sup>87</sup> Art. 10 to 12 of the Law on Public Procurement ("Off. Gazette of RS", no. 124/2012, 14/2015 and 68/2015)

<sup>88</sup> In this chapter, the activity carried out the screening process and received the official report on screening for Chapter 5 - Public Procurement ([http://seio.gov.rs/upload/documents/skrining/eksplanatorni/izvestaj\\_pg\\_5.pdf](http://seio.gov.rs/upload/documents/skrining/eksplanatorni/izvestaj_pg_5.pdf)), noting the adequate the level of preparedness to start negotiations on this chapter, but also has a series of individual complaints and questions that need to continue the process of harmonization.

<sup>89</sup> More about the connection of the system of public procurement and competition protection: Dankovic Sanja Stepanovic, "Protection of the competition and combating corruption in public procurement procedures," Serbian Political Thought, Br. 1/2014, p: 1128

<sup>90</sup> The instructions in terms of contents represents mainly the translation OECD Guidelines for fighting bid rigging in public procurement (2009)

applicable regulations that have an impact on competition in the market.<sup>91</sup> In addition, under the procedure for the consideration and adoption of laws at the level of Government, it is envisaged that for the draft law and the proposal for a regulation or a decision or other act, as a supplement, a statement on the realized cooperation shall be delivered, i.e., the opinion of the authorities, organizations and bodies which in accordance with special regulations provide opinions on these acts, shall be obtained.<sup>92</sup> Accordingly, the legal framework for intervention by the Commission in connection with the normative activity of ministries and other bodies exist, but is not used. In practice, the proponents of sectoral regulations and laws do not provide such documents to the Commission in the preparation stage, and sometimes even in public debate. However, these are acts which are available to the Commission, and at each stage of preparation, particularly in the final stages, the Commission can send its comments and suggestions, via opinions on the proposal for a regulation or act. In current practice of the Commission, such cases were rare, sporadic and without significant influence on decision-makers.<sup>93</sup> In this regard, representatives of the Commission point to problem that when the authorities are preparing the legislation, they as a rule, do not submit the relevant draft laws for the opinion. Therefore, it was pointed to necessary amendments to the Rules of Procedure of the Government in the direction of determining the mandatory opinion of the Commission regarding the regulations of relevance to competition.<sup>94</sup> However, under the existing legal framework, there are also adequate opportunities for more proactive Commission, especially by monitoring the ongoing public debates on the draft laws and other regulations, as well as other forms of involvement in actual processes of preparation and adoption of the regulations.<sup>95</sup>

As a contrary example in relation to the indolent practice of the Commission regarding the issuance of opinions on legislation in preparation, one can point to the case of the Anti-Corruption Agency. Specifically, the Agency has in the past two years prepared and published a large number of opinions and analyses regarding the risk assessment of corruption in the Laws and regulations that have been prepared or adopted in this period.<sup>96</sup> In this way, a significant body of knowledge and skills was formed in establishing risk assessment methodologies in terms of corruption at the legislative level and, most importantly, the authority of the institution was built which regularly monitors relevant legislation and criticizes the problematic regulatory solutions.

Accordingly, the Commission is yet to achieve: 1) the development of instruments to influence sectorial policies and sectoral legislation, such as competition screening<sup>97</sup> and opinions on legislation

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<sup>91</sup> Article 21 par. 1 point 7 CPA

<sup>92</sup> Art. 39 a par. 4 of the Rules of Procedure of the Government ("Off. Gazette of RS", no. 61/2006 - consolidated text, 69/2008, 88/2009, 33/2010, 69/2010, 20/2011, 37/2011, 30/2013 and 76/2014).

<sup>93</sup> It is the opinions regarding the Decision on determining the minimum price of theoretical and practical training of candidates for drivers and determining the lowest price for taking the driving exam in 2012, according to the Law on safety in traffic on roads, and the Regulations on minimum technical requirements for trade oil and oil derivatives in 2011, adopted on the basis of the Law on Trade.

<sup>94</sup> Note in the public debate on the draft study (13.10.2015)

<sup>95</sup> The obligation to publish a program of public hearings and draft act on the website of the suggestor and internet portal of the e-government prescribed by section. 41 par. 4 Rules of Procedure of the Government.

<sup>96</sup> <http://www.acas.rs/praksa-agencije/analize-propisa-na-rizike-od-korupcije/>

<sup>97</sup> Philip Lowe, "The design of competition policy institutions for the 21st century- the experience of the European Commission and DG Competition", Competition Policy Newsletter, No. 3/2008: "A competition test was included in the Commission's revised Impact Assessment Guidelines of 2005. All legislative and policy initiatives included in the Commission's annual work program must pass this test. The basic 'competition test' applied in the context of competition policy screening involves asking two fundamental questions at the outset. First: what restrictions of competition may directly or indirectly result from the proposal (does it place restrictions

in preparation, 2) development of an authority of a key institution advocating the issues pertinent to competition, and finally, 3) exercise of decisive influence in the process of defining policies and legislation with regard to competition issues.

As a positive example of horizontal impact in terms of the removal of regulatory risk to competition, a recent example of amendments to the Law on Banks can be noted. This regulation has long contained a clear example of abuse of the system of competition protection via sectorial regulation, through provisions which the banking sector was exempted from the jurisdiction of the Commission with regard to the infringement, as well as merger control and put under the competence of the National Bank. However, following changes in February 2015, these provisions were repealed, and eliminated normative barriers to the full competence of the Commission in this area. This change is undoubtedly the result of cooperation between several competent authorities and bodies, but also the coordination that took place in the framework of the negotiation concerning chapter 8.

Except through regulations, it is possible through individual acts and measures adopted by the Government or other public authorities, to influence the level of the competition, through selective financial assistance, putting individual economic entities in an advantageous position in the market relative to competitors, or other measures that pose a risk for competition. As forms of assistance, the most common are grants, as well as indirect forms of aid, soft loans, tax exemptions, write-off of tax debts or obligations based on mandatory contributions, various forms of participation and use or disposal of state assets, etc.

### V.3.a State Aid Control

These measures of state bodies are primarily subject to supervision under the Law on State Aid Control, and fall under the jurisdiction of the Commission for State Aid Control. In this regard, special attention should be paid to sectorial state aid, which in relation to regional or horizontal programs, government assistance, causes more significant effects of distortion of competition.

The practice of state aid control, developed after the establishment of the system and the start of work SACC March 2010, identified the following trends:<sup>98</sup>

- 304 acts on the permissibility of state aid;
- 38 acts establishing that the application does not apply to state aid;
- 193 acts on instituting ex post controls.

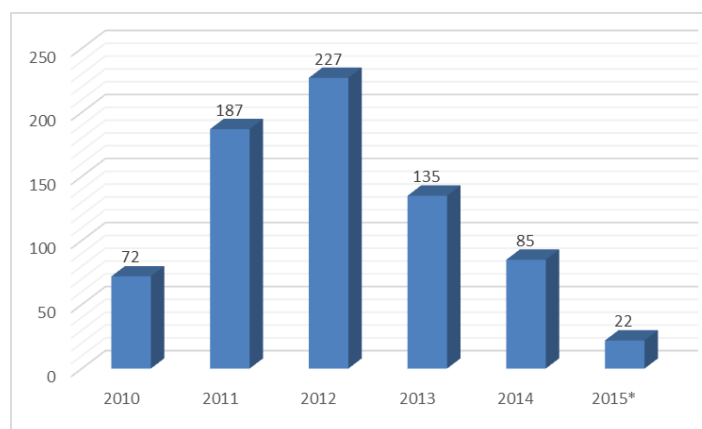
Concerns caused by forth mentioned practice are related to two sets of problems: state aid which is the subject of control, and the one that is not covered. Namely, in the first group cases are listed in which the CSAC has acted, based on a request, or exceptionally, at its own initiative. In these matters, a large number of procedures of subsequent control can be observed, which indicates the insufficient awareness of the state aid grantors regarding their obligations in the proceedings of the previous control. CSAC often do not have complete information, and sometimes providers of state aid do not provide the requested information. On the other hand, a certain part of the state aid program is taking place "below the radar", without the application or other information that would be accessible to

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on market entry, does it affect business conduct, etc.)? Second: are less restrictive means available to achieve the policy objective in question?"

<sup>98</sup> Data as at 31.08.2015. (According to the information on the website SACC).

CSAC, and as a technique for such treatment to apply the Government's decision on the basis of conclusion, i.e., acts that are not published in the Official Gazette. Accordingly, there is no adequate control mechanism, responsibility and sanctions for granting state aid contrary to laws or for ignoring the Commission.<sup>99</sup>



*Number of adopted decisions in state aid control<sup>100</sup>*

The practice of CSAC is often subject to criticism in the EC progress reports. In its 2014 report, it was noted that a number of existing programs of government assistance, including fiscal assistance still need to comply with the EU acquis, and that further efforts should be made to ensure that the CSAC be informed of any measures regarding the allocation of aid and that it should be approved before the aid is granted.

At the organizational level, these reports point to the inadequate level of independence of the CSAC which lack full institutional capacity and a status of a legal person. The Law does not explicitly designate its status and professional and administrative work of the CSAC is performed by the Ministry of Finance. In terms of status, CSAC is operationally independent body established by the Government, but the decision establishing it does not give a reliable answer to the question what kind of body it is, because it does not fit into the legal framework with regard to the Government working bodies.<sup>101</sup> Based on the above, it can be reasonably assumed that the status and organizational matters pertaining to CSAC will be one of the conditions for opening negotiation chapter 8.

<sup>99</sup> Details: Study "State aid - judiciously invest or hidden corruption?", Transparency Serbia, Fund for an Open Society, 2015.

<sup>100</sup> According to the data SACC, as of 31.08.2015. \*

<sup>101</sup> The decision to establish the Commission for State Aid Control of 22.02.2015., Was made on the basis of Art. 43 par. 1 of the Law on the Government, which regulates the legal form of the act, and not on the basis of Article 33 of the same Act, which regulates the establishment and operation of permanent and temporary working bodies of the Government.

