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VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

SERBIA

FULL REPORT



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NOTE

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¹ The Ministry of Trade and Services, the Ministry of Economy, the Administrative Court, the Agency for electronic communications, the Agency for energy, the Agency for Privatisation, the Public procurement office, representatives of universities, consumers organizations, the private sector and lawyers.

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PREFACE

Serbia is a country in transition towards a market economy. It has been deeply affected by the events in the Balkans and is now in a decisive process of recovery and of accession to the European Union (EU). Serbia has substantially liberalized external trade and is about to accede to the WTO. It has liberalized most industry sectors, but some major enterprises still remain under state control. Regulatory systems have improved significantly and are being harmonized with the EU. Procurement systems are still incipient.

Serbia has a competition law since 2005 and a competition authority since 2006. With respect to the enforcement of its competition law, Serbia has made progress by adopting several decisions on anticompetitive practices and by exercising merger control. Some of the major decisions received substantial media coverage and contributed to increase awareness of competition law among the business community and consumer organizations. However, most of the decisions of the Serbian Commission for the Protection of Competition have been annulled by the Supreme Court and one fine was levied in January 2011. A new competition law was adopted in November 2009 giving more powers to the Commission and moving judicial control to the Administrative Court. The first important competition case was confirmed in November 2010 and a criminal investigation was announced by the Public Prosecutor's office in an abuse of dominance case in the milk market. Increasing the resources of the Commission for the Protection of Competition, improving its methodologies in procedural issues, reinforcing its investigatory powers and strengthen the capacity of the judiciary in the field of competition law remain the highest priorities in order to strengthen Serbia's competition law enforcement.

International competition led to a restructuring of industry sectors in Serbia with reallocation of factors. Trade with the EU has intensified and barriers to trade in Serbia have been substantially reduced, although some impediments remain that will have to be eliminated when Serbia becomes a member of the WTO which is expected to take place in 2011. Serbia is also part of the Central European Free Trade Agreement (CEFTA) that created a free trade union. Barriers to trade have also been eliminated between Serbia and Russia, which is another major trading partner for Serbia. However, barriers to entry still persist in major wholesale and retail markets.

In the first years of the past decade, the Government undertook a large privatization program, with particular relevance for medium and small-sized enterprises. Following this program, and before Serbia had established a system of merger control, large concentration waves took place in several markets that led to high concentration levels, in particular in the food retail and milk markets, as well as to the formation of several conglomerates. Private monopolies characterize certain sectors, like the oil industry. Public monopolies still dominate the energy sector and some telecommunication markets. Privatization of some major enterprises is still a priority of the present Government, a process that was interrupted by the financial crisis. Competition issues will need to be taken into consideration during any future privatization process in order to avoid high concentration levels in the sectors concerned which would be detrimental to the competitiveness of the economy and to consumers.

In particular in the health sector, where past methods of procurement and regulation have facilitated collusion among suppliers, procurement issues need to be addressed. The recently established Agency for Anti-corruption has started its work and a major case has already attracted attention.

Serbia was a fairly developed country (as a part of Yugoslavia) until the 1980s and had a tradition of a market economy until World War II, so it should be possible to (re-)establish a solid base of small and medium-sized enterprises. Physical infrastructure has been upgraded and the legal framework

for doing business has been improved with the help of programs supporting Serbia during the EU accession process.

Competition policy is a major instrument for building a modern and competitive market economy. Competition law and its enforcement form one pillar of competition policy. In a country in transition like Serbia, other aspects of a competition policy, such as external trade and investment policies, sector regulation, privatization policies, public procurement policies, licensing and concessions, as well as reducing barriers to entry and exit of firms, are essential to build an efficient economy with a strong level of innovation. For example, opening the economy to international competition is an important policy that shall increase efficiency. Privatization can contribute to establishing a competitive market or to creating monopolies and dominant market players. Procurement policies can substantially raise the State's and ultimately the taxpayers' cost of provision of goods and services; if cartelization is allowed among bidders and competitive bidding does not take place. These areas are addressed in this report.

Serbia has already built a good level of infrastructure, although economic growth requires the modernization and expansion of the existing infrastructure in several sectors, like transportation and energy. Having an efficient infrastructure is crucial for a modern competitive economy, since a country's infrastructure constitutes the backbone of its entire economy. As in other sectors, competition plays a major role in promoting efficiency and reducing costs. Since infrastructure sectors are often characterized by the presence of natural monopolies, like in network industries, regulation needs to correct market failures. Vertically integrated dominant companies may have to be unbundled in order to promote competition and natural monopolies have to be regulated, mainly in terms of maintaining an open and non-discriminatory access. In this respect, Serbia has undertaken the first steps, but the infrastructure sectors remain of the highest priority to be addressed in the country's competition policy. Serbian sector regulation has been improved substantially and will be further aligned to EU standards.

Electricity prices in Serbia are among the lowest in Europe, but the industry remains in the hands of state enterprises, much in need of modernization. Maintaining low prices for political reasons will undermine an increase in efficiency and will not facilitate the process of opening the sector to new independent power producers. Priority should be given to fully unbundle production from operating the high-voltage transportation network system. Gas prices are comparable to those in other countries in the region, but high considering the purchasing power parity of the country. Gas supplies are monopolized by Srbijagas, but there is very little the country can do before there is a diversification in suppliers, which depends on the realization of international pipelines projects. District heating systems in major cities are quite inefficient.

Telecommunication prices in Serbia are among the lowest in the region, and telecommunications operators offer some of the best services in the region, but competition still remains an issue in several segments. The fixed line copper network has yet to be subject to unbundling and standard reference offers, required for interconnection with the incumbent are not yet regularly available. The incumbent still has a dominant position in fixed line telephony and a major market share in mobile communications. One of the major concerns arises from the privatization of the incumbent without taking safeguards for creating a competition friendly environment. Other major concerns are the need to roll out the fiber optic network in major cities and to provide broadband access to rural areas, in order to avoid the digital divide between cities and rural areas.

The financial sector remains quite stable even in the aftermath of the financial crisis. Most of the banking sector has been privatized and large foreign banks have taken positions in these institutions, which have a highly diversified origin of shareholders. This represents a major advantage vis-à-vis most of the other Eastern European countries where banks have sometimes acquired dominant positions and exerted strong political pressure.

Serbia has already privatized most of its commercial businesses, but large segments in utilities are still under state control. Privatization in several sectors, like manufacturing and banking, has not contributed to market concentration, but concerns relative to competition in the sectors and relating to firms that are still in the privatization process should be introduced up front, in parallel with other concerns like financial inflows to the Treasury and corporate control.

A major area requiring special effort is public procurement. There is still no legal framework to fight anti-competitive practices in public procurement and consequently no enforcement of competition law in this area. Several studies of the World Bank have shown that savings of about 20 per cent can be achieved if a more efficient and competitive procurement system is introduced, contributing also to a substantial reduction of corruption.

Licensing, concessions and public-private partnerships are policy areas where the country needs to modernize its legal and institutional framework in order to build a modern market economy and be able to increase investment in infrastructure and other social sectors.

Serbia has achieved significant progress in opening the economy to foreign trade, a process that was intensified in the last four years with a unilateral lowering of barriers to imports from the EU, which will eliminate tariffs for industrial goods by the end of 2015. Serbia has also entered CEFTA and negotiated free trade agreements with Russia and other countries. WTO membership is expected in 2011 and Serbia is now engaged in negotiations with the EU, expecting to become a candidate country by 2012.

The foreign investment regime of Serbia is also one of the more business-friendly in the region, and has attracted investments to the car, steel and pharmaceutical industries as well as in trade and services. However, progress still needs to be made in creating a more business-friendly environment, namely in terms of the rule-of-law, improving the functioning of courts and law enforcement, reducing bureaucracy and improving regulation.

Problems also remain in market entry and some regulatory constraints, still requiring reforms to promote investment and foreign trade. Regulation in infrastructure has followed EU standards, although there is still some way to go before the introduction of the latest methodologies. A new State Aid Law has been enacted and enforcement should now be pursued. Also a new consumer protection law has already been introduced, although there are serious institutional limitations for its implementation. The same is true for the field of unfair competition.

The main areas for improvement of the Serbian competition policy are: (i) the limited impact of competition law enforcement due to lack of resources of the Authority and problems with judicial control, (ii) major problems in public procurement (bid rigging and market sharing affect in particular the health care and the construction sector), (iii) the close connections between regulatory issues, public procurement and corruption practices that need a close cooperation among authorities, (iv) the need to strengthen competition culture of all economic agents, as well as the need to reinforce training and academic curricula for competition law and economics at Universities, for compliance programs in the public administration and enterprises as well as in the judicial system. 21 recommendations are proposed in the areas of competition law and enforcement, regulation and competition policy and on other institutional issues.

The most important proposed measure is to strengthen the Serbian Commission for Protection of Competition (SCPC) in order to be able to fully enforce the law and dispose of its functions. Creating a sustainable and predictable source of financing for the SCPC is among the highest priorities. The SCPC should also reinforce its human capital basis, endow the Authority with high level expertise in economics and expand its operational capacity in both law and economics. The SCPC would still need technical assistance for several years in order to continue improving the good work already done in

the past. The training should also be extended to the Administrative Court that has recently been attributed the jurisdiction for judicial review of decisions of the SCPC. The recent reform of the competition law aligned it substantially with EU competition law, so Serbia may want to wait for 4 to 5 years to revisit the law.

The complementary areas of consumer protection and unfair competition need to be upgraded in institutional terms. Although laws have been enacted, the present institutional framework is extremely weak. The enforcement system relies on consumer non-governmental organizations (NGOs) that do not have the capacity to enforce the law or bring cases to courts. The Government of Serbia needs to take a major decision on how to enforce those two important areas of law in order to protect its citizens against unscrupulous firms and to protect the fair play among businesses. Two options will be discussed: (a) attributing to the SCPC additional functions in the fields of consumer protection and unfair Competition, or (b) reinforcing the respective department in the Ministry of Trade and Services and attribute the required enforcement powers to it.

Another important area of competition law and policy is to develop and institutionalize the coordination between the SCPC and all the sector regulators, clearly stating their respective jurisdictions.

In the area of regulation and competition policy, it is proposed to create a high-level unit in order to advise directly the Government on competition implications of any economic policy being proposed or under discussion, to formulate annually the objectives of competition policy for the Government and to undertake an assessments of any act or law that may have competition implications. This group could cooperate with the SCPC when a deeper analysis is required. In a country like Serbia, where privatization is still taking place at a large scale, competition concerns should be addressed at an early stage and previous to any privatization model being announced for a particular industry. Currently, this would apply to the telecommunications sector. The same concern applies to restructuring public enterprises. Network industries are particularly prone to dominant positions, which is why they need to be closely regulated and observed from a competition perspective. They are particularly relevant for the competitiveness of the country.

Preventing bid-rigging and promoting competition among firms that take part in public procurement needs particular attention in Serbia, not only to reduce taxpayers' costs, but also to avoid corruption. The law needs to be changed in order to prevent bid-rigging and also to eliminate discrimination in favor of domestic firms. Close cooperation should take place among the SCPC, the State Procurement Office and the Anti-corruption Agency.

Finally, competition policy should be given an equal status as industrial policies in the formulation of development policies of the country, the enforcement of state aid needs to be strengthened, and the effort of advocacy by the SCPC has to be intensified. A larger effort in training in law and economics of competition should also help improve institutional capacity.

1. FOUNDATIONS AND HISTORY OF COMPETITION POLICY

1.1 Introduction: Serbia's Competition System in Context

Serbia is a landlocked country located at the crossroads of Central- and Southeastern Europe, covering the southern lowlands of the Carpathian basin and the central part of the Balkans. As part of the Yugoslav Republic, Serbia had a socialist economy after World War II, and suffered a profound shock with the disaggregation of the Yugoslav Republic in the late 1990s. It is still an economy in transition and it has been negotiating its membership into the European Union ("EU") since 2000. Serbia instituted a Competition Law in 2005, which is its first law based on modern rules for the protection of competition. It also created the Commission for Protection of Competition ("SCPC"), an independent state institution that is responsible for the enforcement of the Serbian competition law. The SCPC started its activities in May 2006. This report firstly reviews the economic, historical and political context of the Serbian competition law and policy.

1.2 The Economic, Historical, and Political Environment

1.2.1 Political Context

Serbia was part of the Socialist Federative Republic of Yugoslavia (SFRY) formed after World War II. After the fall of the Berlin wall, Slobdan Milosevic ascended to power and instituted an authoritarian regime. The mix of different ethnic and religious groups in several of the federated states was a cause for the turbulent period with several wars affecting the Balkans until 2000. As a result of the war, the GDP of Serbia dropped to about half of the 1990 level.

Elections in Spring 2008 resulted in the formation of a coalition Government by the 'democratic bloc' of parties, comprising President Tadic's Democratic Party (DS), the center-right party G17+ that is led by the former Minister of Economy, and the Socialist Party of Serbia that is led by Serbia's current Minister of the Interior. Some of the parties from this block have led the Government in Serbia since late 2000, when Slobdan Milosevic was forced to step aside following allegations of electoral fraud. The coalition Government of 2008 marked a shift of policies towards an approximation to the EU, although the opposition still maintains a substantial representation in Serbia's Parliament.

1.2.2 Economic Context

After two decades of decline, reforms in Serbia since 2000 have resulted in renewed growth. From 2000 to 2007, on the eve of the global financial crisis, the GDP growth rate averaged 5.5 per cent per annum. However, in terms of GDP the country had reached only 70 per cent of its level of 1989. The traumatic events that affected Serbia were a major factor behind the gap in the GDP growth achieved by Serbia and that achieved by other economies in transition (Figure 1). In fact, the increase in GDP from 2000 to 2008 achieved by Serbia (55 per cent) is about the same as the average of other economies in transition.

Growth has been driven by large capital inflows and significant reform to improve the business environment. Nevertheless, external imbalances have widened with the global financial crisis and remain a potential risk for sustained growth. Due to the impact of the fiscal retrenchment required by the crisis, according to the Serbian National Bank, GDP growth was negative in 2009 (-3.0 per cent), but it was positive again in 2010 (1.5 per cent) and it is expected to recover gradually in the next three years.

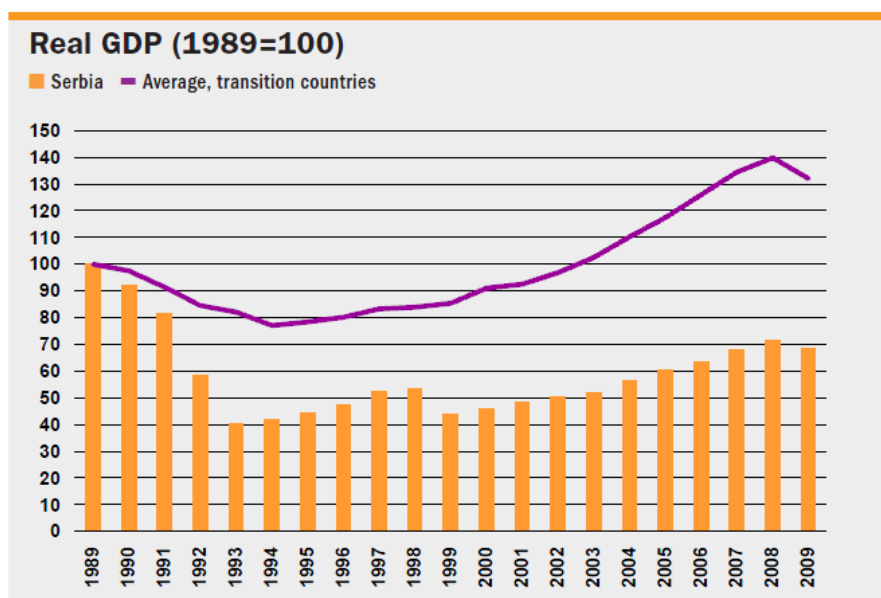
Renewed growth has been underpinned by significant reform. A value added tax (VAT) introduced in 2005 has simplified tax procedures and strengthened Serbia's revenue base. Extensive restructuring of the banking system has helped to improve the allocation of capital, and access to credit. The privatization of about 1,800 state and socially owned enterprises has given new life to sometimes moribund companies and improved the basis of the Serbian market economy.

Table 1: Country data (2009)

Population	7.3 million
GDP (current US\$)	42.98 billion
GDP per capita (Atlas method, current US\$)	6,000
Area (sq km)	88,400

Source, World Bank, *World Development Indicators*, 2011

Figure 1



Source: EBRD, *Transition Report*, 2009, page 217

Growth has contributed to improvements in living standards for most Serbians. The GDP per capita has risen from about US\$2,700 in 2003 to just under US\$4,300 in 2006 and US\$6,811 in 2010, at current prices. Taking into account purchasing power parity indices, the GNI per capita reached US\$7,630 in 2010.

The latest World Bank poverty measurement suggests that the proportion of the population living below the absolute poverty line of approximately US\$2.15 per day fell significantly, from 14.6 per

cent in 2004 to 8.8 per cent in 2006. Nevertheless, poverty remains a persistent problem in rural areas, which are home to about two thirds of all poor people in Serbia. This is particularly evident in depressed regions where major industries (often extractive and industrial) were located during the Yugoslav period. Perception of the progress achieved is still low, in part because average incomes are just returning to the level reached in 1989.

Despite Serbia's strong growth performance, significant challenges remain. External weaknesses are apparent in double-digit and expanding current account deficits. External debt remains about 60 per cent of the GDP, despite a series of London and Paris Club debt write downs. Although public debt has declined significantly, private external liabilities continue to grow quickly. Large current account deficits have unsettled the focus of monetary and exchange rate policies, which have alternated between disinflation and exchange rate objectives. Like in other countries of the Western Balkans, the unemployment rate remains high, at approximately 20 per cent of the labor force.

To address these issues and strengthen growth, further institutional reforms are still needed. Competition and corporate governance issues need further attention. Despite the adoption of considerably strengthened bankruptcy legislation in 2004, there has been a reluctance to use such procedures for state-owned companies which have not been able to be successfully sold to the private sector, despite of the longer-term benefits that such actions could generate by freeing up underutilized, but productive assets. Despite restructuring, large state-owned enterprises such as the Elektroprivreda Srbije (electricity) and Telekom Srbije (telecom) remain under public ownership.

Presently, the private sector contributes about 80 per cent to the GDP, considering the statistical reported accounts. According to Serbian Government figures, remaining state, socially-owned, and mixed enterprises generate corporate losses equivalent to 1.9 per cent of the GDP in 2006, although this is a significant reduction compared to 2003 (the estimates of state subsidies in 2003 ranged from 3 per cent by the Government to as much as 5 per cent of GDP by the IMF based on data from the National Bank of Serbia's Solvency Centre).

The level of the informal economy, as estimated by the World Bank in 2002² was 29 per cent of the reported GDP, which compares favorably within the group of transition economies (38 per cent), but is high when compared with OECD countries (18 per cent).

Focused on infrastructure bottlenecks, reflecting inadequate investment over the past 20 years, and high labor taxation, the Authorities have used the scope provided by strong VAT receipts and one-off privatization revenues to give precedence in their policy agenda to relaxing the fiscal position and reducing labor taxation. These policies are likely to have long-term benefits, provided investments are carefully prioritized.

However, due to the global financial crisis, a strong fiscal adjustment program had to be undertaken, with the support of the IMF. Under the IMF stabilization programs, the Government has implemented measures to reduce the budget and the external deficits with some success.

Under the current agreements with the European Union, competition policy is being accorded high priority in the reform agenda. "The National Program for EU Integration of Republic of Serbia into the European Union" of December 2009 establishes as part of the Trade Development Strategy of the Republic of Serbia, (*Article 3.1*) the following: "...a pro-European oriented development policy is required for the Republic of Serbia, namely through:

² Schneider, F., "Size and measurement of the informal economy in 110 countries around the world", Paper produced for World Bank Doing Business, mimeo, July 2002.

- strengthening the policy of competition through further liberalization of import, amendments to the anti-monopoly laws and their strict enforcement;”³

1.2.3 Institutional Development and Transition

Reflecting progress in institutional reforms, Serbia was rated by the Bank’s *Doing Business 2006* report as the top reformer in 2004-2005. Gains were particularly evident in major reductions in the time and cost required to start a business, which resulted in 40 per cent more businesses being registered in 2005 compared to 2003, as well as a new civil procedure code that halved the time required to resolve business disputes and perceptions of a strengthened rule of law and control of corruption.

Governance indicators for Serbia also continue to improve, although from a low base. While significant improvements have been made in the overall business environment, further improvements are possible: today Serbia still ranks only 89 out of 183 countries in overall *Doing Business* indicators,⁴ in large parts because of complicated business licensing permit procedures that generate opportunities for rent-seeking behavior. Compared with other countries of the region (East Europe and Central Asia), Serbia also ranks below average. Starting a business and enforcement of contracts are major concerns.

³ Further official documents refer to priority given to competition policy:

- National Strategy of Economic Development of the Republic of Serbia for the period 2006 – 2012 (Article 8.4 - Basic policy for efficient integration to EU market, Article 8.4.1. - Competition policy, Article 8.4.3. - Public procurements and Article 8.4.6. - Consumer protection);

- Strategy for Development of Competitive and Innovative Small and Medium Enterprises for the period 2008-2013 (Article 4.- Legislative and institutional framework) and Article 5.- The European context for creation of SME's development policy);

- Serbian Public Administration Reform Strategy (Article 3.6. - Regulatory reform and Public Policy);

- Strategy for Attracting Foreign Direct Investments (adopted by the Government of the Republic of Serbia on 16th March 2006, Official Gazette of Republic of Serbia, 22/2006), in its Article 6. (Institutional framework) and Article 7.3. (Improving overall competitiveness).

- MIPD 2009-2011 (Section 2.3.1.2 Socio-Economic, Criteria Objectives and choices point 5, pg. 24) points out: “Enhancing the investment climate and support to small and medium sized enterprises; Develop national institutional capacities for the implementation of anti-trust policy, a competitive Serbian business environment and industry capable of sustaining the competitive pressure of the European market.”

- MIPD 2009-2011 (Section 2.3.1.3 - Ability to assume the obligations of membership: Objectives and choices, point 4, pg. 26) states the following: “Support State Aid and the Competition Protection authorities to meet EU anti-trust and state-aid standards. Ensure the independence of the Commission on Competition.”

- The amended “National Plan for EU Integration from December 2009”- NPI (Section 3 - Ability to assume obligations from the membership to EU, subsection 3.8 Competition Policy, p. 228-236) highlights current legislative and institutional framework in the competition and state aid policy, as well as legislative priorities in area of competition and state aid for 2010, 2011 and 2012.

⁴ World Bank, *Doing Business 2011 - Making a difference for entrepreneurs*, page 4.

Table 2: Institutional Indicators

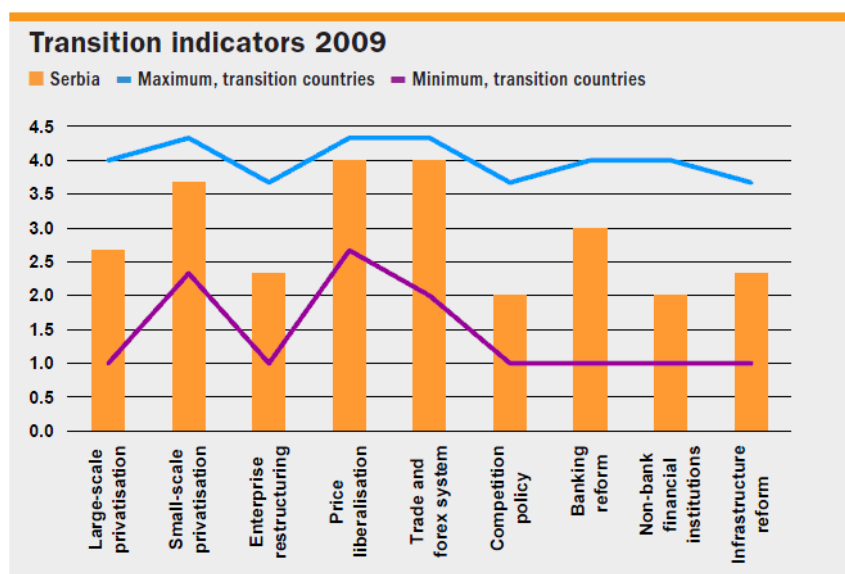
	Current	Ranking in Region
World Bank Doing Business	89 out of 183	18 out of 25
Starting a business	83 out of 183	17 out of 25
Protecting investors	74 out of 183	14 out of 25
Enforcing contracts	94 out of 183	21 out of 25
		Change from 2007
World Economic Forum Global Competitiveness Index	96 out of 139	-5 (85 out of 134)
Institutions	120 out of 136	-12(108 out of 134)
Goods market efficiency	125 out of 136	-10(115 out of 134)
Infrastructure	93 out of 136	+9(102 out of 134)
Business sophistication	125 out of 136	-25(100 out of 134)

Source: World Bank (2011) and World Economic Forum (2010-2011)

According to indicators collected in the *World Competitiveness Report* for 2010-2011, Serbia holds the 96th out of 139 places, relatively high in terms of primary health and education, and it scores low in terms of institutions, mainly related to corporate and state governance and business capabilities, it is better in infrastructure, but one of the lowest in efficiency of goods markets. Particularly worrisome is the fact that it has deteriorated in all these indicators, except infrastructure, since 2007, despite the progress achieved before.

In terms of the transition process, Serbia gets high marks in price liberalization, trade and foreign exchange systems and in the small-scale privatization, but it is clearly behind in terms of competition policy, non-bank financial institutions and enterprise restructuring.

Figure 2



Source: EBRD, *Transition Report*, 2009

1.2.4 EU Association

Since signing the Stabilization and Association Agreement (SAA) with the EU in 2008, Serbia has begun unilaterally to implement an Interim Trade Agreement with the EU. The process of ratification of SAA is underway and it has already been ratified by numerous EU member States, as well as by the European Parliament. The European Commission (EC) has given Serbian passport holders visa-free access to the Schengen zone as of January 2010. Negotiations on membership in the World Trade Organization (WTO), which began in 2005, are at an advanced stage.

An Interim Agreement binding all the Parties, namely the EU and its member States, on the one side, and the Republic of Serbia, on the other side, has entered into force on 1 February 2010. SAAs are international treaties which are concluded with all countries of the Western Balkan having expressed the wish to accede to the EU. The establishment of an Association with the EU and its member States constitutes the first step on the way to full membership of the candidate country.

The **Stabilization and Association Agreement**, *Title VII Approximation of laws, law enforcement and competition rules*), Article 73 “*Competition and other economic provisions*” states the following:

“1. The following are incompatible with the proper functioning of this Agreement, insofar as they may affect trade between the Community and Serbia:

- i) all Agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
- ii) abuse by one or more undertakings of a dominant position in the territories of the Community or Serbia as a whole or in a substantial part thereof; ...”

The European Partnership of February 2008 sets out the short-term priorities (section: *European standards*, subsection: *Competition*) such as:

- to improve existing anti-trust legislation in line with the SAA requirements and strengthen the administrative capacity of the Competition Commission to ensure efficient and independent enforcement of the rules in line with the European Union acquis.
- to improve merger control procedures in order to strengthen the efficiency of the Competition Commission.

The European Partnership highlights the following medium-term priorities (section: *European standards*, subsection: *Competition*):

- to implement State aid legislation and ensure that the authority monitoring state aid functions effectively.

2. THE LEGAL FRAMEWORK – THE LAW ON THE PROTECTION OF COMPETITION

In 2005, Serbia replaced the Antimonopoly Law from 1996,⁵ which never had gained any practical importance, by modern rules contained in the first Law on Protection of Competition⁶ (hereafter

⁵ Official Gazette of the Federal Republic of Yugoslavia No. 29/96

⁶ Official Gazette of the Republic of Serbia No.79/05

referred to as the “FLPC”) and charged an Independent State body, the Commission for Protection of Competition (hereafter referred to as the “SCPC”), with their application and enforcement. The SCPC started its functions in May 2006. This was the start of the Serbian competition law regime, in line with the Serbian Constitution of 2006 which in its Article 84 ensures each person enjoys the same legal position on the market, and prohibits any unlawful restriction of free competition that is brought about by the creation or the abuse of a monopolistic or dominant position.

Its basic provisions were modeled after Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The FLPC also established a system of merger control and ensured the equal treatment of private and public undertakings through a provision similar to Article 106 TFEU. It created the SCPC as an independent and autonomous State body, entrusted with the application of Serbia's competition rules and responsible only to the National Parliament. However, the FLPC contained major shortcomings concerning its implementation. The main problems had been created by the legislator itself through the adoption of inadequate procedural rules.

The FLPC did not vest the Commission with own powers to impose sanctions on undertakings which obstructed its orders which hampered both the investigation of suspected infringements and the execution of final decisions. It deprived the law from their deterrent effect, as the “Infringement procedure” before the misdemeanor judge proved to be an unsuitable means to compel compliance with the competition rules. On the other hand, the FLPC had failed to provide the parties with all procedural guarantees which are required under the rule of law, in particular full rights of defense. These issues were regulated by the General Administrative Act, which applied to procedural issues unless otherwise determined by the FLPC. The same solution is applied in Serbia's current competition law. Moreover, because the thresholds for merger notification were set a low level, the SCPC was overloaded with numerous requests for authorization which absorbed more than 80 per cent of its working capacity.⁷ Hence, the capacity to investigate cartels and abuses of dominance was rather limited.⁸

In response to the various lacunae and limitations of the Competition Law of Serbia, the Parliament of Serbia adopted the new law on protection of competition that entered into force on 1 November 2009 (hereafter referred to as the “LPC”). The LPC is aligned with the competition laws of the most advanced competition law regimes. It has seven chapters that bear the following headings: “General Provisions” (chapter I, Articles 1 to 8), “Violations of Competition” (chapter II, Articles 9 to 16), “Concentration of Undertakings”(chapter III, Articles 17 to 19), “Commission for the Protection of Competition” (Chapter IV, Articles 20 to 32), “Procedure before the Commission” (Chapter V, Articles 33 to 70), “Judicial Review” (Chapter VI, Articles 71 to 73) and “Transitional and Final Provisions” (Chapter VII, Articles 74 to 81). The reorganized legal text makes a clear distinction between rules of substance and rules of procedure. The former are contained in chapters I, II and III, while the latter are contained in chapter V, where they form a comprehensive system which distinguishes between general procedural provisions (Section 1, Articles 33 to 46) and specific provisions according to the different kinds of proceedings and decisions (sections 2 to 5, Articles 47 to 70). Contrary to the FLPC, Chapter IV of the new Law deals only with the position, the competences, the internal organization and the financing of the Commission, whereas the latter’s various actions are defined in Chapter V on procedure.

⁷ See also Alexandr. Svetlicinii, “The New Serbian Law on the Protection of Competition”, in: *Pravni zivot (Legal Life)* No. 12 (Belgrade 2009), Tome IV, p. 567 -579 at 573

⁸ In 2008 the SCPC dealt with 137 merger cases, compared to only 10 cases of anticompetitive agreements and 2 cases of abuse of a dominant position; see SCPC’s Report on its activities for 2008, February 2009, at p. 5-31

The new legal framework has been completed during 2010 by the adoption of eight by-Laws:

- regulation on the request for an individual exemption from the prohibition of anticompetitive agreements;
- regulation on criteria for the definition of relevant markets;
- regulation on the content and form of the notification of concentrations;
- regulation on agreements between undertakings operating at different levels of the production or distribution chain (vertical agreements) which are exempted from prohibition;
- regulation on agreements on specialization and research between undertakings operating at the same level of the production or distribution chain which are exempted from prohibition;
- regulation on agreements on research & development between undertakings operating at the same level of the production or distribution chain which are exempted from prohibition;
- regulation on criteria for setting fines as a measure for the protection of competition and sanctions for procedural breaches, ways and terms for their payment and conditions for the determination of relevant measures;
- regulation on conditions for the relief from pecuniary fine as a measure for the protection of competition (leniency program – relief and reduction in the amount of payment).

2.1 Scope, aims and coverage

Pursuant to its **Article 1**,⁹ the LPC

“... shall regulate the protection of competition on the market of the Republic of Serbia with the goal of economic development and welfare of the society, and in particular to the benefit of consumers.”

It is noteworthy that the new law, contrary to its predecessor, no longer intends “to provide identical conditions for undertakings”. Furthermore, the LPC has deleted the previous aims of “economic efficiency” and “economic welfare”. These notions have been replaced by those of “economic development” and “welfare of the society”, which are more general, allowing more flexibility in the interpretation of the Law, in particular of Article 3 point 4, which relates to “activities of public interest”, and Article 11 which defines the requirements for an exemption from the prohibition of anticompetitive agreements. The benefit of consumers has been maintained as an important aim to be reached.

With respect to the scope of application of the LPC, the Serbian legislator applies both the principle of territoriality and the effects doctrine. Entrepreneurial acts, such as cartel agreements or concentrations, which are at least partly performed within Serbia fall under the Serbian jurisdiction by virtue of the principle of territoriality. The same is true for anticompetitive practices by undertakings located in the Serbian territory. Where the act or conduct in question has been initiated outside the Serbian territory, it is nevertheless caught by the LPC under the effects doctrine, if it affects or could affect competition on the Serbian market. It is, however, generally admitted that in such a case the effect on competition inside the national territory should be direct,

⁹ All Articles cited in this report which do not contain any further reference are those of the LPC.

predictable and substantial. By adopting Article 2 of the LPC, the legislator has followed the same line as the European Commission and most EU member States.¹⁰

Article 3 on the personal scope of application of the LPC takes as its point of departure the concept of “undertaking” underlying the EU competition rules,¹¹ explaining this concept in a rather comprehensive manner.

The definition given in Article 3 (1) embraces

“...all legal and natural persons, that directly or indirectly, permanently, occasionally or ad hoc, perform economic activities in trade of goods or services, regardless of their legal status, form of ownership, citizenship or state of origin (hereafter referred to as “undertakings”).”

