

Competition Law Enforcement in Times of Crisis: the Case of Serbia

by

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Abstract

The development of Serbian competition law started in 2005 with the adoption of its first modern Competition Act. National competition rules are generally harmonized with European Union law, especially following the adoption of the current Competition Act of 2009. However, several problems in competition law enforcement can be identified still, the importance of which increases as the effects of the current economic crisis spread. The paper focuses mainly on three problems specific to competition law enforcement in Serbia, a country with a weak economy. The first problem identified is that of a possibly privileged treatment of state-owned companies. The Competition Authority commenced so far only two proceedings against undertakings with state-owned capital. Furthermore, the Authority seems to accord insufficient attention to some industry sectors that are of special public interest, such as the production and trade of gas or oil, dominated by undertakings with state-owned capital. Sector-specific analyses undertaken by the Competition Authority did not result in any proceedings being initiated *ex officio*. The second problem identified in this paper is the reluctance of the Serbian Competition

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Authority to enforce competition rules in certain ‘sensitive’ situations. Instead of taking a pro-active approach, it sometimes seems that the Authority chooses to act as an ‘advisor’ of undertakings rather than an enforcer of competition law. Finally, the paper analyzes the activities of the Commission for State Aid Control, notorious for its perpetually positive approach towards institutions granting state aid.

Résumé

Le développement du droit serbe de la concurrence a commencé en 2005, avec l’adoption de la première loi moderne relative à la protection de la concurrence. Les règles nationales de la concurrence sont généralement harmonisées avec le droit de l’Union européenne, en particulier suite à l’adoption de la loi relative à la protection de la concurrence en 2009. Pourtant, l’auteur identifie plusieurs problèmes relatifs à la mise en œuvre des règles de concurrence, dont l’importance a augmenté pendant la crise économique actuelle. L’article se concentre en particulier sur trois problèmes relatifs à la mise en œuvre des règles de concurrence en Serbie, un pays à difficultés économiques. Le premier problème identifié par l’auteur est relatif à un possible traitement préférentiel des entreprises publiques. Jusqu’à présent, l’Autorité de la concurrence n’a initié que deux procédures contre les entreprises publiques. De plus, il paraît que l’Autorité de la concurrence n’accorde pas suffisamment d’attention aux secteurs d’intérêt général, comme celui de la production et distribution de gaz, qui sont dominés par d’entreprises publiques. Les enquêtes sectorielles entreprises par l’Autorité de la concurrence dans ces secteurs n’ont abouti à aucune procédure initiée *ex officio*. Le deuxième problème identifié par l’auteur est celui de la réticence de l’Autorité de la concurrence d’initier des procédures dans certaines situations « sensibles ». Au lieu d’approche proactive, l’Autorité a choisi de jouer le rôle de « conseiller » d’entreprises dans certains cas. Finalement, l’auteur analyse les activités de la Commission pour le contrôle d’aides d’Etat, fameux pour la totalité de décisions déclarant l’aide compatible avec la loi.

Classifications and keywords: competition advocacy; competition law enforcement; control of state aid; economic crisis; Serbia.

I. General assessment of the Serbian competition law regime

Similarly to other South-East European countries, Serbia embraced competition rules quite late, under the direct influence of European Union law and following significant political changes. While it was still part of the Socialist Federative Republic of Yugoslavia, Serbia had a centrally planned economy where the majority of market participants were state-owned. The idea of free competition was, thus, inconsistent with the values of a socialist society. In the last decade of the twentieth century, Serbian economy started

to slowly shift to a more liberal model. This process was, however, largely halted by the destruction of the socialist Yugoslavia, the UN embargo and the surrounding Balkans conflict. Still, the Federal Republic of Yugoslavia, which was at that time formed by Serbia and Montenegro, adopted in 1996 its first competition act, entitled the Act Against Monopolies¹. The legislation was highly controversial since it laid down rules which were practically impossible to enforce. Under the 1996 Act, competition rules were to be enforced by the Anti-monopoly Commission, whose members were appointed from among 'distinguished academics, experts and businessmen'². Paradoxically, certain members of the Commission were CEOs of the very undertakings whose behavior was to be analyzed under the 1996 Act! Although Serbia's first competition act was in force for almost ten years, it was never enforced.

