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Constitutional Court of Serbia
15 Bulevar Kralja Aleksandra Street
Belgrade

September 5, 2017

Petitioner:

1. Gecić Law Firm, 2 Nikole Spasića Street, 11000 Belgrade – attorney at law Bogdan M. Gecić;
2. Association for Protection of Constitutionality and Legality, 158/325 Požeška Street, 11000 Belgrade – statutory representative Savo Manojlović; and
3. YUCOM Lawyers' Committee for Human Rights, 4 Kneza Miloša Street, 11000 Belgrade – statutory representative Milan Antonijević.

In accordance with Article 51 of the Constitutional Court Act[1] (hereinafter: ***the CCA***), the petitioner hereby submits to the Constitutional Court of Serbia the following:

C O N S T I T U T I O N A L C H A L L E N G E

To initiate a procedure for the review of the following general acts:

I. **Protection of Competition Act** ("Official Gazette of the Republic of Serbia", nos. 51/2009 and 95/2013)

II. **Regulation on Criteria for Calculating the Amount Payable on the Basis of the Measure for Protection of Competition and Sanctions for Procedural Breaches, Manner and Terms of Payment Thereof and Conditions for Determination of Respective Measures** ("Official Gazette of the Republic of Serbia", no. 50/2010)

III. **Regulation on Conditions for Leniency** ("Official Gazette of the Republic of Serbia", no. 50/2010)

IV. **Regulation on Agreements on Specialization between Undertakings Operating on the Same Level of the Production or Distribution Chain, Exempted from Prohibition** ("Official Gazette of the Republic of Serbia", no. 11/2010)

V. **Regulation on Research and Development Agreements between Undertakings Operating on the Same Level of the Production or Distribution, Exempted from Prohibition** ("Official Gazette of the Republic of Serbia", no. 11/2010)

[1] "Official Gazette of the Republic of Serbia", nos. 109/2007, 99/2011, 18/2013 - decision of the Constitutional Court, 103/2015 and 40/2015 – as amended.

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VI. **Regulation on Agreements between Undertakings Operating on Different Levels of the Production or Distribution Chain, Exempted from Prohibition** ("Official Gazette of the Republic of Serbia", no. 11/2010)

VII. **Regulation on the Content of Request for Individual Exemption of Restrictive Agreements from Prohibition** ("Official Gazette of the Republic of Serbia", no. 107/2009)

VIII. **Regulation on the Criteria for Defining the Relevant Market** ("Official Gazette of the Republic of Serbia", no. 89/2009)

IX. **Guidelines for Implementation of the Regulation on Criteria for Calculating the Amount Payable on the Basis of the Measure for Protection of Competition and Sanctions for Procedural Breaches, Manner and Terms of Payment Thereof and Conditions for Determination of Respective Measures**

X. **Guidelines for Implementation of Article 69 of the Protection of Competition Act and Regulation on Conditions for Leniency**

XI. **Decision on the Manner of Publishing Decisions and Acts, and Replacing and/or Omitting Data (Redactions) in Decisions and Acts of the Commission for Protection of Competition**

XII. **Instructions on Implementation of Article 58 of the Protection of Competition Act**

XIII. **Opinion of the Commission on Implementation of Article 10 of the Protection of Competition Act with Regard to Affiliated Entities in Public Procurement Proceedings**

XIV. **Instructions on Submitting Requests for Individual Exemption of Restrictive Agreements from Prohibition**

XV. **Instructions for Detecting Bid Rigging in Public Procurement Procedures**

XVI. **Instructions on Communicating with Parties**

XVII. **Instructions on Content of Initiative to Examine Competition Infringement of Article 16 of the Protection of Competition Act**

XVIII. **Instructions on Implementation of Competition Regulations to Associations of Undertakings**

XIX. **Organizational Bylaws of the Commission for Protection of Competition** ("Official Gazette of the Republic of Serbia" no. 49/2010)

in terms of their conformity with the Constitution of the Republic of Serbia and the European Convention for the Protection of Human Rights and Fundamental Freedoms

In 1 copy,
With 11 Appendices

By way of this petition to initiate a procedure for a review of the Protection of Competition Act (hereinafter: ***the Competition Act***), Regulation on Criteria for Calculating the Amount Payable on the Basis of the Measure for Protection of Competition and Sanctions for Procedural Breaches, Manner and Terms of Payment Thereof and Conditions for Determination of Respective Measures (hereinafter: ***the Regulation on Measures***), Regulation on Conditions for Leniency (hereinafter: ***the Leniency Regulation***), Regulation on Agreements on Specialization between Undertakings Operating on the Same Level of Production or Distribution Chain, Exempted from Prohibition (hereinafter: ***the BER for Horizontal Agreements on Specialization***), Regulation on Research and Development Agreements between Undertakings Operating on the Same Level of Production or Distribution Chain, Exempted from Prohibition (hereinafter: ***the BER for Horizontal R&D Agreements***), Regulation on Agreements between Undertakings Operating on Different Levels of Production or Distribution Chain, Exempted from Prohibition (hereinafter: ***the BER for Vertical Agreements***), Regulation on the Content of Request for Individual Exemption of Restrictive Agreements from Prohibition (hereinafter: ***the Individual Exemption Regulation***), Regulation on the Criteria for Defining the Relevant Market (hereinafter: ***the Relevant Market Regulation***), (together, without the Competition Act: ***the Secondary Legislation***) Guidelines for Implementation of the Regulation on Criteria for Calculating the Amount Payable on the Basis of the Measure for Protection of Competition and Sanctions for Procedural Breaches, Manner and Terms for Payment Thereof and Conditions for Determination of Respective Measures (hereinafter: ***the Guidelines on Measures***), and Guidelines for Implementation of Article 69 of the Protection of Competition Act and Regulation on Conditions for Leniency (hereinafter: ***the Guidelines on Leniency***), Decision on the Manner of Publishing Decisions and Acts, and Replacing and/or Omitting Data (Anonymization) in Decisions and Acts of the Commission for Protection of Competition (hereinafter: ***the Decision on Redactions***), Instructions on Implementation of Article 58 of the Law on Protection Of Competition (hereinafter: ***the Instructions on Implementing Article 58***), Opinion of the Commission on Implementation of Article 10 of the Protection of Competition Act With Regard to Affiliated Entities in Public Procurement Proceedings (hereinafter: ***the Opinion on Implementing Article 10***), Instructions on Submitting Requests for Individual Exemption of Restrictive Agreements from Prohibition (hereinafter: ***the Instructions on Individual Exemptions***), Instructions for Detecting Bid Rigging in Public Procurement Procedures (hereinafter: ***the Instructions on Bid Rigging***), Instructions on Content of Initiative to Examine Competition Infringement of Article 16 of the Protection of Competition Act (hereinafter: ***the Instructions on Abuse of Dominance***), Instructions on Implementation of Competition Regulations to Associations of Undertakings (hereinafter: ***the Instructions on Associations***), Organizational Bylaws of the Commission for Protection of Competition (hereinafter: ***Bylaws***) (together, without the Competition Act and the Secondary Legislation: ***Other General Regulations***), in terms of their conformity with the Constitution of the Republic of Serbia and the European Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter: ***the ECHR***), the petitioner hereby requests from the Constitutional Court to:

1. Adopt a decision to initiate the procedure for the review of the Competition Act, the Secondary Legislation and Other General Regulations in terms of their conformity with the Constitution and the ECHR, in accordance with Article 53(1) of the CCA;

2. Suspend the enforcement of individual acts and actions adopted and/or undertaken pursuant to the Competition Act, the Secondary Legislation and Other General Regulations, as well as all proceedings that can result in consequences pursuant to Article 68 of the Competition Act, until a final decision has been made, in order to prevent further irreparable adverse consequences on undertakings, in accordance with Article 56(1) of the CCA;

3. Adopt a decision by which it would declare the contested provisions of the Competition Act, Secondary Legislation and Other General Regulations to be in breach of the Constitution and the ECHR and repeal them, and determine the manner in which the damage caused by implementation of the unconstitutional provisions of the Competition Act, the Secondary Legislation and Other General Regulations is to be remedied.

