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### COMPETITION COUNCIL AS PART OF ECONOMIC POLICY, COMPETITION AND REGULATION IN BiH

### КОНКУРЕНЦИЈСКО ВИЈЕЋЕ У ФУНКЦИЈИ ЕКОНОМСКЕ ПОЛИТИКЕ КОНКУРЕНЦИЈЕ И РЕГУЛАЦИЈЕ У БИХ

**Summary:** *In this paper we pay special attention to antitrust authority as the main regulatory body whose main task is to maintain healthy competition - structures in BiH. Given that the Competition Council of Bosnia and Herzegovina was established relatively late, compared to the surrounding countries, the logical question is whether the antitrust body BiH was able to monitor all the activities and events in the region, the EU, and the world. It is a known fact that one of the main conditions for EU accession is existence of effective and fully operational regulatory body in the field of competition. To what extent have Competition Council and Bosnia and Herzegovina contributed to the fulfillment of this condition imposed by the EU? What are the previous results of the Competition Council of Bosnia and Herzegovina? We will try to provide the answers to these questions in this paper. The first part is based on introducing anti-monopoly bodies in BiH, as well as its basic tasks and roles. The second part relates to the definition of the Competition Act which is in force in Bosnia and Herzegovina, while the third part is devoted to analysis of the business of the Competition Council in BiH. Therefore, the aim of this paper is to point out the significance of the existence and application of the Competition Act, and the Competition Council, which are, in the opinion of relevant experts, the key to improving competition in the and Bosnia and Herzegovina.*

**Keywords:** *antitrust body, competition law, dominant position, market concentration, prohibited agreement.*

**JEL Classification:** *K21, L41, L44.*

**Резиме:** *У овом раду посебну пажњу посвећујемо антимонополском телу БиХ, као главном регулаторном телу чији је основни задатак одржавање здраве тржишне конкуренције – структуре у БиХ. С обзиром да је Конкуренцијско вијеће БиХ основано релативно касно, у односу на окружење, поставља се логично питање: да ли је антимонополско тело БиХ било у стању да прати све активности и дешавања у окружењу, ЕУ, и свету? Позната је чињеница, да је један од главних услова придруживању ЕУ постојање ефикасног и потпуно оперативног регулаторног тела на пољу тржишне конкуренције. У којој мери су БиХ и Конкуренцијско вијеће допринели испуњавању тог услова наметнутог од стране ЕУ? Какви су резултати досадашњег рада Конкуренцијског вијећа БиХ? Одговоре на ова питања настојаћемо да обезбедимо у овом раду. Први део рада се заснива на упознавању антимонополског тела у БиХ, као и његовим основним задацима и улогама. Други део рада се односи на дефинисање самог Закона о конкуренцији који је на снази у БиХ, док се трећи део рада односи на анализу пословања Конкуренцијског вијећа у БиХ. Дакле, циљ овог рада јесте да укаже на значајност постојања и примене Закона о конкуренцији, као и Конкуренцијског вијећа, који су према мишљењу релевантних стручњака, кључни за унапређивање тржишне конкуренције у БиХ.*

**Кључне речи:** *антимонополско тело, закон о конкуренцији, доминантни положај, тржишна концентрација, забрањени споразум.*

**ЈЕЛ класификација:** *K21, L41, L44.*

## 1. INTRODUCTION

We can say that the issue of market concentration in Bosnia Herzegovina, and therefore in the Republic of Srpska, just started growing up during the last few years. Consequently, an independent and autonomous body was formed in 2004, with the sole authority in deciding on the existence of prohibited competitive operation in the market of Bosnia and Herzegovina, which takes as its main primary objective the monitoring of market concentration on the territory of Bosnia and Herzegovina, as well as the protection of promotion of competition in this area.

As one of the main reasons for such late appearance of problems of market concentration in the territory of Bosnia and Herzegovina is the war, which in the period from 1992 to 1995 occurred in these areas, as well as the transition process of Bosnia and Herzegovina. The events of the war completely drained the economy of Bosnia and Herzegovina and led it in a difficult position, which caused stagnation of prosperity of the market and the industry in the coming years. When we add to that the issue of privatization, the transition, we can easily come to the conclusion why the issue of market concentration in Bosnia and Herzegovina is a relatively young concept.

The issue of market and industry concentration and dedication deserves special attention. This is because the industry is one of the main pillars of economic growth and development of a country.

A basic indicator of the importance and seriousness of problems of market concentration can be the fact that all developed countries (USA, Japan, the EU, etc.) dealing with the given issues for decades and addressing the issue of market concentration, often encounter a variety of problems and difficulties. It is therefore essential that the Competition Council of Bosnia and Herzegovina, as soon as possible, studies and analyzes all the positive and negative experiences of the above mentioned countries, to be better prepared to cope with market concentration in this region.

It is known that BiH is seeking to become a full member of the EU. EU membership brings, on the one hand, a number of benefits, and on the other hand certain fears about large unified EU market. For small countries, such as Bosnia and Herzegovina, access to such a large market need not necessarily mean disaster, or opinion that BiH will be placed at the edge of the global economy. This is primarily described as the construction of a highway linking of Bosnia and Herzegovina and the world economy. Whether it comes to buying, selling, traveling or studying - the single market opens up a whole new world of opportunities, especially for the younger generation. How can all this be put in touch with the competition? Simply, the competition and the single market are inseparable. Competition and market size are the basis of the single market. The single market can not function if everyone uses and follows different rules and procedures. The only practical solution is that all participants (whether it is a small Bosnia and Herzegovina or large Germany) have equal access and equal treatment in the market. This approach is particularly helpful to small countries and companies, and partly explains why such a large number of countries/companies aspires to join the EU.