The development of Serbian competition law can be traced more accurately to 2005 and the adoption of the first modern Competition Act (hereafter, 'the 2005 Competition Act')³. Compared to its neighbouring countries, Serbian legislation was introduced somewhat late. For instance, Hungary adopted its Competition Act in 1996, Slovenia in 1999 and Croatia in 2003. Although the substantive rules laid down by the Serbian 2005 Act were generally in line with EU law standards⁴, its procedural rules were not drafted in a satisfactory manner. Under the 2005 Act, the Competition Authority (Commission for the Protection of Competition) was not empowered to impose fines for an infringement of competition law. The Authority could only initiate proceedings before the misdemeanour tribunal which remained the only competent authority to impose fines. This was a rather peculiar solution, different to the competences of national competition authorities in most European countries and those of the European Commission. It is clear that the judges of the misdemeanour tribunals did not have sufficient knowledge on legal and economic issues surrounding the protection of free and undistorted competition, since they were generally dealing with cases of petty crime. This enforcement model was particularly dangerous since misdemeanour tribunals were often influenced by the executive power, which was a source of corruption concerns.

¹ Official Journal of the Federal Republic of Yugoslavia No. 29/1996.

² Regulation establishing the Anti-monopoly Commission, Official Journal of the Federal Republic of Yugoslavia No. 44/97.

³ Official Journal of the Republic of Serbia No. 79/2005.

⁴ However, certain substantive provisions were incomplete, especially those regulating anti-competitive agreements e.g. the 2005 Competition Act did not define *de minimis* agreements. Furthermore, by-laws allowing for block exemptions of certain anti-competitive agreements have never been adopted. For an in-depth analysis of the 2005 Competition Act see: D. Popovic, 'The upcoming reform of Serbian competition law: A necessary step towards closer approximation with the EU law' (2008) 4 *Concurrences* No. 22067.

In the first years following its establishment, the attention of the Competition Authority was placed firmly on merger control. This was a direct consequence of the fact that the 2005 Competition Act set rather low thresholds for the obligatory notification of concentrations⁵. Low thresholds led to large numbers of notifications, which were usually approved within summary proceedings only because it was clear that the notified operations did not restrict competition on the Serbian market⁶. Since the Authority had rather limited human resources, low notification thresholds resulted in other areas of competition law enforcement – prohibition of anti-competitive agreements and abuses of dominance – being *de facto* neglected.

A new Competition Act was adopted in 2009 (hereinafter, ‘the 2009 Competition Act’)⁷ significantly improving the Serbian competition law regime. Substantive rules have been further harmonized with EU law, while rules of procedure have undergone a much needed reform. The Competition Authority has finally become empowered to impose fines, which should be seen as an important pre-requisite for efficient competition law enforcement. Necessary by-laws were also adopted, thus completing the Serbian legislative framework. They include, most importantly, three block exemption regulations that were never adopted under the previous Act⁸. Importantly also, the 2009 Competition Act laid down different thresholds for notifications of concentrations, in order

⁵ In setting the thresholds for the control of concentrations, the 2005 Competition Act differentiated between concentrations whose participants are already present on the Serbian market and those in which at least one participant is a Serbian undertaking. This way, the 2005 Act created a system whereby foreign undertakings accede to the Serbian market. Authorization was necessary if one of the two conditions was met: (a) combined total annual turnover of all participants achieved on the Serbian market exceeding EUR 10 million in the previous financial year, or (b) combined total annual turnover of participants realized on the international market in the previous financial year exceeding EUR 50 million, whereby at least one of the participants had to be registered on the territory of the Republic of Serbia. During the privatisation process in Serbia, the second criterion was frequently met, since foreign investors generally realized total annual turnover of EUR 50 million on the international market. This automatically led them to notify the operation, regardless of the size of the undertaking acquired in Serbia.

⁶ In its 2008 Progress Report for Serbia, the European Commission noted the need for a more adequate notification thresholds for concentrations, which would ensure that the notification duty applies only to those operations that could affect competition in Serbia. See: Serbia 2008 Progress Report, SEC (2008) 2698 final.

⁷ Official Journal of the Republic of Serbia n^o 51/2009. For the analysis of the 2009 Competition Act see: I. Dajkovic, ‘Comments on the new Serbian Competition Law’ (2010) 31(2) *ECLR* 52.

⁸ The Government adopted 3 block exemption regulations (on specialization agreements, on R&D agreements, and on vertical agreements), a leniency regulation, a regulation on the criteria for setting fines, and a regulation on relevant market definition. They are available at the Competition Authority website: www.kzk.gov.rs.

to allow the Authority to better focus on anti-competitive agreements and the abuse of a dominant position⁹.

Neither the 2005 nor the 2009 Competition Act laid down rules on the control of state aid. These rules have been introduced into the Serbian legal system by a separate Act on the Control of State Aid (hereafter, 'State Aid Act'), which was adopted and entered into force in July 2009 although its application did not start until 1 January 2010¹⁰. The Government established a separate body in charge of its enforcement – the Commission for the Control of State Aid (hereafter, 'State Aid Commission'), within the auspices of the Ministry of Finance¹¹. In a country with rather fragile democratic institutions, it would have been more appropriate for the legislator to opt to empower the existing Competition Authority to enforce the State Aid Act, rather than establishing a separate institution with limited guaranties of its independence. The activities of the State Aid Commission will be analyzed in detail in the latter part of this paper.