## VI. Challenges of the Application of Rules of Competition

### VI.1 The Commission for Protection of Competition: Organization, Capacity and Practice

In the short period following its establishment and commencement of operation in 2006, CPC has grown into a respectable authority for protection of competition. At this stage, the Commission has significant professional, organizational, technical and financial capacity. In interviews with the actors, it was indicated that, through its practice and professionalism, CPC gained a reputation not only in the Serbian market, but that it also represents a model and has built a reputation among the institutions in the region.

Professional services of the Commission currently employ 36 people, mostly university graduates. In addition, four of five members of the Council of the Commission are employed in the Commission.

<b>Professional Services of the Commission</b>		<b>No. of employees</b>
<b>1</b>	Secretary	1
<b>2</b>	Sector for examination of mergers	9
<b>3</b>	Sector for determining the violations of competition	9
<b>4</b>	Sector for international and domestic cooperation	1
<b>5</b>	Sector for legal affairs	3
<b>6</b>	Sector for economic analysis	2
<b>7</b>	Sector for financial affairs	3
<b>8</b>	Sector for normative-legal, HR and general affairs	7
<b>9</b>	Jobs outside internal organizational units	1
	<b>Total</b>	<b>36</b>

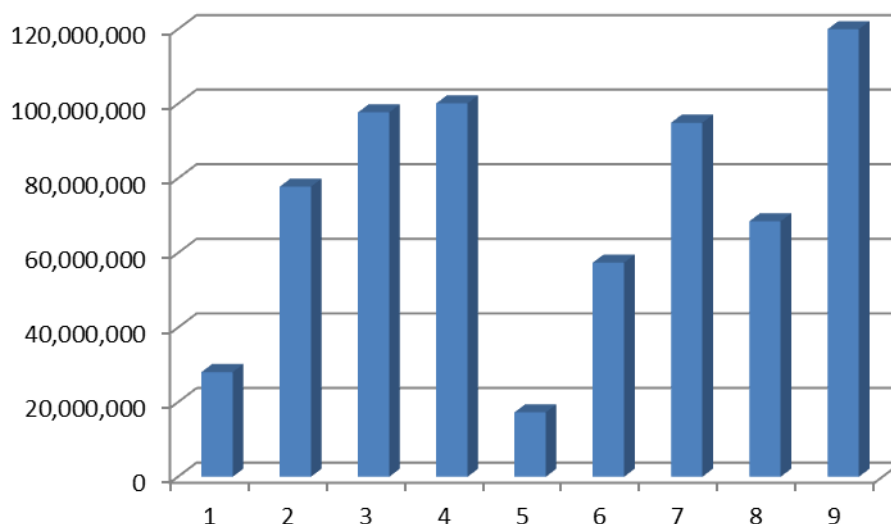
Under the Act on internal organization, 54 jobs are systematized for the professional services of the Commission, but the actual number is significantly less than required (2/3 occupancy). The reasons for this lack of professional capacities are related to the limitations of the approved funds for this purpose in comparison to the annual financial plan approved by the Government.

In 2014, the Commission had revenue of issuance under its jurisdiction in the amount of 305,777,244 dinars (94.5% of total revenues of the Commission). In the structure of revenues, by far the largest



part (89.9%) comprise fees from issuing the decision on approval of concentration in an abbreviated or examination procedure.

One can observe a significant difference between total revenues and expenditures of the Commission. In 2014, realized revenues of RSD 325,129,970 and 119,704,354 dinars expenditures, so in that year reported a surplus in the financial operations of the Commission of 205,425,616 dinars. Most of these funds are paid into the national budget.<sup>102</sup>



*The amount of the excess of income over expenditure of the Commission, which was paid into the budget of RS in the period 2006-2014.*

Simultaneously with the aforementioned findings, it should be noted that there is significant space and a need to improve the institutional capacity of the Commission. In other words, the institution was built and defined, procedures are established and organization functions, and the current practice testifies of its capabilities (and limitations) in terms of volume and quality of the fulfillment of its functions, primarily with regard to supervision. The focus of Commission's activities in the previous period was undoubtedly the development of practice in matters in which it takes action. Exceptional volume (and load) of controls of concentrations is relatively successfully overcome, out of which by so far the largest percentage are the abbreviated procedures. At this point, the question may arise (including some of the stakeholders), whether surveillance is successful and adequate in relation to the essential factual questions which are impossible to examine in short terms and with the available resources, or if a "filter" in this control is too thin, and in some cases possibly selective. This question is not necessarily discussed in relation to the threshold control, which makes it necessary to find an appropriate balance of interests, abilities and needs of the market - concentrations are extremely plentiful source of revenue for the Commission, but a relatively large number of cases (about 100 annually) make the commitment of significant resources. The result is a rare launch of the investigation procedures and undertaking of prescribed measures (bans or conditional concentration).

<sup>102</sup> All data are based on the Annual Report of the Commission for Protection of Competition for 2014.

On the other hand, in the matter of the infringement, there is a relatively small number of cases, and almost no landmark case. We should note that according to past experience in the work of the Commission, by far the largest number of cases, starting from the preliminary questions regarding concentrations or injury, to analyzing, and proposing decisions to the President of the Commission and the Council, in accordance with their responsibilities, was performed by the expert service, and that there are extremely rare situations that it was done on the initiative of a Council member. Accordingly, expert service is and should be a "driving force" in the work of the Commission, as it does, within the limits of the existing possibilities. Certain functions of the Commission rarely or not at all performed (consultative-instructive function, normative functions, coordination and cooperation, economic analysis). The lack of personal capacities, in terms numbers and the structure, was the main highlight in conversation with the representatives of professional services.

The Commission's work, as well as the legal and institutional framework for the protection of competition, was the subject of a recent study by UNCTAD, which, among other things, emphasized the need to create a sustainable and predictable source of funding for the Commission, strengthen human resources, particularly in the field of economic analysis, develop normative functions, organize trainings and implement procedures in specific thematic and sectoral continents (bid rigging, the health sector), strengthen the function of cooperation with sectorial regulators and other recommendations for the improvement of the Commission's work.<sup>103</sup>

The Commission's practice is the subject of debate within the professional community, including practitioners in this field, in business community, and often has been criticized for depending on the interest and orientation of the person who is evaluating its work. Lawyers who handle cases mainly in the concentration generally evaluate its work in positive terms, stressing timeliness of the Commission with regard to its capacity, professionalism and the fact that the Commission's practice is often a landmark for the work of other national competition authorities in the region. On the other hand, attorneys at law for the parties in the infringement procedures have a different opinion, and point out particular issues or failures in the work of the Commission, especially in certain positions stated in its decisions. From the perspective of the courts competent to examine the legality of acts of the Commission, its practice certainly seems inconsistent and unreliable. The business public is not informed in detail about the practice of the Commission, and is viewed via its two roles, which are not central to its authority - one is the control of concentrations and procedural and financial liabilities in connection with the notification, and the other as an institution that should provide a greater degree of knowledge and information on the competition rules (competition advocacy). Representatives of the state administration do not have enough information, nor interest, because it is an autonomous and independent regulatory body. Critical evaluation practices of state bodies is often the main highlight of academic papers. Pertinent estimate is, in accordance with the applied methodology, of predominantly theoretical character and generalize the factors that are beyond the specific theoretical discourse. Finally, the expert service of the Commission and the authority for decision-making authorities, would indicate to the organizational, technical and other problems in regular work, which complicates the treatment of the Commission, and causes its lack of activity in certain areas in its jurisdiction.

As with other national bodies for competition, it is difficult to give a value-neutral evaluation practices. Views expressed with regard to the Commission's documents or its lack of practice in certain matters or

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<sup>103</sup> United Nations Conference on Trade and Development (UNCTAD), Voluntary peer review of competition law and policy: Serbia, 2011.

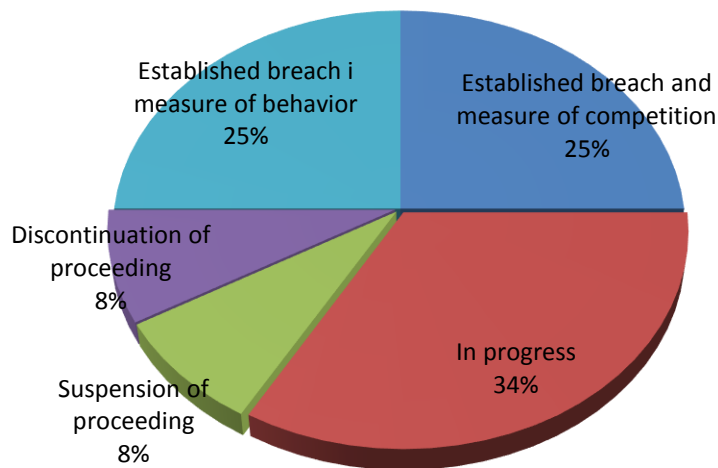
areas are determined based on stakeholder's position in relation to the Commission. Jurisprudence, typically, provides a reliable and relatively objective indicator of success in the work of certain organs, at least from the perspective of the legality of acts enacted by that organ. However, in the context of judicial practice in the field of competition, this rule is also not completely reliable, because it is a practice that is being built practically from the "white paper", without sufficient prior knowledge and experience in the field, and in the complex circumstances of permanent "judicial reform" processes that for past 15 years continuously takes place with major, systemic changes at the organizational, personnel and procedural level in the judiciary.

Accordingly, in the absence of reliable elements for value-neutral assessment practices, we will try to reflect upon some of the issues had the highest importance from the angle of the relevant processes. Primarily, it is the assessment that the Commission's practice is quantitatively modest, and in qualitative terms, insufficiently reliable and consistent.

In the infringement proceedings, as an essential responsibility of the Commission, after a legal reform process in 2009<sup>104</sup>, a total of 21 cases has been solved (most of them are individual and after repeated procedures), of which 8 pertain to substance abuse of dominant position and 13 to restrictive agreements. The structure of these decisions is diverse, as well as the outcomes of the cases.<sup>105</sup>

In cases involving the abuse of a dominant position, with regard to the existing state (in some cases, court proceedings are pending), in six cases the procedure ends by identifying these breaches of competition, three of which contained protection measures (fines), and three measures of behavior, one was temporarily terminated using the new termination procedure provision, and in one case the procedure was canceled. In addition, at this moment, the four proceedings are ongoing, which were initiated starting from April 2012 until December 2013.

