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GOVERNMENT OF THE REPUBLIC OF SERBIA
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B e l g r a d e

An Analysis of the Implementation of Anti-Monopoly Regulations from 2006 to 2010 and Problems in the Work of the Commission for Protection of Competition

1. Work of the Commission in the period from 2006 to October 2010

The Commission for Protection of Competition was established in April 2006. According to the then valid Law on Protection of Competition (Official Herald of the Republic of Serbia No. 79/05), the Commission* Council members were elected on the basis of the proposals made by the following proponents: The Serbian Association of Lawyers, The Serbian Scientific Society of Economists, Serbian Chamber of Commerce, the Bar Association of Serbia and the Government of the Republic of Serbia.[1] Consequently the Council consisted of three University professors, including two professors of law and one professor of economics. The term of office of two Council members expired in April 2009 and the ramp Council has been working since then.

In the period 2006 – 2009 the Commission was overloaded with a great number of concentration control cases. The Law prescribed low total annual income thresholds for the market stakeholders which created the obligation for submission of applications to the Commission for approval. Consequently, the Commission received 56 applications for approval of concentrations in 2006, 130 applications in 2007, 133 applications in 2008 and 109 applications in 2009. The obligation of making decision regarding such cases was a burden for the already limited personnel capacity of the Commission.

In spite of that, the Commission tried to focus its engagement on other areas of its legal responsibilities – establishing cases of abuse of dominant position and forbidden (cartel) agreements, as well as giving opinion on the regulation proposals that may have influence on competition.

In 2007 the Commission established several cases of abuse of the dominant position in the proceedings conducted against the cable operator SBB,[2] the Belgrade Bus Station and the dairy factories owned by the *Danube Foods Group* – the Investment Fund of *Salford*.[3]

In the same year the existence of a forbidden agreement was established with 14 taxi transporting associations from Belgrade – the Decision on determining the uniform (minimum) price of taxi services. After the Supreme Court of Serbia had revoked* the Decision of the Commission forbidding the concentration of *Primer C – C-Market*, the Commission issued a Decision forbidding the concentration in repeated proceedings.

In 2008 the Commission conducted and completed the proceedings against the two biggest drug producers in Serbia – *Hemofarm* and *Galenika* and against seven biggest wholesale pharmaceutical companies, in which it established the existence of a forbidden agreement whose aim was to restrict the competition on the wholesale drug* market. In the repeated proceedings against the dairy factories of the *Danube Foods Group*, the Commission issued a decision by which it established the abuse of the dominant position by these dairy factories on the unprocessed milk market.

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[1] The Bar Association of Serbia did not submit its proposal for a candidate within the time foreseen by the law and therefore the Government of the Republic of Serbia used its legal right and made a proposal for two candidates.

[2] All the decisions of the Commission are available on its web site www.kzk.gov.rs

[3] The proceedings were concluded at the beginning of 2008.

In 2009 five cases of forbidden agreements were established: two decisions of the Association of Serbian Insurance Companies on the conditions of sale of all-risk insurance of motor vehicles and the personal liability insurance; an agreement between *Panonijabus* transporters (*Severtrans*, *Vojvodina* and *Lasta*) and *Nisprevoz* for the purpose of restricting competition on the bus lines from Serbia to Germany; an agreement between the *Serbian Karate Federation* and the *BMA Trading* on the obligation of wearing ADIDAS protection equipment at karate competitions and the Tariffs of the Organization of Serbian Phonogram Manufacturers. In the same year proceedings were initiated against the representative of the *Western Union* Company in Serbia. The proceedings were concluded in 2010 establishing the abuse of the dominant position because of the conclusion of a network of exclusive contracts with more than 20 banks in Serbia, with the aim of eliminating competition from the swift money transfer market*.

In 2010 (by October 12) the Commission concluded the proceedings in which it established the existence of forbidden agreements determining the minimum oil retail prices concluded between the companies *Invej* (for oils *Banat* and *Sunce*) and METRO and the *Dijamant* Company and 23 retail chains in Serbia.

The Commission started making sectoral analyses, which is a contemporary trend in the practice of the European bodies for protection of competition. In 2009 the Commission made an analysis of the liquid gas market, and at the beginning of this year it started making an analysis of oil derivatives wholesale and retail markets.

At the end of 2009 and in the first half of 2010 the Commission prepared all necessary bylaws for the application of the new Law – nine regulations adopted by the Government and the Guidelines for the application of these acts.

Significant decisions issued by the Commission are shown herebelow.

1.1. *Primer C – C-Market* concentration

In January 2006 the ***Primer C*** Company submitted an application to the Ministry of Trade, Tourism and Services for approval of the concentration created by the purchase of the shares of the targeted company *C-Market*. It was stated in the application that *Primer C* acquired the control over the targeted company in December 2005 when it bought 74.5859 % of the *C-Market* shares.

The Commission took over this case from the Ministry on 15 May 2006 and by the end of June issued a decision by which it rejected the application for the approval of concentration forbidding the concentration.

It was established in the proceedings that the founder and the sole owner of *Primer C* was the *Novafin Co*. registered in Luxembourg. The founder and the sole owner of *Novafin* is the business company *Hemslade Trading Limited* registered in Cyprus. This company, owned by Miroslav Miskovic, controls by majority or sole ownership of shares or interests numerous business companies in Serbia (*Delta Group*). By acquiring the majority package of the *C-Market* shares *Delta* acquired the control over the biggest trade chain in Serbia including 194 stores, out of which 179 are located in Belgrade (146 on the territory of the central city municipalities). *Delta Group* members are *Delta Maxi*, with 39 stores in Belgrade and *Pekabeta* with 68 stores in Belgrade. By the purchase of *C-*

Market, *Delta Group* acquired the dominant position on the market of non-specialized retail trade in foodstuffs and other consumer goods sold at facilities such as self-service stores, supermarkets and hypermarkets on the territory of the city of Belgrade, which was established by the Commission on the basis of the statements made in the very application and on the basis of the data of the Statistical Office of the Republic of Serbia.

