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Peer review of Serbian competition law and policy

Overview

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Note

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Preface

1. This report examines competition law and enforcement in the Republic of Serbia, as well as competition policy and other policies with implications for competition in the markets of the country. It is based upon (a) a review of the legal documents – competition law, statutes of the Serbian Commission for Protection of Competition (SCPC), regulations and guidelines; (b) decisions and reports issued by SCPC; (c) laws, statutes, regulations and reports pertaining to regulators and other institutions in charge of policies with a bearing on the functioning of competition in the markets of Serbia; (d) two missions to Belgrade in November 2010 and January 2011, where interviews were carried out with the Council and personnel of SCPC, the Ministry of Trade and Services, the Ministry of Economy, the Administrative Court, business and consumer associations, academics, lawyers and economists.

I. FOUNDATIONS AND HISTORY OF COMPETITION POLICY

A. Introduction: Serbia's competition system in context

2. Serbia instituted a competition law in 2005, which is its first law based on modern rules for protection of competition. It also created the Serbian Commission for Protection of Competition, an independent state institution, with responsibility for its application and enforcement. SCPC started its activities in May 2006.

B. The economic, historical and political environment

3. 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.

4. As a result of the war, the gross domestic product (GDP) of Serbia in 2007 was at about half the level in 1990. However, in 2008 the coalition government introduced policies approximating those of the European Union, stimulating economic growth.

C. Economic context

5. After two decades of decline, the reforms in Serbia since 2000 have resulted in renewed growth.

6. From 2000 until 2007 (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 was only at 70 per cent of the level of 1989. The traumatic events that affected Serbia were a major factor behind the gap between Serbia's GDP growth and that achieved by other transition economies. With a population of 7.5 million, its GDP per capita was $7,630 in purchasing power parity for 2008; according to the World Bank, Serbia was at only 23 per cent of the European Union (EU) level, and 64 per cent of the level of the poorest EU country (Bulgaria).

7. Growth has been driven by large capital inflows and significant reforms to improve the business environment. Nevertheless, external imbalances have widened, with the global financial crisis remaining a potential risk to sustained growth. Due to the impact of the fiscal retrenchment required by the crisis, GDP growth was negative in 2009, but it was positive again in 2010 and is expected to recover gradually over the next three years.

D. Privatization and competition

8. Privatization policies are an essential part of building a market economy, and are thus part of competition policy. In fact, the way that a firm is privatized can mould competition in a given market.

9. In Serbia, the privatization programme started in 2001, with around 3,000 companies in the portfolio of the State. In order to carry out the privatization process, the Government set up a privatization agency with the following functions: (a) to privatize companies with the aim of maximizing the revenue for the State and creating conditions for the future sustainability of ownership; (b) to undertake bankruptcy procedures for state-owned firms without a viable market solution; and (c) to monitor performance of privatization contracts. The Government

intended to sell majority ownership in order to transfer control to the private sector, and to distribute about 30 per cent of shares to workers and the population, in equal parts.

10. Thus far, the programme has been successful: the Government has sold more than 2,000 companies, with an intake of around 2.3 billion euros. There are still about 100 companies left for privatization – mainly public utilities, including about 700 companies that are not purely commercial.

E. Doing business: entry barriers and exit

11. Successive governments have made several efforts to improve the 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 the tax rates, competition from the informal sector, and lack of access to finance as the main obstacles to doing business. The Government has established a "guillotine" project to promote regulatory reform, and by mid-2009, an inventory of the existing regulations had 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 days to 5.

12. Major progress still needs to be made in the area of rule of law by improving the efficiency of the courts, which are overcrowded with cases, giving a very lengthy time between filing a case and the final outcome.[1]

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

F. EU association agreements

13. Since signing the Stabilization and Association Agreement (SAA) with the European Commission in 2008, Serbia has begun unilaterally to implement an Interim Trade Agreement with the European Union. The process of ratification of the SAA is under way; it has already been ratified by numerous EU countries and by the European Parliament. Negotiations on membership of 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 hand, and the Republic of Serbia on the other hand – entered into force on 1 January 2010.