The constitutional challenge is being submitted for the following reasons:

I. Articles 34, 35, 38, 41, 48 and 70 of the Competition Act, regulating proceedings before the Commission for the Protection of Competition (hereinafter: the Competition Commission or Commission), in conjunction with Articles 21, 22, 25 and 26 of the Competition Act, are in breach of Articles 32, 33, 34 and 41 of the Constitution of the Republic of Serbia and Articles 6, 7 and 8 of the ECHR

II. Article 57(6) of the Competition Act, on the basis of which the Regulation on Measures was adopted, is in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

III. Articles 53, 54 and 55 of the Competition Act, regulating the procedure for conducting raids by the Competition Commission are in breach of Article 40 of the Constitution of the Republic of Serbia and Article 8 of the ECHR

IV. Articles 71 and 72 of the Competition Act, regulating the procedure for judicial review of decisions rendered by the Competition Commission, in conjunction with Article 43 of the Act on Administrative Disputes, are in breach of Articles 20, 36 and 41 of the Constitution of the Republic of Serbia and Articles 6 and 13 of the ECHR

V. The Regulation on Measures, enacted pursuant to Article 57(6) of the Competition Act, is in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

VI. The Leniency Regulation, enacted pursuant to Article 69(5) of the Competition Act, is in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

VII. The BER Regulation for Horizontal Agreements on Specialization, enacted pursuant to Article 13(3) of the Competition Act, is in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

VIII. The BER Regulation for R&D Horizontal Agreements, enacted pursuant to Article 13(3) of the Competition Act, is in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

IX. The BER Regulation for Vertical Agreements, enacted pursuant to Article 13(3) of the Competition Act, is in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

X. The Individual Exemption Regulation, enacted pursuant to Article 12(4) of the Competition Act, is in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

XI. The Relevant Market Regulation, enacted pursuant to Article 6(4) of the Competition Act, is in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

XII. The Guidelines on Measures, enacted pursuant to Article 21(1)(5) of the Competition Act, in conjunction with Articles 57 and 70 of the Competition Act, are in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

XIII. The Guidelines on Leniency, enacted pursuant to Article 21(1)(5) of the Competition Act, in conjunction with Article 69 of the Competition Act, are in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

XIV. Decision on Redactions, adopted based on Article 22(2) of the Competition Act is in breach Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

XV. Instructions on Implementing Article 58, adopted based on Article 21(1)(5) of the Competition Act are in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

XVI. Opinion on Implementing Article 10 is in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

XVII. Instructions on Individual Exemptions, adopted based on Article 21(1)(5) and (11) of the Competition Act are in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

XVIII. Instructions on Bid Rigging, adopted based on Article 21(1)(5) of the Competition Act are in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

XIX. Instructions on Communicating with Parties, adopted based on Article 21(1)(9) of the Bylaws are in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

XX. Instructions on Abuse of Dominance, adopted based on Article 21(1)(5) of the Competition Act are in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

XXI. Instructions on Associations, adopted based on Article 21(1)(5) of the Competition Act are in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

XXII. Bylaws are in breach of Article 34 of the Constitution of the Republic of Serbia and Article 7 of the ECHR

NOTE: The petitioner hereby notifies the Constitutional Court that legislation listed under numbers XII to XXII above has not been published in any official gazettes but exclusively on the website and notice board of the Commission. Therefore, the petitioner requested certified copies thereof directly from the Commission, all in accordance with Article 51(2) of the CCA. Commission officer notified the petitioner

that the subject authority does not issue certified copies of general regulations issued by it, for which reason the petitioner requested the documents through a request for access to information of public importance (attached).

Due to the fact that the petitioner is, due to reasons outside its control, unable to submit certified copies of the abovementioned documents before receiving the Commission's response to the request for access to information of public importance, we hereby submit simple copies thereof, as available on the Commission's web site, www.kzk.org.rs, on September 4, 2017.

We also note that, under Article 78(2) of the Act on General Administrative Procedure (*"Official Gazette of the Republic of Serbia"* no. 18/2016) "public delivery **entails publishing a document on the website or notice board of the issuing authority**. A document *may also be* published in an official gazette, daily newspapers or in another suitable manner."

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R E A S O N I N G

Contents

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For ease of reference, please find below a list of abbreviations, which will be used throughout this document, regardless of whether they are defined elsewhere or in the reasoning:

No.	Abbreviation		Definition
1.	**Administrative Act**	meaning	Act on General Administrative Procedure (*"Official Gazette of the Republic of Serbia"* no. 18/2016)
2.	**Administrative Disputes Act**	meaning	Act on Administrative Disputes *("Official Gazette of the Republic of Serbia",* no. 111/2009)
3.	**BER for Horizontal Agreements on Specialization**	meaning	Regulation on Agreements on Specialization between Undertakings Operating on the Same Level of Production or Distribution Chain Which are Exempted from Prohibition *("Official Gazette of the Republic of Serbia"*, no. 11/2010)
4.	**BER for Horizontal R&D Agreements**	meaning	Regulation on Research and Development Agreements between Undertakings Operating on the Same Level of Production or Distribution Which are Exempted from Prohibition *("Official Gazette of the Republic of Serbia"*, no. 11/2010)
5.	**BER for Vertical Agreements**	meaning	Regulation on Agreements between Undertakings Operating at the Different Levels of Production or Distribution Chain Which are Exempted from Prohibition *("Official Gazette of the Republic of Serbia",* no. 11/2010)
6.	**Constitutional Court**	meaning	Constitutional Court of the Republic of Serbia
7.	**CCA**	meaning	Constitutional Court Act *("Official Gazette of the Republic of Serbia",* nos. 109/2007, 99/2011, 18/2013 - decision of the Constitutional Court, 103/2015 and 40/2015 – as amended)
8.	**Civil Procedure Act**	meaning	Act on Civil Procedure *("Official Gazette of the Republic of Serbia",* nos. 72/2011, 49/2013 - decision of the Constitutional Court, 74/2013 - decision of the Constitutional Court and 55/2014)
9.	**CLLE Act**	meaning	Act on Criminal Liability of Legal Entities *("Official Gazette of the Republic of Serbia",* no. 97/2008)
10.	**Commission**	meaning	Commission for the Protection of Competition of the Republic of Serbia
11.	**Competition Act**	meaning	Protection of Competition Act *("Official Gazette of the Republic of Serbia"*, nos. 51/2009 and 95/2013)
12.	**Constitution**	meaning	Constitution of the Republic of Serbia *("Official Gazette of the Republic of Serbia",* no. 98/2006)
13.	**Court**	meaning	Administrative Court of Serbia
14.	**Criminal Code**	meaning	Criminal Code *("Official Gazette of the Republic of Serbia"* nos. 85/2005, 88/2005 - corr., 107/2005 – corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016)
15.	**Criminal Procedure Act**	meaning	Act on Criminal Procedure *("Official Gazette of the Republic of Serbia"*, nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014)
16.	**Decision on Redactions**	meaning	Decision on the Manner of Publishing Decisions and Acts, and Replacing and/or Omitting Data (Redactions) in Decisions and Acts of the Commission for Protection of Competition, available at: http://bit.ly/2eK5Kzn
17.	**ECHR**	meaning	Act on Ratification of the Convention for Protection of Human Rights and Fundamental Freedoms *("Official Gazette of Serbia and Montenegro"*, - International Treaties, nos. 9/2003 and 5/2005)

