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RESTRICTIVE AGREEMENTS AS A FORM OF COMPETITION VIOLATION IN SERBIA – THEORY AND PRACTICE

ABSTRACT: Restrictive agreements are agreements among market participants that significantly restrict, distort or prevent competition. This paper aims to elucidate the concept of restrictive agreements as a form of competition infringement within the scientific, professional and business-legal communities. The paper systematizes the definitions of this concept and examines the relevant laws and regulations governing it. Additionally, the paper will analyze and evaluate the efficacy of the Commission for the Protection of Competition, highlighting both its strengths and weaknesses in making decisions on the prevention of monopolies. Through an analysis of the commission's decisions concerning companies operating within the territory of the Republic of Serbia, this paper identifies challenges and proposes solutions to enhance the Commission's effectiveness.

Keywords: *Restrictive agreements, Commission for the protection of competition, violation of competition.*

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1. Introduction

Competition represents one of the most beneficial phenomena in the economic life. Its advantages are multiple, and simply cannot imagine the normal functioning of economic transactions, the operation of the market and the economy in general, the development of a society, and the quality satisfaction of the needs of social life without the existence of competition. It is an economic phenomenon, the subject of study in the economic sciences, but considering that the law defines the framework within which economic activities take place and economic phenomena manifest, it is also a subject of legal regulation. Legal solutions ensure that competition thrives, survives, and produces its positive effects. Legal theory provides very few definitions of competition (Porter, 2008).

The violation of effective competition through the actions of associations as market participants has two main manifest forms: a severe form, in the sense of an absolutely prohibited restrictive agreement, and a milder form – an activity that is potentially in conflict with competition protection rules (Commission for the protection of competition, 2021).

The main types of acts and actions that constitute competition violations are: a) restrictive agreements and arrangements; b) abuse of dominant market position; c) concentration of market power that leads to or can objectively lead to one of the previous forms of competition violations; and d) state aid (Ezrachi, 2010).

2. The concept of restrictive agreements

Restrictive agreements or arrangements are agreements between market participants, which are in relation to competitors or potential competitors, regardless of whether they are formal or informal, written or unwritten agreements, and that (United Nations Conference, 2010):

- Agreements that determine prices and other sales conditions, including international trade.
- Coordinated bidding or offering in public procurement procedures, also known as bid-rigging or collusive tendering.
- Market or customer allocation.
- Restraints on production or sale, including by quota.
- Group boycotts and concerted refusals to purchase/ supply.
- Collective denial of access to an arrangement, or association, which is crucial to competition.

All the listed forms of restrictive agreements and arrangements are prohibited. There is the possibility of individual or group exemption from the prohibition, with individual exemptions granted by the competent authority upon the request of a party to the agreement, provided that the conditions prescribed by law are met.

2.1. Institutional mechanisms and measures for the protection of competition

There are significant differences in the institutional approach to the application of competition law in different countries, as well as cultures. In many countries, including the European Union, an administrative concept of enforcement is applied, while in other countries, there is a system of so-called parallel or divided competences involving two or more administrative authorities, with one of them potentially acting as an entity with quasi-judicial powers in making decisions on competition violations and imposing protective measures and sanctions. Some countries provide for the jurisdiction of regular courts in the enforcement process (with or without special divisions for competition violations), while others have specialized competition courts (tribunals).

In order to establish a body for the protection of competition, it is necessary to make a decision on the relationship with the elected political officials of the executive and legislative powers in the Government. Ideally, the competition protection body can be both independent from political pressure in implementing its policy to investigate and prosecute competition violations, but also responsible for exercising its powers and spending public funds (Kovacic & Human 2012). In Serbia, the authority responsible is the Commission for the Protection of Competition, which is an independent and autonomous organization exercising public powers and having the status of a legal entity.

Protection measures and sanctions are predominantly of an administrative nature, such as behavioral measures and structural measures. The first type of administrative measures compels market participants to refrain from competition violations in the future or to undertake specific acts and actions aimed at eliminating harmful market effects and preventing the occurrence of future damage. Structural measures are those measures taken by the competent competition authorities to restore the disrupted balance of market shares among participants in the relevant market. They typically involve an order for the divestiture of a specific portion of a company's assets. Monetary

fines represent a significant tool for enforcing competition law against entities found to have committed acts or actions that violate on competition.