II. THE LEGAL FRAMEWORK: THE LAW ON THE PROTECTION OF COMPETITION

14. In 2005, Serbia replaced the Antimonopoly Law of 1996[2] (which never gained any practical importance) by modern rules contained in the first Law on Protection of Competition (FLPC)[3] and charged an independent and autonomous State body – the Commission for Protection of Competition – with their application and enforcement. SCPC began its activities in May 2006. Its basic provisions were modelled 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 of the TFEU. SCPC is responsible only to the national parliament. However, the FLPC presented major failures concerning its implementation. The main problems had been created by the legislator itself through the adoption of inadequate procedural rules.

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[2] *Official Gazette of the Federal Republic of Yugoslavia.* No. 29/96.
[3] *Official Gazette of the Republic of Serbia.* No.79/05.

15. The FLPC did not vest the Commission with its own powers to impose sanctions on undertakings that obstructed its orders, and hampered both the investigation of suspected infringements and the execution of final decisions. It deprived the law of its deterrent effect, as the "infringement procedure" before the misdemeanour judge proved to be an unsuitable means of compelling compliance with the competition rules. On the other hand, the FLPC had failed to provide the Parties with all procedural guarantees required from a State of law, in particular the full rights of defence. However, these issues are regulated by the General Administrative Act, which applies to procedural issues unless otherwise determined by the FLPC. The same solution is applied in the 2009 Law on Protection of Competition (LPC). Moreover, because the thresholds for merger notification were set at a low level, SCPC was overloaded with numerous requests for authorization which absorbed more than 80 per cent of its working capacity. Hence, the capacity to investigate cartels and abuses of dominance was rather limited.

16. In response to the various lacunae and limitations of the Competition Law of Serbia, the Parliament of Serbia adopted the LPC, which came into force on 1 November 2009. The LPC is aligned with the most advanced countries. The reorganization of the legal text has now a clear distinction made between rules of substance and rules of procedure. The new legal framework was completed during 2010 by the adoption of eight by-laws.[4]

A. Scope, aims and coverage

17. Pursuant to its Article 1, the LPC establishes the "goal of economic development and welfare of the society, and in particular to the benefit of consumers", which replaces the intent "to provide identical conditions for undertakings" and the "economic welfare" of

[4] See the full-length voluntary peer review of the competition policy of Serbia. UNCTAD/DITC/CLP/2011/2.

the previous law. With respect to jurisdiction, 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 Serbian jurisdiction by virtue of the principle of territoriality. Article 3, relating to the personal scope of application of the LPC, takes as its point of departure the concept of "undertaking" underlying the EU competition rules, explaining this concept in a rather comprehensive manner, which includes firms, state institutions, public enterprises and cooperative associations, among others.

B. Anticompetitive agreements and practices

18. 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."

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

20. 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.

C. Exemptions

21. To be exempted, an anticompetitive agreement must meet two positive and two negative conditions: On the one hand, 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. On the other hand, it may neither impose on the undertakings concerned restrictions which are not indispensable

to the attainment of these objectives, nor may it afford such undertakings the possibility of eliminating competition in respect of an essential part of the products in question.

22. The Law makes a distinction between individual exemptions (Article 12) granted by SCPC on the basis of a request submitted by parties to the agreement, who also bear the burden of proof for the fulfilment of the exemption criteria, and block exemptions for certain categories of anticompetitive agreements, granted by decree of the Government (Article 13).[5] The block exemption decree has already been adopted. 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.

D. Abuse of dominance

23. The LPC has introduced a different definition of the term "dominant position" (from the old law), taking the main elements of the corresponding provision in paragraph 19 (2) of Germany's Law against Restrictions of Competition *(Gesetz gegen Wettbewerbsbeschränkungen)*.[6]

24. 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 the European Court of Justice[7] and (subject to slight changes) used in the FLPC.

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[5] SCPC has already published the regulation detailing the information required, namely the "Regulation on the Content of Requests for Individual Exemption from Prohibition of Anticompetitive Agreements".

[6] Bundesgesetzblatt I, page 1954.

[7] See the judgement in the "Kali und Salz" case, France v. Commission, [1998] ECR I-1375 at paragraph 221.

25. In order to facilitate the application of the above provisions, the LPC has maintained legal presumptions linked to market share thresholds as laid down in the previous law, which followed the example offered by paragraph 19 (2) of Germany's 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 position, whereas several undertakings are deemed to jointly hold a dominant position if together they reach a market share of 50 per cent.

26. Article 16 prohibits and defines the abuse of a dominant position using the same words as the previous law did. The text of this provision reiterates Article 102 of the TFEU.