The provision covers the following entities:

"1) Domestic and foreign companies and entrepreneurs;

2) State institutions, bodies of territorial autonomy and local self-governments;

3) Other natural and legal entities and associations (unions, trade associations, sports organizations, institutions, cooperative associations, holders of intellectual property rights and others);

4) Public enterprises, companies, entrepreneurs and other undertakings entrusted with activities of public interest, or those which have been given a fiscal monopoly, by the act of the State authority in charge, except if through the application of this law they are prevented from performing activities of public interest or tasks assigned to them."

The item confirms that natural or legal persons engaged in an economic activity of public interest or operating a fiscal monopoly remain subject to the LPC, unless it can be shown that the application of its provisions, in particular those prohibiting anticompetitive agreements and the abuse of dominant positions, would prevent such undertakings from performing their task. The Law here provides for a narrowly defined legal exception, which is modeled after Article 106 (2) TFEU.

As is common in most of the jurisdictions, labor relations are excluded from application of the LPC (Article 4).

Application of the new versus of the old law always raises juridical problems. Article 74 of LPC stipulates that all cases initiated under the old law should be completed under the old law, and Article 78 also stipulates that the old law ceases to be applied when the new law enters into force.

These principles need to be complemented by the application of two simple principles.

The first is that facts originated before the new law was enacted and entered into force should be analyzed and sanctioned under the old law, facts originated after the new law should similarly be dealt with under the new law. The most difficult cases refer to behavior that is continuous in time and that overlaps both laws. In this case it is necessary to distinguish if it is behavior that is reappraised (there is an implicit revolving decision that can be extended or terminated at each

¹⁰ Note that the United Kingdom and Ireland do not recognize the effects doctrine.

¹¹ In its judgement in case Höfner & Elser v. Macroton, [1991] ECR I-1979 at paragraph 21 the European Court of Justice stated that “the notion of “undertaking” extends to any entity engaged in an economic activity, regardless of its legal status or the way in which it is financed.” This definition has been confirmed many times in recent years.

moment in time) or a decision that was taken at a given moment and its effects extend over the old and new law. The first should have the same treatment as above. In the second the old law applies. The second principle is that when in doubt the law that is more favorable to the undertaking applies.

2.2 Anticompetitive agreements and practices

Article 10 (1) defines

“Anticompetitive agreements” as “those made by undertakings with the object or effect to significantly restrict, distort or prevent competition in the territory of the Republic of Serbia.”

The basic definition is the same as in Article 101 (1) TFEU. It is important to underline that this provision establishes a clear distinction between “object” and “effect” of the agreement. The term “or” between both notions indicates that they constitute alternatives.

Under EU law, this finding has important consequences: It means that the European Commission does not need to analyze the impact that the agreement under scrutiny has or might have on competition in the relevant market, if its object is to restrict competition, that is to say when it is capable of restricting competition by its nature. Most of the so-called hardcore restrictions, i.e. offences of a particularly serious nature, such as price fixing, output limitation and market and customer allocation are considered to constitute anti-competitive agreements by object under EU law.

The forms that “anticompetitive agreement” can assume are laid down in Article 10 (2), as in the previous law. This concept covers contracts and parts of contracts, explicit and implicit clauses, concerted practices and even decisions by associations of undertakings having as their object or effect to appreciably prevent, restrict or distort competition on the territory of the Republic of Serbia.

The list of examples in Article 10 (2) which had been fully harmonized with the wording of Article 101 (1) TFEU, already by the previous Law, remains unchanged, too:

- Fixing of purchase or sales prices;
- Limiting or controlling of production, markets technical development or investment;
- Discrimination of other trading parties, thereby placing them at a competitive disadvantage;
- Tying of products which have no connection with each other; and
- Fixing market shares or sources of supply.

Pursuant to Article 10 (3) such “agreements” are prohibited and void, unless exempted in the context of the LPC.

2.3 Exemptions

The provisions on exemption from the prohibition of anticompetitive agreements have undergone an important simplification. Chapter II contains in three short Articles only the basic rules. The relevant rules on procedure have been transferred to Chapter V (Article 60). The material requirements for exemption remain the same as before. Article 11 repeats the wording of Article 101 (3) TFEU. To be exempted an anticompetitive agreement must meet two positive and two negative conditions: First, it must contribute to improving the production or distribution of goods or

to promoting technical or economic progress, and allow consumers a fair share of the resulting benefit. Second, it must neither impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, nor afford such undertakings the possibility of eliminating competition in respect of an essential part of the products in question.

The Law distinguishes between individual exemptions (Article 12) granted by decision of the SCPC on request submitted by parties to the anticompetitive agreement, which also bear the burden of proof for the fulfillment of the exemption criteria, and block exemptions for certain categories of anticompetitive agreements, granted by decree of the Government (Article 13).¹² Contrary to the previous Law, the LPC does not list the various types of anticompetitive agreements being eligible for block exemption. The Block Exemption Decree must specify the kind and content of the agreement concerned, as well as the conditions which ensure compliance with the exemption criteria laid down in Article 11. The Government has already adopted several block exemptions prepared by the SCPC.

In order to reduce the SCPC's workload the legislator has taken a supplementary step by excluding agreements of minor importance from the scope of Article 10, considering that they do not significantly restrict, distort or prevent competition. Article 14 defines such agreements by market share thresholds which the parties must not exceed, and by a list of so-called "hardcore restrictions" into which they must not enter. The market share thresholds are fixed:

- 1) At 10 per cent in case of horizontal agreements;
- 2) At 15 per cent in case of vertical agreements;
- 3) At 10 per cent in case of a mixed horizontal/vertical agreements, or where it is difficult to determine the horizontal or vertical nature of the agreement;
- 4) At 30 per cent in case of agreements with similar influence on the market made by different undertakings, provided that the individual market share of each of them does not exceed 5 per cent on each separate market, on which the effects of the agreement manifest themselves.¹³

Agreements as defined above remain prohibited if they contain hard core restrictions. Horizontal agreements are illegal if they have as their object to fix prices, to limit production or sales, or to share supply markets. Vertical agreements must not contain clauses on resale price maintenance or market partitioning.

The drafting of Article 14, which is modeled after the *de minimis* Notice of the European Commission¹⁴, is subject to several criticisms in light of European law. Firstly, the Notice of the EU Commission establishes as its first condition a market share threshold of 5 per cent and as second condition a market share threshold of 30 per cent.

¹² The SCPC has already published the respective Regulation detailing the information required: *Regulation on the Content of Request for Individual Exemption from Prohibition of Anticompetitive Agreements*.

¹³ This is at odds with the jurisprudence of the European Court of Justice that states that individual agreements do not appreciably restrict competition if they contribute insignificantly to the cumulative effect of parallel networks, and if, moreover, such networks do not foreclose the relevant market to new entrants (See judgement in case "Delimitis", [1991] ECR I-935 at paragraphs 23 to 24). See H. Schoreter (2010), "A new competition policy for Serbia", ACPC, mimeo, Belgrade.

¹⁴ See Commission Notice on agreements of minor importance, which do not appreciably restrict competition under Article 81 (1) of the Treaty establishing the European Community, OJ 2001 No. C 368, p. 7

Secondly, the list of hard core restrictions of Article 14 remains incomplete with regard to horizontal agreements. Sharing sources of supply is as harmful as sharing markets, and the list should also have included boycott or other forms of collective discrimination, as well as tying of products that are not connected with each other by their nature or according to commercial usage.

The FLPC required notification of agreements which cannot be block exempted. The LPC has maintained the same procedure, which is not aligned with EU Regulation 1/2003. In the past, there have been a significant number of notifications that overburdened the scarce resources of the SCPC.

The Government has already published regulations exempting specialization agreements¹⁵ and R&D agreements.¹⁶ The EU has recently adopted a new regulation on specialization agreements¹⁷ that supersedes the 2000 regulation.¹⁸ As the EU regulation, the Serbian counterpart exempts agreements among firms with less than 20 per cent of combined market share if they do not contain any hard-core restrictions. The new EU regulation on R&D¹⁹ follows closely the 2000 regulation.²⁰ In the new regulation, the European Commission has extended the scope of the R&D Block Exemption Regulation, which now not only covers R&D activities carried out jointly but also so-called 'paid-for research' agreements where one party finances the R&D activities carried out by the other party, which are not included in the Serbian regulation. In addition, the new Regulation gives parties more scope to jointly exploit the R&D results. The Serbian regulation follows the 25 per cent limit for the combined market share and contains most of the prohibited clauses of the EU regulation.

2.4 Abuse of Dominance

The LPC has introduced a different definition of the term “dominant position” than the old law, taking the main elements of the corresponding provision in Paragraph 19 (2) of the German “Law against Restrictions of Competition” (*“Gesetz gegen Wettbewerbsbeschränkungen”*)²¹. Article 15 (1) reads as follows:

¹⁵ Regulation on agreements on specialization between undertakings conducting their operations on the same production or distribution level which are exempted from prohibition, pursuant to Article 13, paragraph 3, of the Law on Protection of Competition (Official Gazette of the Republic of Serbia, no. 51/09) and Article 42, paragraph 1, of the Law on Government (Official Gazette of the Republic of Serbia, no. 55/05, 71/05 – correction, 101/07 and 65/08).

¹⁶ Regulation on research and development agreements between undertakings operating on the same production or distribution level which are exempted from prohibition, pursuant to Article 13, paragraph 3, of the Law on Protection of Competition (Official Gazette of the Republic of Serbia, no. 51/09) and Article 42, paragraph 1, of the Law on Government (Official Gazette of the Republic of Serbia, no. 55/05, 71/05, correction, 101/07 and 65/08).

¹⁷ http://ec.europa.eu/competition/antitrust/legislation/specialisation_ber_en.pdf.

¹⁸ Commission Regulation (EC) No 2658/2000 of 29 November 2000, OJ L 304, 5.12.2000, p. 3.

¹⁹ http://ec.europa.eu/competition/antitrust/legislation/research_development_ber_en.pdf.

²⁰ Commission Regulation (EC) No 2659/2000 of 29 November 2000, OJ L 304, 5.12.2000, p. 7.

²¹ An English translation of the Act is available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/110120_GWB_7_Novelle_E.pdf.

“A dominant position in a relevant market is deemed to be the position of an undertaking which has no competitor, or is not exposed to substantial competition, or has a substantially better market position than its competitors considering its market share, economic and financial strength, possibilities for access to supplies and distribution, as well as legal and factual barriers to market entry by other undertakings”.

The FLPC had defined the concept of market dominance in accordance with a formula regularly used by the European Court of Justice.²² The new text no longer mentions strength of potential competitors and countervailing power of buyers among the factors to be taken into account.

The notion of “joint dominant position” has also been redefined by the legislator, which, here again, preferred the wording of Paragraph 19 (2) of the German Law to the formula developed by European Court of Justice²³ and, subject to slight changes, used in the FLPC.²⁴ Article 15 (3) reads as follows:

“Two or more undertakings shall be deemed to have a dominant position on the market if no significant competition exists between them, and if their aggregate market share attains or exceeds 50 per cent (collective dominance).”

In order to facilitate the application of the above provisions, the LPC has maintained legal presumptions linked to market share thresholds as they were laid down in the previous Law, which insofar followed the example offered by Paragraph 19 (2) of the German Law against Restrictions of Competition. Pursuant to Article 15 (2) and (3) an undertaking which reaches a market share of 40 per cent is deemed to be individually in a dominant position²⁵, whereas several undertakings are deemed to jointly hold a dominant position if they together reach a market share of 50 per cent.

Article 16 prohibits and defines the abuse of a dominant position by using the same words as did the previous Law. The text of this provision reiterates Article 102 TFEU. It is characterized by the combination of a general prohibition with a list of four examples which, with one exception (sharing of markets or sources of supply) correspond to those listed in Article 10(2).

2.5 Mergers

Modeled after Article 3 (1) EC Merger Regulation (ECMR), Article 17 (1) identifies three types of concentrations, namely

²² Article 16 (1) of the FLPC reads as follows: “An undertaking has a dominant position on a relevant market if it has the power to behave independently of other undertakings, thus being in a position to make business decisions without taking into account business decisions of its competitors, purchasers or suppliers and/or of end users, their goods and/or services” For the definition of “dominant position” under EU law see judgement of the Court in the “Banana” case, *United Brands v. Commission*, [1978] ECR 207 at paragraph 65

²³ See judgement in case “Kali und Salz”, *France v. Commission*, [1998] ECR I-1375 at paragraph 221

²⁴ Article 17 (1) of the FLPC reads as follows: “Two or more independent undertakings united on the basis of their economic relations on the relevant market and acting jointly as a single undertaking may have a dominant position (collective dominance)”

²⁵ In the German law this share is 33.3%.

"1) Acquisitions and changes to the statute leading to a merger of undertakings, pursuant to the Law stipulating the position of commercial companies;

2) Acquisition by one or several undertakings of direct or indirect control over one or several other undertakings, pursuant to Article 5 (2) of this Law;

3) Joint venture by two or more undertakings aimed at setting up a new undertaking or acquiring joint control, as defined in Article 5 (2) of this Law, over an existing undertaking, which performs its operations on a long-term basis with all functions of an independent undertaking."

The decisive criteria for the appraisal of concentrations are contained in Article 19. This provision is similar to Article 2 (2) and (3) ECMR. In paragraph 1, it establishes the principle that concentrations are forbidden if they would 'significantly restrict, distort or prevent competition in the whole or a substantial part of the Republic of Serbia,' particularly if it results in the creation or strengthening of a dominant position.

The list of factors to be taken into account in the appraisal of a concentration (Article 19(2)) largely corresponds to a comparable enumeration of factors in Article 3 (1) ECMR. It rightly puts the emphasis on the structure of the relevant market (item 1), which is mainly determined by the market positions of the parties involved in the concentration (item 3), their economic and financial power (item 3) and their level of competitiveness (item 6). Potential competition (item 2) may reduce the value of the abovementioned factors, particularly in the absence of barriers to entry on the relevant market (item 5). However, the structure of the relevant market is also influenced by factors characterizing the vertical relations between the different economic levels, such as the possibilities of choice existing for suppliers and users (item 4). Dynamic factors, namely demand and supply trends (item 7), as well as trends in technical and economic development (item 8) are also relevant from a medium-term perspective. The last item, the interests of consumers (9), is more difficult to interpret.

Article 18 exempts from the LPC merger control the following operations: (i) acquisition of shares by financial institutions (e.g. banks, insurance companies) when they are regular operations acquired either for investment or negotiation but with no intention of controlling the undertaking, (ii) acquisition of securities by mutual funds in the conduct of their regular activity, (iii) joint ventures that satisfy the conditions of the LPC, and (iv) bankruptcy procedures. These are usually exempted in a number of jurisdictions. Thus, the LPC merger control extends to the usual domain of application as in the most advanced competition law regimes.

2.6 Claims for Damages caused by Anticompetitive Practices

The LPC establishes in Serbia the possibility of private actions to obtain compensation for damages caused by anticompetitive practices. Article 73 contains several rules with regard to claims for damages. In the first place, it states that infringements of competition may give rise to such claims, corresponding to the case law of the Court of Justice of the European Union relating to infringements of Articles 101 and 102 TFEU.²⁶ Secondly, Article 73 stipulates that proceedings for damages can only be instituted if the infringement of competition has been established by a decision of the SCPC. Such an interpretation would, however, be contrary to the direct effect of the prohibitions laid down in Articles 10 and 16 and also to the case law of the Court of Justice of the

²⁶ See Court of Justice, *Courage v. Crehan*, [2001] ECR I- 6297 at paragraphs 26 to 31; *Manfredi v. Lloyd Adriatico Assicurazioni*, [2006] ECR I-6619 at paragraphs 56 to 59

European Union referred to above. It would drastically limit the private enforcement of the Serbian competition rules. Third parties may give information about a suspected infringement to the SCPC with a view to initiate an investigation procedure, but the SCPC remains free to reject their request. Thirdly, Article 73 establishes that claims for damages must be made in a lawsuit before the court of jurisdiction in civil procedure. Such attribution of competence is common to many European countries.

A claim for damages that have been caused by infringements of the LPC, which are determined by the decision of the SCPC, can be made in a lawsuit before the court that has jurisdiction according to the rules of civil procedure. Article 73 of the LPC stipulates that the decision of the SCPC does not specify any damage occurred. The damage suffered by the competition law infringement needs to be proved in the civil procedure.

2.7 Unfair Competition

Serbia has a specific law on advertising, and the law on consumer protection also regulates some aspects relative to unfair business practices. However, no case has yet been prosecuted and institutional capacity building will need to be implemented at the level of the Ministry of Trade and in the organizations that deal with consumer protection. (See more below).

2.8 State Aid

The National Parliament adopted the Law on the Control of State Aid (hereafter referred to as “the LCSA”) the same day as the LPC. The LCSA is applicable since 1 January 2010.²⁷ From a competition law perspective, State aid should be subjected to tight supervision because it may distort competition and thereby hinder the optimal allocation of economic resources in a country. The provisions on State aid control, laid down in Articles 107 to 109 TFEU, therefore constitute an important part of the EU competition rules, and have been incorporated into the SAA to some extent. Pursuant to these criteria any State aid having the anticompetitive effect is in principle unlawful and hence forbidden. However, State aid is or may be exempted from the prohibition if they contribute to the achievement of certain economic, social or cultural aims defined in accordance with the abovementioned provisions of the Treaty.

In compliance with the SAA criteria²⁸, Serbia established an operationally independent authority that started to operate in March 2010, entrusted with the necessary powers to enforce the said prohibition rule, to authorize State aid schemes and individual aid grants and to order the recovery of State aid that has been unlawfully granted. It also stipulates that the Authority shall regularly publish annual reports on the survey on State aid. It shall, moreover, establish a comprehensive inventory of existing aid schemes and align such schemes to the methods used in the EU. After a joint evaluation of the eligibility of the various regions of Serbia for the grant of State aid and the permitted maximum aid intensities a regional aid map shall be drawn up on the basis of the relevant EU guidelines. However, during the first five years after the entering into force of the SAA Serbia will be allowed to grant regional aids corresponding to the maximum standards of the EU.

²⁷ See Official Gazette of the Republic of Serbia, No. 51/2009 of 14.7. 2009

²⁸ See Article 73 of the SAA EU/Serbia, commented in Part IV of this paper

Pursuant to Articles 6 to 10 of the LCSA, the Commission for the Control of State Aid (hereafter referred to as “the CCSA”), is composed of five members nominated by the Government on the proposals respectively of the Ministries of Finance, of Economic and Regional Development, of Infrastructure and of Environmental Protection and the SCPC. The representative of the Ministry of Finance shall be the Chairperson, and the representative of the SCPC the Deputy Chairperson of the Commission. The members of the Commission must be citizens of the Republic of Serbia, have at least a university degree and possess expert knowledge in the field of State aid, competition and/or EU legislation (Article 6).

The Law creates the obligation to notify any new State aid before it is granted, as well as any changes to a notified aid after its notification (Article 11). The principle of obligatory prior notification covers both aid schemes and individual aids (Article 12). A notified aid cannot be granted before the Commission has decided on its compatibility with the Law (Article 15: “standstill clause”).

The CSSA started to operate in March 2010 and holds regular monthly meetings. Its secretariat uses the services of the Ministry of Finance. Thus far, it has received very few notifications, as the majority of the Public Administration Services are not yet aware of what types of support constitute State aid. The CSSA intends to organize seminars to further raise awareness on the provisions of the LCSA. The Ministry of Economy is the main decision maker on State aid.

3. THE CAPABILITIES OF THE COMPETITION AUTHORITY: RESOURCES AND CONSTRAINTS, AND RECORD ON ENFORCEMENT

3.1 Institutional Framework and Operations of the SCPC

The SCPC was established as an independent commission for the protection of competition and started operations in 2006. It is entrusted only with enforcement of competition law, and it is the sole institution in Serbia entrusted with the enforcement of the LPC. Rules on consumer protection, unfair competition and other related matters are enforced by other institutions. The SCPC is clearly understaffed. It has been flooded with merger notifications and with applications for individual exemptions from the prohibition of anti-competitive agreements, totaling about 130 cases per year. However, no merger has yet been effectively blocked and major remedies have not been imposed.²⁹ The Commission has taken about 6 decisions per year on anticompetitive practices, but only in 2010 a major decision was upheld by the courts. With the entry into force of the LPC, judicial control has been shifted to the newly established Administrative Court. As to the funding of the SCPC, there is a dangerous reliance on merger fees. The financial sustainability of the SCPC's budget requires a new system of financing.

3.1.1 Institutional Set-up of the SCPC

Pursuant to Article 23, paragraph 2, of the LPC, the National Assembly of the Republic of Serbia elects the President of the SCPC and the members of the SCPC's Council. The current President, Ms. Vesna Jankovic (a former judge) was elected in October of 2010. The President and the Council are

²⁹ Although it has issued a negative decision against a merger in supermarkets, the decision was annulled by the courts. The Commission has however retaken the same decision.

elected by the Assembly, upon proposal of the Committee on Trade, from at least 2 lists of candidates. The candidates are chosen from proposals in response to a public announcement of the Chair of the Assembly three months before the end of the term of the current Council. This procedure constitutes a substantial change from the previous law, under which Council members were proposed by professional and business associations.

The president and the members of the Council have to be eminent economic and legal experts, with at least ten years of working experience, and considerable achievements and practice in relevant areas, in particular in the field of the protection of competition and EU legislation, and with the reputation of being objective and impartial (Article 23 paragraph 1). The current members of the Council are: Prof. Vesna Besarovic, Ph.D. (Professor of law), Prof. Sanja Graic-Stepanovic, Ph.D. (Professor of International Law), Ms. Gordana Lukic (former staff of the Commission), and Mr. Ivan Ugrin (a former tax auditor).

The term of office is 5 years, and the members cannot be dismissed except in case of *faute grave*. The posts of the President and of two members of the Council are full time. The other Council members serve on a part-time basis, and they can continue to exercise academic or training jobs, but cannot pursue any other remunerated activity and cannot be members of bodies of political parties, nor promote the program or views of political parties in public (Article 27). The LPC also contains rules on conflicts of interest after the expiration of the term of office.

According to the new LPC, the SCPC has now two organs, the Council of the Commission (hereafter “the Council”) and the “President of the Commission” (hereafter “the President”). Pursuant to Article 22 (1), (2) and (3), the Council, consisting of the President of the Commission and four Members, passes all decisions and acts on issues within the competence of the Commission, unless differently stipulated by the Law and the Statute. Indeed many of the previous competences of the Council have now been attributed to the President. The latter not only assumes the functions of the former President of the Council by representing and acting on behalf of the Commission (Article 22(4)), and by presiding and managing the activities of the Council, signing decisions and other acts and ensuring their execution (Article 25(4)). The President, moreover, has been endowed with the autonomous power to issue decisions and perform other duties in accordance with the Law and the Statute (Article 22 (4)).³⁰

The new tasks of the President comprise in particular the final decision on summary proceedings (Article 37) and a series of decisions in procedural matters (Article 38 (5) and (6)). The latter decisions must be taken in the form of resolutions. The present tasks of the President are:

- initiation of the investigation procedure (Articles 35 and 62);
- suspension or continuation of the procedure (Article 58 (5));
- acts of investigation, such as ordering dawn raids (Article 41 (3));
- protection of information and sources of information (Article 45 (3));
- protection of communications between a party and its lawyer (Article 51 (3));
- *interim* measures aimed at the prevention of serious and irreparable damage to parties (Article 56 (2));
- granting exemptions from the obligation to suspend the implementation of concentrations until their approval (Article 64 (4));
- decision on notifications relating to transactions which do not constitute concentrations (Article 65 (4)).

³⁰ In the past there have been doubts raised within Court procedures about the powers of the Council and the Commission.

Besides the abovementioned decisions, which mainly concern the parties to the procedure and in some cases third persons, the President performs acts relating to the internal sphere of the Commission. The most important are the appointment of an “Authorized Official” of the Commission’s Staff, who is charged with the execution of the investigation procedure in a given case Article 41 (2), and the designation of a “Rapporteur” from among the Council Members, who, in cooperation with the official assigned to lead the procedure, shall prepare the proposition of the final decision and report to the Council on the reasons and all important facts and circumstances of the case (Article 25 (2) and (3)). The Authorized Official is vested with important powers. He/she passes all resolutions for the provision of evidence (Article 38 (7)), except those on inspections and the provision of expert opinions, which are reserved to the President ((Article 41 (3)).

Resolutions, whether passed by the President or the Authorized Official, can be subject to separate appeal, with the sole exception of resolutions on the initiation of a procedure (Article 35 (3)). The President decides on appeals against resolutions passed by an Authorized Official, whereas the Council decides on appeals against the resolution passed by the President. In both cases the appeal shall not postpone the execution of the resolution (Article 38 (8), (9) and (10)). Inversely, Commission decisions are final, and administrative disputes against them can be opened (Article 38 (4)), which, however, has not the effect to suspend their execution (Article 71 (2)). All final decisions of the Commission can be subjected to judicial review (Article 71(1)).

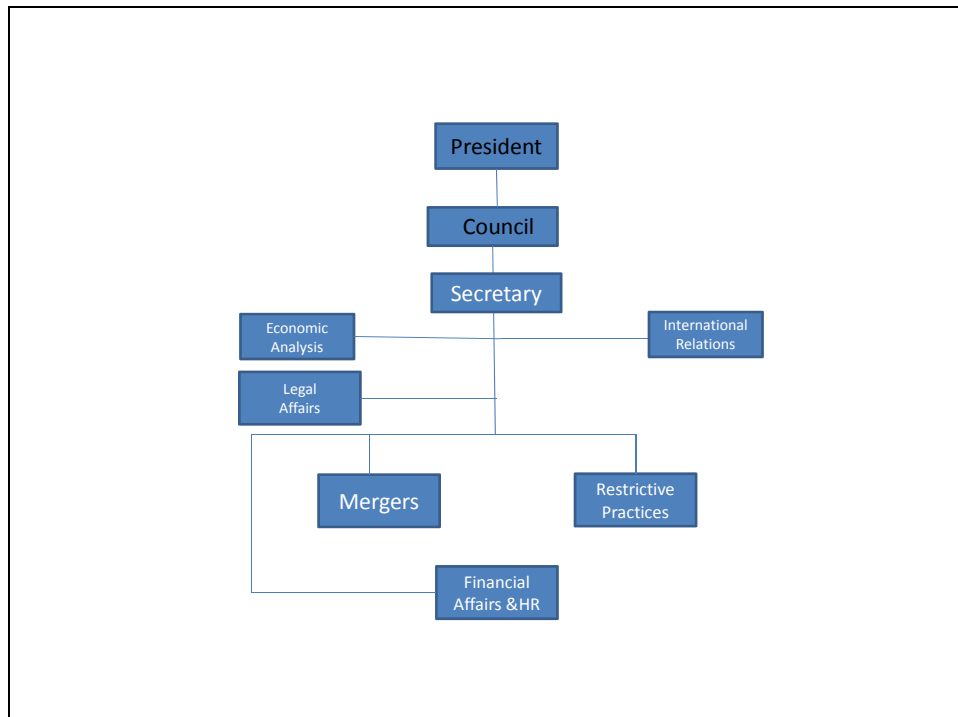
In the past, it was disputed in court who had the power to issue final competition decisions, if unanimous voting was necessary and who had to sign the decisions. The LPC is now clear about these matters. “The Council passes all decisions and acts on the issues within the competence of the Commission, unless it is stipulated differently by the Law and the Statute,” (Article 22(2)). “The Council consists of the President of the Commission and four members,” (Article 22(3)). “The Council issues decisions based on the majority voting by all members,” (Article 25 (1)). “The President of the Commission presides and manages the activities of the Council, signs the decisions and other acts and ensures their execution,” (Article 25(4)).

The Technical Service has retained its previous functions. It shall perform professional activities within the competence of the Commission in accordance with the Law, the Statute and other acts of the Commission (Article 26 (1)). Its main tasks consist in the execution of the investigation procedure, which includes the preparation of decisions of the Council and the President (Article 41 (2)). The Technical Service is managed by a Secretary (Article 26 (3)), appointed by the Council. For being eligible a candidate for that position must hold a degree in law or economics, with at least ten years of work experience in a relevant field and knowledge of competition issues. The Secretary is expected to improve the work of the Technical Service and to fill the gap which in the past appeared to exist between the latter and the Council.

The division of responsibilities between the Council, the final decision making body, on the one hand and the “Rapporteur” and the “Authorized Official” which are the main persons responsible for conducting the investigations on the other hand has the aim of shielding the investigation team from any interference by the decision making body, ensuring a separation of investigation and decision, which is widely recognized important to ensure the rule of law.

Figure 3 shows an organizational chart of the SCPC. There are two operational divisions: mergers and anticompetitive practices, and two advisory divisions: economics and legal affairs. There is also an international relations division and two supporting divisions: financial and human resources.

Figure 3
Organizational chart of the SCPC



Source: SCPC

3.1.2 Functions of the SCPC

The functions of the SCPC can be divided in (i) enforcing the competition law, (ii) supervising markets, (iii) counseling the Government on competition rules, (iv) advocacy, and (v) international cooperation, as specified in Article 21 of the LPC:

- (i) enforcing the competition law
 - a. deciding on rights and obligations of undertakings (item 1),
 - b. imposing administrative measures (item 2),
 - c. enacting instructions and guidelines for the implementation of the Law (item5),
 - d. keeping the records on notified agreements, on undertakings holding a dominant position on the market and on concentrations (item 12),
 - e. organizing, performing and controlling the implementation of measures taken for the protection of competition (item 13),
- (ii) supervising markets
 - a. monitoring and analyzing competition conditions in particular markets and sectors (item6),
- (iii) counseling the Government on competition rules
 - a. cooperating with State authorities, as well as bodies of territorial autonomy and local self-government for the implementation of the Law (item10),
 - b. defining rules to be passed by the National assembly in the field of protection of competition (item 3),
 - c. proposing regulations for the implementation of the Law to the Government, (item 5),
 - d. submitting opinions on draft rules and existing rules which affect competition on the market to the competent authorities (item7),

- e. issuing opinions in view of implementation of rules in the field of competition (item 8),
- (iv) advocacy
 - a. performing activities of competition advocacy, with a view to raise awareness on the need for the protection of competition (item 11),
- (v) international cooperation
 - a. establishing international cooperation in the field of protection of competition in order to fulfill international obligations in this area, and gather information on protection of competition in other countries (item 9).

3.1.3 The SCPC's Investigatory Powers

The SCPC's general power to investigate comprises any action aimed at the provision of evidence which is necessary for establishing a true and complete reasoning of the case under investigation. Article 41(1) enumerates as examples:

- taking of statements of parties and witnesses,
- experts opinion,
- collection of data, documents and other items, and
- performing of inspections and temporary dispossessions.

Regarding the specific legal instruments to be used for the investigation of a case, Article 41 (1) establishes that the parties to the procedure have to submit or provide for inspection the relevant information in written, electronic or any other form. The Law does not say whether the undertaking concerned can itself choose between "submission" and "provision for inspection" of the relevant documents or other items. Article 48 (4) offers this choice only to third parties. Inspections in premises are considered as the more serious intervention. They require a resolution issued by the President of the SCPC (Article 41 (3)), whereas resolutions for the submission of information are passed by the Authorized Official conducting the procedure (Article 38 (7)).

Resolutions issued for the purpose of investigation may be addressed to the parties to the procedure (Article 44). In addition, requests for information may also be addressed to third parties (Article 48 (1) to (3)). They contain the legally binding order to put forward the required evidence. Orders for providing information must contain the name and address of the party concerned, a detailed description of the requested information, the deadline for acting and a warning about the consequences if no, incomplete or false information is provided. Inspections carried out in premises are subject to very detailed rules laid down in Articles 52 to 55. However, these provisions do not explain how the respective resolutions should be formulated.

Inspections are carried out by Authorized officials provided with official identifications in accordance with Article 42. Pursuant to Article 52 the inspectors have the following rights:

1. "Enter and search business premises, vehicles, land and other premises at the seat of the party and other places where the party or third party perform their business or other activities;
2. Inspect business and other documents, regardless of the manner in which these documents are stocked;
3. Confiscate, photocopy or scan business documentation;

4. Seal all business premises and business documents for the time of the investigation;
5. Take oral or written statements from the representative of the party or its employees, as well as documents on the facts which are the subject of the investigation;
6. Perform other actions in accordance with the objective of the procedure."

Documents and objects containing information that might be relevant for the assessment of a case can be temporarily confiscated until all relevant information from these documents or objects is established, or at the latest until the closure of the procedure (Article 55).

If there is justified concern of danger of disposal or altering evidence, an unannounced inspection may be performed (Article 53). If the owner or holder does not allow access to the premises for inspection, forced entry can be made with the assistance of the police, where necessary (Article 54 (2)).

The LPC follows Regulation 1/2003 in giving the Authority the power to inspect private premises. Investigations in private apartments or facilities with identical, similar or affiliated purpose require a court order, if the owner or holder of the premises objects. Such order shall be issued by the Administrative Court, deciding upon a written request of the President of the SCPC (Article 54 (3) and (4)).

3.1.4 Procedural aspects of competition cases

Initiation of a formal procedure

Any intervention of the SCPC in individual cases requires, as the first step, the initiation of a formal procedure. The Law draws a clear line between procedures initiated *ex officio* and those initiated and conducted upon a party's request. The first category comprises investigations of possible infringements of the prohibition of anticompetitive agreements and the abuse of dominant positions (Article 35). The second category includes notifications of concentrations and requests for individual exemptions from the prohibition of anticompetitive agreements (Article 36). However, the character of the procedure may change after its initiation. A procedure upon notification of a concentration shall be continued *ex officio* where the SCPC has reached the conclusion that the case needs to be examined in depth (article 62 (2)).

