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SOME CRITICAL REMARKS CONCERNING THE ACT ON THE PROTECTION OF COMPETITION OF THE REPUBLIC OF SERBIA

1.Abstract

The purpose of this paper is to present the Act on the Protection of Competition of the Republic of Serbia by analyzing its provisions, and to partially compare these provisions with regulations in the region and with EC competition law. The Act on the Protection of Competition (hereinafter: ACP)[1] was adopted on September 16, 2005, by the Serbian National Assembly and entered in force on April 12, 2006, after the Commission for the Protection of Competition had been established. The Act is composed of 78 articles and divided in five chapters: general provisions, violation of competition, the Commission for the Protection of Competition, sanctions and transitional and final provisions. The Act regulates three common and well-known forms of restraints of competition: restrictive agreements, abuse of dominant position and concentrations. Based on theoretical analyses and enforcement experience with the new Act so far, in the final chapter of this article will identify some deficiencies and suggest appropriate amendments.

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[1] Zakon o zaštiti konkurencije, *Sl. Glasnik RS (Official Gazette of the Republic of Serbia*), no. 79/2005. available at <http://www.kzk.org.yu/?link=96&lang=1> (as of January 2008).

Key words: *Act on the Protection of Competition of the Republic of Serbia, competition, restrictive agreements, abuse of dominant position, concentration.*

1. BRIEF HISTORY OF COMPETITION LEGISLATION IN THE REPUBLIC OF SERBIA

In the framework of the process of stabilization and association, launched by the European Union as a political platform for negotiations with the countries of the Western Balkans, and therewith following the process of harmonization of domestic law with EU law, the National Assembly of Republic of Serbia adopted on September 16, 2005 the Act on the Protection of Competition.

By adoption of this Act, Serbia as a legal successor of the Yugoslavian Kingdom,[2] Socialist Yugoslavia,[3] the Federal Republic of Yugoslavia[4] and the State Union of Serbia and Montenegro[5], respectively, continues the legislative tradition of protecting competition in the domestic market. Professor Straus was one of the first authors who thoroughly wrote on Yugoslav Competition Law.[6]

Nevertheless, besides a relatively developed legislative background, the beginning of systematic enforcement of the competition legislation in the

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[2] The Kingdom of Serbs, Croats and Slovenes existed from December 1, 1918 to January 6, 1929. It then was re-named by the King Alexander I in 'The Kingdom of Yugoslavia' also known as the First Yugoslavia, which existed until November 29, 1943/1945.

[3] The Kingdom of Yugoslavia in 1946 was renamed to Federal People's Republic of Yugoslavia. In 1963, the country's name was again changed to Socialist Federal Republic of Yugoslavia (SFRY). Starting in 1991, the SFRY disintegrated.

[4] The Federal Republic of Yugoslavia (FRY) (from April 27, 1992 to February 4, 2003), was a federation on the territory of the two remaining republics of Serbia (including the autonomous provinces of Vojvodina and Kosovo and Metohija) and Montenegro.

[5] The State Union of Serbia and Montenegro was constituted on February 4, 2003, and officially abandoned the name 'Yugoslavia.' On June 3 and June 5, 2006, Montenegro and Serbia respectively declared their independence, thereby ending the last remains of the former Yugoslav federation.

[6] See J. Straus, *Das Wettbewerbsrecht in Jugoslawien - Eine entwicklungsgeschichtliche und systematische Darstellung mit Hinweisen auf das deutsche Recht,* (1970); J. Straus, Die Entwicklung des jugoslawischen Wettbewerbsrechts und die Neueregelung von 1974, *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* (*GRUR Int.*) 1976, S. 426.

market of Serbia started after the enactment of the Anti-monopoly Act in 1996,[7] which was the predecessor of the current APC. However, after a relatively short period of time, the Anti-monopoly Act was replaced. The purpose of enacting the new Act was to react, among others, to two major shortcomings.

One major shortcoming of this Act was the Anti-monopoly Commission's lack of independence, since the Anti-monopoly Commission was founded as a department of Ministry for Trading and Services. In addition, the new Act did not regulate mergers and other and other forms of concentrations in the market.

Immediately after the APC of 2006 took effect, in order to enforce it, the Government of the Republic of Serbia enacted two regulations: the Regulation on Criteria for Defining the Relevant Market and the Regulation on the Content and Method of Submission of Request for Issuing Approval for Proposed Concentration.[8] Simultaneously, protection of competition was raised on a constitutional level. Article 82(1) of the Constitution of the Republic of Serbia of 2006[9] guarantees the market economy characterized by an open and free market, freedom of entrepreneurship, independence of business entities and equality of private assets and other types of assets. As to competition the Constitution ensures equal legal status for everyone in the market, and that acts which are illegal and restrict free competition by creating or abusing monopolistic or dominant status, shall be strictly prohibited.[10]

2. THE LEGAL REGIME OF THE COMPETITION ACT

The Act consists of 78 articles, grouped in five chapters, named as follows: Chapter I – General Provisions (Articles 1 to 6); Chapter II –

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[7] Antimonopolski zakon, Službeni list Savezne Republike Jugoslavije, br. 29/96, published in: Official Gazette of FR Yugoslavia, No 29/96.

[8] Both published in *Official Gazette of the Republic of Serbia*, No. 94/2005, and in force since November 12, 2005, available at <http://www.kzk.sr.gov.yu/?link=81&lang=1> (as of January 2008).

[9] Ustav Republike Srbije, *Sl. glasnik (Official Gazette of Republic of Serbia*), No 83/06, of September 30, 2006, available at <http://www.parlament.sr.gov.yu/content/eng/akta/ustav/ustav_3.asp> (accessed January 2008).

[10] Art. 84(1) and (2) of the Constitution of Republic of Serbia.

Violations of Competition (Articles 7 to 30); Chapter III – Commission for the Protection of Competition (Articles 31 to 69); Chapter IV – Penalty Clause (Articles 70 to 74) and Chapter V – Transitional and Final Provisions (Articles 75 to 78).