E. Mergers

27. Modelled after Article 3 (1) of EC Merger Regulation No. 17 of 1998, Article 17 (1) identifies three types of concentration, namely (a) acquisitions and changes leading to a merger; (b) acquisitions of direct or indirect control; and (c) joint ventures.

28. The decisive criteria for appraisal of concentrations are contained in Article 19. This provision is similar to Article 2 (2) and (3) of the ECMR. Paragraph 1 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.

29. 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) of the 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 above-mentioned factors, particularly in the

absence of barriers to entry on the relevant market (item 5). Article 18 exempts financial operations from the LPC merger control.

F. Claims for damages for anticompetitive practices

30. The LPC establishes in Serbia the possibility of private action to obtain compensation for anticompetitive practices. Article 73 establishes 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 jurisprudence of the EU Court of Justice relating to infringements of Articles 101 and 102 of the TFEU. Secondly, Article 73 stipulates that proceedings for damages can only be instituted if the infringement of competition has already been established by a decision of the SCPC. Thirdly, Article 73 establishes that claims for damages must be made in a lawsuit at the court of jurisdiction in a civil procedure.

G. Unfair competition

31. There is already a law on advertising, and, in addition, the law on consumer protection regulates some aspects relating to unfair 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.

H. State aid

32. The National Parliament adopted the Law on the Control of State Aid (hereinafter referred to as the "LCSA") on the same day as the LPC, and both been applicable since 1 January 2010.[8] State aids are 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 above-mentioned provisions of the Treaty.

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[8] *Official Gazette of the Republic of Serbia.* No. 51/09. 14 July 2009.

33. In compliance with the SAA criteria, Serbia set up an operationally independent authority, which began operating in March 2010, and which is 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.

34. However, the system put in place still needs enforcement, and ministries need further training to assess state aid.

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

A. Institutional framework and operations of the SCPC

35. The Commission for Protection of Competition, which began operations in 2006, has been flooded with merger cases and also individual exemptions, totalling about 130 cases per year. However, no merger has yet been effectively blocked and nor have major remedies been imposed.[9] The Commission has taken about 6 decisions per year on anticompetitive practices, but only in 2010 was it able to see a major decision upheld by the courts. Judicial control has now passed to the new Administrative Court.

B. Institutional set-up of the SCPC

36. Pursuant to Article 23, paragraph 2, of the Law on Protection of Competition (Official Gazette of the Republic of Serbia, no. 51/09), the National Assembly of the Republic of Serbia elects the President of the Commission for Protection of Competition. There are no explicit requisites for the job of council member. There was also a substantial

[9] Although it ruled against a merger of supermarkets, the decision was annulled by the courts. The Commission has, however, taken the same decision again.

change from the previous law, under which council members were proposed by professional and business associations.

37. The term of office is five years, and members cannot be dismissed except in the case of *force majeure*. The posts of the President and of two council members are full-time. The other council members serve on a part-time basis, and they can continue to carry out academic or training jobs, but they cannot pursue any other remunerated activity and cannot be members of political parties.

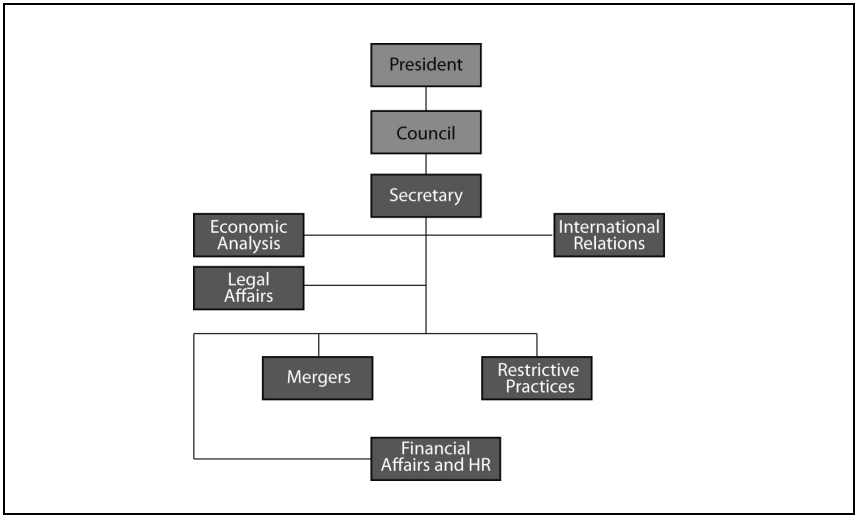
38. According to the new LPC, the SCPC has now three organs, namely the Council of the Commission (hereinafter referred to as "the Council"), the President of the Commission, and the Technical Service of the Commission (hereinafter referred to as "the Technical Service"). Pursuant to Article 22 (1), (2) and (3), the Council – consisting of the President of the Commission and four members – takes all decisions, and acts on the issues within the competence of the Commission, unless stipulated otherwise by the Law and the Statute.