18.	**ECtHR**	meaning	The European Court of Human Rights, based in Strasbourg, established on January 21, 1959, on the basis of the Convention for Protection of Human Rights and Fundamental Freedoms
19.	**EU**	meaning	The European Union
20.	**Guidelines on Leniency**	meaning	Guidelines for Implementation of Article 69 of the Protection of Competition Act and Regulation on Conditions for Leniency (available at: http://www.kzk.gov.rs/kzk/wp-content/uploads/2011/08/Guidelines-for-implementation-of-article-69-of-the-law-on-protection-of-competition.pdf)
21.	**Guidelines on Measures**	meaning	Guidelines for Implementation of the Regulation on Criteria for Calculating the Amount Payable on the Basis of Measure for Protection of Competition and Sanctions for Procedural Breaches, Manner and Terms for Payment Thereof and Conditions for Determination of Respective Measures (available at: http://www.kzk.gov.rs/kzk/wp-content/uploads/2011/08/GUIDELINES-for-implementation-of-the-Regulation-on-criteria-for-setting.pdf)
22.	**Individual Exemption Regulation**	meaning	Regulation on the Content of Request for Individual Exemption of Restrictive Agreements from Prohibition *("Official Gazette of the Republic of Serbia",* no. 107/2009)
23.	**Instructions on Abuse of Dominance**	meaning	Instructions on Content of Initiative to Examine Competition Infringement of Article 16 of the Protection of Competition Act, available at (only Serbian text published): http://bit.ly/2wGXgxx
24.	**Instructions on Implementing Article 58**	meaning	Instructions on Implementation of Article 58 of the Law on Protection Of Competition, available at: http://bit.ly/2eEsRHR
25.	**Instructions on Associations**	meaning	Instructions on the Implementation of Competition Rules Applicable to Associations of Undertakings, available at: http://bit.ly/2j2qDXZ
26.	**Instructions on Bid Rigging**	meaning	Instructions for Detecting Bid Rigging in Public Procurement Procedures, available at: http://bit.ly/2gL3EzQ
27.	**Instructions on Communicating with Parties**	meaning	Instructions on Communicating With Parties, available at (only Serbian text published): http://bit.ly/2j1WasZ
28.	**Instructions on Individual Exemptions**	meaning	Instructions on Submitting Requests for Individual Exemption of Restrictive Agreements from Prohibition, available at (only Serbian text published): http://bit.ly/2eKuGa0
29.	**Leniency Regulation**	meaning	Regulation on the Conditions for Leniency *("Official Gazette of the Republic of Serbia"*, no. 50/2010)
30.	**Bylaws**	meaning	Organizational Bylaws of the Commission for Protection of Competition (*"Official Gazette of Republic of Serbia"* no. 49/2010)
31.	**Opinion on Implementing Article 10**	meaning	Opinion of the Commission on Implementation of Article 10 of the Protection of Competition Act With Regard to Affiliated Entities in Public Procurement Proceedings, available at (only Serbian text published): http://bit.ly/2eKm03v.
32.	**Recommendation on Administrative Sanctions**	meaning	Recommendation no. R (91) I of the Committee of Ministers to Member States on Administrative Sanctions (Adopted by the Committee of Ministers on 13 February 1991 at the 452nd 1neeting of' the Ministers' Deputies), available at: http://bit.ly/2wyWWRd.

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33.	**Recommendation on Judicial Review of Administration**	meaning	Recommendation Rec (2004)20 of the Committee of Ministers to Member States on Judicial Review of Administrative Acts (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies), available at: http://bit.ly/2vCLoiI.
34.	**Regulation on Measures**	meaning	Regulation on Criteria for Calculating the Amount Payable on the Basis of the Measure for Protection of Competition and Sanctions for Procedural Breaches, Manner and Terms of Payment Thereof and Conditions for Determination of Respective Measures *("Official Gazette of the Republic of Serbia"*, no. 50/2010)
35.	**Relevant Market Regulation**	meaning	Regulation on the Criteria for Defining the Relevant Market *("Official Gazette of the Republic of Serbia",* no. 89/2009)
36.	**SAA**	meaning	Stabilization and Association Agreement between the European Communities and Their Member States of the One Part, and the Republic of Serbia, of the Other Part *("Official Gazette of the Republic of Serbia"* – International Treaties, no. 83/2008)

1. The petitioner claims that the above listed provisions of the Competition Act, the Secondary Legislation and the Other General Regulations are unconstitutional and incompatible with the ECHR, since said acts are in breach of Articles 32, 33, 34, 36, 40 and 41 of the Constitution and Articles 6, 7, 8 and 13 of the ECHR.

2. The petitioner claims that the Constitutional Court has jurisdiction to decide on the constitutionality of Other General Regulations.

3. Article 21(1)(5) of the Competition Act explicitly grants the Commission powers to adopt two types of general regulations for the purposes of implementing the Competition Act: (i) instructions and (ii) guidelines.

4. Both instructions and guidelines represent general and legally binding regulations. The general and legally binding nature of these regulations is reflected in the following: **1.** they contain provisions on entry into force – proof they are legally binding; **2.** they are published on the notice board and the website of the Commission – proof they are general in nature, meaning they are binding for third persons, i.e. the public; and **3.** they explicitly regulate their legally binding nature *vis à vis* the Commission, i.e. its officers and staff, when implementing the Competition Act.

5. As an example, please see below several extracts from the Instructions on Communicating with Parties and the Guidelines on Leniency.

Instructions on Communicating with Parties

> *"These Instructions* ***shall be published on the website of the Commission*** *as soon as they are adopted, while* ***they shall be implemented starting from*** *December 14, 2015.*
>
> *Civil servants of the Commission* ***shall be obliged to, starting from the starting date of implementation*** *of these Instructions,* ***adhere to these Instructions*** *when communicating with parties,"*

Guidelines on Leniency:

> *"39) These Guidelines shall* ***come into force on the eight day from the date of publication on the notice board*** *of the Commission, and* ***shall be applicable on investigations*** *of competition infringements pursuant to Article 10 of the Act,* ***which are pending*** *on the day of enactment of this Guidelines.*
> […]
>
> *These Guidelines* ***have been published on the notice board*** *of the Commission for Protection of Competition on August 31, 2010."*

6. In accordance with the Article 167(1)(5) of the Constitution, which regulates jurisdiction of the Constitutional Court, the court shall decide on compliance of general regulations of bodies entrusted with public authorities with the Constitution and statutes. Therefore, the petitioner is of the opinion that the Constitutional Court has jurisdiction to review all general regulations issued by the Commission.

