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EVOLUTION OF COMPETITION LAW IN SERBIA

ABSTRACT: Even though Competition Law began its outbreak in the Serbian legal arena less than a century ago, it was developing rapidly especially in the last decade maintaining the EU antitrust contours. One would say that it is only now on the right track with enforcement of the new Law on Protection of Competition, which makes our legal reality even closer to the EU role model. Thus, this law corrected all shortcomings of its predecessor, and only time will tell us more of his future application.

Keywords: EU Competition Law, Law on protection of competition

Introduction

The development of Serbian Antitrust Law begins in year 1934 when Direction on Cartels was adopted. However, after that point the progress of this fresh and tender branch of law was not developing so smoothly. Throughout the socialist period of ex- Yugoslavian republic, competition policy was obstructed with nationally governed protection of public and state-owned companies which was only prolonging the life of controlled market economy. Therefore, during a long period of time almost until year 1996 Serbia was in lack of essential preconditions in order to develop a welfare-promising branch of law. However, it is essential for further understanding to stress that even though Competition Law became the part of Yugoslavian legal framework in the period of Kingdom of Yugoslavia, it was only the law of disloyal competition that was familiar to legal scholars in that period. After the World War II, situation remained very much the same. Socialist Republic of Yugoslavia introduced the state and public ownership without any chance for independence of market participants and no

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need for Competition Law in such establishment. However, soon things were about to change. With the last changes of Constitution in year 1988 Socialist Republic of Yugoslavia finally proclaimed the principles of free economy as a state guaranteed principles. That did sound like an improvement, but definitely did not prove to be one. Only with enforcement of the first two laws, particularly regulating competition for the first time in Serbian history, certain improvement was noted. However, these two laws: Antitrust Law adopted in year 1996 and Law on Protection of Competition adopted in year 2005 were criticized to be too much under the influence of EU Competition Law, stating that not all norms of EC Treaty present the perfect role model for our market circumstances. This statement will be discussed in more detail later in this paper.

Antitrust Law of SRJ

In year 1996 Yugoslavian legislators decided to establish the framework of new proclaimed economy of free market by establishing and enforcing Antitrust Law[1]. Than, for the first time in Yugoslavian history competition was regulated with Antitrust Law. It was very obvious that national legislators were inspired with EU Antitrust Law applying very directly parts of EC Treaty that were regulating competition policy. I will discuss this phenomenon in more detail later in this paper and heavily criticize it. This law regulated only two distorting competition forms: abuse of dominant position and monopoly agreements. The blank field was left for cartels. One of this law's flaws was that not all types of agreements were forbidden. Agreements that were considered as non-monopoly agreements were ones contributing to the development of industry or trade of goods, initiating technical and technological improvement and benefiting to consumers. This was directly imported from article 81 of the EC Treaty. But, national norms were not in all elements identical. When comparing the articles of Antitrust Law with article 81 of the EC Treaty one can easily encounter that one negative condition is missing. And that is the line saying that excluded agreements cannot create the possibility of elimination of competition for significant number of products. Another flaw of this law showing that Yugoslavian competition policy was still on the beginning of its development is the fact that control procedure of cartel agreements was not regulated enough. However, one improvement was noticed and that was the introduction of the Antitrust Commission. The Commission was authorized to issue decisions about existing monopolistic behaviors. Furthermore, the Antitrust Commission was empowered to give orders to those who were hindering competition. Still, the legislator did not stipulate Commission's independence from political oligarchs. In addition, the Commission of that period was much different than the EU Antitrust Commission

[1] *Službeni list* 29/96

in another sense as well. The Antitrust Commission established with Antitrust Law was not authorized to impose punishments on competition injurers. That was in the hands of Administrative and Regular Courts, and such solution is of course considered to be outdated among the well- known legal scholars.

