UDC: 334.757.026.16(497.7)
Review paper

ANTITRUST POLICY IN SERBIA: REGULATORY FRAMEWORK AND ENFORCEMENT MECHANISM

Dragan Loncar, PhD[1]
Sinisa Milosevic, MsC[2]

Abstract

The main goal of this academic paper is to provide an assessment of the current Antitrust regulatory framework in Serbia along with an analysis of Antitrust Commission practice in this field. This paper comprises of five sections. The first section focuses on the general provisions of Antitrust policy. The second part elaborates four segments of Antitrust policy. The third section gives an insight into the development of Serbian regulatory framework, as well as an overview of the current situation. In the fourth segment the analysis of practices used by Antitrust Commission based on the most important indicators is given. Conclusions and directions for further research are given in the last section.

Keywords: *competition, Antitrust Law, Antitrust policy, Antitrust Commission*

JEL Classification: *K20, K21, K210*

The importance of Antitrust policy

Adequate Antitrust policy practice that has as its basic goals fair competition and customer welfare increase is an important feature for every market economy. Aforementioned primary goal of increased customer welfare is closely intertwined with a number of other goals. E.g., on the macroeconomic

1 Associate Professor at The Faculty of Economics,University of Belgrade, email: dragan.peterhof@gmail.com
2 PhD candidate at The Faculty of Economics,University of Belgrade, email: sinisa.milosevic3@gmail.com

level, effective leveraging of Antitrust policy (hereinafter AP) leads to the overall competitiveness increase of the national economy as a whole through the elimination of monopolies per se as well as of barriers to entry induced by monopoly – like behavior. Intensive competition on the domestic market is an important precondition for the emergence of highly competitive companies on the global market (Porter 1990). Japanese globally competitive companies are a suitable example in support of this statement. I.e., for all the companies that subsequently became highly globally competitive a strong competitive pressure on the domestic (Japanese) market preceded. Industries that fit to this example are: cars, motors, cameras and musical instruments etc. On the other side of the spectrum are industries characterized by scarce competitive dynamics on the domestic market such as construction or paper industry, which did not provide any notable global contender.

On the level of individual competitors, AP disables excessive market power concentration, collusion among competitors as well as different types of dominant position abuse. This further makes the adverse market selection of inefficient companies less possible. Moreover, in such a setting prices are an outcome of equilibrium between supply and demand and market contenders cannot affect them. As a result, competitors make only the decision regarding optimal production quantity, i.e. the quantity that leads to the minimization of average costs. If such an approach is stimulated over a period of time production becomes more efficient and productive. Besides cost / price minimization, contenders can also compete through product differentiation on the market or in a market niche.

On the basis of these examinations, it could be argued that intensive market competition leads to: lower product prices, better quality, broader offer available to consumer, higher rates of economic growth and subsequently increased employment possibilities.

Four basic segments of Antitrust policy

Serbian regulatory framework (Law on competition protection of 2009 (The Law further on) and Law on state aid control and monitoring of 2009) clearly indicates crucial segments of AP, namely:

1) Restriction of agreements on prices and market share (cartel agreements)
2) Restriction of dominant market position abuse
3) Market concentration monitoring and control
4) State aid control and monitoring

Cartels. Secret agreements between two or more companies that define

prices, production and / or supply quotas and market segmentation are regarded as cartel agreements. All agreements of this kind, along with various other actions leading to limitation or prevention of competition, are forbidden by law. More precisely, the following practices are forbidden: the determination of direct / indirect sales / input prices, predetermination of share on the input or output markets, determination of production quotas and product types, organized boycott of other market participants, or sharing confidential information with competitors. Agreements that include these elements are considered restrictive and therefore void. Furthermore, the law considers verbal collusions and implicitly coordinated actions of collusive competitors to be cartel agreements.

The following are hypothetical examples of cartel agreements. E.g., companies A and B have agreed upon refusing to sell products at a predefined fixed price. The second example would be the situation in which companies X and Y have agreed not to compete for the same buyers, meaning that X would not offer its products to buyers of Y and vice versa. The third case could relate to the firms C and D that agreed to simultaneously increase product prices 10%. These are typical examples of cartel agreements. The fact that they are mostly secret and verbally agreed makes these collusive actions hard to prove. However a similar case was discovered and successfully sanctioned in Greece (collusive agreement between food retail chains on prices). The key for providing necessary proofs was the permission to wire mobile phones of involved representatives.