7. As a separate question, but also pertinent for this constitutional issue, the petitioner notes that, in accordance with **the Constitution and the ECHR, legal entities have human rights, as established by the case law of the ECtHR**,[2] and especially the **right to a fair trial pursuant to Article 6 of the ECHR**, including guarantees developed through the practice of the ECtHR as well the autonomous criteria established by this judicial body for differentiating civil, criminal and administrative proceedings within the meaning of Article 6 of the ECHR.[3]

8. The aforementioned case law establishes that human rights protections may, in certain circumstances, be accommodated to the nature of legal entities, i.e. their special features as opposed to natural persons. However, ECtHR case law found no obstacles for legal entities to enjoy all rights referred to in this petition, and especially the right to a fair trial under Article 6 of the ECHR, as established by ECtHR case law. The subject case law is a clear result of the fact that in criminal proceedings, where the most fundamental human rights of the accused can be curtailed, all guarantees of fair trial must be available to legal entities as well as natural persons.

9. Moreover, the case law of the Constitutional Court, in deciding on constitutional appeals, confirms the binding nature of ECtHR case law and recognizes that all legal entities enjoy rights

[2] ECtHR, *X. & Church of Scientology v Sweden*, Application no. 7805/77, May 5, 1979, available: http://bit.ly/2xKYTul; ECtHR, *Société Colas Est v France*, Application no. 37971/97, April 16, 2002, available at: http://hudoc.echr.coe.int/eng?i=001-60431; ECtHR, *André and others v France*, Application no. 18603/03, July 24, 2008, available at: http://hudoc.echr.coe.int/eng?i=001-87938; ECtHR, *Dubus v France*, Application no. 5242/04, June 11 2009, available at: http://hudoc.echr.coe.int/eng?i=001-92990; ECtHR, *Menarini Diagnostics v Itally*, Application no. 43509/08, September 27 2011, available at: http://hudoc.echr.coe.int/eng?i=001-106438; ECtHR, *Société Canal Plus and others v France*, Application no. 29408/08, December 21, 2010, available at: http://hudoc.echr.coe.int/eng?i=001-102435;ECtHR, *OAO Heftyanaya Kompaniya Yukos v* Russia, Application no. 14902/04, July 31, 2014.године, available at: http://hudoc.echr.coe.int/eng?i=001-145730.

[3] ECtHR, *Paykar Yev Haghtanak Ltd v Armenia*, Application no. 21638/03, December 20, 2007, paras 37 and 50, available at: http://hudoc.echr.coe.int/eng?i=001-84119; ECtHR, *Synnelius & Edsbergs Taxi AB V Sweden*, Application no. 44298/02, June 30, 2009, available at: http://hudoc.echr.coe.int/eng?i=001-93235; ECtHR, *Garyfallou AEBE v Greece*, Application no. 18996/91, September 24, 1997, paras 36 to 44, available at: http://hudoc.echr.coe.int/eng?i=001-58096; ECtHR, *Haralambidis, Y. Haralambidis-Liberpa S.A. & Liberpa Ltd v Greece*, Application no. 36706/97, March 29, 2000, para 4. available at: http://hudoc.echr.coe.int/eng?i=001-59359.

under the Constitution and the ECHR.[4] The mere fact that the Serbian legal system regulates criminal liability of legal entities through the CLLE Act, undoubtedly points to the fact that all statutory and constitutional guarantees available in criminal proceedings (substantive and procedural) are *mutatis mutandis* applicable to legal entities.

10. Therefore, **it is undisputable that legal entities and registered entrepreneurs enjoy all rights under the Constitution and the ECHR, with regard to criminal and other penal proceedings.**

11. In accordance with the aforementioned, the petitioner shall prove that the Competition Act, the Secondary Legislation and the Other General Regulations are in direct breach of the relevant provisions of the Constitution and the ECHR, for the following reasons:

- The so-called *administrative* measures for protection of competition (hereinafter: ***the Measures***), which are issued in (i) administrative proceedings before (ii) the Commission are, by their (iii) **nature** and due to (iv) the ramifications they have for the person and/or entity they are issued against, (v) their potentially unlimited amount, and (vi) repressive character, **criminal in essence**, which is why they must be issued in criminal proceedings.

- Criteria for setting the amount of the so-called Measures are prescribed by secondary legislation, i.e. the Regulation on Measures, which is in direct breach of the *nulla poena sine lege* principle enshrined in both the Constitution and the ECHR.[5]

- The procedure for issuing the so-called Measures by the Commission is characterized, under the Competition Act, as an administrative procedure, which is why said procedure is deprived of a number of procedural safeguards that exist in criminal **and other penal proceedings**, including here a mandatory public hearing. In this manner, the Competition Act bypasses procedural guarantees set forth in the Constitution (a circumvention of the Constitution - *fraus constitutionem*).

- Issuing the so-called Measures does not exclude the liability of a legal entity for a criminal offence – abuse of a monopoly/dominance under Article 232 of the Criminal Code[6] (which **is still in force** in accordance with the Amendments to the Criminal Code Act[7]), based on the provisions of the Criminal Code in conjunction with the CLLE Act. This breaches the constitutional principle *ne bis in idem*.

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[4] Constitutional Court, Decision in case no. Už - 9037/2014, October 20, 2016. (case of *Public Enterprise Vojvodinasume*), Constitutional Court, Decision in case no. Už - 7211/2013, May 19, 2016 (case of *company Planet*), Constitutional Court, Decision in case no. Už-1522/2014, April 14, 2016 (case of *NIP Ltd.*).

[5] ECtHR, *Başkaya and Okçuoğlu* v. Turkey, Applications no. 23536/94 and 24408/94, from July 8, 1999, paras 42 and 43, available at: http://hudoc.echr.coe.int/eng?i=001-58276.

[6] Article 232 of the version of the Criminal Code applicable at the moment of submission of this Petition. In accordance with the provision of the independent article of the Act on Amendments to the Criminal Code ("Official Gazette of the Republic of Serbia", no. 94/2016), amendments to chapter twenty-two – White-collar criminal offences (including here Article 232) shall begin to apply only on March 1, 2018. However, even when the changes at hand come into force, Article 229 of the Criminal Code will penalize the conclusion of restrictive agreements, as one of the competition infringements punishable under the Competition Act.

[7] "Official Gazette of the Republic of Serbia", no. 94/2016.

12. **It is important to emphasize that the Commission itself, in its own documents, qualifies the so-called Measures as "*penalties*" that fall under the area of "*penal law*", although the Commission operates in an alleged *administrative* statutory framework.**[8]

13. Notwithstanding the aforementioned, in proceedings before the Commission, and subsequently in the review proceedings of the Commission's decision before the Administrative Court, only procedural guarantees typical for the administrative procedure are applied, including here the possibility of failing to hold an oral hearing. This infers from the instructive provision of Article 34 of the Competition Act. Said Article provides that the rules of the general administrative procedure are to be applied in the proceedings before the Commission, unless otherwise is prescribed by the Competition Act itself. In other words the provision in question *qualifies the nature of proceedings* before the Commission as *allegedly administrative*.

14. Considering that (in the opinion of both the petitioner and the Commission) the so-called Measures are punitive and penal in nature, it is questionable whether guarantees typical for administrative proceedings, as set forth in the Competition Act, are adequate for proceedings where the Commission investigates competition infringements, within the context of the Constitution and the ECHR. The petitioner argues that, the provisions of the Competition Act that classify the proceedings before the Commission **as allegedly *administrative***, and which, in accordance with the principles of administrative law, prescribe rules and procedural guarantees for those proceedings, are in direct breach of Articles 32, 33, 34, 36, 40 and 41 of the Constitution and Articles 6, 7, 8 and 13 of the ECHR. *This is because the so-called Measures issued by the Commission are **punitive**, i.e. sanctions typical for **criminal law**. In accordance with the above listed provisions of the Constitution and the ECHR such sanctions can only be rendered in proceedings which provide guarantees available under criminal law.* Due to the lack of (i) basic guarantees which would be proportional to the severity of the so-called Measures and (ii) adequate form of proceedings for issuing them, the Secondary Legislation and the Other General Regulations, adopted based on the above listed provisions of the Competition Act, are in clear breach of the Constitution and the ECHR.