The single market is considered to be responsible for a large increase in the prosperity of the EU Member States in the last 50 years, and it is certain that EU countries will be poorer had it not been a single market. It should be emphasized that Bosnia and Herzegovina, as a possible future member of the EU, in the beginning will not be able to achieve great benefits and rewards of the single market. But crucial connection, that we have to understand and comprehend here, is that in these circumstances the prosperity of Bosnia and Herzegovina was linked to unified EU market, as well as the maintenance and improvement of the market competition. The fact is, that all of this is easy to say, because there are always "losers" who have lost the battle in competition, and who make a variety of arguments why it is easier and better to avoid market competition. But it should be noted that the path that seems easier today, in fact, is the path to relative poverty.

This approach, for example, can temporarily save a few jobs in our backyard, but for the whole economy it would mean the loss of several thousands jobs in the years to come. For countries such as Bosnia and Herzegovina, which aims to catch up with the bigger, richer countries in Europe and the region, protectionism is particularly dangerous thing. However, to obtain maximum of competition, Bosnia and Herzegovina should do more than just follow the directives of the EU. This means that Bosnia and Herzegovina must make several difficult decisions, and investments to be ready to succeed in the EU market.

The point of competition policy is not to leave all activities to the market. There still exists an important role of the state. For instance, one way to contribute to an easier achievement of success in the single market of the EU will be that the government tries to effectively focus to public assistance

(State Aid) in those sectors that will bring positive effects. However, it is often the case of misallocation of state aid which, as a result, will not show positive effects. To prevent this sequence of events it is necessary to focus state aid to the "horizontal objectives". This means that state aid is directed towards the world economy in order to achieve greater productivity instead of giving money to only one company/industry. A common example, that we can see in Bosnia and Herzegovina, is providing state aid to enterprises which do not need such assistance, or helping enterprises which were already ruined. All these activities of the state directly lead to the disruption of "healthy" competition and contribute to further ruining of our already devastated economy.

Although the Bosnia and Herzegovina government has been trying since 2004 to develop stable and strong antitrust policy (Competition Policy), we still have to do a huge job in this field in order to make competition started give positive effects. That is why Bosnia and Herzegovina should build competitive culture. This primarily means necessity to understand that the competition does not only make laws coming from Brussels, or the technical debate between lawyers and economists.

Market competition tries to provide consumers with lower prices, more choice and higher quality. So, an effort to make each individual understand value of competition and be able to play a role in its maintenance is worthwhile. Thus, Bosnia and Herzegovina should give more attention to discuss and investigate the issue of competition, and bear in mind that the debate about competition policy does not seem intimidating to the population. That is why we should not allow these conversations seem "foreign" and complicated.

Currently we live in a time of rising prices, as more and more people say "no more competition", and expect miracles from the competent competition bodies. However, the reality is quite different. On the contrary, the market competition has gained more importance in these difficult economic times. The best way to achieve a competitive culture is the existence of active and informed consumers. Nearly every day we are presented as the consumers, and therefore informed consumers can be the eyes and ears of competition policy. To do this, the consumers are looking for chance to independently act when they are in a situation to be victims of a competitive issue. Based on calculations of European Commission, European consumers, as victims of the competition violation, pay EUR 20 billion each year. Metaphorically speaking, let us imagine that we are taxed by certain companies just because it suits them. This, of course, is wrong and must be changed, and it can only be changed by the existence of effective competition bodies in BiH.

## 2. CONCEPT AND ROLE OF THE COMPETITION COUNCIL IN BOSNIA AND HERZEGOVINA

Political organization of Bosnia and Herzegovina, as one state consisting of two entities requires special organization of competitive authority in a way that all three political parties can accept. Competition Council was established on 1 May 2004, as an independent body with its headquarters in Sarajevo. It has the sole authority to make decisions about the presence of a prohibited competitive operation in the market of Bosnia and Herzegovina, in terms of the provisions of the Competition Act (hereinafter CA).

Competition Council (hereinafter as CC) consists of six members who have the status of administrative judges, who are elected from among recognized experts for a period of six years, with the right to dispose of another term. In accordance with the political organization, three members are appointed by the Council of Ministers of BiH, two members by the government of the Federation of BiH, and one member is appointed by the government of the Republic of Srpska. President of CC is selected only for a period of one year, with no possibility of being re-elected (Article 22 [4] of CA):

*BiH Council of Ministers, on the proposal of the Competition Council, shall appoint annually the president from among the members of the Council for a period of one year, without any right to re-election during the term of a member of the Competition Council.*

We assume that this short period is the result of political system in Bosnia and Herzegovina, but it would be desirable that the president holds the position for a longer period. An important reason for this is a formed European network of competition authorities (ECN), through which European competition authorities cooperate in the application of their competition laws. Such cooperation requires establishing good personal contacts. Another important reason is the relatively long duration of the investigation and control procedures for concentration. For example, in Germany, since the

establishment of competitive body in 1957 (almost 50 years ago), until 2005, only three presidents of "Bundeskartellamt" performed this function.

The law stipulates a minimum of five members present at the meeting in order to make a valid decision by a majority vote (Article 24 [1] of CA). For every decision, at least one member from each constituent nation must provide vote, and no member can abstain from voting. It is anticipated that the CC has meeting at least once a month (Article 24 [3] [c] of CA). Accordingly, we should analyze whether such rare sessions are sufficient in practice, to take all necessary decisions to implement the law in the whole of BiH.

Regulation on internal organization and systematization in CC of Bosnia and Herzegovina defines the organizational units for CC, scope and organization of work, schedule of activities and tasks to employees of CC with the terms of reference, the number of employees required to perform duties, responsibilities and powers of civil servants and employees, trainees, the achievement of work in CC, and cooperation with other institutions of Bosnia and Herzegovina in performing the duties of this body. These Regulations foresee a total of 26 employees (6 members of CC and 16 employees/secretariat staff, including 12 civil servants), representing an increase of 4 civil servants compared to the previous year. Competition Council currently employs 25 workers (6 members of the council, 15 civil servants and 4 workers ).