Contrary to EU law,³¹ there seems to be, under the LPC, no procedures conducted upon the request of complainants. Third persons are generally not considered as parties to the procedure, this qualification being reserved to undertakings which have notified a concentration or submitted a request for individual exemption, or against which the investigation procedure is initiated (Article 33). However, the LPC stipulates that persons having taken initiatives for the investigation of potential infringements by providing information to the SCPC or otherwise are to be informed within 15 days about the outcome of their initiative (Article 35 (4)). They have, moreover, the right to be informed about the course of the procedure (Article 43 (3)). The same right is granted to other third parties, if they are able to prove their legally-founded interest in monitoring the procedure.

³¹ Article 7 of Regulation (EC) No. 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 No. L 1, p. 1, procedures for finding an infringement can be initiated upon a complaint or *ex officio*.

The procedure is initiated by resolution of the President of the SCPC. The conditions for taking this act and the requirements to be met by its content differ according to the character of the procedure. Concerning procedures upon the party's request, the Law does not furnish any specification insofar. It is clear however that the procedure can be initiated only after the SCPC has accepted the request for an individual exemption as being complete that is to say when it contains all the information which is necessary for the appraisal of the case. Only after a formal confirmation of the completeness of the respective request, the legal deadlines for the adoption of the final decision - 60 days (Article 60 (1)) - start. Further details will be provided in implementing rules to be issued by the Government for exemptions from the prohibition of anticompetitive agreements (Article 12 (4)).

The conditions for the initiation of procedures *ex officio* are described in a rather precise way. Pursuant to Article 35 (1), the investigation of anti-competitive practices shall be initiated as soon as the SCPC learns that there are plausible indications for such infringements.

Article 35 (2), moreover, determines the necessary content of the resolution by which an procedure *ex officio* is initiated. The text of the resolution must present a description of the activities or acts which might constitute the infringement, indicate the legal basis and the reasons for the initiation of a procedure, and contain an invitation to all parties to provide the SCPC with data, documents and other relevant information in their possession. It shall be published in the Official Gazette of the Republic of Serbia and on the website of the SCPC (Article 40 (1)).

Rights of Defense

The right of undertakings to be heard before a decision affecting their legal or economic position is taken, and to use all available means of defense against accusations is an essential element of the rule of law, be it before the judge or an administrative body, which meets the requirements of the rule of law. The LPC has considerably improved these rights, approximating them to the standards of EU competition law.

The legitimate interests of parties involved in an *ex officio* procedure (Article 33 (1)) are protected in different manners during the different phases of the procedure. The text of the resolution on the initiation of a procedure is normally published in the Official Gazette of the Republic of Serbia (Article 40 (1)) and thus accessible to all undertakings that may be concerned. Sending a copy of this text to those parties which are named in the resolution is not required by the LPC, but by general administrative law with which the CPC complies.

Article 54 grants specific protection in the case of an inspection of premises. Paragraph 1 establishes that the Authorized Official has to show his/her identification card (Article 42) and to present the resolution passed by the President of the SCPC (Article 41 (3)) which orders the investigation in that premise. The party must be provided with the possibility to be present during the inspection, if so demanded, unless the purpose of the demand is to prolong or impede the procedure (Article 52 (2)). It can be assumed that the party may at such an occasion be accompanied or represented by its legal counsel, although the Law remains silent on this point. Moreover, Paragraphs 3 and 4 establishes that investigations in apartments or private facilities require a court order. The owner or holder of the apartment or any other private premise is entitled to be present during the inspection in person or by representation, along with two adult witnesses (Paragraph 5). The latter's presence is obligatory, if an apartment is inspected and neither the owner or holder nor his/her representative are present (Paragraph 6). Article 53 only allows carrying out unannounced inspections if the destruction or altering of evidence must be feared. Such concern has to be justified. However, the SCPC insofar enjoys large discretion. Notice that under EU competition law, sudden dawn raids constitute the rule rather than the exception.

Pursuant to Article 43, parties have the right to be informed about the course of the procedure. For this purpose, they may inspect the SCPC's file and take copies. Internal documents such as records on voting and draft decisions, as well as records labeled as confidential and protected data may not be inspected or copied. The same principles govern the competition law of the EU.³²

The most important provision relating to the parties' rights of defense is laid down in Article 38 (2):

"Before passing a decision on infringement of competition the Commission shall notify the party of the relevant facts, evidence and other elements on which the decision would be based, and it shall invite the party to present its case within a given time limit."

The document to be notified to the party corresponds to the statement of objections under EU competition law,³³ since it includes relevant facts and evidence on which the Council will base its decision. The party has the opportunity to put forward its arguments on facts, evidence and legal questions. As under EU Law, the party has to present its position in writing. For the preparation of its defense, access to the case file is of highest importance. Unlike EU competition rules³⁴, the LPC does not give the parties the right to an oral hearing which completes the written phase of the procedure. However, the SCPC is entitled to organize such a hearing when appropriate in accordance with LPC. Under EU law, the decision has to be based only on facts, evidence and arguments which were mentioned in the statement of objections or discussed during an oral hearing. The same rule seems to apply under the new Serbian Law.

The final decision shall be in written form (Article 38(6)). The delivery of letters, containing the decision, follows the general rules for administrative procedures (Article 39). Exceptionally, in case of repeated delivery, i.e. in the case of delivery in the form of a public statement, the contents of the letters shall be published on the Commission's web site and shall be considered delivered after 15 days from the date of publication, unless the Commission decides to extend that period. The party may not claim an inappropriate delivery if the letter is delivered to the address of the party's seat as registered in the register of companies. The final decision shall be published in the Official Gazette of the Republic of Serbia and on the Commission's web site, (Article 40).

Third Parties rights

Pursuant to Article 33 (2), third parties are not considered as parties to the procedure. Their function is limited to monitoring actions taken by the SCPC. For that purpose third parties have been granted certain information rights. Persons having taken initiatives for the investigation of potential infringements by providing information to the SCPC or otherwise must be informed within 15 days about the outcome of their initiative (Article 35 (4)). They, moreover, have the right to be informed about the course of the procedure (Article 43 (3)). The same right is granted to other third parties, if they can prove their legally founded interest in monitoring the procedure. This may be, in particular, the case of undertakings which as competitors, suppliers or customers of the parties to the procedure are victims of the latter's illegal acts or behavior and therefore consider a claim for

³² See Notice on the rules for access to the Commission file, OJ 2005 No. C 325, p. 7

³³ See Article 27 (1) and (2) of Regulation (EC) No. 1/2003 (note 36) and Article 18 (1) of Regulation (EC) Nr. 139/2004 (note 38)

³⁴ See Commission Regulation (EC) No. 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty, OJ 2004 No. L 123, p. 18, and Commission Regulation (EC) Nr. 802/2004 implementing Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, OJ 2004 Nr. L 133, p. 1

damages (Article 73). The Council of the SCPC shall pass an act regulating in details what information to be supplied and the manner in which it is to be provided.

The identity of persons who provided information that led to the inspection of premises can be protected based on Article 45. Upon the request of such person, the SCPC may order the protection of the source of the information or of particular information, if the interest of the person or a third party is justified and outweighs the public interest in a transparent procedure. The party requesting protection has to show that the unveiling of the said information might cause substantial damage. The protected information shall be barred from free access which is usually granted under the Law on information of public importance.

3.1.5 Merger notifications

According to Article 61 of the LPC, a concentration must be notified to the Commission if:

- "1) the combined aggregate annual turnover of all undertakings concerned made on the global market in the preceding year is above €100 million, with the condition that at least one party involved in concentration on the market of Republic of Serbia generated an incomes exceeding €10 million;
- 2) the aggregate annual turnover of at least two parties involved in concentration made on the market of the Republic of Serbia is higher than €20 million in the preceding year, if at least two parties involved in concentration have annual turnover of more than €1 million each in same period on the market of the Republic of Serbia."

The thresholds for the notification follow insofar the recommendations of International Competition Network as they are based only on turnover value. They have been increased compared to the notification thresholds contained in the FLPC. The global market threshold increased substantially from about €50 to €100 million, and the domestic market threshold from €1 to €20 million. The previous thresholds were widely considered as too low.

According to Article 63, a merger notification has to be filed within 15 days after:

- 1) conclusion of agreement or contract;
- 2) announcement of public invitation i.e. bid or closing of public bid; and
- 3) acquisition of control.

The procedure is initiated only after the SCPC has found that the notification of the envisaged concentration is complete in the sense that it contains all the information which is necessary for the appraisal of the case.³⁵ Only after the formal confirmation of the completeness of the notification, the legal deadlines for the adoption of the final decision – one month (Article 65 (1)) - start. The term of one month of phase 1 is usually insufficient for an in-depth analysis of complex concentrations. Therefore, the LPC allows for a second phase that can be initiated by decision of the President of the Commission (Article 62).

³⁵ SCPC has already published a Regulation on the Content and Form of the Notification of Concentration (Regulation published in Official Gazette of the Republic of Serbia, no. 89/2009 dated 2.11.2009).

The type of information requested by the SCPC involves: (i) a description of the transaction that leads to the concentration; (ii) a description of the control of the parties to the concentration, (iii) a description of the relevant markets,³⁶ and the provision of market shares and information relevant for the analysis of market structure, (iv) the identification of major suppliers and buyers, and (v) an assessment of the impact of the concentration, including likely efficiencies.

The notification fee amounts to 2 million dinars (USD 25,000) for summary proceedings and 4 million dinars (USD 50,000) for Phase II proceedings. About 95 per cent of the notifications are decided in summary proceedings. The notification fees are clearly among the highest merger notification fees paid in Europe, considering the income levels of Serbia.

The LPC previews a possibility of a summary decision on concentrations (Article 37). Prior to the authorization of the SCPC, the concentration is suspended (Article 64). If a concentration is made without approval, the LPC orders the de-concentration (Article 67).

Notified concentrations can be subject to final decisions of four kinds:

- dismissal of the case, if the notification thresholds according to Article 61 are not met (Article 65 (4));
- approval of the concentration, if the material requirements laid down in Article 19 are fulfilled (Article 65 (3));
- prohibition of the concentration, if the above-mentioned material requirements are not fulfilled (Article 65 (3)); or
- approval of the concentration upon the condition that the parties fulfill commitments which they have offered to the CPC in order to ensure compliance with the requirements laid down in Article 19 (Article 66).

If within the timeframe of summary proceedings, the Commission estimates that the conditions for an approval of the concentration are not fulfilled it should notify the applicant. It might be the case that the SCPC has not enough information and the merger requires an in-depth analysis or based on the information obtained so far, the SCPC considers that the merger should be blocked. In the practice of EU competition authorities, such notification of the facts, evidence and other elements takes the form of a statement of objections.

A concentration may be investigated *ex-officio*, (i) if the parties' aggregate market shares attain or exceed 40 per cent of the relevant market in Serbia, or (ii) if there are well-founded indications that the concentration would not fulfill the conditions for approval, or (iii) if it was not approved according to the Law. This means, an investigation *ex-officio* can occur in two situations: either the parties to the concentration have not notified the operation, or the investigation undertaken by the Commission within phase 1 leads to evidence that the conditions for an approval might not be fulfilled. In fact, this is the way in which the LPC provides for an in-depth investigation that may follow the first phase of the merger analysis. The final decision in an in-depth investigation must

³⁶ The Commission has already published a Regulation defining Relevant Markets (Regulation was published in Official Gazette of the Republic of Serbia, no. 89/2009 dated 2.11.2009). It is interesting that the present Regulation excludes reference to the SNIP test due to previous difficulties in the Courts. The Regulation also omits any reference to potential competition. The Regulation would benefit if the SCPC publishes two templates for notification of concentrations: one for simplified notifications and another for regular notifications. These notifications should include a detailed questionnaire for the requesting parties to fill in.

then be taken within a further period of three months (Article 62 (4)). If a decision on the concentration has not been reached within the periods respectively of one month or three months, the concentration is considered to be approved.

The conditions leading to an investigation *ex-officio* are compatible with the general reasoning of the law that stipulates a threshold of 40 per cent for dominance. However, it should be noted that in modern competition economics, the market share is not the only factor to determine dominance. This is simply a triggering factor that seems reasonable in a country with the institutional capacity of Serbia.

After additional information is provided by the applicant and evidence is collected by the Commission, it should adopt a preliminary decision to be sent to the parties in order to allow them to exercise their right of defense. Only afterwards, the SCPC should take the final decision. Some jurisdictions fix a term for the in-depth (or second) phase that varies from 2 to 6 months. The Serbian legislator chose an intermediate period of 3 months. For the calculation of the deadline, it is very important to know whether a request for information by the SCPC or the formulation of a response to such request by the applicant stop the clock. Otherwise the applicant can delay the response and thereby put the Authority in a difficult position, since the concentration is deemed approved (Article 65(2)), if the SCPC does not issue a decision within the stipulated timeframe.

The SCPC's obligation to inform the party to an *ex officio procedure* about the content of an envisaged negative decision, and to invite it to present its case, has been extended to a conditional approval of concentrations (Article 66). In fact, the LPC intends to avoid the prohibition of concentrations although they do not meet the conditions for approval. The applicant, therefore, is informed about the factual and legal reasons preventing the SCPC from taking a positive decision, and is given the opportunity to propose commitments with a view of eliminating the competition concerns that it raises. According to Article 66(1) and (2), the applicant may present special conditions, currently known as remedies:

"If the Commission estimates that conditions for approval of concentration are not fulfilled, it shall notify the applicant on important facts, evidence and other elements which the decision will be based on and will invite the party involved to present its case within the given timeframe. The applicant may suggest special conditions that it is willing to accept so that concentration could meet the requirements for approval."

If the SCPC considers that the proposed remedies would solve the competition concerns posed by the concentration, it will approve the concentration upon the condition that the applicant fulfills the commitments, and it will monitor the implementation thereof.

3.1.6 Overview of the SCPC activities

Table 3 shows the number of merger cases that the SCPC handled in the period of 2007 to 2010. On average, the SCPC handled about 110 cases per year. There was a peak of 133 of decisions taken in 2008 when a substantial number of privatizations took place (40 to 45 cases). About seventy per cent of the cases involved foreign companies. It is expected that a lower number of cases will be notified under the LPC that took effect in November 2010, since it increased significantly the notification thresholds. However, the thresholds are still considered rather low by international standards.

Table 3
SCPC caseload: mergers and acquisitions

	Number of Mergers and Enterprise Associations			
	2007	2008	2009	2010
Mergers				
Cases opened	125	137	105	70
Decisions taken	105	133	101	65
Associations and Joint Ventures				
Cases opened	0	0	0	0
Decisions taken	0	0	0	0

Source: SCPC

In the period from 2007 to 2009, the SCPC decided on average 14 cases per year which dealt with anticompetitive practices. 4 out of these 14 cases dealt with the abuse of dominance, 3 of the 14 cases were decisions on cartels and the remaining cases were individual exemptions. The large number of individual exemptions was due to the obligation to notify potentially anti-competitive agreements under the previous law. Taking into consideration the number of professional staff, the SCPC has handled a substantial number of cases.

Table 4
Number of cases on Anticompetitive Practices

	2007	2008	2009	2010
Abuse of Dominance Cases				
Cases opened	7	3	2	0
Decisions taken	7	3	2	0
Transferred to next year	0	0	0	
Cartels and coordinated practices				
Cases opened	2	4	10	0
Decisions taken	2	3	5	4
Transferred to next year	0	1	5	
Individual Exemptions				
Cases opened	4	16	5	n/a
Decisions taken	4	10	5	n/a
Transferred to next year	0	6	0	n/a
Total				
Cases opened	13	23	17	0
Decisions taken	13	16	12	4
Transferred to next year	0	7	5	n/a

Source: SCPC

In 2009, the SCPC started to undertake market studies. In 2009, it concluded a study of the LPG market and started a study of the oil and oil derivatives market which is still ongoing.

3.1.7 Sanctions and Remedies

Under the LPC, the SCPC has the power to impose sanctions, which constitute administrative measures within the meaning of Article 21, item 2, and Article 59. The LPC has followed the example of the EU also insofar as it differentiates between these two kinds of sanctions. The basic regulations implementing Articles 101 and 102 TFEU provide for fines³⁷ and periodical penalty payments.³⁸ The LPC adopts the same approach in Articles 68 and 70. The two forms of sanctions need to be distinguished because they have different aims. The immediate object of a fine is to punish undertakings for infringements committed in the past and to prevent any recurrence. Furthermore, fines shall also deter other undertakings from infringing the law.³⁹ Periodical penalty payments are administrative means to bring an infringement to an end, and to force undertakings to comply with their legal obligations in the future.⁴⁰ Both sanctions could therefore be imposed for one and the same infringement without violating the general principle of *ne bis in idem*.

However, the LPC unlike EU law separates the fields of application of the aforesaid two kinds of sanctions.⁴¹ Under the EU competition rules, both fines and periodical penalty payments may be used against the violation of substantive rules, as well as for non-compliance with the parties' procedural obligations. Article 68 of the LCP reserves the use of fines to cases where the substantive rules have been violated, whereas Article 70 allows the imposition of periodic penalty payments only for breaches of procedural rules.

³⁷ See Article 23 of Regulation (EC) No. 1/2003 and Article 14) of Regulation (EC) No. 139/2004 (note 36).

³⁸ See Article 24(1) of Regulation (EC) No. 1/2003 and Article 15 (1) of Regulation (EC) No. 139/2004.

³⁹ See judgments of the European Court of justice in case *Boehringer Mannheim v. Commission*, [1970] ECR769 at paragraph 53 , and in case "*Pioneer,*" *Music Diffusion Française v: Commission*; [1983] ECR 1825 at paragraphs 101 to 110.

⁴⁰ See case COMP/37.792 "*Microsoft*", decided by the European Commission on 10 November 2005, Press Release IP/ 06/ 979 and MEMO/06/277, both of 12 July 2006.

⁴¹ This is a point made by Schroter, *op. cit.*, page 43.

Sanctions for infringements of substantive rules

Article 68 (1) establishes the main elements of the “punitive sanction” imposed as a measure for the protection of competition. A fine up to 10 per cent of the total annual turnover,⁴² calculated pursuant to Article 7, shall be imposed on an undertaking, if it:

1. Abuses its dominant position on the relevant market pursuant to Article 16 of the Law;
2. Concludes or implements a anticompetitive agreement falling within the scope of Article 10, but which was not exempted under Article 60 of the Law;
3. Does not perform or execute measures for removal of a competition infringement or a measure of de-concentration, pursuant to Articles 59 and 67 of the Law;
4. Implements a concentration despite the order of suspension laid down in Article 64, or which was not approved pursuant to Article 65.

Compared to the corresponding provisions in EU competition law,⁴³ the above list has certain shortcomings. Item 2 should also contain a reference to the block exemption regulations issued according to Article 13 of the LPC.

Procedural penalties have been provided for non-compliance with interim measures (Article 56) and for failure to notify a concentration (Article 61). In case of non-compliance with the remedies offered for a conditional approval of a concentration (Article 66), the SCPC can impose a de-concentration according to Article 67. In case of non-compliance, a fine can be imposed by virtue of Article 68. (1), point 3. Article 68 (2) fixes a time frame of three months up to one year for the payment of the fine.

The power to impose sanctions represents a major change with respect to the situation under the FLPC. In fact, under Article 70 of the FLPC, the SCPC did not have the power to impose fines on undertakings, but was limited to “submit to relevant infringement authority the request for initiation of infringement procedure against undertakings performing acts relating to prevention, restriction or distortion of competition.” Another important change consists in the fact that under the FLPC, the minimum fine was set at 1 per cent of an undertaking's turnover and the maximum at 10 per cent. Therefore, it was not possible to impose any fines lower than 1 per cent of the offender's turnover, which can be significant in the case of large enterprises, and may have led the authorities to just dismiss the case. These changes in the LPC are welcomed and decisive for improving the enforcement of the law and clearly approximate the Serbian law with the EU law.

Article 68 (3) is extremely important since it establishes the time limit for the payment of the fine:

"Measures for the protection of competition cannot be issued nor [fines] collected after the expiration of the period of three years from the day of action performed or failure to fulfill

⁴² The LPC does not specify if it is national or global turnover. However, the most common interpretation is that it is the turnover on operations realized in the Serbian market. First, Article 7 specifies that the turnover is calculated before taxes, a concept that can only be applied, in the case of foreign companies, to transactions taken place within the Serbian territory. Second, when the law refers to global and Serbian turnovers in the thresholds for merger notification, it makes explicit that distinction.

⁴³ See Article 23 (2) of Regulation (EC) No. 1/2003 (note 38) and Article 14(2) of Regulation (EC) No. 139/2004 (note 36)

obligation, i.e. from the last day of time period on which action was taken as referred to in paragraph 1 of this Article."

The time runs respectively from the last day of the infringement, and from the date on which the decision was received by the party. Under EU competition law,⁴⁴ the limitation period is three years for infringements of procedural provisions, and five years for the violation of substantive rules. Fines and periodical payments cannot be collected upon the expiry of a uniform period of five years from the date of receipt of the decision fixing the amount to be paid. The Serbian time period is rather short, when compared with EU competition law and other advanced competition law regimes. This is particularly serious in a country with limited experience in competition law enforcement, where investigations and the collection of information are still quite difficult.

The Government of Serbia has already published a regulation,⁴⁵ setting the method for determining fines, their payment and other sanctions. According to Article 3 of the regulation, there are seven criteria for determining the amount of a fine: (i) the infringement was committed knowingly its impact on competition, (ii) the impact and the duration of the infringement, (iii) repetition, (iv) enticement of other undertakings, and three other criteria relative to the termination of the practice, its effects prior to the opening of the investigation, and the level of cooperation with the authorities. These criteria can, however, still be refined/improved. The way in which the EC determines the level of fines in competition cases may provide some guidance in this respect.

The method used by the EC to establish the fine follows two phases:⁴⁶

First Phase:

In the first phase, the EC determines a basic amount of the fine which will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.

It multiplies the value of the sales of the undertaking to which the infringement pertains (S) by a certain percentage (t) depending on the gravity of the infringement and by the number of years-duration (n) of the infringement: tnS .

How is t determined? Based on a sliding scale, with a maximum amount of 30 per cent of the value of the sales, using the following principle: "the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented."

Horizontal price-fixing, market-sharing and output-limitation agreements, which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such

⁴⁴ See Articles 25 and 26 of Regulation (EC) NO. 1/2003 and Regulation (EEC) No. 2988/74 on Limitation Periods in Transport and Competition Law of the European Economic Community, OJ 1974 No. L 319, p. 1

⁴⁵ Regulation on criteria for setting the amount payable on the basis of a measure for protection of competition and sanctions for procedural breaches, form and terms for payment thereof and method for determination of respective measures, Official Gazette of Republic of Serbia, no. 50/2010.

⁴⁶ See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:EN:PDF>

infringements will generally be set at the higher end of the scale. Thus, hard-core cartels have the highest proportion, t.

Plus, a specific amount to deter violations of the law (€): “In addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15 per cent and 25 per cent of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output limitation agreements. The Commission may also apply such an additional amount in the case of other infringements.”

Second Phase:

In the second phase, the EC adjusts the basic amount of the fine in order to reflect aggravating of mitigating factors, such as:

- (a) the infringement constitutes a repetition of offences (aggravating factor): “the basic amount will be increased by up to 100 per cent for each such infringement established”
- (b) cooperation in investigations (mitigating factor);
- (c) the offender is the leader or instigator of the violation (aggravating factor);
- (d) the offender terminated practice when Commission intervened (mitigation factor); or
- (e) the participation in the infringement was limited (mitigating factor).

Finally, the Commission may also take into consideration the offender's “ability to pay”.

Another important factor that should be taken into account when setting a fine regards the institutional development of the country and the level of knowledge of the competition law by Serbian undertakings. It may be advisable to have a sliding increasing scale over a transition period.

Leniency

Article 69 provides for a lenient treatment which the SCPC may accord to parties to anticompetitive agreements in order to reward them for their cooperation in the investigation of the case. Pursuant to Paragraph 1, the party that was the first to reveal the existence of such an agreement or to provide evidence which enabled the SCPC to pass a decision finding an infringement of Article 10 (1), is to be relieved of punitive sanctions, that means from the imposition of fines under Article 68 (1), item 2. Relief is granted upon the condition that at the moment of submission of evidence the SCPC did not have information about the existence of the anticompetitive agreement, or that it had only information without sufficient evidence to issue a resolution initiating the procedure (Paragraph 2).

Parties to an anticompetitive agreement which do not meet the conditions for relief from punitive sanctions may pursuant to Paragraph 3 benefit from a reduction of the amount of the fine which otherwise would have been imposed, if in the course of the procedure they provide evidence not available until that moment, which allows the SCPC to close the procedure or to pass a decision finding an infringement of Article 10 (1). Initiators of the anticompetitive agreement do not benefit from leniency. The Government shall determine in more detail the conditions for the application of Article 69, which to a large extent reflects the practice of the European Commission.⁴⁷ The grant of leniency has proven as being an extremely efficient means to enforce the prohibition of anticompetitive agreements, in particular against secret price, quota and market partitioning cartels.

⁴⁷ See Notice on immunity from fines and reduction of fines, OJ 2006 No. C 298, p. 17

The Government of Serbia has already published a regulation covering the leniency procedure.⁴⁸ According to this regulation, only first leniency applicant benefits from full immunity from fines provided that the investigation has not yet started and the applicant stops the violation immediately and fully cooperates with the authorities. The limitation of the leniency to only the first applicant is a very powerful instrument to destabilize cartels, although it may prevent other undertakings from providing other crucial evidence.

Sanctions for breaches of procedural rules

The FLPC (in its Article 72) had foreseen the possibility to fine undertakings and their managers for non-compliance with notification and information obligations. The LPC has abandoned this provision and has instead created the “penalty for procedural breaches”. Pursuant to Article 70, an amount between 500 and 5000 Euros can be imposed for each day that an undertaking does not comply with a procedural order of the SCPC or an order according to Article 57. The SCPC may impose such penalties if the undertaking concerned

1. does not fulfill a request to deliver or provide information, or delivers or provides incorrect, incomplete or false information under Articles 44 and 48 of the Law;
2. does not act pursuant to an interim measure issued under Article 56 of the Law;
3. does not notify a concentration within the time frame stipulated in Article 63 (1) of the Law."

The above wording gives the impression that the legislator had still in view to punish the undertakings for prior non-compliance with the said procedural obligations. The text does not express in clear words that the undertakings are compelled to future acting, but this follows from its introductory words which indicate that the amounts referred to in the provision are fixed per day. Article 70, thus, establishes periodical penalty payments. At first sight, it may appear strange that acts impeding the inspection of premises according to Article 52 are not mentioned as such in the list of items. However, the non-compliance with the obligations to present the relevant business documentation to the Authorized Official and to give oral or written statements seems to be covered by item 1. Physical obstruction to the inspection can be broken by the police while assisting the inspectors in carrying out their task and the breach of seals can be pursued under criminal law.

The procedure for the imposition and the collection of penalties according to Article 70 is structured as follows: Firstly, the SCPC fixes by decision the amount of the penalty for each day of non-compliance with the undertaking's procedural obligation. Only when the breach of the respective procedural rule has ended, the SCPC can state the definitive amount to be collected. This again has to be done by decision, which, pursuant to Article 70 (3)), also determines a time frame for the payment between one and three months from the receipt of the decision. Unlike EU competition law, the LPC does not provide for the possibility of fixing the definitive amount of the periodical penalty at a figure lower than that which would arise under the original decision. However, pursuant to Article 70 (2), the sum of the daily penalties may not exceed 10 per cent of the undertaking's annual turnover as defined in Article 70. In Article 70 (4) the Law has barred the imposition of penalties upon the expiry of a period of one year from the date of the procedural order in question. This makes sense. The same cannot be said of the one year limitation period for the collection of the penalties, which is much too short.

Common rules on fines and periodical penalty payments

⁴⁸ Regulation on criteria for relief from obligation to pay financial sanction of the measure for protection of competition, Official Gazette of the Republic of Serbia, no.50/2010.

Articles 68 and 70 are complemented by Article 57 which, on the one hand, establishes certain principles and, on the other hand, contains a series of “technical provisions” to be taken into account by the SCPC when it decides on the imposition and the enforcement of fines and periodical penalty payments. In determining the amount of the sanction, the intention or negligence of the undertaking, the gravity of the infringement and its effects on the relevant markets and on consumers, as well as the established duration of the infringement must be considered (Paragraph 2). The aforementioned appraisal criteria reflect the general principle of proportionality, which also governs the measures for the removal of infringements, dealt with in Article 59.

Fines and periodical penalties have to be paid to the budget of the Republic of Serbia (Paragraph 3) and will respectively be partly or totally reimbursed, if the amount of payment is decreased or the decision on which it was based is revoked (Paragraph 4). However, interest rates and other cost shall be reimbursed from the funds of the SCPC (Paragraph 5). In case of measures determined against associations of undertakings, all members are jointly and severally liable and may jointly or individually make payments, if the association is unable to pay, for instance because it does not possess its own funds (Paragraph 6). Similar, but more detailed rules exist in EU competition law.⁴⁹ If necessary, payments will be enforced by the tax authorities (Paragraph 7). The Government issued implementing rules containing criteria for determining the amount of fines and periodical penalties, the manner in which they are to be imposed, and the time frame for their payment (Paragraph 8). Insofar the experience of the European Commission⁵⁰ could offer some guidance.

Behavioral and structural measures

According to Article 59(1), the SCPC may issue behavioral measures:

“Commission may issue measures aimed at removal of established competition infringement, i.e. prevention of possibility for creation of the same or similar infringement, by giving order for taking of certain actions or banning of certain behavior.”

However, the LPC gives the SCPC a more powerful instrument, aligning the powers of the CPC with the European Commission powers⁵¹ and only with the more advanced EU Competition Authorities⁵², which is the power to impose structural measures:

“If a significant danger of repeating the same or similar infringement to competition is determined as a result of the structure of the undertaking, Commission can order a measure to change the structure of undertaking with goal to eliminate that danger i.e. to re-establish the structure as it existed before the infringement was established.”(Article 59(3))

⁴⁹ See Article 23 (4) of Regulation (EC) No. 1/2003 (note 38)

⁵⁰ See Commission Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation (EC) No. 1/2003

⁵¹ According to Article 7 of Regulation 1/2003 of the EU Council, “[the Commission] may impose on [undertakings] any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.”

⁵² Like UK, Netherlands, and more than a dozen other European competition authorities.

“Structural measure may require divestiture of the structure of undertaking, particularly through sell-off of its parts or property to other parties that are not connected to that undertaking.” (Article 59(4))

The LPC follows the above jurisdictions in specifying a rule of proportionality for imposing these measures to re-establish competition in the markets, and that structural measures should only be used as a last resort, if there are no behavioral rules available and the gravity of the situation so requires.

3.1.8 Criminalization of Anticompetitive Practices

The Serbian Criminal Code contains an Article criminalizing abuses of monopolistic positions. According to its Article 232:

“Any person in an enterprise or in any other company with a capacity of legal entity or an entrepreneur responsible for abusing its monopolistic or dominant position in the market or by conclusion of a monopolistic agreement which causes distortion in a market or creates conditions resulting in a beneficial position for such entity in comparison to other parties, in the acquisition of material assets for the relevant entity or for another entity, or causing harmful effects to other companies, consumers or users of services, shall be punished by being imprisoned for the period from 6 month up to 5 years and fined.”

Contrasting with most of the EU national competition law regimes, the present law punishes abuses of dominance, but not hard core cartels or bid-rigging. This is a result of the wave of competition laws in transition economies, which after the socialist state regimes considered monopolies as the worst type of market arrangement that could harm the economy. However, the interpretation of the above article can be extended to hard core cartels, if the agreement among enterprises is considered a “monopolistic agreement” that causes “harmful effects to other companies, consumers or users of services”. So far, there is no case law regarding this interpretation. In particular, the term “acquisition of material assets” which is the literal translation of the equivalent “obtaining profits” is contrary to the concept of a market economy.

The enforcement of this law is carried out by the Office of the Public Prosecutor, and generally only after the Courts have confirmed a decision of the Commission for Protection of Competition. The first case of criminal prosecution has been announced regarding the abuse of dominance in the milk market.

There is a substantial controversy about if a country that has a young competition regime should have criminal sanctions. The argument in favor is that by putting the bar at such high level it makes the competition regime more dissuasive. The other argument is that monetary sanctions can be easily absorbed by companies, while personal sanctions are more deterrent to individuals that are responsible for anticompetitive practices, and in countries like the United States criminal sanctions have highly dissuasive effects. However, there are three main arguments against it. The first is the “carrot and stick” approach in law. In order to encourage detection and increase the probability of being caught there should also be a leniency program. However, leniency programs are only applicable to cartels that are secret agreements, and not abuses of dominance. This is one of the main reasons why in the more advanced jurisdictions only hard core cartels are criminalized. The second argument is that abuses of dominance are more difficult cases to assess in terms of

economics and law, and thus subject to more type I errors.⁵³ This argument has been explicitly embodied in the latest guidelines on monopolization practices by the Department of Justice of the United States. The third is probably the most relevant for Serbia. In view of a lack of support for the work of the competition authority in a society that is not used to consider economic crimes as very serious, judges may raise the standards of evidence required in competition cases to the level of criminal law, making it very difficult for competition authorities to enforce any competition cases.

3.2 Budget and Resources of the SCPC

So far the resources of the SCPC have relied mostly on merger fees. However, it is considered that this form of financing will not be sustainable as the SCPC needs to expand its staff and merger fees may need to be reduced.

The SCPC has currently 10 lawyers and 7 economists working in the operational divisions and in the legal department and the economics department. This is a very low number when compared with either neighbor countries (e.g. Croatia has the double) or EU authorities. The Council of the Commission has 5 members, including the President. The President and two additional members of the Council hold a full time position. Table 6 shows the distribution of personnel by division. The limited number of staff is one of the most important bottlenecks for competition law enforcement in Serbia. The Government has recognized the problem and is committed to increase the resources of the SCPC under the arrangements with the EU.