The extent of the harmonization of Serbian competition rules with that of the European Union must be considered as rather high. The harmonization process started, on a voluntary basis, way before Serbia signed the Stabilization and Association Agreement, and the Interim (Trade) Agreement with the European Union, in April 2008¹². Under the Stabilization and Association Agreement, Serbian authorities are not required to apply EU law. They are only required to interpret national competition rules in line with the criteria arising from the application of EU competition rules and interpretative instruments adopted by EU institutions, in cases where the behaviour in question may

⁹ Under the 2009 Act, a notification duty arises if one of the following thresholds is met: (a) combined aggregate annual turnover of all undertakings concerned on the global market in the preceding year exceeds 100 million EUR, and at least one participant generates more than 10 million EUR turnover on the Serbian market; or (b) aggregate annual turnover of at least two participants generated on the Serbian market exceeds 20 million EUR, and each of at least two participants has generated turnover exceeding 1 million EUR on the Serbian market. Concentrations realized through public bids in accordance with the Act on Takeover need to be notified even if the thresholds are not met. The Competition Authority may also initiate *ex officio* proceedings in case the aggregate market share of the participants in the territory of the Republic of Serbia is at least 40%, in case the Authority presumes that the concentration does not meet the criteria for the approval prescribed by the Competition Act, or in case of any other operation not approved in accordance with the Competition Act.

¹⁰ Official Journal of the Republic of Serbia No. 51/2009. The first constitutive session of the State Aid Commission was held on 30 March 2010.

¹¹ Website of the State Aid Commission, part of the website of the Serbian Ministry of Finance: www.mfin.gov.rs.

¹² The European Commission publishes its Progress Reports annually, thus evaluating the reforms undertaken by Serbia. In December 2009, Serbia officially applied for membership in the European Union.

affect trade between Serbia and the EU¹³. This duty concerns only national provisions on anti-competitive agreements, abuse of dominance and state aid control. The Competition Authority has so far not referred directly to the criteria arising from the application of EU competition rules in its decisions, although it *de facto* observes them¹⁴.

II. Specific problems of competition law enforcement

In 2009, Serbia was strongly hit by the current global economic crisis, which originated in the United States in 2007. At that time, the Competition Authority was still largely inexperienced in the enforcement of the prohibition of anti-competitive agreements and the abuse of a dominant position. As explained, the 2005 Competition Act contained a ‘built-in error’, that is, low notification thresholds for concentrations, which largely pre-determined Serbia’s enforcement focus for a number of years. For example, in 2006 the Competition Authority did not establish the existence of a single anti-competitive agreement nor did it prove a single abuse case; it did, however, approve 40 concentrations. In 2007, the Authority established the existence of a single anti-competitive agreement, determined that an undertaking abused its dominant position twice and approved 102 concentrations. In 2008, two anti-competitive agreements were found as well as two abuses and 133 concentrations approved¹⁵.

The entry into force of the 2009 Competition Act coincided with the development of the economic crisis in Serbia. The new Act, which laid down

¹³ Art. 73(2) of Stabilization and Association Agreement between the European Communities and their Member States on the one part, and the Republic of Serbia of the other part: ‘Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the EC Treaty and interpretative instruments adopted by the Community institutions’. See also: Interim agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Serbia, of the other part, Art. 38(2). For the interpretation of similar provisions in agreements concluded between the Republic of Croatia and the EU, see: Constitutional Court of Croatia, case no. U-III-1410/2007, 13 February 2008, § 6.

¹⁴ It should be noted, however, that it is not possible to have a complete insight into the activities of the Serbian Competition Authority. The Authority is obliged to publish only the wording of its decisions in the Official Journal of the Republic of Serbia, which makes the website of the Authority the main source of information on competition enforcement. Unfortunately, only rare decisions of the Competition Authority are published online in their entirety.

¹⁵ See Annual Reports of the Serbian Competition Authority, available at <http://www.kzk.gov.rs>.

different notification thresholds, made it possible for the Authority to focus on competition infringements *stricto sensu*. It seems, however, that there was no general consensus among the members of the Authority whether to actually intensify their activities, given the difficult social and economic environment of the time. Still, certain improvements can be noted. In 2009, the Competition Authority found four anti-competitive agreements, established the abuse of a dominant position in two cases, and approved 103 concentrations. In 2010, it conducted four proceedings concerning alleged anti-competitive agreements, three for suspected abuse and cleared 73 concentrations. In 2011, the Authority conducted seven cases on anti-competitive agreements, one related to abuse and oversaw 94 concentrations¹⁶.