The abovementioned regulations also established professional service as an organizational unit that performs administrative, professional, and technical tasks, within which are the office for competition in Mostar and Banja Luka, as organizational units outside the seat of CC in accordance with Article 20 (2) of CA:

*The Competition Council has acting offices of the competition in FBiH and in the Republic of Srpska, as organizational units outside the seat of the Competition council.*

But CC in Sarajevo is the main competent body, as an independent administrative body that can enforce the law across the country, and it is also the only body that has the right to make decisions.

Competition Act is based on the principles of modern European competition law and market practice. This law is largely harmonized with the rules and regulations of the European Union in the field of market competition - Articles 81 and 82 of the Treaty establishing the European Community, legislation enacted in 2003 and 2004 - Council Regulation EC no. 1/2003; 139/2004; 773/2004; 802/2004, which provides efficiency and transparency in its implementation, and contributes to the reduction of state intervention in this area (Competition Council of Bosnia and Herzegovina 2007).

CA applies to all business entities and their activities for the prevention, restriction or distortion of competition on the BiH market, including operations abroad that have an impact on the above mentioned markets.

With implementation of CA, CC provides improvement of the principle of free market competition and prevents with specific measures that certain business entities have unfair favorable position compared to other businesses. Starting from this concept of market competition policy, enforcement of CA contributes to creating benefits for final consumers, which is reflected in higher quality and cheaper products/services in the market which surely, in the long term, is providing greater welfare for Bosnia and Herzegovina.

The main task of CC in Bosnia and Herzegovina is the removal of prohibited competitive operation of business entities in order to protect and maintain free market competition, and establishment of uniform and transparent criteria for all industrial and other subjects on the market. The main activities of the Competition Council are (Competition Council of Bosnia and Herzegovina 2007):

- Prevention of concluding agreements of business entities which restrict competition in the market (Article 4 of of CA);
- Elimination of abuse of dominant position of economic entities (Article 9 of CA);
- Control of the mergers, acquisitions of business entities (concentration) in the relevant market (Article 12 of CA);
- Giving opinions and recommendations on any aspect of the competition ex officio or at the request of the national authorities, bussiness entities or the relevant associations (Article 25 of CA);
- Convergence of market competition to the business community and relevant institutions through various forms of promotion (Competition Advocacy).

Competition Council must cooperate with other authorities in Bosnia and Herzegovina, such as chambers of commerce, professional organization of lawyers, etc., in order to explain the terms and not only with competition authorities, particularly the competition authorities of the neighboring countries, but also with the authorities of EU member states, as well as with international organizations dealing with the issue of competition - the OECD, ECN, UNCTAD, etc. Due to the specificity of substance and business activities that take place without borders, the efficiency of regulating competition requires quick and direct contacts between the competition authorities, on which country will not have an impact.

*Starting the procedure:* If there is any form of prohibited competitive operation on the market, Competition Council initiates the procedure ex officio, with the aim of establishing the existence of violations of the law. Also, Competition Council may initiate proceedings on the basis of applications that may be filed by:

- Any natural or legal person who has a legal or economic interest;
- Chambers of commerce, associations of employers and entrepreneurs;
- Consumers' Association;
- The executive authorities in Bosnia and Herzegovina.

After the procedure within the prescribed timeframe, Competition Council shall make the final decision (Article 42 of CA), which is delivered to business entities to which it refers, and published in the Official Gazette of Bosnia and Herzegovina.

*Fines:* Competition Council may impose fines, which can range from 1 to 10% of the annual income of the undertaking (Article 48-49 of CA), depending on the gravity of violations of the law, if it finds a violation of the provisions of the law. It may also impose a fine to responsible persons of the undertaking in the amount of BAM 15.000 to BAM 50.000. CC can determine the periodic penalty payments (penalties) to the parties, which do not exceed 5% of the average daily turnover in the preceding business year for each day of the deadline set by the decision, in case of non-compliance and failure to implement decisions of the competent bodies. CC can also consider reducing the fine or its complete abolition (leniency policy) for legal or natural persons, if, during the procedure, the business entity provides evidence that is relevant to the determination of the violation<sup>1</sup> (Competition Council of BiH 2007).

### 3. COMPETITION LAW IN BOSNIA AND HERZEGOVINA

There is a lot of obscurity that needs to be taken into account when the Competition Law is assessed in relation to the rules and regulations of EU competition, which are based on the basis of Articles 81 and 82 of the Rome Treaty<sup>2</sup> (hereinafter the Agreement) and accompanied with a large number of additional regulations.

*The most important aspect of the of Competition Act is the lack of tradition of competition policy in BiH.*

After the signing of the Dayton Agreement<sup>3</sup> which designed an independent Bosnia and Herzegovina with the political structure as complex compromise, Bosnia and Herzegovina has begun to create a market economy with adequate international assistance, including the adoption of the first CA which established the principle of competition as an important pillar of the new market economy.

First CA (Official Gazette 2001, No. 30) was adopted by the BiH Parliament on 23 October 2001. CA came into force immediately after its publication in the Official Gazette of Bosnia and Herzegovina, however, establishment of Competition Council, as an independent competitive body, did not occur within the time limit of three months from the entry into force of this law. Furthermore, the laws governing the field of trade in Bosnia and Herzegovina are neither consistent with the first law. As a result of the absence of establishing CC, secondary legislation that was needed to

<sup>1</sup> This practice relates to prohibited agreements – Cartel.

<sup>2</sup> The Treaty of Rome, signed in 1957 between the six member countries, gave birth to the European Economic Community, ECC that created the legal instruments for the establishment of a common market.

<sup>3</sup> The Dayton agreement was made in Dayton on 21 November 1995, and signed in Paris on 14 December 1995, as General Framework Agreement for peace in Bosnia and Herzegovina.

implement the law, was not made or adopted. The consequence of all the above is that Bosnia and Herzegovina began only in 2006 with the adoption and application of functional regulations on competition by Competition Council, which are mainly based on the EU regulations and competition rules.