15. Namely, *the alleged administrative nature of the proceedings before the Commission*, qualified as such by the Competition Act, provides for the possibility of applying procedural guarantees that are far removed from the actual nature of the proceedings. The nature and severity of sanctions that can be issued in those proceedings result in competition law cases to be **criminal in nature**, all in accordance with the criteria established by the ECtHR (***the Engel criteria***)[9] and the Constitutional Court.

16. In order to provide an unambiguous, detailed and complete elaboration on the unconstitutionality of the provisions of the Competition Act, the Secondary Legislation and the Other General Regulations and their inconsistency with the ECHR, the petitioner hereinafter presents the relevant provisions of the Constitution and the ECHR, as well as an overview of the case law of the Constitutional Court and the ECtHR.

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[8] The Annual Report of the Commission for the Protection of Competition for the year 2011, page 27. Available in Serbian at: http://www.kzk.gov.rs/kzk/wp-content/uploads/2012/04/Godisnji-izvestaj-o-radu-KZK-2011.pdf;

[9] ECtHR, *Engel and others v. The Netherlands*, App. no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, June 8, 1976, paras. 82-83, available at: http://hudoc.echr.coe.int/eng?i=001-57479. See also: ECtHR, *Campbell and Fell v. United Kingdom*, App. no. 7819/77; 7878/77, June 28, 1984, paras. 69-73 available at: http://hudoc.echr.coe.int/eng?i=001-57456.

The so-called Measures for protection of competition prescribed by the Competition Act are criminal sanctions and can be issued only in criminal proceedings by an independent court.

17. In accordance with the Constitution and the ECHR, as well as the case law of the ECtHR, the most severe sanctions in every legal system are reserved exclusively for criminal law, and can be issued only by an independent and impartial tribunal in criminal proceedings that meet the highest standards of protection of procedural rights of the parties – due process. In terms of the **criminal liability of legal entities under the Serbian legal system**, Article 14 of the CLLE Act introduces a general maximum of sanctions, and prescribes that the maximum fine that can be issued on a legal entity is RSD five hundred million [approx. EUR 4.2 million] (**the general maximum**).

18. On the other hand, the Competition Act introduces a special maximum when it comes to the so-called Measures - **they cannot exceed 10% of the overall annual turnover of undertakings achieved in Serbia in the previous fiscal year**, in case of both natural persons and legal entities. Although the definition of an undertaking under the Competition Act includes both legal entities and natural persons,[10] the majority of cases pertain only to legal entities. Since the Competition Act maximum is set relatively, as a percentage, the amount of the so-called Measure that can be issued by the Commission depends on the business success of a particular undertaking. In other words, in the event that, for example, the undertaking in question operates successfully, the sanction prescribed by the Competition Act ***in the alleged administrative procedure*** may, in an absolute amount, easily exceed the general ***criminal*** maximum prescribed by the CLLE Act [as the only national criminal statute for legal entities].

19. In other words, Article 14(3)(6) of the CLLE Act regulates that for criminal offences which carry a **prison sentence of over 10 years**, a legal entity will be fined with no less than RSD 20 million [approx. EUR 167 thousand] and no more than RSD 500 million [approx. EUR 4.2 million] (rendered in proceedings where all guarantees under criminal law are available to the accused entity).

20. In contrast, in proceedings before the Commission, any entity achieving more that RSD 5 billion turnover per annum [approx. EUR 42 million], can, under Article 68 of the Competition Act, be fined ***above*** the aforementioned general criminal maximum. Moreover, the fine is rendered by the Commission, an administrative body, **instead of an independent court** and **without any criminal procedural guarantees**. *It is important to mention that, according to publicly available financial statements, this group (of entities with over RSD 5 billion [approx. EUR 42 million] annual turnover) includes over 200 companies in the Republic of Serbia,* ***comprising more than half of the current Serbian economy/GDP****.*

21. Furthermore, the general purpose of prescribing and issuing criminal sanctions is to deter offences that violate or compromise values protected by criminal legislation[11], i.e. to achieve so-called special prevention and general prevention.

[10] Article 3(1) of the Competition Act defines undertakings as *all legal entities and natural persons which, directly or indirectly, on permanent temporary or one-time basis, participate in exchange of goods and services, regardless of their legal status, ownership structure, citizenship or state affiliation.*

[11] Article 4(2) of the Criminal Code.

22. The Criminal Code itself protects, inter alia, competition on the market as one of the basic social values, also regulated under Article 84 of the Constitution. This stems from the fact that **the abuse of a monopoly/dominance is prescribed as a criminal offence** (Article 232 of the Criminal Code, in connection to the CLLE Act), which penalizes certain acts of competition infringements. Since the so-called Measures that are issued by the Commission have the same object of protection and are aimed at suppressing behavior that restricts, distorts or prevents competition on the market, as well as achieving special and general prevention [deterrence] in relation to undertakings, it follows that these so-called Measures actually have the same purpose as criminal sanctions.

23. Bearing in mind the severity and purpose that they aim to achieve, the so-called Measures prescribed by the Competition Act, the Secondary Legislation and the Other General Regulations can only be and are **purely criminal in nature**, and can be issued **exclusively** in criminal proceedings, **by an independent court**, with the application and appreciation of all procedural guarantees prescribed for said proceedings – due process.

24. Despite the aforementioned, the Competition Act prescribes that, in the proceedings in which the so-called Measures are issued, rules of the administrative procedure shall apply. Therefore, these proceedings entail procedural guarantees that are **drastically lower** than those provided by the Criminal Procedure Act, the Constitution and the ECHR for every criminal and other penal proceedings, including even misdemeanor proceedings.

The procedure prescribed by the Competition Act certainly does not correspond to the nature and severity of sanctions that can be issued by the Commission, thereby breaching:

1) **Right to a fair trial**, as guaranteed by Article 32 of the Constitution and Article 6(1) of the ECHR;

2) **Unity of the legal system [system coherence]**, as guaranteed by Article 4(1) of the Constitution;

3) **Rights of the accused party**, as guaranteed by Article 33 of the Constitution and Article 6(3) of the ECHR;

4) **Legal certainty in penal law**, as guaranteed by Article 34 of the Constitution, and Article 6(2), and Article 7 of the ECHR;

5) **Right to an equal protection of rights and a legal remedy**, as guaranteed by Article 36 of the Constitution and Article 13 of the ECHR;

6) **Right to inviolability of home**, as guaranteed by Article 40 of the Constitution and Article 8 of the ECHR;

7) **Right to confidentiality of letters and other means of communication**, as guaranteed by Article 41 of the Constitution;

9) **International standards of human and minority rights, as well as the practice of international institutions in charge of their implementation**, as guaranteed by Article 18(3) of the Constitution.