As the effects of the economic crisis grew, the challenges for the Competition Authority increased. On the one hand, it needed to prove it was capable to independently and efficiently enforce national competition rules. The Serbian public opinion, similarly to the European Union, expected the Authority to ‘show results’. On the other hand, there were very few undertakings not experiencing serious financial problems due to the crisis, and possible competition fines could seriously damage their already fragile situation. Furthermore, some of the undertakings still coping with the crisis were state-owned, a fact that certainly generated a psychological effect on the members of the Authority, still not comfortable to enforce competition rules against the state, broadly understood.

Three main features can be identified concerning the activities of the Serbian Competition Authority and the State Aid Commission during the current economic crisis. First, there are doubts as to the privileged treatment given to state-owned undertakings. Second, the Competition Authority seems to have opted in certain situations in favour of competition advocacy instead of competition law enforcement. Third, the activities of the State Aid Commission can be described as a ‘simulation’ of state aid control rather than its actual performance. These three issues are analyzed in more detail in the following sections.

1. Doubts as to the privileged treatment of state-owned undertakings

Pursuant to Article 3 of the 2009 Competition Act, competition rules apply to all legal and natural persons that directly or indirectly, permanently, occasionally or on an *ad hoc* basis, perform economic activities in the trade of goods or services, regardless of their legal status, ownership affiliation or state

¹⁶ *Ibidem*. Report for 2012 has not been published yet.

of origin, including: (a) domestic and foreign companies and entrepreneurs; (b) state institutions, bodies of territorial autonomy and local self-governments; (c) other natural and legal entities and associations (business associations, unions, sports organizations, institutions, co-operative associations, intellectual property holders and other); and (d) public undertakings, entrepreneurs and other undertakings performing activities of public interest, or those that have been given a fiscal monopoly by the state authority in charge, except if the application of the Competition Act would prevent them, either *de iure* or *de facto*, from performing the activities or tasks assigned to them by the public authority in question. The 2005 Competition Act could apply to state institutions, bodies of territorial autonomy and local self-governments only when they were directly or indirectly engaged in the trade of goods or services. There is no reference to direct or indirect participation in the trade of goods or services in the current Act suggesting that the scope of the application of Serbian competition rules has been enlarged.

It is clear from the previously cited provisions of the 2009 Competition Act that there is no *de iure* privileged treatment of undertakings with state-owned capital, even those in which the State holds a majority stake. However, according to publicly available information, the Competition Authority initiated so far only two proceedings against an undertaking with state-owned capital (the *Public Cemeteries of Kragujevac* case and *Telekom Srbija* case), one of which was later terminated. Such disappointing statistics generate doubts as to the privileged treatment of public undertakings in Serbia, given that their activities simply do not seem to raise the interest of the Competition Authority.

In the *Public Cemeteries of Kragujevac* case (see below), the Serbian Competition Authority found that the scrutinized public undertaking abused its dominant position on the market for the administration of cemeteries in the city of Kragujevac by leveraging its market power into a neighbouring market and tying unrelated services¹⁷. The Authority initiated also formal

¹⁷ Competition Authority, decision no. 5/0-03-92/2011-1, available at <http://www.kzk.gov.rs>. The *Public Cemeteries of Kragujevac* is a public undertaking entrusted by the municipal government to provide services of general economic interest – to manage municipal cemeteries. The undertaking decided to mark off certain parcels on the Bozman cemetery and place them under a special regime that provided that all individuals acquiring burial sites within that area had to purchase tombstone designs, construction and erection services exclusively from the *Public Cemeteries of Kragujevac*. The Competition Authority found that the public undertaking leveraged its market power into the connected market of tombstone design, construction, erection, maintenance and related funeral services. It concluded that the undertaking engaged in a competition restricting practice of tying unrelated services, thus abusing its dominance. The company was ordered to modify its standard agreements and subjected to a fine which amounted to 2,3 % of its total annual turnover: RSD 2.682.000,00 (approximately EUR 26.000,00).

proceedings against Telekom Srbija, incumbent electronic communications operator in Serbia, for alleged abuse. It does not seem, however, that a final decision had ultimately been adopted in this case¹⁸. Telekom Srbija, a state-owned company, is the leading fix and mobile telephony operator in the country. It is the owner of Serbia's communications infrastructure and thus the key player on wholesale markets. The proceedings were initiated *ex officio*, following an initiative¹⁹ submitted by Orion Telekom and the Association of Internet Service Providers of Serbia. The investigation focused on two types of behaviour. The Competition Authority examined first whether Telekom Srbija engaged in vertical price squeeze²⁰. The incumbent, a vertically integrated operator, conducted a promotional action in June and July 2011 offering to its potential retail customers Internet access at prices equal to or lower than those charged on the wholesale market. The investigation focused also on accusations of unfair trading practices implemented by Telekom Srbija on the wholesale market for Internet access²¹.