39. The division of responsibilities between the Council, the final decision body, and the Rapporteur and the Authorized Official (who are the main persons responsible for conducting the investigations) aims to shield the investigation team from interference by the decision body, ensuring a separation of investigation and decision, which is widely recognized as being important to ensure the rule of law.

40. Figure 1 shows the organizational chart of SCPC. There are two operational divisions – mergers and anticompetitive practices, and there are two advisory divisions – economics and legal affairs. There is also an international relations division, and two supporting divisions – financial affairs and human resources.

Figure 1

SCPC organizational chart



C. Functions of SCPC

41. The functions of SCPC can be divided into (a) enforcing the competition law; (b) supervising markets; (c) counselling the Government on competition rules; (d) advocacy; and (e) international cooperation, as specified in Article 21 of the LPC.

D. SCPC's investigatory powers

42. SCPC's general power to investigate comprises any action aimed at providing the evidence necessary to establish a true and complete reasoning of the case under investigation. Article 41(1) enumerates the following as examples: taking statements from parties and witnesses; experts' opinions; the collection of data, documents and other items; and performing inspections and temporary dispossessions.

43. Regarding the specific legal instruments to be used for the investigation of a case, Article 41 (1) establishes that the parties in the procedure have to submit or to provide for inspection the relevant information in written, electronic or any other form. This obligation relates to documents, items that contain the information, and other items that may be subject to evidence in the procedure. Inspections on the 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)). The LPC follows regulation 1/2003 in giving the Authority the power to inspect private premises. Thus far, no surprise inspections (dawn raids) have been carried out, and the SCPC needs further resources and training to conduct these operations.

E. Procedural aspects of cases on anticompetitive practice

1. Initiation of a formal procedure

44. 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.

2. Rights of defence

45. The new law 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, according to the different phases of the procedure. The text of the resolution on initiation of the procedure is published in the *Official Gazette of the Republic of Serbia* (Article 40 (1)) and is thus accessible to all undertakings that

may be concerned. Article 54 grants specific protection in the case of inspection of premises.

3. Third parties' rights

46. These have a minor status under the Law, because pursuant to Article 33 (2) they 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 have, moreover, the right to be informed about the course of the procedure (Article 43 (3)).

4. Merger notifications

47. According to Article 61 of the LPC, a concentration must be notified to the Commission in case:

(a) 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 the concentration on the market of the Republic of Serbia generated an income exceeding €10 million;

(b) 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 the concentration have an annual turnover of more than €1 million each in the same period on the market of the Republic of Serbia.

48. The thresholds have increased from the previous law, but they are still considered quite low. A notification should be filed with the SCPC within 15 days after the conclusion of the agreement or contract (Article 63). The term of one month is usually insufficient for the analysis of

complex mergers, and the LPC stipulates a second phase that will be initiated by decision of the President of the Commission (Article 62).

49. The fees paid for notification are 2 million dinars ($25,000) for summary proceedings and 4 million dinars ($50,000) for inquiry proceedings. About 95 per cent of the notifications are summary proceedings. These are clearly among the highest fees paid in Europe, considering the income levels of Serbia.

50. A concentration may be investigated ex officio, if the parties' aggregate market shares reach or exceed 40 per cent of the relevant market in Serbia, or if there are grounded indications that the concentration would not meet the conditions for approval, or if it was not approved according to the Law.

51. According to Article 66(1) and (2), the applicant may present special conditions, currently known as remedies. If the SCPC considers that the proposed commitments to solve the anticompetitive problems posed by the concentration are sufficient, it will then approve the concentration on the condition that the applicant fulfils the commitments, and will monitor the implementation thereof.

5. Overview of SCPC activities

52. In the 2007–2010 period, the SCPC had an average of about 110 merger cases per year. There was a peak of 133 decisions taken in 2008 when a substantial number of privatizations were made (40 to 45 cases). About 70 per cent of the cases involved foreign companies. A lower number of cases has been notified since the new LPC – which increased the thresholds – came into force in November 2010.