It is necessary to accept the fact that our business environment and institutional design is not accustomed to such regulations and the introduction of new competition rules will be difficult and time-consuming process. For example, the US Congress enacted its first CA (Sherman Law<sup>4</sup>) in 1890, the EU adopted the Treaty of Rome in 1957, and Bosnia and Herzegovina is only now being included in already established legal regulations on competition policy with over 40 years of tradition.

As another important fact, we mention the political organization of Bosnia and Herzegovina. Bosnia and Herzegovina has a complex division of its territory into one state, two entities with dual administrative responsibilities and overlapping functions. The application of competition law, on the economic and competition behavior of entrepreneurs as well as merging between entity lines, complicate things when in terms of legal and practical aspects. CA is one of the best tools for rapid development of economy in BiH.

The third striking fact is that all the countries in the region, formed after the breakup of Yugoslavia in the 90s of the last century, have brought their specific Competition Act, largely with the help of the EU. It is known that all adopted CAs follow the basic rules of the EU (legal harmonization with the EU in line with the Stabilisation and Association Agreement with the EU), but they still differ in important details. This is explained by the fact that the individual projects of the EU, by providing technical assistance, suggested different sets of rules for adjustment to specific circumstances of the country concerned. These differences were also a consequence of frequent changes of CA in the EU, which have occurred in recent years. A number of countries have followed the changes in the EU, while others have not. Accordingly, we conclude that BiH will dispose of adopted rules and regulations that are closer to the EU legislation, than the laws that were passed previously by other countries in the region. CA adopted in Bosnia and Herzegovina is fully in accordance with the modernization package adopted by the European Commission.

In the last few years, we were often in a dilemma whether to change anything within the CA. Should the law as the primary act be shorter? Or perhaps the law should have, in a broader sense, more elements related to the procedure? To explain this dilemma, we should draw attention to the following fact. The rules from Articles 81 and 82 of the Treaty on which underlie competitive principles of the EU, have not significantly changed since the ECC Treaty of 1957, only the executive regulations have evolved and expanded quickly. The same situation exists with the Sherman Act in the United States in 1890. The main competition regulations of this law have not changed for more than a hundred years. Current CA in Bosnia and Herzegovina has been updated in accordance with the Stabilisation and Association Agreement (SAA).

#### **4. PROHIBITED COMPETITION PRACTICES IN BOSNIA AND HERZEGOVINA**

So far we have talked briefly about the Competition Council, the Competition Law which came into force in BiH, and now we will try to briefly explain prohibited competitive practices which we can face in the market, within prohibited competitive actions, which were defined by the Competition Law in Bosnia and Herzegovina. We will consider all the basic competition rules governing prohibited competitive practices (Hoelziler and Paneff 2005). Here we primarily refer to: prohibited agreements, dominant position and market concentration.

##### **4.1. Agreement**

The agreements which have as their ultimate goal elimination of competition and raising prices above competitive levels, are considered illegal. On the other hand, there are agreements that ensure the growth of the general welfare, production growth, and increase technological progress which is considered permissible (Carlton and Perloff 2005, 658). When we talk about agreements in

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<sup>4</sup> Sherman law adopted in 1890, and it is the first measure taken by the US Congress to prohibit monopolistic activity.

Bosnia and Herzegovina, the definition in Article 4 of CA in Bosnia and Herzegovina, which covers both horizontal and vertical agreements, almost entirely reflects Article 81 of the Treaty (Hoelziler and Paneff 2005):

*Prohibited are all agreements, contracts, certain provisions of the agreement or contracts, joint action, explicit and tacit agreements between undertakings and decisions by associations of undertakings that aim and effect the prevention, restriction or distortion of competition in the relevant market, which relate to:*

- a) *direct or indirect fixing of selling and purchase prices or any other trade conditions;*
- b) *limit or control on production, markets, technical development or investment;*
- c) *share of markets or sources of supply;*
- d) *application of dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a disadvantage compared to the competition;*
- e) *conclusion of agreements subject to acceptance by the other parties of additional obligations which, by their nature or according to commercial usage, have no connection with the subject matter of the agreement.*

All of the above agreements are considered to be prohibited because they contribute to distortion of market competition and the abuse of market power. However, these agreements can be approved only if they contribute to improving the production or distribution of goods and services within BiH.

## 4.2. The dominant position

A key element of competition law are the competition rules on abuse of a dominant position. In the following exposure we give some of the most important basic elements that are used to assess the operations of business entities that have a dominant position. One question often arises: What is the competition? The concept of competition is striving of competitors/market participants to be superior to its rivals, to win the sympathies of potential customers which in turn implies greater market power, and therefore profit. Thus, if individual company manages to impose its superiority over its competitors and to expel them from the competition, then we can say that such a company is a monopolist. But we come to an important question. Are monopolies, and their dominant positions on the market, illegal? Of course not! The exploitation of this market power in an illegal manner is considered illegal.

Another important issue is how to define the term "dominance". There are numerous factors which, in different situations on the market, determine whether a business entity is dominant. We will give three main factors which can prove whether the dominance is present on the market, such as: the definition of the relevant market, market share analysis, and analysis of competition constraints. So, the first step of establishing a dominant position is the determination of the relevant product and geographic market, after which we will access the main criterion for determining dominance - market share. Market share is not the most ideal indicator of dominance, but it is the easiest to determine by means of mathematical formulas (Hoelziler and Paneff 2005).

In Bosnia and Herzegovina, based on the CA, we assume the presence of market dominance when the market share of a business entity exceeds 40%, or when two entities jointly exceed 60% (Article 9 [2], and [3] of CA). It should be noted, that even when market participants reach these thresholds, it shall not necessarily mean that any activity of such companies should be prohibited. Therefore, this raises the difficult question, which behavior of dominant business entities can be tolerated and which cannot. The answer to this question varies from country to country, and that is why there are different laws on competition.