Aside from the fact that the Competition Authority initiates proceedings against state-owned undertakings only in extremely rare cases, it seems also that it pays insufficient attention to some of the sectors that are of special public interest, such as the production and trade of gas or oil, dominated by undertakings with state-owned capital. The impression briefly emerged in 2009 that the Serbian Competition Authority finally decided to investigate some 'politically sensitive' industries. It published in February 2010 the results of a sector inquiry evaluating the competitive conditions in existence on the market for the wholesale and retail distribution of liquefied petroleum gas. The inquiry was initiated by the Ministry of Trade and Services which was concerned that prices of liquefied petroleum gas in Serbia did not follow the fluctuations observed world-wide. This trend could have been caused by the lack of competition on the national market or by price-fixing

¹⁸ Order of the President of the Council of the Competition Authority of 6 October 2011.

¹⁹ Proceedings are initiated *ex officio*, but any legal or natural person may submit an initiative to the Competition Authority. Upon examination of the initiative, the Competition Authority may decide to initiate proceedings.

²⁰ A firm which is vertically integrated and controls essential input to retail services implements a price squeeze if the price demanded on the wholesale level makes it impossible for an equally-efficient retail-stage competitor to operate profitably (or even survive) given the level of retail prices, and if the firm does not charge its own downstream operation the same high price.

²¹ The activities of Telekom Srbija were under the scrutiny of the Bosnian Competition Authority as well. Telekom Srbija Bosnian branch – Telekom Srpske was under investigation for alleged abuse of a dominant position in proceedings initiated by one of its competitors, Crumb Group doo. However, the Bosnian Competition Authority failed to close the proceedings within the prescribed time limits. Competition Council of Bosnia and Herzegovina, case no. 05-26-2-028-78-II/10, 12 October 2011.

arrangements among competitors. Market participants stated during the inquiry that wholesale prices for the distribution of liquefied petroleum gas were established in Serbia taking into account world oil prices as well as the prices charged by competitors. All market participants interviewed by the Competition Authority submitted that they correlate their retail prices with those set by the Oil Industry of Serbia (NIS)²². The Authority concluded that it was not possible to establish that a price-fixing agreement was underway – retail price parallelism was explained by the fact that all competitors used the same reference price (retail prices of NIS). It was thus concluded that establishing a price-fixing agreement on the wholesale distribution market would require constant monitoring of prices and their comparison with the fluctuations of world oil prices, a requirement which could not have been fulfilled during the course of this market inquiry. Consequently, the Authority concluded that it was unable to prohibit the observed practices because they did not represent competition law infringements. Instead, the Competition Authority issued several recommendations²³. It is regrettable that the sector inquiry did not contain any information on the criteria used for non-price competition among retail distributors of liquefied petroleum gas, which induce consumers to choose between competing traders offering the product at the same price. Focusing the inquiry solely on price parallelism omitted other elements influencing the conditions of competition on the relevant market.

In April 2011, the Competition Authority announced that it is conducting a sector inquiry to evaluate the competitive conditions in existence on the markets for the import, processing, wholesale and retail distribution as well as the trade of oil and oil derivatives. The results of this inquiry were eventually published in February 2013, almost two years after its initiation. In a rather descriptive document, the Competition Authority concluded, *inter alia*, that retail prices of oil and oil derivatives were still equable. Further to this, the Authority addressed a recommendation to the Government to formulate additional statistical tools for monitoring the production and trade of oil and oil derivatives, which would allow the Authority to perform a new more detailed analysis in the subsequent 3-years period²⁴.

In the meantime, the Competition Authority issued a public warning to Srbijagas, a public undertaking engaged in the transport, distribution, storage and trade of natural gas. As indicated in a press release published on 8 April

²² A state-owned undertaking, prior to its privatization in 2009.

²³ The Competition Authority recommended NIS to refrain from informing its purchasers about the retail prices applied on its own retail locations. It noted that distribution agreements must not contain direct references to prices practiced by NIS. The Analysis is available at <http://www.kzk.gov.rs>.

²⁴ The Analysis is available at <http://www.kzk.gov.rs>.

2011, the public warning was a reacted to information published by the media which stated that Srbijagas reached an agreement with three potential buyers – Azotara Pancevo (fertilizer company), MSK (methanol and acetic acid complex) and Petrohemija (producer of petrochemicals) – on the sale of approximately 1 billion cubic meters of gas at prices below those used for other buyers. The Competition Authority acted ‘in an attempt to prevent any possible restrictions of competition and negative effects on the market’²⁵. The Authority noted also that if the agreement was to be implemented, it would have to initiate *ex officio* abuse proceedings against Srbijagas.

