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COMPETITION POLICY IN THE EUROPEAN UNION

Summary: *Europe dedicates great importance to the protection of free competition and the necessity for normative regulation, so that within the framework of the Treaty of Rome on the formation of the European Union the so-called Treaty of Amsterdam, as the first basic document in the field of competition protection, had been adopted. This document is later elaborated by the adoption of the Regulation on control of concentrations between companies, and a special competition commission (European Commission) was set up, which in cooperation with the regulatory bodies of certain EU member states deals with competition protection issues in the European Union.*

Key words: *protection of competition, European Union, anti monopoly law*

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INTRODUCTION

The protection of competition is essential for the efficient functioning of the market economy. The protection of competition is institutionally implemented through the competition policy (also called anti monopoly policy), which deals with the protection and strengthening of competition among market participants in order to ensure equal conditions for all participants. In addition to regulating the monopoly, the competition policy also addresses the limitation of any behaviours of companies that may endanger the elements of effective competition (Ristić 2009, 68). It is a policy that leads to the realization of effective competition as a prerequisite for economic and wider social progress (Stojanović and Kostić 2013, 326).

The competition policy aims to promote the effective competition process by providing efficient allocation of resources through the free market, whereby measures and means of competition protection should lead to increased competitiveness of goods and services from relevant markets. Unlimited competition, which implies free movement of goods, services, capital and people, opens up space for synergistic action of various factors, and the openness of individual markets is a prerequisite for stimulating companies to be economical, innovative and inventive, thus ensuring an increase of company's welfare and overall prosperity (Stojanović and Radivojević and Stanišić 2012, 122). The competition policy is continually seeking to increase efficiency, promote innovation and improve the ability of producers and consumers to have choices (Dutz and Vagliasindi 2000, 764).

Institutionally, the regulation of competition issues was first solved in the USA in 1890 when a law on protection of competition was adopted, the so called Sherman Antitrust Act which banned the agreement between the subjects, thus limiting trade, and in particular the agreement of the competitors about the prices. This act regulates monopoly behaviour for the first time and sanctions the abuse of market power. In 1914, the Sherman Act was amended by the Clayton Act regulating the connections (concentrations) of companies that distort the healthy competition in the market. In 1936, the US competition protection was further enhanced by adopting the Robinson-Patman Act regulating price discrimination. Complementing and de-

veloping regulations in the area of competition protection continued in the forthcoming period.
The significance of implementing anti monopoly policy derives from the impact this policy has on consumers' welfare, enterprises' productivity and economic growth of the country. This brings benefits for consumers which are derived from low prices and high quality products, as well as a wide selection of different and high quality products.
The competition policy should harmonize the conditions of competition in all parts of the market and for all market participants, with a number of priorities that the competition policy should implement, among which the most significant are these (Begović and Pavić 2012, 9):

- Fighting the cartels and preventing their emergence;
- Improving and accelerating privatization and economic restructuring;
- Increased economic freedom of companies and private entrepreneurs;
- Reducing the uncertainty of all participants, especially companies and private entrepreneurs;
- Avoiding price control as a mechanism of anti monopoly policy;
- Engaging in other policies that have an impact on the competitiveness of market structures or behaviours, especially those that create barriers to entry.

By limiting the companies' excessive market power, competition policy improves allocative efficiency, i.e. production efficiency and consumer and market welfare. The implementation of the competition policy is based on analysing the market conditions (production and geographic). The competition policy establishes allocative efficiency by preventing and sanctioning all participants in the market that distort free competition in the market by their behaviour.