2.1. General provisions

Articles 1 to 7 determine the purpose and the aim of the Act, define the concepts of different restraints of competition and of the relevant market, as well as the territorial and personal scope of application, including the application to related undertakings.

2.1.1 Subject Matter and Purpose of the Act

The subject matter and purpose of the Act is determined as the 'protection of competition in the market in order to provide identical conditions for undertakings, with the aim to improve economic efficiency, and accomplish economic welfare for the whole society.' From a perspective of legal theory, the purpose defined like this is compatible with the opinion that competition law is divided into rules against restraints of competition and those preventing and suppressing unfair practices.

The Act only regulates restraints of competition, in order to protect competition itself instead of protecting participants in the market. In contrast, the Trading Act[11] deals with unfair practices and prohibits such practices, speculations and restrictions of the market. Unlike good business customs and practice, the concept of unfair practices refers to any merchant's activity that harms other merchants, or legal entities or consumers.[12]

Through setting these aims, the Serbian legislature accepted a contemporary concept of the economic and social role of competition legislation, with an emphasis on economic goals, referred to as 'economic

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[11] Zakon trgovini, Sl. glasnik RS, (Official Gazette of Republic of Serbia), no. 85/2005, of October 6, 2005.

[12] The same approach is applied in the European Union where unfair competition between companies is a matter of the domestic law of the Member States. *See* OECD, Competition Law and Policy in the European Union 35 (2005), available at <http://www.oecd.org/dataoecd/7/41/35908641.pdf> (as of January 2008).

efficiency.'[13] Social goals are indicated by the Act by reference to the promotion of 'economic welfare' for the whole society, particularly consumer benefits. Nevertheless, the position of consumers is not determined only by this Act, but mainly by the more specific Consumer Protection Act.[14]

The Act starts with the presumption that fulfilling general aims and protecting actual interests of the market participants is possible by controlling market power beyond a legally defined level, as well as conspiracies of undertakings harmful to consumers. In general, the Act aims to sustain the market structure by supporting the relations of the market participants that do not harm competition. Furthermore, the Act provides market participants with legal remedies against distortions of competition and conduct that threatens to distort competition. It also empowers the Commission for the Protection of Competition to take sanctions and other measures in order to prevent further distortions of competition and removes the damage caused by such distortions.

Restraints of competition are considered to be the following acts and practices of economic entities and other legal entities and people participating in the market:

1) agreements, which considerably prevent, restrict or distort competition;

2) abuse of dominant position; and

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[13] Just as a comparison, in the European Union it is expected from competition policy to integrate national markets and sustain the common internal market, as well as to provide equality and fairness, and ultimately to maintain competition. Pursuant to that, the Treaty establishing the European Economic Community considers that 'the institution of a system ensuring that competition in the common market is not distorted' constitutes one of the necessary means for promoting 'a harmonious, balanced and sustainable development of economic activities' and 'a high degree of competitiveness.' In Bosnia and Herzegovina, the Law on Competition is expected 'to maintain and stimulate economic competition and to ensure the free determination of prices for goods and services.' For detailed overviews of the objectives and proposes of competition legislation, *see* UNCTAD, Model Law on Competition, TD/RBP/CONF.5/7, at 11 (2000), available at <http://www.unctad.org/en/ docs/tdrbpconf5d7.en.pdf> (as of January 2008).

[14] Zakon o zaštiti potrošača, *Sl. glasnik RS (Official Gazette of the Republic of Serbia)*, no. 79/05, of September 16, 2005, available at <http://www.parlament.sr.gov.yu/ content/lat/akta/akta_detalji.asp?Id=278&t=Z#> (as of January 2008).

3) concentrations causing considerable prevention, restriction or distortion of competition, particularly as a result of the creation and strengthening of a dominant position in the market.

This is a common way to identify restraints of competition known to legal systems of neighboring countries[15] and to Community law.[16] But for their assessment, the Act differentiates between restrictive agreements and concentrations on the one side and abuse of dominant position on the other side, with regard to their relevance for competition. The first two forms of behavior in the market are treated with less severity, prohibited only agreements and concentrations leading to relevant, *e.g.* considerable or fundamental harm to competition, whereas every abuse of dominant position is a prohibited restraint of competition. In dividing competition restraints by their relevance, certain criteria are required for distinguishing them. The duty to formulate such criteria was entrusted to the Government of the Republic of Serbia. Nevertheless, since the Government did not formulate the requested criteria, the Commission for the Protection of Competition in practice relied only on criteria established in the Act. Pursuant to Art. 2(2) of the Act, considerable prevention, restriction or distortion of competition are to be assessed from case to case, in light of the level and scale of the changes in the structure of relevant market, restrictions on and remaining possibilities of equal market access for new competitors, reasons for withdrawal from the market by existing competitors, changes restricting the possibilities for market supply, the level of consumer benefits and other circumstances restricting competition.

It seems that the legislature has brought in some unnecessary dilemma by introducing a qualified form of a restraint of competition, referred to as a 'considerable prevention, restriction or distortion' as a necessary element for banning an agreement, and thereby created the need for future

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15 *See* for example the Act on Competition of Bosnia and Herzegovina, <http://www.bihkonk.gov.ba/en/index.html>; the Competition Act of the Republic of Croatia, <http://www.aztn.hr/eng/pdf/zakon/zztn.pdf>, the Law on the Protection of Competition of the Republic of Macedonia, implemented as of January 1, 2005, with amendments in *Official Gazette of Republic of Macedonia* no. 22/07.