The fact that the Serbian Competition Authority issued a public warning is interesting for at least two reasons. First, it is not clear what was the legal basis for such action. Broadly interpreted, only Article 21(12) of the 2009 Competition Act could possibly be seen as such because it allows the Authority to perform activities meant to raise public awareness on the importance of competition protection. Second, and more importantly, it does not seem²⁶ that the Authority had ever before issued such warning to a privately-owned company. This creates doubt as to whether the Competition Authority would have reacted in the same ‘lenient’ way to alleged abuse had Srbijagas not have been a public undertaking.

2. Competition advocacy as a substitute for competition law enforcement

It is undisputed that the Competition Authority must do more than simply enforce Serbian competition law. These ‘additional’ activities are often referred to as competition advocacy. The notion of competition advocacy encompasses the Authority’s proactive activities, and especially its role in the formulation of Serbian economic policies which may adversely affect competitive market structures, business conduct and economic performance²⁷. An important focus for competition advocacy is the development of a competition culture. The tools that can be employed in this context include the publication of: decisions issued by the Competition Authority, information booklets for the general public, annual reports and market studies. They also cover regular communication with the media as well as the organization of seminars and conferences etc. Success in building a competition culture has clear benefits for enforcement: companies will be more likely to voluntarily comply with

²⁵ The press release is available at <http://www.kzk.gov.rs>.

²⁶ As already indicated, the Competition Authority does not publish all the acts it adopts on its website, which further complicates the analysis of its activities.

²⁷ OECD Study ‘Competition advocacy: Challenges for developing countries’, 1. The study is available at <http://www.oecd.org>.

competition rules, businesses and the public alike will more willingly cooperate with enforcement actions (e.g. by providing evidence), policy makers will support the mission of a competition body²⁸. Still, competition advocacy should only supplement the core activity of competition law agencies, which is the enforcement of competition rules, and not replace it even in part. It seems, however, that competition advocacy substituted competition enforcement on several occasions in Serbia.

For example, the Competition Authority issued in October 2011 a public warning to banks participating in the Serbian market, reminding them that it is prohibited to enter into gentlemen's agreements or any other forms of anti-competitive behaviour. More precisely, the Competition Authority warned banks not to agree on what interest rates to offer to their clients²⁹. It is regrettable that the Authority chose to act as an 'advisor' to the banks, instead of investigating allegations made public by associations of banking services users that such anti-competitive agreements had already been entered into. This is particularly true since the proceedings before the Serbian Competition Authority are, as a rule, initiated *ex officio*³⁰. Under Article 33 of the 2009 Competition Act, natural and legal persons that submit initiatives for investigating competition law infringements, those providing information and data, experts and organizations whose analyses are used in the proceedings, as well as other state bodies and organizations cooperating with the Competition Authority in the course of its proceedings, are not considered 'parties' to the procedure. Therefore, third parties cannot 'force' the Competition Authority to conduct an investigation of an alleged anti-competitive behaviour. The Competition Authority reacted in a similar, 'advisory' manner in April 2011 to the media coverage of the aforementioned agreement reached between the oil and gas distribution undertaking Srbijagas and three of its buyers.

In contrast to these cases, the Serbian Competition Authority demonstrated in December 2011 that it is in fact capable of combining competition advocacy with competition law enforcement. It found in the aforementioned Public Cemeteries of Kragujevac case, that the public undertaking, which was entrusted by the municipal government with the provision of services of general economic interest, abused its dominant position. Aside from initiating proceedings against this particular undertaking, the Authority organized also a meeting meant to raise awareness of competition law with the representatives of other public undertakings entrusted with the provision of the same public

²⁸ *Ibidem*, 9.

²⁹ The press release is available at <http://www.kzk.gov.rs>.

³⁰ The only two exceptions to this rule are: (a) notification of concentration; (b) request for an individual exemption from the prohibition of anti-competitive agreements.

service (managing municipal cemeteries)³¹. The Serbian Competition Authority should by all means continue to recourse to competition advocacy but only as a supplementary tool to competition law enforcement.