### **Practice of the Commission for Protection of Competition: Abusing the Dominant Position**



The subject of the recently detailed exposes, as a case study in this matter is the case of "Frikom". This process was initiated by an act of 6 August 2010, against the industry of frozen food "Frikom" on reasonable assumptions concerning existence of an infringement of competition in the form of abuse

<sup>104</sup> The new law began with the implementation on 1.11.2009.

<sup>105</sup> Practice of the CPC is shown on the basis of data from the website of the Commission ([www.kzk.gov.rs](http://www.kzk.gov.rs)).

of a dominant position. During the procedure that relevant market was determined to be the wholesale of the industrial ice cream on the territory of the Republic of Serbia. It was found that the share of Frikom in the relevant market during the three-year period was above 70%, which satisfied the requirement for the legal presumption that a dominant position includes 40% market share (this legal presumption is abolished by law in 2013). The factual part of the act is determined by a series of injuries which, among other things, consist of imposing obligations to customers-retailers through standard contracts in the wholesale market, that the subsequent sales to end users-consumers are fully and faithfully implemented in accordance with the previously defined retail prices, the obligation of exclusive purchase of relevant products, with direct and/or indirect ban on selling competing products, as well as an obligation of retailers to the wholesaler to compensate, in unreasonable amounts, in case of damage that does not comply with all contractual obligations, and others. Accordingly, in the given case a hard core violation was identified for determining the final price (resale price maintenance, RPM), as well as exclusivity in the sale, in two specific forms, in terms of keeping the cooling device (freezer exclusivity) and the exclusive purchase of the relevant product with the ban on sales of competing products (outlet exclusivity). Decision on determining the violation of competition on 19 November 2012, included a measure for the protection of competition, in the form of pecuniary fine in the amount of 4% of the total annual revenue in the year preceding the initiation of the proceedings (in 2009), as a measure to eliminate violations of the competition, in the form of behavioral measures which prohibits the conclusion of contracts with customers-retailers, which would include provisions on the determination of prices in subsequent sales, exclusivity refrigeration and retail stores, provisions to impose unfair business conditions in relation to the market and negotiated smaller business partners, as well as provisions to apply unequal conditions to equivalent transactions with other market participants, with the aim of individual market participants to create a disadvantage for their competitors.<sup>106</sup>

Due to a generous amount of facts, conspicuous, and even obvious violation of competition that have been identified, the procedure is carried out in a proper and lawful manner, and act for the Commission to give adequate reasons for the decision, including the imposed measures, it appears that this case is completely legal and in fact rounded. In addition, the Commission decision was confirmed in the proceedings before the Administrative Court and the Supreme Court of Cassation, and the administrative measures to protect competition were conducted. On this basis, it can be concluded that this was the first-landmark of the Commission on the matter of abuse of a dominant position, and more importantly, it was viewed as such from the perspective of practitioners and the bodies that monitor the work of the Commission. However, the question is if it enough to have a single landmark case in the area of serious infringement of the competition after nine years of work of the Commission. If this pace in its work continues, the question is when to expect the next decisions that will be a landmark for balancing the practice of economic entities with the rules of competition (competition compliance), but also to serve as a source of information and explanations with regard to awareness raising about the importance of the competition policy.

In some ways the opposite example, or rather negative example of practice in the same area, is the case of Imlek. It is a process that dates back to 2007 and which was, after much procedural complications, finalized by the decision of 9 August 2012, stipulating that joint stock companies

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<sup>106</sup> Details of the case "Frikom": Cedomir Radojicic, "Case"Frikom "- Anatomy of a violation of the competition," Protection of the competition and combating monopoly, Dragan Dobrasinovic et al., Belgrade, Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, 2014 (p. 51 -81)

"Mlekara" from Subotica and Industry of milk and milk products "Imlek" in Belgrade, as a single participant in the market, have a dominant position in the relevant market for purchase of raw cow's milk intended for further industrial processing in dairies on the territory of the Republic of Serbia and which stipulates the abuse of the dominant position by imposing unfair business conditions and applying inequal conditions to equivalent transactions with other trading parties.<sup>107</sup>

This item has been marked by a series of problems and obstacles, mainly of a procedural character, but also related to a set of circumstances. The first decision in the case was issued in May 2009, in relation to the facts from the 2006-2008 period, and after the start of implementation of the Law in 2009, launched a special procedure for the determination of the newly established merger remedies (administrative fines) on the basis of the violation and the facts of the previous solution. This was followed by court proceedings, mostly marked by Imlek representative's remarks regarding the illegal retroactive application of laws. The court decisions have fluctuated from the confirmation to the cancelation and returning for retrial. In addition, administrative measures, determined at the relatively high amount of EUR 3 million (at the exchange rate from the time of enactment of the act), was charged. Following the abolishment of the act, in the repeated procedure of the administrative dispute this amount was paid back, along with the one-year legal interest on that amount.

In this case the facts and application of substantive rules "melted" under the weight of the challenges related to transitional legal regime, and confusion in the new procedural framework, both by the Commission, and in practice the courts. In this regard, it should be pointed out to the problematic view of the Commission, which was crucial for the adoption of measures for the protection of competition laid down in the new act on determination of measures from 2011, inexistant "proceedings for the imposition of administrative measures", in which the determination of measures to was established aa the main element in the Procedure. The Law explicitly regulates special procedures that take place before the Commission, and proceedings for infringement of the competition, the procedure for concentration control and the procedure for individual exemption of restrictive agreements, and does not recognize the special procedure for determining the administrative measures, while the measure for the protection of competition has a clear accessory character in the proceedings regarding the potential infringement.<sup>108</sup>

Another important factor should be pointed out related to the penal policy of the Commission, which is determination of the measures to protect competition in the concrete case, which is the first in which this measure had been applied in a relatively large amount. It seems that the objections that could be heard at the time of enactment of the Act of 2009, as well as the beginning of its application, were that cautious steps are required to pave the way for the policy of the institution as regards the implementation of a completely new legal institutions in the domestic legal order (administrative measure in financial amount), but also in the context of the harmonization of criteria for measuring the scale of the measure. The Commission did not accept the "small steps" approach at the beginning of practice of scaling the measures for the protection of competition, which presented an additional burden and its work, as well as understanding and accepting of new practices in the relevant business community.

This case, in addition to the importance in terms of establishment of the relevant case law was accompanied by a relatively large public interest, which was further revived by statements of

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<sup>107</sup> The Supreme Court of Cassation's judgment of 10.09.2015. rejected the request for review of the judgment of the Administrative Court which rejected the action for review of the legality of the Commission decision of 9.08.2012, which finally put an end to this case.

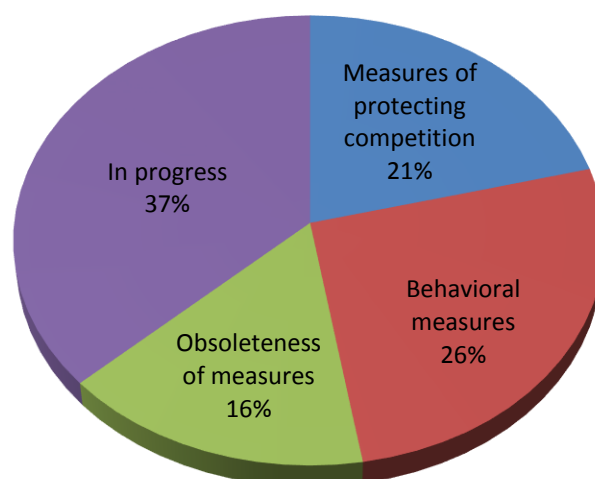
<sup>108</sup> D. Protic, O. Uzelac, op.cit.

politicians in certain moments, and which created the expectation that it will take concrete measures on the market of a product which is relevant for all consumers (fresh milk), and to sanction violations adequately. On that basis, one can reasonably expect that the Commission and the courts were under pressure from certain public expectations, which were different throughout the timeline of the case. From the sectorial perspective, the Commission's practice in these cases, including those that are ongoing, are concentrated in only four industries: food processing, telecommunications, transportation and utilities (funeral services), with one case in the financial and tourist services and pharmaceutical products (public procurement). It should be kept in mind that the Commission has conducted more sectorial analyses, but in just two sectors, food (production and purchase of raw milk) and energy (wholesale and retail market of petroleum based products).

In terms of the process instruments, it is necessary to mention that the mechanism of cancellation of the proceedings was used for the first time, which includes commitment decision.<sup>109</sup>

In the matter of the infringement because of restrictive agreements, the Commission's practice is somewhat more extensive: a total of 12 cases decided, in 9 cases the procedure is ongoing. In these cases, in 9 cases a violation of the competition, and 3 cases were completed by canceling the administrative suspension measure, due to obsolescence. In several cases, the court proceedings regarding the Commission's decision are still pending.

### **CPC: Restrictive agreements**



So far, the largest number of cases in which there was the emergence of a restrictive agreement, are linked to certain forms of pricing (the lowest price, illegal forms of influence on the final price), while in two cases the injuries consisted of another form of essential prevention and distortion of competition in the market. Thus, in terms of violation of competition through restrictive agreements which directly or indirectly fix purchase or selling price, this is a relevant practice of the Commission. Based on it, in this segment, it is possible to establish a policy to comply with competition rules (compliance policy) at the level of market participants.

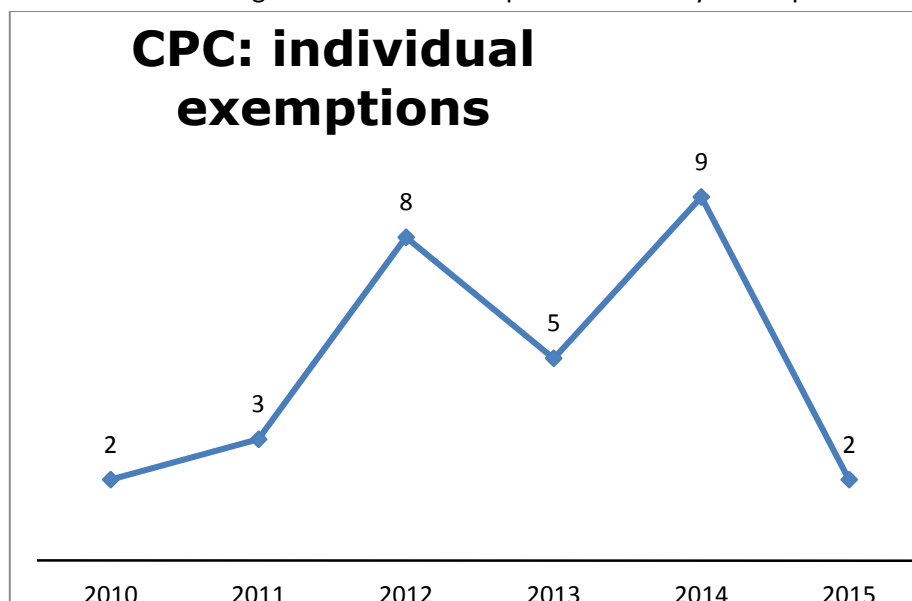
<sup>109</sup> Case Telekom (Conclusion to abort the proceeding on 14.11.2014).