Table 6
Personnel of SCPC (2010)

	Lawyers	Economists a	Support staff	Total
Executive Council	5		1	6
Mergers	4	1		5
Restrictive Practices	3	4		7
Abuse Dominance	1	1		2
Coordinated Practices	2	3		5
Economics Department		2		2
Legal Department	3			3
Sub-Total	10	7	0	17
International Relations		1	1	2
Administrative services			10	10
Total	15	8	12	35

Source: SCPC

Table 7 reflects the budget of the SCPC in 2010 and the budget programmed for 2011.

⁵³ A type I error is given, when a competition authority wrongly prohibits business conduct as anti-competitive (over-enforcement). Under-enforcement, where a competition authority does not prohibit anti-competitive behavior is called type II error.

Table 7
Budget of the SCPC
(€ 1,000)

	2010	2011
Personnel	900	930
Others	400	510
Total	1,300	1,440

Source: SCPC

It is widely recognized that the SCPC needs to remunerate its personnel above the level of civil servants in order to attract lawyers and economists of high qualifications who can confront the professionals hired by large firms either in casework or in courts.

3.3 The Judiciary and the Resolution of SCPC Competition Cases

Under the previous law, judicial control was exercised by the Supreme Court of Serbia. In the past, the SCPC did not have much success in court cases. There were 13 cases that were not decided in favor of the Commission. In most cases, the SCPC corrected the procedures and took a similar decision. The Supreme Court quashed cases always on the basis of procedural issues. Some reasons for the Commission's failure in Court related to a lack of clarity in the distribution of competence between the Council and the Commission. Others were related to the lack of access to the minutes of the Council. Still others did not contain references to all the documents submitted by the parties. However, the most common criticism was lack of clarity of the case. Under the FLCP, only the Misdemeanor Court could apply fines from 1 to 10 per cent of the turnover of the undertakings concerned. However, no fine has ever been imposed by Courts.

Other important reasons were also the complexity of competition cases, the large number of other cases in the courts and sometimes the lack of understanding of the substantive competition issues by the judges.

Under the new law, the control of decisions of the SCPC is exercised by the Administrative Court. This is a new Court that resulted from the judicial reform in Serbia. It started operations in January 2010 and is composed of 38 judges. However it is already overwhelmed with the number of pending cases. 17 thousand cases were transferred from the Supreme Court to the Administrative Court and on average around one thousand new cases are filed per month. There is also a need for training judges in the area of competition law, which will be addressed under a new project that is being prepared with the support of the European Commission. In view of the number of cases and the way cases are allocated to judges (by lottery), the Court does not intend to have judges specialized in competition matters. The Commission has won one major case in the field of abuse of dominance in the Administrative Court (Danube Foods case, see Annex I), as well as one cartel case related to the veterinary association. Also, the Administrative Court upheld 4 further decisions by the SCPC.

Appeals against decisions of the Administrative Court can be made to the Supreme Court of Cassation and are limited to errors in the application of the law. Since the Criminal Code also contains a clause regarding abuses of dominance, the Public Prosecutor can prosecute undertakings after the decision of the Administrative Court. Legal actions may be brought before the Administrative Court within 30 days from the date on which the decision of the SCPC was submitted to the party concerned (Article 71 (1)). Third parties do obviously not have the right to appeal

against decisions by which the SCPC has granted an individual exemption, pursuant to Article 60, or has approved a concentration pursuant to Articles 65 or 66. In this respect, EU law is more generous as it gives not only the addressee, but any natural or legal person the right to institute proceedings against an act of the European Commission which is of direct and individual concern to them (Article 263 (4) TFEU). The filing of a legal action shall not postpone the execution of the decision, which may, however, be suspended by the SCPC or the Court upon the request of the plaintiff in order to prevent irreparable damage to the plaintiff, provided that such postponement is not against public interest (Article 71 (2) to (5)). This is a very important provision that reinforces enforcement capacity.⁵⁴

The procedure of judicial review of competition cases is governed by the Law on Administrative Disputes. Pursuant to Article 72 (1), the Administrative Court reviews the legality of the decision. The scope of such legal control is not defined in the LPC, but in the Law on Administrative Disputes. Hence, it is not clear whether it includes the appraisal by the SCPC of complex economic facts. Decisions imposing fines fall within the full jurisdiction of the Court, which may, as a rule, alter that part of the decision (Article 72 (3)). The Law foresees strict time frames for submissions by the SCPC, namely 8 days for the response to the legal action and 15 days for the reaction to the plaintiff's counter statement (Article 72 (4)). It also obliges the Court to decide upon the legal action within two months (Article 72 (5)). This is an important factor in view of the congestion that exists in the Courts.

3.4 Relations with the Legislature and the Executive

3.4.1 Legislature

Relations between the SCPC and the Parliament are extremely important, since it is the legislative that nominates the Council of the Commission every five years. Article 20 of the LPC establishes that the SCPC is "accountable for its operations to the National Assembly of the Republic of Serbia". It has to present its Annual Reports up to the end of February of each year.

However, there is no the Parliament does not have to consult the SCPC when a law with implications on competition is being prepared, as it is the case in other jurisdictions.

3.4.2 Executive

The SCPC is independent from the Government. However, every year in November, it needs to submit its financial plan to the Government for approval.

The Ministry of Trade is responsible for general competition policy of the Government and was heavily involved in the drafting of the new competition law. The Ministry of Trade is also responsible for the supervision of markets and for the intervention in particular basic foodstuffs.

⁵⁴ In fact, under several national competition regimes in the EU the Court appeal stops any effects of the decision of the administrative authority. Since the process of appeals may take 4 to 7 years it postpones significantly the payment and with inflation decreases automatically the value of the fine.

Although the law does not explicitly give the SCPC the right to issue recommendations to the Government, according to Article 21 (8) it is one of the functions of the SCPC to issue opinions on the implementation of competition policy, assuming that those opinions can be directed at any public or regulatory body. Moreover, Article 21 (7) attributes to the SPC the function of submitting opinions on draft rules or on existing rules affecting competition in the markets. However, the law does not require the Executive to consult with the SCPC when a law or rule has implications on competition policy, as it is the case in other jurisdictions.

Article 49 of the Law establishes the right of the SCPC to request information from other State authorities and organizations and, on the other hand, the obligation of the latter to positively react to such requests. Article 49 (3) shows, that for the purposes of competition law cooperation between the SCPC and other public bodies that collect economic data (offices of statistics, tax authorities, local self-government authorities and organizations, chambers of commerce and other organizations exercising public functions) is most important. The details of the cooperation are laid down in Article 49 (1) and (2). The starting point is a request from the SCPC for the supply of certain information. To allow for some flexibility in the relationship between various State entities, the LPC has not defined the form and the exact content of the request. But it is clear that the SCPC has to somehow specify the information which it wants to receive and that it also has to indicate the time frame for its delivery. The addressee must in any case respond to the request within the given time frame. Pursuant to Article 49 (4) and (5) untimely or incomplete action or lack of action from the side of the addressee may lead to remedial actions. These consist firstly in a complaint by the SCPC to the addressee's superior authority with the request to take the necessary actions in order to provide the needed information, and secondly, if such a step remains without success, in the publication of the whole matter by the SCPC.

Cooperation with the police is defined in Article 50. Pursuant to this provision, the police have to assist the SCPC particularly in carrying out inspections and provisional repossessions. Its principal role will consist in preventing or breaking active resistance on the side of the undertaking concerned. Where the police fail to effectively exercise this function, the abovementioned sanctions will apply.

3.4.3 Towards a Domestic Competition Network

Relations with sector regulators, in particular for telecom and energy, are rather limited and no case has yet been referred from one institution to the other. The telecommunications regulator intends to coordinate with the SCPC in the future with respect to analyses of the telecom markets. The SCPC has signed a memorandum on cooperation with the National Bank of Serbia, the Agency for Energy and a memorandum on cooperation with the Republic Agency for Telecommunications will be signed in the near future. So far, the SCPC has created a good cooperation with officials from regulatory agencies during the investigation in several cases.

3.5 Cooperation with Non-governmental stakeholders

3.5.1 Business Organizations

The SCPC has maintained important relations with the Serbian Chamber of Commerce and with regional Chambers of Commerce. These relationships are crucial for compliance purposes. In fact, in

Serbia it is obligatory for all firms to be affiliated with the Chamber of Commerce, and firms of the same industry participate in trade associations that meet regularly under the auspices of these Chambers of Commerce. In the past, cartels or collective abuses of dominance were negotiated within their trade associations, as it is the case of the pharmaceutical industry. After the first decision of the SCPC against anticompetitive practices, the Chambers of Commerce have been more aware of competition law and are now performing a compliance supervision on any agreement reached under their auspices. The Chambers of Commerce also have been instrumental in educating the business community on competition law and other business laws with the help of the project of ACPC.

3.5.2 Consumer Groups and Consumer Protection

The SCPC is not responsible for consumer protection. A new law on consumer protection was adopted on November 2010, but enforcement remains quite weak. There are 25 non governmental organizations (NGOs) in the field of consumer protection registered with the Ministry of Trade. There is a central national coordinating body. These NGOs obtain some financing from the Ministry of Trade when submitting projects for the protection of consumers. Its number may be reduced due to stricter criteria for being able to get financing from the Government.⁵⁵ There are also 30 smaller regional NGOs working in this area.

The new Law on Consumer Protection transposes 15 EU Directives on product liability, warranties, distance selling, injunctions, and others into Serbian law. The Ministry of Trade is responsible for the law enforcement. However, its Department for Consumer Protection has only around 9 professionals. It manages a call center (Consumer Protection Center) with a free telephone number, which receives between 50 and 60 complaints a day. Any complaint is re-directed to an NGO. NGOs then can approach the companies to redress the situation or to use their lawyers to undertake a collective complain in a Court. The problem is that NGOs are understaffed and do not have required resources.⁵⁶

The Consumer Protection Department is also trying to develop a mediation system to solve disputes between consumers and firms, but the Chamber of Commerce has not shown any interest in the matter.

Furthermore, the Trade Ministry supervises the Trade Inspectorate with about 500 inspectors in charge of enforcing consumer protection in the non-food sector. The Ministry of Agriculture is responsible for food trade and industry, and the Ministry of Health for medicines. There have been several training programs financed by TAIEX for the inspectorates, but they are not yet fully knowledgeable of the consumer protection law. Another problem is that they have the power to directly charge a shop-owner of any wrong doing and collect a fine between 5 and 20 thousand Euros. They do not need to refer the case to the Courts.⁵⁷

⁵⁵ It is now required a minimum of 50 active members by institution.

⁵⁶ The European Commission has advised the decentralization of the enforcement at the time that public enterprises dominated, and thus a department of the state could not properly and independently exercise an auditing function.

⁵⁷ This is seen by several Serbian officials as an opportunity for corruption.

Although the situation is improving, this is certainly a weak enforcement system, due to the lack of a consumer protection culture and the weak capabilities of the NGOs.

With respect to the enforcement of consumer protection law, EU member States have followed two basic institutional models. They either merge consumer protection with competition law enforcement into a single Authority, like the United Kingdom, or they set up a separate state department in charge of consumer protection and the prevention of fraud, like France. The first model has the advantage of entrusting the competition and consumer protection authority with two fields of enforcement with recognized synergies; it also makes the authority more visible in the eyes of consumers and small businesses. The drawback is that the authority can become overwhelmed with consumer protection complaints and cases and not pay enough attention to the more complex competition cases.

The second model creates a state arm that can be used at national and local level to enforce consumer protection. It has the power to impose fines and take decisions that can then be appealed against in court. The drawback is that it is not independent and can be used by the State for other purposes than just its main function. Sometimes it does not act effectively against large enterprises. In both systems NGOs play a very useful role of channeling consumer complaints to those authorities or inform consumers about their rights. They can also be watchdogs of those authorities.

Consumer credits are explicitly excluded from the new Law on Consumer protection. In a joint effort by the Ministry of Trade and Services and the National Bank of Serbia, a Draft Law on the Protection of Banking Services Users was prepared, which was submitted to the National Parliament for adoption on February 1, 2011.

Fully endorsing all activities geared at regulating consumer protection in general, and the protection of financial services for consumers in particular, the National Bank of Serbia has agreed with the Ministry of Trade and Services to leave out the provisions on consumer loans from the Draft Law on Consumer Protection because of the specific features of loans and other banking products and services. It has also been agreed that the Law currently under preparation will regulate banking services, including lending to natural persons, in a comprehensive and systematic way and in accordance with EU Directives and international principles of good banking practice.

In line with the above, the new Law will aim to promote good business practice and fair dealing with clients, critical for further strengthening of confidence and, by extension, development of the banking sector as a whole.

As referred to above, the SCPC has maintained relations with consumer groups through some regional NGOs, but thus far no case has been referred to the Commission for possible investigation. Further work will be undertaken to strengthen relations between competition and consumer protection policies.

The new Consumer Protection law has introduced the collective action which can be used by consumer organizations to claim damages in the name of consumers, but so far there has not been any case brought up to the courts.

Consumer organizations currently complain because the high prices in food retail, telecommunications, gas and fuel. They also complain about abusive clauses in contracts with major infrastructure providers and in the financial sector. However, they lack legal capacity to analyze these contracts and propose changes. Thus far, some of the changes were achieved through negotiations with the enterprises concerned. Some of these organizations are receiving technical assistance by twining projects with similar organizations in Europe. A component for strengthening institutional capacity will be included in the upcoming technical assistance by the EC project

regarding training and education of consumers, measuring consumer satisfaction in certain markets and publication of consumer reports. The project will include NGOs and the Ministry of Trade.

3.5.3 Universities and National Institutes

Two members of the Council of the SCPC are university professors and since they only hold a part time position and continue teaching at university they maintain an important link with the universities. This is mainly the case of the faculties of law. There is no direct relationship with faculties of economics.

The Faculty of Law of the University of Belgrade now offers Master programs in law where competition law is offered as a facultative subject. Currently, there are about 30 students per year that attend classes and 2 or 3 that undertake their thesis in the area of competition law. In other countries, competition law has been integrated into courses on regulation.

There is a lack of courses on industrial organization in economics departments which rather limits the preparation of economists for working on competition economics. Currently there are no courses offered by Serbian universities on competition economics by their departments of economics.

These lacunas could be filled in by students that go abroad to obtain a master degree in the field of competition law and economics, but there is yet no incentive for steering students to those matters.

Serbia has a network of national institutes in different areas of knowledge which are supported by the government, concentrate specialists in each scientific field and organize seminars and conferences. The Institute of economic sciences, as well as the Faculty of Economics of the University of Kragujevac have already been asked to undertake a study for the SCPC in a major merger case and in abuse of dominance cases in order to define relevant markets.

Members of the National Institutes can also be asked to testify in competition cases as expert witnesses, if they are part of lists which judges can call upon in court cases.

3.5.4 Cooperation with Non-Government Organizations

Serbia lacks yet a network of NGOs that may be important in voicing competition problems. Thus far, the only relations have been with NGOs that work in the consumer protection area.

4. SECTOR REGULATION OF SERBIA AND ENFORCEMENT

4.1 Institutional Framework

In infrastructure sectors that are often characterized by network economies and economies of scale or scope, there is a need to regulate economically and technically access or to lower barriers to entry. Since the 1980s, the EU and other developed countries have also launched a process to deregulate markets that are at least potentially competitive and to introduce competition. Other

regulation tries to correct market failures like asymmetric information and moral hazard in the credit and insurance markets, or imperfect consumer information and promote merit goods in the health sector. In this section, the institutional framework of Serbia's sector regulation will be reviewed and its institutional capacity required for the formulation and enforcement of regulatory laws and rules will be assessed.

In Serbia, the following regulatory institutions are in charge of economic regulation:

- National Bank of Serbia, responsible for the regulation of banks and insurances;
- Commission for the Stock Exchange, responsible for the regulation of the capital markets;
- Agency for Telecommunications Regulation (RATEL), responsible for the regulation of telecommunications;
- Energy Agency of the Republic of Serbia (EARS), responsible for the regulation of electricity, gas, pipelines for oil and the central heating systems;
- Republic Broadcasting Agency for media and telecom content; and
- Civil Aviation Commission for airports and aircraft security.

In overall terms, there seems to be incipient regulation in the capital markets, where the regulatory functions are not separated from the commercial functions of the stock exchange. There are yet no independent regulatory bodies for the water sector and for road and railways transportation which are common in developed countries.

In the following, some of the major areas of importance for competition policy in Serbia will be addressed: sector regulation in energy, telecommunications, financial markets and health.

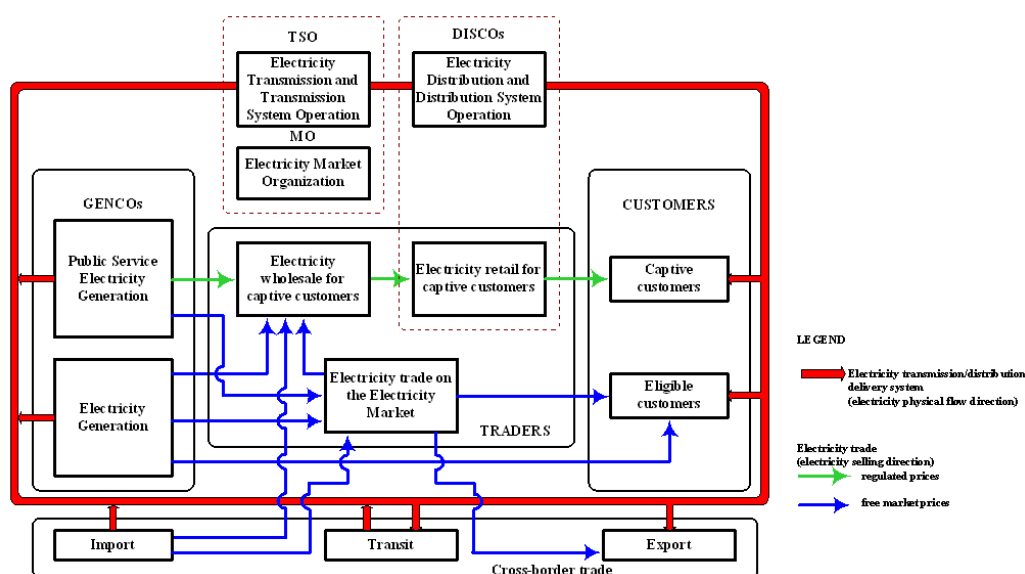
4.2 Energy Regulation

4.2.1 Electricity

The Serbian electricity market is characterized by a dominant position of the state owned holding company “Elektroprivreda Srbije” (EPS), established for electricity generation and distribution, as well as for the supply of electricity for tariff customers in Serbia. EPS has 11 subsidiaries: 5 electricity generation companies, 5 regional distribution system operators (DSOs) and 1 coal mining company. All of these subsidiaries are established in the form of limited liability companies. Electricity is produced from lignite (70 per cent) and hydropower (29 per cent) and the remainder from a gas powered station. The regional distribution operators are: “Elektrovojvodina”doo Novi Sad, “Elektrodistribucija Beograd”doo Beograd, “Elektrosrbija”doo Kraljevo, “Jugoistok” doo Nis and “Centar” doo Kragujevac.

A separate state owned company “Elektromreza Srbije” (EMS) is responsible for the transmission of electricity on high voltage level and for system operation activities. It also acts as a market operator. There is a large number of interconnectors with neighboring countries: 8 interconnectors. Serbia is self-sufficient in electricity, but imports in winter and exports in summer. Figure 4 gives an overview of the 3 electricity markets and the operators in Serbia.

Figure 4: Electricity markets



Source: Energy Agency of the Republic of Serbia (EARS)

The Government has decided to open the electricity sector for private participation by launching a tender process for independent power producers in order to build and operate 2 coal-fired plants and 1 gas powered plant. The process of tendering is under way.

EARS is responsible for the regulation of electricity, gas, pipelines for oil and for central heating systems. Regulation is exercised in terms of (i) determining methodologies for setting prices, (ii) giving opinions on the network energy prices, on prices for transport by oil and oil derivatives pipelines and on prices of electricity and gas for tariffs customers (those prices are subject to Government approval), (iii) issuing licenses for performing energy related activities, (iv) approval of grid codes and the market code, (v) market monitoring, and (vi) taking decisions on appeals when requests for connection or access to the system are denied. Market regulation is based on the Energy Law of 2004 that largely follows the EU legislation up to that time. A new law is under preparation in order to harmonize the Serbian legislation with the new EU Directives.

Several codes have been adopted in order to regulate technical aspects and access to the transmission and distribution systems. On 17 April 2008, the transmission grid code of EMS was approved which regulates technical aspects of the interface between the electricity transmission system and its system users. It establishes certain obligations on behalf of EMS, in particular relating to technical conditions for connecting electricity generation, transmission, distribution premises, and customers' premises to the transmission system. Furthermore the grid code contains rules on third party access to the transmission system, provisions on technical and other arrangements for secure and safe system functioning, a method for specifying and implementing system services, emergency procedures, functional requirements and accuracy class of measuring devices, and it defines the method for metering electricity.

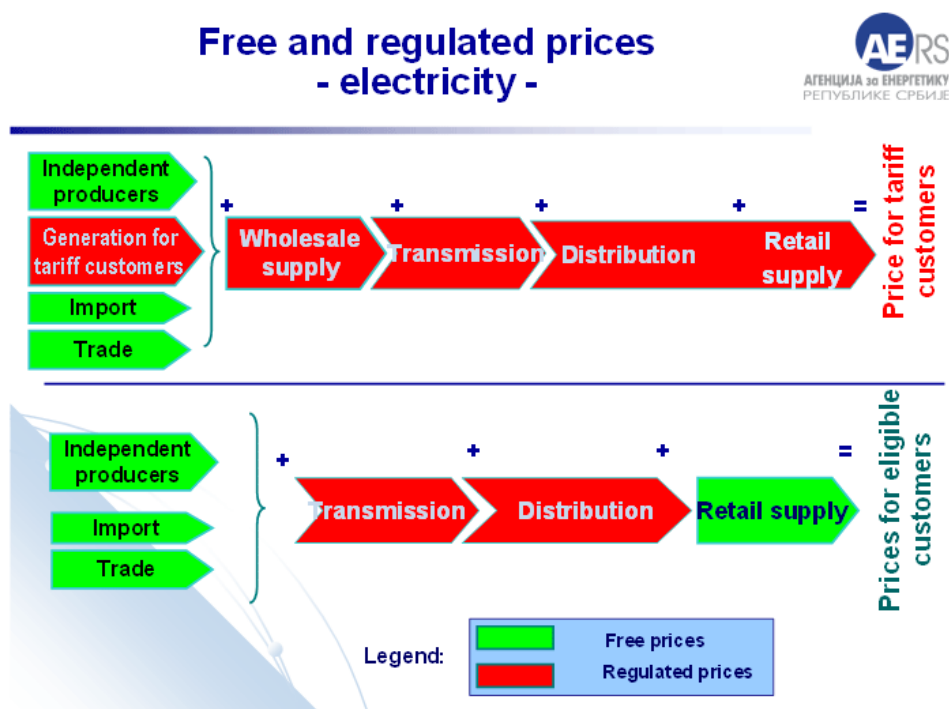
The Energy Law of 2004 established that all electricity consumers were tariff customers who, in compliance with the law, received electricity from the trader who was obliged to supply tariff customers at regulated prices. At the same time the opportunity was given to customers meeting eligibility criteria specified in the Law, to acquire the status of a so-called eligible customer and thus enabling them to purchase electricity on the free market, in several phases of liberalization of trade.

In the first phase, starting from the day when the Energy Law became effective, the electricity market was potentially open for all customers with an annual electricity consumption greater than 25GWh. As of January 1, 2007, all electricity customers with an annual consumption greater than 3 GWh were allowed to exercise the rights of eligible customers. Thus, 21 per cent of the electricity market was potentially open (for about 350 customers). The right to acquire the status of an eligible customer was given to all non-household customers in February 2008, in line with the decision of the Serbian Energy Agency. Since then 47 per cent of the electricity market is potentially open to trade.

The gradual opening of the Serbian electricity market will continue until the market is fully opened as required by the ratified Energy Community Treaty that obliges Serbia to open the electricity market also for households until 1 January 2015. However, there is not yet a significant amount of electricity traded in the market, and no power exchange has yet been established, although discussions are underway to establish a Serbian power exchange or a regional exchange involving several states in the Balkans.

Regulated prices apply to the natural monopolies electricity transmission and distribution, as well as to end user tariffs for captive customers. Currently, eligible customers do not have an incentive to use their access to the free electricity market, as the levels of regulated prices are lower than the market prices. The system of price regulation (described in Figure 5) follows the general scheme used in the EU.

Figure 5: Price regulation



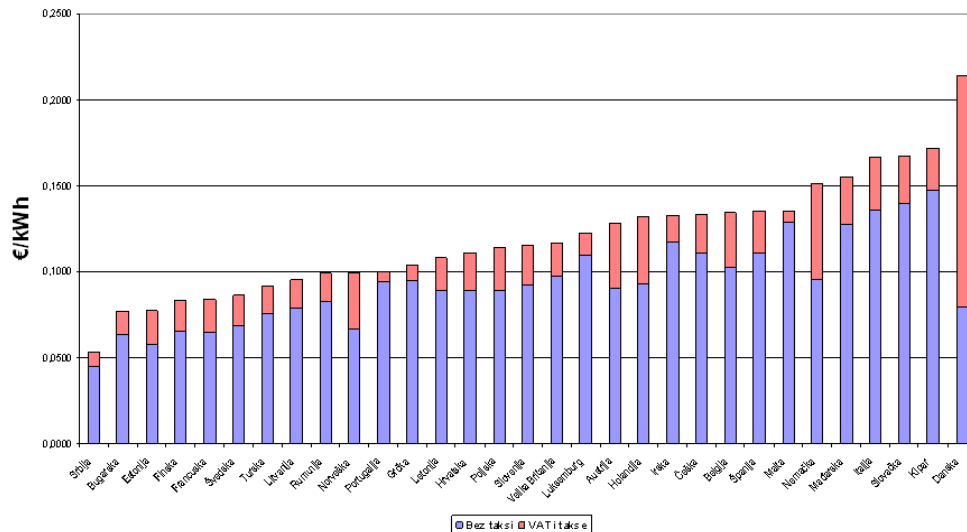
Source: EARS

The regulation of prices in the electricity sector is based on the following principles: (i) cost coverage that enables the regulated company to earn revenue and cover its justified running costs (operating costs and costs of capital). Costs deemed to be justified are those that are necessary and

unavoidable (including appropriate rate of return on capital) for a regulated activity to be conducted in a safe and good manner. (ii) Economic efficiency in terms of technical efficiency and an optimum tariff system structure (allocative efficiency). (iii) Consumption incentives for energy saving, time optimization, and preservation of limited (non-renewable) energy sources and environment protection. (iv) Non-discrimination in pricing, regardless of the size, ownership and other factors, and avoidance of cross-subsidies, and (v) Compliance with EU regulations.

The state-owned enterprise EPS has been running substantial deficits. The prices of electricity in Serbia are among the lowest in Europe. Using the Eurostat methodology, Figure 6 shows that the average electricity price for industrial customers in Serbia was 0.052 Euros per kWh in 2009, the lowest among European countries, including VAT and other taxes. As shown in figure 7, Serbia has also the lowest electricity prices for households (0.055 Euros per kWh, including taxes and fees) - about one quarter of the highest price (Italy).

Figure 6: International comparison - Average electricity prices for industrial customers (2009)



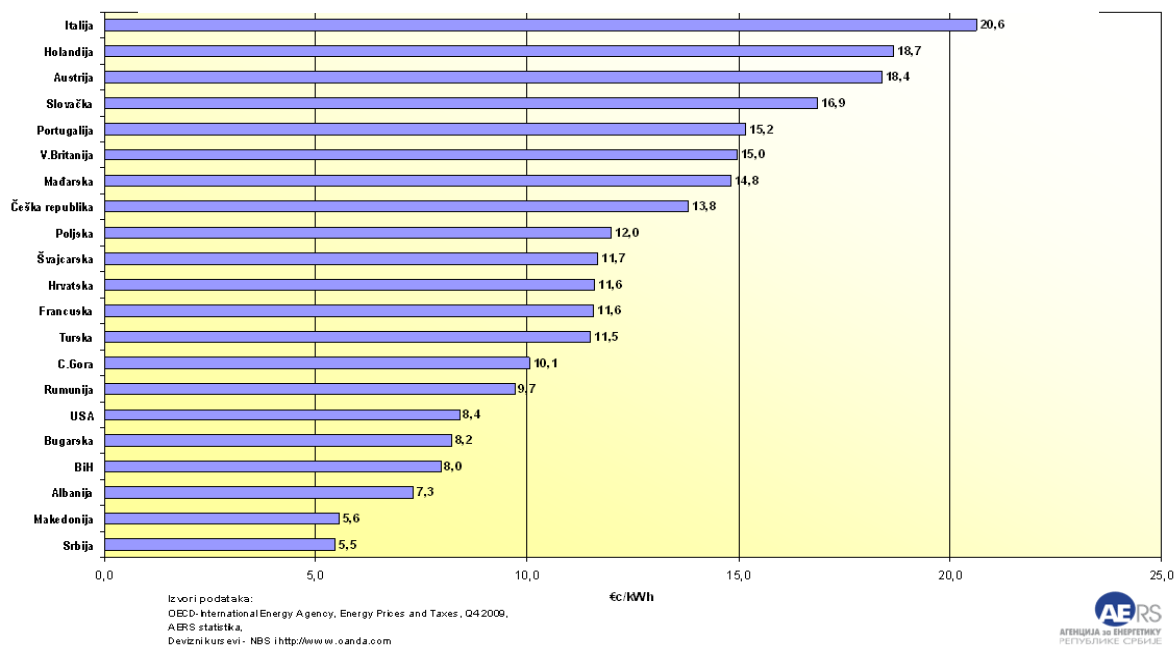
Izvor podataka: cene po novoj metodologiji EUROSTAT. Tipiski potrošač za industriju - godišnja potrošnja u opsegu od 500 MWh do 2000 MWh.

Napomena: Cene u Srbiji su obracunate po staroj Metodologiji EUROSTAT (Tipiski potrošač za industriju - B2: 500 kW snaga i 2000 MWh godišnja potrošnja) za industriju po tarifnim stavovima 1.08.2008.godine i srednjem kursu evra u drugom polugođu 2009.g. od 1€ = 93.8933 din.

Industrija: Za Francusku, Tursku, Grčku, Luksemburg, Belgiju i Italiju korišćeni su podaci iz prethodnog polugođa. Za Austriju iz istog polugođa prethodne godine. Iznos poreza za Italiju je procenjen.

Source: EARS

Figure 7: International comparison – electricity prices for households (2009)



Source: EARS

The low electricity prices in Serbia are due to several factors, although most prices in the region are among the lowest in Europe (FYRM, Albania, and Bulgaria). First, the Serbian prices reflect the Government policy of protecting households from high energy prices and to promote the competitiveness of the Serbian industry. Although there is no cross-subsidization, only now capacity pricing for households has been introduced. According to some estimates, with the present weight cost of capital, regulated electricity prices at the end user level are about 50 per cent of fully economic prices. This implicit subsidy poses a major challenge for new independent power producers. A second factor is that the asset base for production, transmission and distribution of electricity in Serbia is rather old, and consequently has been to a large extent amortized. However, there is a need for maintenance of and reinvestments in the old power plants and transmission grids. Thirdly, there are still no charges for renewables, namely wind and other high cost renewables that have been introduced in several countries in the EU, like Denmark and Portugal.

Regional cooperation in electricity is pursued under the Energy Community Regulatory Board (ECRB), created by the Energy Community Treaty of October 2005 in Athens, which entered into force on July 2006 and extends the internal EU energy market to Southeast Europe. It thereby provides a stable investment environment based on the rule of law, and ties the parties to the treaty together with the EU. Through its actions, the Energy Community contributes to security of supply in wider Europe.

The general objective of the Energy Community is to create a stable regulatory and market framework in order to:

1. attract investment in power generation and networks in order to ensure stable and continuous energy supply that is essential for economic development and social stability;
2. create an integrated energy market allowing for cross-border energy trade and integration with the EU market;
3. enhance the security of supply;

4. improve the environmental situation in relation with energy supply in the region; and
5. enhance competition at regional level and exploit economies of scale.

Conclusion: The process of introducing competition in the electricity market is still quite incipient. The small national market size and specific market structure limits the means of introducing competition and EU aims are to develop competition on regional and EU level. The incumbent is still a state owned enterprise, whereby its corporatization (i.e. restructuring to a joint stock company) is under preparation. The corporatization process should help to attract investments to some of the outdated power stations. Despite the fact that it comprises several legal entities, the incumbent is still vertically integrated. The first step for establishing a more competitive system was to fully unbundle the Transmission Operator (high tension network for transport of energy). In addition, the production of electricity could be divided into several power generation groups to be privatized in the future. This process should help to attract investment to some of the outdated power stations. However, it needs to be stressed that opening the system to a market economy requires fully economic prices that reflect the opportunity costs of energy. Economic prices are a sine-qua-non condition for participation of the private sector in the production of energy.

4.2.2 Natural Gas

The market for natural gas is dominated by a single importer and dominant supplier, the state-owned enterprise Srbijagas. About 85 per cent of the gas is imported and 15 per cent is produced domestically. There is presently only one point of entry into Serbia coming from Hungary. In the future, a new pipeline, the South Stream, may connect to the Bulgarian system, but this would not allow importing other than Russian gas. Another project, Nabucco, still largely in the drawing board, may allow importing gas from Azerbaijan, Turkmenistan, Iran and Iraq and can connect the Serbian transmission system to those in Bulgaria or Romania.