Delta Group defaulted on the Decision of the Commission. According to the 2005 Law the Commission was not authorized to order a measure for the disposal of the *C-Market* shares or to penalize *Delta*. A claim was submitted to the magistrate, but this claim was rejected with an explanation that the concentration was made when the Law was not in force, which was not true, as the Law became effective in September 2005, and the *C-Market* shares were acquired in December of the same year. The Commission appealed the magistrate's decision and the City Magistrates Council revoked the first-instance decision. In new proceedings the magistrate issued a decision suspending the magistrate proceedings with an explanation that the 2009 Law, which came into force in the meantime, was a more favourable law for the offender.

Primer C filed a suit with the Supreme Court of Serbia, which made a judgment in September 2007 revoking the Decision of the Commission. As its reasons for the revocation of the Decision the Court stated the lack of the minutes on the conferring and voting of the Council and incorrect determination of the relative market, referring to the Study of the Faculty of Law, which had not been submitted to the Commission to express its opinion about it.

In November 2007 in repeated proceedings the Commission issued a decision rejecting again the application of *Primer C*. Now the Commission had at its disposal the data collected by market stakeholders and established that in 2006 the market share of *Delta* (*Delta Maxi + Pekabeta + C-Market*) was: 69.5 % according to the number of the retail stores, 69.2 % according to selling space, and 63.5 % according to the total annual income, which clearly indicated that with the accomplished concentration this Group had acquired the dominant position on the Belgrade market.

Primer C again filed a suit against this Decision with the Supreme Court. The Court did not decide on this suit, but the case was transferred to the Administrative Court, which started work in 2010. The Administrative Court has not yet made a decision regarding the suit against the Decision of the Commission.

All the above stated made it possible for *Delta Group* to use its dominant position for five years, charging monopolistic prices for goods sold at its retail stores.

1.2. Abuse of the dominant position by the dairy plants of *Danube Foods Group* – Investment Fund *Salford*

In 2007 the Commission conducted proceedings in order to establish if there was the abuse of the dominant position by the dairy plant of the *Danube Foods Group* – Investment Fund *Salford* (*Subotica* Dairy Plant, *Imlek* and *Novi Sad* Dairy Plant, which merged with *Imlek* in the meantime). The proceedings were concluded at the beginning of 2008 and a decision was issued establishing that the dairy plants had the dominant position on the unprocessed milk market in the Republic of Serbia (47.4 % of the market

share in 2006) and that they had abused it by imposing unfair conditions of operation and by the application of different business operating conditions for the same transaction with different market stakeholders. The unfair business operation conditions included non-transparent calculation of the milk purchase price and the impossibility of the producers to control the quality of the sold milk as it was controlled at the laboratories of the dairy plants, and the price of the milk was calculated on the basis of the quality of the milk. The type contracts the dairy plants concluded with the individual milk producers included provisions enabling the dairy plants to terminate such contracts unilaterally and unconditionally, while the milk producers could use this right only after certain conditions are fulfilled. The producers were obliged to inform the dairy plants about all the contacts with other milk purchasers and their offers under the threat of the contract termination, whereby they secured a better position on the market than their competitor dairy plants. Finally, the dairy plants granted loans for the purchase of heifers with the obligation of the milk producer to deliver all the milk to this dairy plant, instead of only the milk obtained from the received and taken over heifers, or those purchased on loan. More precisely, the Commission established in its decision that the dairy plants had abused their dominant position because:

- it was foreseen in Article 7.2 of the type Contract for Production, Delivery and Purchase of Milk that the quality of the unprocessed milk shall be determined by the laboratory of the dairy plant and that the contractual parties agree that the dairy plant findings shall be considered final for the purpose of the Contract;

- it was foreseen in Article 10.1, Points 7 and 8, of the type Contract for Production, Delivery and Purchase of Milk that the milk producer shall immediately and without any delay inform the dairy plant about contacts with other dairy plants or milk purchasers and business offers received from other dairy plants, milk purchasers and other natural and legal persons;

- it was foreseen in Article 12 of the type Contract for Production, Delivery and Purchase of Milk that the dairy plant may unilaterally terminate the Contract with the obligation of the producer to compensate all the damage caused to the dairy plant resulting as a consequence of the contract termination due to fault of the producer, contrary to Article 13.1, which provided for the right to the termination of the Contract by the producer only if the dairy plant does not collect unprocessed milk from the producer more than three times successively, unless it has informed the producer or stopped collecting milk because of justified reasons, and if the producer does not receive the payment for the delivered unprocessed milk of satisfactory quality, in accordance with Article 6 of the Contract;

- in contracts for delivery of heifers and in loan contracts the producers are conditioned by an obligation to deliver all the produced quantities of milk during a certain period, and not only to deliver the milk obtained from the heifers received or purchased on loan;

- it was foreseen in Article 6.1 of the type Contract for Production, Delivery and Purchase of Milk that the purchase price of unprocessed milk shall be formed on the basis of the price list, which makes an integral part of the Contract as Appendix 2, while the Contract does not provide for under what conditions the price list can be changed, or the right of

the producers to unilateral termination of the Contract under reasonable conditions if they are not satisfied with the milk purchase price.