16 *See* Articles 81 and 82 of the EC Treaty. These provisions will remain the same under the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, December 13, 2007, 2007 OJ C 306, p. 1.

clarification by practice. According to the competition rules of the neighboring states and the European Union conduct involving restrictive or cartel agreements is assessed in light of its effect on trade between the Member States or on the entire common market or a relevant part of it, instead of abstractly qualifying the restrictive nature.[17] In other words, whether conduct of market participants prevents, restricts or distorts competition is assessed in light of its potential or actual effects or consequences on the common market or a relevant part of it.[18]

However, the Act does not regulate state aid. The matter of state aid for undertakings is of special relevance, since former socialist states like Serbia used to develop a peculiar, protective attitude towards certain undertakings, especially those owned by the state. Keeping in mind that those states play a significant role in the process of transition of the economy, it was expected that these issues would be regulated. The reason why this was not done lies, for the most part, in the political environment and economic demand for a fast ending of the process of privatization. Besides, the content of the new State Aid Act has been in the preparation process for more than two years, and it is still in the phase of drafting, which confirms the sensitivity of this matter.[19] The current Draft requires a special regulatory body to be established in order to enforce the Act.

2.1.2 Territorial and Personal Scope of Application

Regarding the territorial scope of application, the APC adopts the effects doctrine. This means that the APC is applicable to practices and acts conducted in the territory of the Republic of Serbia and to practices and acts conducted in foreign territory, having the effect of distorting competition in the market of the Republic of Serbia.

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[17] *See* Art. 81 of EC Treaty by which 'all agreements between undertakings, decisions by associations of undertakings and concerned practices, which may be affect trade between Member States and which have as object or effect the prevention, restriction or distortion of competition within the common market' are prohibited as incompatible with the common market.

[18] A similar formula was adopted by Art. 2(1) of the Act on Competition of Bosnia and Herzegovina and by Art. 2 of the Competition Act of the Republic of Croatia.

[19] The draft is available at <http://www.mfin.sr.gov.yu/src/1186/> (as of January 2008).

In a personal sense, the Act shall apply to all legal and natural persons and government bodies, institutions of regional autonomy and local self-governments that are engaged, directly or indirectly, in the trade of goods or services, and which by their acts and practices violate or may violate competition (hereinafter: undertakings) in particular to:

1) business enterprises, entrepreneurs and other forms of enterprises regardless of their form of ownership and seat, and for entrepreneurs, in addition, regardless of their nationality and permanent residence;

2) other natural and legal persons who are engaged, directly or indirectly, in a permanent, single or temporary trade of goods and/or services, regardless of their legal status, form of ownership, nationality, seat or permanent residence, such as trade unions, business associations, sports organizations, institutions, cooperatives, owners of intellectual property rights, etc.; and

3) government bodies, institutions for regional autonomy and local self-governments, when directly or indirectly engaged in trade of goods or services.

Pursuant to this Act, the definitions of companies, public enterprises and private enterprises are contained in the Law on Business Companies20 and in the Act on Public Enterprises. Essentially these definitions do not differ from the concept of an undertaking in EC jurisprudence.21 The key element for all of these market participants is participation in any trade of goods and/or in the provision of services in the market in the sense of any economic activity.

The Law shall also apply to related undertakings. Pursuant to Article 5(2), two or more undertakings shall be considered as related undertakings when one of them:

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[20] Zakon o privrednim društvima, *Sl. glasnik RS (Official Gazette of Republic of Serbia)* no. 125/2004, published on November 22, 2004, in force since November 30, 2004. In Serbian language available at <http://www.parlament.sr.gov.yu/content/lat/akta/akta_detalji.asp? Id=178&t=Z> (as of January 2008).

[21] The ECJ has defined the concept of an undertaking as 'any entity engaged in a economic activity, regardless of its legal status an the way in which it is financed.' *See* Case C-41/90, 1991 ECR I-1979, para. 21 – *Klaus Hoefner and Fritz Elser v. Mactrotron GmbH*; Case C-475/99, 2001 ECR I-8089 – *Firma Ambulanz Glöckner v. Landkreis Südwestpfalz.*

a) directly or indirectly, exercises decisive influence on the management of another undertaking particularly on the grounds of holding the majority of share capital; or

b) exercises more than half of the voting rights in management boards and has a right to appoint more than half of the members of the management or the supervisory board and the bodies authorized to act as proxies to the undertaking and agreements on transfer of controlling interest. Two or more related undertakings pursuant to this Act shall be considered as a single undertaking.

This Act shall apply to business enterprises, other forms of enterprises and entrepreneurs engaged in economic activities of general economic interest, as well as to such institutions entrusted with a fiscal monopoly. These are often State-controlled or undertakings to which the state granted special or exclusive rights comparable to undertakings in the sense of Article 86(2) EC. It is not important whether such undertaking is public or private, provided that economic activities of general economic interest have been entrusted to it by an act of public authority. However, the application of the Act may not prevent the performance of activities of general economic interest, *i.e.* entrusted activities. The wording 'prevents the performance of activities' is clear referring to a very strict interpretation of this exception. It is not sufficient that compliance with the provisions of the Act merely complicates the exercise of the entrusted activities.

2.2. Acts and Practices Preventing, Restricting or Distorting Competition

2.2.1 Restrictive Agreements

According to the APC, competition can be affected by 'acts and practices.'[22] As such acts affecting competition, the legislature considers agreements, contracts and single provisions of contracts, explicit or tacit agreements, concerted practices and decisions of associations of undertakings, which are specified by the technical term 'agreements.' In comparison with EC competition law, the APC gives wider meaning to the word 'acts' than the community concept of 'agreement' in such way that the word 'acts' includes 'contracts' and 'a certain part of contracts.' Moreover, introducing the concept of 'contract' in addition to 'agreement'

[22] The uncommonly used phrase 'acts and behavior' can be found in UNCTAD, Model Law on Competition, *supra* note 13. *See* commentary to Articles 3 and 4.

without clear criteria for distinction can cause ambiguity. Even in a legal context these terms can be misinterpreted.