The aim of the protection of competition is to protect competition as a process, which means that it does not protect competitors. Thus, abuse of dominant position relates to all the behaviors of the dominant business entities that harm the competitive process, such as predatory pricing, collusion, etc. It should be noted that the determination of high prices may or may not be considered to be forbidden. In fact, in the United States establishing a high price is not prohibited, while in most European countries this is not the case. US defend this approach with the fact that high prices practically attract new competitors. However, here the position of consumers, who are obviously damaged, is practically

ignored. As for BiH, high observed prices are considered to be an abuse of a dominant position and, accordingly, such behavior is considered prohibited.

However, in a number of cases, in which competitive bodies lead actions against companies with very high prices, the result was that the decision fell to court or has not achieved the desired results. The reason for this is the unresolved problem of determining "competitive" prices under normal market conditions that would fully satisfy the courts.

So far we have talked about very high prices as possible way of abuse of dominant position in the market. However, here we take into account the very low cost (in terms of abuse), which we call predatory prices. A company that has large funding sources can easily reduce its market price below the cost of production in order to thereby eliminate its competitors, provide a monopolistic positions, even though such a move brings significant losses to monopolists. After achieving his goal, the monopolist again raises prices above the level of competition and thus compensates for previous losses and achieves even higher profit. The fact is that the monopolists, if that is allowed, constantly repeat predatory price policy whenever there is some new competitor, until they achieve reputation as "aggressive" monopolists, which provides them in advance with fewer attempts from potential rivals for entry into their markets (Waldman and Jensen 2007, 351). This theory is easy to understand, almost in all countries of the world there is a belief that predatory prices abuse should be banned. CA in Bosnia and Herzegovina also prohibits predatory prices by the dominant business entity.

We conclude that competition authorities should not interfere in the price control if the competitive process works; the best control over the high or low rates will be done permanently by this process.

### 4.3. Concentration

When we talk about concentration, we mean number and size of firms operating in the relevant market. Measures of concentration, which are now well established throughout the world (index big four, HH index, measure of entropy, etc.) and their primary aim is to determine the effect of exact number and size of firms on the market competition by using simple numerical indicators. Number of firms, as well as the size of firms, play a very important role when we talk about the "nature" of the market. For example, the nature of competition on the market under which ten largest identical companies operate will not be the same as the nature of competition that prevails on the market where one dominant company and nine small and identical enterprises operate (Lipczynski 2005, 205).

CA in Bosnia and Herzegovina has defined the term "concentration" as: a merger of companies, joint ventures, acquisition of control or influence of a company in several ways. Concentration does not include the following activities (Competition Council in Bosnia and Herzegovina 2007):

1. Creation of joint venture in order to coordinate the market activities of the parent company;
2. Acquisition of shares or participation on the market for temporary purposes (twelve months) by banks or other financial institutions;
3. When in the event of bankruptcy or liquidation, certain person is appointed to exercise control over the business subject and to carry out its functions in accordance with the laws of bankruptcy or liquidation.

Russian competition law has very detailed rules, such as family ties, with a detailed list of degree of relatives (parents, children, brothers, uncles, etc.). The criterion which is still in force in EU, and therefore in Bosnia and Herzegovina, has its advantages and disadvantages. The main advantage is, that the dominating company on the market cannot obtain through concentration even the slightest of other business entities, or a part of such an entity, because any strengthening of a dominant position on the market must be banned. We emphasize that this rule is very restrictive, because there is no proof that each concentration has negative market performance. The main disadvantage regards the definition of the threshold of market dominance, especially in terms of oligopolistic market. The CA was not very accurate in this field: substantial violation of effective competition. We wonder what the term "substantial" means? What does the term "violation" mean? We note that it is possible to have a broad range of interpretations and therefore the outcome of the investigation may be difficult to predict (Hoelziler and Paneff 2005).



Competition Act requires advance notice by potential participants in concentration when it reaches certain thresholds. In BiH, the criterion for this threshold is annual income of all undertakings concerned. It is not entirely clear whether the term "income," as used in CA, is identical to the definition of "traffic", as used by EU rules on mergers. Revenue and traffic can vary significantly, for example in terms of taxes, which may be trade-based, but certainly not the same as income tax. Often the items in the balance sheet are recorded in order to reserve items without real circulation.

The second independent criterion is that the total annual income of at least two business subjects/parties of the concentration with a total income from sales of goods and services within the territory of Bosnia and Herzegovina must be at least BAM 5 million (approximately 2.5 million euros).

The third independent criterion is that the market share of the enterprise in the relevant market exceeds 40%. Accordingly, we conclude that the desire of proposers of laws in Bosnia and Herzegovina was to have full control over even small concentrations in BiH.

In order to avoid the situation where a concentration is carried out through a number of separate and smaller concentrations which are below the thresholds that are relevant to control, Article 14 (4) of CA provides that a series of concentrations executed over a period of two years will be considered as one concentration, performed as of the date of the last of a series of several concentration.

## **5. ANALYSIS OF OPERATION OF COMPETITION COUNCIL IN BOSNIA AND HERZEGOVINA**

Acquainted with the basic roles and tasks of the Competition Council, the existing Competition Law in Bosnia and Herzegovina, as well as with the basic forms of prohibited competition action, we might look and analyze results achieved so far by Competition Council in BiH. The primary aim of this institution is to protect competition in Bosnia and Herzegovina, and therefore the protection of consumers, through the prevention of illegal agreements, the concentration and abuse of dominant position. Also, it should be noted that by a good and conscientious performance of its duty this body can contribute to a great extent to filling the budget of BiH institutions. Competition Council is also supposed to monitor developments in anti-monopoly bodies in the region (Croatia, Serbia, etc.), as well as to adapt to the current CA in EU. Let us recall that BiH is seeking to become a full member of the EU, and to make this, it is necessary to meet certain standards and norms. One of the main conditions for joining the EU is precisely the establishment and effective functioning of the antimonopoly bodies, which will be aligned with the current CA in EU. Competition Council in Bosnia and Herzegovina truly strives to meet all of the standards and norms that are required by this body, but all that is solved very slowly, with great delay.