3. 'Simulation' of state aid control

The Stabilization and Association Agreement requires Serbia to introduce national legislation on state aid control that is in line with EU law standards. The State Aid Act was adopted and entered into force in July 2009 and its application commenced on 1 January 2010. The Act differentiates between three categories of state aid: (a) prohibited state aid; (b) state aid which is compatible with the State Aid Act; and (c) state aid which may be considered to be compatible with that Act. Under its Article 3, any state aid, regardless of the form in which it was granted, that distorts or may distort competition in the relevant market, or which is contrary to ratified international treaties, is prohibited. Under Article 4 of the Act, state aid is compatible if: (a) it has a social character and is granted to individual consumers, provided that it is granted without discrimination relating to the origin of the products concerned; or (b) it is granted to alleviate damage caused by natural disasters or other exceptional occurrences. Under Article 5, state aid may be considered compatible if it is granted: (a) to promote the economic development of areas of the Republic of Serbia where the standard of living is abnormally low or those with serious unemployment; (b) to remedy a serious disturbance in the Serbian economy or to promote the execution of an important project of the Republic of Serbia; (c) to facilitate the development of certain economic activities or of certain economic areas in the Republic of Serbia, where such aid does not adversely affect or threaten to affect competition in the relevant market; (d) to promote the protection and preservation of cultural heritage.

The categories of state aid laid down by Serbian legislation correspond to those laid down by Article 107 TFUE. However, the economic and social contexts in which these rules are applied differs significantly. In the European Union, undertakings benefit, directly or indirectly, from support via the Structural Funds, the Cohesion Fund, instruments related to the Common Agriculture Policy and other numerous EU financial instruments. By contrast, Serbian undertakings can benefit from the Instrument of Pre-Accession (IPA) but only to a certain extent. Therefore, they may generally receive aid only from their own, less generous national authorities, provided such aid is in line with the State Aid Act. Following the entry into force of the Interim

³¹ The press release is available at <http://www.kzk.gov.rs>.

Agreement with the EU, the Serbian market opened to certain categories of goods from the European Union, which exposed local producers to additional EU competition. Coupled with the effects of the ongoing economic crisis, this fact has significantly threatened the functioning of a large number of Serbian undertakings. National authorities found themselves faced with a dilemma: whether to financially support certain undertakings (in principle, state-owned ones), or to properly enforce state aid rules, which would surely result in the closure of a number of local companies and thus increase the unemployment rate³². In an economy where many undertakings depend on some form of state aid, the decision of the public authorities was not surprising. 'Financial injections' from the Government continued mostly to large socialist-type holdings in the electricity and steel production sectors as well as in car manufacturing.

However, the decision to continue granting significant amounts of state aid could not have been realized if Serbia had an independent body charged with the control of state aid. Instead of empowering the existing Competition Authority with the enforcement of the State Aid Act, the Government decided to establish a separate entity for that purpose – the State Aid Commission, under the auspices of the Ministry of Finance. The Commission does not, unfortunately, seem to be sufficiently independent from the executive power to efficiently fulfill its role. Members are appointed by the Government from among those who possess 'expert knowledge in the field of state aid, competition, and/or EU legislation'³³. Experts are chosen according to proposals submitted by the ministries of finance, economy, infrastructure and environmental protection, as well as the Competition Authority. The Commission is chaired by the person appointed according to the proposal of the Ministry of Finance, while the representative of the Competition Authority sits as deputy chairperson. Since the majority of state aid schemes, as well as the majority of individual state aid grants, originate from the Ministry of Finance, it seems highly unlikely that the Commission, led by the representative of that same Ministry, would declare such aid incompatible. In a country with a fragile democracy, it would have been wiser to empower the existing Competition Authority to enforce state aid rules. Unlike the members of the State Aid Commission, members of the Council of the Competition Authority are elected by the National Assembly, on proposal from the Parliamentary Trade Commission, a solution which guaranties at least a certain level of independence from the Government. The case law of the State Aid Commission proves the correctness of this

³² According to the survey conducted in 2012 by the National Statistics Authority of Serbia, the unemployment rate was 25.5%.

³³ Art. 6(4) of Act on Control of State Aid.

suggestion. According to its yearly reports published online, all notified aids have been declared compatible so far³⁴.

However, the Serbian situation does not greatly differ from that of the European Union during the current economic crisis. For example, EU Member States' governments did not show any reluctance when deciding to fund struggling banks. Such aid was approved by the European Commission, almost overnight³⁵. Current economic crisis aside, the impression remains strong that the enforcement of EU-type rules on state aid control in a candidate country should be postponed to the time immediately preceding its accession. Candidate countries should be equipped with more flexible tools, which would allow them to respond to specific problems of their national economies. However, this need is not recognized by the provisions of the Stabilization and Association Agreement signed by the EU with Serbia and other Western Balkan countries. Throughout the region, the same artificial 'performance' is thus being facilitated: a national body in charge of state aid control is indeed established but, in almost all cases, it declares that all aids granted are compatible with the law.