The largest network for transport and distribution of gas is owned by Srbijagas, which is the wholesaler, transporter, distributor and retailer. The South East of Serbia is supplied by Yugorozgas, a company with participation of Gazprom (50 per cent), Srbijagas (25 per cent) and Centrex ME Energy (25 per cent). It is wholesaler, transporter, distributor and retailer as well.

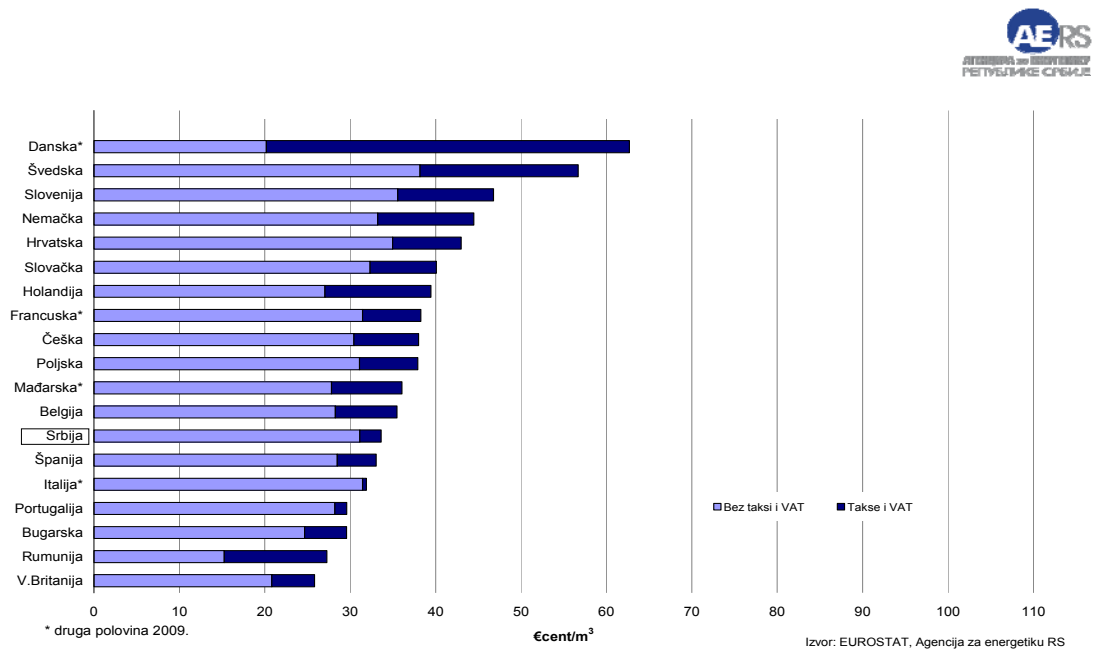
The contract for gas supply with Russia is indexed to the international price of oil. Domestic prices are also indexed to the international price of oil. Gas prices in Serbia are comparable with European levels (Figures 8 and 9). Natural gas is a major source of heating in major cities. Given that most of the central heating systems are old and quite inefficient and taking into account their costs for gas, the municipal firms in charge of heating face difficulties regarding their financial sustainability.

As of February 2008, in accordance with the decision of the Council of the Energy Agency of the Republic of Serbia, the right to acquire the status of an eligible customer may be exercised by natural gas customers other than private households. Thus, about 88 per cent of the natural gas market is potentially open. The Serbian market for natural gas will be fully opened for all households by 2015, in line with the ratified Energy Community Treaty.

Free prices for natural gas are those pertaining to eligible consumers, and are specified in the contract entered into between the eligible customer and the supplier. Regulated prices are prices at which the natural gas trader for the purpose of supplying tariff customers sells gas to natural gas retailers for tariff customers and prices at which retailers sell natural gas to tariff customers. The prices of natural gas transport, storage and distribution services for all customers (both tariff and eligible) are also regulated. Service charges of natural gas transport, distribution, and natural gas

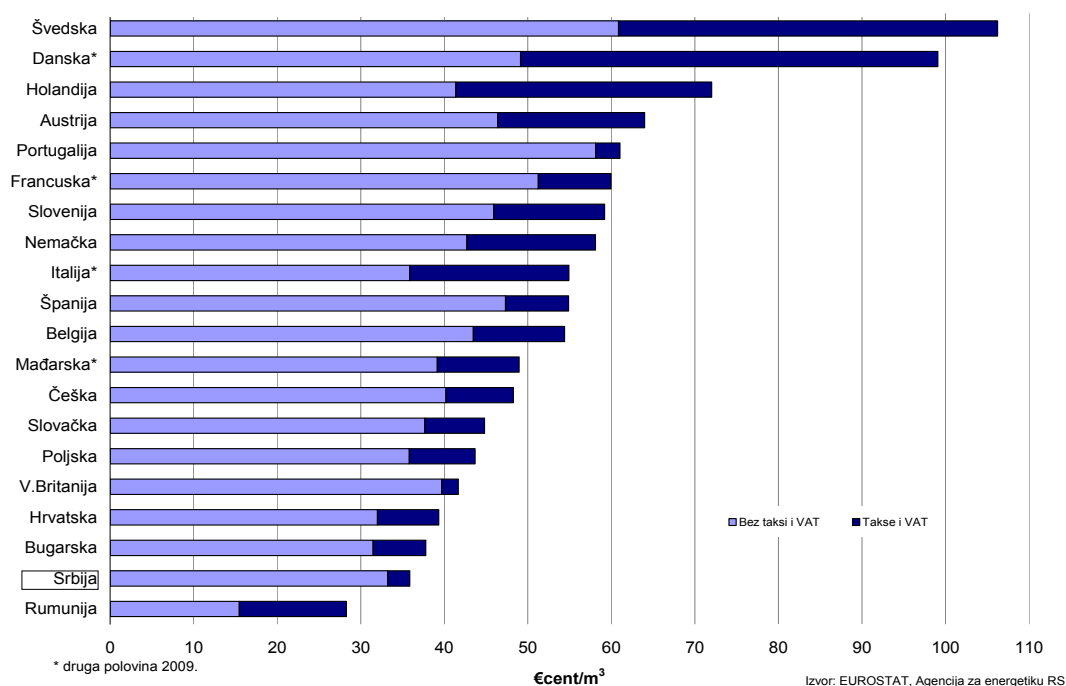
storage for tariff customers are part of the charges included in the tariffs to customers of natural gas. The regulation of gas prices follows the same principles as the regulation of electricity prices.

Figure 8: International comparisons – Natural gas prices in industry (2010)



Source: EARS

Figure 9: International comparisons – Natural gas prices for households (2010)



Source: EARS

Conclusion: In order to increase competition and energy security it would be advisable to diversify the sources and routes of supply of natural gas by expanding interconnection with other major suppliers, although Serbia will remain dependent on international contracts.

4.2.3 Oil Derivatives

According to the Energy Law, EARS is in charge of regulating the prices for using Serbia's oil and oil derivatives pipelines, according to the same principles as apply to the electricity and natural gas sector. The state-owned company Transnafta Pancevo is responsible for oil transport by the pipelines.

There are two refineries in Serbia, owned and operated by NIS, a state monopoly that was sold (51 per cent) to Gazpromneft, a Russian company in 2009. Domestic production covers about 20-25 per cent of gross inland consumption. At the end of 2010, the Serbian oil market was liberalized for all products. The import of refined products (LPG, unleaded gasoline, eurodiesel and fueloil) is around 1.5 million tons in total.

The incumbent is also a major wholesaler and retailer of oil derivatives. There are 253 licensed wholesalers and about 400 retailers in the oil market in Serbia. In addition to NIS, there are four large distributors at both the wholesale and the retail levels: Lukoil, Mol, Ekohellenic and OMV. At the retail level, there is still a substantial presence of independent firms. NIS has about 480 petrol stations and all other distributors in Serbia together have more than 900 stations.

In 2001, the Government of the Republic of Serbia adopted the Decree on Oil Derivatives Prices and the Decree on Special Terms and Conditions for Import, Processing, Distribution and Trade in Oil/Oil Derivatives to enable the control of oil/oil derivatives prices in the transition period. Up to 1 January 2011, both, wholesale and retail prices were subject to a maximum price established by the government. As of that date, the prohibition of imports and the price regulation were abolished. However, the Ministry of Mining and Energy adopted a by-law stating that only fuels with European standards can be imported. The excise duties for imports which are officially based on fuel quality are around 4.5 dinars per liter higher than those of domestically refined products. These measures will expire by the end of 2012.

The SCPC is presently undertaking a market investigation of the oil sector. Serbia still produces and consumes a substantial amount of “dirty” fuels that do not comply with the quality standards of the EU, but the permission of this production will end at the end of 2012. The refineries that have now been privatized and mostly sold to a Russian firm need major investments for upgrading their products. The monopoly granted by the Government to Gazpromeniefert has to be temporary and strictly monitored in order for the company to make the required investments.

Conclusion: One of the most important measures to improve competition in the market for oil derivatives would be to liberalize imports. The temporary monopoly given to the incumbent in the market for the refining of oil needs to be closely monitored and strictly limited to the term that is required for the modernization of the refineries and the upgrading of production of fuels to achieve European standards to avoid serious pollution.

4.3 Telecommunications

With about 3.1 million fixed lines, out of which 2.8 million are residential, the fixed telephony market of Serbia is the second-largest market among the EU Enlargement candidates (Croatia, Macedonia (FYROM), Turkey, Albania, Bosnia & Herzegovina, Montenegro, Serbia and Kosovo/UNSCR 1244). The penetration rate is the highest among EGC, and above the average of the EU-27 (42.2 against 40 per cent).

The level of competition in the fixed network and services is still incipient, due to the recent liberalization process. The fixed telephony market is dominated by the incumbent Telekom Serbia, which is controlled by the State (80 per cent).⁵⁸ A license for a second fixed telephony operator was granted in January 2010 to Telenor. Telenor was under the obligation to start providing fixed telephony services within 12 months. A third public fixed telephony operator Orion is providing PATS over CDMA 2000 network in the 410-430 MHz band.⁵⁹ There are about 28 licensed service providers that are active in the market (see Table 8).

⁵⁸ All the data refers to 2009. See RENT, An Overview of Telecommunications Markets in the Republic of Serbia, 2010.

⁵⁹ The information on multinational comparisons provided in this section is based on Cullen, Enlargement Countries Monitoring Report IV – December 2010, a report for the European Commission.

Table 8: Number of operators in fixed telephony

Country	Public fixed telephony network operators		Public fixed voice telephony service providers	
	Authorised operators	Operators active in the market	Authorised providers	Providers active in the market
Croatia	13	9	62	38
FYROM	38	9	34	34
Turkey	56	10	103	103
Albania	82	82	86	86
Bosnia & Herzegovina	12	11	12	11
Montenegro	2	2	10	7
Serbia	3	2	47	28
Kosovo (UNSCR 1244)	3	2	3	2

Source: Cullen International, *Enlargement Countries Monitoring Report IV*, December 2010

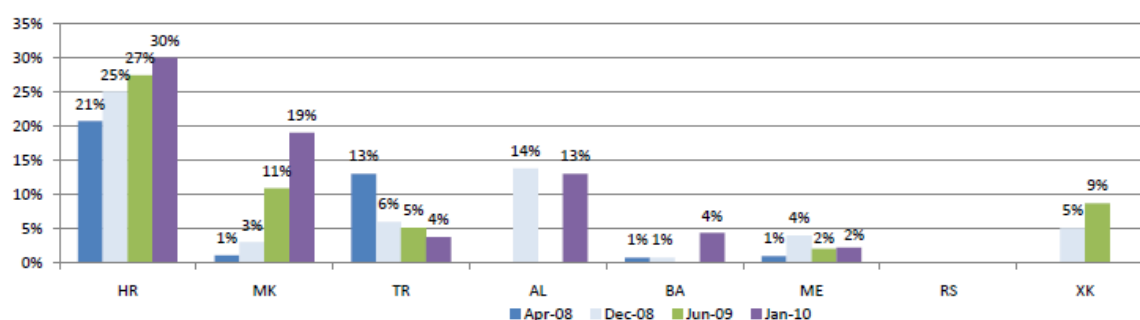
Table 9: Market share of incumbent in fixed telephony

Country	Overall market share		National calls		International calls	
	By retail revenue	By minutes of traffic	By retail revenue	By minutes of traffic	By retail revenue	By minutes of traffic
Croatia	79.50%	68.26%	69.09%	66.67%	64.02%	78.26%
FYROM	80.75%	77.53%	82%	77.68%	78.80%	71.56%
Turkey	86%	94.05%	NA	97%	NA	74%
Albania	83%	90.42%	N/A	80%	N/A	80%
Bosnia & Herzegovina	94.67%	95.75%	99%	99.82%	89.46%	84.60%
Montenegro	98.00%	99.80%	N/A	N/A	N/A	N/A
Serbia	100%	100%	100%	100%	100%	100%
Kosovo (UNSCR 1244)	98.02%	97.11%	N/A	97.64%	N/A	88.57%

Source: Cullen International, *Enlargement Countries Monitoring Report IV*, December 2010

In Serbia, the incumbent still has a market share of 100 per cent in the markets of national and international calls using fixed networks (Table 9 and Figure 10). A cost-effective way for alternate providers to take market share from the incumbent is to use carrier selection or carrier pre-selection. They can also use voice over internet (VoIP) and provide direct access. Figure 10 shows that Croatia and Macedonia are the countries where alternate providers have been able to increase their market share more significantly.

Figure 10: Market share of alternate providers of fixed telephony



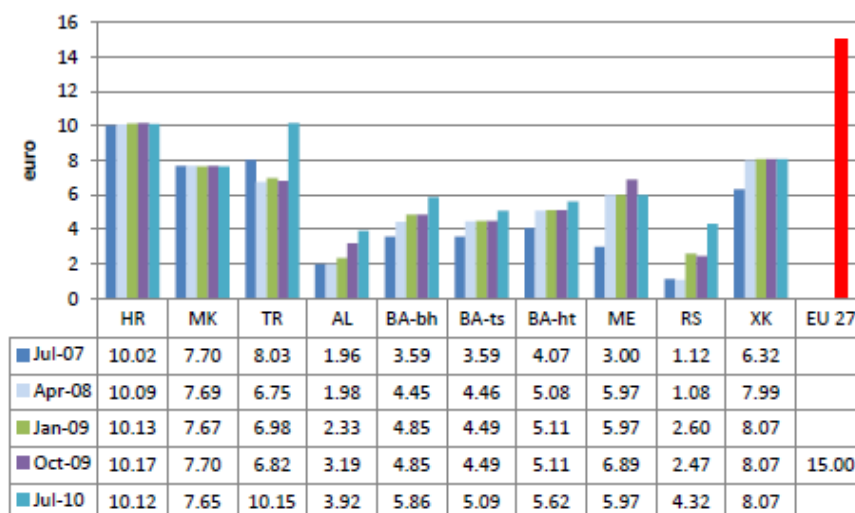
Source: Cullen International, *Enlargement Countries Monitoring Report IV*, December 2010

Translation: HR-Croatia, MK-Macedonia, TR-Turkey, AL-Albania, BA-Bosnia-Herzegovina, ME-Montenegro, RS-Serbia and XK-Kosovo/UNSCR 1244

Prices of fixed telephony are below the average in the EGC (Figure 11). The minimum cost of a local call, e.g. is .5 Eurocents, compared with 3.7 Eurocents in Turkey. The standard residential rate has

been rising substantially in the last three years, but it is still among the lowest in the EGC. The same applies to business rental rates.

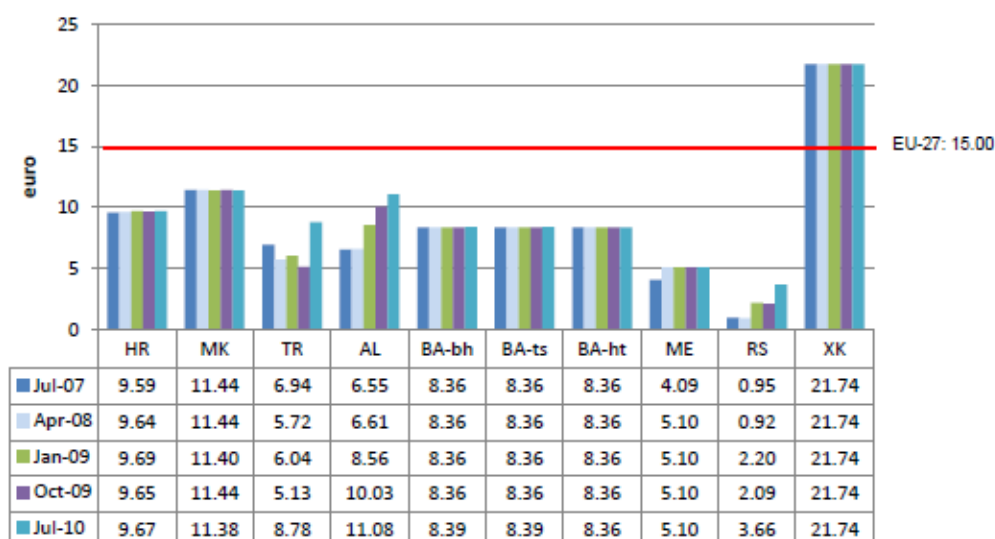
Figure 11: Standard residential monthly rate (Euro)



Source: Cullen International, *Enlargement Countries Monitoring Report IV*, December 2010

Translation: HR-Croatia, MK-Macedonia, TR-Turkey, AL-Albania, BA-Bosnia-Herzegovina, ME-Montenegro, RS-Serbia and XK-Kosovo/UNSCR 1244

Figure 12: Business rental monthly rates (Euro)



Source: Cullen International, *Enlargement Countries Monitoring Report IV*, December 2010

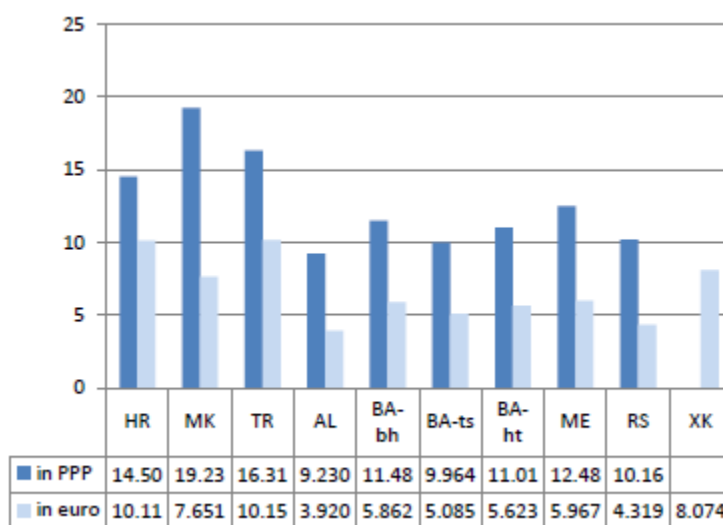
Translation: HR-Croatia, MK-Macedonia, TR-Turkey, AL-Albania, BA-Bosnia-Herzegovina, ME-Montenegro, RS-Serbia and XK-Kosovo/UNSCR 1244

The same conclusion is reached for the prices of fixed telephony, for both residential and business users, except for international calls that are among the highest in Serbia (Figure 12).

Local fixed telephone calls are almost zero priced for residential users, but the regulator is pushing for the equalization of residential and business prices based on costs.

However, the prices in Purchasing Price Parity in the EGC are substantially higher than nominal prices, but still putting most of the prices for Serbia below the EU-27 average (Figure 13).

Figure 13: Standard residential rental rates (including VAT)
(Euro)



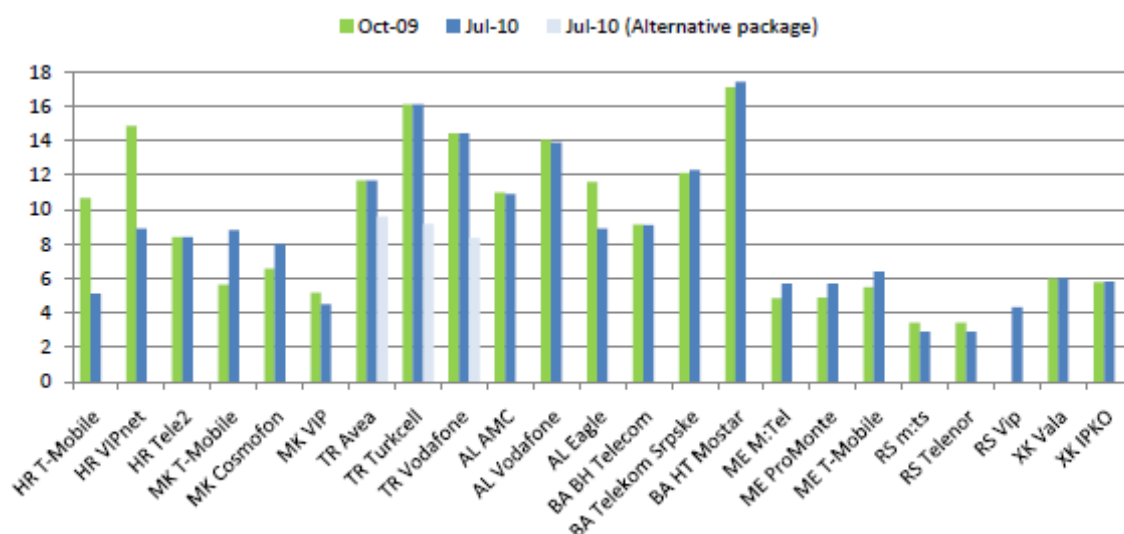
Source: Cullen International, *Enlargement Countries Monitoring Report IV*, December 2010

Translation: HR-Croatia, MK-Macedonia, TR-Turkey, AL-Albania, BA-Bosnia-Herzegovina, ME-Montenegro, RS-Serbia and XK-Kosovo/UNSCR 1244

There are already 9.9 million subscribers of mobile telephony in Serbia, with a penetration rate of 133 per cent, close to the EU-27 average, and also among the highest in the EGC. There are 3 operators offering services of mobile telephony: mts, controlled by Telekom Serbia (with a market share of 60 per cent based on the number of subscribers, and a market share of 50 per cent based on revenues), Telenor, a subsidiary of the Nordic telecom (with market shares of 29 and 40 per cent, respectively) and VIP mobile, controlled by VIP Austria, (with market shares of only 11 and 10 per cent, respectively). The first two operators have a network covering the entire country. The concentration index, HHI, is among the highest but comparable to six other countries of the EGC.

Prices of a mobile service package in Serbia offered by the 3 mobile operators are among the lowest in the EGC – the EU-27 average in 2009 was 11.4 Euros per month (Figure 14). The operator with the network that does not cover the entire territory of Serbia has the highest price.

Figure 14: Prices of mobile services for low usage users in per month (Euro)



Source: Cullen International, *Enlargement Countries Monitoring Report IV*, December 2010

Translation: HR-Croatia, MK-Macedonia, TR-Turkey, AL-Albania, BA-Bosnia-Herzegovina, ME-Montenegro, RS-Serbia and XK-Kosovo

A 10 per cent tax charged on mobile prices, as a measure to balance the budget due to the financial crisis, has raised some protests among the population.

There are about 590 thousand internet broadband connections and 252 thousand narrow-band connections in Serbia- The repartition of the respective technology is shown in Table11.

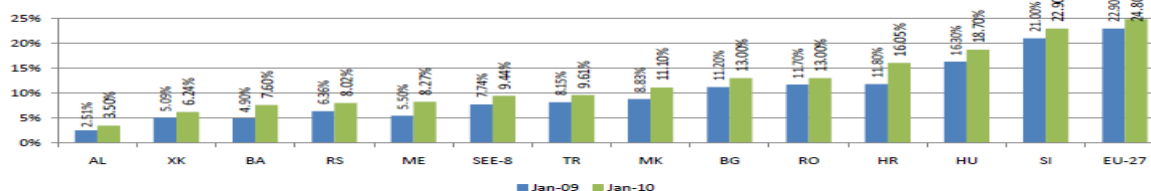
Table 11: Internet connections

Country	Operator	Total number of broadband connections (all technologies)	xDSL connections	Cable modem	Leased lines	FTTx	FWA	Other
Croatia	Incumbent	525,048	524,397	-	614	-	38	-
	Alternative operators	186,758	121,963	40,777	392	3,657	19,969	-
FYROM	Incumbent	117,289	116,314	-	265	-	-	710
	Alternative operators	109,862	24,565	61,256	20	-	6,278	17,543
Turkey	Incumbent	8,007,936	5,974,460	-	15,564	-	-	17,912
	Alternative operators	772,543	473,264	191,331	1,243	100,601	-	6,104
Albania	Incumbent	61,000	59,600	N/A	130	70	N/A	1,200
	Alternative operators	50,000	35,000	N/A	-	-	-	15,000
Bosnia & Herzegovina	Incumbent	170,212	169,539	-	673	-	-	-
	Alternative operators	121,901	2,103	62,634	235	235	55,961	533
Montenegro	Incumbent	44,606	44,606	-	-	-	-	-
	Alternative operators	7,278	-	70	-	-	7,208	-
Serbia	Incumbent	246,992	234,134	-	573	-	12,285	-
	Alternative operators	343,594	117,118	187,923	744	19	33,579	4,211
Kosovo (UNSCR 1244)	Incumbent	34,068	34,068	-	-	-	-	-
	Alternative operators	100,290	-	95,495	-	46	4,479	270

Source: Cullen International, *Enlargement Countries Monitoring Report IV*, December 2010

The broadband penetration rate in Serbia (8 per cent) is still low compared with the EU-27 average (24.8 per cent). The highest rate among the EGC is Croatia, with a rate higher than Romania and Bulgaria (Figure 15).

Figure 15: Penetration rates of broadband



Source: Cullen International, *Enlargement Countries Monitoring Report IV*, December 2010

There are about 200 internet providers in Serbia, but only 4 licenses were issued for broadband (Table 12). The incumbent in Serbia has one of the lowest market shares in the EGC (29.4 per cent in revenue). xDSL is the technology used for 60 per cent of the connections and cable is used in 30 per cent of total connections. Alternative operators use xDSL retail lines with a bitstream technology. Maximum internet speed in broadband in Serbia was quite satisfactory: 16 Mbps in downstream for xDSL and 60 Mbps for cable, which is comparable to the OECD average, although there are still a substantial number of connections with a low speed.

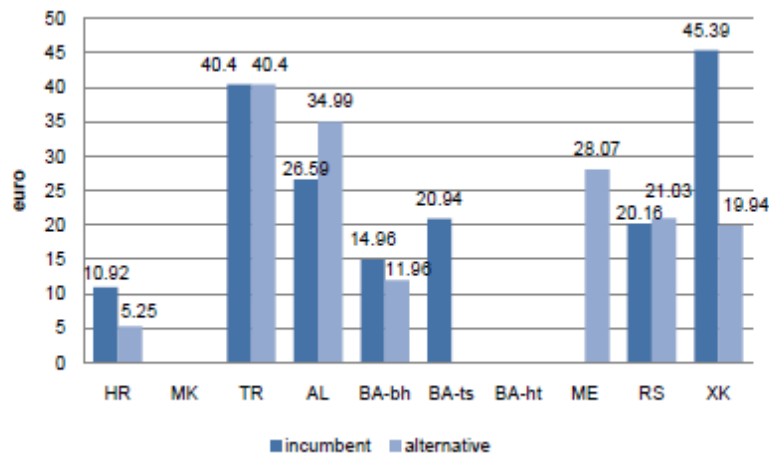
Table 12: Number of Internet Service Providers

Country	Total number of ISPs	Incumbent ISP's overall market share	
		By revenue	By number of connections
Croatia	55	68.90%	80.99%
FYROM	73	47.15%	51.70%
Turkey	108	89.74%	77.8%
Albania	92	54%	63.5%
Bosnia & Herzegovina	77	53.94%	64.28%
Montenegro	7	N/A	95.00%
Serbia	199	29.4%	29.3%
Kosovo (UNSCR 1244)	11	N/A	25.35%

Source: Cullen International, *Enlargement Countries Monitoring Report IV*, December 2010

Internet prices in Serbia are among the lowest in the group, with a monthly price for a broadband connection of 2 MBps of 20.16 to 21.03 Euros (Figure 16).

Figure 16: Subscription charge for 2 Mbps connection, including VAT (Euro)



Source: Cullen International, *Enlargement Countries Monitoring Report IV*, December 2010

A basic 3-play offer costs about 40 Euros per month, but is considered quite expensive in comparison with the average wage of 350 Euros.

There are 70 operators of cable TV which have regional monopolies. SBB is the largest company among them in Belgrade. The penetration rate of cable TV is still low (15 per cent).

The optical fiber network has started to be rolled out in Belgrade, but it reaches only businesses. The strategy of the government for the next 4 years in terms of the information society is to reach 20 per cent of the population with a minimum of 4 MB debit of broadband. This is the most difficult area of Serbia's telecommunication policy, particularly the coverage of less populated urban and rural areas. The regulator is counting on the CMA technology to cover these areas.

The regulation of the telecommunications markets is entrusted to RATEL, which is an independent institution with about 100 employees. The regulation in place follows the 2003 EU package, but an effort is being made to update the regulatory framework. RATEL is responsible for the management of the radio spectrum, for carrying out market analyses and for imposing remedies on dominant operators, as well as for regulating prices. RATEL has identified 7 markets for competition analysis, and is following the methodology of the EC, consulting the EC for its implementation. An observatory program has been established. In contrast to other enlargement candidates, no protocol has been celebrated between RATEL and the SCPC.

RATEL has considered that in Serbia, the following markets are relevant for *ex-ante* regulation on a national basis:

- fixed telephony;
- mobile telephony;
- leased lines;
- interconnection;
- internet services; and
- provision of cable distribution systems.

In its market analysis, RATEL identified two firms with "significant market power" and imposed the following remedies:

- Telekom Srbija enjoys significant market power in the retail public fixed telephone networks and services; remedies: network access and interconnection, non-discrimination, cost-orientation, transparency, prohibition of cross-subsidization and retail price control.⁶⁰
- SBB enjoys significant market power in retail radio and television program distribution via cable network; remedies: retail price control, accounting separation.⁶¹

Thus far, in only two markets, prices have been regulated: domestic fixed telephony and cable TV services. There is clearly another market where mobile operators have a monopoly position: the market for termination calls that has been regulated in most of the EU markets.

The method of price regulation follows the cost method based on historical data supplied by the regulated firms. More advanced methods, using long run incremental costs (LRIC) and other models that include efficiency will need to be introduced.

Regulatory enforcement is still rather weak. The maximum fine that can be imposed is presently 2 Million dinars. There are 5 cases on appeal. Courts are confronted with the complex technical issues involved and experienced difficulties with the respective decisions. Now, the Administrative Court has jurisdiction over appeals against decisions by RATEL.

The Government is now establishing universal service obligations by issuing licenses obliging the licensee to provide for specific types of service and coverage, but no financial compensation mechanism has been provided. Universal service obligations include: (i) access to a public telephone service enabling functional internet access (equivalent of a dial-up connection), (ii) special measures for disabled and socially disadvantaged users, (iii) free access to emergency services, public payphones, and (iv) access to a telephone directory and directory enquire services. RATEL has designated four operators responsible for the universal service obligations: Telekom Srbija, Tlenor, VIP and Orion Telecom.⁶² Financial mechanisms in order to compensate for the costs of the provision of universal services have been created in several European countries by joint contributions from all the operators and sometimes with additional charges to the present users.

In Serbia, the liberalization of the telecommunications sector took place at a later date than in most of the other countries in the EGC. Articles 32 and 109 of the Telecommunication Law of April 2003 granted Telekom Srbija exclusive rights for all fixed line services until 9 June 2005. The market was formally liberalized on 9 June 2005. Since then, only two licenses have been awarded: to Orion (Media Works) for FWA/CDMA services (June 2009) and to Telenor for fixed networks and services (February 2010). The new Law on Electronic Communications of 29 June 2010 foresees the full liberalization and a general authorization regime starting in January 2012. Since 2005, the public data network and services have been liberalized.

Because no operator in the mobile market has been found to enjoy significant market power, no reference interconnection offer has yet been issued. The unbundling of the local loop has been one of the major driving forces in the EU liberalization of telecommunication services. No reference unbundling offer has been issued in Serbia, but RATEL had to intervene in June 2010 to fix local loop

⁶⁰ RATEL decision of March 3, 2006.

⁶¹ RATEL decision of Feb 19, 2007.

⁶² RATEL decision of March 12, 2010.

unbundling charges for Telekom Srbija for the access by Telenor. Very few local loops have been unbundled.

No regulation has been issued on number portability, which is an essential instrument for promoting competition between telecom operators.

Privatization of the incumbent in the telecommunication markets has not yet taken place, although there are presently plans for it to take place in 2011. According to its financial data, Telekom Srbija has one of the highest profitability among the incumbents in the EGC, with a rate of return on capital employed (ROCE) of 12.7 per cent, EBITDA of 43.6 per cent and EBIT of 24.3 per cent in 2009 (Table 13). It is also by far the largest company in the EGC. As regards efficiency, measured by the number of fixed lines per employee (a measure used by the OECD) it is clearly behind Turkey and Bosnia & Herzegovina.