As we already know, the market in Bosnia and Herzegovina is quite specific, and therefore the industrial sector, especially from the standpoint of Competition Council in BiH. In fact, in Bosnia and Herzegovina we especially consider the market of the Republic of Srpska, market of the Federation of Bosnia and Herzegovina and the Brcko District market. Competition Council has solved this problem by opening its offices on each of these market, in order to more effectively monitor changes in market concentration.

Competition Council, from its inception until today, has solved the growing number of requests for takeovers and mergers of companies in BiH. However, it should be noted that the main reason for "relatively" large number of cases of concentration is transition, ie. privatization in Bosnia and Herzegovina, due to which there was a significant sell-off of state capital in all firms in BiH. It is understandable that Bosnia and Herzegovina will be more attractive to investors when it becomes a candidate for full membership in EU, which would of course then bring more jobs for qualified workers in BiH.

A very important fact is that revenues from administrative fees and fines charged by Competition Council represent the revenue for budget of the institutions of Bosnia and Herzegovina. Accordingly, Competition Council with effective performing of its jurisdiction can greatly contribute to additional filling of BiH budget. In the table below we can see how these revenues totaled over the past few years.

*Table 1 Total revenues from administrative fees and fines 2006-2012*

<b>Year</b>	<b>Administrative fees (BAM)</b>	<b>Fines (BAM)</b>	<b>Total (BAM)</b>
2006	95.750	725.000	820.750
2007	171.008	1.050.000	1.221.008
2008	207.751	525.000	732.751
2009	172.000	590.000	762.000
2010	66.750	1.126.510	1.193.260
2011	88.750	189.500	278.250
2012	72.093	2.421.354	2.493.448
<b>Total</b>	<b>874.102</b>	<b>6.627.364</b>	<b>7.501.467</b>

Source: Competition Council of BiH 2013

Note that the revenues from administrative penalties in the first four years were significantly higher than in the period after 2009. From this, we can conclude that in the first few years of Competition Council (2006-2010) operation, there was a lot more cases of enlargement, concentration and market participants in Bosnia and Herzegovina, which can not be said for the period after 2010. In terms of the fines-generated revenues, we notice that they varied from year to year, depending on the number and magnitude of misconduct by market participants. It is extremely important that all market participants, which violate the laws of "fair" market competition, will be prosecuted and adequately punished, because it results in several benefits: 1. prevent further distortion of competition; 2. make all market participants aware that illegal acts will not be tolerated; 3. significantly improve the revenue side of the budget of BiH. In 2012, Competition Council significantly increased income due to much greater collection of fines, ie. the largest in the history of its existence since 2006. However, we must conclude that this is still a relatively small number of convictions, and that these revenues can and should be much higher, and in order to do so, the Competition Council needs to improve and raise business to a higher level. Why is efficient functioning of Competition Council important? Primarily due to the protection and preservation of the competitiveness of the market, but also due to the fact that their efficient operation can significantly contribute to the filling of the budget of BiH. As we said earlier, the field of work of Competition Council, in the narrow sense, includes the following areas:

1. Assessment of the agreements of business entities;
2. The prevention and elimination of abuse of dominant position by one or several industrial enterprises;
3. Control of concentrations of undertakings;
4. Giving opinions and advice on any aspect of the competition.

In the period 2006-2012, the Competition Council held 119 meetings of Expert Collegiate Body, 113 meetings at which final decisions have been made for 230 cases, and approved 108 expert opinions.

The top priority of Competition Council since 2006 is raising the expansion of the scope of operation in all segments of the market competition, strengthening and developing cooperation with international and national institutions, the continued convergence of various aspects of market competition to the business community, and other relevant institutions, through various forms of promotion (program „Competition Advocacy“), in order to ensure proper implementation of legislation and raising awareness and knowledge, as well as continued cooperation with the EU project „Support to Competition and State Aid to Bosnia and Herzegovina“.

As we can notice in table 2, during the period from 2006 to 2009, there is an increase in the number of cases received and cases initiated ex officio, in 2007 compared to 2006 by more than 100%. Since 2009, there were significant reductions of reported concentration, which is partly caused by the global financial crisis and a decline in economic activity, and partly because of introduction and application of Article 14 of the Law on Changes and Amendments to the CA. This has contributed to reducing the number of cases of estimates of concentrations in relation to previous year<sup>5</sup>. Why is that? The alignment of CA with EU regulations in the field of competition law, the requirements for the mandatory application of the intention of concentration of business entities with headquarters and

<sup>5</sup> Its application began from 2010.

residence abroad, are set cumulatively, thereby avoiding the reporting and assessment of concentrations irrelevant to protect market competition in Bosnia and Herzegovina.

The number of expert opinions that the Competition Council performed remained steady throughout the period under review. We note that in the period from 2006 to 2012 there were only 37 possible cases registered of abuse of dominant position. It is a relatively small number for the observed period, which could be the result of either a very good adherence to the Competition Law by market participants in Bosnia and Herzegovina, or lack of engagement of Competition Council. It should be noted that there has been relatively high percentage of execution/implementation of cases in the observed period.

The European Commission in its Progress Report on Bosnia and Herzegovina in 2012, in the part related to implementation of the Stabilisation and Association Agreement, which covers the period from October 2011 to September 2012, specifically in the part that relates to the field of competition, stated that there had been "some" progress in the fight against the trusts, and that "some" progress had been achieved in the area of competition. The term "some" progress used for BiH by the European Commission, cannot be considered as a good result, because Competition Council in many ways "lags" in relation to antitrust bodies in neighboring countries. Let us just say that state aid control in Bosnia and Herzegovina has not yet come into effect, while in Croatia and Serbia it has been successfully applied for a long time. There is a relatively small number of staff experts in the field of market concentration in relation to antimonopoly bodies in region and the website is not at an adequate level, and so on (Competition Council 2013).