The Commission ordered the dairy plants:

- to change the provisions of the type Contract for Production, Delivery and Purchase of Milk so to provide for the right of the producer to request a control analysis of the chemical and microbiological results of the milk, to be carried out by independent institutions foreseen by the contract, and whose analyses shall be considered final, with the obligation of the dairy plant to compensate the producer for damages and costs in case that the analysis of the independent institution shows better milk quality results than those shown by the dairy laboratory analysis;

- to display on a visible place at the milk collection stations a notification to the producers about their right to request a control analysis of the chemical and microbiological milk results to be conducted by specified independent institutions whose analyses shall be considered final, with the obligation of the dairy plant to compensate the producer for damages and costs of the analyses in case that the analysis of the independent institution shows better milk quality results than the dairy plant analysis;

- to include new provisions in the type Contract for Production, Delivery and Purchase of Milk providing for the unilateral termination of the contract under equal conditions for both contractual parties, specially providing for the right of the producer to terminate the contract if he is not satisfied with the milk purchase price;

- to provide for in the contracts for allocation of heifers to milk producers that they have the obligation to deliver only the milk quantities obtained from the received or taken over heifers and only in the period until their return, and to provide for, in the loan contracts, the obligation of the milk producers to deliver only the quantities of milk sufficient for the settlement of the loan debt and only during the loan period;

- to prepare new price lists where they will show the nominal amount of the purchase prices per 1 liter of milk for each milk category and that the milk categories (extra, first and second category) are determined within the corresponding range of parameters (proteins, fat units, microorganisms and somatic cells) for each category, as well as the type and amount of incentives and their duration period;

- to deliver to each milk producer who delivers milk directly to the dairy plants the new price list every time the price list is changed, and to display the new price list on a visible place at the milk collection station in order to inform about it the milk producers who delivery milk at milk collection stations.

The dairy plants did not act according to the order of the Commission, and the Commission could not sanction the dairy plants for the already stated reasons.

The dairy plants filed a suit with the Supreme Court against the Decision of the Commission. The Court revoked the Decision of the Commission with an explanation that the Commission had to enable the lawyers to have an insight in the statements of the witnesses, agricultural producers, which had not been done because the Commission wanted to protect their identity. Another remark of the Court referred to the application of the Regulation on Determination of Relative Market. The Commission acted in accordance with the Court remarks and in 2009 issued again a decision with the same

contents, to which the dairy plants again filed a suit. In October 2010 the Administrative Court confirmed the Decision of the Commission and the Republic Public Prosecutor's Office announced criminal proceedings for the criminal act of the abuse of the dominant position.

1.3. Abuse of the dominant position by the cable operator SBB

On two occasions the Commission established that SBB had abused its dominant position.

The first proceedings, which were concluded in 2007, dealt with the promotion campaign conducted by SBB on the territory of the municipalities of Palilula and Stari Grad in Belgrade, with the aim of the elimination of competition. This operator offered the citizens who had concluded contracts with other operators free cable TV for a period of 12 months and free internet for three months, under the condition that they conclude a three-year contract. At the same time it raised the monthly subscription rates in other parts of the city from Dinars 395 to 450, which means that it financed the costs of the campaign from the increased subscription rate, and at the expense of its users in other city municipalities. The Commission ordered SBB to conclude an annex with all the users with whom it had concluded a contract during the promotion campaign allowing them to change the operator. The Commission also filed a claim for the initiation of offence proceedings. The Administrative Court issued two different decisions in the disputes against the decision of the Commission initiated by SBB and the Association of Cable Operators (the party which initiated the proceedings). By the judgment following the SBB suit the Court revoked the Decision of the Commission with an explanation that it could not establish which body had issued the Decision and when the Decision was issued. In the judgment following the suit of the Association the same Court confirmed the Decision of the Commission, finding no procedural faults.

In the other proceedings the Commission conducted ex officio against SBB in 2008, it was established that SBB had concluded contracts for exclusive distribution of programs by DTH technology with the following television companies: TV PINK, TV AVALA, FOX TV, TV KOSAVA and HAPPY TV (national broadcasters), SUPER TV (provincial broadcaster), TV METROPOLIS, ENTER TV, SOS CHANNEL and TV STUDIO B (Belgrade regional broadcasters), which resulted in prevention and restriction of competition on the market of providing TV program distribution services by DTH technology, and restriction of the market and technical development at the expense of the consumers. The DTH technology is significant because it enables the reception of TV program distributed directly from satellites to individual users in places where there is no cable TV. According to the estimate of the Commission, the essence of contracting the exclusive distribution right by SBB was to bind TV companies, which are not allowed to conclude contracts with other competitors who distribute or intend to distribute TV program by the DTH technology, both during the contract period and (in particular cases) during a certain period as from the date when the notification of the termination of the contract becomes effective. On the other hand, SBB preserved the right to conclude contracts with TV companies which would, according to its estimate, make its package more attractive. This means that the exclusivity was not bilateral and that it was concluded primarily in the interest of SBB.