On the other hand, it is fair to say that there is a lack of hard core cartel cases (price fixing, limitation of the production and commerce, division of the market), including restrictive agreements in procurement (bid rigging). One of the main reasons that can be heard in conversation with relevant stakeholders for this phenomenon is the lack of sufficiently reliable conditions for the implementation of leniency program, which is considered crucial in breaking up cartels. In current practice, there has only been one attempt of application ("Jeremic-Transport" in the "Nis Express"), which is only the first step in the right direction.

In connection to forth mentioned, an anecdotal case of METRO is particularly indicative. In the context of transitional legal regime to the new law, several cases of tests for restrictive agreements were initiated, under seemingly "beneficial" terms in comparison to the previous Law, and to prevent the extension of a new mechanism of sanctions to the existing problematic business practices in wholesale of consumer goods. The epilogue of these cases is that the Commission has invested considerable time and resources in these cases, that the measures were determined in certain cases, but at the end, mechanisms of implementing these measures were lacking (eg. in case INVEJ).

In terms of bid rigging cases, even 5 procedures are ongoing at the moment, which were initiated in the period between February 2011 and July 2015. By so far, however, in these cases, no decision has been made.

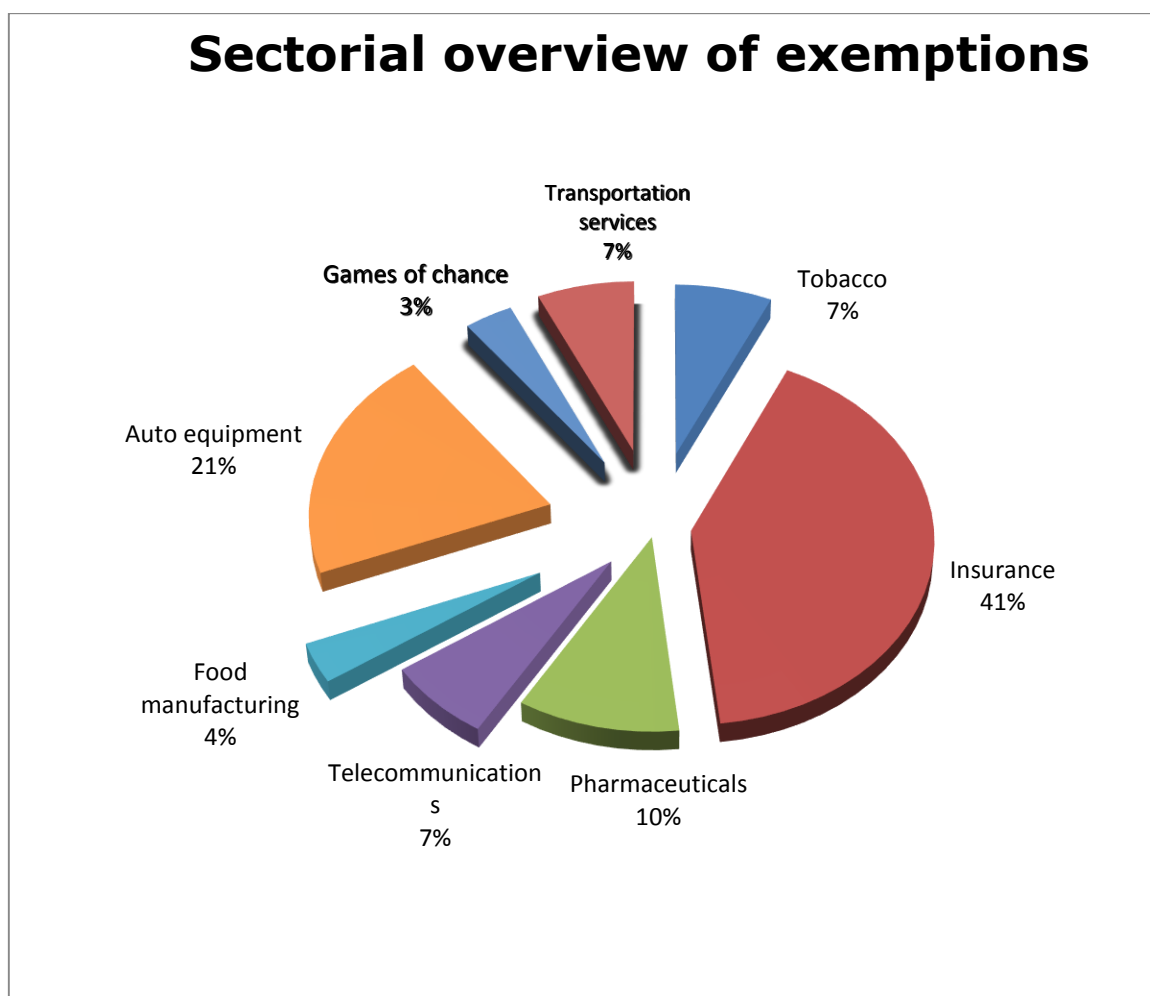
At the procedural level, again, one can observe the problem with the self-determining measures to protect competition, although not as a forth mentioned "procedure to determine measures", and based on the acts on determining violations from the period of validity of the previous law.<sup>110</sup>



Individual exemption of restrictive agreements had a prominent place in the practice of the Commission. In the period of application of the Law from 2009, 29 decisions were adopted on the exemption from the prohibition. Broken down by sector, by so far the largest number of individual exemptions pertain to the insurance industry.

<sup>110</sup> Group of pharmaceutical companies, a special act determined rate based on the decision on determining violations on 12.12.2008.

With regard to the overview of previous cases, it should be noted that one foreign investment (Michelin), with 6 cases, affected the seemingly high number of cases in 2012, and the volume in the sector of production and trade in vehicle equipment.



In the field of control concentrations, the Commission has acted in a relatively large number of cases in the previous period of application of the current Law. It approved 522 concentrations, per application in abbreviated proceedings, and in 20 cases the test procedure was carried out or is ongoing. In 6 cases, a conclusion was adopted to reject the application or the suspension for the withdrawal of the application.

It is difficult to single out a case, as particularly important, in order to observe a landmark case in this area. In this regard, attention should be paid to cases in which the Commission shall initiate the examination ex officio, and this practice is already present. In addition, in the practice, there were conditional approvals following the implementation of the test procedure in 6 cases, and in one case it was the prohibition of the concentration.<sup>111</sup>

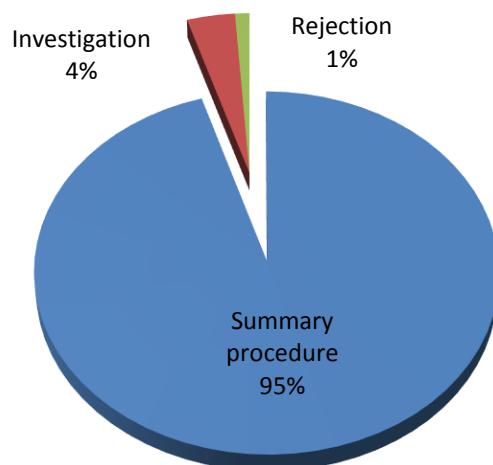
Issues related to the height of the threshold notification, in addition to the amount of fees, the highest subject of attention, and discussion among the relevant actors. At this point, it can be concluded that it is also the time needed to decide on the examination procedure that was subject to criticism by the

<sup>111</sup> Conditional approval in cases Holcim / Lafarge, Alitalia / Etihad, Agrokor / Mercator, Sunoco / Hellenic, Centrosinergija / Lanus i-Print System / Futura, a prohibition in the case of Sunoco / Hellenic in 2012.



professional service of the Commission (due to large loads in these cases). The amendment of the Law in 2013, extended the deadline for the Commission's actions in these matters.

## CPC: Mergers



The statutory procedural rule regarding the "silence of the administration" in the control of concentrations (as in the summary and in the examination procedure) means the so-called positive presumption, or a presumption of approval of concentration. However, in practice there is a lack of implementation of this provision. The reasons for that is, which can be heard among the professional staff, related to the efforts being made to prevent an unfavorable impression in the public.

Among the practitioners who follow the area of control of concentrations, basic content with the work of the Commission in these cases can be noticed, especially in terms of promptness in case handling. However, it may be argued whether such a picture of the situation is actually reliable, bearing in mind that in matters of concentration, even in the examination procedure if it ends with the authorization, as a rule, parties with opposing interests and that would challenge the act of the Commission, do not occur. Therefore, the court reviewing of the legality of these acts should not be expected.

At the same time, it was pointed to the shortcomings of some technical issues, such as the uneconomical forms of Commission's acts (large volume) or a request to create opportunities for the application and delivery of occasionally very extensive documentation, entirely by electronic means. The Commission's practice is conditioned by the professional, organizational and technical capacities, and this is a question that often arises in all analyzes and commentaries of its work. The Commission at this stage has solid capacities, but, as a rule, these are assessed as insufficient in terms of its responsibilities, particularly with regard to the structure of jobs and available resources. Insufficient capacity of the Commission indicates a continuity of the EC progress reports,<sup>112</sup> but also in discussions with stakeholders. In this context, it is firstly pointed towards the need to raise the capacity of economic analysis, regulatory policy and cooperation with other supervisory bodies.<sup>113</sup> The lack of

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<sup>112</sup> European Commission Progress Report on Serbia 2009-2014.