To sum up everything above mentioned about Antitrust Law enacted in year 1996, closer insight into fragile development of Serbian Antitrust Law points towards noticeable but still small improvement. With this law, SR Yugoslavia finally got its first law exclusively regulating competition. But, on the other hand it was only a failed try to fully copy European Competition Law. Finally national tendency to harmonize Yugoslavian Law with EU legal system[2] was heavily criticized as being too direct and not so fruitful. Serbian legislators were simply not taking into consideration the difference in position of Competition Law in developed European legal systems on the one side and in Yugoslavian system on the other. Therefore, certain adjustments had to be made in the national Competition Law with considerable EU influence but without any reproduction.

Sources of Competition Law in Republic of Serbia

Law on Protection of Competition was adopted on September 14th 2005 by the National Parliament. The law regulates the questions of competition violation, abuse of dominant position, concentration of economic subjects and measurements that regulate these questions. Besides that, this law established the Commission for Protection of Competition that is in charge for all questions of competition in the market of Republic of Serbia. In addition, this law was composed in order to protect constitutionally proclaimed principles of free market and protected competition. For the sake of illustration, the article 64 of Serbian Constitution states:

„Every act or action that creates or encourages Monopoly or restricts the market in any other way is against Constitution"

Regulative framework anticipated with the Law for Protection of Competition is still not complete since not all necessary regulation have yet been adopted.

Territorial and Personal Range of Positive Competition Law

Regarding personal range Competition Law applies on commercial organizations, business associations, public and other companies entitled with special rights by the state, individuals, national bodies, bodies of territorial autonomy and local administrative bodies. In other words, every economically active subject that with its own actions performs violation of competition is considered to be a subject of Antitrust Law.

[2] Decision about Establishment of the Commission for Harmonization of Yugoslavian legal system with EU law, (1996). *Official Gazette of SRJ* (45)

However, certain subjects are excluded from application of this law and those are: companies, business associations and entrepreneurs that perform the activities of public interest.[3]

Concerning territorial range of Law on Protection of Competition it will be applied inside the borders of Republic of Serbia as a subject of International Public Law.

Legal Position of the Body in Charge for Application of Competition Law

Numerous bodies may be involved in the creation and application of Competition Law, among which the Antitrust Commission or currently known as the Commission for Protection of Competition Law has a central role. Besides that, antitrust authorities create or exercise competition policy.

Competition policy has a main role in creation of positive environment for business activities, which is as well a basic condition for permanent economic growth. Competition policy through its impact on elementary industry branches secures market's acquisition of flexibility necessary for initiation and innovations. In order for this competition policy to be fruitful it must rest on two pillars that have for its goal efficient competition in the interest of consumers and intensification of the national economy's competitiveness. First pillar is strong and energetic application of antitrust rules that prohibit company's involvement in restrictive agreements or abuse of dominant position. And the second pillar represents an opening of economic sectors in which efficient competition is still not stabile enough.[4]

However all of this would not be possible without the crucial role of the Commission for Protection of Competition in the scope of antitrust. This authority was formed with enactment of Law on Protection of Competition on September 14th 2005. The Commission represents an independent organization that performs public duties and is responsible for its work to the National Parliament.[5] The Commission was constituted on April 12th 2006 with election of President and Vice-President. The Commission is obliged to represent in front of the Parliament a yearly report about its performance. Report for the past year is to be handed out latest until February of the current year. Another important organ is a five-member Council[6]. The Council is in charge for decision-making and emission of certain documents. Members of Council are respectful scholars in the area of Law or Economics, but they also must be well acquainted with Competition Law. The Commission is in charge of:

[3] Law on Protection of Competition, article 4
[4] Varga S., (2007). *Competition Law,* p. 101
[5] Law on Protection of Competition, article 32
[6] Ibid, article 33

1. deciding about rights and duties of market participants in accordance with the law
2. participation in emission of regulation in the area of protection of competition
3. proposing to the Government creation of regulation
4. following and analyzing conditions for competition in certain markets and in certain sectors
5. giving opinions to competent authorities about regulation propositions and enacted regulation that violate Competition Law
6. giving opinions about application of regulation in the area of Competition Law
7. accomplishing international cooperation in the area of competition protection in order to fulfill international obligations and to collect information about competition protection in another countries
8. cooperation with national authorities, local governance authorities, in order to provide necessary conditions for consistent application of this law and other regulations that are arranging the questions valuable for protection of competition
9. undertaking of actions with impact on developing the conscience about necessary protection of competition[7]
10. keeping the records about reported agreements, participants that have dominant position in the market and concentrations
11. organizing and controlling the conduct of measurements that secure protection of competition.