Restrictive agreements could, however, be exempt from restriction in certain cases (The Law of 2009, Articles 11 – 14). Exemptions are made when a restrictive agreement contributes to the development of production and turnover (i.e. when it contributes to technical or economic progress) in the industry and makes it possible for consumers to gain a fair share in benefits achieved. Another condition that is to be satisfied is the absence of imposed market barriers that are not necessary for an agreement to be functional. I.e. competition on the whole / relevant part of the market should not be excluded. When requested by involved parties, AC could exempt an individual restrictive agreement from restriction (individual exemption). Less important agreements are exempt from restriction by default. With this in mind, less important agreements under the provisions of Serbian regulatory framework are the ones made by competitors that: have combined market share of less then or equal to 10% when the same production and turnover chain level is considered (horizontal agreements); have combined market share of less than or equal to 15% when different levels of production and turnover chain are considered (vertical agreements); have combined market share of 10% and it is hard to distinguish whether the agreement is vertical or horizontal in

nature or whether it has features of both vertical and horizontal agreement; have combined market share of less than or equal to 30% given that those agreements affect market in a similar way and given that their individual market share on each market affected by the agreement does not exceed 5%. Besides these precise preconditions, in order for less important agreements to be allowed, they must not refer to price level determination, production or sales volume restriction or market fragmentation.

Dominant market position abuse (abuse of dominant position further on). Competition analysis is always made of so called relevant market. There are two criteria used for the definition of a relevant market: geographical (area for which the level of market concentration is determined) and relevant product market (competitors that produce a substitute for a product of a particular company). After boundaries of relevant market are defined the existence of dominant position is assessed. The assumption that an absolute market share of 40% indicates dominant position is the most common choice for AC, although there are additional assumptions defined by the law (absence of notable competition, favorable position in the input market, etc.) After the relevant market is defined and the dominant position is confirmed, AC approaches towards the determination of dominant position abuse.

Abuse of dominant position usually includes direct or indirect imposition of input or output prices as well as imposition of other unfavorable trade conditions, restrictions of production volume, reduction in the offer diversity or technological development unfavorable to the customer, application of different business terms to comparable undertakings with different partners that leads to unfavorable competitive position (buyer or supplier discrimination) as well as imposed inclusion of additional contractual terms that are essentially unrelated to the subject of contract or contradict common trade practice.

Most frequent forms of dominant position abuse include: imposition of unreasonably high prices to customers, predatory prices (net sales price below variable or full cost price), fixing or minimizing consumer prices, costumer discrimination through provisory differentiation in the rebate policy towards different customers, *tying* as the means for making sales mandatory (e.g., when costumer intends to buy “Plazma” cakes from Bambi company, she is obliged to also buy chocolate produced by Bambi) and bundling (e.g. if customer is to buy “Plazma” cakes from Bambi company, she is obliged to buy all the products within the Bambi product assortment). Shelve space rental that disproportionately exceeds market share of the company is also regarded as an action indicating dominant position abuse.

Although dominant position is not forbidden per se, every abuse of dominant

position is forbidden and sentenced by law. Fines are set in the range from 1 to 10% of annual revenue. AC is also allowed to issue the order of temporary or permanent operation seizure for a particular entity. Reputation of "monopolist" is often the worst effect of being prosecuted / fined for abuse of dominant position because it undermines company credibility and leads to the value discounting in the final instance.

Concentration. Excessive concentration of market power achieved through external company growth (merger and acquisition transactions) is forbidden by law. Therefore, concentration approval procedure is defined. In essence, if individual or combined turnover of companies that are subject to concentration exceeds the defined threshold, the approval from AC is necessary for such a concentration to be conducted. The effects of prospective concentration on market power distribution are assessed on the basis of autonomously gathered information, or information provided by the subjects to the procedure. Metrics used by AC include: CR indicator, HH index or Gini coefficient. These tools for concentration assessment are not the subject of this paper and therefore will not be further elaborated.

AC approves only the acts of concentration that do not lead to excessive market power augmentation or probability of competition dynamics distortion in the respective market. Besides binary decision on the particular concentration case (Yes / No), AC can issue conditional decisions. The acquisition of Mercator by Agrokor is an example for such practice. The concentration was approved under the condition that a certain number of Idea markets (owned by Agrokor concern) cease operations while another group had to reduce the selling space.