The conclusion of a contract with the exclusive distribution right denies access to all SBB competitors, and to such TV programs which SBB designates as the most attractive. Namely, in its package SBB included programs of TV companies which it found "attractive", which is justified and reasonable from the business view. On the other hand, it provides this service to such TV companies mainly free of charge, and the direct consequence of such an action is a higher TV subscription rate which has to be paid by the end user (viewer) if he chooses the SBB program package, as he will not be able to choose another service provider with the same of similar package. By such an approach SBB restricts competition to the existing competitor (impossibility of concluding a contract with TV companies whose services SBB exclusively distributes and offers in its package) and it creates additional entry barriers for potential competitors intending to enter this market. The ultimate consequence is the prevention of market development at the expense of the consumers who are denied the possibility of choice between different market stakeholders who could offer packages with the same or similar contents. Because of this there is no price competition both for the TV companies (broadcasters) which receive the subject service, and for the end consumers and users.

By its Decision the Commission ordered SBB to conclude with the national, provincial and Belgrade regional broadcasters with which it had concluded a contract for exclusive distribution right an Annex to the Contract by which the Contract is to be amended so to provide that the SBB right is not exclusive. The Commission has filed a claim for the initiation of offence proceedings. The Administrative Court has not yet issued a decision regarding the SBB's suit against the Commission's Decision.

1.4. Forbidden (cartel) agreement between drug producers and wholesale pharmacies

In 2008 the Commission found out that the biggest drug producers and wholesale pharmacies in Serbia, including: *Hemofarm, Galenika, Zdravlje, Jugoremedija, Habitfarm, Srbolek, Slaviamed, Pharma Swiss, Velefarm, Vetfarm, Farmalogist, Jugoehemija Farmacija, Vetprom Hemikalije, Farmanova Veleprodaja* and *Unihemkom* had concluded forbidden agreements with the aim of restricting competition on the relevant wholesale drug market on the territory of the Republic of Serbia.

The Commission established that the mentioned drug producers, members of the Group of Drug Producers of the Association for Chemical, Pharmaceutical and Rubber Industry and Non-Metal Industry of the Serbian Chamber of Commerce, at the meeting of the Group of Drug Producers held on 22 January 2008, determined uniform sales conditions for drugs offered in public tender procedures. The sales conditions were determined by that Decision so that the gross price of preparations could not be reduced, the 6 % distribution discount could not be transferred to end users and the maximum payment period that could be offered by the buyer was 150 days. The same producers agreed (agreed the practice) to oblige the buyers of drugs in 2008 to sell the products being the subject of contracts to end users (pharmacies and health institutions), that the buyer could not, without a previous agreement of the drug producer, sell the products purchased under the relevant contract to other distributors (wholesale pharmacies) or make compensations with them, that the buyer had no right to change the price of drugs and the discount level

when selling them further without a previous approval of the drug producer and that the buyer was obliged to obtain a previous approval from the drug producer in order to take part in a public procurement tender.

The Commission has also established that the wholesale pharmacies, members of the Trade Association of the Serbian Chamber of Commerce: *Velefarm* from Belgrade, *Vetfarm* from Belgrade, *Farmalogist* from Belgrade, *Jugohemija-Farmacija* from Belgrade, *Vetprom Hemikalije* from Belgrade, *Farmanova Veleprodaja* from Belgrade and *Unihemkom* from Novi Sad made a decision at the meeting held on 28 February 2008 by which they determined the business operation rules in the area of trade which is not the subject of classical public procurement procedure.

On the basis of the 2008 Drug Wholesale Conditions determined by the Decision of the Drug Producers Group and the agreed practice of drug producers, on one hand, and the decision of the Wholesale Pharmacies, on the other hand, drug sales agreements were concluded between the mentioned drug producers and the wholesale pharmacies for 2008, including provisions restricting competition on the drugs wholesale market, such as exclusive sale to end users, compensation or sale to other distributors only with the producer's approval, and the obligation of the buyer to obtain the seller's approval to change the price for further sale and the obligation of the buyer to obtain a prior approval from the producer in order to participate in a public procurement tender.

In the concrete case the interference of the drug producers in the price policy of drug wholesalers and restricting the freedom of the wholesalers to choose a market which is the best for their economic interests had a direct aim to eliminate smaller wholesale pharmacies from the market. The reduction of the number of drug wholesalers would make it easier to make agreements between drug producers and wholesale pharmacies, which would enable the drug producers to control the drug sale conditions between the wholesale pharmacies and their buyers – health institutions and pharmacies, and at the expense of drug users and medical preparations.

The Commission proclaimed null and void the provisions in the contracts concluded between the drug producers with the wholesale pharmacies based on the decisions of the Groups.

The Administrative Court has not yet issued a decision following the suit against the Commission's Decision in this case.

1.5. Forbidden agreements of Association of Insurers

On two occasions the Commission established that the Serbian Association of Insurers had made decisions by which it obliged its members to apply uniform rates for personal liability insurance services.

Thus the Commission established that on 5 June 2008 the Management Board of the Serbian Association of Insurers made a decision restricting competition on the market of all-risk insurance of leased motor vehicles. The mentioned Decision recommended the insurance companies to give up the calculation and collection of the all-risk premiums for the entire years-long period and return to the annual calculation and for the purpose of improving the business results and solvency of the insurance companies. June 16, 2008

was specified as the date of the commencement of its application and it is stated that all the insurance companies providing all-risk insurance would receive the Decision to express their acceptance in writing and that the Association would inform them about the acceptance results. The Commission also established that the *Dunav* Insurance members, DDOR Novi Sad, *Delta Generali* Insurance, *Sava* Insurance, *Milenijum* Insurance, *Takovo, Triglav Kopaonik,* AMS Insurance, *Wiener Städtishe* Insurance and *Globus* Insurance accepted the Decision of the Association of 5 June 2008, whereby they concluded a forbidden agreement.