A restrictive agreement's bad or prohibited outcome is assessed by an object or effect regarding the level of influence on competition and the relevant market. The difference between the object and the effect of prohibited agreements can be explained by the legislature's intention to cover not only agreements that involve intent of the contracting parties to restrain competition at the moment of signing the agreement, but also the agreements that regardless of the contracting parties' intent, can objectively cause prevention, restriction or distortion of competition. In some foreign legal systems, agreements that have the purpose of harming competition, like price agreements or market division agreements, are forbidden *per se*. The Serbian Competition Act instead does not rely on any *per se* prohibition.

The level of influence on competition is determined by the term of 'considerably' preventing, restricting or distorting competition. This can be interpreted in various ways and will have to be clarified by practice. In Serbian legal writing, the term 'considerably' is regarded as opening room for accepting a *de minimis* rule and for the recognition of agreements of minor importance that do not come under the cartel prohibition of the Act.[23]

A second element that must exist in restrictive agreements is related to the impact or influence on competition. In the APC, it is an accepted well-known opinion that, for restrictive agreements, it is enough to show that they could have negative impact on competition, regardless of their actual harm to competition. In other words, the expression 'may effect' implies that within a sufficient degree of probability an agreement is capable of having an effect on trade or competition. In the EC, the CFI has developed a test in order to establish whether an agreement or practice is likely to affect the competitive structure inside the Community by altering the patterns of trade.[24]

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[23] See R. Vukadinović, Zakon o zaštiti konkurencije (Preface to the Act for Protection of Competition), 2006, p. 24.

[24] *See* Case 56/65, [1966] ECR 235, 249 – *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm*: 'For this requirement to be fulfilled it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states.'

Finally, as a third element, the violation of competition must considerably affect 'the relevant market.' According to Article 6(2) of the Act, the relevant market is defined as the relevant product market and the relevant geographical market. The relevant geographical market is the market of the Republic of Serbia, while the relevant product market is defined by the set of goods and/or services that can be substituted for each other under the reasonable terms from the standpoint of the consumers of said goods and/or services. This particularly concerns their quality, normal use and price. The criteria for determining the relevant market are defined by the Regulation on the criteria for defining the relevant market.[25] According to Article 2(1) of this Regulation, the relevant market shall be defined by application of the SSNIP (small but significant non-transitory increase in prices) test. This test, which is also known as the hypothetical monopolist test, requires the definition of the specific market for particular products or services where the hypothetical monopolist could profitably introduce a small, but significant and permanent increase in price.[26]

Pursuant to the Act, prohibited agreements are null and void, but some agreements or group of agreements can be exempted from the prohibition. There are two procedures for granting an exemption to a particular agreement or to a part of such agreement: a procedure for individual exception and a procedure for group or block exemptions. Article 9(1) of the Act only provides for general conditions for an individual agreement exemption procedure and entrusts the Commission to decide on it. The Commission may, at the request of the parties to the agreement, grant an exemption to a particular agreement or to a part of such agreement (individual exemption) in case such agreement or a part of such agreement contributes to the improvement of production or distribution. This refers to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit. The restrictions that are imposed are only those that are necessary for the attainment of these objectives, and do not provide the possibility of eliminating competition in respect of the substantial

[25] Sl. glasnik RS (Official Gazette of the Republic of Serbia), no. 94/2005.

[26] Pursuant to this Regulation, a small but significant increase in price is an increase in price in the range of 5 to 10%, while within the meaning of this Regulation more permanent increase in price is a price rise of up to one year.

part of relevant goods or services market. The burden of proof concerning the existence of terms for individual exemptions shall be borne by the applicant.

The government has power to define in more details conditions for group exemptions and determines certain categories of agreements to be exempted from the prohibition. The Act provides that horizontal agreements, in particular agreements on specialization, research and development as well as on cooperation may be exempted from the prohibition. As exemptible vertical agreement, the Act enumerates those involving exclusive sale or supply, exclusive distribution, exclusive allocation of customers, selective distribution, distribution or franchise services. These are prohibited as part of agreements on exclusive distribution or supply, and exclusive representation, according to which the agent carries the business risk, restrictions of sale to end users by wholesale merchants and transfer of technology. These vertical agreements may be exempted from the prohibition in case they are concluded for a period longer than 5 years and that they are in effect in particular parts of the territory of the Republic of Serbia. The possibility to group-exempt agreements has so far never been used due to the fact that the Government did not enact regulations on conditions for group agreement exceptions and did not determine categories of agreements that can be exempted, although agreements match the foregoing conditions.[27]

2.2.2 Abuse of a Dominant Position

Another way to harm competition relates to the behavior of undertakings that have a dominant position in the market. Although the APC does not specifically say that a monopoly position is considered dominant, one or more undertakings can hold legally relevant market power, described as a dominant position.

The APC regulates both cases of individual and collective market power. The Act does not address how undertakings acquire their dominant position; it only regulates their behavior of undertakings that hold such position in the market. It is important that relevant market power derives from economic and not legal relations. The main thing is to determine legal criteria for the existence of a dominant position. Practice shows that, besides monopoly as an extreme form of dominant position, which is to be assessed by using

[27] The Commission for the Protection of Competition submitted a draft for such regulation at the end of 2006, but its adoption was postponed because of amendments to the Act.

economics, other forms of dominant position are determined in a legal sense in light of market shares.

The Serbian legislature takes this approach by combining it with other elements depending on whether an individual undertaking or a group of undertaking might have dominant position. Generally, an undertaking has a dominant position in the relevant market if it has the power to behave independently of other undertakings. Such undertaking is in a position to make business decisions without taking into account business decisions of its competitors, purchasers or suppliers and/or end users, their goods and/or services. In case an individual dominant undertaking has a market share in the relevant market that exceeds 40%, it may or may not be considered dominant, depending on other circumstances. These circumstances are for instance the market shares of competing undertakings in the same market, the existence of barriers to entry and the strength of potential competitors, as well as a possible dominant position of the buyer. An undertaking having a relevant market share below 40% may also be considered dominant, but in such a case the burden of proof is on the Commission or the applicant to demonstrate the undertaking's dominant position.[28] Above the market share threshold of 40%, the burden of proof is on the undertaking to show that it is not dominant.