The existence of "natural" monopolies in the national markets was the characteristic of planned economies. When AP is not implemented prior to privatization, public monopolies tend to become legal private monopolies during the transition process.

State aid. Legal framework (Law on state aid of 2009, Articles – 5) defines allowed and prohibited state aid. State aid which inhibits competition in the market or contradicts signed international agreements (e.g. Stabilization and Association Agreement – Chapter 8, "Competition policy") is prohibited. On the other hand, social aid, aid for preservation of natural or cultural heritage as well as natural disaster or other emergency relief programmes are allowed.

The practice of aiding certain industries is quite common in developing countries. Instruments such as subsidies, tax reduction or write – off, equity increases or debt write – off are used for this purpose. Effects on competition

remain the same irrespective of selected instrument. Companies aided by the state are not motivated to make an additional effort in order to achieve and leverage the economies of scale, reach higher efficiency or increase national or global competitiveness in any other way. That is why a state aid control and monitoring is implemented hand in hand with state aid policy. The aim of state aid monitoring and control is to reduce the possibility of uneven aid distribution among companies and subsequent creation of preferable position to a limited number of entities. The emergence of such disbalances would lead to an unfair market contest which should be otherwise based on economic efficiency and limited state aid and intervention.

The analysis of regulatory framework

The first legal acts regulating certain aspects of Antitrust compliance in Serbia were enacted in the beginning of the 20th century through the regulatory framework of Kingdom of Serbs, Croats and Slovenes in 1922. Later, during the Socialist Federal Republic of Yugoslavia (1974.) and Federal Republic of Yugoslavia (1996.) further regulation was enacted. The first modern Antitrust Law (the Law further on) was enacted in 2005. At present the Law of 2009 with amendments from 2013 is in force. The Antitrust Commission (AC further on) is established in 2006 based on the Law of 2005 (Matić Bošković, 2014).

Antitrust policy in Serbia was firstly institutionalized in 1996. by the adoption of Anti – Monopoly law in 1996. Prior to this solution competition protection was regulated through the Law on Trade. The Department of Anti – Monopoly Affairs was in charge of competition – related issues until the Antitrust Law came into force in 2005 (Maksimović and Radosavljević, 2012). General provisions of this law were defined according to the Articles 101, 102 and 107 of the Treaty on the Functioning of the European Union (TFEU further on).

In the Article 3 of TFEU it is envisaged that “the establishing of the competition rules necessary for the functioning of the internal market”. This claim is further elaborated in the Article 119 by emphasizing that “for the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.” It is obvious that these provisions were used as the starting point for Serbian competition protection regulatory framework. Furthermore, concentration monitoring and control system as well as equal treatment of private and public entities in Serbia was established under

the provisions defined in the Article 106 of the TFEU. Provisions of Article 101 were the basis for defining relevant aspects of restrictive agreements regulation while the provisions of Article 202 were implemented in the field of dominant position abuse.

The Antitrust Law of 2005 was defined in accordance with EU guidelines. It is important to note that there was not much space to make changes that would include nationally – specific features in the law. Consumer welfare is the primary goal. Three types of anti – competitive behavior are clearly defined in the Law: excessive concentration of market power, cartel agreements and abuse of dominant position. The development of important decrees in the Law over the last three versions (2005, 2009, 2013) along with the critical assessment is given further on.

The first drawback of Law of 2005 is the **absence of dominant position definition** (Article 15). This issue is in a way similar to the situation from the version of 1996 in which dominant position was defined but clear metrics for its determination were absent. Deterministic definition introduced in 2009 version of the law approached the determination of dominant position "taking into account the magnitude of market share, economic and financial strength, availability of procurement and distribution markets as well as legal and situational barriers to entry for other market participants". After amendments were introduced in the 2013 version, certain improvements have been made, in particular with reference to the contents of Article 15 which was changed to the following: "Market participant which can conduct business on a relevant market with a high level of independence from other existing or potential competitors, buyers, customers, suppliers or consumers is considered to have dominant position. Market power of individual participant is determined by accounting for economic and other indicators, in particular: 1) Structure of relevant market; 2) Market share of participant that is subject to the assessment of dominant position; 3) Current and potential competitors; 4) Economic and financial strength; 5) The level of vertical integration; 6) Preferable position in terms of approach to supply and distribution market 7) Legal or situational barriers to entry for other market participants 8) Customer influence 9) Advantages in terms of technology or intellectual property". It is, however, indicated that assessment of each individual indicators is not mandatory. Moreover it is not indicated which indicators are the most important. This makes it possible for AC to define adequate indicators for each particular case.