By the said Decision the Association determined the business operation conditions for the Association members, whereby it interfered in the business policy of the market stakeholders and violated the basic principle on which Article 7 of the Law from 2005 is based – that each market stakeholder must be free to determine independently its business policy.

An administrative dispute is in progress, and the offence proceedings have been suspended by a decision of the City Magistrate, against which an appeal has been filed to the Magistrate Council.

In the other proceedings conducted by the Commission against the Serbian Association of Insurers and its members it was established that the Management Board of the Association, overstepping its authority, in July 2008 made a decision with Premium Rates X*-AO for insurance of owners and users of motor and towed vehicles against damages caused to third parties. It was also established that the insurance companies, the Association members, including: *Dunav* Insurance, DDOR Novi Sad, *Delta Generali* Insurance, *Sava* Insurance, *Milenium* Insurance, *Takovo, Triglav Kopaonik,* AMS Insurance, *Wiener Städithshe* Insurance, AS Insurance and UNIQA Non-Life Insurance had applied the Association's Decision, whereby they significantly prevented and restricted competition. By an analysis of the price list of the personal liability insurance services it was established that on 11 August 2008 all the insurance companies applied the Association's Decision by taking over the table of premiums into their price lists whose application started as from 11 August 2008.

In spite of the fact that nearly two million insured persons were denied the possibility to have a choice of the personal liability insurance as regards its price, the elimination of competition between insurance companies with regard to this type of insurance was legalized by the amendment of the regulations in the area of mandatory insurance (applied since 12 October 2009). Namely, it is prescribed by Article 108 of the Mandatory Insurance Law (Official Herald of the Republic of Serbia No. 51/2009) that the insurance companies are obliged to apply common conditions of insurance, the premium system with uniform insurance premium bases for such services and the minimum rate. Article 118 of the Law prescribes that this provision shall cease to be effective on the ninetieth day upon the joining of the Republic of Serbia to the European Union, whereby the legislator has disclosed that the regulatory elimination of competition in this area is contrary to the EU regulations. The Commission has sent an opinion to the Government indicating that this regulation restricts competition on the personal liability insurance market.

An administrative dispute is in progress.

1.6. Abuse of dominant position by *Western Union*

In 2009 the Commission concluded the proceedings by which it established that the company *Western Union*, operating through its representatives in Serbia *Eki Transfers* and *Tenfore*, had abused the dominant position on the swift money transfer market. *Eki Transfers* and *Tenfore* developed a network of long-term sub-representative contracts with 24 out of 32 banks on the territory of the Republic of Serbia authorized to carry out international transfers. When we add two banks – *Societe Generale* and *Postal Savings Bank*, which have direct representation contracts with *Western Union*, the number of covered banks is 26 out of 32, whereby these four representatives have acquired a collective dominant position on the international swift money transfer market between natural persons.

Eki Transfers and *Tenfore* abused the dominant position by contracting restrictive provisions, such as ”loyalty obligations“, and ”exclusivity“, effective during the Contract period, and during a certain period upon the expiry or termination of the Contract period (from three to 18 months, depending on the bank). By the mentioned provisions the banks have undertook the obligation not to provide swift money transfer services to *Western Union* competitors during the contract period and during a certain period upon the expiry or termination of the Contract. Besides the above stated, most contracts concluded by *Eki Transfers* provide for an additional obligation of the bank to pay a certain amount of penalty money in case of non-compliance with the exclusivity clause.

By contracting the “loyalty obligation”, and “exclusivity” the *Western Union* representatives have obliged business banks for a long time. The obligation of paying penalties in case of breaching the loyalty obligations of the bank additionally discourages banks to terminate their Contract with the Western Union representative, or to conclude a contract with a competitor. Access of possible competitors was prevented or additional barriers for the entry into the market were created in this way.

There are already significant regulatory and other barriers on the swift money transfer market. The regulatory barriers arise from the provisions of the Law on Foreign Exchange Operations (Official Herald of the Republic of Serbia No. 62/06), where Article 32, Paragraph 1, provides for that international payment operations should be carried out through banks in foreign currencies and in Dinars and the Law on Payment Operations (Official Gazette of the FRY No. 3/2002 and 5/2003 and Official Herald of the Republic of Serbia No. 43/2004, 62/2006 and 11/2009), which prescribes in Article 49 that, besides banks, payment operations in Dinars may be also carried out by the Post Office.

This means that the global operators for transfer of money have engaged the banking network in the Republic of Serbia as the only available, directly or through the representatives. The postal network is active on the market of swift transfer (receiving and sending) of money with the subject global operator and its representative, but exclusively in Dinars.

Therefore, the Commission finds that the consequence of contracting the mentioned restrictive provisions is complete closure of the market for *Western Union* competitors.

The variety in the offer of international money transfer services is significant for the citizens of Serbia because Serbia is a country with a large Diaspora and a lot of money transfers from abroad. Nevertheless, the data of the World Bank show that three fourth of such transfers arrive through relatives, friends, bus drivers, etc. Greater competition on the swift money transfer market would contribute to the reduction of the prices of such services and to a greater inflow of hard currency transfers from abroad into the legal money flows.

The Commission has ordered to *Eki Transfers* and *Tenfore* to conclude annexes to the Contract in order to amend the existing contracts so to delete all the restrictive provisions by which the bank is obliged to provide exclusively the *Western Union* services.

An administrative dispute is in progress.