<sup>113</sup> Book recommendation of the National Convent on the EU 2014/15, the working group for Chapter 8 - competition policy, according to recommendations: 'Institution for the Protection of Competition through the inclusion of economists and representatives of civil society organizations in their work and their training for

exercise of certain functions can be linked to the lack of capacity, particularly in terms of regulatory issues (active participation in the process of preparation of the relevant legislation, provision of legal opinions) and competition advocacy, but in the first place, it is necessary to improve the functions of economic analysis and strengthen the economic arguments for its decision.

In addition to issues of professional and organizational capacity, the position of the Commission as an independent supervisory authority, which is accountable to the National Assembly ought to be mentioned. Parliamentary oversight over the work of the Commission is carried out through consideration of its annual work report, and the powers in the process of nomination, election, termination of office or dismissal of the chairman and members of the Council. However, the powers of approval of the annual financial plan of the Commission and its Statute, belong to the Government, and in this regard the question of the possibility of achieving an appropriate level of independence in their work can be raised. There are examples of other supervisory institutions, such as the Commissioner for Information of Public Importance and Personal Data Protection Commissioner for Equality, Anti-Corruption Agency, all of which are exclusively subject to parliamentary supervision, without the mediation of the Government in terms of their financial, personnel or organizational status. According to the current legal and functional status, the operational independence of the Commission may not be questioned because there is no indications of the pressures of the executive branch on the work of the Commission. However, it certainly comes to achieving certain standards of independence that has already been set up in case of forth mentioned institutions, and that there is no adequate argument to exclude the Commission from this circle of independent control bodies. This question had (and still has) specific, practical implications, especially in the field of approving the annual financial plan by the Government, and thus the Commission's ability to operate independently, as well as in terms of HR capacity, although there are adequate financial resources for the successful functioning at the significantly higher organizational capacity.

One question that often arises in conversation with practitioners in the field of competition is transparency in the proceedings before the Commission. Estimates can be heard of a high degree of transparency, which is de facto larger than the one stipulated by law.<sup>114</sup> This exactly is the problem with regard to questions of protecting the confidentiality of data, despite the application of the institute of measures for the protected data, in particular its effects in relation to other organs beyond the particular procedure and attitude to requests for access to information of public importance.<sup>115</sup> Therefore, there are issues with regard to the application of rules on public proceedings of general administrative procedure, followed by special provisions of the LPC including the measure for data protection, the ability (and limitations) of applying the institute of access to information of public interest, due to which the parties to the proceedings are subject to considerable risks with respect to information about their operations that are performed in the process.

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dealing with this topic. Cooperation with regulatory bodies (identifying and defining ways of cooperation), especially with the bodies that are responsible for the initial disruption of fair play and competition (public procurement, privatization) ".

<sup>114</sup> Public Discussion on Draft Study (13.10.2015.)

<sup>115</sup> Art. 45 CPL

## VI.2 Parliamentary Oversight

The CPC is an independent supervisory body that reports to the National Assembly.<sup>116</sup> The way in which this responsibility is realized is by means of submission of an annual work report, which is examined and for which the competent parliamentary committee states its opinion.<sup>117</sup> In addition, and more importantly in terms of realization of responsibilities for the activities of the Commission, the National Assembly elects and dismisses the CPC President and the members of the Council.

With regard to the functioning of parliamentary oversight and in particular the practice of the competent parliamentary committee, a progress can be observed in the period since the first election of the current Commission (2006), which took place without public attention, up until the last election. The CPC election of 2014 was characterized by a high degree of transparency of the process - from the public announcement for candidates in accordance with legal requirements, up to the interview of all candidates before the members of the board, which was transmitted in public via Internet. The same level of transparency is provided when discussing the report of the Commission, but also other issues that may come before the competent committee and the National Assembly, in accordance with their mandate, as well as individual responsibility and duty of the President and members of the Commission Council.

Simultaneously with the high-grade transparency in the work of the competent parliamentary body, it is necessary to conclude and that their work and the possibility of a proper insight into the work of the Commission and its agencies is conditioned by the quality of the report and the data reported.

## VI.3 The Practice of Administrative Court and Supreme Court of Cassation

The jurisdiction to review the legality of the decisions of the Commission belongs to the Administrative Court, which makes its decision, within the administrative dispute. Against the judgment of the Administrative Court, an extraordinary remedy is possible (a request for the review of court decisions) in all competition cases bearing in mind that they meet one of the procedural requirements (the appeal in the administrative procedure before the Commission is excluded), and on this legal remedy the Supreme Court of Cassation takes decision.<sup>118</sup>

The challenges with regard to legal solution in terms of jurisdiction have already been discussed. The common denominator for remarks on judicial practice in the matter of protection of competition, which could be heard in the interviews, are uncertainty, inconsistency and lack of timeliness. According to the interlocutor, the case law in this matter is not sufficiently reliable. It is estimated that the examination procedures of the Commission acts last for too long, sometimes several years. This is an important factor of legal uncertainty for all participants in the process. On several occasions the situation occurred that different councils have different attitudes on same issues. Court decisions to uphold a complaint or a claim, are almost exclusively based on the issue of the time of application of

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<sup>116</sup> Art. 20 CPL

<sup>117</sup> On the basis of Art. 45 of the Rules of Procedure of the National Assembly for issues in the field "market functioning, preventing monopolistic activity and unfair competition" is in charge of the Committee on the Economy, Regional Development, Trade, Tourism and Energy.

<sup>118</sup> In practice, the question of locus standi of the Commission for the submission of this extraordinary legal remedy in an administrative dispute, but the Supreme Court of Cassation remove that doubt (verdict Uzp VKS-352/2012 from 22.05.2013.)

the Law (in connection with the changes in the Law) and procedural reasons, and exceptionally, the examination of the legality of the method and the amount of imposed administrative measures occur. Examination of the Commission's decisions on the merits of the case, on the question of the legality of the reasons for the application of substantive competition rules, did not find an adequate place in the previous case-law.<sup>119</sup> With regard to this, question can reasonably be asked in relation to the decisions of the court confirming the acts of the Commission, whether the general court's "view" even reaches to the question of the merits of such acts, as well as the question of the possibility for the Court to decide in a dispute of full jurisdiction in this matter.

A lack of relevant cases is due to the fact that there are no as sentences or attitudes in the jurisprudence of the Administrative Court on this matter. Furthermore, within the framework of the Administrative Court, there is no specialization in this matter and the court rules do not provide a special register for courses in the field of protection of competition in the Administrative Court. Particularly aggravating circumstance is the general situation in the judiciary, which was, in discussions with the stakeholders during the research, evaluated extremely unfavorably, and that leads to the possibility of partial impact on improving the performance of judges, successful specialization or of other actions to increase the capacities in the matter of the protection of competition.

In recent years, we can see closer cooperation between the Commission and the Court, exchange of knowledge and experience in this matter, including the participation of judges in conferences and events organized by the Commission. To improve the performance of judges in these cases was also carried out in the framework of IPA projects they "Strengthening the institutional capacity of the Commission for Protection of Competition (CPC) in the Republic of Serbia." However, a joint estimation of the interlocutors is that these activities are too rare and insufficient, and that there is no systematic approach to capacity building of the judiciary in the investigation of acts in matter of protection of competition. On the other hand, there are also opinions that too close cooperation between the Tribunal and the Commission is also problematic in terms of the independence of the court, because via its views and opinions, especially in case of persistent advocacy, the Commission may have a decisive influence on the attitudes of the courts, in the circumstances where the courts have not developed a separate legal standpoint in the matter.<sup>120</sup>

Based on the foregoing, and especially discussions with the stakeholders, an estimation can be observed that the judicial review of acts of the Commission is "the bottleneck" of the practice of application of the competition rules. This practice lacks coherence and consistency, and thus legal predictability. There is a lack of court decisions which contain opinions regarding key issues of the facts and application of substantive rules, and which together with the acts of the Commission ought to provide a solid (but flexible) design of implementation practice of the Law.

## VI.4 Business Practice and Competition Culture

Competition culture is probably the most frequently-cited phrase in discussions with relevant stakeholders. Most often, it is mentioned as a necessary pre-condition for actual competition in the market of Serbia, in addition to the existing progress on legislation, and to a certain extent, the

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<sup>119</sup> Details on the relevant case law of the Administrative Court and the Supreme Court of Cassation is given in the paper of the court. Olga Djuricic, "Controversial legal issues regarding implementation of the Law on Protection of Competition" (<http://www.vk.sud.rs/sr/sporna-pravna-pitanja>)

<sup>120</sup> Note in the Public Discussion on Draft Study (13.10.2015.)

implementation of the legal framework. At the same time, it was observed that in this field, there is room for improvement. "There should be a clear awareness of the importance of competition, primarily in relation to th politivity decision-makers, rather than market participants, because their acts or omissions can significantly influence the situation, without sufficient consciousness of that sort"<sup>121</sup> - this is an indicative attitude which could be heard, and is the best indicator of practitioners' perception in terms of the required order of pertinent steps.

In the business community, there is a different level of awareness about the importance of competition. Among enterprises that traditionally belong to the domestic market, there is a very low level of knowledge of the matter of competition, and certain typical forms of its distortion, such as agreements on prices, exclusive conditions of sale or division of the market. These are part of the inherited business practices of earlier times, which is still present. Some foreign companies present in our market have regular training and/or provide brochures for senior and middle management on the topic of harmonization of practice with the competition rules and preventing practices that can be recognized as a violation of competition. At the other end of the spectrum regarding the knowledge of the matter of competition, are big economic entities, mainly foreign investors, who bring with them a considerable body of knowledge and experience in other jurisdictions, which are then build on and add to the domestic rules and practices of the Commission. In these operating systems, there is a high level of compliance functions of competition, which is organized as an in-house function or related to the legal assistance of reputable law firms. In recent years, a growing interest of local businesses can be seen, as well as small and medium-sized enterprises, with regard to information on the substantive rules, constraints and opportunities provided by the institutional protection of competition.