The second important issue is the determination of **dominant position abuse**. This violation of competitive behavior is defined in the Article 16 of the Law and has not been subject to changes since the inception in 2009. Furthermore, it is also essentially the same as the definition used in the Law of

2005. Aforementioned Article states that "abuse of dominant market position is forbidden. Dominant position encompasses the following actions in particular: 1) the direct or indirect imposing of unfair input or product prices or other unfavorable business conditions; 2) the imposing of limitations to production as well as market or technical development; 3) application of different business conditions to comparable arrangements with different market participants that leads to the unfavorable position of some participants; 4) conditioning the contract for partner by additional obligations that differ from contracted subject in terms of nature and / or common practice." Harmonization of Article 16 of the Law and Article 102 of the TFEU is obvious and could be regarded as positive.

Third important topic is the fact that considerable problems were experienced during the **enforcement** of the Law of 2005. AC was not authorized to define fines for market participants that did not execute its orders. More precisely, the enforcement of the law was assigned to Magistrates` courts which made it impossible for AC to both investigate violations and execute final decisions (including fines). This inconsistency was extensively leveraged by the companies. Due to the inefficient solution of several disputable cases of dominant position abuse (e.g. the case of IMLEK company) that became subject to the statute of limitations, Serbia received operating aid from EU in the field Antitrust policy system.

Instruments of law enforcement were assigned to the AC in the Law of 2009 while the legal process was transferred from Magistrates` courts to the Supreme Court of Cassation and Constitutional Court. AC was authorized to exercise resolutions and determine sentences. Sentence is determined in the area of 1 – 10% of total revenue from relevant market. Introduced changes made the whole process faster and more efficient. Possibility for cases to reach legal obsolescence was considerably reduced thus making this strategy ineffective for legal representatives of the companies. The latest solution gives powers to AC to assess competition violations and determine the means for removing them. The following measures are used as the means for recuperation of competitive setting: de-concentration measures, behavioristic measures and structural measures.

Legal framework for Antitrust compliance was supplemented with following bylaws:

- Government Act on the content of inquiry for individual exemption from restrictive agreements from prohibition
- Government Act on the criteria for the relevant market determination
- Government Act on the content of application for concentration approval and procedure for its submission

- Government Act on agreements between market participants situated in different segments of production and distribution chain (vertical agreements) that are exempt from prohibition
- Government Act on research and development agreements between market participants situated in the same segment of production and distribution chain (horizontal agreements)
- Government Act on criteria for the determination of the sentence amount paid on the basis Antitrust measures, process sentences, means and deadlines of payment and conditions for the determination of these measures
- Government Act on conditions for the exemption from payment of Antitrust compliance fine (*leniency program*)

Fourth issue relates to the **exemption** from measures of Antitrust policy. The Law of 2005 allowed for exemption of companies of, so called, strategic "social importance". Since this status was acquired relatively easy in practice, the application of Antitrust Law was seriously undermined. The exemption from regulation relating to restrictive agreements and the option to conditionally allow for concentration existed in all version of the Law (2005, 2009, 2013). The latter is often used as a way to allow concentration and simultaneously simulate conservative approach of the PCP (e.g. the case of Mercator and Agrokor where concentration was allowed with requirements for Idea to close several markets and reduce the selling space in several of its markets). It is important to indicate that the discretion of AC in approach to the exemption provision is a problem rather than exemptions per se.

The fifth issue is caused by the fact that laws of 2005 and 2009 almost exclusively focused on proving the intention to commit competition violation, thus redirecting attention from other important topic such as the determination of real effects of supposed anti – competitive practice. No analysis of decisions made and fines issued was made insofar with an intention to measure the effect on the market dynamics of actions undertaken.

Irrespective of an array of positive changes introduced by the Law of 2009 and subsequent amendments of 2013 certain **flaws of reformed regulatory framework should be indicated**.