1.7. Forbidden agreements between edible oil producers and trade chains

At the end of 2008 and at the beginning of 2009 the Commission conducted and concluded proceedings against the edible oil producers and trade chains *Dijamant* and *Invej* (trade marks *Banat* and *Sunce*) and the trade chains whereby it established that these oil producers had agreed the retail prices of oil with traders.

The producer *Dijamant* had concluded sales contracts with the following business companies: *Delta Maxi, M-Rodic* and *Mercator-S, Veropoulos, Tus Trade, Metro Cash & Carry, Pevec, Univerexport, Jabuka, DIS, Angropromet, CBS Trgovina, CDE S, Valdi, TS Stork Group, Perutnina Ptuj, Aman, Sreten Guduric, Real-Market, Trle NB, Phiwa* and *KTC*. The Commission also established that the oil producer *Invej* had a similar contract with *Metro Cash & Carry*.

By the said contracts the oil producers granted to the traders a discount for complying with the minimum retail oil prices. On the basis of these contracts the oil producer *Dijamant* notified in writing its buyers on changes of the minimum price for further sale, and this only a few days before the application of the new retail price at the traders' retail facilities. At the same time it was established that *Dijamant's* notifications of the date when the new minimum price was to be applied at the traders' retail facilities was applied by the traders as requested, and that the traders determined and applied the new price of edible sunflower oil *Dijamant* for the consumers exclusively in the nominal amount which was higher than the minimum price determined by the *Dijamant's* notification. The stated was established on the basis of the requested and received data on the prices at the traders' retail facilities in the reference time periods from August 2008 to September 2009, in comparison with the marked dates contained in *Dijamant's* notification on the effective dates of the new minimum price at the traders' retail facilities. By this approach the edible oil producers directly restricted the right of their buyers to form freely edible oil prices, restricting thus the competition between traders in further sale of edible oil and at the expense of the consumers.

The scheme how edible oil producers dictate oil prices to retail traders is practically applied in the entire food processing industry.

2. Commission's work effects

In spite of the efforts to achieve maximum results in the first years of its work, actual effects of the Commission's work in the area of competition enhancement on the Serbian market have failed to take place, and for a number of reasons:

2.1. Non-compliance with the Commission's decisions by market stakeholders

Non-compliance with the Commission's decision prohibiting the concentration of *Primer C* (*Delta*) and *C-Market* issued in June 2006 is a drastic example. In spite of the prohibition, this company has been for the five years enjoying the dominant position on the retail market in non-specialized stores of mainly food products, resulting in high prices of food products in Belgrade.

2.2. Lack of legal powers

According to the old Law, the Commission did not have powers to pronounce penalties for established competition violation and for cases of non-compliance with the Commission's orders.

2.3. Unwillingness of courts to enforce the Law

According to the old Law the parties could initiate administrative disputes against the Commission's decisions before the Supreme Court, and the Commission could initiate offence proceedings against the market stakeholders who violated competition. No request for the initiation of offence proceedings has been positively resolved. The judges explained their decisions by making reference mainly to the time limitation from the Law on Misdemeanors (one year), in spite of the fact that Law on Protection of Competition as *lex specialis* provided for a period of time longer than five years. After the adoption of the new Law, the judges have referred to the fact that an administrative measure of paying an amount of money for violation of competition is foreseen now, being a milder punishment than an offence punishment, and therefore, an offence punishment cannot be pronounced any more (following the application of the criminal law rule providing for an obligation that a milder punishment should be applied to the criminal act perpetrator).

The Supreme Court revoked the Commission's decisions exclusively by making reference to procedural reasons (for example, lack of minutes of consultation and voting in case files, in spite of the fact that minutes were properly recorded because they refer to the work of the Commission Council; the "inability" of the Court to establish which body had issued the Decision, as it was stated in some provisions of the old Law that it was done by the Council, and in some that it was the responsibility of the Commission, etc.). In 2009 this Court stopped ruling under the suits against the Commission's decisions, probably because the Administrative Court was about to start work, which, according to the Law, took over all the administrative disputes.

The Administrative Court continued a similar practice. Some examples of the Court's decisions following the suits against the Commission's decisions are illustrated hereunder. In the Decision revoking the Commission's Decision in the case of *Delta Agrar – Florida Bel* (conditionally approved concentration), the judge referred to the articles of the Law

related to the abuse of dominant positions, in spite of the fact that it was a concentration control procedure. In case of the abuse of the dominant position by the cable operator SBB two councils of the same Court issued different decisions – the Commission's decision was revoked following SBB's suit because the Court could not establish the date when the Decision was issued (the date when the session of the Council was held and the date under which the Decision was registered with the Commission differed), while the Commission's Decision following the suit of the other party, the Association of Cable Operators, was confirmed by its decision. By the Decision revoking the Commission's Decision in case of the Association of Taxi Transporters the Court advised the Commission that it should have ordered a measure to the Association, and not to establish that the Decision of the Association was null and void, though this Decision was null and void according the very Law, and the Commission only stated that by its Decision and there were no other measures that could have been ordered. Extraordinary legal remedies have been filed with the Supreme Court of Cassation against all the mentioned decisions.

The Commission made an effort to include the Administrative Court judges in the training organized within the EU Project "Strengthening the Institutional Capacity of the Commission for Protection of Competition". Seminars were organized in cooperation with the Judicial Academy, but the response of the judges was negligent. Out of the three seminars organized during this year, one was called off because of poor response by the judges, and another one was attended by only two judges.

It was stated in the European Commission's 2010 Report on the progress of Serbia that the judicial capacity to deal with essential issues of competition was poor and that it was necessary to make significant effort in this area.