1. COMPETITION POLICY

1.1. Legal and economic frameworks of competition policy

Competition policy is an area in which law and economy meet and complement each other. Positive economic analysis (Duvnjak 2018) is the basis for the adoption of regulations that make up the legal framework for regulation, which implies that the implementation of the competition policy must be observed both from a legal and an economic point of view.
The economic analysis of the situation in a given market investigates and interprets the events on the market, and the causes and consequences of different market processes, so that, based on the results obtained, various measures in the competition policy domain could be adopted. When analysing market conditions and adopting measures of competition policy, the degree of freedom of market participants has to be considered on one hand, and the possibility of efficient functioning of the competitive economy on the other (Clarke 2011, 42). Only if both conditions are fulfilled at the same time there are conditions for an efficient market competition and maximizing the welfare of consumers and society as a whole.
The competition policy is conceptually and essentially different from the competition law. Competition law is defined as a set of legal norms which should ensure that competition is not distorted in a way that reduces social welfare, while competition policy is a wider concept which, in addition to competition law, includes all activities of state agencies and bodies that are directly or indirectly involved in competition protection, i.e. Prevention of its disruption (Ma 2011, 307). The consumers law is closely related to competition, as well as the establishment of different production standards, state subsidies, determination of minimum and maximum prices of products or services, etc. (Begović and Pavić 2012, 23).
The competition law, as a special branch of law, regulates the most important issues of functioning of competition in a single market. It includes several specific elements (restrictive agreements, abuse of dominant position, concentration of companies, state aid and state monopolies) depending on the way in which the functioning of healthy and fair competition in a single market is compromised (Spasić 2008, 72). The aim of the competition law is to pro-

mote the economic efficiency of market participants and to optimize the allocation of resources through the ensurance of free competition. In addition, the competition law seeks to protect small market participants and consumers from the hostile practices of large and powerful market participants who dominate the market and/or make mutual agreements thus restricting free market competition. And finally, one of the aims of the competition law is its impact on the creation of a single market (which is particularly related to the common markets of several countries like the European Union) and the prevention of market distortion by some of its participants (Feldmann 2009, 58).

1.2. The main task of competition policy

The most important task of the competition policy is to monitor and regulate the work of the monopolies (hence the name anti monopoly policy), that is, large companies that have a large power on the market. The purpose of this policy is to protect the general interest of society in circumstances where monopoly companies abuse their power and threaten other participants on the market, firstly the consumers. Therefore, the competition policy must constantly balance between the potential benefits and the likely unwanted consequences made by existence of a monopoly on a particular market.

Another important area within the competence of the competition policy is monitoring and regulation of concentration, i.e. connecting the participants of the market. Increasing the size of the company through internal development, especially by merging and taking over other companies, can undermine the freedom of competition in the market, resulting in the need for monitoring and possible regulation, including the ban on mergers. Regulatory bodies have a very difficult task to balance the benefits that arise by mergers due to a more efficient operation of the new company compared to the previous ones that operated independently and the costs incurred due to the potential abuse of the dominant position of the new company in the market.

The competition policy also monitors and regulates the occurrence of restrictive activities (practices) carried out by individual market participants. These are activities undertaken by one or more large companies, which threaten or significantly restrict competition in the market. These restrictive activities include agreements regarding fixed prices, defining non-market prices, various forms of discriminatory practice focused on either suppliers or buyers. Restrictive agreements are implemented in practice through various types of formal and/or informal agreements between companies in the market. Regardless of whether formal or informal arrangements exist, they can be horizontal and vertical depending on whether they are companies belonging to the same branch or companies from different parts of the value chain, i.e. production and turnover phases. Horizontal agreements exist between companies belonging to the same branch. They can cooperate through an agreed price policy, production quotas, market sharing, exchange of important information on prices and the scope and type of offer, etc. Vertical agreements include companies belonging to different areas in the production chain and are related to the so called exclusive agreements signed by dominant companies with suppliers and buyers. These agreements determine the price, quality and other essential elements, such as the right of priority, which puts all other companies in an unfavourable position compared to other participants with whom such agreements had not been signed (Hüschelrath and Peyer 2013, 122).