Hence, the existence of market dominance has to be determined on the grounds of all relevant economic criteria defining the position of undertakings in relation to other undertakings, in particular as it concerns the quantity of goods and/or services and income realized from trade of goods and/or services.

According to these criteria, two or more undertakings having an aggregate relevant market share exceeding 50% may or may not be considered dominant. This depends among other things on the undertakings' share in the relevant market, the relative size of this share in relation to the share of other undertakings doing business in the same market, the existence of barriers to entry and the strength of potential competitors, as well as a possible dominant position of the buyer. If aggregate market share of two or more undertakings is below 50%, the burden of proof is on the Commission

[28] Also in the neighboring countries, a market share of 40% is very often chosen as the basis of a presumption for a dominant position. *See* UNCTAD, Model Law on Competition, *supra* note 13, commentary to Art. 4.

or the applicant to show that there is market dominance. Conversely, two or more undertakings having an aggregate relevant market share exceeding 50% bear the burden of proof that they are not dominant.

A dominant position as such is not prohibited. However, specific conduct of a dominant undertaking may be banned as abusive. This means that the mere structure of the market does not violate competition law. Violation of competition law can be based on specific 'behavior, practice or doing', which is addressed in this context as abuse of a dominant position. In that sense, the Act forbids abuse of dominant position in the relevant market. According to the Act, the abuse of a dominant position in the relevant product or services market is considered to be such practice which restricts, distorts or prevents competition, such as:

1) directly or indirectly imposing unreasonable purchase or selling price or other unreasonable conditions;
2) limiting production, markets or technical development, thereby causing harm to consumers;
3) applying dissimilar conditions to identical transactions with other trading parties, thereby placing them at a competitive disadvantage in the market; or
4) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial customs, have no connection with the subject of such contracts (tying practices).

Other kinds of conduct by dominant undertakings that disadvantage other parties in the relevant market could also constitute an abuse. Although there is no provision for an exemption, Community case law at least has developed a doctrine according to which otherwise abusive conduct is not prohibited under Article 82 EC if it is 'objectively justified.'[29]

2.2.3 Concentrations as a Form of Restraining of Competition

Concentrations, in general, are a way of merging two or more companies in order to achieve joint access to and to act in concert in the relevant market. This was once considered as beneficial conduct that led to

[29] *See* OECD, Competition Law and Policy in the European Union, 2005, at 26, available at <http://www.oecd.org/dataoecd/7/41/35908641.pdf> (as of January, 2008).

technological progress.[30] Nevertheless experience of developed markets showed that concentrations can affect markets and competition in such markets negatively. Especially this is the case when concentration of undertakings leads to the creation or strengthening of a dominant position in the market.[31]

Practice has shown that mergers cannot be properly regulated with cartel agreements and prohibition of abuse of dominant position alone; it was necessary to enact special legal rules that also address those kinds of behavior. Considering this being not just a legal, but also an economical question, regulation of mergers in other national legal systems and in the EU was implemented late in comparison to regulation of cartels and abuse of dominant positions. The Serbian Act finds its place among modern competition law in determining that it is possible to regulate and control mergers by enacting an obligation for the merging parties to submit an application for merger approval before the Commission for the Protection of Competition.

According to Article 21(1) of the Act, the following shall be considered as a concentration of undertakings:

1) status changes of undertakings, pursuant to the Law on Business Enterprises;

2) direct or indirect acquisition of control over the whole or a part of another undertaking by one or more undertakings;

3) establishment and joint control by at least two independent undertakings over a new undertaking acting on a fully independent and long-term basis and having access to the market (joint venture).

The control referred to by Art. 21(1) requires - according to Article 21(2) - decisive influence on an undertakings' business activities, on the grounds of granted rights, agreements or any other legal or actual facts, in particular the following:

a) ownership over or disposal with the whole or part of the property of an undertaking;

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[30] *See* UNCTAD, Model Law on Competition, *supra* note 13, at 28, box 11.

[31] This provision is similar to the balancing-test clause in Section 36 of the German Act against Restraints of Competition (Gesetz gegen Wettbwerbsbeschränkungen).

b) contractual authorization or any other grounds enabling decisive influence on the composition, activities or decision making of another undertaking.

The forms of control referred to in Article 21(2) shall be assessed independently or one in relation to another, whereas relevant legal and actual facts shall be taken into account but not the intention of the merging parties.

However, because of potential procompetitive effects of the concentration, the process and the result of the concentration are not *per se* prohibited. Similar to acquiring a dominant position, the procedure of implementing a concentration is not prohibited *ipso facto*. Prohibited concentrations are only those that considerably prevent, restrict or distort competition, by creating or strengthening a dominant position in the market.

This type of restraining competition, compared to the previous two, is legally regulated in a specific way, because protection is realized in advance (*ex ante*) and generally the object of protection is the market structure. Therefore, provisions on concentration aim to protect or preserve the actual market and market structure. This can be achieved by eliminating potentially distorting concentrations in advance. Pursuant to this, mergers shall only be carried out upon approval issued by the Commission at the request of the undertakings. The request shall be notified to the Commission within a period of eight days upon signing of the agreement or announcing a public bid offer or acquiring control. The request may be submitted when the parties have serious intentions to conclude an agreement by signing the letter of intention. This can also be done when the parties announce their intention to make the offer for purchase of shares. On proposal by the Commission, the Government of the Republic of Serbia has adopted a regulation on the content and method of submission of the request for authorization of concentrations (notification).[32]

Notification is only required for large concentrations assuming that only such concentrations can have a detrimental effect on the market structure and competition. The volume of a concentration is usually measured in overall

[32] *See* Regulation on the content and method of submittal of the request for issuing of approval for proposed concentration, *Official Gazette of the Republic of Serbia*, no. 79/05, available at <http://www.kzk.org.yu/?link= 81&lang=1> (as of January 2008).

turnover exceeding a certain threshold.[33] According to the Act a concentration requires *ex ante* approval if:

a) the combined annual turnover of all undertakings involved in the concentration effectuated in the market of Serbia exceeds the equivalent of €10 million in Serbian Dinar at the exchange rate on the date of making the annual calculation of the undertakings for the previous financial year, or - alternatively - if

b) the combined annual turnover of all undertakings involved in the concentration realized in the world-wide market exceeds the equivalent of €50 million in Serbian Dinar at the exchange rate on the date of making the annual calculation for the previous financial year, whereby at least one of undertakings involved in concentration has to be registered on the territory of the Republic of Serbia.