Table 13: Financial indicators of incumbents

Country	Fixed incumbent operator	Key financial ratios and performance indicators				
		ROCE	EBITDA margin in %	EBIT margin in %	Average number of employees	Number of fixed lines per employee
Croatia	T- Hrvatski Telekom	8.28%	37.74 %	17.60%	4,849	298
FYROM	Makedonski Telekom	30.02%	44.6%	26.7%	1,285	296
Turkey	Türk Telekom	36%	41%	26%	3,883	4,193
Albania	Albtelecom	3.82%	53.95%	9.70%	1,950	146
Bosnia & Herzegovina	BH Telekom	5.50%	39.06%	21.18%	1,100	490
	Telekom Srpske	4.88%	32.66%	10.35%	1248	146
	HT Mostar	-5.52%	0.49%	-22.05%	1,219	104
Montenegro	T-Com Montenegro	9.67%	39.36%	25.85%	917	194
Serbia	Telekom Srbija	12.7%	43.6%	24.3%	9,594	324
Kosovo (UNSCR 1244)	PTK	17.93%	31.24	12%	531	164

Source: Cullen International, *Enlargement Countries Monitoring Report IV*, December 2010

Serbia remains one of the countries in the EGC with the largest state control of the incumbent telecom operator (Figure 17).

Figure 17: State ownership of telecommunications operators

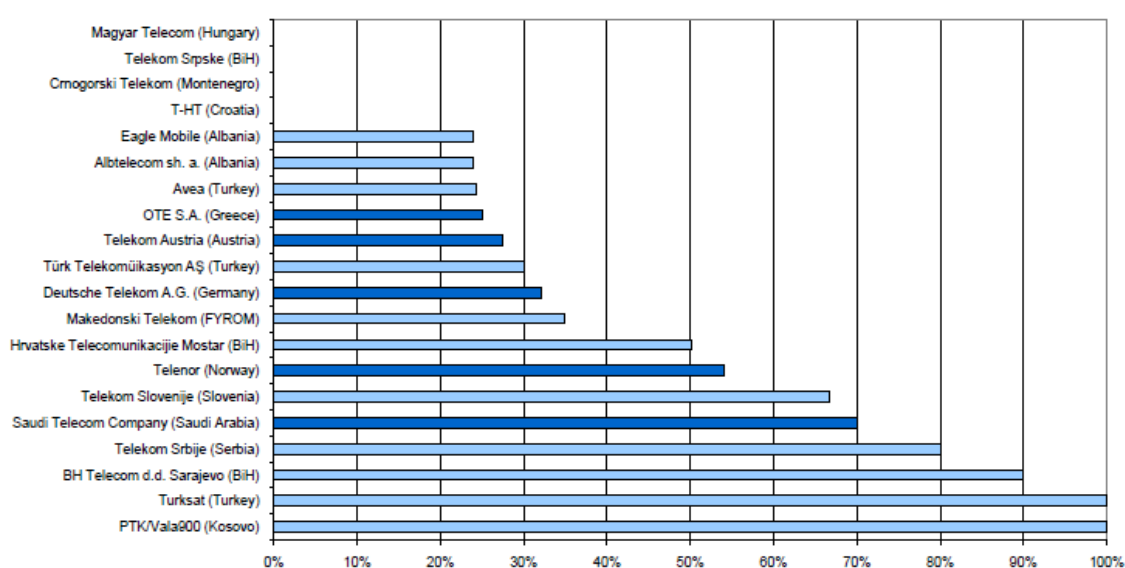


Figure 31 - State ownership of telecommunications operators

Source: Cullen International, *Enlargement Countries Monitoring Report IV*, December 2010

In most of the countries in the EGC, foreign operators have taken partial or full control of some telecom operators. In the case of Serbia, OTE has acquired 20 per cent of Telekom Srbija, Telenor has a subsidiary in mobile communications, like Telekom Austria/Mobilkom with VIP mobile.

Conclusion: Overall telecom prices remain below the EU-27 average and are among the lowest in the EGC. However the liberalization process is still incipient, mainly in terms of local loop unbundling, one of the methods widely recognized to give access to alternative operators. The incumbent company is the largest in EGC and is dominant in fixed line telephony and has the mobile operator with largest market share. However, there are other competing networks, like cable, which exercise competitive pressure in the market for internet. The Government intends to privatize Telekom Srbija, a highly profitable company, but with some signs of overstaffing. In terms of competition policy, it should subject the privatization contract to an opening of the fixed line network, to obligations of local loop unbundling and to the publication of reference offers. It would also be advisable to separate the fixed line and mobile services for privatization purposes.

4.4 Other sectors

Health

The provision of health services is mainly the responsibility of the public health service. There is a generalized health insurance for the entire population. Medicines are partly financed by the State. Medicine prices are regulated, and they are based on an average of the prices on 3 foreign markets: Italy, Slovenia and Croatia. Prices in these countries are relatively high because of protectionist policies, in the cases of Italy and Slovenia especially directed at giving an incentive to R&D.

The pharmaceutical industry was historically important in Serbia. Although some of the factories have closed it still remains important today, especially the production of generics. Most of the Serbian pharmaceutical companies have been acquired by German firms. Foreign producers of pharmaceuticals have raised the issue of the need to strengthen the standards of IPR in the sector.

An Agency for procurement of medicines and other consumables for hospitals centralizes the procurement of these products. Following historical trends, there is a lack of transparency in the procurement processes and methods based on former market sharing that was sometimes followed in the past.

The Anti-Corruption Agency has started to prosecute cases of corruption in the health sector. Five executives of pharmaceutical companies and three heads of national institutes for health have been arrested and charged for over-prescribing cancer medicines.

There is clearly a need for closer cooperation between the SCPC, the Anti-Corruption Agency and Procurement Agencies in order to avoid bid-rigging and corruption in procurement in the health sector, like in other sectors. The State auditor can also play an important role in the audit of procurement practices.

Financial markets

The banking system of Serbia has one of the lowest concentration ratios in Europe. There are 27 banks registered with the National Bank of Serbia. The four major banks have a market share of 40 per cent, based on total assets. The HHI is 637.

Table 7: Total assets of Serbian commercial banks
(as of the end of September 2010)

Total Balance Sheet		(in thousands of dinars)	Market share (%)
1	Banca Intesa a.d. Beograd	337,725,994	14.0
2	Komercijalna banka a.d. Beograd	253,926,389	10.5
3	Raiffeisen banka a.d. Beograd	210,014,730	8.7
4	Unicredit Bank Srbija a.d. Beograd	159,000,021	6.6
5	Hypo Alpe-Adria-Bank a.d. Beograd	147,091,818	6.1
6	Eurobank EFG a.d. Beograd	146,008,990	6.1
1	Agroindustrijska komercijalna banka AIK banka a.d. Niš	121,929,371	5.1
2	Société Générale banka Srbija a.d. Beograd	120,359,439	5.0
3	Vojvođanska banka a.d. Novi Sad	88,226,810	3.7
4	Alpha Bank Srbija a.d. Beograd	86,765,705	3.6
5	Volksbank a.d. Beograd	75,262,143	3.1
6	ProCredit Bank a.d. Beograd	68,814,367	2.9
7	Poljoprivredna banka Agrobanka a.d. Beograd	67,442,297	2.8
8	Erste Bank a.d. Novi Sad	61,817,221	2.6
9	Piraeus Bank a.d. Beograd	49,496,155	2.1
10	NLB banka a.d. Beograd	47,294,017	2.0
11	OTP banka Srbija a.d. Novi Sad	43,324,050	1.8
12	Crédit Agricole banka Srbija a.d. Novi Sad	40,638,054	1.7
13	Razvojna banka Vojvodine a.d. Novi Sad	36,582,568	1.5
14	Univerzal banka a.d. Beograd	33,014,672	1.4
15	Banka Poštanska štedionica a.d. Beograd	32,891,265	1.4
16	Privredna banka Beograd a.d. Beograd	32,048,669	1.3
17	Čačanska banka a.d. Čačak	28,385,037	1.2
18	Marfin Bank a.d. Beograd	28,163,212	1.2
19	KBC banka a.d. Beograd	27,010,622	1.1
20	Findomestic banka a.d. Beograd	18,340,059	0.8
21	Srpska banka a.d. Beograd	13,618,333	0.6
22	Credy banka a.d. Kragujevac	9,705,066	0.4
23	Jugobanka Jugbanka a.d. Kosovska Mitrovica	8,826,203	0.4
24	JUBMES banka a.d. Beograd	8,097,209	0.3
25	Opportunity banka a.d. Novi Sad	4,483,429	0.2
26	Moskovska banka a.d. Beograd	1,854,644	0.1
27	Dunav banka a.d. Zvečan	1,827,475	0.1
TOTAL		2,409,986,034	

Source: National Bank of Serbia

The majority of the banking sector is now fully privatized, although the State has still minority shares in several commercial banks, and controls the second largest bank. The larger banking groups are controlled by foreign banking firms from Italy, Austria, Greece, Germany, France and Slovenia.

Table 8: Major shareholders of Serbian commercial banks

30.09.2010.	Major shareholders
Banca Intesa a.d. Beograd	Intesa Sanpaolo Holding International S.A.77.79% Intesa Sanpaolo SPA15.21% IFC7.00%
Komerijalna banka a.d. Beograd	Republika Srbija42.59% European bank for reconstruction and development25.00%
Raiffeisen banka a.d. Beograd	Raiffeisen International Bank-Holding AG100,00%
Unicredit Bank Srbija a.d. Beograd	UNICREDIT BANK AUSTRIA AG100.00%
Hypo Alpe-Adria-Bank a.d. Beograd	HYPO ALPE-ADRIA-BANK INTERNATIONAL AG Klagenfurt99.92%
Eurobank EFG a.d. Beograd	EFG Eurobank Ergasias Athens55,21% EFG NEW EUROPE HOLDING B.V. AMSTERDAM42,74%
Agroindustrijska komercijalna banka AIK banka a.d. Niš	Agricultural Bank of Greece20.34% UNICREDIT BANK AUSTRIA AG5.66%
Société Générale banka Srbija a.d. Beograd	Societe Generale S.A.99.99%
Vojvodanska banka a.d. Novi Sad	National bank of Greece100.00%
Alpha Bank Srbija a.d. Beograd	ALPHA BANK A.E.100.00%
Volksbank a.d. Beograd	Volksbank international AG96.90%
ProCredit Bank a.d. Beograd	ProCredit holding a.g.Frankfurt83.33% Commerzbank AG Frankfurt16.67%
Poljoprivredna banka Agrobanka a.d. Beograd	Republika Srbija20.07% Hypo Kastodi 47.60%
Erste Bank a.d. Novi Sad	EGB CEPS HOLDING GmbH, Wien74.00% Steiermärkische Bank und Sparkassen AG, Graz26.00%
Piraeus Bank a.d. Beograd	PIRAEUS BANK SAPIREUS100.00%
NLB banka a.d. Beograd	NOVA LJUBLJANSKA BANKA99.50%
OTP banka Srbija a.d. Novi Sad	OTP BANK91.43% HOME ART & SALES SERVICES A.G.4.03%
Crédit Agricole banka Srbija a.d. Novi Sad	CREDIT AGRICOLE S.A.100,00%
Razvojna banka Vojvodine a.d. Novi Sad	Izvršno veće AP Vojvodine61.87% "DDOR Novi Sad" A.D.10.10%
Univerzal banka a.d. Beograd	Banka nema akcionare sa više od 5% glasačkih prava
Banka Poštanska štedionica a.d. Beograd	Republika Srbija68.48% JP PTT Saobraćaja Srbija23.89%
Privredna banka Beograd a.d. Beograd	Republika Srbija19.41%
Čačanska banka a.d. Čačak	Republika Srbija38.84% European bank for reconstruction and development London24.99%
Marfin Bank a.d. Beograd	MARFIN POPULAR BANK PUBLIC Co Ltd97.22%
KBC banka a.d. Beograd	KBC INSURANCE NV100.00%

Source: National Bank of Serbia

A recent *Financial Stability Report* by the National Bank of Serbia⁶³ concludes that the financial system is in good health, with an average capital adequacy ratio above 8 per cent and a deposit insurance system in place. The financial sector withstood quite well the effects of the 2007-2009 global financial crisis. This was largely due to the tight credit policies pursued by the National Bank of Serbia during the expansionary phase of 2004-2008. Capital buffers created in the run up to the crisis proved to be the key factors in alleviating its effects. Prompt action, notably the Vienna Initiative (FSSP),⁶⁴ produced tangible results within a relatively short period of time. The introduction of Basel II and a timely upgrading of the framework in line with international standards and best practices represent a logical continuation of the National Bank of Serbia's prudential and countercyclical policy.

⁶³ National Bank of Serbia. *Financial Stability Report*, 2010, available at the site of the bank.

⁶⁴ On 27 March 2009 in Vienna, under the IMF's auspices, a coordination meeting was held with banking groups whose subsidiaries operate in Serbia (making up around 60% of the domestic banking sector's balance sheet total). At this meeting, banking groups committed to maintaining their exposure to legal entities in Serbia over the next two years at least at their December 2008 levels. They also undertook to maintain the solvency and liquidity of their subsidiaries above the prescribed minimum and to consider pre-emptive recapitalization should the results of stress tests implemented by the NBS so require.

5. FURTHER ASPECTS OF THE COMPETITION POLICY REGIME OF SERBIA: ACHIEVEMENTS AND CONSTRAINTS

5.1 Institutional Framework

The Ministry of Trade is responsible for the overall competition policy. The SCPC is an independent Authority and is responsible for law enforcement subject to the control of the Administrative Court, and can be consulted by the Government and the Parliament on competition issues. The Ministry of Economy is responsible for the external trade and investment regime and jointly with the Ministry of Finance carries out the privatization program. Procurement is regulated by the Central Procurement Office but is decentralized.

This chapter will analyze the policies that have a direct impact on the level of competition in the Serbian markets: (i) external trade regime, (ii) foreign investment regime, (iii) privatization, (iv) procurement, and (v) regulatory entry and exit barriers to do business.

5.2 External Trade and Foreign Investment Regime

External Trade Regime

The Republic of Serbia has made significant progress in liberalizing its external trade regime and has obtained favorable treatment in most of its important foreign markets. Exports to the EU, representing about 60 per cent of the total of Serbian exports, were freed from any import duties after the fall of the Milosevic regime in 2001, except for agricultural products that are subject to some restrictions. Similar rights have been extended by EFTA. About 17 per cent of Serbian exports are sold in the Central European Free Trade Association (CEFTA) that has eliminated import duties on industrial goods, and a large part of the remainder is exported to Russia, with whom Serbia has a free trade agreement covering most of the exports. With the creation of a customs union between Russia, Byelorussia and Kazakhstan in 2009, Serbia also extended free trade agreements to these other countries. In June 2010, it also started to negotiate a free trade agreement with Turkey.

About 55 per cent of total imports into Serbia come from the EU and 20 per cent of Serbian imports are covered by CEFTA, with about 10 per cent coming from Russia. Presently, overall import duties are about 8.7 per cent, on a total revenue base. Quantitative restrictions have already been abolished for almost all products. Serbia started unilaterally to reduce barriers to EU exports into the country in 2009, covering about half of the industrial products. According to present Government plans, Serbia will eliminate all barriers to EU exports in industrial goods by the end of 2014. Under the SAA, all import taxes for imports originated in the EU will have to be abolished. In agriculture, there will remain several restrictions. The overall tariff equivalent is estimated at about 2 per cent at the end of the process.

Serbia is part of CEFTA since 2007. The main objectives of CEFTA are to expand trade in goods and services and foster investment by means of fair, stable and predictable rules, eliminate barriers to trade between the Parties, provide appropriate protection of intellectual property rights in accordance with international standards and harmonize provisions on modern trade policy issues, such as competition rules and State aid. It also includes clear and effective procedures for dispute settlement and facilitates the gradual establishment of the EU-Western Balkan countries zone of

diagonal cumulation of origin, as envisaged in the EC's Communication of 27 January 2006.⁶⁵ The Agreement fully conforms to the WTO rules and procedures and EU regulations. CEFTA has eliminated tariffs in all industrial goods, but only a small part of agricultural goods are covered.

Negotiations with the World Trade Organization (WTO) are under way and the Serbian Government estimates becoming a full member in 2011. The remaining obstacles are bilateral negotiations with several countries, mainly Ukraine.

Some agricultural products, like wine and spirits, meat and dairy products are subject to quantitative restrictions by the EU, and they are also subject to similar restrictions by Serbia. Meat and vegetables are also a concern in the trade with Turkey. There are also substantial problems with exports of agricultural products to Russia due to the quality standards imposed by that country.

Serbia intends to become a candidate country for the European Union by December 2012.

Trade liberalization has had a very favorable impact on the overall economy of Serbia. In particular, it has allowed the increase of the coverage of imports from 30 per cent in 2000 to about 60 per cent in 2010. The most important exports of Serbia are agricultural products, steel, other mineral products (copper and aluminum), textiles and cars and car parts.

There are presently 6 free zones established in industrial parks in Serbia.⁶⁶ They exempt all imported and exported goods from duties and VAT (18 per cent). All major municipalities have established a free zone and local governments have given important subsidies in terms of land and infrastructures. Several industries like automobiles (Fiat), tires (Michelin), textiles and machinery assembly have benefited from these schemes.

Foreign Investment Regime

Serbia was recently considered by OECD to have a favorable foreign direct investment (FDI) regime among SEE countries - outside of the EU, Croatia and Serbia have the highest scores in FDI policy.⁶⁷ The FDI agency, Serbian Investment and Export Promotion Agency (SIEPA), is considered to be one of the best agencies for promoting foreign investment.⁶⁸ According to this report, some of the areas that need further improvement are: (i) protection of IPRs, (ii) training of workers and continuing education, (iii) transparency and the fight against corruption in procurement procedures, and (iv) the privatization program.

Serbia provides substantial financial and tax incentives for FDI. Strategic sectors for FDI considered by the Government are:

- Automotive industry: Serbia will start producing 200 thousand cars per year in the Zastava factory that was taken over by FIAT. The Zastava factory has attracted more than 30 per cent of FDI, representing about €1.3 billion of FDI inflows to Serbia since the year 2000, and

⁶⁵ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0027:FIN:EN:PDF>.

⁶⁶ Law on Free Zones (Official Gazette of Republic of Serbia, no.62/06).

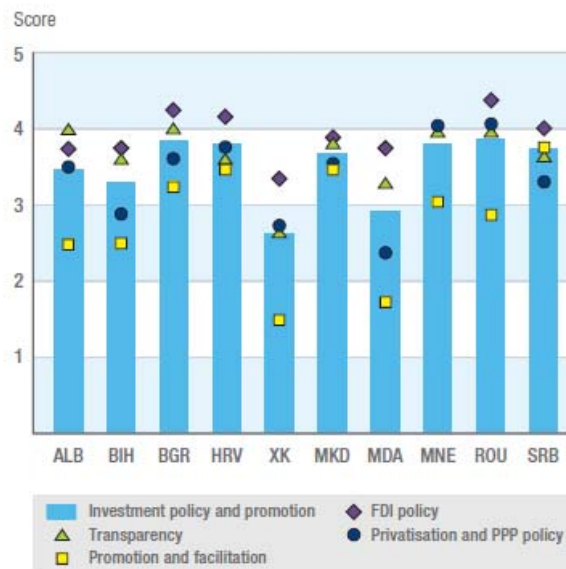
⁶⁷ OECD (2010). Investment Reform Index 2010: Monitoring Policy and Institutions for Direct Investment in South-East Europe.

⁶⁸ See its site: <http://www.siepa.gov.rs/site/en/home/>

creating close to 20,000 new jobs. The industry benefits from favorable customs, tax, logistic and infrastructural conditions.

- Food industry: This industry would be attractive given Serbia's large amount of arable land, good research institutes, proximity to European markets and its climate suitable for the production of fruits and vegetables.
- ICT industry: Serbia is home to highly experienced and skilled labor. Technical education in Serbia is particularly strong, with about 33 per cent of university graduates coming from technical schools. In addition, Serbia has the highest percentage of English speaking population in the SEE region (49 per cent).

Figure 11: OECD Investment Policy Index



Source: OECD (2010) *Investment Reform Index 2010*

In its last report,⁶⁹ the OECD recommends: (i) to improve, ensure transparency and simplify procedures for acquiring business-related licenses and permits at the sub-national level, possibly giving the FDI agency a one-stop-shop function; (ii) conduct public-private consultations, e.g. for the construction of fiber optic networks, (iii) promote multinational cooperation in cross-border regional networks for roads and railways, and (iv) develop Public Private Partnerships, by enacting appropriate legislation, become knowledgeable in cost-benefit analysis and drawing-up contracts, as well as in the monitoring of those projects, that may be particularly useful in large-scale infrastructure (energy and transport).

Particularly important for Serbia are the free trade agreements with Russia and other Eastern European countries that allow European firms to export to that market without barriers, when the goods contain more than 51 per cent of Serbian content.

⁶⁹ OECD (2010). *Investment Reform Index 2010: Monitoring Policy and Institutions for Direct Investment in South-East Europe*.

5.3 Privatization and competition

In economies in transition, privatization policies are an essential part of building a market economy, and thus are part of competition policy. In fact, the way in which a firm is privatized can mold competition in a given market. For example, the privatization of a state monopoly may lead to a private monopoly, which can increase efficiency of the firm, but it will lower overall social welfare in the long term. Private monopoly controlled by foreign investors will potentially siphon away much of the producer surplus generated by it. The maximization of the funds for the Treasury, which are generated by the privatization is a genuine and commendable concern, but should also be accompanied by other concerns like competition policy. It is not the right approach to claim that competition concerns are taken into account since the competition law subjects mergers and acquisitions to the approval of the competition authority and since sector regulation will apply afterwards. Merger notification may be the final act in the process of privatizing a state-owned company and it is extremely difficult for a competition authority to undo a long and complex process undertaken with Government authority. Besides, to correct structural problems after the firm has been privatized is institutionally and legally extremely difficult, since shareholders will argue that they have paid a certain price reflecting the pre-agreed institutional framework.⁷⁰ Usually, competition and regulatory laws are not well equipped to solve structural problems of markets.

In Serbia, the privatization program started in 2001, with around 3,000 companies in the State's portfolio. In order to carry out the privatization process the Government set up a Privatization Agency with the following functions: (i) privatize companies with the aim of maximizing the revenue for the State and creating conditions for the future sustainability of ownership, (ii) undertake bankruptcy procedures for state-owned firms without a viable market solution, and (iii) monitor performance of privatization contracts. In the privatization process, large companies were to be sold under negotiated tenders and small companies under auctions. The Government intended always to sell majority ownership in order to transfer control to the private sector, and distribute about 30 per cent of shares to the workers and the population, in equal parts. The Government also set up a Shareholders Fund in order to manage the shares distributed to the population.

Thus far, the program has been successful: the Government sold more than 2,000 companies, with an intake of around 2.3 billion Euros. There are still about 1,000 companies left for privatization, mainly public utilities, including about 700 companies that are not purely commercial. The major companies, in terms of capitalization, still under state control are electricity, airline and airport (JAT Airways, JAT Tehnika and Airport "Nikola Tesla"), a mining complex (RTB Bor) and telecommunication. The oil company was sold as discussed in section 4.2.3. The Government is now in the process of selling 51 per cent of Telekom Srbija.

Although in some cases competition policy has been taken into account in the privatization process like in the banking sector this has not always been the case. In the case of Telekom Srbija that, as we saw above, has a monopoly in fixed line telephony and a dominant position in mobile telephony, competition concerns could be pursued by splitting the company into two: one that obtains the fixed line telephony business and the other a mobile operator. There are concerns that such a solution would decrease the overall value of cash received by the State. As a minimum, and given the fact that the unbundling of the local loop has yet to take place in Serbia and is a major requirement in the EU telecom policy, the obligation to undertake such measure could be included in the privatization contract.

⁷⁰ One of the most recent cases were the difficulties in the separation of the copper and cable networks of the telecom incumbent firm in Portugal, after more than 10 years of privatization into a quasi-monopoly of those networks.

The role of the SCPC has been limited to assess mergers after the deal is consummated. However, this is too late for any significant structural remedy to be implemented, since this could be seen as going against government policy. Competition concerns about each privatization process should be taken into account right at the beginning of the process and be part of the overall decision of the Government. These concerns will have even more importance as the majority of companies still to privatize are in the nontradables sector, and thus not subject to international competition pressure.

5.4 Procurement Procedures

Public procurement represents about 16.7 per cent of GDP in EU countries, with a larger share in some Balkan countries, including all enterprises controlled by the State.⁷¹ Experience in several countries shows that improving efficiency and competition in public procurement can yield 20 to 30 per cent of savings in public expenditures. A World Bank assessment undertaken in 2002 refers to several problems that seem yet to persist: lack of training of procurement officials, widespread corruption in procedures, and lack of auditing functions both at central and local levels. The health sector is singled out as the most problematic. There are important economic consequences, namely to alienate small and medium enterprises, as well as some foreign firms, from the procurement process, discriminating against an important sector of the economy and distorting the level-playing field for competition. However, progress has been significant in several areas like setting up the Public Procurement Office and a Bidders' Commission Review.

The agency in charge for monitoring and promoting best practices in procurement is the Public Procurement Office.⁷² Inter alia, its responsibilities are:

- the participation in drafting the regulations pertaining to the sphere of public procurement;
- providing consultation services to procuring entities and bidders;
- monitoring public procurement procedures;
- submission of requests for the protection of rights in the case of a violation of the public interest;
- informing the body in charge of auditing public funds and budget inspections and other bodies competent for the initiation of offence proceedings on irregularities in conducting public procurement procedures and delivering public procurement reports which have been identified in the course of the performance of the above-mentioned activities;⁷³
- issuance of certificates to public procurement officers, as well as keeping the register of the public procurement officers who have been issued certificates; and,
- informing public entities and undertakings on cooperation with national and international institutions.

The Public Procurement Office and the Review Commission are the institutions responsible for ensuring compliance with regulations on public procurement.

⁷¹ See, e.g., World Bank, *Croatia: Country Procurement Assessment Report*, March, 2005. The latest similar report available for Serbia is World Bank. Federal Republic of Yugoslavia: Country Procurement Assessment Report. June, 2002.

⁷² <http://www.ujn.gov.rs/en.html>

⁷³ This item does not clearly state the obligation to notify SCPC of any evidence of bid-rigging.

The Law on Public Procurement⁷⁴ is not yet harmonized with EU legislation, has a substantial number of exemptions and does not institute a clear procedure for public procurement and auctions. Several by-laws have also been enacted. The World Bank report cited above had already pointed out some weaknesses like giving too much leeway for procurement agencies to choose restricted auctions and bid opening procedures that exceed its function, and the lack of transparency in the criteria for selection of bids. Another major problem identified is that sometimes procurement managers do not follow the recommendations of the Tender Commissions and act at their own discretion in making transactions.

A twinning project, "Strengthening Public Procurement in Serbia" (SPPS) is under way between the Public Procurement Office of Serbia and the Local Government Denmark (LGDK), with support of the European Commission. The objectives of the project are: fighting corruption, implementation of anti/corruption measures, and alignment with EU standards. Many corruption cases are detected through the complaints by bidders. Therefore, it is important to train bidders in knowing their rights and the functioning of the complaint system and the Review Commission. Training PP-officers with high ethical standards is evenly important: they are in the front-line to carry out efficient and law-obeying public procurement procedures. The development of an ethical code of conduct for procurement officers is being undertaken by the Twining Project.

The standardization of procedures and documents and transparency are crucial for strengthening competition in public procurement. An important solution is to organize procurement according to the following 3 principles:

- For the supply of standard goods and services (consumables) the price should be the only decision criterion, based on a sealed-envelop auction, (a data base of prices could be prepared by Authorities, reporting winning bids as a reference).
- Large public works should be subject to only two stages of selection. The first stage should serve the qualification of bidders based on competence and minimum financial capability, with criteria defined rigorously and in a transparent way. The second stage should be based on best-cost bidding, in a sealed-envelop auction.
- The criteria for consulting and other highly specialized services should most importantly be based on competence and experience.

This classification shows that procurement should not be undertaken according to a "one model fits-all" approach and should depend on the particular object of the procurement. A high number of participants, independent competitive bidders, and transparent auction methods, help to avoid bid-rigging. Electronic procurement has also led to substantial improvement in several countries.

The current Procurement Law of Serbia, requires under Article 19 that the procuring entity shall exclude a bid "if it has indisputable proof that a bidder has given, offered or alluded to, directly or indirectly, a gift or some other benefit [or that a bidder has threatened, directly or indirectly] a member of the Public Procurement Committee, a person who participated in the preparation of the tender documents, a person participating in planning the public procurement or some other person in order to influence them in order to discover confidential information or influence the procuring entity's action or decision making in any phase of the public procurement procedure". The Law is not harmonized with the Directive (EC) 18/2004, UNCITRAL and OECD recommendations that lists, besides corruption, other reasons for exclusion: (i) participation in a criminal organization, (ii) fraud,

⁷⁴ Official Gazette of Republic of Serbia 39/2002.

and (iii) money laundering. Moreover, it does not stipulate another important reason for annulling the tender – evidence of bid-rigging.^{75,76}

Moreover, the Procurement Law should also stipulate that when there is evidence of bid-rigging, the facts should be communicated to the SCPC accompanied by all the supporting documentation. Such process should be performed with a maximum secrecy and parts should not be informed of the specific reason in order to protect the investigation.⁷⁷

The Procurement Law does not contain other provisions to avoid collusion, like the exclusion of consortia to cartelize the market, or provisions to avoid collusion during negotiation with pre-selected candidates.

Another important element is to prohibit negotiations after tenders have been presented, even in procurement models like the negotiated procedure or the competitive dialogue procedure, as the European Commission has recently clarified: “In open and restricted procedures all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held only for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting authorities, and provided this does not involve discrimination.”

The experience in several European countries shows the prevalence and seriousness of bid-rigging even in the most developed countries. Criminal sanctions for officials that violate the law and exclusion of firms from future public procurement for a period of 4-6 years have proven to be quite effective.

Pursuant to Article 57 of the Procurement Law, “A procuring entity may reject a bid due to an abnormally low price.” Although the entity should consult the bidder to understand the reasons for the low price, it is also not in accordance with the best practices where exclusion of low prices should be done only in exceptional circumstances, in order not to defeat the purpose of the minimum cost for the State.

A very important concept that has not yet been adopted by the regulation on procurement is the minimization of cost to the State over the cycle of the product. E.g., a car may be offered at a low price, but the spare parts required afterwards may be so expensive that the total cost for the good may be much higher than the analysis of the bid showed.

⁷⁵ The Model Law of UNCITRAL stipulates in “Article 12. Rejection of all tenders, proposals, offers or quotations: 1. The purpose of article 12 is to enable the procuring entity to reject all tenders, proposals, offers or quotations. Inclusion of this provision is important because a procuring entity may need to do so for reasons of public interest, such as where there appears to have been a lack of competition or to have been collusion in the procurement proceedings, where the procuring entity’s need for the goods, construction or services ceases, or where the procurement can no longer take place due to a change in Government policy or a withdrawal of funding. Public law in some countries may restrict the exercise of this right, e.g., by prohibiting actions constituting an abuse of discretion or a violation of fundamental principles of justice.”

⁷⁶ The World Bank Guidelines on Procurement that have been the basis of a substantial number of laws across the world, also refer as improper conduct and grounds for exclusion of bids or annulling the procedure the following practices: (i) corrupt, (ii) fraudulent, (iii) collusive, (iv) coercive, and (v) obstructive.

⁷⁷ The Model Law also says in Article 12: “Paragraph (1) does not require the procuring entity to justify the grounds that it cites for the rejection.”

There is currently the practice of giving a 20 percent cost advantage (or 20 points more in a 100 points contract criteria) to domestic firms in procurement auctions, in order to support domestic industry and services. According to Article 52 (4) of the Procurement Law, "In the case of applying the criterion of the lowest price offered, and in a situation where there are bids of a domestic and a foreign bidder providing services or performing works, the procuring entity must select the bid of the domestic bidder provided that its price offered is not more than 20 per cent higher compared to the lowest price offered by the foreign bidder." This favorable treatment of domestic bidders decreases the pressure from import competition.

Health Procurement

Serbia has a national health system with full coverage of the national health insurance for its population. The system is financed through a tax on wages and budget resources. Companies can have supplemental insurance for certain types of health costs, like for dental health and surgical procedures.

There are lists of medicines and health products with different levels of State financing. For medicines bought in pharmacies, the State contribution is reimbursed directly by the National Institute of Health. There are currently payment arrears from the Institute, but there are substantial arrears from hospitals and other health entities to pharmaceutical companies.

Procurement is made directly by hospitals and other health institutes, but is centralized at the level of National Institute of Health, among others, for (i) dialysis products, (ii) citostatics (cancer medicines), and (iii) hip implants. The Institute also deals with procurement for construction.

The procurement procedure starts by receiving requests from hospitals at the beginning of the year. These requests are then aggregated and submitted to expert teams for their opinion. Following this, the invitation for bids starts. The auction is announced in the Official Gazette of Serbia with all the specifications. Participants are given 30 days to submit a bid. In the case of construction and hip replacements, the Institute establishes a limited list of bidders that are qualified. In the case of medicine, the product has to be previously approved for use in Serbia by the Agency for Medicines and Medical Devices, even if it has already been approved by the FDA in the United States or any major EU members State.

The bidders have to submit documentation on each of the products indicating the respective price, the term of delivery and the terms of payment. The criteria for the selection of the winning bid are based not only on the price but also on the quality of the product and the terms of delivery and payment, which should be clearly fixed in the bidding documents.

An expert team assesses the quality of the product. In the case of a restricted auction (construction and some medical devices), as well as in cases where only one supplier submits a bid, a process of negotiation takes place. The results of auctions are published in the Official Gazette. There is usually only one auction by type of product per year. The plan for auctions is established at the beginning of the year. If the respective product lacks in the hospitals, the Institute may be put under pressure to carry out the auction rapidly. Contracts are then established for 1-year supply.

The National Institute of Health has found indications for bid-rigging, either by forming consortia or by fixing prices, but proceeded with the auction. The law does not require that such auction had to

be annulled⁷⁸ or to inform the SCPC of the evidence of collusion. There have also been cases where companies have divided the markets among hospitals, but there is no mechanism for monitoring procurement procedures.⁷⁹ There is also no centralized data base on the results of the auctions in order to monitor prices and possible collusion.