Regardless of financial resources, some countries recognize the right of market participants and consumer organizations to file a lawsuit for compensation in the competent court. This is a private legal instrument that leads to the restitution of property to subjects who, due to competition violations, have suffered actual damages in the form of reduced assets or prevented expected growth. In some countries, a lawsuit for compensation represents an independent legal protection instrument, considering that there is no requirement for prior completion of an administrative procedure for examining and determining competition violations.

In a certain number of countries, criminal liability for individuals is provided for in cases of more severe competition violations (cartels). Prison sentences for individuals, as responsible individuals within the management of economic entities, have a significant preventive character. In addition to imprisonment or as an alternative to it, some countries provide for the possibility of imposing a measure prohibiting the management of economic entities for a certain period.

2.2. The legal regulations that regulates competition violations with a focus on restrictive agreements

Since not every concept that exists in nature and affects society is legally regulated, more precisely, there are no statutes concerning it, we can conclude that the legal regulation of a specific concept must follow its significance. This means that only those concepts that become significant to society at a particular historical moment are legally regulated. It follows that legal concepts are regulated only at the point in the historical development of society when society has developed sufficiently to recognize the importance of their legal regulation. Regarding this, we come to the point when, under the pressure of European legislation, the Republic of Serbia realized the need to protect the competition of its market and regulate the concept of a restrictive agreement.

The Law on Protection of Competition (2009) in addition to regulating the protection of competition and establishing the position, organization, and authority of the Commission for Protection of Competition, also regulates the concept of restrictive agreements, their prohibition, and the conditions under which they are exempted from the prohibition. A characteristic feature of an individual exemption from the prohibition is that the request

is submitted by the parties involved in the restrictive agreement, and the Commission for Protection of Competition makes the decision regarding the exemption.

3. Initiation of the procedure for the protection of competition

Taking solutions from other state systems uncritically, we find ourselves in a situation where five individuals, who do not have directly superior experts to oversee them, make decisions about competition protection in the Republic of Serbia. Instead, we should utilize the existing judicial system, which already has expert judges in the field of commercial law and expert witnesses in the field of economics. This system also has an appellate court and extraordinary legal remedies and has so far proven to be more efficient and under less public pressure than any government administrative authority.

Since there hasn't been an announcement of a change in the competition protector, we must familiarize ourselves with the issues related to the competition protection process before the Commission for Protection of Competition.

A party in a proceeding before the Commission for Protection of Competition can be a market participant who has submitted a notification of concentration or a request for individual exemption, or a market participant against whom an investigation procedure has been initiated. We must emphasize that the legal status of a party, as per the Law on Protection of Competition, is not limited to those who initiate the investigation of competition violations, information and data providers, experts, and organizations whose analyses are used in the proceedings. It also includes other government authorities and organizations that collaborate with the Commission during the process. The Commission is only obligated to inform each initiator of an investigation into a competition violation about the outcome of the initiative within 15 days from the date of receiving the initiative.

The Commission initiates an investigation procedure into a concentration violation as a result when, based on the submitted initiatives, information, and other available data, it reasonably assumes the existence of a competition violation (Vukadinović, 2006).

The commission within its jurisdiction: Decides on the rules and obligations of market participants in accordance with the Law on Protection of Competition; Participates in the development of regulations related to the field of competition protection; Proposes to the Government the adoption of regulations for the implementation of this law; Monitors and analyzes

competition conditions on individual markets and in individual sectors; Gives an opinion to competent authorities on proposed regulations, as well as on valid regulations that violate competition; – gives an opinion regarding the application of regulations in the field of competition protection; Achieves international cooperation in the field of competition protection, in order to fulfill international obligations in this area and collect information on competition protection in other countries; Cooperates with state bodies, bodies of territorial autonomy and local self-government, in order to ensure the conditions for the consistent application of this law and other regulations regulating matters of importance for the protection of competition; Undertakes activities to develop awareness of the need to protect competition; Keeps records on reported agreements, on participants who have a dominant position on the market, as well as on concentrations, in accordance with this law; Organizes, undertakes and controls the implementation of measures to ensure competition protection (Radenković-Jocić, 2006).

3.1. Measures for competition protection and procedural penalties

In order to protect competition, specific sanctions must be established. These sanctions are specified in the Competition Protection Act as measures for competition protection or as procedural penalties.