When assessing the effects of an intended concentration, the Commission shall assess whether such concentration considerably prevents, restricts or distorts competition, particularly as a result of the creation or strengthening of a dominant position in the market, taking into account the following indicators: the structure of the relevant market, existing and potential competitors, the market position of the parties involved in concentration and their economic and financial power, whether there is a possibility to choose another supplier or customer, legal and other barriers to entry in the relevant market, the domestic and international level of competitiveness of the parties involved in concentration, supply and demand of relevant goods and/or services, technical and economic development and consumers interests.

Considering the fact that the Act adopts a system of preventive control for concentrations with a duty to notify to the Commission, it is perceived that the defined levels are too low.[34] This is considered as an unnecessary burden for the applicants and for the work of the Commission itself.[35]

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[33] In Community law those concentrations are qualified as concentrations with a Community dimension.

[34] Notification thresholds vary in neighboring states. For example, according to Art. 25 of the Act of Protection of Competition of Montenegro, the request for approval is mandatory if the cumulative annual turnover of the merging parties realized in Montenegro exceeds €3 million in the previous fiscal year. Alternatively, notification is mandatory if the joint annual turnover in the world-wide market for the previous fiscal year exceeds €15 million and if at least one of the merging parties is registered in Montenegro, while in Croatia the thresholds are fixed at €135 million for the global market and €13.5 million for the

2.3. Commission for the Protection of Competition and Procedure Provisions

2.3.1 The Status of the Commission for the Protection of Competition and the Procedures before the Commission

The provisions of the Act are applied and enforced in administrative proceedings by a special regulatory body – the Commission for the Protection of Competition (hereinafter: Commission). The Commission consists of the Council for the Protection of Competition on the one hand and the Technical Service on the other hand. The Council, as a decision-making body, has five members and is responsible for making all decisions and other acts within the competence of the Commission. The Technical Service performs the professional activities within the competences of the Commission and consists of departments for restrictive agreements, abuse of dominant position and concentrations and of a general department and an international cooperation department.

Regarding its status, the Commission is an independent and autonomous organization entrusted with public competencies within the scope defined by the Act on the Protection of Competition. Independence and autonomy is ensured by the way of the appointment of its members and independent steering of the proceedings on the one hand and relative financial autonomy as compared to the Government and other state authorities on the other hand. The members of the Council are appointed by the Parliament on the proposal of institutions entrusted to propose the

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domestic market for each of at least two of the merging parties. In Bosnia and Herzegovina, a concentration needs to be notified if the total turnover of all participants adds up to at least KM100 million (€50 million), or at least two of the merging parties have a domestic turnover of at least KM5 million (€25 million).

[35] In this sense also the European Commission indicated that the turnover thresholds for notification are set too low. In addition the Commission argued that both thresholds - for the world-wide and domestic market - should be applied cumulatively. *See* also V. Radović, Zakon o zaštiti konkurencije RS (Act on the Protection of Competition of the Republic of Serbia), Pravo i privreda 1-4/2007, p. 19; Stevanović, Zaštita konkurencije u Srbiji (Protection of Competition in Serbia), *Srpska Pravna Revija,* 6/2007); Jankovic, Antitrust Does Not Protect Competition: A Critique of the Proposed Antitrust Regulation in Serbia, available at <http://www.mises.org/journals/scholar/Jankovic.pdf> (as of January 2008); and Svetlicinii, Efficiency Defence in the Merger Control Regimes of EC and Republic of Serbia: A Comparative Perspective, *Pravni život*, LVI (2007)XIV, p. 241.

members of the Council on a five-years term.[36] For its work, the Commission as a collective body is responsible to the Parliament. Council members are appointed among prominent experts within the legal or economic field, provided that they have specific expertise in the field of competition. This is the way how the Act ensures independence of the Commission.

Nevertheless, as regards the financial aspect, independence of the Commission is partially limited by the fact that the Government has to approve the financial plan. But, in return, the Government is obliged, if necessary, to provide additional means for financing the Commission's work.

2.3.2 Provisions on the Administrative Procedure

a) Initiation of Proceedings

The main task for the Commission is to enforce the Act and to impose appropriate measures and sanctions when a violation of competition law is established. In the proceedings before the Commission, unless otherwise regulated by this Act, the provisions of the General Administrative Procedure Act shall apply. Administrative proceedings start either with the application on request submitted by an interested party or on independent initiative by the Commission itself. The President of Council is obliged to issue a resolution on initiation of proceedings upon request within a period of eight days from the date of the submission of a request by the interested party. If the proceedings before the Commission involve parties with opposing interests, the Commission will be obliged to provide the request and resolution on the initiation of proceedings to the party against which the proceedings are conducted. This party is entitled to supply its own response to the request within a period set by Commission, which cannot be shorter than eight days.

The President of the Council shall make a resolution dismissing the request, if an unauthorized person has submitted the request, or the

[36] These iinstitutions are the Association of Lawyers of Serbia, the Association of Economists of Serbia, the Bar of Serbia, the Chamber of Commerce of Serbia and the Government of the Republic of Serbia.

practice stated in the request is not restricting, preventing or distorting competition.

b) Parties Eligible to Initiate Proceedings

The right to initiate proceedings belongs to the Commission as well as undertakings and parties concerned.