The Effects of the Commission's Work after the First Year of its Establishment

Already after the first year of the Commission's work it was easy to see that earlier mentioned shortcomings were completely based on right grounds. Numerous scholars were trying to convince legislators that threshold for concentration registration was too low and that the Commission's authorities were as well rather symbolic. Something had to be done if Serbia wanted to have strong and fully protected competition.

During the first year of its establishment the Commission was financed from the national budget. After that year the Commission continued as an independent body financing itself from its own profit. The Commission is financed in accordance with its financial plan that is being created every year and presented to the Government until November 1 of current year. Excess in costs is being covered

[7] Law on Protection of Competition, article 35

from reserves, and in case that those funds are not enough they will be covered from the national budget.[8]

Procedure in front of the Commission is being regulated with General Law on Administrative Procedure. The Commission's decisions are irrevocable. But it is possible to initiate administrative procedure against the Commission's decision in front of the authorized court.[9]

There are two types of procedure that can be set up in front of the Commission. The first one is the procedure initiated by the Commission ex officio and the second one is the procedure initiated on the request of private parties.

The Commission can initiate the procedure itself when client presents certain facts:

1. that there is a conduct that prevents, restricts and distorts competition
2. that he\she does not have enough funds to initiate the procedure, or when procedure is necessary in order to protect identity of a client.

The deadline for decision-making is four months from the day the request was submitted (if the procedure has been initiated on the client's request). And in the case of public enforcement procedure the deadline is six months starting from the day the conclusion was issued.[10]

There are two types of penalties for law infringement. The first are the measurements ordered by the Commission when market participants do not proceed in accordance with the Commission's decision. In that case the Commission can order temporary prohibition of business activities for the period not longer than three months. Or, if that does not show as successful, the Commission can temporary prohibit the performance of its functions for the period not longer than four months.

Other types of penalties are the penalties for conducting an infringement ordered by the Court.

The violator will be fined with the amount of 1 to 10% of total turnover in the passed year if he:

1. concludes or performs forbidden agreement
2. does not perform the measurements ordered by the decision about prohibition of agreement or abuse of dominant position[11]
3. abuses dominant position on the relevant market
4. installs a concentration for which it has not been issued an approval
5. installs a concentration for which it has been issued an approval based on incorrect data
6. does not behave according to other decisions.

[8] Law on Protection of Competition, article 51
[9] Ibid, article 52
[10] Ibid, article 66
[11] Ibid, article 71

Analyzing the Commission's position it is easy to encounter that this Commission is having rather limited authority. Basically this Commission is only presenting requests for starting the procedure in front of the Court. Furthermore, it is also not nominated to decide about penalties, which is as well duty of the Court. Furthermore, there is extremely low threshold of yearly turnover for requesting concentration's approval. This leads to conclusion that the Commission is overloaded with insignificant cases and therefore will pay less attention to the problems of cartels and dominant position. Also, in connection with concentrations, the nullity of concentrations is not anticipated and the Commission is also not authorized to order a de-concentration. On the contrary, the European Commission is authorized to decide about penalties while Court is only controlling its decisions. In this aspect Serbia should follow the EU competition policy.

Generally, the Commission has too narrow authorizations for successful application of the law. It should be added to few of the Commission's authorizations that it is able to collect fines in cases when the law is not respected. In order to protect competition it is crucial to react on time, because it is not possible to repair the damage inflicted on competition. The other impediment to successful procedure is the fact that the Commission does not have the right to punish the ones refusing to cooperate in investigation. Therefore, the Commission should be enabled to punish the parties refusing to participate in investigation. However, there are two problems aligned with this proposal.