53. In the 2007–2009 period, an average of 14 cases of anticompetitive practices were decided per year, which included four cases of abuse of dominance and three cartels, with individual exemptions accounting for the remainder of the cases. The large number of individual exemptions was due to the obligation, under the previous

law, to notify agreements. Taking into consideration the number of professionals, SCPC has produced a substantial number of cases.

6. Sanctions and remedies

54. Under the new law, SCPC has the power to pronounce sanctions, which constitute administrative measures within the meaning of Article 21, item 2, and Article 59. Articles 68 and 70 provide for fines and periodical penalty payments. The immediate object of a fine is to punish undertakings for infringements committed in the past and to prevent any recurrence, but fines also act as a general deterrent to other undertakings. Both sanctions could therefore be imposed for one and the same infringement without violating the general principle of *ne bis in idem.*

7. Sanctions for infringements of substantive rules

55. Article 68 (1) establishes the main elements of the "punitive sanction" imposed as a measure for protection of competition. A fine of up to 10 per cent of the total annual turnover, calculated pursuant to Article 7, shall be imposed on an undertaking, if it (a) abuses its dominant position (Article 16); (b) concludes an anticompetitive agreement (Articles 59 and 67); (c) does not respect a measure for removal of a competition infringement or de-concentration, or does not respect a decision to block a concentration.

56. Procedural penalties have been provided for non-compliance with interim measures (Article 56) and for failure to notify a concentration (Article 61). Article 68 (3) establishes the time limit for issuing and collecting fines (1 year), which is rather short for competition cases.

57. The Government of Serbia has published a regulation setting out the method for determining fines and for their payment, as well as other sanctioning measures. The criteria relate to termination of the practice or act as well as its effects previous to opening of investigation, and the level of cooperation with the authorities.

8. Leniency

58. Article 69 provides for measures of leniency which the SCPC grants in favour of 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, i.e. from the imposition of fines under Article 68 (1), item 2. Relief is granted on 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 only had information without sufficient evidence to issue a resolution on initiation of the procedure.

59. Parties to the anticompetitive agreement which do not meet the conditions for relief of punitive sanctions may, pursuant to paragraph 3, benefit from a reduction of the amount of the fine that otherwise would have been imposed, if, in the course of the procedure, they provide evidence which would allow the SCPC to close the procedure or to make a decision.

9. Sanctions for breaches of procedural rules

60. Pursuant to Article 70, an amount between 500 and 5,000 euros can be fixed for each day on which an undertaking is acting contrary to a procedural order of the SCPC, or does not comply with these orders in view of Article 57 of the Law.

61. By distinguishing between imposition and collection of penalties, the Law recognizes that Article 70 necessarily comprises a procedure in two phases. In the first phase, the SCPC fixes by decision the amount of the penalty for each coming day of non-compliance with the undertaking's procedural obligation. Only when the breach of the respective procedural rule has ended can SCPC state the definitive amount to be collected.

10. Common rules on fines and periodical penalty payments

62. Fines and periodical penalties have to be paid into the budget of the Republic of Serbia (paragraph 3), and will either 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 and other costs shall be reimbursed from the funds of SCPC (paragraph 5). In the case of measures determined against associations of undertakings, all members are jointly and similarly 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). Enforced payment will be made by the tax authorities (paragraph 7).

11. Behavioral and structural measures

63. According to Article 59(1), SCPC may issue behavioural measures. However, the LPC gives SCPC a more powerful instrument – aligning Serbia with the European Commission powers and with the more advanced EU competition authorities – which is the power to impose structural measures.

12. Criminalization of anticompetitive practices

64. The Criminal Code contains article 232 which criminalizes abuses of monopolistic positions. The present law punishes abuses of dominance but does not directly punish hardcore cartels or bid-rigging. This was a common phenomenon in the first generation of competition laws adopted by the formerly centrally planned economies. However, the interpretation of the above article can be extended to hardcore cartels if the agreement among enterprises is considered a "monopolistic agreement" that causes "harmful effects to other companies, consumers or users of services". The enforcement of this law is carried out by the public prosecutor's office, and generally only after the courts have confirmed a decision of the Commission for Protection of Competition. The first case has been announced, regarding abuse of dominance in the milk market.