Also, during all these years of Competition Council operation, there had to be greater public awareness achieved on the existence and operation of the above-mentioned body in BiH. We almost do not have seminars on the subject of concentration, a relatively small number of cases has been processed (compared to individual countries in the region), few negative reviews have been made, the total amount of collected fines is relatively small, etc. We must and should achieve significantly more progress in these fields, especially if we want to reach EU standards on this issue.

Table 2: Business analysis of Competition Council in BiH

Year	Classification of cases	Completed	In the procedure	Total	Completed (in %)
2006	<i>Prohibited agreements of business entities</i>	2	0	2	100%
	<i>Abuse of dominant position of the business entities</i>	2	0	2	100%
	<i>The concentration of business entities</i>	14	8	22	63,64%
	<i>Expert opinions</i>	14	1	15	93,33%
	<i>Other</i>	5	0	5	100%
	<b>Total</b>	<b>37</b>	<b>9</b>	<b>46</b>	<b>80,43 %</b>
2007	<i>Prohibited agreements of business entities</i>	1	1	2	50%
	<i>Abuse of dominant position of the business entities</i>	0	1	1	0%
	<i>The concentration of business entities</i>	26	18	44	59,1%
	<i>Expert opinions</i>	9	1	10	90%
	<i>Other</i>	16	0	16	100%
	<b>Total</b>	<b>52</b>	<b>21</b>	<b>73</b>	<b>71,23%</b>
2008	<i>Prohibited agreements of business entities</i>	4	2	6	67%
	<i>Abuse of dominant position of the business entities</i>	2	1	3	67%
	<i>The concentration of business entities</i>	43	13	56	77%
	<i>Expert opinions</i>	18	0	18	100%
	<i>Other</i>	6	0	6	100%
	<b>Total</b>	<b>73</b>	<b>16</b>	<b>89</b>	<b>82%</b>

<b>2009</b>	<i>Prohibited agreements of business entities</i>	4	2	6	66%
	<i>Abuse of dominant position of the business entities</i>	6	2	8	75%
	<i>The concentration of business entities</i>	41	1	42	97%
	<i>Expert opinions</i>	18	2	20	90%
	<i>Other</i>	/	/	/	/
	<b>Total</b>	<b>62</b>	<b>7</b>	<b>69</b>	<b>89,85%</b>
<b>2010</b>	<i>Prohibited agreements of business entities</i>	6	5	11	54%
	<i>Abuse of dominant position of the business entities</i>	8	2	10	80%
	<i>The concentration of business entities</i>	14	4	18	78%
	<i>Expert opinions</i>	17	4	21	81%
	<i>Other</i>	/	/	/	/
	<b>Total</b>	<b>45</b>	<b>15</b>	<b>60</b>	<b>75%</b>
<b>2011</b>	<i>Prohibited agreements of business entities</i>	3	5	8	37,5%
	<i>Abuse of dominant position of the business entities</i>	6	3	9	66,6%
	<i>The concentration of business entities</i>	20	2	22	90,9%
	<i>Expert opinions</i>	23	5	28	82,1%
	<i>Other</i>	/	/	/	/
	<b>Total</b>	<b>52</b>	<b>15</b>	<b>67</b>	<b>77,6%</b>
<b>2012</b>	<i>Prohibited agreements of business entities</i>	10	2	12	83,3%
	<i>Abuse of dominant position of the business entities</i>	3	1	4	80%
	<i>The concentration of business entities</i>	12	3	15	81,25%
	<i>Expert opinions</i>	20	2	22	90,9%
	<i>Other</i>	/	/	/	/
	<b>Total</b>	<b>45</b>	<b>8</b>	<b>53</b>	<b>85,45%</b>

Source: Competition Council of BiH 2013

As it says in its annual report, the Competition Council will endeavor to maintain during 2014, continuity in achieving key objectives and activities specified by legal framework of operation of Competition Council and its Work Programme. Work activities will mainly be aimed at settlement of claims of business entities in accordance with the CA, and also at continuing the communication with other business entities and their associations, regulatory bodies, consumer associations, state institutions with the aim of raising awareness and knowledge about the role of law and policy of market competition.

Competition Council will, no doubt, continue to work on prevention, detection and sanctioning of prohibited competition and other actions of business entities, which can be seen by entering into restrictive agreements or abuse of dominant position. The plan of activities of Competition Council essentially does not change from year to year. We will give some important objectives that this body should pay attention to in the future:

- a) Increase the number of employees;
- b) Strengthen the staffing structure with a large number of experts in the field of market concentration;
- c) Maintenance of a number of seminars in Bosnia and Herzegovina, with the aim of increasing awareness and familiarization of business entities, government bodies, non-governmental organizations, with the role and significance of market competition law, and its impact on establishing, protecting and promoting fair market competition;
- d) Education and training of employees in Competition Council;

- e) Provision of work premises for Competition Council;
- f) Establishing better, more modern, more meaningful web page of Competition Council;
- g) Improving the collection of fees and fines aimed at strengthening budgetary revenues.

We stress that the above objectives have been already clearly defined as the goals and priorities of Competition Council in recent years, however, the fact is that little has been done on their implementation. Realization of these goals would effectively ensure transparency of Competition Council, as well as openness to business and professional community, and provide a contribution to further affirmation of market competition in Bosnia and Herzegovina, as an effective instrument of development of the economy as a whole. Competition Council, by its existence and operation, should ensure a single economic space and equal conditions for the success of all businesses on the market in BiH.

## 6. EMPIRICAL RESEARCH

Priority objective of this paper is to point out the significance of the existence and application of the Competition Act and the Competition Council, which are, in the opinion of relevant experts, the key for improving market competition in Bosnia and Herzegovina. Empirical research was conducted through a survey on a sample of 20 business owners operating in BiH. The structure of the surveyed enterprises by activity was as follows: manufacturing (8), financial services and insurance services (5), wholesale and retail trade (5), construction (2). The surveyed entrepreneurs were asked to evaluate the importance of CA and Competition Council in the protection and promotion of market competition. The questionnaire was answered by 20 respondents (business owners). The following table shows the analysis of the importance of the proposed objectives.