First, there is a reasonable doubt that some Courts are not qualified enough to decide in cases of competition protection. It is considered that cases in the area of Competition Law are too complicated and that possible damages are too big to be imposed by the Court in charge of traffic offences.

The other problem is the possibility to begin two procedures with the same subject in front of different authorities. The Commission's decision about restrictions of Competition Law can be challenged in front of Superior Court, and the Commission is also the one initiating the procedure in front of the Court. As a consequence it may occur that Superior Court will revoke decisions of other authorized Courts. This all can be the result of different procedural laws followed by these Courts[12].

Thorough analysis testifies that punishments stipulated with the Law on Protection of Competition are opposite to what was agreed in the National Admission Strategy. According to the Strategy the Commission is in charge of administrating the procedure and imposing the sanctions as well. Moreover, punished companies also shared the right for judicial protection against the Commission's decision in front of Administrative Court. This decision enables Courts to conduct procedure efficiently and also to impose the sanctions shortly after the infringement gets discovered.

[12] Skopljak Z., Godinu dana od primene Zakona za zaštitu konkurencije, p. 67

In the light of all above mentioned, my position is that the Commission should and must have the authority to impose sanctions when material law gets violated as well as in situations of procedural disturbance.

The major flaw of the Commission's position is the fact that the Government of Serbia is approving the Commission's budget. This is directly opposite to the notion that the Commission should be an independent body.

The other shortcoming needed to be repaired is the introduction of the new law that will regulate the procedure in front of the Commission. Administrative Law gives opportunity to the parties to delay the procedure and to contract around the law. Therefore, the other solution should be adopted as it already happened in Croatia and Slovenia.

However, that is not all regarding the flaws of the Commission's position. The last but not the least is the regulation for electing the members of the Council for Protection of Competition. The council's members are being proposed by the Serbian Chamber of Commerce, Association of lawyers of Serbia, BAR association and National Government. The problem is that BAR association's and members of Chamber of Commerce can easily be personally involved in cases processed by the Commission and conflict of interest may occur.

Legal Regulation of Cartels

The Law on Protection of Competition came into force on April 26th 2005. This Law stipulated the Commission for Protection of Competition, as an independent and self-contained organization. The Commission is responsible to the National Parliament. The Commission starts with work after election of the Council. After the five council members get elected the Council adopts the Statute that regulates organization, work modules, field of work and the other questions significant for the Commission's effective performance. This law anticipates three forms of competition violation:

1. agreements which intrinsically prevent, restrict or distort the competition (cartels),
2. abuse of dominant position,
3. concentration that intrinsically prevent, distort or restrict competition, especially establishing dominant position[13].

Legal regulation of cartels first of all considers prohibition of the agreements between undertakings that have for its goal or a consequence restriction or distortion of competition[14]. Fight against cartel prohibition is one of the most important objectives for all competition authorities in the world since cartels cause enormous damage for both economy and consumers. Even Adam Smith was

[13] Radović Z. and Ratković, Zakon za zaštitu konkurencije, p. 1

[14] Marković-Bajalović D., (2000). Tržišna moć preduzeća i antimonopolsko pravo, Beograd, Službeni list SRJ, p. 46

claiming that between competitors exist tendency of collusion that corresponds to the fact that profit will increase if parties cooperate rather than compete. Cartels in general have no positive effects, only negative. In a nutshell, cartels eliminate competition. Undertakings involved in cartel produce less products of lower quality and lay the consequences on consumers and society in general. Cartels do not usually appear in every segment of industry. Those are usually sectors with high level of concentration, significant entry barriers, homogeneous products, similar prices and product structures, and finally developed technology[15]. In Serbia, cartels usually appear in traditional industry branches such as industry of oil and sugar. But the other industries should not be forgotten such as banking and independent professions.