13. Budget and resources of SCPC

65. So far, the resources of the SCPC have relied only on the fees paid for mergers. However, it is considered that this form of financing will not maintain the sustainability of the Commission, as it needs to expand its staff, and merger fees may need to be reduced.

66. SCPC currently has 10 lawyers and 7 economists working in operational divisions and in the law and economics divisions, which is a very low number when compared either with the neighbouring countries (e.g. Croatia has double) or with competition authorities in the EU. The Council of the Commission has five members, including the President. The President and two of the council members have full-time positions. This is one of the biggest bottlenecks for law enforcement in Serbia. The Government has recognized the problem, and is committed to increasing the resources of the Commission under the EU arrangements.

67. The budget for SCPC for 2010 was about 1.3 million euros, totally financed by merger fees. It is widely recognized that SCPC needs to remunerate above the level of civil servants in order to attract highly qualified lawyers and economists who could confront the professionals hired by large firms either in casework or in the courts. But the financing needs to be stable, foreseeable and adequate for the functions of the Authority.

14. The judiciary and the resolution of SCPC competition cases

68. Under the previous law, judicial control was exercised by the Supreme Court of Serbia. Judicial review significantly restricted the enforcement of competition law. There were 13 cases unfavorable to the Commission. In some cases, the Commission corrected the procedures and took a similar decision, and in a few cases it dropped them. The Supreme Court always quashed cases on the basis of procedural issues. Some reasons for the Commission's failure in court related to a lack of clarity about the distribution of competence between the Council and the Commission. Others related to the lack of access to the minutes of the

Council and to the fact that the decision did not contain references to all the documents submitted by the parties. But the most common criticism was lack of clarity about the case.

69. Under the new law, review of the SCPC's decisions is carried out by the Administrative Court. This is a new court, which resulted from the judicial reform in Serbia. It began operations in January 2010. It is composed of 38 judges. However, it is already overwhelmed by the number of cases. There were 17,000 cases transferred from the Supreme Court, and 1,000 cases are filed per month. In view of the number of cases and the way in which cases are allocated to judges (by lottery), the Court does not intend having judges who specialize in competition matters. The Commission has won a major case in the Administrative Court with Danube Foods in the field of abuse of dominant position, as well as one case of coordinated practices related to the Veterinary Association. The Administrative Court upheld four less important decisions of the Commission. Appeals on matters of law can then be made to the Supreme Court of Cassation.

F. Relations with the legislature and the executive

1. Legislature

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

71. However, there is no clause requiring Parliament to consult with SCPC when new laws are being prepared that may have with implications on competition policy, as is the case in other jurisdictions.

2. Executive

72. The SCPC is independent from the Government. However, it has to submit its financial plan every year by November, for government approval.

73. The Ministry of Trade is responsible for the 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 market supervision and intervention, in particular with regard to basic foodstuffs.

74. Although the law is not explicit in giving SCPC the right to issue recommendations to the Government, Article 21 (8) gives SCPC the function to issue opinions on implementation of competition policy, assuming that those opinions can be directed at any public or regulatory decision. 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, establishes the obligation of the latter to positively react to such requests.

IV. SECTOR REGULATION IN SERBIA, AND ENFORCEMENT

A. Institutional framework

75. Relations with sector regulators – in particular telecommunications and energy – are rather limited, and no case has yet been referred from one institution to the other. The telecommunications regulator intends to coordinate in the future in market analysis of the telecommunications markets. However, SCPC has signed memorandums of cooperation with the National Bank of Serbia and the Agency for Energy, and a memorandum for cooperation with the Agency for Telecommunications was signed in early 2011. So far, SCPC has created a good level of cooperation with officials from regulatory agencies, during investigations in several cases. However, there is a need for closer cooperation between the SCPC and the anti-corruption agency and

procurement agencies to avoid bid-rigging and corruption in procurement in many sectors, including health, transport and construction. The Court of Accounts can also play an important role in the audit of these practices.

B. Energy regulation

1. Electricity

76. The electricity market is characterized by the dominant position of the state-owned "Elektroprivreda Srbije" (EPS) company, established for electricity generation and distribution and for the supply of electricity for tariff customers in Serbia. There are 11 companies that are subsidiaries of the EPS mother company and all of them are in the form of limited liability companies. These comprise five electricity generation companies, five regional distribution system operators, and one coal-mining company.

77. There is also an independent regulator in the electricity sector – the separate state-owned "Elektromreza Srbije" (EMS) company responsible for the transmission of high-voltage electricity and for system operation activities, which is also a market participant. There is also a large number of interconnectors (eight) with neighbouring countries.