The need to introduce a special regime of state aid control for countries in a transitional period was not generally recognized by the European Union even during the previous phase of the enlargement process. This does not necessarily mean, however, that all state aid provisions of past association agreements were drafted in an identical manner. For instance, the Association (Europe) Agreement signed in 1993 between the European Communities and the Czech Republic provided that, until implementing rules were adopted by the Association Council, state aid control should be exercised by the contracting parties on their respective territories, according to their respective legislations³⁶. By contrast, the Europe Agreement with Poland provided that, until implementing rules were adopted, the provisions of the Agreement on

³⁴ Reports are available on the website of the Serbian Ministry of Finance: <http://www.mfp.gov.rs/pages/issue.php?id=7271>. The dependence of the State Aid Commission from the Ministry of Finance is evident even from the fact that it does not have a separate website, but only a page within the website of the Ministry.

³⁵ For an in-depth analysis see: T. Eger, 'Solidarity and competition in the European Union during the financial and debt crisis' (2011) *Institute of Law and Economics Working Paper Series*, available at <http://www.ssrn.com>. J. M. DeVito, 'The role of competition policy and competition enforcers in the EU response to the financial crisis' (2011) 11-01 *American Antitrust Institute Working Paper*, available at <http://www.antitrustinstitute.org>.

³⁶ Article 64(3) of Europe Agreement between the EC and the Czech Republic: 'The Association Council shall, within three years of the entry into force of this Agreement, adopt the necessary rules for the implementation of paragraphs 1 and 2. Until the implementing rules are adopted, practices incompatible with paragraph 1 shall be dealt with by the Contracting Parties on their respective territories according to their respective legislations'.

interpretation and application of Articles VI, XVI and XXIII GATT were to be used as implementation rules for the provisions of the Europe Agreement regarding state aid control³⁷. Implementing rules were to be adopted by the relevant Association Council within three years of the entry into force of each Europe Agreement. Those that entered the European Union in 2004 argued in their accession negotiations that account should be taken of problems associated with the 'transition' period. Poland, for instance, requested a protocol providing that state aid to environmental, regional and restructuring projects would be judged in the light of transition problems. The European Commission prepared even a draft of a special state aid regime for countries in a transitional period, but the draft was later withdrawn³⁸.

There is another particular problem with the *acquis* relevant to the Balkan countries. There has been no coherent application of the principle of subsidiarity in this field. The EU hesitates between considering state aid control as an important tool to prevent Member States from inflicting damage upon each other, and treating it as a kind of medicine that should be taken for the countries' own good. It is true that while governments sometimes choose to use state aid in a foolish way, this tends to cause little damage outside their own borders. Undoubtedly, this is a matter of concern, but there are national political mechanisms for the expression of such concern³⁹.

III. Conclusive remarks

The current economic crisis, the effects of which are particularly severe in Western Balkan countries, has only emphasized competition law enforcement problems existing throughout the region. In the case of Serbia, these problems include, on the one hand, a rather lenient approach of the Competition Authority towards the activities of state-owned undertakings. So far, the Authority opened only two formal proceedings against public undertakings, one of which was terminated without a decision. Such statistics generate doubts as to the privileged treatment of state-owned undertakings in Serbia, given that their activities simply do not seem to raise the interest of the Competition Authority. Nevertheless, unlike private employers, state-owned undertakings managed to avoid massive job losses during the current crisis which makes them the backbone of the Government's policy to maintain the unemployment rate under control. A closer inspection by the Competition Authority of the

³⁷ Article 63(3) of Europe Agreement between the EC and Poland.

³⁸ A. Evans, 'Enlargement and state aid in CEECs' (2004) 4 *CLASF Working Paper* 14.

³⁹ *Ibidem* 3.

potentially anti-competitive activities of incumbent operators could disturb their current market position, and consequently undermine the Government's policy efforts.

Regardless of ownership, it seems that in certain 'sensitive' situations, the Serbian Competition Authority uses competition advocacy as a substitute for law enforcement. Hopefully, such cases will become less frequent as the guaranties of independence for the Authority's members strengthen. Finally, a 'simulation' of state aid control is being facilitated both in Serbia and in other Western Balkan countries. Following the conclusion of a Stabilization and Association Agreement, a national body in charge of state aid control is indeed established, but it indiscriminately clears all notified state aid cases. Candidate courtiers before EU accession should be equipped with more flexible tools for state aid control, allowing them to take into consideration the specific problems of their own economies. However, this need is not reflected in the provisions of the Stabilization and Association Agreement signed by the European Union with Serbia, nor in the Agreements signed by the EU with other Western Balkan countries. Ignoring the specific needs of countries in the transitory phase creates an artificially positive result in the area of state aid control, which does not benefit either the candidate country or the European Union.

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