According to the words of Law on Protection of Competition adopted in year 2005: agreements, contracts, certain clauses of contracts, implicit or tacit collision, coordinated practice and decisions of organizations and market participants that have as a goal or a consequence intrinsic hindrance or violation of competition are prohibited and void"[16]. Prohibited agreements are especially the ones that **1.** fix buying and selling prices or other market conditions, **2.** limit or control production, market, technical development and investments, **3.** share the markets or sources of supply, **4.** employ unequal business conditions on the same deals with different market participants, **5.** dictate the conclusion of agreements with acceptance of additional obligations that are not linked with the subject of agreement[17].

When we compare the legal regulation of cartels in European framework we can encounter that the regulation is quite similar. The differences are only in systematic and secondary legislation. Bulgarian Law on Protection of Competition prohibits the same types of agreements as Serbian Law, but also it regulates the agreements with the so-called" negligible effects"[18]. Competition laws of Croatia and Bosnia and Herzegovina are rather similar to our. It is important that they all prohibit the same types of agreements and that the legal consequence of those infringements is the same everywhere – such agreements are always void. There is an obvious reason why all these laws are similar and that is that they all had the same role model that is the article 81 of EC Treaty. The only difference is in different geographical areas it is being applied on.

At the end I should say something about exceptions from prohibitions of certain agreements. Those are the agreements between undertakings and associations that contribute to the development of production or distribution or promote technical or economical progress and enable the regular participation of consumers.

[15] Varga S., op. cit., p.105
[16] Law on Protection of Competition, p. 3, article 7
[17] Ibid, p. 3, article 7
[18] Radović Z. and Ratković, op. cit., p. 2

Apart from these, all other agreements are considered prohibited and void. To sum up, in order to apply cartel prohibition three conditions must be satisfied:

1. there must be agreement and collision between undertakings
2. objective or consequence of such collision must be significant violation of competition
3. violation of competition must seriously damage the economy of free market

Legal Regulation of Dominant Position in the Market

Abuse of dominant position in the relevant market represents the conduct of undertakings that manifests in applying different methods than those that are being applied in the conditions of regular competition, in production or with services that can directly or indirectly harm consumers and competitors. Antitrust policy has accepted the principle of objective abuse, which means that actual guilt of dominant undertaking is not relevant for existence of abuse.

The Competition Law of Republic of Serbia of year 2005 stipulates that the participant that has dominant position on the market is the one that deals independently of other participants, or makes business decisions irrespectively of business decisions made by its competitors, suppliers, buyers or final consumers[19]. Market participants may and may not have the dominant position if their market share is 40% taking into consideration competitor's shares, entry barriers, the power of potential competitors and potential dominant position of consumers[20]. Market participant whose market share is more than 40 % is compelled to prove that he does not have dominant position. Moreover, dominant position may be held by the market participant whose market share is also less than 40 %, and in that case the Commission or the person reporting the case is responsible to prove the existence of dominant position[21]. According to Serbian Competition Law conducts that prevent, distort or restrict competition are being considered to be the abuse of dominant position. Such conducts :

1. directly or indirectly impose inequitable buying or selling prices or other inequitable conditions
2. limit production, market, technical or technological development harming the consumers
3. apply unequal business conditions on the same deals with different market participants, which puts them in disadvantageous position compared with other competitors
4. dictate conclusion of agreement with acceptance of additional obligations that in their nature are not linked with the subject of agreement.

[19] Law on Protection of Competition, p. 6, article 16
[20] Ibid, p. 6, article 16
[21] Ibid, p. 6, article 16

If the Commission concludes that dominant position was abused, it will issue the decision that will affirm the infringement and declare the measurement that must be undertaken by the market participants in order to establish competition and redress harmful consequences. According to the EU competition role model the dominant position is not prohibited itself but only the abuse of dominant position.

Legal Regulation of Concentrations

Concentrations, according to the Law on Protection of Competition, are coalition of two or more undertakings for the sake of collective trading in the market. Concentration arises in the case of:

1. status alterations of market participants,
2. acquiring indirect or direct control of one or more participants over other participants or his part,
3. foundation and collective control of new market participants by at least two independent participants[22].