Table 3 Analysis of the importance of the Competition Council and the Competition Act

	Questions	Not at all important	Not important	I have no opinion	It is important	It is very important	Total percent
1	Do you consider the existence of the Competition Act in BiH important?	0%	0%	0%	25%	75%	100%
2	Is the role of the Competition Council of Bosnia and Herzegovina important in maintaining "fair" competition?	0%	0%	0%	15%	85%	100%
3	Do you think that organization of regular seminars on the protection of competition in Bosnia and Herzegovina is important?	0%	0%	15%	15%	70%	100%
4	Do you think it is important to carry out regular checks of concentrations of business entities in Bosnia and Herzegovina?	0%	0%	0%	35%	65%	100%
5	Do you think it is important to begin with the control of state aid in BiH?	0%	0%	15%	35%	50%	100%

Source: Research of the author

Analyzing the above table, we can conclude that none of the questions was answered with answers: *not at all important*, *not important*, and that a small number of respondents had *no opinion* on the question asked. It is the basis upon which we can conclude that entrepreneurs in BiH place great importance on the role of CC and CA. Entrepreneurs in Bosnia and Herzegovina are obviously aware of the fact that without the CA and the competent body to take care of its implementation, the market will be ruled by the laws of the jungle without adequate protection for smaller and weaker participants. When you look at the answer *very important*, we notice that it was present with 50% or

more of respondents in all the issues raised. The respondents gave the greatest significance to CC role in the preservation of fair competition, and then to CA. We cannot ignore that a significant number of respondents gave a great significance to issues related to the seminars on the protection of competition, because they believe that BiH worked very little on raising awareness of entrepreneurs, government bodies, non-governmental organizations and consumers about this very important issue. Of all the questions asked, the participants in the survey assigned the least importance to state aid significance. This result is obviously a consequence of lack of awareness of entrepreneurs about the importance of state aid, since it is known that it is just inadequate state aid that can greatly distort competition and often be an instrument of abuse. The survey would certainly have had a different outcome, if participants had had more information about the problem. Finally, we note that the results of previous research are almost entirely consistent with previous findings in this paper.

## 7. CONCLUSION

Competition policy is the basic element of the internal market of a country, and therefore it results in understanding that the economic flows must be based on the principles of market economy and free and fair competition. Competition can be viewed as a basic mechanism of market economy through which it achieves a balance. If we confront supply, which consists of producers and traders, and demand, which is composed of intermediaries and final consumer, it will form a market price for a particular product or service while simultaneously maximizing personal interests. This process itself, is the market leading to a state of economic efficiency, where competition occurs as a major regulator of the entire process. Therefore, the objective of competition policy on the one hand is the effective protection of consumers, and on the other hand strengthening of business competition in the internal market. Accordingly, it should be noted that Competition policy implemented by the European Union covers all significant areas: prohibited agreements, abuse of dominant market position, merger control and state aid.

One of the main goals and objectives of Bosnia and Herzegovina should be to protect the health and safety of consumers and the protection of their economic interests. The EU clearly outlined three key objectives of consumer policy in the European Union:

1. A high level of consumer protection, which entails the harmonization of regulations not only in the field of security products and services, but also in the field of economic and legal interests of consumers;
2. The effective application of consumer protection laws, resulting in a uniform consumer protection throughout the EU territory. Priority in this sense is the development of administrative cooperation between member states;
3. The participation of consumer organizations in EU policymaking.

The fact is that some of the rights and competition policy of the EU falls into the area of state aid. This area in BiH has only recently been regulated by law, and establishment of state aid control should be a priority in the future. It should be noted that, based on the system established in the EU, Bosnia and Herzegovina has already begun with the establishment of a legal framework in this field, with the technical assistance of EU experts within the project "Support for the Competition and State Aid." In this area, Competition Council, with other government bodies through institutions, will have significant responsibilities and obligations.

Of course, BiH, as well as all other countries in the region, tends toward full membership in the EU, but to reach this goal it is necessary to first meet certain standards and criteria. Consequently, BiH is expected to provide as soon as possible adequate legislation on the protection of economic interests of consumers, which would include: unfair trade practices, misleading and comparative advertising, price marking, contracts concluded away from business premises, business negotiation, consumer credit, tourist package, the acquisition of rights to use immovable property within a certain time period, unfair terms in consumer contracts, sale of consumer goods and associated guarantees, injunctions for the protection of consumers, and so on.

BiH is a country that is committed to strict enforcement of the regulations of competition, but great help in the implementation of these regulations could also be provided by consumer protection associations. Accordingly, we should work to strengthen relationships between CC and consumer protection associations because these associations can provide the necessary data for best possible and

more effective enforcement of the regulations concerning the competitors in the market, the earlier practice of individual entrepreneurs and their relationship to consumers. These associations, as well as any other interested person may request from Competition Council to initiate proceedings against business entities which distort market competition by their actions.

Healthy and fair market competition is one of the most important instruments in the creation and strengthening of a single economic space in BiH, that would contribute to creating the conditions for the emergence of new competitors in the market, which ultimately provides consumers with greater choice of products at the lowest possible prices. Providing a harmonized BiH legislation in the field of competition will certainly contribute to greater foreign investment that can lead to an increase in the number of competitors in the market. This process also provides consumers with a greater choice of products and services.

We can expect that the entrance of foreign businessmen in the BiH market, especially those who come from countries with developed competition law, would reduce abuse of dominant position, and consequently, consumers can expect certain benefits.

Finally, this shows visibly a very strong causal connection between the measures and instruments of consumer protection and law and policy of competition protection. Postulates of consumer protection are built into the rules of the protection of market contest. If we ensure efficient and effective implementation of laws and regulations (which are presented in this paper) governing these interacting fields, we will most certainly achieve adequate progress, both for businesses and for consumers.

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