Special attention in terms of competition culture deserve various forms of association of business entities that are present in Serbia. Associations within the chamber system, business and professional associations, represent tradition, established practice, and sometimes legal obligation.<sup>122</sup> Associations play an important role for the exchange of experiences, opinions, and information on important issues of common interest to its members or sector in which they are organized. Among the important functions of the association is the improvement of the situation in the sector and to promote the efficient functioning of the sectorial markets to which they belong. In this sense, the Serbian Chamber of Commerce and Industry is particularly important, in which a large number of sectoral associations is organized (for trade, tourism, public utilities, the Electronic Communications and Information Society, Transport and Telecommunications, Banking, Insurance and other financial institutions, etc.). It should, however, be noted that these associations are also extremely risky environment in relation to the competition rules. For example, contacts that can take place in this ambience carry the danger of an agreement on harmonized market presence.<sup>123</sup> If this dimension of the current situation, which

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<sup>121</sup> Interview with V. Smiljanic, lawyer (law office Karanovic-Nikolic)

<sup>122</sup> Establishing professional chambers is required under the regulations on judicial professions (lawyers, notaries and bailiffs), healthcare professionals (doctors, dentists, pharmacists, biochemists and medical technicians); Regulations on Chambers of Commerce were, until recently, predicted binding membership.

<sup>123</sup> OECD report on policy roundtable Potential pro-competitive and anti-competitive aspects of trade/business associations: "Trade associations remain by their very nature exposed to antitrust risks, despite their many procompetitive aspects. Participation in trade and professional associations' activities provide ample opportunities for companies in the same line of business to meet regularly and to discuss business matters of common interest. Such meetings and discussions, even if meant to pursue legitimate association objectives, bring together direct competitors and provide them with regular opportunities for exchanges of views on the market, which could easily spill over into illegal coordination. Casual discussions of prices, quantities and future business strategies can lead to agreements or informal understandings in clear violation of antitrust rules. It is

is common in all market economies, is supplemented by the legacy of so-called „agreement-based“ economy, the characteristic feature of the previous socialist system, which is reflected in the support for the agreements between the undertakings, common plan or joint action on the market (even when they are direct competitors), the entire depiction of the risk from the point of competition becomes complicated. These are precisely the conditions in which it is necessary to develop an awareness regarding the culture of competition, "rules of conduct" in the relations of cooperation between the business actors, and the phenomena that are desirable and necessary in relations between competitors in order to improve the situation on the market, and which belong to the illegal actions and acts.

Competition advocacy is focused on the creation, dissemination and awareness of the importance of competition in the market, and probably the most effective instrument for developing a culture of competition. Among the interlocutors, CPC was recognized as the main actor in this activity, and to a lesser extent, other state bodies or business associations and chambers. It seems that, in this respect, the Commission does not meet the expectations, both from businessmen and the general public. Remarks that can be heard are focused on the "invisibility" of the Commission, the absence of its leading personalities (the President, members of the Council) from electronic and print media, as well as insufficient presence in professional publications. All the above remarks are even more acute in the case of CSAC.

The Commission has ensured a relatively high degree of transparency in its work, and it is also one of the essential preconditions for the competition advocacy. All acts which the Commission adopted are available on its website (although not always in integral form), and the Commission regularly publishes reports about certain important moments in their work. There is significant room for improving technical solutions to ensure adequate, accurate and reliable transparency of the CPC, but this function is conditioned by the practice of the Commission in terms of contents.

On the other hand, there is no specialized professional newsletter or other permanent platform for exchange of knowledge and experience in matters related to protection of competition. The Commission has no training program or other form of raising the professional capacity within their organization and beyond, to raise the culture of competition in government bodies and the business community. Periodic individual issues, papers or lectures in this area occur on traditional counseling lawyers or economists, which are organized by professional associations.

The Commission in its work showed a significant degree of transparency and the greatest part of the passed acts are available on the website of the Commission. Acts on the outcome of the infringement are published regularly, in the integral form (decision with an explanation). Conclusions on the initiation of the infringement procedure are also published unless the President considers that publication would be jeopardize by the procedure. In addition, up until now, implemented sectoral analysis are available on the website. In this way, the Commission fulfills its legal obligations with regard to the publishing of these acts. However, its practice goes further than that, because in concentration of the examination procedures, documents on the outcome of the procedure are also published, or the approval of concentration in both summery proceedings and in the examination procedure. It may be noted that the level of transparency in the work of the Commission is adequate, and that its standards are above the statutory requirements.

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for this reason that trade associations and their activities are subject to close scrutiny by competition authorities around the world.” DAF/COMP(2007)45

On the question of the state of competition in Serbia, in public, especially in the media, often an argument is being used in favor of the thesis about the extremely poor condition indicated by the position of Serbia on the scale of the Global Competitiveness Index of the World Economic Forum (GCI/WEF).<sup>124</sup> According to the 2015 report, Serbia was ranked 94th place in total, with an average index of 3.14 (on a scale 1-7). However, GCI is an indicator of the structural and dynamic development potential of an economy, and in this sense, its relative place in the global economy, and contains a large number of factors that are methodologically placed into 12 units, and therefore cannot be equated with the state of competition in (its) market. In addition, it should be noted that the methodology for the development of the index to a large extent of subjective nature. It is based on the scores given in the survey regarding a number of issues that are considered relevant to the competitiveness of the economy, so the outcome is dependent on the perception of local actors involved in the survey. In connection to this, it is interesting to pay attention to the individual evaluations, for example, protection of property rights (127th place, 3.14), unnecessary public expenditure (132th place, 2.17) or the regulatory burden (140th place, with 2.21). For illustration, the neighboring Montenegro is in the same report ranked 67th with a total overall average index 4.2 with significantly better marks in a number of categories (in the same case, unnecessary public spending with an index of 3.42, 55th, and regulatory burden was assessed with 3.59, i.e., 58th).<sup>125</sup> From this brief overview, it can be noted that the drastic differences exist, especially in categories that are subject to subjective evaluations of participants in the survey. Accordingly, it can be asserted that the high level of "self-criticism" is present in Serbia, that gives a relatively negative assessment of the situation in terms of a range of institutional factors, regulatory or functional nature, which does not necessarily correspond to objective and comparable indicators. In any case, the position of Serbia on a scale GCI is extremely unfavorable and that, in addition to the aforementioned influence of subjective aspects (while also acknowledging the fact that objective aspects of quantitative character also exerts its influence), leads to conclusion that this position cannot be equated with the actual level of competition in the market, nor the effectiveness of competition policy, as it sometimes appear in public, and partly in the professional community. On the question of causality of such perceptions, more difficult it is to give a reliable answer, but one of the factors that by nature arises is the media image that is created on the topic of competition.

An important place to create the image of the competitive situation belongs to the media in which this topic is relatively common in the context of systemic problems or individual market situations, which are associated with a lack of competition or infringements of competition from the present participants in the market. The question of correlation of media information on the topics from the field of competition and the perception of market participants, existing and potential, deserves a special examination, particularly when added to the importance of having the media in awareness raising about the importance of competition. On the basis of discussions with stakeholders, a critical attitude can be noticed towards the media presentation of this topic, which is often superficial, sensational or tendentious. The main and often the only thematic unit in media coverage of market trends boils down to the question of prices of certain products and services, with simplified information on factors such developments. In addition, the media discourse is often politicized, and in the form of a public debate is lightly used terms such as "monopoly" for the company or its leading

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<sup>124</sup> <http://reports.weforum.org/global-competitiveness-report-2014-2015/>

<sup>125</sup> As a curiosity can serve the data according to which, for example. Rwanda on the global competitiveness rankings to 32 cities over Serbia, with a total index of 5.26, and for example in terms of public spending and unnecessary regulatory burden, recorded excellent results 5.71 (4th place) and 4.79 (6th place).

figures, or pejorative forms (eg. "tycoons"), the way in which further complicates the position of the Commission and fair and independent work. At the moment, there are no specialized media programs which would enable professional discussion or a deeper presentation of individual relevant questions, and printed publications, also do not pay significant attention to the attitude of professional actors. Analytical data, which are available from many sources and are available for the media, are not used enough, nor adequately. By providing information to the public, about the situation regarding the issues that arise as a subject of interest in some cases, the sectoral markets, or in specific situations, such as changes in prices of certain items, shortage, or other changes in the market that could be related to violations of competition would be accurately and impartially presented.

In the market where there is a high degree of competition, the competitive pressure is one of the key factors in achieving the interests of consumers. This market mechanism can substantially eliminate the need for implementation of policy instruments to protect consumers, as it ensures that all the attributes of products and prices are easily accessible and can be evaluated and compared, in order for well-informed consumer to make economic decision. The reality of the real level of competition on certain sectoral markets is such that the lack of competitive pressure regularly monitors the occurrence of violations of consumer rights. Correlation of the systems of protection of competition and consumer protection was not the subject of more attention, not in public, but not among the actors, except that at a very general level, it is in the interests of consumers that the violations of competition are suppressed. In this regard, the discussions regarding the institutional model of consumer protection, sporadically addressed a request for this thematic unit to be incorporated into the existing institutional framework of the CPC, modeled on such cases in the EU environment (eg. Italy, Bulgaria). Although it is an area that has long been of interest in the context of the European competition law and consumer protection law, at the moment there is still no reliable analytical resources or studies that could shed light on this relationship in the legal and institutional environment in Serbia.

At this moment, we can see inadequate knowledge of the rules of competition among the consumer protection stakeholders, including representatives of consumer organizations. Representatives of consumer organizations often via the media indicate to the individual issues that may be linked to certain forms of restriction or distortion of markets, such as the so-called unjustified increase in prices of certain items, product shortages, as well as violations of consumer rights by individual market participants, phenomena that may (but need not) be associated with violations of competition. This information is vital for market surveillance, and competition authorities. However, at this moment, cooperation cannot be identified between the Commission and consumer organizations, through the exchange of data and analytical processed initiatives for the infringement. The Commission does not have the function of communication with consumer organizations, while, with regard to the other side, the lack of professional capacity can be detected which is necessary for the relevant participation in the institutional forum to combat violations of competition.