1. Provisions of the Competition Act which regulate the proceedings before the Commission breach the right to a fair trial (the Engel criteria)

25. In accordance with Article 32(1) of the Constitution, *everyone shall have the right that an independent and impartial tribunal established by law, fairly and in reasonable time, publicly discusses and decides on their rights and obligations, grounds for suspicion which were grounds for initiating proceedings and accusations brought against them [criminal charges].* In the same manner, Article 6(1) of the ECHR provides that *in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*

26. The cited provisions of the Constitution and the ECHR guarantee the right to a decision in each individual matter by an independent and impartial authority.

27. The impartiality assessment is primarily based on an examination of facts which may give rise to doubts as to the impartiality of the acting authority.[12] The most obvious case of breach of the impartiality principle exists in cases where investigative and judicial functions are merged within one authority. This type of breach of the principle of impartiality, guaranteed by the Constitution and the ECHR, exists in the case at hand, since the Commission, acting as an investigating authority, initiates the proceedings, and then, acting in its "judicial capacity",[13] conducts said proceedings and renders a final decision (acting as ***judge, jury and executioner***).

28. The subject legislative solution also breaches Principle 7 of the Recommendation on Administrative Sanctions, which stipulates that the burden of proving the liability which is the basis for determining the sanction must lie with the administrative authority. It is difficult to imagine a situation in which an administrative authority, which conducts an investigation on its own, would have any difficulties in proving [to itself] a disputed fact. It is clear that in the case of proceedings before the Commission, the said principle cannot be implemented as long as the investigative and adjudicative functions are fused in this single body.

29. Contrary to the current under Serbian law, in a number of European and non-European countries, the investigative and judicial functions are clearly separated in the field of competition enforcement, and are, in that respect, entrusted to different authorities. Thus, among other countries, in Austria (which Serbian general administrative proceedings were modelled on), Sweden, Finland[14], Canada and the US, the investigative function is entrusted to administrative authorities, while decision-making, issuance of fines, and enforcing come under the exclusive jurisdiction of the courts.

30. Moreover, the US legal system, being the first to regulate antitrust/competition law, made provision for this separation of powers from the very outset.

31. It is particularly important to point out that the Austrian legal system, as one of the main models of Serbian general administrative law, sets a sharp boundary between powers of the

[12] ECtHR, *Castillo v. Spain*, App. No. 79/1997/863/1074, October 28, 1998, available at: http://hudoc.echr.coe.int/eng?i=001-58256.

[13] ECtHR, *De Cubber v. Belgium, App. No.* 9186/80, October 26, 1984, para. 29, available at: http://hudoc.echr.coe.int/eng?i=001-57465.

[14] International Comparative Legal Guides in the area of cartels and leniency, available at: https://iclg.com/.

administration and the judiciary with regard to competition law investigations. The **Federal Administration for the Protection of Competition (Ger. Bundeswettbewerbsbehörde) is only authorized**, where there is a suspicion of competition infringement, **to initiate proceedings before the court, while the Vienna High Court, in the first instance, and the Supreme Court, on appeal, are exclusively competent to decide on the liability of undertakings for competition infringements and to issue penalties on this basis**.

32. Even countries in which this separation of powers has not yet been implemented, as is the case with the Netherlands and Germany, have mechanisms for overcoming the negative effects of the fusion of investigative and adjudicative functions in one body. Namely, although the administrative authority is the one that conducts both the investigation and makes the decision on an undertaking's liability and the appropriate sanction, such a decision is subject to several stages of review within the body itself, with a mandatory oral hearing, as well as detailed, examination on merits by the courts, both in terms of legal and factual matters. For example, Dutch legal system introduces control via regular legal remedies in three instances - against the first instance decision of the administrative body for the protection of competition, an appeal can first be filed in administrative proceedings. Then, the decision adopted by the administrative body on appeal can be challenged before the Administrative Court, whose judgment, eventually, can be subject to appeal before the Court of Appeal for Trade and Industry of the Netherlands.[15]

33. When interpreting the above provisions of the Competition Act, it is necessary to take into account the case law of the Constitutional Court and the ECtHR, which is recognized and adopted by the [Serbian] Constitutional Court **as legally binding** (Article 18(3) of the Constitution).[16]

34. As with other provisions of the ECHR, the terms used in Article 6(1) require a different interpretation compared to interpretation given under domestic laws or by the national authorities, with the aim of preventing contracting states to circumvent the application of guarantees prescribed by the ECHR by qualifying what should be criminal proceedings as disciplinary, administrative or civil (*fraus legis*).[17]

35. The contrary would allow a legislature of each contracting state to move any legal area from a criminal to an administrative nature, through simple statutory requalification, thereby circumventing obligations under the ECHR (***fraus constitutionem***). In other words, if this were the case, **nothing could prevent legislatures from, by a simple majority, moving any offence, even the most serious ones, such as murder, into the sphere of administrative law** and sanction such offence without any criminal procedural safeguards whatsoever / due process – and without the court – *judge, jury and executioner*.

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[15] *Ibid.*

[16] Constitutional Court, Decision in case no. Už-9495/2013, October 22, 2015, available at: http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/12039/?NOLAYOUT=1; Constitutional Court, Decision in case no. Už - 4100/2011, July 10, 2013, available at: http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/9365/?NOLAYOUT=1; Constitutional Court, Decision in case no. Už -1866/2009, February 18, 2010, available at: http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/1521/?NOLAYOUT=1; Constitutional Court, Decision in case no. Už - 476/2008, July 14, 2010, available at: http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/2323/?NOLAYOUT=1.

[17] ECtHR, *Adolf v. Austria*, App. No. 8269/78, March 26, 1982, para. 30, available at: http://hudoc.echr.coe.int/eng?i=001-57417; ECtHR, *Öztürk v. Germany*, App. No. 8269/78, March 26, 1982, para. 49, available at: http://hudoc.echr.coe.int/eng?i=001-57553.

36. For this reason, according to **well established case law of the ECtHR, legal qualification of a particular offence or area of law as criminal, civil or administrative, is not left only to national legislatures**, but also to the Constitutional Court and the ECtHR. **There are clear criteria** pursuant to which these courts determine whether the legal qualification given by the legislature is in accordance with the Constitution and ECHR or not.

37. According to a long-held position of the ECtHR, the national qualification of the terms "*criminal charge*" and "*civil rights and obligations*" is not decisive, and the ECtHR will decide, on the basis of the criteria developed through its case law, whether a particular case is a *"criminal"* or a *"civil"* matter[18]. The subject distinction is of paramount importance since, in the former case, the **guarantees of due process** must be at a significantly higher level compared to such guarantees in the latter.

38. If it is established that a matter should be qualified as a "criminal charge", not only Article 6(1) of the ECHR, but also paragraphs 2 and 3 of the same Article, as well as Article 7 of the ECHR, shall apply.

39. In accordance with ECtHR's case law (which is binding in Serbia on the basis of Article 18(3) of the Constitution) and the case law of the Constitutional Court, when determining whether there is a criminal charge against a person, natural or legal, the fulfilment of the so-called **ENGEL CRITERIA shall be examined**:[19]

    a) classification in domestic law;

    b) nature of the offence;

    c) severity of the penalty that the person concerned risks incurring.

40. The first criterion, given that it depends entirely on the will of the contracting state, serves only as the starting point for assessing the matter in question. The second and third criteria are far more important than the first one, **and it must be noted that they are set alternatively**.[20] In other words, the fulfilment of the second ***or*** third criterion creates sufficient grounds for concluding that there is a criminal charge within the meaning of Article 6(1) of the ECHR, that is, the criminal nature of a particular law, regardless of its statutory qualification.