Request for concentration authorization is being presented under condition that combined turnover of all concentration participants in Serbian market in last financial year is more than 10 million Euros, equivalent to the value in dinars with exchange rate on the day of end of financial year. In accounting yearly revenues it is not taken into consideration the amount of revenues that concentration participants accomplish in transactions amongst themselves. If concentration participants acquired revenues doing business in the international market as well, than the minimum yearly turnover must be more than 50 million dollars for concentration to be registered (while at least one of the concentration participants has to be registered on the Serbian territory).[23]

As it was mentioned before these thresholds are far too low and lead to the conclusion that the Commission will be overloaded with less significant issues while it should be more concentrated on the highly harmful infringements such as monopoly and abuse of dominant position. Without certain makeovers of current Serbian Competition Law there is no chance for effective antitrust policy and successful implementation of the laissez-faire principle.

The New Law on Protection of Competition

The New Law on Protection of Competition was accepted by the National Parliament on the July 8th 2009. It came into force on November 1st 2009. This Law in many things represents an improvement of the Serbian antitrust. It without a doubt tries to cure all the flaws of Serbian legal reality in the scope of antitrust.

[22] Law on Protection of Competition, p. 8, article 21
[23] Ibid, p. 9, article 23

There are several reasons why this law is better than the previous one. First of all, it gives more authority to the Commission. And second of all, it sets out the higher threshold for requesting concentration authorization. These are definitely the most important improvements in the national antitrust policy, however there are many others, but I shall present only some in the following lines.

Furthermore, unlike before, now the Commission is authorized to directly penalize the party violating the competition by setting out the fine or other. Concerning fines, the Commission can now impose a fine in range of 10% of total yearly income (in the year before the proceedings in front of the Commission have started).

As well if the Commission realizes that there is a hazard of repeating the same or similar violation that is a result of an offender's structure, it can order a measurement that would have for a consequence a change of such structure.

Similar to the previous, if the Commission establishes that competition rules have been violated it can order an offender to divide the undertaking, sell the shares or break the contract. All in order to establish the situation which was in place before the violation has occurred.

Following, the Commission is now in charge to order a market participant to behave in certain manner or to refrain from certain actions in order to protect competition.

If the party does not behave according to the Commission's orders; does not supply the relevant information, or provides the incorrect ones; or if the party behaves against the measures ordered by the Commission; or if it does not apply in the period of 15 days for concentration authorization it can be fined with 500 to 5000 Euros for each day of such behavior.

Among other things, this law stipulates in more detail the leniency program and it enables the parities involved in the competition violation to earn a fine decrease if they provides certain incriminating information about the other cartel members.

Another relevant improvement represents an introduction of compensation for consumers and businesses who are victims of competition breaches. This definitely points that Serbian legislators are following trends in the scope of EU antitrust.

To close up this elaboration, I shall mention as well that this law is putting new investigative power in the hands of the Commission and sets a higher threshold for request of concentration authorization which finally provides more space for the Commission to deal with serious competition violations threatening the general welfare.

Conclusion

Observing the whole socio-political platform of the competition law development in Serbia one can easily encounter that despite all existing impediments the national antitrust policy had a rather successful progress. The newest law guarantees us a shortcut to a harmonization process and another tool enabling the accession to European family. However, apart from political goals this law should above all protect the consumers and provide welfare in the playground of the laissez-faire principle.

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Evolucija prava konkurencije u Srbiji

R e z i m e

Iako je pravo konkurencije doživelo svoje utemeljenje u okvirima srpskog zakonodavstva tek pre manje od jednog veka, ono se doista razvijalo veoma brzo i u skaldu sa konturama prava konkurencije Evoprske Unije. Ipak, moglo bi se reći da je srpsko pravo konkurencije zapravo tek sada na pravom putu sa donošenjem novog Zakona o zaštiti konkurencije koji je stupio na snagu 1. novembra 2009 godine. Ovim zakonom ispravljene su sve mana njegovog predhodnika, a da li će biti nedostataka prilikom njegove primene pokazaće vreme.

Ključne reči: pravo konkurencije Evropske Unije, Zakon o zaštiti prava konkurencije

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