Firstly, **certain provisions are less precisely defined** than in the Law of 2005. In the Article 6, e.g. it is stated that Government should define concrete criteria for the determination of relevant market. Such a solution is a step back compared to the previous one since the Regulation on the criteria for the relevant market determination defined necessary indicators with this regard. Current solution leaves AC without analytical framework for the determination

of both relevant product and geographical market thus making this initial and crucial step in the competition analysis undefined.

Secondly, the **sentencing** system was entirely shifted. AC was authorized for the decision regarding sentencing instead of Magistrates` courts (The Law of 2009, Articles 38 and 68). Capacities of Serbian AC to make decisions in considerably complex cases with potential financial effect on the subject company measured in EUR millions is questionable having in mind the experience and know – how available. Capability of conducting complex economic and econometric analysis as basis for decisions about sentences is particularly unclear.

Thirdly, complaints of companies that are subject to AC examination are submitted to the **Administrative Court that currently does not possess adequate knowledge and experience** to tackle them properly. The practice of either absolute confirmation or abolition of AC decisions is in line with this conclusion. As a result the risk of cases being transferred to other constitutional courts or International Court for Human Rights in Strasbourg is substantially increased. This could further lead to the increase in the fiscal burden having in mind the fines paid after a case is lost in Strasbourg.

Fourthly, as result of lobbying from the AC the Articles considering the **approval of concentration** did not change leaving AC with the possibility to increase the revenue gathered on the basis of sentences. Besides that the acquisition of control over competitor (both partial or total) is considered as concentration. Further explanations are made in order to more clearly define when acquisition leads to concentration:

- If the value of acquired share exceeds 50% of other participants total assets
- If the acquired share presents the core business of other participant
- If the value of acquired share exceeds certain threshold

Given that AC is a self – financed institution, it is clear that such an approach aimed at the increase in the number of applications for concentration approval and subsequent augmentation of sentence – related income. The fact that Serbian AC processed by far the largest number of applications compared to the similar institutions in the countries of region comes as no surprise (e.g. 5 times more than in Croatia). Although current approach implemented in the Law was subject to intense criticism, no changes are intended. For example, Article 61, paragraph 1, point 1 states that almost every multinational corporation conducting business in Serbia must report every act of concentration irrespective of the region in which it takes place. The question of adequacy of concentration approval fee arises if it is known that values are 25000 EUR (for shortened procedure) and 50000 EUR (for examination procedure).

Such a setting could drive away multinational companies that have intensive concentration activity over a short period of time. If necessary administrative capacity for these actions would also be taken into account, the former would seem even more probable.

Fifthly, the criteria for the exemption from the law application are not clearly defined (on the basis of Articles 12 and 13 from the Law of 2009). The most obvious example is the definition of *de minimus* principle which indicates that market participants that own small market share should not be a matter of consideration even when they commit anti – competition activities. The ratio for such assumption is the fact that small entities do not affect market mechanism considerably. Besides de minimus principle, anti – competitive practices that are proven to foster production and trade or contribute to the economic and technical progress in general are exempt from the measures of AP. These practices should, however, provide consumers with the fair share of the benefits and should not impose restrictions / barriers to other market participants or exclude competition on the relevant market / relevant part of the relevant market. Although these situations seem appropriate to be exempted from the application of the Law, imprecise criteria and the fact that final decisions are in the ACs sole discretion make abuse in this area probable. General practice shows that exemptions should be applied particularly to (Ahikari 2004): small and medium enterprises (SMEs), research and development agreements; joint procurement organized by a group of micro / small enterprises in order to reduce costs and increase competitiveness; trade associations; agreements between producers with the purpose of expanding to foreign markets or promoting export, etc.

The analysis of the Antitrust Commission practice

Low level of competition in an economy is frequently caused by the absence of adequate Antitrust policy. In order to make this effect possible there are requirements that should be met: the use of preventive measures should be preferred over punitive measures; the separation of investigative and judicial powers; the implementation of clear criteria for the initiation of investigation; the existence of clear and transparent appeal procedure; the possibility to claim compensation for the damage caused by anti – competitive behavior of certain market participants; equal treatment of public and private entities in terms of law application; the definition of adequate competition protection measures; the protection of confidential information; the permanent promotion of Antitrust policy and the achievement of legal and formal independency of entity in charge Antitrust compliance.