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[18] ECtHR, *Adolf v. Austria*, App. No. 8269/78, March 26, 1982, para. 30, available at: http://hudoc.echr.coe.int/eng?i=001-57417; ECtHR, *Öztürk v. Germany*, App. No. 8269/78, March 26, 1982, para. 49, available at: http://hudoc.echr.coe.int/eng?i=001-57553; ECtHR, *Jussila v. Finland*, App. No. 73053/01, November 23, 2006, para. 29, available at: http://hudoc.echr.coe.int/eng?i=001-78135.

[19] ECtHR, *Engel and others v. The Netherlands*, App. no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, June 8, 1976, paras. 82-83, available at: http://hudoc.echr.coe.int/eng?i=001-57479. ECtHR, *Milenkovic v. Serbia*, App. no. 50124/13, March 1, 2016, para. 33, available at: http://hudoc.echr.coe.int/eng?i=001-161001; Constitutional Court, Decision in case no. Už - 1285/2012, March 26, 2014, available at: http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/10166/?NOLAYOUT=1; Constitutional Court, Decision in case no. Už – 1207/2011, June 12, 2014, available at: http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/10507/?NOLAYOUT=1; Constitutional Court, Decision in case no. Už – 11106/2013, May 19, 2016, available at: http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/12880/?NOLAYOUT=1; ECtHR, *Lutz v. Germany*, App. no. 9912/82, August 25, 1987, para. 56, available at: http://hudoc.echr.coe.int/eng#{"itemid":["001-57531"]}.

[20] ECtHR, *Lutz v. Germany*, App. no. 9912/82, August 25, 1987, para. 55, available at: http://hudoc.echr.coe.int/eng?i=001-57531; ECtHR, *Milenkovic v. Serbia*, App. no. 50124/13, March 1, 2016, para. 33, available at: http://hudoc.echr.coe.int/eng?i=001-161001.

a) Classification in domestic law

41. The first criterion on the basis of which a particular offence can be qualified as *criminal* under Article 6 of the ECHR is the legal qualification of that offence in national law. It is necessary to determine whether the provisions of the statutes that define and prescribe sanctions for such offences fall within the scope of criminal law, under domestic law classification and structure of the legal system. Although this criterion serves only as a starting point[21], the qualification of the offence in domestic law is important, because if an offence is qualified as criminal under national law, said qualification will in itself be sufficient to characterize the proceedings regarding such an offence as criminal in nature, and to apply all the guarantees provided for in Article 6 of the ECHR.

42. Certain competition infringements, apart from being incriminated by the Competition Act, also constitute a criminal offence [in Serbia] - abuse of a monopoly/dominance, as penalized under Article 232 of the Criminal Code[22] . Said Article prescribes:

> *"A responsible person in a company or another business entity having the status of a legal entity, or an entrepreneur who, by abusing a monopoly or a dominant position on the market or by concluding a monopoly agreement, distorts the market or places that entity in a privileged position compared to other undertakings so as to realize material gain for that entity or for another entity or causes damage to other business entities, consumers or users of services, shall be punished by imprisonment for a term of* ***six months to five years and a fine****."*

43. In addition, in accordance with the provisions of the CLLE Act, not only the responsible person in the legal entity, but also the legal entity itself can be held liable for this criminal offence. It follows from the foregoing that **the act of abuse of a monopoly or dominance on the market** and the conclusion of a monopolistic (i.e. restrictive) agreement are **qualified in the Serbian legal system as criminal offences by fundamental [organic/systematic] statutes,** which the Competition Act is not (**according to the principle of the unity of the legal system**, see below).

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[21] ECtHR, Engel and others v. Netherlands, applications no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, June 8, 1976, paras 82-83, available at: http://hudoc.echr.coe.int/eng?i=001-57479.

[22] It is Article 232 of the version of the Criminal Code applicable at the time of the submission of this challenge. In accordance with the provision of the Act on Amendments to the Criminal Code ("Official Gazette of the Republic of Serbia" No. 94/2016). Namely, the latest amendments to the Criminal Code, which should enter into force on March 1, 2018, **prescribe a new, amended criminal offence, and provides for a "blanket norm" for the application of "statute regulating the protection of competition",** as follows:

Conclusion of a restrictive agreement

Article 229

(1) *Whoever, in a subject of economic activity, concludes a restrictive agreement, not exempted from prohibition* ***under the statute regulating protection of competition****, which determines prices, restricts production or sale or markets division, it shall be punished by imprisonment from six months to five years and a fine.*

(2) *The perpetrator of the offence from paragraph 1 of this article which fulfills the conditions for exemption from the obligation determined by the measure of protection of competition in the sense of the act on protection of competition, may be exempt from punishment.*

The abovementioned is again one of the competition infringements, as incriminated by Article 10 and other articles of the Competition Act.

44. On the other hand, the Competition Act does not explicitly qualify competition infringements as criminal offences. However, going by a correct, systemic interpretation of its provisions, one can only come to the conclusion that, in a series of material and procedural aspects, it regulates competition infringements as *de facto* criminal offences. In defining competition infringements, determining sanctions for such infringements, and regulating proceedings before the Commission, **the Competition Act adopts and applies a number of tools that are characteristic exclusively for criminal law with regard to the most sever criminal offences**.

45. In case of substantive criminal law, Article 2 of the Competition Act prescribes that its provisions apply to acts and actions committed on the territory of the Republic of Serbia, as well as to those committed outside its territory, which affect or may affect competition in Serbia. In the same way, and in accordance with Articles 7 and 9 of the Criminal Code, the Criminal Code shall, under appropriate conditions, apply to anyone who commits an offence against the Republic of Serbia or a national thereof, regardless of **(I)** the **nationality of the perpetrator and the place where the offence was committed.**

46. Article 9 of the Competition Act defines competition infringements as acts or actions of an undertaking that have or may have by their object or effect the significant prevention, restriction or distortion of competition. It is therefore clear that the Competition Act distinguishes between **(II) competition infringements by object and by effect**, as is the [traditional] case with the Criminal Code in terms of dividing criminal offences into ones that must include a consequence of an act and others where this is not the case.

47. Additionally, in terms of criminal procedural law, Article 34 of the Competition Act prescribes **that rules of general administrative procedure shall apply** in the proceedings before the Commission. However, proceedings before the Commission are, at the same time, governed by the Competition Act in a manner that **unambiguously indicates their criminal nature**. It is obvious that **a whole series of enforcement tools** in competition proceedings, are essentially tools and concepts from the Criminal Procedure Act, which is applicable to criminal offences prescribed by the Criminal Code and other statutes.

48. Thus, Article 38(2) of the Competition Act provides that the Commission shall, prior to issuing a final decision on competition infringements, *notify the party* in writing of the crucial facts, evidence and other elements on which the decision will be based, and invite it to respond to such notification, within a specified deadline. **In an analogous manner, (III) the indictment] in criminal proceedings**, according to Article 332(1) of the Criminal Procedure Act, contains a description of the criminal offence in question, the facts of the case, as well as a motion to introduce evidence. In addition, in accordance with Article 335(1) of the Criminal Procedure Act, the indictment is delivered to the accused for reply, i.e. a statement in respect of the allegations. Thus, the meaning of the principle ***audiatur et altera pars*** is embedded in a manner analogous to that in criminal law.