78. The Energy Agency of the Republic of Serbia is responsible for the regulation of electricity, gas, and pipelines for oil and central heating systems. Regulation is exercised in terms of determining methodologies for setting prices, giving opinions on the network energy prices, on prices for transport, and on prices of electricity and gas for tariff customers (these prices are subject to government approval), issuing licences, approval of grid codes and the market code, market monitoring, and taking decisions on appeals when a request for connection or access to the system is denied.

2. Natural gas

79. The market for natural gas is dominated by a single importer and dominant supplier. The biggest network for the transport and distribution of gas is owned by a state firm, Serbija Gas, which is the wholesaler, transporter, distributor and retailer. The south-east of the country is supplied by Yugorozgas – a company with ownership by Gazprom (50 per cent), Serbijagas (25 per cent) and Centrex ME Energy (25 per cent) – which is also a wholesaler, transporter, distributor and retailer.

80. The Serbian natural gas market will be fully liberalized for households, in line with ratification of the Energy Community Treaty binding Serbia, by 2015. 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.

3. Telecommunications

81. The level of competition in the fixed network and related 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). Prices of fixed telephony are below the average electricity generation cost. For example, the minimum cost of a local call is half a euro cent, compared with 3.7 cents in Turkey. Standard residential rates have been rising substantially over the last three years, but they are still among the lowest in the EGC. The same applies to business rental rates.

82. There are 70 operators of cable television, but they have regional monopolies, with SBB the largest company in Belgrade. The penetration rate of cable television is still low (15 per cent).

83. Regulation in the telecommunications market 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. Thus far, prices are regulated in only two markets: domestic fixed telephony, and cable television services. There is clearly another market where mobile operators have a monopoly position, namely the termination calls market, which has been regulated in most of the EU markets. Regulatory enforcement is still rather weak. The maximum fine that can currently be imposed is 2 million dinars. There are five cases on appeal.

C. Other sectors

1. Financial markets

84. The banking system of Serbia has one of the lowest concentration ratios in Europe. There are 27 banks registered in the Central Bank of Serbia. The four major banks have a market share of 40 per cent in terms of total assets. The Herfindahl-Hirschman Index is 637.

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

86. A recent stability report by the Serbian Central Bank concluded 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 the effects of the 2007–2009 global financial crisis quite well.

V. FURTHER ASPECTS OF THE COMPETITION POLICY REGIME OF SERBIA: ACHIEVEMENTS AND CONSTRIANTS

A. Procurement procedures

87. 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. Experience in several countries shows that improving efficiency and competition in public procurement can yield savings of 20 to 30 per cent in public expenditures. A World Bank assessment undertaken in 2002 referred to several problems which still seem to persist: lack of training of procurement officials, widespread corruption in procedures, and the lack of an auditing function at both central and local levels.

88. The Law on Public Procurement is not yet harmonized with EU legislation; it has a substantial number of exemptions and does not institute a clear procedure for procurement and auctions. The World Bank report cited had already pointed out some of the weaknesses, such as giving too much leeway for procurement agencies to choose restricted auctions, bid-opening procedures that exceed their function, and lack of transparency in the criteria for selection of bids. Standardization of procedures and documents, and transparency, are crucial for strengthening competition in public procurement.

89. Moreover, the Law on Public Procurement should also stipulate that when there is evidence of bid-rigging, the facts should be communicated to SCPC accompanied by all the supporting documentation. All of this process should be performed in maximum secrecy, and parties should not be informed of the specific reason in order to protect the investigation.

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

91. Another important element is to prohibit negotiations after tenders have been presented, even in procurement models such as the negotiated procedure or the competitive dialogue procedure.

B. Health procurement

92. Serbia has a national insurance system that provides full coverage of the population. 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.

93. The National Institute of Health has already found evidence of bid-rigging, either by forming consortia or by price-fixing, but it proceeded with the auction. There is no requirement in the law that bid-rigging should be reported to SCPC by the public procurement authority. There have also been cases where companies have divided the markets among hospitals, but there is no mechanism for monitoring procurement procedures. There is also no centralized database on the results of the auctions that could monitor prices and identify possible collusion.