The Commission has awareness of the importance of raising public awareness on competition policy, and that it is the most responsible factor in the application of the Law in this whole process. However, attention is given to other authorities, the National Assembly and the relevant committees, the government and regulatory bodies and academia, which rarely address this topic. It was pointed out that there is no college in the country with the a subject of the competition except as an optional subject at master studies at the Faculty of Law. Too few of those who create access and influence in



the process and in practice, and the media are interested in this complex subject matter and are also insufficiently trained.<sup>126</sup>

On the issue of the presence of the Commission and its representatives in the public, a claim about its lack of visibility can be accepted. In recent years, the appearance of the President of the Commission in the media is almost unprecedented. There are rare occasions when the CPC representatives participate in professional meetings with their presentations. In an interview with stakeholders, the impression was that the remark about the "lack of transparency" more related more to the phenomenon of "invisibility", because the Commission has established a high standard of transparency in their work and in terms of acts passed by, as noted above. The form and diction of acts adopted by the Commission are determined by the rules of administrative procedure in which these are enacted, and the common practice of administrative bodies in similar matters, based on which the Commission has formed its practice of making these instruments. They are characterized by high degree of formality, summary depictions of economic analysis, and sometimes the question regarding the quality of their development and provided argumentation can be raised. Therefore, case studies, presentations or lectures on specific issues relevant to the practice of the competition are missing.<sup>127</sup> Insufficient presence in a wider, and more importantly, in the professional public, leaves a set of vague formal acts that are passed in the proceedings before the Commission, because there is a large number of questions by stakeholders, professional or academic world for which there is no adequate response. There is a need for representatives of the Commission to actively advocate the standpoint that they take in their practice or in relation to conduct of the proceedings before the Commission, as well as other issues that arise as relevant from the perspective of market protection. Therefore, the expert authority of the Commission in the public would be increased, a legitimacy in the eyes of the market participants would be provided, who need explanations or instructions, and for which the CPC provides landmarks for their business practices.

Education and training in the field of competition is considered one of the key factors promoting a culture of competition. Training programs achieve double function, raising the competence of the participants in the program, the professionals who will provide this knowledge equitably and effectively exercise their duties in the corporate or public sector, while on the other hand, raises awareness of the importance and functioning of the system of protection of competition. In terms of training and raising awareness about the importance of competition, the practice of one regional law office should be mentioned which issues a regular annual specialized publication, with contributions of its lawyers and staff and on the development and application of competition law, recent developments in this field in the region, and global trends in the practice of application of the competition law.<sup>128</sup>

At this point, outside of academic study, there is no permanent professional training programs in the field of competition. In addition, within the framework of academic studies, this thematic area has not had a greater significance, and still observes a lack of adequate academic literature.<sup>129</sup> Some

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<sup>126</sup> Public Discussion on Draft Study (13.10.2015.)

<sup>127</sup> Some members of the Council and expert services of the Commission, had seen the articles and professional papers in the field (Dankovic Sanja Stepanovic, Cedomir Radojicic), or come from the academic environment with a significant body of work in this area (Dijana Markovic Bajalovic, former president of the CPC), or still talking about sporadic cases.

<sup>128</sup> Publication: "In focus: Competition", publicist Karanovic and Nikolic (2007-2015)

<sup>129</sup> In recent years have appeared first thematic expertise of university textbooks in the first place, "Introduction to Competition Law", B. Begovic and V. Pavic, Faculty of Law, University of Belgrade, 2012 and "Law and Competition Policy," Sanja Stepanovic Dankovic, 2014.

interlocutors highlighted the need and the possibility that the competition law and policy are put into the basic studies, and that for this action there already exists appropriate basis (lecturers, literature, practice), while at the same time some programs were already initiated.<sup>130</sup>

Within the IPA project "Strengthening the institutional capacity of the CPC in Serbia", in cooperation with the Serbian Chamber of Commerce and Industry, in early October 2014 a pilot training program titled "Autumn School Policy and Competition Law" was implemented. However, it is important to note that the Commission does not have a developed training function, nor has so far exercised this activity.

Based on the above, it can be concluded that in terms of competition advocacy very little has been done. In the whole period of the past ten years, which is marked by the introduction of new legislation to protect competition, the construction of relevant institutions, initiation of procedures and decision-making in all jurisdictions (abuse of dominant position, restrictive agreements, individual exemptions, merger control) and the establishment of case law, activities of public advocacy of competition were not in focus and were without a significant impact on the public awareness raising about the importance of competition and the development of a culture of competition.

## VII. Discussion on Research Findings

Based on the the previous chapters, it can be concluded that the policy and competition law in Serbia is entirely related to policy and EU competition law, to which it owes its emergence, identity and applied systemic concept, the material rules and the largest part of the institutional and procedural solutions. Although there is a pre-history of antitrust rules, the modern competition law is based in Law of 2005, and based on intense activity in legislation, practice and awareness raising about the importance of competition in the professional community. It can be concluded that in only ten years since the introduction of this system in domestic legislation a major development path was made.

The Law of 2005 made the first attempt to transpose the legal framework for the protection of EU competition acquis. Basic elements of a structure of a new area of law in the domestic legal order were defined, as well as the basic outline of this system. This attempt is not entirely yielded success for reasons that often accompanies projects with regard to transposition - material transfer rules is being made, while the conditions for their functioning in the domestic legal and real environment are not provided. This law was based on a standard institutional model that could not produce the expected results - an independent supervisory institution, in the legal form of a separate organization, in which the examination and merger control cases are carried out via administrative procedure; it did not have a mechanism to sanction the violations because the mechanism exclusively falls within the criminal law and the jurisdiction of misdemeanor authorities.

The current legislative framework for the protection of competition is characterized by the high level of concordance with the relevant EU law, and that is an assessment of the above cited EC report, and also during the screening process. The assessment that the legislative part of the transposition effort is largely successfully completed is the opinion of the most of the respondents in the survey, noting that there are always individual legal decisions or regulations that require attention and improvement.

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<sup>130</sup> Recently, the Center for Public Policy of the EU, Belgrade University, in cooperation with DEPOCEI / Tempus program, is organizing a pilot training program on the subject of competition policy.

Applicable law contains specific and original procedural framework, within a specific administrative procedure, the CPC has powers for adopting administrative measures to protect competition and eliminate competition infringements. Although it is a unique legal solution in the context of national legislation, it has provided efficient and effective instruments of intervention for the Commission to take measures which should simultaneously return or create conditions of competition in the relevant market and which have the effects of prevention, both specific and general. It was probably a successful transition to procedural and institutional model of the Law of 2009 which was crucial for achieving acceleration in the development of the competition, the formation of relevant practice of the Commission, the acquisition of a specific authority of this institution among the market actors, as well as achieving the effects of prevention, all as a result of a successful model which links the examination procedure and the sanctioning violations.

Simultaneously with the statement on the adoption of EU competition law, it is necessary to observe certain characteristics that have had implications for national legislation and the practice of its application. EU competition law has an evolving character and has been developed on the basis of several provisions of the Treaty of Rome in 1957, through secondary legislation, EC practices and the ECJ, which resulted in its inconsistency, complexity and a lack of transparency.<sup>131</sup> On the other hand, these same properties also include the adaptability of the basic material rules prohibiting restrictive agreements and abuse of the dominant position, and their exceptional longevity, because at different times and in different contexts they had different meanings and effects.<sup>132</sup> Such historical development has caused the plurality of targets, because the initial goal was never defined; it was instead, a consequence of the policy of combating violations of competition by competent institutions, in the first place by the EC.<sup>133</sup>

Another important specificity of the competition law of European provenance is that the nature of the substantive competition rules is quite different from the usual substantive norms encountered in other legal areas, because it contains a rule of extremely high level of generality. For such a rule to be applied or to adequately fit into the domestic legal system, the focus of responsibility has to be on the institutions that enforce them, because a precise meaning of the standard is required.<sup>134</sup> Substantive rules are followed by a series of more specific procedural and penal provisions and it is up to the national legislation and the relevant authorities to find the appropriate combination of instruments for implementation of competition policy.<sup>135</sup>

Generality and lack of concreteness of substantive competition rules open the door to the competent institutions (in the case of EU law these are the European Commission and the EU Court of Justice), to take advantage of this characteristic and adapt it to the demands of the time, circumstances and opportunities.<sup>136</sup> These specifics are extremely aggravating factor for the application of the

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<sup>131</sup>D. Markovic Bajalovic, *Market power of companies and antitrust law*, Official Gazette of FRY, 2000, p.45

<sup>132</sup> S. Weatherill, P. Beaumont, *EU Law* (3rd ed.), 1999, p. 793: „The flexibility of the terms used has allowed the institutions to mould the competition rules in a way that reflects conceptions of economic policy that are in some areas by no means uncontroversial“.

<sup>133</sup> G. Monti, *EC Competition Law*, Cambridge University Press, 2007, p. 19: „What is missing from the competition laws of many jurisdictions, including the EC, is an authoritative statement of the role of competition policy“.

<sup>134</sup> S. Weatherill, P. Beaumont, *op. cit.*

<sup>135</sup> G. Monti, *op.cit.*: „The discussion suggests that a workable system of competition law must operate with a mixture of rules and standards, opting for rules whenever the error costs can be tolerated, and setting out standards when the cost of implementing the standard is less than the error cost of a rule.“

D.Markovic Bajalovic, *op.cit.*, p. 45

<sup>136</sup> D. MArkovic, Bajalovic, *op.cit.* p.45.

competition rules, in an environment that requires a "clear and precise provisions", which specifically and precisely determines what is allowed and what is not.<sup>137</sup> Accordingly, the burden of applying competition rules, and their refinements in relation to specific circumstances, falls to the competent institution. It is a requirement with which the holders of these authorizations, as well as actors on the market are not sufficiently familiar with, which is unique in the national legal system and demands high standards of the profession and professionalism for the proper fulfillment.

Objections among the business community and practitioners regarding the implementation practice of the LCP can be summarized to be the insufficient consistency, the lack of landmark cases and the modest scope of practice in specific matters. In such conditions, it is difficult to build a business practice that would comply with the competition or raise the level of competition culture. At the same time, it must be observed that in a relatively short period of time the relevant Commission's practice in most subjects which are subject to monitoring has been established. In the same estimations, the lack of consistency between the administrative and judicial procedures is even more criticized, as well as frequent repeat procedures and changing attitudes of judicial instances. When the line of movement of some objects is monitored, it is extremely non-linear. These are precisely the key moments that condition the assessment of interlocutors that the legal security is not sufficient, which leads towards the necessity to define a unified and coherent approach in the application of substantive competition rules.<sup>138</sup>

When the above remarks are brought into connection with the relevance of the above described practice of institutions which apply the rules of the competition, one of the central issues of the competition policy in Serbia can be observed - the power of the institutions that apply the competition rules has a crucial influence on the situation in this field and an adequate legal framework is the first and necessary, but not a sufficient condition for success. Already at this point, a conclusion can be made for a number of objections in the first place that it is very general, and that it is probably equally applies to most areas of public policy and regulation in Serbia. Such a complaint would also be justified, but at the same time it indicates the systemic nature of the shortcomings in question - institutional failure in contrast with the requirements of the new legislation which is to a significant extent aligned with the *acquis*, undoubtedly permeates all areas. However, in case of competition, things are somewhat more complicated, because the role of the competent institution, involves its active shaping of policies and rules through their practice. Positive evaluation of the work, in the first place CPC, that can be heard among the interlocutors, such as continuous and intensive progress in a relatively short period of time, professionalism and transparency - these are all characteristics which are the basis of solid prospects for the further development of the Commission.