2.4. Absence of support for the work of the Commission by other government bodies

The Commission tried to get involved in the process of the preparation of the law and other regulations that may have effect on competition, to which it is entitled both by the old and the new Law. The Legislation Secretariat was contacted with a request that draft laws and other regulations be delivered to the Commission to give its opinion, but the reply was that the Rules of Procedure of the Operation of Government did not provide for an obligation of obtaining an opinion from the Commission.

The Commission has noticed a practice that, whenever it establishes the violation of competition in certain area, regulations are changed so that the market stakeholders can behave contrary to the regulations on competition. For example, certain foreign drugs were removed from the Drug List by the Rules on the Drug List prescribed and issued at the expense of the obligatory health insurance fund, so that the domestic drug producers could be protected following the recommendation of the Government of Serbia in spite of the fact that the domestic producers have had already been privileged enough in public procurement procedures (Official Herald of the Republic of Serbia No. 116/2008). It was prescribed by the Regulation on Conditions and Method of Use of Funds for Subsidizing the Price of Mineral Fertilizers for 2009 Autumn Sowing (Official Herald of the Republic of Serbia No. 50 and 91/2009) that only producers registered on the territory of the Republic of Serbia could participate in the tenders of the Ministry of Agriculture for purchase of fertilizers.

The said regulations are undoubtedly the result of the lobbying by the domestic business circles wanting to protect themselves against competition. On this occasion the Commission sent its opinion to the portfolio ministries and the Government, but there was no response. It is stated in the 2010 Report of the European Commission on the progress of Serbia that the application of regulations on competition is undermined by the adoption of conflicting horizontal regulations.

2.5. Inactivity of the National Assembly in following the work of the Commission

The Commission regularly, within the legally prescribed time periods, submits to the National Assembly of the Republic of Serbia an Annual Report on its work for consideration and adoption. The Portfolio Committee included this report in the Agenda only once, in July 2007, after the formation of the new Government. The Committee members did not discuss the Report at all, but only voted against it without giving an explanation for it.

3. Preparation of the new Law

In 2007, after the formation of the coalition government lead by the Democratic Party of Serbia and the Democratic Party, an amendment to the 2005 Law on Protection of Competition was prepared. The Draft Amendment eliminated certain shortcomings in the material and legal part. A definition of the small-value agreement was introduced, the provisions on the conditions for exemption of agreements by types (group exemption) were specified, absolute prohibition of certain categories of horizontal agreements (agreement on prices, market division, limitation of production or sales and changing the purpose of a tender) was introduced. Definitions of the dominant position and concentration of market stakeholders were specified. Should a concentration be created without an approval, the Commission would be authorized to order measures for the purpose of re-establishing competition on the market, such as: division of the company, disposal of shares or stakes, termination of the contract, as well as all other necessary measures. Introduced was the obligation of the Government agencies and organizations and other institutions to provide to the Commission data on the market stakeholders. The Commission was authorized to independently order fines (the measure of paying an amount of money) from 1% to 10% of the total annual income of the market stakeholder. The procedure of electing the Council members was changed so that it was foreseen that the Parliament Committee for Trade would make proposals for the candidates at its own initiative. This created conditions for the politicization of this body. However, the Draft Amendment was not adopted because of the dissolution of the coalition and premature elections.

After the formation of the new Government in 2008, the preparation of a new law was initiated. The procedure for establishing competition violation (abuse of the dominant position and restrictive agreements) was clearly separated from the procedure of controlling the concentration. The procedure for establishing competition violation has the elements of criminal proceedings, including: conducting investigation, searching business premises, vehicles and land, examination and temporary confiscation of

documentation and things, etc. If competition violation is established at the end of the procedure, pronounced is a penalty or measure which is required for the re-establishment or preservation of competition. The procedure of controlling concentrations is administrative and in most cases it ends with an approval or conditional approval of concentration. The Law provides for the jurisdiction of the Higher Commercial Court in case of disputes following the decisions brought by the Commission, creating thereby preconditions that such disputes be ruled by judges who know the economic and legal matters and who are more familiar with the competition law than the Administrative Court judges.

However, during the elaboration of the Draft Law at the Ministry of Trade and Services significant diversion from the expert version was made and especially in the procedural part, because the provisions on the procedure of establishing competition violation and the procedure of controlling concentration were mixed up. The provision related to the measures that may be pronounced by the Commission are not clear – they speak about behavioral measures and structural measures, where *exempli causa* it is not even specified what measures are in question. The Commission is obliged to give preference to the behavioral measures rather than the structural measures, in spite of the fact the world practice reveals otherwise. The minimum fine was repealed, which means that the Commission has an option not to impose a fine. The time limitation period for pronouncing a fine (a competition protection measure) was shortened to three years instead of the five years foreseen so far. If we consider the fact that the procedure of establishing competition violation lasts very long, sometimes several years, the said solution effectively reduces the possibility that the Commission may punish a violating market stakeholder. Though the money of a fine is paid to the budget, in case of the revocation of the Commission's Decision in court proceedings, the Commission would be obliged to pay interest and compensate the costs of proceedings from its own funds. The application of this provision in practice may seriously jeopardize the functioning of the Commission. The Administrative Court jurisdiction is foreseen for disputes following suits against the Commission's decisions.