The implementation of competition policy, in addition to strictly economical elements, are also influenced by other elements, such as social, political, developmental and ecological ones. Regulatory bodies implementing the competition policy also take into account social factors, especially in times of economic crisis, when an anti-competitive behaviour of market participants (the so called crisis cartels) is tolerated in order to reduce social tensions and to maintain the level of employment. It is based on the hypothesis that the damage caused by the non-market behaviour of some companies is less than the unemployment that would arise in

the event of their failure. Of course, in the long run it is an unjustified economical behaviour, so it is applied only in exceptional circumstances for a limited period.
Regardless of the various impacts, any law on protection of competition originally addresses issues of creating, strengthening and abusing the market power of the participants in the market. The Law on Protection of Competition with relevant regulations (rulebooks, decrees, guidelines, etc.) defines the rights and obligations of market participants and the manner of acting of the regulating bodies (institutes, commissions, agencies, services, etc.). Such an approach insists on controlling all the activities that lead to changes in the market structure and, where appropriate, the imposition of warnings, prohibitions and penalties. In this way, the market participants are prevented and discouraged from disturbing the free competition in the market and from violating the provisions of the competition law.

2. ANTI MONOPOLY POLICY OF THE EUROPEAN UNION

The competition policy of the European Union is implemented in the Union as a whole and at the level of the member states, which also adopt laws and regulations that are in some respects different from state to state. Nevertheless, these regulations and regulatory practices must be in line with the fundamental rules defined by the European Union.
The core of the EU competition policy is contained in the acquis communautaire, the most developed part of which is the competition law. Sources of the acquis communautaire, depending on who passes them, can be classified into primary and secondary sources (Lopez 2013, 31). The primary sources of the acquis communautaire are adopted or passed by member states during the organisation of mutual relations and by the European Union (community), on the basis of their contractual capacity, as a subject of international law, by signing agreements with the international organizations and third countries. Secondary sources of EU law must be harmonized with the primary ones: decrees, instructions and decisions, guidelines, recommendations and opinions.

2.1. Competition law of the European Union

The emergence and development of competition law and the anti monopoly policy of the EU was largely impacted by the United States Antitrust Policy. In the Treaty of Rome establishing the European Community, the issue of competition law and protection was one of the key issues, and articles 81 through 90 deal with this issue. The most significant goal of EU is to create a single market.
The competition law and control of state aid are the most important part of the rules for the creation of a single market. Article 3(1) of the Treaty on the Functioning of the European Union defines the exclusive competence of the Union. Point (b) defines the establishment of competition rules necessary for the functioning of the internal market; In Title VIII, Economic and monetary policy, Article 119(1) the following is defined: For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition. In the Treaty on the Functioning of the EU, competition rules are defined by Articles 101 and 102.
Competition protection in the European Union is also regulated by secondary acts adopted by EU bodies. At present, every member of the European Union has a national institution dealing with the fight against monopoly and the protection of competition. The first EU state to form such institution was Germany in 1954. Luxembourg did not adopt the Competition Law until 2004 while the Competition Commission in this country was formed even after the one formed in Serbia. Luxembourg formed this institution in 2007 (Hylton and Deng 2007, 289).

According to the regulated subject, the system of the acquis communautaire consists of two sets of regulations. The first one regulates organizational and constitutional issues, such as the composition, the manner of operation and the competencies of the common bodies of the European Community, i.e. the European Union today, their mutual relationship and the relationship towards member states.

By their nature and origin, these norms can be compared to the constitutional and administrative law of the member states' internal law, and they constitute the institutional law of the European Union. The second set of norms regulates the establishment and functioning of the internal market, i.e. the realization of the four freedoms underlying the European Union: free movement of goods, free movement of persons and labour, freedom to provide services and to establish companies, and free movement of capital, as well as competition regulations. All of these norms make up the law of the internal market, i.e. the economic law of the European Union (Nicholson 2008, 1017). Even when European integrations were just in the beginning stage, there was a need for a common competition policy. Provisions concerning the competition were contained in the Treaty of Rome and in its later versions.