The State Auditor of the Republic of Serbia, which started operating in 2009, is responsible for the auditing of public sector accounts and procurement procedures, but lacks sufficient resources. In most developed countries, the Court of Accounts plays a major role in auditing, ex-post, the accounts of all State institutions and identifying major problems in the procedures and processes of procurement, concessions and other contracts between the State and private entities.

5.6 Doing business: entry barriers and exit

Successive governments have made several efforts to improve Serbia's business environment, although significant problems remain according to cross-country surveys. Serbia was ranked 88th in the World Bank's *Doing Business 2010* survey. In the 2008/09 *Business Environment and Enterprise Performance Survey* (BEEPS IV), enterprises identified tax rates, competition from the informal sector and a lack of access to finance as the main obstacles to doing business. The Government has established a "guillotine" project to promote regulatory reform and, as of mid-2009, an inventory of existing regulations has been prepared. In addition, a one-stop shop for company registration began operating in May 2009 in order to reduce the time needed to register companies from 23 to 5 days.

Major progress still needs to be done in the areas of rule of law, by improving the efficiency of the Courts that are overloaded with cases and take a long time to decide.⁸⁰ Serbia's business environment would also benefit from an improvement in the public administration procedures and a more transparent and non-discretionary system. The regulatory system still needs to be improved as discussed above. The Central Bank also claims in its *Financial Stability Report, 2010* that an improved and speedier bankruptcy procedure would also contribute to a transfer of resources to more productive firms and sectors.

According to the latest Global Competitiveness Report of the WEF for 2010-2011, the four main obstacles to business in Serbia, based on a survey conducted among businesses in the country, are: corruption, inefficient Government bureaucracy, political instability and difficulties in access to credit. In the area of institutions, the report cites (i) the lack of protection of minority interests, (ii) the lack of efficiency of corporate boards, (iii) the inefficiency of the legal framework for settling disputes, (iv) the burden of government regulation, and (v) the favoritism in decisions of Government officials. In the area of goods market efficiency, the report refers to (i) the extent of

⁷⁸ The law enables the procurement agent to exclude bids with unusual low prices, without any further investigation, which seems quite at odds with the objective of procuring the lowest prices for supplies to the State.

⁷⁹ The World Bank report refers to a case of market sharing among several domestic pharmaceutical industries that would violate Serbia's competition law. The report also undertook an estimation of potential savings if a competitive bidding system was in place for a sample of medicines and computed savings of about 20% of the total cost for the State budget. Once again this shows the importance of conducting procurement according to competition rules.

⁸⁰ The European Commission stresses the importance of fighting corruption and organized crime in building the rule of law (Strategy Paper of 2009).

market dominance, and (ii) the effectiveness of anti-monopoly policy, questions that were addressed above in this report. The report also gives low marks to business sophistication which is related to the lack of experience of managers in managing firms in a market economy subject to strong forces of globalization. The highest marks were given for the health and education sectors that have contributed to reasonably good levels of human capital.

6. INTERNATIONAL COOPERATION AND CAPACITY-BUILDING

6.1 Assistance to the Serbian Commission for Protection of Competition

The Assistance to the Commission for the Protection of Competition (ACPC) was a 36-month project funded by the EC, and managed by the European Agency for Reconstruction (EAR). The project was carried out between 2008 and 2010.⁸¹ It was implemented by an international consortium selected by the EAR and the Project's beneficiary. The Consortium was led by the IRZ Foundation (Deutsche Stiftung für internationale rechtliche Zusammenarbeit e.V.), Germany and included the German Technical Cooperation GTZ (Deutsche Gesellschaft für technische Zusammenarbeit GmbH), Germany and Colja, Rojs & Partners (Law firm Colja, Rojs & partnerji, o.p., d.n.o.), Slovenia.

The ACPC project was set up in January 2008 to provide support to the SCPC, as well as other partners as the judiciary, selected ministries, sector regulators, the business community and all institutions involved in SAA agreement where competition is one of the most important areas. The Project had 3 components: (i) strengthening the institutional capacities of the SCPC, (ii) harmonizing the legal framework and its implementation with the relevant EU rules in the field of competition and (iii) increasing awareness on competition policy. Altogether, the project engaged 3 long term experts (including the task leader, Andrej Plahutnik, former head of the Slovenian Competition Authority) and 19 short-term experts responsible for the implementation of all planned activities.

Regarding the first component, the ACPC project undertook 33 workshops on competition law and enforcement and on competition economics, by internationally experienced experts. It assisted the staff with the solution of procedural and substantive competition law and economic issues using international experience. The Project contributed also to the institutional strengthening of the Commission by pointing out some weaknesses like (i) the lack of members of the Board in full time, (ii) the procedure for selecting Board members, (iii) the large number of merger notifications, caused by low thresholds, together with short legal deadlines for taking the final decision, which led to a situation where all case handler are predominantly occupied with merger control, (iv) the lack of resources to prosecute cases of anticompetitive practices, (v) the lack of competition advocacy, and (vi) the SCPC's lack of power to sanction offences. Under the ACPC project, it was also pointed out that the SCPC's effectiveness was limited because of the lack of technical staff and limited budgetary resources. Some of these weaknesses were corrected by the new law.

⁸¹ See the website of the project www.acpc-rs.org

In fact, a major contribution of the ACPC project was the assistance in drafting a state of the art competition law, as described in the first part of this Report, which solved the majority of the weaknesses identified in the previous law.

Increasing awareness on competition law was undertaken by 16 seminars with the business community, law faculties, ministries and consumer associations. The partner for these actions of competition advocacy was the Chamber of Commerce. Training and information was provided to judges of the High Court of Commerce, the previous court in charge of controlling decisions of the SCPC, to the Judicial Academy and to the Administrative Court. The Project also contributed to clarify and intensify the institutional relations between the SCPC and the Ministries and other state institutions, namely the Ministry of Trade and Services which is in charge of competition policy in general. It also contributed to the formulation of strategic documents and to the introduction of a State Aid regime. Finally, the project contributed to intensify international cooperation by organizing study visits to the European Commission and European Courts, and to several National Competition Authorities and National Courts.

A second project of technical assistance to the SCPC, is being prepared by the Government with the support of the EC. This project shall start by the end of 2011, with the duration of 2 years. There is also interim technical assistance provided by the German Government which aims at providing training in dawn raids.

6.2 International Cooperation

The Commission is a member of the International Competition Network (ICN) and cooperates in different areas by contributing papers on the Serbian competition policy. The SCPC reported to the ICN Working Group, which deals with issues of advocacy and promotion of competition and collects data on the experiences of market analysis, as part of efforts to promote competition.

The SCPC is also active in projects of the Organization for Economic Co-operation and Development (OECD) and has sent several staff members to the OECD training centre in Budapest. A case on the abuse of a dominant position by entering into exclusive agreements which was based on the SCPC's decision against the cable operator SBB, was presented in 2009 at a seminar in the OECD Regional Centre in Budapest. Furthermore, the SCPC benefits from UNCTAD technical assistance on competition law and policy issues and participates in the intergovernmental meetings organized by UNCTAD's Competition and Consumer Policies Branch.

In October 2009, the SCPC and the ACPC project organized the first regional conference dedicated to the protection of competition, "Trade - the mirror of the market economy", with the participation of representatives of bodies for the protection of competition, chambers of commerce and representatives of the business community from seven countries in the region: Serbia, Albania, Austria, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Slovenia. It was agreed between the participants that a regional conference would take place every year in a different country of the region.

The SCPC has maintained regular bilateral contacts and received technical assistance from, among others, the national competition authorities of Japan, Germany and Austria.

7. FINDINGS AND POLICY RECOMMENDATIONS

7.1 Competition Law and Enforcement

This first group of recommendations aims at reinforcing the capacity of the SCPC and increasing its efficiency. The most important recommendation is to strengthen the SCPC in order to be able to fully enforce the law. In addition, the main items that should be part of the SCPC's Business Plan for the period from 2011 to 2014 are discussed at the Annex. Creating a sustainable and predictable source of financing is the first priority. Then, the SCPC should reinforce its human capital basis and endow the Authority with high level expertise in economics and also expand its operational capacity in both law and economics. The SCPC would still need technical assistance for some years to come to continue improving the good work already done in the past. The training should also extend to the Administrative Court that has recently been attributed the jurisdiction to review decisions of the SCPC. The recent competition law reform aligned Serbia's competition law with EU competition rules. Therefore, Serbia should wait for 4 to 5 years to revisit the law and correct major enforcement faults. UNCTAD is ready to contribute to this future debate on the law.

The complementary areas of consumer protection and unfair competition need to be upgraded in institutional terms. Although respective laws have been enacted and approximate Serbian law in this respect with EU law, the present institutional framework is extremely weak. The enforcement system relies on consumer NGOs that do not have the required capacity to enforce the law or bring cases to courts. The Government of Serbia needs to take a major decision on how to enforce these two important laws in order to protect its citizens against unscrupulous firms and to promote the fair play among businesses. Two policy options will be discussed: (a) to attribute additional functions of consumer protection and protection against unfair competition to the SCPC, or (b) to reinforce the respective Department in the Ministry of Trade and Services and give it all required enforcement powers.

Another important area of competition law and enforcement is to develop and institutionalize legally the coordination between the SCPC and the Serbian sector regulators, specifying clearly their respective jurisdiction according to the principle according to which the best placed institution shall be in charge for the enforcement of competition law.

Recommendation 1: Provide the SCPC with predictable, stable and adequate financial resources.

Addressed to: SCPC, Legislature, Government

It is essential for the well-functioning of a competition authority to have a predictable, sustainable and adequate level of financial resources. The funding needs to be predictable (low risk) because the institution needs to know the financial resources that would be available for the period ahead when drawing-up its business plan. It needs to be sustainable (low fluctuations) because a regulatory institution has mainly fixed costs caused by a given organization of personnel and cannot suffer from substantial fluctuations in its income. The financial resources also need to constitute an adequate envelope of resources tailored to the functions that the authority has been entrusted with by the legislature.

Presently, none of these requirements are fulfilled, and it is recommended that the SCPC work with the Government in order to find an adequate solution, which should be incorporated in the Articles of the LPC which relate to the functioning of the authority, as soon as possible.

The SCPC is the only competition authority in Europe that is only financed by merger fees. The LPC does not explicitly mention any other source of financing for the SCPC and only stipulates that the Government may be called upon to fill-in any deficit, ex-post, which the SCPC may incur. In competition authorities of EU member States revenues from merger fees represent between one fifth and one fourth of the total revenues, and never constitute the major part of the financing. As a result, Serbia has among the highest merger fees in Europe, constituting an important barrier to business.

Therefore, this source of financing introduces important distortions in business decisions that should be lowered. Moreover, it does not satisfy the three criteria enunciated above. The number and dimension of mergers cannot be predicted at the beginning of the year or of any business period, and fluctuates substantially with the business cycle and also with so called waves of mergers. Consequently, the Authority has tended to hire staff very conservatively because it may lack the financial resources to pay them. As explained in more detail below, the SCPC is seriously understaffed, and the amount of financial resources for the future is not adequate for the functions that the SCPC has been entrusted with.

The proposed Business Plan for 2011-2014 suggests an increase in the overall financial resources of the SCPC from 1.4 to 1.8 million Euros, and an increase in budget transfers from the State or alternative sources of funding from 0 to 1.1 million Euros, as the revenues from merger fees need to be lowered for reducing barriers to trade.

There are several ways that could be pursued to give the SCPC a predictable, stable and adequate level of financial resources. Two policy options are suggested below:

First policy option: The Government could establish an annual budget allocation to the SCPC, and transfer the funds in the same way as to any other government department. This is the most widely used method throughout the world. An amount should be set based on an estimated envelope for the financing needs of the SCPC for the next three years, incorporating a reduction for about half of the merger fees, and setting the Government budget contribution at about 80 per cent of the total budget of the SCPC. In the Annex, an overview of the resources needed by the SCPC is provided which could serve as a basis for further negotiations. The yearly amount of the Government's allocation would need to be set on an annual basis, using the same process that other Government departments use for their budgets, and to be incorporated into the budget of the Ministry of Trade and Services.

The benefits of this policy option are that the SCPC would have a source of financing that satisfies the above-mentioned criteria for carrying out its responsibilities, in case the Government agrees with the overall business plan and provides the authority with the adequate envelope of financial resources. Another benefit is that it allows the reduction of the merger fees that are extremely high by European standards. Finally, since the financing comes from the Government, it provides an opportunity for discussing broad competition policies, without compromising the independence of the Authority.

The obvious cost of this policy option is that it may give the Government the possibility to exercise pressure on the authority and thereby jeopardize its independence. To mitigate this risk, the LPC needs to clearly stipulate that it is the responsibility of the Government to finance the needs of the SCPC and that the business plan falls within the responsibility of the SCPC.

In order to implement this solution the following steps are required: (1) a presentation of a proposal by the SCPC to the Government of a 3-year business plan with detail about planned actions and the required human and financial resources; (2) a discussion of the ways and means to proceed to the agreed budgetary allocation; (3) the preparation of an amendment of the LPC stipulating that the

primary source of financing of the SCPC are annual budget transfers by the Government to the SCPC and that the budget of the SCPC should be part of the Ministry of Trade and Services' overall budget; (4) an approval by the Parliament of the proposed amendment of the LPC.

In this case, the SCPC has to prepare a detailed budget, according to the rules and format established for all Government departments, and send it to the Ministry of Trade and Services within the respective time period.

Second option: Alternatively, legislation could be enacted to allow the SCPC to receive a part of the amount of revenues collected by regulatory agencies from regulated firms. This is a method of financing introduced very recently,⁸² and builds on the premise that regulated firms can be required to pay a specific sum to the sector regulator for the respective regulation and also to the competition authority for the services ensuring the regulation of competition in the respective sectors.⁸³ In this case, the Government need to enact a decree (it may not need a law) ordering the sector regulators to transfer a given percentage of the resources collected from the regulated firms to the SCPC.⁸⁴ The percentage would need to be calculated on the basis of the required resources to finance the business plan of the SCPC and the actual revenues of each regulator, presupposing that all regulators pay the same percentage to avoid discrimination.

The benefits of this solution are a clearly established rule of financing, avoiding an annual negotiation with either the Government or the sector regulators on the amounts to be transferred. It preserves the independence of the authority since it does not require the annual presentation of a business plan, or even a budget to the Government.⁸⁵ Since the percentage of resources to be transferred from the sector regulators is usually a small amount and according to the present law, the sector regulators have to transfer any surplus to the Treasury, it may be easy to negotiate this solution with the sector regulators.

The associated downsides include the difficulty to find regulators that would agree to this solution. Furthermore, the Government may sometimes need to either reduce the percentage to be transferred from a specific regulator to the SCPC or exclude a regulator from the arrangement which has genuine difficulties to transfer parts of its resources to the Authority.

In order to implement this policy option, the following steps need to be taken: (1) a proposal based on the business plan of the SCPC and the budgets of all sector regulators would need to be negotiated with the Government, where the Minister of Trade and Services would have to take the lead, (2) a draft decree will have to be elaborated, (3) the proposal will need to be circulated to the sector regulators and the Ministers in charge of the sector, and (4) the final decree could be approved by the Government.

Several countries also use other means of financing their competition authorities like transferring a part of the fees for registration of a corporation in the registrar's office to the competition authority, or sharing the income generated by corporate taxes with the competition authority.

⁸² This method was introduced by Portugal in 2004 for the Portuguese Competition Authority.

⁸³ It may be argued that it is only the regulated sectors that pay and not all sectors in the economy, but the other sectors may pay through general taxation and then budget transfers to the Authority.

⁸⁴ In the Portuguese case the percentage has been about 7%, but it has been stipulated that it could be up to 10%.

⁸⁵ Only if the percentage to be transferred needs to be set annually. We advise against this option, because it introduces unnecessary unpredictability in the system.

Recommendation 2: Amend Article 57 (4) and (5) in a way that the CPC does not bear the financial risk that fines are decreased or revoked by the Administrative Court.

Addressed to: Government and Legislature

According to Article 57 (3), fines imposed by the CPC have to be paid to the State budget of Serbia. If upon appeal, the Administrative Court decreases or entirely revokes those fines, the amounts paid to the State budget are refunded out of the State budget (Article 57 (4)). However, according to Article 57 (5), the CPC is liable for the interest that accrued during the judicial review procedure. With the increased level of fines that the CPC may impose according to the LPC, it runs a substantial financial risk if a company appeals against a fines decision by the CPC. Given that the fines are not paid to the budget of the CPC, but to the State budget, it has no possibility to gain any interest for the paid sums pending appeal. For this reason, it is suggested that any interest for unduly paid fines shall also be paid out of the State budget. This requires an amendment of the wording of Article 57 (4) and (5).

Recommendation 3: Provide the SCPC with highly qualified lawyers and economists who have the required knowledge and skills to carry out the responsibilities established by the LPC. Institute the position of a Chief Economist and hire 4 economists for merger control and 2 IT specialists to assist with dawn-raids.

Addressed to: SCPC and Government

The SCPC is currently seriously understaffed not only in number of personnel but also in qualitative terms of filling positions with candidates who have qualifications and specializations required for discharging the SCPC's responsibilities. According to the proposed Business Plan for 2011-2014, the SCPC will need to increase its overall staff with 14 additional professionals.

Currently, the most serious problems are: (1) the need to institute the position of a Chief Economist who will be responsible for quality control of all economic work done within the authority, in particular the methodologies used and evidence collected in its case-work. The Chief Economist would also advise the Council on all economic aspects. The position requires a seasoned economist who holds an advanced university degree in economics with specialization in industrial organization, and with a significant number of years of professional experience, preferably in competition matters; (2) the need of 4 additional economists for the Department of Mergers. In fact, most of the work of merger analysis requires economic assessment. With only 1 economist, the respective department is clearly understaffed; (3) the need of 2 IT specialists who need to be trained in forensic IT programs in order to assist with dawn-raids. Since these operations only take place occasionally, they should also provide assistance in other IT matters, maintain and improve the website of the SCPC and provide technical expertise in software for statistical and econometric analysis for the economists.

The Department of Restrictive Practices also needs to be reinforced with 4 lawyers and the International Relations unit with an additional lawyer, since it has presently only 1 person.

Recommendation 4: Establish models for basic legal documents and elaborate guidelines for procedures of the SCPC.

Addressed to: SCPC

In the past, the SCPC lost court cases because of procedural issues, which is frequent in countries with a recent competition law and young institutions. In order to prevent these problems in the future, the SCPC needs to establish standard forms of basic legal documents, like the structure of a statement of objections or a merger control decision. It is also important to draft internal guidelines and manuals which shall specify procedures and their legal bases and contain pedagogical examples for case-handlers. These documents should give clear directions about each of the steps in the investigation, how to conduct oral hearings, how to conduct dawn-raids, how to ask and how to deal with information provided by a complainant, defendant or third person, how to evaluate evidence, and all the other problems faced by case-handlers. When the law is open to different interpretations, the guidelines should shed light on the different alternatives and how the Authority should propose a solution to the Courts. Some of these documents, expurgated from any confidential or purely internal issues, may be made public in order to also guide lawyers and Courts about the solutions proposed by the SCPC.

Recommendation 5: Prepare and launch a campaign against bid-rigging, initiate investigations in some cases and train personnel in the health sector and in other departments with major procurement programs

Addressed to: SCPC, State Procurement Office and Government

The report identifies bid-rigging that affects public procurement at various levels as a major concern. Experience from other countries shows that bid-rigging increases costs by an average of 20 per cent, and is an important source of inefficiency of enterprises that supply state organizations, besides facilitating corruption. The present competition law provides for the basic framework that allows the SCPC to prosecute bid-rigging, however no cases have been yet investigated, despite persistent rumours about some cases. The main reason was the lack of human resources and lack of knowledge on competition issues of the agents carrying out procurement procedures.

It is proposed that the SCPC draw up a campaign based on documents of the OECD⁸⁶ and experienced competition authorities of *inter alia* the United Kingdom, Sweden, Portugal and Mexico. These should address three issues: (1) why bid-rigging is unlawful and hurts taxpayers, (2) how to detect bid-rigging in public procurement, and (3) how to design tenders to decrease incentives for bid-rigging.

Once these documents and presentations have been prepared, a campaign should be launched with cooperation of the State Procurement Office to conduct seminars in all major departments in charge of public procurement. International assistance may be required for this campaign in order to benefit from the experience of other authorities.

Recommendation 6: Train SCPC personnel and acquire tools for conducting dawn-raids

Addressed to: SCPC

A major tool for investigating cartels and bid-rigging are dawn-raids. Cartels are secret organizations and they are extremely difficult to detect and investigate. It is also challenging to obtain enough evidence to make a case that stands in court. In this context leniency programmes offer tremendous help. After a competition authority receives a leniency application, the next step is to carry out a dawn-raid in order to obtain further information and apprehend documents that may constitute evidence of the unlawful agreement. Also when a procurement agent obtains evidence that a bid-rigging may have taken place, it passes all the information to the SCPC who again needs to conduct a

⁸⁶ See OECD. Detecting bid rigging in public procurement: Helping governments to obtain best value for money; Guidelines for Fighting Bid Rigging in Public Procurement; and, Guidelines for Fighting Bid Rigging in Public Procurement, all available at www.oecd.org/competition.

dawn-raid to obtain further information and evidence. These investigations need to be prepared very secretly and the inspection needs to take place as a complete surprise in order to avoid parties to destroy or hide evidence.

Personnel at the SCPC need to be trained in preparing and carrying out dawn-raids and the authority needs to acquire the tools for conducting dawn-raids.

Recommendation 7: Continue seeking for technical assistance

Addressed to: SCPC

The SCPC has benefited from a three-year technical assistance project financed by the European Commission which brought the technical level of the authority to a level close to EU standards. However, in view of the new challenges of the authority, the need to recruit and train new staff and to enter into new venues of investigation, it clearly needs further assistance. A new program included in IPA for the 2012-2014 period is under elaboration.

Recommendation 8: Training of judges of the Administrative Court

Addressed to: Government, Administrative Court

The control of decisions of the SCPC has been transferred from the Supreme Court to the Administrative Court of Belgrade. There is a need of technical assistance for training judges of this Court and assistance for them to participate in international networks of judges who handle competition cases.

Recommendation 9: Create institutional capacity for consumer protection and against unfair competition

Addressed to: Government, SCPC

The original idea of using consumer NGOs for implementing consumer education programs and enforcing consumer protection legislation has clearly failed, because they do not have the capability of carrying out these duties. Unfair competition policy is also very incipient. These two policies are essential to complement Serbia's competition policy and bring all the fruits of a market economy to consumers.

Based on the experience in developed countries, there appear to be two approaches to solve these issues. Firstly, the above-mentioned policies could be merged with competition policy and the SCPC could be attributed jurisdiction in all three areas (competition, consumer protection and unfair competition). Alternatively, the department of the Ministry of Trade which is already in charge of these policies but without resources and legal capacity to enforce them could be strengthened.

First Option: Merge competition law with consumer protection and unfair competition law enforcement and institute the SCPC as single enforcement authority. This is the option chosen by countries like the United States and the United Kingdom. The benefits are the synergies that may arise by implementing jointly these policies. A complaint that may be made wrongly regarding one type of policy falls within the scope of another policy, or may lead the Authority to launch joint investigations. Another benefit is that actions by the authority become more visible for consumers, given that in consumer protection cases, their rights are directly defended, while competition cases may not attract the same type of attention.

Possible disadvantages result from the fact that the Authority may use its entire capacity for the hundreds of consumer protection complaints that are usually made every year. Because of the quick

returns in terms of exposure that the Authority may reap, it may neglect the more complex and extensive cases of anticompetitive practices.

This option may also be preferred because staff of the SCPC is already trained on competition issues that give them a head start relative to other institutions. However, this option is clearly not recommended if the SCPC is not given the additional resources to carry out the additional functions, because it would worsen the present situation of a large gap relative to the needs of the authority.

Second Option: Strengthen the Department for Consumer Protection in the Ministry of Trade and Services. This is the option chosen by countries like France and Germany. The benefits of this option are that it allows an institution to specialize in consumer protection and unfair competition practices. It also uses the expertise already accumulated by the Ministry of Trade and Services. However, it is important that the department in charge of the above policies be decoupled from the services of economic and sanitary inspections, which play a very different role.

The costs of this solution include the need to reinforce substantially the personnel of the department and endow them with lawyers and economists able to analyze complaints, bring cases against businesses that violate laws and negotiate settlements in court.

Recommendation 10: Reinforce cooperation between the SCPC and sector regulators, focused on competition policy

Addressed to: SCPC, Sector Regulators, Government and Legislators

There is already a significant level of cooperation between the SCPC and the sector regulators, sometimes framed by a protocol signed between the two institutions. However, sometimes, there have been cases that fail to be prosecuted because the sector regulator does not have the responsibility to prosecute anticompetitive practices, and does not report them to the SCPC.

In a future revision of the competition law, the following terms for coordination between institutions are proposed:

- a. Each sector regulator should be responsible to communicate to the SCPC any information or evidence about practices or behaviour that may violate the LPC.
- b. The SCPC should communicate to the respective sector regulator any information or evidence regarding practices or behaviour that may violate sector regulation laws.
- c. In a merger that involves firms in a regulated sector, the SCPC should ask the opinion of the sector regulator about the concentration at the beginning of the procedures, and consult the regulator before the final decision. However, the final decision should be of the SCPC.
- d. Similarly in case of anticompetitive practices in regulated industries, the SCPC should ask the opinion of the sector regulator about the case at the beginning of the procedures, and consult the regulator before the final decision. However, the final decision should be of the SCPC.

Before changing the law, these principles can be incorporated in protocols between the SCPC and sector regulators.

Recommendation 11: Further aligning the Serbian competition law with EU competition law

Addressed to: SCPC, Government and Legislators

In November 2009, Serbia enacted a new competition law that is largely aligned with the EU legislation. A detailed analysis of the present law was made in this report and a few cases were identified where the law still needs to be improved. However, except for the financial concerns, discussed above, it is recommended that Serbia waits about 4 to 5 years before it undertakes another revision of the law, building on the enforcement experience made during this period.

In order to address the major issues that were identified, it is recommended to:

- Increase the thresholds for merger notification.
- Introduce the concept of third persons as parties in the procedure, and regulate their role in merger control proceedings and the investigation of anticompetitive cases.
- Revise Article 14 in terms of *de minimis* criteria and the list of hard core restrictions, e.g. sharing sources of supply, boycott or other forms of collective discrimination, as well as tying of products that are not connected with each other by their nature or according to commercial usage.
- The LPC needs to specify clearly how to count the time given to the SCPC for analyzing mergers, in the first and second phases, and stipulate a reasonable time period for complex cases.
- Criteria for fixing the fines for violation of competition law seem too subjective and molded by criminal law, and will be open to substantial litigation in Courts. In fact, both EU jurisprudence and the European Commission have opted for more objective criteria that are simultaneously easier for undertakings to understand.
- The Serbian time period for prescription of acts or practices violating competition law is rather short, when compared with EU competition law and the major national competition laws. This is particularly serious in a country with young competition law enforcement, where investigations and collecting of information are still quite difficult.

Abolish Article 232 of the Criminal Code regarding the criminalization of abuses of monopolistic positions, which is at odds with the Competition Law and European Laws.

7.2 Regulatory Issues and Competition Policy

Recommendation 12: Create a high-level unit for competition policy within the Government structure

Addressed to: Government

Competition policy, or markets policy, with the aim of building efficient markets, is an important policy for economic development, and at least as important as trade policy, industrial policy and infrastructure building policies. In order to bring to light its importance, and since contrary to other policies that particular Ministries are in charge of (e.g.: the Minister of Trade and the Minister of Economy are in charge of trade policy, the Minister of Public Works and the Minister of Telecommunications are responsible for physical infrastructure policy), competition policy needs to be given a higher visibility. The SCPC is the institution in charge of competition law enforcement, but competition policy is much more than this function and encompasses many aspects of broader economic policies. Thus, it is advised to create a small but high-level unit, at the level of the Prime

Minister or the Minister of Economy, which shall be responsible for formulating and implementing competition policy autonomously or in conjunction with other policies. Countries like Germany or Netherlands have those advisory groups close to the Minister of Economy.

The role of this high-level unit, composed of utmost 3 persons would be: (i) to advise any member of the Government on competition implications of any economic policy being proposed or under discussion within the Government, (ii) formulate annually the broad objectives for competition policy in cooperation with all the Ministries, (iii) undertake regular assessments of any major laws and regulations under consideration, at the elaboration stage.

The Government of Serbia has already internalized the importance of conducting regulatory impact assessments for its decisions and laws. Competition impact assessments are usually also part of that process, as the OECD has been emphasizing recently, and some countries like UK and Mexico have adopted those methodologies.⁸⁷

Recommendation 13: Strengthen concerns of competition policy in privatization policy, in particular in telecommunications

Addressed to: Government, Minister of Finance

Network sectors are characterized by large economies of scale and economies of scope, and thus are prime candidates for dominant positions. Evidently, economic efficiency requires regulation of natural monopolies, but competition can still be introduced in some segments of the market and an open-access policy be implemented.

When privatizing large companies in the nontradables sectors, competition concerns should be taken into account, because it is very difficult to impose divestitures or to correct the markets after the assets are in private hands, and they can cause major costs to the economy in terms of loss of competitiveness, for lack of competitive pressure.

A simple example can make this point more vividly. In the privatization process presently under way of the incumbent Telekom Srbija, competition concerns need to be taken into consideration before the process even starts. Telekom Srbija has a quasi-monopoly in fixed telephony and a dominant position in mobile communications. Liberalization of EU telecom markets has been based on the unbundling of the local loop, a policy that the incumbent has refused to accept and that has led to some complaints by competitors. Under these circumstances, a privatization contract could include a clause requiring Telekom Srbija to unbundle, under conditions specified by the regulator.

Recommendation 14: Promote competition in infrastructure (network) industries in order to reduce costs and improve competitiveness

Addressed to: Government, in particular Ministries dealing with infrastructure related matters, Legislature

Promoting competition in all infrastructure industries, from air transport to natural gas is of crucial importance for increasing the competitiveness of the economy, since these sectors are naturally protected from international competition. In some sectors like air transport, giving access to low-cost companies to the main airport contributes to increase tourism, among other positive impacts.

In natural gas, a sector clearly dominated by Serbiagas, Serbia needs to diversify its sources of supply, although any project is closely linked to international pipelines.

⁸⁷ See OECD, Competition Assessment Toolkit, 2 vol., 2010, available at www.oecd.org/competition.

Recommendation 15: Strengthen policies to fight bid-rigging in procurement throughout all central and local governments

Addressed to: Government, Legislature, State Procurement Office, Municipalities

The present Competition Law of Serbia prohibits cartels affecting tenders and auctions for the provision of goods and services to the State. This is an area requiring enforcement, as we recommended above.

However, and in line with the legislation of more advanced competition law regimes, the procurement law needs to be changed in order to prevent bid-rigging. The legislation should be changed in three points. First, it should direct the State agent who organizes the auction to stop the auction and declare the auction as terminated if there is any evidence of bid-rigging. The agency does not (and should not for the sake of prosecution) need to inform the parties of the causes for annulling the act. Second, the State agent should communicate all the evidence and information to the SCPC and cooperate with this agency in the investigation of the cartel. Third, if found culpable in a case prosecuted by the SCPC, the undertaking(s) that have participated in the bid-rigging, should be excluded for a given period (e.g. with a minimum of 4 years) from participating in any other procurement procedure by the State.

Recommendation 16: Coordinate actions of competition, procurement and anti-corruption offices to reduce costs of acquisitions to the State and improve the rule of law

Addressed to: SCPC, State Procurement Office, Anti-Corruption Agency

Experience around the world has shown that sometimes bid-rigging is facilitated by corruption. The first cases of coordinated practices in health procurement have been prosecuted by the Anti-Corruption Agency, because corruption was involved.

In order to increase the efficiency in prosecuting these practices that are very costly to the State and undermine the society and the market, it is recommended to closer cooperate among the three agencies in charge of procurement, antitrust and corruption. This cooperation could take place by firstly signing a protocol among each other specifying the exchange of information and the specialization of each one in order to achieve the common objective. For example, a “whistle blower” could be given immunity of prosecution and also leniency from the SCPC. The procurement office could be in charge of maintaining a data base of prices and conditions of delivery of all goods and services per tender. And the anti-corruption office could inform the other agencies of all cases to detect anti-competitive behavior.

Recommendation 17: Eliminate domestic preference in procurement

Addressed to: Government, Legislature

The present domestic preference of 20 points accorded to domestic firms is not consistent with international agreements and is a source of inefficiency. Besides, it is very difficult to characterize a domestic firm with the complex interconnectedness of modern industry and services.

7.3 Other Institutional Issues

Recommendation 18: Give to competition policy an equal status when designing economic policies

Addressed to: Government, SCPC

Although Competition Policy, or Market Efficiency Policy, have sometimes been given the appropriate priority by the Government, a more widely supported priority of this policy is recommended in order to increase competitiveness and efficiency of the Serbian economy.

In most of the economies in transition anti-monopoly policy, in order to avoid the substitution of public enterprises by private monopolies is a legitimate concern, but Serbia has already adopted since 2004 a competition law that is broader. Moreover, the only way to build an efficient market economy is to give competition issues the same priority as other policies in order to promote economic development.

The SCPC can also play an important role in advocacy of competition policy, by advising the government at all levels, and also issuing recommendations about major competition problems in the economy, in cooperation with the above-mentioned high-level competition policy unit.

Recommendation 19: Strengthen enforcement of State Aid policies

Addressed to: Government

In the EU and some other developed countries, competition law is the sister policy of state aid control. When the Government intervenes in the economy by giving subsidies, or granting tax benefits, special loans or transfers capital, it distorts the competition in the market and may reduce substantially the efficiency of the market.