Another significant feature of the protection of competition is its multidisciplinary nature. Law - Economics - Polity is the axis that needs to drive complex institutional mechanism of regulation, supervision and sanctioning violations of competition in the market. It may be questioned whether the multidisciplinary nature of one of the aggravating factors in its comprehensive understanding of the context of the environment that is characterized by segmentation and departmentalization.

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<sup>137</sup> In talks with representatives of the business community, still occurs demand for a "precise and exhaustive legal provision for things that are not allowed."

<sup>138</sup> Philip Lowe, "The design of competition policy institutions for the 21st century- the experience of the European Commission and DG Competition", Competition Policy Newsletter, No. 3/2008: "The enforcement system must be designed in a way that guarantees coherence and predictability for business: coherence ensures equal treatment. Predictability allows firms to plan for compliance. To achieve this, ex-ante rules and individual enforcement decisions should be based on a common methodology, clear and publicised enforcement objectives and an in-depth knowledge of how markets function".

Multidisciplinary approach requires cooperation and coordination in a number of areas, regardless of whether the concerned departments of ministries, trial appearance on the market, or scientific field various academic institutions. This feature is particularly challenging in terms of judicial control over the acts of the Commission, because a solely legalistic discourse does not provide an adequate picture and does not provide legal protection neither to the party, not to the authority whose act is subject to judicial control.

State aid control is an integral competition policy and this research is covered to the extent which is necessary to understand its place and importance in the context of a functioning system according to the requirements and standards of the EU. Based on the above, it can be concluded that the first steps were made, the basic legal and institutional framework was set, but it is estimated by the interlocutors as well as within the official reports<sup>139</sup>, that this area is yet to witness an intense activity, the construction of an operationally independent body and the establishment of reliable and transparent mechanisms.

Within the issue of awareness raising about the importance of competition, it is necessary to observe restrictions on competition policy, which are not always sufficiently accentuated. Competition policy, no matter how successful reception of the legal regime of the competition or how competent institutions adequately and effectively enforce the rules itself cannot ensure the structural economic changes. Requires a wider range of favorable factors that would cause major changes, such as a noticeable economic growth, employment or achieving favorable trade balance, and successful competition policy is one of the necessary conditions or catalyst of such changes.

The culture of competition, in addition to questions of a disciplined and a consistent practice of the application of the Law, on the basis of the forthmentioned issues in the previous chapters, appears as another major problem. This includes issues of public advocacy, public awareness raising about the importance of competition, as well as training programs and professional development. As was the intensive development on the legislative front and the initial relevant practice of applying the Law noted, so in terms of competition advocacy very little has been done. Even that which has been done is part of the wider context of the Commission's activities, projects of support and the academic community, i.e., not specifically designed and planned activity. This problem area includes, among other things, action to other state bodies, stakeholders in sectorial policies, as well as sectorial regulators and independent control authorities, with instruments of influence on the identification and definition of the response to the risks of distortion of competition. The second part is the attitude towards the general and specific public, which can range in the spectrum of media campaigns to building of a platform for exchange of views and experiences in the community of practitioners in this field. The third part of the training programs and vocational training, ranges from academic, specialist (eg. in cooperation with institutions of judicial training), to thematic expert consultations and other forms of professional training.

Finally, it should be noted that in the eyes of market players, professional and business community, the CPC is considered to be the only focal point and the only possible authentic carrier of competition policy. The Commission so far, did not have pretensions to that role, but also no suitable capacity. However, at the moment when the competition law was harmonized with its European model, and when the initial practice of applying the Law has been defined, it seems to be justified to expect transition of the key role in the competition policy to the hands of the Commission. At the beginning

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<sup>139</sup> Annual EC Progress Report on Serbia, 2009-2014.

of the second decade of the existence of modern competition law and policy in Serbia, the way in which the Commission would respond to this expectation of the public concerned, above all, market actors to ensure legality and legal predictability in practice, transparency and clarity of rules, as well as the voice of the deputies Competition in the forum of public policy, will influence the success in the development of competition.

## VIII. Conclusions and Recommendations

Based on the research conducted and the above stated findings, the following conclusions regarding the current state of competition policy in Serbia can be drawn and key problems in putting these policies into practice identified:

- The legislative framework for the protection of competition is defined, consistent and in a high level of compliance with the relevant EU law. In the area of state aid, a basic legal framework has also been established, but there are questions of normative character that need to be improved;
- The CPC has achieved its primary supervisory function in accordance with the Law, in actions initiated and implemented. The specific legal model of integrated processing and sanctioning violations works relatively successfully in practice;
- Legal status of the CPC is in accordance with the requirements of the existence of an operationally independent body for monitoring the observance of the rules of competition in the Serbian market. The organizational and technical capacity of the Commission are not appropriate in number and structure to the needs of the volume and complexity of work. On the other hand, the location and capacity of the CSAC does not meet the prescribed statutory functions;
- Administrative and judicial practices are crucial to provide the real dimension to prescribed rules of the competition, and in the period of application of the Law practice is characterized by insufficient reliability and consistency. Although there were cases in all matters within the competence of the Commission, there is a lack of the landmark cases; the same goes for jurisprudence;
- The function of economic analysis in the Commission's work is not confined to the extent necessary for the reliability of decisions made, as well as to provide an adequate picture of the situation in certain sectorial markets; In this sense, the lack of sectoral analysis, and such a phenomenon leads to causistical approach (acting on request), and inconsistent practices;
- The business community is significantly, although unevenly, familiar with the regulations on protection of competition, but has great expectations of the Commission, both in terms of the development of competition policy and in terms of improving the practice of the Law. The academic community has an increase of interest, as well as works in this area and developments of academic programs on this topic. Consumer organizations are rarely present in this matter and there is no cooperation with the Commission;
- Competition policy has not been sufficiently recognized as a specific public policy, nor the bearer of this policy was publicly identified. Competition issues rarely if ever occur in the inter-ministerial coordination between ministries and other state bodies, in consideration of sectoral policies and regulations. The impact of the CPC on the process of preparation and adoption of regulations is negligible;
- There is a significant burden of legacy of the period of the socialist planned economy, as well as the negative consequences of a structural character and transitional trends, in particular in terms of the privatization process from the previous period, before the adoption of competition legislation. These effects still pervade the market trends and business practices of market participants, and this is an additional complex factor which the competition policy faces in this area, especially in terms of raising the culture of competition.
- Activities in the field of competition advocacy are rare and almost imperceptible. Training programs and professional training are sporadic and do not have the continuity. The CPC is

transparent in its work, but it lacks the explanations, the exchange of opinions and the debate on the key outstanding issues regarding the application of competition rules.

The recommendations can be drawn from these findings and conclusions as follows:

1) Recommendations addressed to the Government and other institutions responsible for the status and capacity of oversight bodies in this area and the organization of the judiciary:

- ***A greater degree of independence of the institutions, further strengthening of capacity:*** it is necessary to provide an adequate level of financial independence of the CPC. In the first place, the abolition of the mechanism of approval of the financial plan of the Commission by the Government and the establishment of a separate budget within the national budget. Financial control should be within the existing framework of the state audit and parliamentary oversight. In terms of CSAC, it is necessary to establish complete operational independence, as well as an appropriate organizational model that supports such status. In addition, further improvement of the capacity of CPC professional services is necessary to create conditions for the exercise of complex functions that are prescribed by law and which are not presently realized or are insufficient and inadequate;
- ***Improving the capacity of the court:*** requires specialization in matter of competition in the Administrative Court, as well as training of acting judges of the Court. It is also necessary to consider the possibility of establishing separate organizational units (eg. specialized judicial panels). Planning and implementation of specific judicial training is required.

2) Recommendations relating to the functions and practice of the Commission for the Protection of Competition:

- ***Ensure consistency of practices:*** it is necessary to intensify the practice, especially in the matter of the infringement, and improve the quality of decisions, in particular by providing adequate reasons, based on established facts and the economic analysis. Implementation of the Law in the same situations must be identical, i.e., it is necessary to ensure the protection of the legitimate expectations of the parties, as well as persons to whom the Law may be applicable - market participants.
- ***Strengthening the functions of economic analysis:*** carry out a sectorial analysis on markets which are considered to be particularly vulnerable in view of the risks of distortion of the competition (telecommunications, energy, transport, banking sector and the financial services). It is necessary to improve the economic analysis in the cases of the infringement, as well as control of concentrations.
- ***Strengthening the normative, consultative-instructive and coordination functions of the Commission:*** it must be taken by other governmental agencies, the Government and ministries, policy-makers and drafting legislation, through a strong normative and consultative-instructive function, giving opinions on draft regulations, participation in the policy development process and the preparation of legislation. It is necessary to develop a methodology and implementation of competition screening, as well as improving the soft law instruments (guidelines). Improvement of the functions described above, would create conditions for the Commission to assume the role of the central competent authority which would coordinate the development of competition policy.
- ***Increasing the level of professional culture of dialogue:*** it is necessary to further open the Commission to the public, primarily professional public and the business community. It is necessary to create a forum for exchange of views and experiences regarding the



consideration of the Commission's practice, the reasons for a particular decision, procedural and organizational issues, but also the relevant phenomena on the market.

- **Competition Advocacy:** it is necessary to undertake designed and ongoing activities aimed at awareness raising about the importance of the competition policy. In this way, in conjunction with other conditions that are the subject of previous recommendations, raising the culture of competition will be ensured, and thus the change in the realities of the market - changes in the behavior of market actors, the harmonization of their business practices and acts with the rules of competition, and finally, the improvement of the conditions of competition in the internal market of Serbia.

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