4. Attempts of making influence on the work of the Commission

The first attempts to influence the work of the Commission began in 2006 after the Decision forbidding the concentration of *Primer C – C-Market*. The company *Delta* hired the Faculty of Law in Belgrade to make a legal study which was to challenge the legal grounds of the Commission's Decision, while the Serbian Chamber of Commerce and *Consit d.o.o.* prepared an economic analysis which proved that *Delta* did not have the dominant position. Both studies were submitted to the Supreme Court of Serbia, which was to make a decision following the suit against the Commission's Decision, but it was not delivered to the Commission so that it could give its opinion on them. The Commission received these studies only after the Decision had been revoked by the Court's Decision.

In September 2007 the Supreme Court revoked the Commission's Decision, which caused significant reactions among the public. The then Minister of Trade, Mr. Bubalo invited the President of the Commission to his cabinet and warned her not to comment

the Court decisions publicly and to attribute the blame for all to the Technical Service of the Commission. After the public learned about the pressures, the National Assembly Committee for Trade and Services met. In spite of the fact that most Council members stated that the Commission had been exposed to pressures, the Committee adopted a decision that there had been no pressures.

At the end of 2007, at the time when the Commission was working on the *Salford* case and in spring 2008, when it worked on the case of the purchase of the company *SI Market*, Milan Beko made pressure on the President of the Commission. In a conversation he claimed that the Government did not stand behind the Commission and that it would be the best for the President to use her position for her personal benefit as she had integrity and enjoyed the public trust.

In the autumn of 2008 Minister Milosavljevic gave an interview to the *Economist* stating that the only company which had a monopoly in Serbia was NIS /Oil Industry of Serbia/. After that the President of the Commission requested a reception by President Tadic in order to inform him about the pressures made on the Commission.

Later on the Ministry of Trade and Services made a public request to the Commission to conduct proceedings for establishing the existence of a cartel of oil producers, in 2009 and in 2010. The first time the Commission acted in accordance with the request of this Ministry and conducted an investigation, knowing in advance that no evidence would be found because, when a public statement of the existence of a cartel is made, potential cartel participants are warned to hide possible evidence. During the hearing of the officials of the Association of Edible Oil Producers, the Commission workers were presented only one document – an invitation to the Ministry of Trade and Services, with the Agenda item: "Making agreement on oil prices".

The Ministry of Agriculture acted in a similar way, trying to shift the seasonal problems regarding the purchase prices of agricultural products to the Commission's ground. In contacts with representatives of this Ministry the Commission tried to explain when and how it could react, but the practice of sending public requests to the Commission continued.

At the beginning of 2010 the pressures started in connection with the purchase of the *Novosti* by WAZ, when this company submitted "Updated Declaration of Concentration".

An article was published in the *Arena 92*, a *Novosti* publication, on 16 March 2010 with the headline "Independent bodies full of backroom dealers" featuring a large photo of the President of the Commission and a series of malicious fabrications.

In April 2010 the President was contacted by professor Hasan Hanic, who had previously cooperated with the Commission, offering technical and material assistance to the Commission and personally to the President. During several meetings he always brought some small presents and every time he enquired about the *Novosti* case. He offered an interview in the *Novosti* and enquired if a suit was filed because of the published article. During one meeting he boasted how he had bought an apartment in Cyprus at favorable conditions, and offered the President a catalogue with photographs of apartments to take it home and have a look at it.

At the end of June WAZ started making pressure on the Commission requesting that an opinion be issued that the concentration be considered approved, because the Commission failed to bring a decision within a period of one month in accordance of the new Law. The attorneys of this Company informed the Commission that WAZ had registered itself with a registration court in Austria, as the owner of a share in *Ardos*, one of the three companies holding the *Novosti* shares. On the other hand, the *Novosti* made pressure that the Commission should establish that WAZ had created a concentration without the Commission's approval. Numerous journalists from different media contacted the President personally by telephone warning that Beko's lawyers were threatening with a suit against the Commission.

5. Facts and circumstances related to the procedure of the election of the Commission President and the Council members

The announcement for the election of the President and the Council members of the Commission for Protection of Competition was published in the *Official Herald of the Republic of Serbia* and in the *Politika* on 27 November 2009. As the election requirements specified in the text of the announcement did not comply with the legal requirements, Minister Milosavljevic was informed about it and after that the announcement was repeated. Owing to the already described problems in the work of the Committee for Trade and Services, the election procedure could not be conducted until the new members of the Committee had been elected by the end of September 2010.

In February 2010, the weekly "NIN" published an article forecasting the outcome of the election of the Commission President, stating that the new candidate had no experience in the area of competition protection. The name of the now elected candidate was published in the *National Civil Paper* /*Nacionalni gradjanski list*/ of 25 June 2010.

On Monday, October 3, the Commission sent a letter to the National Assembly Speaker, indicating that the Rules of Procedure of the National Assembly did not allow that a proposal which did not comply with the Constitution, the Law and the said Rules be included in the National Assembly Agenda. It is prescribed in Article 23, Paragraph 1, of the Law on Protection of Competition that the President and the Council members of the Commission for Protection of Competition should be elected from among respectful experts in the area of law and economics, with minimum ten years of relevant working experience, who have created recognized and significant works or practice, especially in the area of protection of competition and the European law and who enjoy the reputation of objective and unbiased personalities.

The election of the President and the Council members of the Commission was included anyhow in the Agenda of the session of the National Assembly of the Republic of Serbia. The voting was done on Tuesday, October 12 in late evening hours. The issue of the Official Herald of the Republic of Serbia publishing the Decision on the Election of the President and Council members of the Commission was published under the same date.

In Belgrade, 15 December 2010

COUNCIL PRESIDENT
Verica Barac