Preventive measures in focus

Cost minimization is one of the ways to achieve competitiveness. High fines applied by AC when provisions of the Law are violated have quite the opposite effect since they increase the costs for affected companies. General consensus among policy makers in the field is that the sentences should be higher than the abnormal profits earned partially or entirely through the anti – competitive practice in order to de-motivate companies to commit such actions (Khemani 1995). Companies could incur substantial financial effects or even losses as a result of this approach. Even profitable firms could be severely struck. When anti – competitive actions are consciously undertaken, "initiator – company" accounts for the potential financial effects of sentences, which is not the case for companies that violate regulations unintentionally. This could lead to the absurd situation where otherwise competition driven firms are financially burdened or even driven out of the business due to the unanticipated costs. This a strong argument in favor of preventive measures.

The separation of investigative and judicial powers

The Law of 2009 introduced the AC both with the investigative authority and the authority to define the competition protection measures and sentenced companies that restricted, prevented or undermined market competition. This was not the case previously since the investigative authority and the decision on the existence of violation was assigned to the AC while the sentencing process was in the authority of Magistrates` courts. In order to implement a mechanism for controlling and assessing ACs decision such division of authorities should be reestablished.

Initiation of investigation

Clear criteria on the adequate grounds for initiation of investigation are important for several reasons. Firstly, the lack of such criteria makes the regulatory framework incomplete which leads companies to account for higher regulatory risk when they assess the potential investment in particular country. As a result, the prospects of investing in a country with such legal system do not seem attractive. This leads to decrease of foreign investment and, furthermore, it reduces the competitive pressure thus limiting the possibilities for the increase in competitiveness.

The appeal mechanism

The introduction of adequate appeal mechanism would contribute to the strengthening of ACs credibility. Clear procedure for submitting appeals to the

government body coordinated to AC is crucial for the functioning of such a mechanism. Benefits of introducing this change are twofold. On the one hand, subjects to ACs investigation would be given an opportunity to react when sentences are inadequate or unjust for some reason while on the other AC would have to make decision making process better in order to avoid the loss of credibility in the relation to coordinated government body.

Equal treatment of public and private entities and the possibility of compensation for the damage caused by anti – competitive behavior

Both final customers and other market participants should have a possibility to be compensated for the damage caused by anti – competitive actions. This option should be included in the regulatory framework. Besides that it is crucial that Antitrust policy be applied to both public and private companies.

Adequate competition protection measures

Adequate competition protection measures should be applied to a company that was proven to have been conducting anti – competitive actions. These efforts should both reduce the possibility of further anti – competitive behavior and neutralize negative effects caused to other market participants and final consumers. Financial sentences are determined when damage caused to the functioning o market is substantial. This measure should be used particularly when anti – competitive actions are intentionally committed with the goal of market share and / or profit increase. Therefore the value of issued sentence should exceed gains acquired through sanctioned behavior. If amounts of fines are known in advance and made transparently available, then Antitrust policy achieves an a priori effect.

The protection of confidential information / avoiding conflict of interest

Subjects to the investigation by AC have to make large amount of important data available. Due to the considerable risk that this data may become available to the competitors, it is important that AC establishes reliable mechanism for the protection of confidential data. Besides that, AC should guarantee the safety of provided information to the companies that are subject to investigation.

The promotion of Antitrust policy

In some cases anti – competitive actions of market participants are caused by the introduction of Government acts in different fields of economic / social policy. Together with the fact that market processes are dynamic per se this is the reason for coordination between Antitrust policy and other relevant

Government policies both in the field of regulatory framework development and practical implementation. In order to create “coordination mindset” among policy decision makers, AC should continuously promote competition rules and their importance. These efforts would increase the responsibility and commitment to the goals of AP both in Government and AC. Besides that potential positive and negative implications would be discovered and used as valuable contribution in decision – making – process.

The independence of AC

Political influence should be reduced as much as possible if AC is to make fair decisions based on the objective investigations and transparent criteria. Establishing AC as an entity that is organizationally independent from other government bodies and removing the possibility for political turmoil to affect the election / replacement of AC Council members would decrease overall political influence on this institution.