VI. INTERNATIONAL COOPERATION AND CAPACITY-BUILDING

A. Assistance to the Serbian Commission for Protection of Competition

94. "Assistance to the Commission for Protection of Competition" (ACPC) was a 36-month project that was funded by the European Commission and managed by the European Agency for Reconstruction, which took place between 2008 and 2010.

95. A second project of technical assistance to SCPC is being prepared by the Government, with the support of the European Commission, which is to start by the end of 2011 and have a duration of two years. There is also an interim technical assistance project in collaboration with the German Government, mainly to provide training in surprise inspections.

B. International cooperation

96. The Commission is a member of the International Competition Network (ICN), and cooperates in different areas by contributing papers on Serbia's competition policy. The Commission has also benefited from technical assistance from the Organization for Economic Cooperation and Development (OECD), and has sent several staff members to the OECD regional training centre in Budapest. The Commission works with the secretariat of UNCTAD on issues of competition law and policy.

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

VII. FINDINGS AND POLICY RECOMMENDATIONS

A. Competition law and enforcement

98. This first group of recommendations refers to reinforcing the capacity of SCPC and increasing its efficiency. The most important measure of competition law and enforcement is to strengthen SCPC in order to be able to fully enforce the law. Creating a sustainable and predictable source of financing is the first priority. Then, it should reinforce its human capital basis and endow SCPC with high-level expertise in economics and also expand SCPC's operational capacity in both law and economics. SCPC would still need technical assistance for some years to come, in order to continue improving on the good work that has already been carried out.

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

Addressed to: SCPC, Legislature, Government.

First policy option: The Government should establish an annual budget allocation to SCPC, and transfer the funds in the same way as to any other government department.

Second policy option: Enact legislation to allow SCPC to participate in the amount of revenues collected by regulatory agencies from regulated firms.

Recommendation 2: Provide SCPC with highly qualified lawyers and economists with at least the minimum qualifications required for discharging 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 help with retrieving digital evidence from dawn raids.

Addressed to: SCPC and Government.

Recommendation 3: Establish models for basic legal documents and elaborate guidelines for procedures for implementation of the LPC.

Addressed to: SCPC.

Recommendation 4: Prepare and launch a campaign against bid-rigging, initiate investigations in some cases, and train personnel in the health sector and in other departments that have major procurement programmes.

Addressed to: SCPC, State Procurement Office and Government.

Recommendation 5: Train SCPC personnel and acquire tools for conducting dawn raids.

Addressed to: SCPC.

Recommendation 6: Continue to support SCPC with technical assistance.

Addressed to: SCPC.

Recommendation 7: Training of judges of the Administrative Court.

Addressed to: Government, Administrative Court.

Recommendation 8: Create institutional capacity for consumer protection and against unfair competition.

Addressed to: Government, SCPC.

First policy option: Merge Competition Law with Consumer Protection and Unfair Competition Law Enforcement in SCPC.

Second policy option: Strengthen the Department of Consumer Protection in the Ministry of Trade and Services.

Recommendation 9: Reinforce cooperation between SCPC and sector regulators, focusing on competition policy.

Addressed to: SCPC, sector regulators, Government, legislators.

Recommendation 10: Further aligning Serbian competition law with EU laws.

In particular, abrogate the obligation for SCPC to reimburse the interest and other costs of fines from its own resources if the SCPC decision is revoked on appeal.

Addressed to: SCPC, Government, legislators.

B. Regulatory issues and competition policy

Recommendation 11: Create a high-level unit for competition policy within the Government structure.

Recommendation 12: Advocate for the inclusion of competition policy considerations during privatizations, in particular in the telecommunications sector.

Recommendation 13: Restructure public enterprises in order to increase efficiency and to prepare for future privatization, in particular in electricity.

Addressed to: Government, Minister of Energy.

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

Addressed to: Government, all ministries in charge of infrastructure, legislators.

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

Addressed to: Government, State Procurement Office, municipalities.

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

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

Recommendation 17: Eliminate domestic preference in procurement.

Addressed to: Government, legislators.

C. Other institutional issues

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

Addressed to: Government, SCPC.

Recommendation 19: Strengthen enforcement of State aid policies.

Addressed to: Government (Ministry of Finance).

Recommendation 20: Continue advocating the benefits of competition policy among economic operators, consumers, and government officials.

Addressed to: SCPC.

Recommendation 21: Institute courses on industrial organization and competition law and economics in law schools and economics departments at postgraduate level.

Addressed to: Ministry of Justice, Ministry of Education, private universities.