The Commission *shall* make a resolution on initiating proceedings *ex officio* requesting the Technical Service to conduct it, if the Commission finds, on the grounds of information or otherwise, that the practice concerned is likely to cause harm to competition pursuant to the provisions of this Act. The Commission *may* initiate proceedings *ex officio* if it finds that the practice concerned

a) is likely to cause considerable distortion, restriction or prevention of market competition; and

b) it proves likely that the notifying party has insufficient funds to initiate and conduct the proceedings or that conduct of proceedings *ex officio* is necessary in order to protect the identity of the interested party.

Resolution on initiating proceedings *ex officio* shall be made by the President of the Council.

An interested market participant, empowered to request the Commission to establish a violation of competition law, is defined as a party that suffers or risks to suffer damage. But also parties to an agreement, undertakings with a dominant position or the parties to a concentration have a right to initiate proceedings. Parties to an agreement may request to establish whether a particular agreement is not prohibited. An undertaking that has a dominant position in the relevant market may request from the Commission to issue a decision establishing that particular practice, which such undertaking intends to engage in, is not considered to be abusive. In case of concentrations, the Commission is authorized to initiate proceedings upon the request for authorization of concentration, submitted by

1) the parties to the concentration in case of status changes of the undertakings or a joint venture; or

2) an undertaking or the undertakings acquiring the control over another undertaking or a part of an undertaking.

The following are defined as market participants who suffer or risk to suffer damage: the Chamber of Commerce, an association of employers and entrepreneurs, a consumer protection association and state administrative bodies and regional and local self-government authorities.

c) The Closure of Proceedings

The Commission brings proceedings to an end by making a decision on the undertakings' rights and obligations. Such decision can be made in summary or following regular proceedings depending on the need to conduct investigation or not. Without conducting investigation the Commission can immediately make a resolution if:

1) parties with opposing interests are not involved in the proceedings;
2) a party in its request supplies facts or submits evidence on the basis of which it is possible to establish the facts or relevant circumstances or if the facts and circumstances can be established on the grounds of facts found by the Commission;
3) in the proceedings initiated upon the request for authorization of concentration, on the grounds of submitted evidence and other facts found by the Commission, it is justifiably assessed that the concentration shall not considerably prevent, restrict or distort competition, particularly as a result of the creation or strengthening of a dominant position in the market; or
4) it is not necessary to hold a special hearing of the interested party in order to protect its legally protected interests.

In other cases, the Commission institutes regular proceedings.

Depending on the subject matter, the Commission shall make a decision establishing a violation of this Act, if the agreement or some of its provisions considerably prevent, restrict or distort competition, or if a dominant position is abused, as well as a decision on exemption from prohibition of the agreement. These decisions must be handed down within a period not exceeding:

a) four months following the day of the submission of the request, in proceedings instituted at the request of an interested party, or
b) six months following the day of the resolution on initiation of proceedings conducted *ex officio*.

In concentration cases the Commission is obliged to make a decision upon request for the authorization of concentration within a period of four months following the day of the submission of the request. In its decision, the Commission may conditionally or fully approve or refuse to grant authorization for concentration. If summary proceedings take place, the Commission is obliged to hand down its decision authorizing concentration within a period of one month following the day of the submission of the request.

Decisions made by the Commission shall be final. Against the final decision of the Commission, an administrative dispute may be initiated before the Supreme Court within 30 days and the provisions of the General Administrative Procedure Act shall apply.

2.4. Sanctions

The Act on the Protection of Competition pursues two types of sanctions for violation of the Act, namely measures and fines.

The Commission may take various measures when undertakings do not obey a decision that establishes violation of the prohibition of restrictive agreements and the abuse of a dominant position. Besides establishing violation of competition law, decisions may order measures for removing the negative effects of the violation. If, in cases related to restrictive agreements and abuse of market dominance, undertakings fail to act pursuant to the measures within the time limits set by the decision, the Commission is obliged to make a decision imposing on the undertaking concerned a temporary prohibition of trading a particular type of goods and/or services in the relevant market, not exceeding a period of three months. If these measures do not produce any results, the Commission can prohibit economic activities for a period not exceeding four months. Nevertheless, in cases of an abuse of a dominant position, the Commission is not authorized to take measures such as divestiture of the dominant undertaking, transfer of its assets, shares and participating interest, termination of agreements or waiving of rights enabling exercise of prevailing influence on another undertaking. Even in the cases of unauthorized concentration, the Commission does not have authority to adopt measures of de-concentration.

Imposing a fine is the second type of sanction. However, the Commission itself may not impose fines; it only has power to request the relevant infringement authority to initiate infringement proceedings against undertakings performing acts that prevent, restrict or distort competition.

An undertaking may be fined from 1 to 10% of its total annual turnover realized in the financial year preceding the infringement.

3. FINAL REMARKS WITH A CRITICAL REVIEW

The Commission's short experience with the enforcement of the Act so far has already revealed some weaknesses regarding the substantive provisions the Act and also regarding the procedural rules.

As to substantive provisions, the Act provides no precise criteria for interpreting the doubtful concept of '*considerable* prevention, restriction and distortion of competition' in the framework of defining restrictive agreements. Regarding concentrations, the notification threshold is too low, since it requires large market participants to ask for approval for almost every single transaction. This can lead merger control in the wrong direction. The bottom line of setting merger thresholds would be to free the merger control body from dealing with small retailers, which most certainly cannot significantly affect competition. If those thresholds are too low, the competition agency ends up being swamped with cases and will be financially unable to deal with cartels and abuses of dominant positions. A solution to this problem would consist in raising the thresholds and making the domestic and world-wide turnover thresholds cumulatively applicable.

Major criticism concerns the part of the Act regulating proceedings before the Commission, and the chapter describing sanctions delivered by the Commission.