To better understand the scope of penalties for competition violation, we must understand how they are determined. Namely, from the previous discussion, we concluded that the amount of the penalty should not exceed 10% of the total annual revenue generated within the territory of the Republic of Serbia. First, we need to determine the amount of the competition protection measure, and its level depends on the starting point, which is then multiplied by the factor of the severity of the violation, and subsequently by the factor of the duration of the violation.

In Serbia, there have been modest results in detecting and penalizing market participants in the previous period. The total amount of fines imposed on participants in restrictive agreements from the inception of the Commission for Protection of Competition until the end of 2020 is 20.111.243.690 Serbian dinars, as indicated in table 1.

Table 1: Measures for competition protection

Year	Subject	Amount of fine (DIN)
2011	Veterinary Chamber of Serbia	1.243.690
2011	Niš ekspres i Jeremić transport	21.650.850
2011	Lasta i Evropa-Bus	118.985.835
2011	Takovo , Uniqa i AS insurance	25.879.773
2012	Pharmaceutical companies	1.289.274.214
2012	Idea i Grand Prom	112.439.961
2015	D&D Travel ,DJD transport i Jeremić transport	915.696
2015	Amm Immovables, beteco, sagoja i Advane line	33.832.595
2016	Umbrela corporation LTD	1.631.513
2016	Bora Kovačević i Large transport	10.484915
2017	Vital i Victoriaoil	3.751.637
2018	Auto Čačak D.O.O I drugo	10.909.400
2018	B2M doo – Beograd, Grafo Trade doo – Beograd, Trgodunav doo – Beograd i Master Clean Express doo Palic	3.731.025
2019	Mikops – Birolinija – Biro Print Sistemi – Dikti Line – Birodeveloping – Birotehnika – Konica Minolta Poslovna	59.837.072
2020	Keprom DOO I Senta prompt – "Folly farm"–„oaza zdravlja"Apoteka „Užice",	4.475.256
2020	Yuglon DOO – Keprom DOO – Aksa DOO – „K-PHARMA" – Sopharma Trading– Medicom DOO Šabac– NS Pharm DOO Novi Sad – Apoteka Kraljevo – Vega DOO	8.889.067
2020	Mikrolift servis remont i montaža liftova i električnih uređaja – SCLIFT2018 D.O.O.	49.468

Source: View of the author according to decisions of the Commission for the Protection of Competition of the Republic of Serbia

The severity of the violation factor can be influenced by several reasons, which are categorized as follows: very serious competition violations (for which a factor of 2 to 3 is prescribed), serious competition violations (for which a factor of 1 to 2 is prescribed), and minor competition violations (for which a factor of 1 is prescribed). (Regulation on crieria for setting the amount payable on the basis of measure for protection of competition and sanctions for procedural breaches, the method and terms of their payment and the conditions for determining those measures, 2010).

3.2. Judicial Review of the Commission's Decisions

After the completion of the proceedings before the Commission, a party to the proceedings has the right to seek judicial protection, which involves filing an administrative lawsuit with the Administrative Court within 30 days from the date of receiving the final decision of the Commission. In this proceeding, the legality and appropriateness of the Commission's decision can be examined. Legality is considered to be whether the decision was made in accordance with the procedure defined for decision-making, while appropriateness assesses whether the Commission made the decision in line with the objective entrusted to it. We can say that legality pertains to legal matters, regulating the procedure and authorities, while appropriateness grants a certain scope of decision-making even in the realm of political matters on the basis of which the Commission's decision is made.

After receiving the lawsuit, the Administrative Court sends the lawsuit to the Commission within 15 days for a response. From the moment the lawsuit is received, the Commission has a period of 30 days to provide a response to the Administrative Court regarding the same. After receiving the response, the Administrative Court will make a decision within a maximum of three months. In such cases, the Administrative Court typically proceeds by reviewing the written evidence submitted by both parties, and court hearings are very rarely scheduled (only in situations where the case is more complex, and the court believes that an oral debate would facilitate a better understanding of the matter). Due to this procedure before the Administrative Court, trials usually last significantly shorter compared to other courts.

To illustrate the judicial review, an example of an Administrative Court decision can be given, which consists of examining the legality of the decision but does not pay attention to the appropriateness of the decision, and does not provide any explanation as to whether such a decision is in line with the purpose of the Law on Protection of Competition or contradicts it.