The financing of AC

In the end it is important to tackle the question of AC financing. Several things are important with this regard. Firstly, AC should have enough resources to attract qualified employees capable of making fair decisions on the AP related issues. Secondly, the required independence of AC should be further reinforced with self – financing strategy. Main sources of income for AC or similar entities are fees and sentences collected through the application Antitrust measures. This approach could, however, create substantial problems since the focus of AC is then easily transferred to agglomeration of income through excessive imposition of (unfair) sentences and / or distortion of criteria for concentration approvals. As a result, important cases of competition rules violation could end up uninvestigated and not sentenced.

The question of sources for the AC financing should not be in focus since the adequate mechanism for the assessment of ACs decisions is a more important topic. Crucial issue with this regard is the one of the cost – benefit effect of ACs decisions. It is argued (Voigt, 2006) that the crucial preconditions for successful AP are the quality of AC and judicial system.

The speech of the former president of British Competition and Markets Authority (CMA further on) is a nice example of the effective entity for competition protection. During the 10 – year – period CMA handled 4 cases of 4 billion UK pounds combined worth. The damage incurred to consumers was 2 billion UK pounds on the car market solely. The second area of significant competition violation was the telecommunications market with charges of up

to 40% above the competitive level. In this case solely, corrections made to the competitive behavior of market participants resulted in benefits of 325 – 700 million UK pounds to final consumers compared to the 2,5 million UK pounds of budgetary resources used.

Similar examples of Antitrust compliance violation could be found all over the world and irrespective of affected sectors. In Spain, e.g. the price of sugar was 5 – 10% higher than the EU average for a certain period of time. Spanish entity authorized for the Antitrust compliance determined the cartel agreement on the sugar market and fined involved market participants for 8,7 million EUR. This leads to the increase in market competition that subsequently transferred to the markets of products that use sugar as input.

The last observation tackles the **lack of adequate focus of Serbian AC**. Further on are elaborated the arguments in favor of this claim.

Firstly, the **primary field of ACs involvement is the application for concentration approval** which indicates the focus on the fee – related income increase. The fact that the Law of 2013 defined low thresholds for the concentration that requires reporting made it possible for AC to leverage this resource as the main source of income.

Secondly, overall impression is that **AC does not demonstrate the determination to investigate competitive practices** of multinational companies present in Serbia. The same stands for the large companies of the financial sector. It is important to indicate that The National Bank of Serbia has the authority over financial institutions with exempts AC from responsibility in this area.

Thirdly, the **ACs independence** is not entirely achieved. Members of ACs Council are elected by the National Assembly in a process that includes aggressive lobbying. Furthermore, current and former members did not possess adequate experience in the field of Antitrust compliance. The same stands for the know – how in economy and econometrics. However, the last version of the Law introduces a mandatory election of two members with the academic / business background in economics.

Fourthly, AC focused on minor (in the sense of cost – benefit trade – off) cases including those of Kragujevac cemetery and main bus station in Ljig. With no intention to underestimate the importance of these cases the feeling is that there are a number of more important issues that should have been tackled by the AC.

Fifthly, AC did not invest enough effort in conducting sector analyses that would lead to the determination of anti – competitive practice. Besides that, ex post analysis of punitive measures imposed by the AC is absent.

Conclusion

The segments Antitrust policy in Serbia based on the Antitrust Law and practice of Antitrust Commission are assessed systematically and thoroughly in this paper. The effect of positive and negative elements of the Law and ACs practice on the competition protection parameters is explained.

It is concluded that the current Law directly refers to the recommendations from the EU with little or no adjustments to the local setting. Consumer welfare is the primary goal outlined in the Law. Three practices are explicitly prohibited by the Law: excessive concentration of market power, cartel agreements and the abuse of dominant (market) position.

The analysis of Law of 2005 has indicated that this version had multiple serious issues although it was based on the general regulatory framework of the EU. The issues elaborated in the paper are: the definition of dominant position, the parameters of dominant position abuse, inefficient application due to the jurisdictions of Magistrates` courts, the neglect of state aid issue, discretionary exemption rules, the focus on proving the intention of anti – competitive activity instead of determining the effects.