2.2. Sources of competition law

There are many sources of the economic law of the European Union. They are diverse, and some are specific. The basic source for this law, as well as for the whole of EU law, is the Treaty on the Functioning of the European Union, also known as the Treaty of Lisbon, preceded by the Treaty on European Union signed on 7 February 1992 (The Maastricht Treaty) and the Treaty establishing the European Economic Community of 1957, as amended by the 1986 Single European Act.

The provisions on competition law are contained in the Title VI, Chapter I, Articles 81 through 89 of the Treaty establishing the European Community. Given the immediate regulated subject, the provisions are divided into regulations applicable to companies: Articles 81 through 86, and state subsidies: Articles 87 through 89 of the Treaty of Establishment. Until the Treaty of Amsterdam amending the Treaty on European Union (EC), the provisions of Article 91 regulated damping, but were subsequently abolished as redundant. The general objectives of the said provisions are set out in Article 2 of the Treaty of Establishment, while the provisions of Article 3(1)(g) provide for a Community obligation to provide a system which does not infringe competition rules in the internal market (Mestmäcker and Schweitzer 2014, 28).

Article 81 of the Treaty establishing the European Community is being implemented in cases of restricting competition through inter-company agreements, decisions on company mergers and concerted practices. Article 81(1) of the Treaty establishing the European Community prohibits any inter-company agreements, company merger decisions and concerted practices that may have an effect on trade between member states and which are intended or result in the prevention, restriction or threat of competition in the common market. The competition law of the European Union has the principle of prohibiting illegal cartel behaviour, with the possibility of individual and group exemptions.

Article 82 of the Treaty establishing the European Community is concerned with the violation of competition by a company or group of companies by abusing dominant position. Article 82(1) of the Treaty on the Establishment of the European Community prohibits any kind of abuse in the use of dominant position on the common market or in the significant part of it by one or more companies, which may have an effect on trade between member states. There is no possibility for the Commission to adopt a decision on exemption of the ban on abuse of dominant position. It should be noted that the acquisition of a monopoly or dominant position alone cannot be characterized as prohibited and contrary to the principle of free trade, except in exceptional circumstances, the Treaty limits only the abuse of dominant position.

Articles 83 through 85 of the Treaty of Establishment define the powers of the European Union bodies to adopt implementing rules and guidelines for the application of Articles 81 and 82. Article 86 regulates the position of public companies and companies to which the states have granted special or exclusive rights or are empowered to provide services of general economic significance. Articles 87 and 88 of the Treaty establishing the European Community relate to the cases of restriction of competition through the use of state aid. Article 87 prohibits any state aid or state resources in any form whatsoever which restricts or may restrict competition by favouring certain companies or the production of certain products. State aid is prohibited to the extent that it allows certain companies to influence trade between member states or restrict the competitiveness of other companies.

In the domain of competition, the acquis communautaire implies a policy of examining competition violations, controlling concentrations and controlling state subsidies. The acquis of the European Union, in the domain of competition law, implies rules and procedures for fighting monopoly behaviour of companies (restrictive agreements between companies and abuse of dominant position) and which prevent the executive authority from granting state aid which would endanger free and fair competition on the domestic market. When it comes to preventing unauthorized concentrations, the Commission has the authority to reconsider concentrations exceeding the defined turnover thresholds, while member states may control concentrations up to that level of turnover.