By the decision of the Commission for Protection of Competition Number: 6/0-02-764/2018-19 dated December 31, 2018, the concentration of the participants Telekom and Radius Vector was approved in a simplified procedure.

The Administrative Court issued Decision 3U.2054/2019 on May 9, 2019, in which it noted that the plaintiff (who filed an administrative lawsuit against the decision of the Commission made in a simplified procedure) was not a party to the proceedings that preceded the issuance of the contested decision. More precisely, neither Telekom nor Radius Vector were involved, and therefore, the plaintiff lacked the legal standing to file the lawsuit.

Consequently, in this specific case, the procedural and legal prerequisites, under Article 33, paragraph 1 of the Law on Protection of Competition on Protection of Competition Act, were not met.[1]

This leads to the conclusion that the Commission was allowed to make a decision in a simplified procedure without a hearing, without public participation, and most importantly, without the involvement of consumers to whom this concentration would apply. In this manner, the Commission approved the concentration in the market solely by reviewing a list of cases without any public insight. However, if someone who is not a party in the sense of Article 33 of the Law on Protection of Competition attempts to challenge the legality of such a decision, they will be rejected with the explanation that they do not have the right to review one of the publicly significant decisions made by a five-member body without any factual scrutiny or subordination.

The question arises: why would anyone have an interest in re-examining a decision that allows them to enjoy any right? The most common party to initiate proceedings is the one who has suffered harmful consequences due to the actions of other participants in the market. However, neither the Law on Protection of Competition nor the judicial practice allows them to discuss this issue in court.

I believes that with such a division of power, consumers are at the greatest disadvantage and in the most difficult legal position. Consequently, the court did not consider whether such a decision aligns with the objectives proclaimed in Article 1 of the Law on Protection of Competition.

4. Example of control of a restrictive agreement between companies Telekom and Telenor

The companies Telekom Serbia A.D. and Telenor Serbia have approached the Commission for Protection of Competition with a request for individual exemptions (as explained in the previous text). In proceedings related to such requests, the Commission first determines its jurisdiction, and then decides on whether the conditions for granting an exemption under the submitted agreement are met, in accordance with the law-prescribed conditions (Article 11, 12, 13, and 14 of the Law on Protection of Competition Act), which it will do in the case of this received request. To prevent further misinformation of the public, we emphasize that this is not about the concentration (merger) of two

[1] Presuda Upravnog suda broj 3U.2054/2019 od 9. maja 2019 godine [Judgment of the Administrative Court No.3U.2054/2019 of May 9, 2019.]

or more market participants but about an exemption from the prohibition of contracts with limited and defined business cooperation in a specific segment of business (Commission for Protection of Competition, 2021).

On April 21, 2021, the Commission for Protection of Competition issued decisions through which it granted exemptions from the prohibition of restrictive agreements for the Contract for the Provision of Ethernet Bit stream Services dated December 30, 2020, and the Contract for the Right to Use Optical Fibers dated December 30, 2020.

Since both parties in the proceeding, namely Telenor and Telekom, were satisfied with this decision, it was not expected that either of them would oppose such a resolution. The competitor in the market is the only one who filed an administrative lawsuit to determine that this decision has caused harm to them. However, the Administrative Procedure Act and the Competition Protection Act do not provide the possibility for third parties, such as competitors or consumers, to challenge such a decision, which represents a significant problem in the legal system. This lack of transparency in the arguments for and against exemptions from certain agreements is particularly problematic.

The problem with the legal control of such a decision is that its annulment can only be sought through administrative litigation. Administrative litigation can be initiated by a person who believes that their right or legally-based interest has been violated, and an interested party can initiate administrative litigation only if the annulment of the administrative act by the Administrative Court would be detrimental to them. None of the situations mentioned relate to the possibility of initiating administrative litigation against an individual act that would be detrimental to consumers.

After submitting a request for the review of the annulled decision, filed due to a violation of the law, another regulation, or a general act, and a violation of procedural rules that could impact the decision, the Supreme Court of Cassation issued – Uzp 217/2022 a judgment on July 8, 2022, rejecting that request.