The Law of 2009 introduced several improvements such as more concise definition of dominant position and anti – competitive actions that indicate abuse of dominant position. Authority for the determination of sentence is transferred to the AC and is in the range of 1 – 10% of annual revenue generated by company on the relevant market. This made the procedure more efficient and significantly reduced the possibility of case obsolescence thus making this strategy less viable for legal teams of investigated companies. The exemptions from the application of Law are more precisely stated but there is still substantial discretion in this field. The following negative elements are perceived: several provisions are less precise compared to the solution of 2005; the logic of sentencing was entirely changed but still focuses on irrelevant aspects; appeals are submitted to the Administrative Court although this institution does not possess the necessary know – how and resources to handle them; thresholds for obligatory concentration approval remained unreasonably low; exemptions are still not defined precisely enough.

The AC practice could be regarded as satisfactory mostly because positive

trends are perceived. However, the following segments have proven to be problematic or absent: preference of preventive measures over punitive, the separation of investigative and judicial powers, the existence of clear criteria for the initiation of investigating procedure, the existence of clear appeal procedure, the possibility of requesting a compensation for damage caused by anti – competitive behavior of other market participants, equal application of the Law to public and private entities, the definition of adequate competition protection measures, the protection of confidential information, continual promotion of Antitrust compliance and achievement of more noticeable legal and formal independence of AC. Particularly important conclusion is the one regarding unclear or absent focus of AC. This statement is based on the absence of cases in the fields of dominant position abuse and restrictive agreements as well as the lack of determination in tackling the anti – competitive practices committed by multinational companies and financial companies. Further negative features are strong political influence particularly in the field of Council Member selection, focus on minor cases, absence of sector analyses and absence of previous practice assessment.

Having in mind all aforementioned arguments, the overall conclusion is that the Law was improved in 2009 and 2013 versions compared to the solution provided in 2005, particularly in the fields of dominant position definition as well as the definition of dominant position abuse. Further on, AC was authorized to exercise sentences. Discretion in the field of exemption from the Law was also reduced. However, the new regulatory framework did not introduce substantial improvements. Inconsistencies and drawbacks that originated from such setting are outlined in the paper. The analysis of AC practice showed that this institution is much more capable of tackling even the most complex cases. The improvement of know – how in the fields of economics and econometrics would be a valuable provision to this. Other suggestions on improving the functionality and effectiveness of AC are stated in the paper.

References

- Adhikari, R. (2004). *Prerequisite for Development-oriented Competition Policy Implementation: A Case Study of Nepal*, Competition, Competitiveness and Development: Lessons from Developing Countries, New York, UNCTAD, p.53-91.

- Begović, B., Pavić, V., (2009). *Jasna i neposredna opasnost: prikaz novog zakona o zaštiti konkurencije*, Anali Pravnog fakulteta u Beogradu, 2/2009, p. 70-88.

- European Commission (2009). Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), Official Journal of the European Union, p. 7-20.

- Georski, P. A. (2004). Is Competition Policy Worth it?, Competition Commission.

- Khemani, S. (1995). *Competition Law: Some Guidenlines for Implementation*, In: Liberalised Trade and Fair Competition**,** CUTS, Calcutta.

- Lipimile, G. K. (2004). *Competition policy as a stimulus for enterprise development*, Competition, Competitiveness and Development: Lessons from Developing Countries, UNCTAD, p. 171-206.

- Maksimović, Lj., Radosavljević, G. (2012). *Mikroekonomska teorija kao osnova politike zaštite konkurencije*, Srpska politička misao, Vol. 36, p. 179-199.

- Matić Bošković et al. (2014). Zaštita konkurencije i suzbijanje monopola, Fondacija za otvoreno društvo.

- OECD. (2002). Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes., website,http://www.oecd.org/dataoecd/41/44/1841891.pdf

- Porter, M. E. (1990). The Competitive Advantage of Nations, London, Macmillan.

- Treaty on the Functioning of the European Union (1992): European Commission.

- Voigt, S. (2006). *The Economic Effects of Competition Policy: Cross-Country Evidence Using Four New Indicators*.

- Antitrust Law. *Official Gazette of the Republic of Serbia*. Issue 79/05.

- Antitrust Law. *Official Gazette of the Republic of Serbia*. Issue 51/09.

- Antirust Law (Draft Law on the amendments to the Antitrust Law).

- The Law on State Aid Control. *Official Gazette of the Republic of Serbia*. Issue 51/2009.