Although Serbia has already adopted a law on State aid and instituted a Commission for evaluating State aid, enforcement still needs to be substantially strengthened. This needs to take place by training and informing all the ministries in charge of State aid to follow the law and mechanisms for evaluation, and putting in place effective control mechanisms at central level (Ministry of Finance).

Recommendation 20: Continue the effort of advocacy in competition policy among economic agents in Serbia

Addressed to: SCPC

The effort of advocacy is always an unfinished job in any jurisdiction. The work of the SCPC, and as seen above, of the ACPC program were commendable in this regard. The effort should continue including different stakeholders: (i) businesses in order to make them understand what are the rules of the game and the instruments that are in place for leveling the playing field, (ii) the government to correct interventions that may distort competition in the market and decrease barriers to entry, exit and doing business in general, (iii) the academia to inform on the art and science of competition law and enforcement; and (iv) consumers to inform on the benefits of the market and free choice.

This effort should benefit from future international assistance to the SCPC.

Recommendation 21: Institute courses of industrial organization and competition law and economics in law schools and economics departments at post-graduate level

Addressed to: Ministries of Justice and of Education, and Private Universities

The teaching of competition law at the University level, as well as the teaching of industrial organization in business and economics departments needs to be either launched or strengthened in Serbia. Cooperation with other universities in developed countries, with UNCTAD and other institutions could help to develop the initial materials for courses in these important subjects, not only for the SCPC but for law and economics consultancy firms and enterprises in general. This policy measure would contribute to enlarging the pool of professionals for the SCPC, improving the quality of professionals that counsel firms in their business strategies and for advocacy in general. Another component in this policy is providing scholarships for Master or Doctorates in the best universities abroad.

ANNEX I

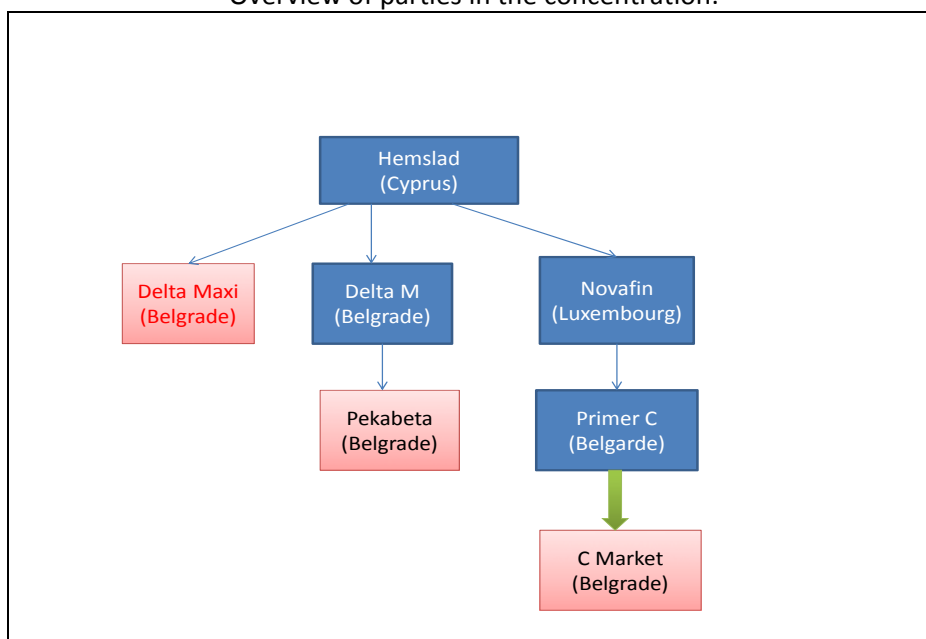
CASE STUDIES OF SERBIAN COMMISSION FOR PROTECTION OF COMPETITION

I. Acquisition by "Primer C" of "C Market"

Parties involved in concentration: Applicant is the company "Primer C" with registered head-office in Belgrade. The founder and sole owner of that company is "Novafin" (Luxembourg). Founder and sole owner of "Novafin" is Hemslade Trading Ltd. (Cyprus) which, among others, has a majority share both in the capital of "Delta M", a trade and services company in Belgrade and "Delta Maxi" (Belgrade), a large conglomerate, holding 100 per cent of shares in both. The SCPC found that Hemslade Trading has a decisive influence on management, in terms of legal provisions, through its immediate affiliated companies (indirect control), among others also in "Pekabeta" (Belgrade) in which "Delta M" holds 57.58 per cent of shares.

"C Market", the target company has the main activity in "retail trade in non-specialized stores, mostly in food, beverages and tobacco" (code 52110). The applicant indicated itself that "C Market" is a leading national chain of food stores and consumer goods. The notification also refers that although the largest in the volume of business, "C Market" is mostly regional – Belgrade chain stores - and that within the period of several years prior to the submission of the notification, its main competitors were "Pekabeta", "Maxi discount", "Mercator", "Rodic" and "Super Vero".

Overview of parties in the concentration:



As the Figure shows, Primer C notified the acquisition of C Market, but the SCPC discovered that the applicant is indirectly owned by Hemslade which (directly or indirectly) owns Delta Maxi and Pekabeta, all supermarket chains operating in food distribution.

Relevant markets: Based on the notification, the relevant product market consists in supply of mostly food and other consumer goods in retail stores such as convenient stores, supermarkets and hypermarkets (activity 52110), whereas geographic market consists of markets of Serbia and Belgrade, pursuant of Article 6 of the Regulation on Criteria for Defining Relevant Market (Official Gazette of the Republic of Serbia, no.34/05).

After investigation, the SCPC defined as relevant geographic market, the city of Belgrade, where 179 stores were located, whereas around 100 stores were located in several zones – Stari grad, Vračar Zvezdara, Voždovac and Novi Beograd (New Belgrade).

In the appeal to the Supreme Court, the applicant changed the previous position expressed in the notification, defining, in its complaint, product market in a wider sense, comprising a large number of types of stores in retail trade (non-specialized and specialized stores, cash & carry centers and even stores registered for wholesale trade), and in specific terms stores of general type, i.e. non-specialized stores (groceries, mini markets, supermarkets, hypermarkets, mega-markets, discount stores, cash & carry centers). The applicant also defined the whole market of the Republic of Serbia as the relevant geographic market in wider sense and only as sub-markets particular territorial segments of the Serbian market – Belgrade, Vojvodina and Serbia proper (excluding Belgrade).

The SCPC followed the methodologies of the European Commission in defining the relevant product market by types of supermarkets defined by area of sales. Indirectly, the accuracy of the market definition of the SCPC was confirmed by applicant, in the appeal to the Supreme Court, stating that “competition exists in every sale store in which consumer buys identical product which is being sold in "Maxi" "Pekabeta" or "C Market"”.

Problem of control and its implications: When submitting its initial application, the applicant did not have any reason to minimize market position of "C Market", since the applicant was not engaged in any trade in the markets of the Republic Serbia and of "C Market". However, the SCPC argues that Hemslade Trading Ltd., through "Primer C" acquired control over "C Market", leading to a complete different assessment of market structures. Namely, the concentration would increase the market share of the parties involved in concentration, since the market shares of "C Market" would have to be added to the market shares of "Delta Maxi" and Pekabeta.

Based on the analysis of ownership relations, the SCPC established that companies "Delta Maxi", "Pekabeta" and "C Market" are to be considered, together with their owner – Hemslade Trading Ltd., as a single market participant. By carrying out the concentration of "Primer C" and "C Market", Hemslade Trading Ltd. acquires a decisive influence in three participants in the relevant markets ("Delta Maxi", "Pekabeta" and "C Market").

Market structure: According to data provided by the Serbian Institute of Statistics, the SCPC found that the parties involved in the concentration would held jointly market shares of 41.8 per cent in 2004 and 40.2 per cent in 2005 in the market of retail trade of exclusively food products in the city of Belgrade. In the revised decision the SCPC found that the post-merger number of sale stores reached a market share of 69.4 per cent, the number of square meters of sale stores 69 per cent, whereas in terms of annual turnover the market share of the parties involved in concentration amounted to 63.4 per cent, based on data for 2006 in the city of Belgrade.

Decision: The SCPC rejected the concentration between trade and service company "Primer C" d.o.o., Beograd and the shareholding trade company "C Market" a.d., Beograd. Under appeal, the Supreme Court of Serbia in November 2007 did not uphold the decision of the Commission based on procedural grounds, mainly related with the lack of a study applying the SSNIP test for market definition. the SCPC adopted a second decision, still in 2007, rejecting the merger which is still under appeal. Meanwhile the parties went ahead with the merger.

II. Abuse of dominance and exclusive contracts

Summary: The SCPC issued a decision establishing the abuse of a dominant position by Serbia Broadband – Serbian Cable Network from Kragujevac (hereinafter: SBB) in the market of provision of services of distributing TV program via DTH (direct to home) technology to national, regional and broadcasters in the region of the capital, Beograd. The abuse is the conclusion of contracts by SBB with the said broadcasters imposing exclusive rights of distribution of TV programs via DTH technology, resulting in prevention and restriction of competition in the defined relevant market to the detriment of consumers.

SBB is a telecommunications company operating in the market of cable distribution of TV programs (defined as operator with significant market share by the Serbian Agency for Telecommunications- the competent regulatory body), and also in the market of distribution of TV programs via DTH technology as well as in the market of cable Internet.

Legal context: Under the FLPC, Articles 16 defining dominant position and Article 18 defining the type of abuses. Article 19 stipulates that if the Commission, ex officio or at the request of interested party, establishes that the dominant position has been abused; it shall adopt a decision establishing violation of Article 18. The decision should contain measures obligatory for the undertakings and enabling the re-establishment of competition in the relevant markets and eliminating the harmful consequences of the abuse of dominant position as well as the time limit for its implementation.

Procedural aspects: The Commission initiated an ex officio procedure after obtaining certain information in the course of its investigation of competition conditions in the market of distribution of TV program via DTH technology. The facts required for adopting the decision were obtained from the party against which the procedure was conducted and its actual and potential competitors, competent regulatory bodies (the Serbian Agency for Telecommunications and the Serbian Broadcasting Agency), as well as from televisions whose programs are distributed by SBB via DTH technology. The Commission obtained the facts through written form and by taking oral statements.

Assessment of the market structure : Market definition (product and geographic dimensions) – The market of services of distribution of TV programs via DTH technology to the national, regional and broadcasters for the city of Beograd region was defined as the relevant product market, while the entire territory of the Republic of Serbia was defined as the relevant geographic market. On defining relevant market of providing services of distribution of TV programs via DTH technology as a separate relevant market, it was found that such service is not interchangeable with the service of distribution of TV programs via cable network for the following reasons:

Although both services are intended for distribution of TV programs to end users, the type of distribution differs according to its physical characteristics since it requires totally different equipment and infrastructure. Cable distribution of TV programs to end users is made through the installed cable network, while DTH technology requires equipment necessary for broadcasting TV signal to satellite, as well as special appliances used by end user to receive signal. SBB uses DTH technology in cases where it is more cost effective to use satellite instead of introducing cable TV in particular regions. In general, there is no overlapping between the distribution of TV programs via DTH technology and cable distribution network. In Serbia, DTH technology is a relatively new technology which cannot be considered as interchangeable with cable distribution, due to the possibility for its programs to be broadcasted even in regions where there is no cable network.

The relevant geographic market is defined as the territory of the Republic of Serbia based on the fact that SBB distributes, via DTH technology in the entire territory of the Republic of Serbia its TV programs of national, regional and broadcasters for the city of Beograd region.

Dominant position: Dominant position of SBB is established in relation to the context of the package. Within its basic package, SBB offers, in total, 28 TV programs, out of which 20 are from Serbia, whereas SBB concluded contracts on exclusive distribution via DTH technology with 17 televisions. SBB's only competitor is Digi Sat from Beograd which offers a basic package of 40 TV programs, out of which only 4 are from Serbia, two of them public services.

Commission assessment of power of potential competitors – Telekom Serbia stated that it was in the final preparation for launching IPTV and DTH services, but during the negotiations of DTH services with broadcasters with national frequency, it received oral information that they had exclusive contracts for broadcasting with SBB.

SBB's position in the relevant market was also analyzed in terms that it is a market characterized by the existence of entry barriers concerning, primarily, the obligation of obtaining necessary licenses, i.e. approvals from competent regulatory bodies, as well as requiring significant initial investments.

Competitive Effects: Pursuant to the assessment of the Commission, the aim of the exclusive rights of distribution in the contracts celebrated by SBB was its intention to reserve for itself the market for distribution of TV programs (duration of contract was 3 years with a possibility of automatic extension), while SBB would retain the right to conclude contracts with TV operators for which it evaluates that would contribute to attractiveness of its package. By conclusion of contract with exclusive right of distribution, SBB closed access of all actual and potential SBB competitors to TV programs considered by SBB as the most attractive.

Namely, SBB included in its package programs of televisions which it considered "attractive", free of charge. The exclusivity led to a higher subscription paid by end user (TV viewer) due to non-existence of choice of another service provider offering identical or similar package (SBB price level is nearly twice as high as the prices charged by its competitor). The Commission noted that this situation refers to a relatively new market, i.e. relatively new technology in the territory of the Republic of Serbia, and that it is necessary to ensure equal conditions not only for existing, but also for new participants with an aim to develop the market.

The fact that significant financial resources were needed by potential competitors entering this market, and the difficulty in providing competitive packages at prices that would make their investments profitable is a barrier for new entries to this market (and expansion of existing ones).

Technical or business justification offered by the parties: SBB stated that exclusive rights were not absolute, but limited as the other contractual party may choose to distribute its program independently via the same or another satellite. It also stated that the main reason for contracting these rights was the limited capacity of the platform for distribution of TV programs via DTH technology, using the satellite rented by SBB.

Decision: The Commission assessed that the exclusive rights clauses leads to prevention and restriction of competition i.e. restriction on the market for existing competitors (impossibility to conclude contracts with televisions whose programs are exclusively distributed by SBB, i.e. offered in its package) and creation of entry barriers for potential competitors intending to enter this market which, as a consequence, causes prevention of market development to the detriment of consumers who are deprived of possibility to choose between different market participants which could offer

packages of the identical or similar context. For that reason, there is no competition in price both in terms of televisions (broadcasters) to which the subject services are rendered as well as to end users, consumers.

The decision taken by the Commission ordered SBB to make an Annex to the contract, with national, regional and broadcasters for the region of Beograd city, with which it concluded contracts establishing exclusive right of distribution of television programs via DTH technology, modifying the contract and eliminating the exclusivity clause. The order has been followed by SBB.

III. Abuse of dominance with buyer power

The Commission issued a ruling against Danube Foods, which operates a set of milk and dairy companies. It has proved that Danube Foods has a dominant position in the market of raw milk bought from dairy farmers and processed either in dairy products or in milk for distribution. The case proves that Danube Foods has violated Article 18 of the Competition Act, by abusing its dominant position.

At the end of August 2007 the Serbian Commission for Protection of Competition initiated proceedings against the three largest producers of milk on the territory of the Republic of Serbia, forming part of the DANUBE FOODS GROUP B.V. DANUBE FOODS GROUP B.V. is a legal entity established in Holland with major stake in the capital of Joint Stock Companies IMLEK, NOVOSADSKA MLEKARA and MLEKARA SUBOTICA⁸⁸ (hereinafter jointly referred to as: "Milk Producers"). Since Art.5 of the FLPC provides:

"Two or more undertakings shall be considered as related undertakings when one of them directly or indirectly, exercises decisive influence on the management of other undertaking particularly on the grounds of holding majority share capital, exercises more than half of voting rights in management boards and has a right to appoint more than half of the members of management or supervisory board and the bodies authorized to act as proxies to undertaking and agreements on transfer of controlling interest.

Two or more related undertakings pursuant to this Law shall be considered as a single undertaking."

the Commission considered all Milk Producers as one legal entity for the purpose of the investigative proceeding.

Consumers in the Republic of Serbia were faced with high increase in price of milk and milk products at the end of August 2007 and beginning of September 2007. At the same time due to extremely hot and dry weather during the previous spring and summer the primary producers of milk (hereinafter: "Farmers") were faced with a problem of extremely low purchase prices paid by Milk Producers. Farmers were concerned that they would not be to afford buying rations at market prices, in view of the lack of pastures. The price Milk Producers were paying the Farmers was low, by economic standards, for the past three years, with only one slight and insignificant increase, which led the Farmers to finally join into some forms of organizations so as to protect their interests and get a

⁸⁸ Danube Foods Group B.V. is a company founded by the New World Value Investment Fund. Danube Foods Group B.V. bought five of the biggest milk production companies in the territory of the Republic of Serbian, by tender in the privatization process, before the Law on Protection of Competition came into force.

better price⁸⁹. The SCPC launched an investigation to determine if Milk Producers had a dominant position on the buying side (dominant buyer) and if there was an abuse of that position in their established business relation with the Farmers.

The Ministry of Agriculture, primary responsible for the well functioning of the inspected market, provided the SCPC with relevant data regarding the total production of milk in Serbia in 2006, total milk that was purchased by Milk Producers and their competitors on the purchase market (data in total and per milk producer), as well as data on the structure of farms in the Republic of Serbia i.e. how many farms are still with daily production below 20-30 liters per day, how many are large producers with more than 200 liters/day, and so on.

The SCPC collected also information from the Organization to which most of milk production companies in Serbia belonged, than requested and obtained data and documents from the Milk Producers about the structure of the Farmers that were selling raw milk to them, list of names and addresses of all Farmers selling milk to Milk Producers. Officials of the SCPC interviewed farmers from different parts of Serbia primarily on the chemical and microbiological analysis of milk, manner of calculating the payment for milk bought by Milk Producers, type of contracts they have with Milk Producers and banks, and above all the power of Farmers in business negotiations with Milk Producers. The SCPC officials collected also information, statements and cross-arguments of the representatives from all three Milk Producers.

The SCPC, as stated above, was investigating the existence of a dominant position of Milk Producers on the geographic market of the Republic of Serbia and on the product market “purchase of raw milk by the milk production companies”.

The SCPC collected data on the total quantity of raw milk produced on the territory of Serbia in the preceding year (2006) together with data on the total quantity of milk purchased by all milk production companies and Milk Producers alone. It has been determined from three sources⁹⁰ that the total production of raw milk in 2006 was about 1.600 millions liters, out of which some 740 million liters was purchased by milk production companies. Out of 740, some 350 million liters was purchased by Milk Producers, which amount to 47,4 per cent. The three largest competitors of the Milk Producers on the defined relevant market had respectively 5,8 per cent, 5,5 per cent and 3,9 per cent while other 16 competitors held together app. 15 per cent (neither of them above 2 per cent). Also, only the Milk Producers purchase milk on the whole territory of the Republic of Serbia while all other competitors have mainly regional presence.

The SCPC obtained contracts on production, purchase and delivery of milk that larger Farmers (with more than 200 liters per day) had with Milk Producers. These contracts were all of identical content with the very same clauses, save for the larger producer of raw milk PKB Industry (producing some 50 million liter per year). Namely, these contracts provided that the analysis of milk performed by Milk Producers (which is by far the major element for determining the actual purchase price Milk producers) is final, i.e. there is no provision allowing for super/additional analysis in case of doubt like the one envisaged in the contract with the biggest supplier. The contract further contained the so called English clause inviting the Farmer signing the agreement to inform the Milk Producer of any offer he/she might be given by the Milk Producers’ competitors on the market. It was further followed by the threat of sanction to Farmers if they failed to respect the clause, i.e. termination of

⁸⁹ When SCPC launched the investigation the price per liter Farmers were receiving from the Milk Producers was app. 20 euro cents, while at the end of investigation Milk Producers were offering to them app. 40 euro cents.

⁹⁰ Milk Producers itself, Organization of all milk producers and the Ministry of Agriculture.

agreement without prior notice by the Milk Producers. On the other hand, Farmers had the right to terminate the agreement only in case the Milk Producer does not collect in three (3) days in a row and only after Milk Producer is provided with additional fifteen (15) or on demand even thirty (30) days to fulfill its contractual obligations. Overall, the contracts contained the rights of the Milk Producer and obligations on the side of Farmers, as pointed out by one of the Farmers in his statement to the officials. The agreement was of the type “take it or leave it” and nothing could be changed in it in case the Farmer was not satisfied with any of the offered clauses.

The abuse of dominance was also founded in the manner the analysis of milk was established: solely and exclusively by the Milk Producer, not allowing for an independent institution to analyze the milk of those Farmers who doubted the results of the Milk Producers. The form the final price was calculated was far from transparent as it included all types of calculation formulas, based on percentage of milk fat and proteins, microbiological analysis etc. while the basic price, which Milk Producers were announcing in their Price lists, did not play any role in due course of calculating the total price for the delivered quantity of milk. The SCPC also established that a single Farmer (either large, with over 12 million liters per year, a small one or organization of Farmers as a group) could not make any pressure on the Milk Producers in order to raise the price for their product, since the offer of Milk Producers in respect of the price was of the type “take it or leave it” with no previous negotiations.

After establishing the abuse of dominant position, the SCPC ordered in its Decision from January 2008 specific measures to be undertaken by the Milk Producers, among others: to allow for super-analysis in case of doubt, in contracts and in form of public announcement, , to provide for the possibility of expedient one-sided termination of the agreement by the Farmer in case Milk Producer fails to fulfill its obligation of taking of milk based on the agreement, to tie Farmers for the provided cattle only for the milk produced by that head of cattle and not all the cattle that Farmer might have on its farm prior to credit arrangement with the Milk Producer, annulled the provision of English clause in the agreements with Farmers, and to draft a new price list in a transparent way, to show the exact price and elements per class of milk and per liter, i.e. for 2nd, 1st and extra class of milk.

The Supreme Court overturned the Decision on the basis of procedural issues and referred case to review to the SCPC. The SCPC issued the new Decision on abuse of dominant position in May 2009, taking into account remarks made by Supreme Court.

The decision was confirmed by the Administrative Court in November 2010, representing the first major competition case to be confirmed by courts in Serbia. The case may now be prosecuted under criminal law.

IV. Price fixing by a professional association

In legal proceedings instituted ex officio, the Commission found that the decision of the Insurers Association of 23 July 2008, regarding the Tariff premium X-AO to ensure owners or users of motor vehicles and trailers from liability for damage caused to third parties (auto liability insurance), violate Article 7 of the Competition Act.

It was also found that members of the Association - Dunav Insurance, DDOR, Delta Generali Insurance, Sava Insurance Millennium, Insurance Takovo, Triglav Kopaonik, AMS Insurance, Wiener Staditsche Insurance, General Insurance UNIQA and AS Insurance, had agreed to fix the tariff to ensure owners or users of motor vehicles and trailers, starting 11 August 2008, preventing and limiting competition in the market for insurance services to owners and users of motor vehicles and trailers from liability for damage caused to third parties.

In accordance with the Regulation on premium rates in automobile liability insurance and other insurance regulations, the Association is authorized to determine only the technical premium. Insurance companies independently decide how much to add in terms of the amount of contributions for the prevention and overhead costs, and within the limits prescribed by Regulation. Contrary to the authority of the applicable regulation, the Insurance Association has set a minimum amount of premium. This is done by adding the technical premium with the maximum amount prescribed for the prevention and overhead costs. The decision was delivered to members of the Association for application. Analysis of pricing policies of listed companies showed that by 11 August 2008 all insurance companies implement the decisions of the Association for the minimum insurance premiums with the Tariff premium X-AO Association, carrying a table of premiums as agreed.

The Association has rendered a decision declaring the sale price of the service and submitted to the Parties for acceptance and implementation, so combining the policies of market participants and denying them to independently undertake a business.

After the SCPC decision, the Government enacted a decree covering mandatory car insurance that allows agreements among insurance companies to fix/minimum prices until the Serbian accession into EU.

V. Exclusivity agreement

Eki Transfers and Tenfore developed a network of long-term contracts with 24 of the 32 banks in the Republic of Serbia authorized to work in money transfers with other countries. When adding the two banks - Société Générale and Postal Savings Bank, which have a direct representation contract with Western Union, a total of 26 banks within the 32 banks, they reached a collective dominant position in the fast cross-border transfers of money between individuals.

Eki Transfers and Tenfore were accused of abusing their dominant position by contracting restrictive provisions, such as obligations in terms of loyalty, or exclusivity, which were valid for the duration of the contract (contracted for the period of 5 years with automatic prolongation for the same period of time), and the period after the expiration or termination of the contract (for three to 18 months, depending on the bank). Under the mentioned provisions, banks have committed to during the term of the contract, and in a certain period after the expiration or termination of the contract, will not provide services of fast money transfers that could compete with Western Union. In addition, most contracts that were concluded by Eki Transfers, provide the additional obligation of the bank, in case of non-exclusivity, to pay a certain amount of money on behalf of penalties to the agent. Eki started his exclusivity arrangements with Banks in 2001, and Tenfore in 2008.

Contracting obligations in terms of loyalty, or exclusivity with Western Union agents are long-term commercial bank ties. The obligation to pay monetary penalties for violations of the commitments of loyalty to the bank further disincentives to terminate the contract with the agent of Western Union, or to conclude a contract with a competitor. This prevents access to potential competitors, and creates additional barriers to market entry.

The market of fast money transfers had already considerable regulatory and other barriers. Regulatory barriers arise from the provisions of the Foreign Exchange Act (Official Gazette of the Republic of Serbia, no. 62/06) in Article 32 Paragraph 1 the payment operations carried out through banks in foreign currency and dinars and the Law on Payment Operations (Official Gazette. FRY, no. 3/2002 and 5/2003 and Official Gazette Republic of Serbia, no. 43/2004, 62/2006 and 11/2009), which in Article 49 specifies which payments in dinars can be performed by other institutions than banks.

This means that the global money transfer operators formed by the banking network in the Republic of Serbia is the only available, directly or through a representative. Postal network is active in the market for rapid transfer of services (receiving and sending) of money with the concerned global operator or his representative, but only in local currency.

As very important entry barrier the SCPC recognized the lack of possibility for economies of scope for the new entrant. The SCPC assessed that loyalty or exclusivity clauses had, as their effects, a market foreclosure effect for Western Union competitors. The SCPC ordered in its Decision to Eki Transfer and Tenfore to annul loyalty or exclusivity clauses in their contracts with banks.

ANNEX II

Proposed Business Plan of the SCPC for 2011-2014

We first define the main objectives of the SCPC in terms of the services (outputs) that its statutes stipulates as the enforcer of competition law in Serbia, second specify the main objectives in terms of improving its capacity (inputs), and third evaluate the resources in terms of personnel and financial resources required to fulfil those objectives. The business plan defines an action plan that is the basis of a contract between the Authority and society to charter its actions and a basis for analysis of its performance.

Objectives

The priorities of the SCPC for the period 2011-2014 in terms of its services to the economy of Serbia are: (1) to increase consumer's welfare and efficiency of enterprises by reducing the number of cartels, abuses of dominance and other restrictive practices operating in Serbia and contributing to the dissuasion of those practices; (2) to reduce the costs to the State and taxpayers and also improve efficiency of competitors by launching a campaign against bid-rigging; (3) preventing the creation and reinforcement of dominant positions by controlling mergers; (4) cooperating with government, courts, sector regulators and other state institutions in defining and implementing policies for increasing competition and efficiency in the economy; (5) promote advocacy among business and consumers on the role of competition law; and (6) contribute to cooperation at international level. More specifically, in terms of restrictive practices, it is the aim of the SCPC to increase the number of major cases concluded of anticompetitive practices from about 4 in 2010 to about 15 in 2014; the number of mergers controlled from 70 in 2010 to about 90 in 2014, as merger activities are expected to raise; the number of market studies from about 2 studies in 2009-2010 to an annual average of 2 studies; and the number of guidelines and procedural manuals to frame its activity to about 2 per year.

In terms of the improving the enforcement capacity, the priorities of the SCPC are: (1) establish a system of financing the Authority that is predictable, stable and sufficient to perform the actions planned; (2) reinforce the capacity in terms of economics and law, by hiring and training highly qualified personnel; (3) draw-up models of legal documents and internal guidelines for procedures in order to ensure that all decisions of the SCPC conform with the law and satisfy the high standards of competition economics. These instruments would solve problems that arose in the past with cases appealed to the Courts and have been dismissed based on procedural issues. Within this work is the specification of a model for the statement of objections in anti-competitive practices and in merger cases, and the elaboration of a Manual specifying procedures and their legal justification, with pedagogical examples for case-handlers.

The following table shows the activity levels programmed for the major functions that the SCPC needs to discharge by its statutes:

	2010	2011	2012	2013	2014
	Actual	Estimated	Projected	Projected	Projected
Mergers					
Cases opened/decisions taken	70	70	75	80	90
Cases of dominant position					

Cases opened	0	2	3	2	3
Decisions taken	0	1	2	2	3
Cartels and coordinated practices					
Cases opened	0	4	7	10	8
Decisions taken	4	3	5	8	9
Individual Exemptions/vertical restraints					
Cases opened	0	4	5	4	5
Decisions taken	0	2	4	4	5
Market studies					
Initiated	0	2	1	2	1
Concluded	0	1	2	1	2
Guidelines and Procedural Manuals					
Initiated	0	2	1	2	1
Concluded	0	0	2	1	2
Total					
Initiated	70	84	92	100	108
Concluded	74	77	90	96	111

Source: Report's Proposal

Human Resources Required

We now proceed to estimate the human resources required to implement the action plan and the objectives defined above. Overall, the SCPC will need to increase its professional staff in operations from 17 to 26. The number of lawyers would increase from 10 to 13 and economists from 7 to 13. The overall number of personnel, including the Council, would increase from 35 to 49.

The merger department is clearly understaffed with 4 lawyers and only 1 economist. Since a large part of the work in mergers is based on economics, the SCPC needs to hire an additional 4 economists. With this number of personnel, a team of 1 lawyer and 1 economist would have to process about 17 cases a year, which is a high number. The total man-hours would depend on the complexity of the cases, but usually only about 10-15 per cent of the cases require an in-depth study, that should be allocated to the more experienced and skilled professionals.

The departments of restrictive practices would still maintain 3 economists and hire an additional 3 lawyers. Since the number of cases completed per year is about 15, a team of 1 lawyer and 1 economist would have to handle 3 cases per year, which is still a high number for the number of professionals.

The legal department and the economics department would still have the same number of persons, but for hiring a high-level economist with a substantial number of years, or nominating him internally, to a position of Chief Economist. He would be in charge of monitoring the quality of the economic work of the Authority and provide economic advice to the Council.

PROPOSED PERSONNEL OF THE SCPC (2011-2014)				
	Lawyers	Economists	Support staff	Total
Executive Council	5		1	6
Mergers	4	5	1	10
Restrictive Practices	6	4	1	11
Abuse Dominance	3	2		5
Coordinated Practices	3	2		5
Economics Department		4		4
Legal Department	3			3
Sub-Total	13	13	2	28
International Relations	1	1	1	3
Administrative services		2	10	12
Total	19	16	14	49
Note: Administrative services includes 2 IT specialists in "support staff"				

Source: Report's proposal

Budget and Sources of Finance

Based on the human resources needed to implement the above program, we have estimated the financial resources needed. We have estimated the budget based on the same expenditure per personnel as of 2011, and a savings of about 5 per cent in other expenditures. The year increase is gradual to achieve the level of 2014. In 2014 the total budget of the SCPC is projected at 1.8 Million Euros.⁹¹

Proposed Annual Budget for the SCPC (€ 1,000)				
	2011	2012	2013	2014
Personnel	930	1.023	1.116	1.209
Others	510	553	595	638
Total	1.440	1.576	1.711	1.847
Memo:				
Merger notifications	1.440	1.200	960	720
Gov. budget transfer or other sources	0	376	751	1.127
Note: at constant prices of 2011				

Source: Report's Proposal

The financing of the budget that was based on merger fees up to 2011 is proposed to be cut by a half, also gradually, by 2014, compensated by transfers from the government budget or/and from transfers from sector regulators, or any other sources that the government may decide. The revenue from merger fees would decrease from 100 per cent financing to about 40 per cent in 2014, still a large share of total expenditure of the Authority. Transfers from the state budget increase gradually from 376 thousand Euros in 2012 to 1,127 thousand Euros in 2014.

⁹¹ An average of the 44 countries with active Competition Authorities around the world gives 350 thousand Euros per 1 million population. Serbia would still at about 64% of that level.

Acronyms

CEFTA	Central European Free Trade Association, comprising Albania, Bosnia and Herzegovina, Croatia, Macedonia, Moldova, Montenegro, Serbia and UNMIK-Kosovo ⁹²
SEE	South East Europe, comprising Albania, Bulgaria, Bosnia and Herzegovina, Croatia, Kosovo under UNSCR 1244/99, Republic of Moldova, Macedonia (Fyr), Montenegro, Romania, Serbia
EGC	Enlargement Group of Countries designated potential candidates to the European Union, comprising Croatia, the former Yugoslav Republic of Macedonia, Albania, Bosnia and Herzegovina, Montenegro, Serbia, Kosovo under UN Security Council Resolution 1244 and Turkey. ^{93 94}
EARS	Energy Agency of Republic of Serbia
SCPC	Serbian Commission for Protection of Competition
LPC	Law on Protection of Competition (present law)
LSCA	Law on Control of State Aid
FLPC	Former (previous) Law on Protection of Competition
SAA	Stabilization and Association Agreement (between Serbia and the EU)
ECMR	European Commission Merger Regulation
TFEU	Treaty on the Functioning of the European Union
RATEL	Agency for Telecommunications Regulation

⁹² See <http://www.cefta2006.com/>

⁹³ See http://ec.europa.eu/enlargement/the-policy/index_en.htm. Membership will only happen when the necessary [requirements](#) are met (Copenhagen criteria).

⁹⁴ As of January 2011, candidate countries are Croatia, FYR of Macedonia, Montenegro and Turkey. The rest of the countries are potential candidates.