When referring to the Treaty on the Functioning of the European Union, the provisions defining competition law are set out in Article 37 (State monopolies of commercial nature), in Title VII - Common rules on competition, taxation and approximation of laws, Chapter 1 - Rules on competition, Section 1 - Articles 101 through 105 (Rules applying to undertakings), Article 106 (Public undertakings and undertakings with special or exclusive rights) and Section 2 - Aid granted by the state, regulated by Articles 107 through 109 (Rules on state aid) of the Treaty on the Functioning of the European Union. In the area of competition and concentrations violation, national level bodies competent for the protection of competition must cooperate closely with the Commission in EU competition protection procedures. Starting 1 May 2014, all national authorities responsible for protection of competition were also given the authority to fully apply Articles 101 and 102 of the Treaty on the Functioning of the European Union to prevent distortion or restriction of competition. To this end, these authorities should have powers similar to those of the European Commission. National courts can also directly apply EU rules to investigate a breach of competition law.

Article 101 of the Treaty on the Functioning of the European Union, as well as Regulation 139/2004 on the control of concentrations, are the key legal norms regulating the issues of restrictive agreements and concentrations in the European Union, i.e. relations involving two or more participants in the market. Regulation 139/2004 regulates relationships that lead to permanent changes in the control over a company, and thus the changes in market shares in the relevant market. Article 101 of the Treaty on the Functioning of the European Union refers to restrictive agreements of a horizontal or vertical type with an influence on competition which is not insignificant. Article 102 of the Treaty on the Functioning of the European Union, regulates prohibited conduct in the market, but refers only to abuses of those market participants that can be found to be in a dominant position in the relevant market. Article 102 on abuse of dominant position is part of the competition law of each member state and is applied by the European Commission and national authorities responsible for protection of competition. The application of EU competition law in this segment envisages the determination of a dominant position, and then actions or behaviour of a dominant market participant that can be considered as abuse of that position (Dobrašinović and Matić and Prokopijević and Plahutnik and Radojčić 2014, 49-50).

The priority of the work of the European Commission and the national regulatory authorities for protection of competition are violations of competition that produce the most severe and worst consequences for consumers. In addition to the Treaty on the Functioning of the Euro-

pean Union and the acquis communautaire, other sources of competition law include: secondary sources (implementing legislation adopted by the European Commission and the Council of Ministers) and court practice.

Secondary sources are regulations, guidelines and decisions, recommendations and opinions adopted by the Council and the Commission for the purpose of implementing the provisions of the Treaty on the Functioning of the European Union and of the Treaty establishing the European Community in relation to competition law. Namely, the Council has been empowered to adopt certain regulations or guidelines by a qualified majority in order to implement principles under Articles 101 and 102 (formerly 81 and 82), upon a proposal from the Commission, and after consulting the European Parliament.

The regulations are of general importance (Savić Božić 2016), they are fully and directly applied in each member state. Guidelines are binding on the member states with regard to the objectives to be achieved, respecting the full freedom of choice of the competent national authorities in terms of manner, form and means by which the set objectives are achieved.

The first and most important regulation is the Council Regulation No. 1/2003, which replaces Regulation No. 17 of 1962, which defines the procedure for the implementation of Articles 101 and 102 of the Treaty on the Functioning of the EU, thus ensuring their uniform implementation in all member states, regardless of the differences in their legal systems. The Council also adopted other important decisions for the implementation of EU competition law.

Particularly important is the Council Regulation No. 139/2004, which replaced Council Regulation No. 4064/89 on control of concentrations between companies. Article 2 of the Council Regulation No. 139/2004 prohibits concentrations that create or enhance a dominant position and which may result in a significant reduction in effective competition in the common market or its essential part. Council Regulation No. 139/2004 applies to concentrations with a communautaire dimension, while other forms of competition violations are regulated by Articles 101 and 102 of the Treaty on the Functioning of the European Union (Treaty of Lisbon), i.e. Articles 81 and 82 of the Treaty establishing the European Community. Regulation No. 2790/1999 on vertical restrictive agreements also has an important role in the competition law. Announcements and decisions of the Commission have a huge practical significance in the implementation of competition policy. They are used to adopt guidelines on behaviour of companies in the areas not fully regulated by the acquis communautaire of competition.