There is a serious sub-standardization of the proceedings before the Commission, starting with a request for initiation of proceedings, followed by the approval or denial for request to start proceedings, to the adoption of an appropriate decision. The time limits set by the Act are disputable, since, as it has already happened in practice, they jeopardize thorough and complete assessment of complex cases. This is due to the fact that application of provisions of the General Administrative Procedure Act to issues not regulated by this Act proved to be inappropriate for proceedings before the Commission. Since issues regulated by the Act on the Protection of Competition often require special rules, it would be better to enact specific procedural rules that treat proceedings before the Commission as a separate form of administrative proceedings.

As for the character of decisions adopted by the Commission on administrative matters, a two-step principle is accepted. Decisions made

by the Commission are final, but against the final decision, an administrative law dispute may be initiated before the competent court, namely the Supreme Court of the Republic of Serbia. Although the nature of the administrative dispute is not clear, the Act implies complete jurisdiction (*de plain droit*) of the Supreme Court.[37] Regardless of the justifiability of this solution, there is a certain lack of feasibility, since the burden is put on the Supreme Court due to the fact that administrative courts have not yet started to work. Establishing administrative courts will however not entirely solve this problem, since they are about to face a new field, particularly when the court's assessment of the actual situation is required.

Another shortcoming of the Act relates to the lack of nullity of concentration and the lack of the power of the Commission to order de-concentration in the case a concentration is implemented without the Commission's approval. To certain market participants, it might be more acceptable to pay the fine, and still implement the transaction, if future monopoly returns are expected to outweigh the earlier loss due to the fine.

The imposition of monetary penalties and other measures are particularly burdened by the fact that the Commission itself is not entrusted with the power to impose monetary penalties, but can only submit a request to the relevant infringement authority for initiation of infringement procedure against concerned undertakings. The Act allows very high penalties, ranging from 1 to 10% of the total annual turnover for the previous financial year. These fines are in disproportion with the treatment of violations of competition law as minor violations, *i.e.* a misdemeanor, which are adjudicated by the Misdemeanor Courts. This kind of regulation creates two dilemmas. The first one regarding misdemeanor courts is one of the administrative systems under the patronage of administrative authorities. These courts have their own criteria for independent decision-making. The second dilemma questions the competence of Misdemeanor Courts, especially their audacity necessary to impose the maximum predicted fines to larger undertakings. Court that are more used to adjudicate traffic offenses may not live up to the

[37] *See* also Svetlicinii, *supra* note 37, at 254 (opposing the view expressed here).

challenge created by the amount of possible fines and the economic relevance of the proceedings in competition law matters.

An additional problem is that the Commission is not entrusted with the right to impose sanctions against market participants who refuse to cooperate during the inquiry. The Commission should be empowered with the ability to directly impose penalties for refusal of cooperation. Practical problems could occur related to enforcing imposed penalties due to the possibility of conducting two proceedings on the same matter at one time before different bodies. The decisions of the Commission determining and finding an infringement of the Act may be appealed to the Supreme Court. On the other hand, the Commission can initiate proceedings before a Misdemeanor Court. Consequently, the Supreme Court can repeal the decision, but a Misdemeanor Court can impose a penalty for the market participant (or vice versa). In addition different procedural rules can lead to different decisions, especially in the case of a violation of procedural rules.

Specific penalty provisions contradict the National Strategy of Serbia for Serbia and Montenegro's Accession to the European Union.[38] The Strategy requires the entire penalty procedure be entrusted to the Commission, including the imposition of fines for an infringement of the Act, and that judicial protection be provided in administrative court proceedings initiated by the allegedly infringer against the Commission. Such an approach would in fact ensure the simplicity of the procedure and would enable the Commission to react in time and to impose penalties in conformity with EC rules according to which the European Commission is empowered to impose fines.

Finally, among the issues not regulated by this Act is the imposition of sanctions in case of retaining relevant information or submitting incorrect or misleading data and information during the inquiry, as well as provisions on a leniency program.

The Act does not specify its relation to the increasing number of regulatory bodies empowered to regulate competition issues in special sectors of the economy, such as the energy, media, securities or banking

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[38] *See* National Strategy of Serbia for Serbia and Montenegro's Accession to the European Union, Serbian European Office, June 2005, at 72, available at <http://www.seio.sr.gov.yu/code/navigate.asp?Id=73> (as of January, 2008).

sector.[39] This limitation of the jurisdiction of the Commission for the Protection of Competition can undermine a coherent approach to protecting competition in Serbia.

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Neka kritička zapažanja o Zakonu o zaštiti konkurencije Republike Srbije

U radu su prikazani sadržina i osnovna rešenja Zakona o zaštiti konkurencije Republike Srbije od 2005. godine. Kao osnovni oblici povrede konkurencije u Zakonu su navedeni i pravno regulisani kartelni sporazumi, zloupotreba dominantnog položaja i zabranjene koncentracije, a kao telo koje će se starati o povredma predviđeno je osnivanje Komisije za zaštitu konkurencije. Komisija za zaštitu konkurencije je zamišljena kao nezavisno i stručno telo, ali na osnovu početnog iskustva u radu Komisije autor izražava određenu sumnju u spremnost Vlade da za to zaista i obezbedi neophodne uslove. Određene kritičke primedbe su upućene i na druga rešenja: kako materijalnom pogledu, na primer u pogledu visinu tzv. praga kod prijave koncentracija, tako i u procesnih smislu, na primer, u vezi nedorečenosti rešenja kod regulisanja pojedinih pitanja u prethodnom i u glavnom postupku ispitivanja.

***Ključne reči**: z*aštita konkurencije, povreda konkurencije, restriktivni sporazumi, zloupotreba dominantnog položaja, Komiaija za zaštitiu konkurencije

Key words: protection of competition, violation of competition, restrictive agreements, abuse of dominant position, Commission for protection of competition.

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[39] For instance, the new Law on the National Bank of Serbia regulates competition in the banking sector under the authority of the National Bank of Serbia. *See* Law on the National Bank of Serbia, *Official Gazette of the Republic of Serbia*, No. 72/2003, available at <http://www.nbs.yu/export/internet/english/10/rlinks/law_nbs_200455.pdf> (as of January, 2008).

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