From the explanation provided by the Supreme Court of Cassation, it is evident that the court considers such a request to be allowable but not justified. The argument of the Supreme Court of Cassation is based on the fact that the competitor in the market did not prove that the actions of market participants directly harmed their competitive position in the market by significantly restricting, disrupting, or preventing competition.[2]

[2] Presuda Vrhovnog kasaciong suda broj Uzp 217/2022 od 8. jula 2022 godine.[Judgment of the Supreme Court of Cassation No.Uzp 217/2022 of July 8, 2022.]

The problem with the existence of such a competition protection procedure lies in the fact that the law does not provide an effective means of protecting market participants who are not signatories to agreements and consumers. This protection depended on the opinion of the Supreme Court of Cassation, against which any substantive legal review and control were not allowed. Instead, only constitutional and international legal controls, which are limited to major procedural errors and the conduct of proceedings, were applicable. In this case, such major errors did not occur.

In this manner, competition in the Serbian market is protected only if the participants who have entered into specific agreements are dissatisfied with the Commission's decision. However, in cases where other market participants or consumers may potentially be harmed, they do not have a legal avenue to protect their interests. The available path may not likely give the desired results.

The purpose of competition protection is to safeguard the market from the consequences of restricting competition, which can be irreplaceable. It also serves as an indirect protection for end-users – consumers, who are left to navigate the market through the means of refusal to participate, as they lack other legal avenues for protection.

The procedure before the Commission is envisioned more as a criminal procedure where participants in a potential restrictive agreement defend themselves against the establishment of a prohibition. There is no way for anyone to turn to the Republic of Serbia in any manner for protection from the consequences of a violation of competition in the market.

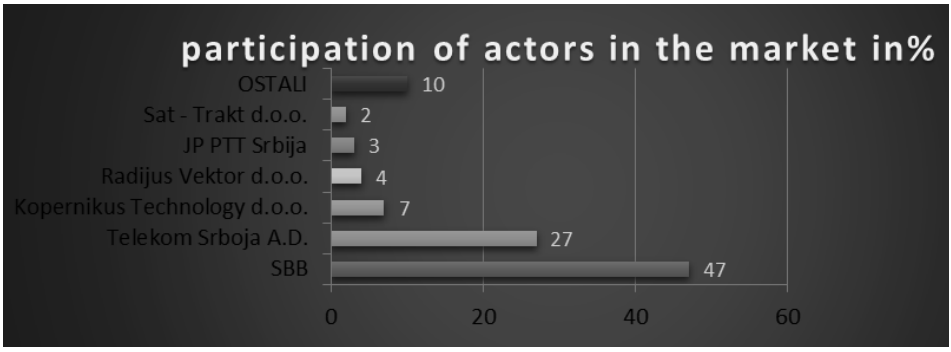
4.1. The Issue of Agreements

Article 1 of the Law on Protection of Competition (2009) clearly defines that competition protection in the market of the Republic of Serbia is carried out "in the interest of economic progress and the welfare of society, especially for the benefit of consumers." Based on the analysis conducted so far, it is evident that consumers, in every aspect, do not benefit from the intended actions of Telekom Serbia; quite the opposite.

Article 10 of the same legislative act states the prohibition of restrictive agreements, which are defined as "agreements between market participants that have the purpose or effect of significantly restricting, disrupting, or preventing competition in the territory of the Republic of Serbia." According to this law, it is sufficient for the purpose of a specific agreement to be aimed at significantly restricting, disrupting, or preventing competition.

According to market share data for media content distribution, the largest operator in the Republic of Serbia in 2019, and still is the business entity Serbia Broadband – Serbian cable network D.O.O. (SBB), with a market share of 47% in terms of the number of subscribers. Telekom Serbia A.D. held approximately 27% of the market share in 2019. In addition to SBB D.O.O. and Telekom Serbia A.D., other notable companies include the business entities J.P. PTT Serbia, Copernicus Technology D.O.O., Radius Vector D.O.O., and Sat – Tract D.O.O. These operators, measured by the number of subscribers, together account for 90% of the market for media content distribution, as shown in Graph 1 (Regulatory Agency for Electronic Communication and Postal Services, 2023).

Graph No. 1: Company Market Share in the Distribution of Media Content in Serbia in 2019.