Other sources of law include the practice of the Court of Justice and the First Instance Court in so-called leading (typical) cases in which the Court used certain provisions of primary or secondary legislation.

The European Court of Justice has the authority to interpret the acquis communautaire in proceedings and to control the legality of acts of Union bodies. Jurisdiction over the actions of individuals and legal entities against the decisions of EU bodies to enforce the competition rules has been transferred to the First Instance Court, which is why its decisions have an impact on the competition law.

The scope of implementation of the European Union competition law is limited by the so-called clause of interstate trade. The prerequisite for any agreement or behaviour on the market to become a focus of the acquis communautaire is the existence of the possibility of endangering trade between member states of the Union. Non-EU companies can also be regulated in accordance with the EU competition law, if their agreements or behaviour can affect trade between member states. In order to determine whether a violation of the EU competition law has occurred, it is not mandatory for this to really happen in practice, it is enough if a restrictive agreement or behaviour exists.

The European Union competition law does not address the issue of unfair competition, because fighting unfair competition is under the jurisdiction of member states and their national legislation. Thus, the regulations on restricting competition may endanger the national and community norms of competition law. Before the implementation of the common market in

cases of differences between national and community norms, provisions that provided for stricter sanctions were used.
After the establishing a common market, the Court and the Commission practice gave priority to the community norms. The European Commission and the European Courts have the most important role in defining and implementing EU competition policy and law. The European Union competition policy is a de facto European Commission policy. The Commission has significant powers in conducting the investigation, including unannounced inspections (Clarke 2011, 44).
Penalties for violating the competition law norms are high and may amount to over 10% of the company's total revenue. European courts also play an indispensable role in enforcing and protecting the competition law. By putting market integration in the forefront, the European Court of Justice has promoted competition policy as the key link in the European integration process, often neglecting other principles such as efficiency and consumer protection. The European Parliament has no significant role in regulating competition law. The European Parliament adopts the annual report on competition policy, prepared by the Commission. The role of the Council of Ministers is limited to the adoption of legislative acts which regulate the application of the provisions of the EU Treaty more closely. Since 2004, the powers given to the Commission for full implementation of the EU competition law have been extended by onto the anti monopoly authorities of the member states. In this way, a system of parallel powers was established under which the Commission and the anti monopoly authorities of the member states can apply the norms of EU competition law, with the establishment of mechanisms and their coordination rules.

CONCLUSION

Free trade and the protection of competition in the market provides little benefit to the majority, while the monopolized market brings enormous profits to individuals. This sentence summarizes the importance of the protection of competition. In the broader sense, the lack of free competition prevents the effective functioning of the market mechanism. Lack of effective competition causes reduction or deprivation of choice, unjustifiably high prices of products or services of lower quality. Free competition has a great importance to the economy, just like the democracy is important for the political system.
The issue of protection of competition is a multidisciplinary area that can be viewed from several aspects. Regulators of protection of competition are primarily lawyers and economists, but the model of regulation in this area certainly reflects to the position of ordinary citizens and the economy. As far as the general social interests and consumers are concerned, competition is mostly a desirable market phenomenon, but it is not desirable for individual companies, because it compels them to work harder, bring innovations and lower the profit. That is why the technical intelligence is very interested in regulation of this area. Namely, the task of all engineers is to use their patents, innovations, or rationalizations in production to reach a dominant position on the market, which is a legitimate objective and is one of the prerequisites for social progress.
On the other hand, lawyers and economists have a task of defining a permissible limit before which there is no disturbance of fair market relations, and penalties for situations involving concentrations, restrictive agreements, abuse of dominant position and other practices that may cause a disturbance of free competition and the functioning of the market mechanism in a particular market. The rules of competition law (anti monopoly law, anti competitive law or cartel law) have the task of eliminating this constant conflict between general social interests and individual interests of companies which can eliminate the application of competition law through their mutual agreements or the level of their market power.

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