Source: View of the author according to Regulatory body for electronic communications and postal services

On November 1, 2018, Telekom Serbia became the sole member of the business entity My Supernova D.O.O. Belgrade by "concluding an agreement for the purchase and transfer of shares in the total share capital, with a 100% ownership structure" (Telekom Serbia, 2023). My Supernova D.O.O. holds a 14.8% share in the media content distribution market. Therefore, Telekom Serbia, along with its subsidiary My Supernova D.O.O., is the second-largest operator in the Republic of Serbia, with a market share of 44%.

With only a 3% higher market share, the SBB Group is another significant player in the market. Therefore, if the state-owned company Telekom Serbia, through its collaboration with Telenor, enabled the "suppression of SBB" in the Serbian market and thus "complete domination of content in relation to United Media," it would signify an intention to monopolize the market. The

dismantling of the SBB Group in the Republic of Serbia in favor of Telekom Serbia places Telekom Serbia in a position to control 90% of the content in the market. In simpler terms, the state would control the entire media content market through its company.

The contract signed by Telekom and Telenor, which media outlets operating under the United Group, owned by SBB, report as a "devilish plan," is actually quite common. It's a restrictive agreement similar to what SBB and Telenor had or Telenor and VIP had, which is possible only if their exemption is approved by the competition protection commission.

A similar contract was also held between Telekom and SBB, and this was before the competition protection commission, established by law in 2005, even had the authority to approve the leasing of state company infrastructure to a private firm. Moreover, it was not within the commission's scope to assess how SBB's free use of Telekom's infrastructure until 2003 affected competing firms, many of which SBB later acquired.

Telekom and Telenor must prove to the competition protection commission, which is responsible for granting them an exemption, that their agreement "does not exclude competition in the relevant market or its essential part" (Article 11 of the Law on Protection of Competition) and that it "provides consumers with a fair share of the benefits."

It is not easy to assess the effect on consumers of the Competition Protection Commission's decision to exempt the agreement between Telekom and Telenor from prohibition. However, certain conclusions can be drawn, and they suggest that all agreements aimed at destroying competition can be beneficial to consumers in the short term. However, due to price wars among competitors, there may be price dumping in the market.

5. Conclusion

The need to protect competition is indisputable and the normal development of competition on the market is of great importance for every country. In this paper, we tried to present more closely the theoretical and practical work of the commission for the protection of the currency, as well as the decisions and results that the commission made in restrictive agreements. That's why we start from the conclusion that the protection of competition must be regulated towards a specific goal that should be achieved, and not just by establishing one body that is responsible for all infringements of competition in the Republic of Serbia, as if such a big issue can be solved by one body and that on the territory of the whole States.

Competition protection in Serbia must be widespread and easily accessible to all market participants, especially consumers, and should take place both at the national and local levels. Apart from the far-reaching consequences that infringement of competition can have in the long term, the existence of such a regulation gives the possibility that when a violation of competition is discovered, the worst sanction that follows the perpetrator is to return a certain part of the profit.

The problem of supervision over the protection of competition in Serbia is not sufficiently regulated, and during the many years of practice of the Commission for the Protection of Competition, it has been seen that the sanctions that have been imposed are not always adequate in terms of the damage caused by the violation of competition.

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RESTRIKTIVNI SPORAZUMI KAO OBLIK POVREDE KONKURENCIJE U SRBIJI – TEORIJA I PRAKSA

APSTRAKT: Restriktivni sporazumi su sporazumi između učesnika na tržištu koji za cilj ili posledicu imaju značajno ograničenje, narušavanje ili sprečavanje konkurencije. Cilj ovog rada je da se naučno-stručnoj i poslovno-pravnoj zajednici približi koncept restriktivnih sporazuma kao jednog od oblika povrede konkurencije. U radu su sistematizovane definicije ovog pojma kao i zakoni i uredbe kojima se ovaj pojam bliže reguliše. Zatim će u radu biti prikazan rad Komisije za zaštitu konkurencije, sa prikazom njenih prednosti i mana pri donošenju odluka o sprečavanju monopola. Problemi se uočavaju u odluci Komisije za zaštitu konkurencije na primeru preduzeća na teritoriji Republike Srbije i na osnovu njih se pronalaze rešenje za unapređenje rada same komisije.

Ključne reči: *restriktivni sporazumi, komisija za zaštitu konkurencije, povreda konkurencije.*

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