49. Furthermore, Article 69 of the Competition Act introduces **(IV) a leniency policy**, under which a party to a restrictive agreement, who first notified the Commission of the existence of such an agreement or provided evidence on the basis of which the Commission issued a decision on the competition infringement arising from a restrictive agreement, would be exempt from the obligation to pay the fine associated with the so-called Measure. **It is indisputable that the policy in question corresponds to plea bargain** stipulated under Articles 320 through 326 of

the Criminal Procedure Act. The bargain in question can be concluded with the accused who confessed that he committed a criminal offence, provided that his testimony is of sufficient importance for the detection, adjudication or prevention of the criminal offence. On the basis of such a bargain, the accused may avoid sanction or full criminal liability.

50. In addition, Article 58 of the Competition Act, which regulates **(V) commitment decisions**, provides that the Commission may issue a decision to terminate an infringement investigation, by which it determines the remedy for the competition infringement at hand, if the party, based on the content of the decision on initiating the procedure, and/or the facts established in the proceedings, submit a proposal of obligations which it is willing to take voluntarily in order to eliminate possible infringements of competition. **This tool essentially corresponds to the plea bargain** regulated in Articles 313 through 319 of the Criminal Procedure Act, according to which the accused may, in exchange for the appropriate type, measure and range of sanctions, *inter alia*, accept the obligation to remedy the damage caused by the criminal offence, or the obligation to compensate the damage caused.

51. It is particularly important to point out the facts that are taken into account when calculating the amount of the so-called Measures. Namely, the final amount of the so-called Measure is determined on the basis of the Regulation on Measures, as secondary legislation, whose implementation is regulated in more detail in the Guidelines on Measures, which are in turn issued by the Commission itself. The Guidelines on Measures, *inter alia*, prescribe that, when calculating the amount of the so-called Measures, the **guilt of the undertaking concerned** shall be taken into account, that is, the amount of the so-called Measure is to be increased if the undertaking concerned committed the infringement with **intent**, while **negligence is regarded as a mitigating circumstance**. Furthermore, **repeated infringement/offenders [recidivism]** is provided as an aggravating circumstance, while in case of **homogenous recidivism** (repeating the same type of infringement), said circumstance is seen as a particularly aggravating circumstance. Therefore, when calculating the amount of a potential sanction, the Commission primarily takes into account the existence of guilt, intent, negligence and recidivism, **all traditional criminal law concepts**. In addition, **the Commission itself**, besides explicitly referring to criminal law concepts in the Guidelines on Measures, **even qualifies the Measures as sanctions that belong to penal law** and, for example, **in its 2011 Annual Report** (page 27) states:

> *"Based on these provisions and legal certainty **in penal law**, **according to which a penalty cannot be issued for an offence which has not been punishable at the time of sentencing**, there are no conditions to further conduct [...] proceedings [for deciding on issuing a measure of protection of competition for a competition infringement in form of a restrictive agreement]."*

52. Finally, it is important to emphasize that, in accordance with the Competition Act, an undertaking is liable for any act of competition infringement, regardless of the function and duties of the person in such undertaking who has undertaken the action in question. Furthermore, Article 6(1) of the CLLE Act prescribes that a legal entity is liable for a criminal offence committed by a responsible person [manager, company officer etc.] within the scope of their duties for the benefit of the legal entity. Therefore, the aforementioned legal solutions provide further proof of the identical approach of both statutes governing criminal law and competition law, and clearly demonstrate the criminal nature of competition law and its relevant procedures.

53. It is thus indisputable that the entire set of tools, notions and concepts in the Competition Act, the Secondary Legislation and Other General Regulations, which apply in proceedings before the Commission, in spite of the fact that the procedure itself is defined as allegedly *administrative*, are in essence derived from criminal law.

54. Moreover, **the ECtHR** takes the view that certain infringements, in the sense of the ECHR, are of **a criminal nature, regardless of the fact that domestic law does not apply criminal law and criminal procedure to them**. In its judgment in case *Welsch v. The United Kingdom* (17440/90, 9 February 1995)[23], said court took a stance that the **criminal nature of the sanction is to be assessed on the basis of its characteristics**, that is, its (i) nature, (ii) purpose, (iii) issuance and enforcement procedure, and (iv) severity.

55. In this regard, Article 12 of the Criminal Procedure Act prescribes that a criminal sanction can be issued only by a competent court in criminal proceedings, and it is undisputed that the sanction consisting of the obligation to pay a fine **up to 10% of the total annual turnover of the undertaking generated on the territory of the Republic of Serbia**, by its severity, constitutes a sanction of a criminal nature, as elaborated above. Namely, one should not lose sight of the fact that, for undertakings operating successfully, the above amount can easily exceed RSD 500 million [approx. EUR 4.2 million], that is, the general maximum of the fine that can be issued against a legal entity as a sanction for a criminal offence, in accordance with Article 14(2) of the CLLE Act.

56. It follows from the foregoing that the procedure in which the alleged Measures are issued is, by its very nature, a procedure for deciding on criminal charge within the meaning of Article 6 of the ECHR. Consequently, in such a procedure, all procedural guarantees of Article 6 of the ECHR must be applied, that is, both guarantees stipulated under paragraph 1 and those stipulated under paragraphs 2 and 3 of this article.

b) Nature of the offence

57. In terms of Article 6 of the ECHR, the second Engel criterion for the assessment of an offence, and consequently a procedure as criminal, is the nature of the offence[24]. Although, already the first criterion in the Serbian legal system is fulfilled pursuant to definitions under the Criminal Code and the CLLE Act, this second criterion is considered more important than the classification in domestic law. The nature of the offence, on the basis of which a specific procedure is being conducted, shall be determined on the basis of the following criteria[25]:

[23] ECtHR *Welsch v. United Kingdom*, application no. 17440/90, February 9, 1995., para. 28, available at: http://hudoc.echr.coe.int/eng?i=001-57927.

[24] ECtHR, *Jussila v. Finland*, application no. 73053/01, 23 November 2006, available on: http://hudoc.echr.coe.int/eng?i=001-78135; ECtHR, *Milenković v. Serbia*, application no. 50124/13, 1 March 2016, para 35, available on: http://hudoc.echr.coe.int/eng?i=001-161001;

[25] ECtHR Guide on Article 6 of the ECHR, para 4.

1. **Whether the legal rule in question is directed solely at a specific group or is of a generally binding character?**[26]

2. **Whether the proceedings are instituted by a public body with statutory powers of enforcement?** [27]

3. **Whether the legal rule has a punitive or deterrent purpose?** [28]

4. **Whether issuing of any penalty is dependent upon a finding of guilt?** [29]

5. **How are comparable procedures classified in other Council of Europe member states?**[30]

58. When it comes to the nature of proceedings before the Commission, the petitioner emphasizes that answers to said questions clearly accentuate its criminal nature, as follows:

59. **First**, competition infringements are classed as **unlawful behavior** by the relevant provisions of the **Competition Act** as well as the **Criminal Code**, i.e. by provisions that are generally binding on **all undertakings**, legal entities as well as natural persons in these legal entities, given that they are prescribed by statutes as general legal acts.

60. **Second**, proceedings for determining competition infringements are initiated by the Commission as a **public body with legal authority to issue the so-called Measures**. Also, the final decision of the Commission by which the so-called Measures are issued, is immediately enforceable, and even filing an appeal against a disputed decision does not suspend enforcement of the decision, but said suspension is possible only where special conditions prescribed in the Competition Act and the Administrative Disputes Act are met.

61. **Third**, since the amount of the so-called Measures is directly proportional to the business success of the undertaking concerned, i.e. the amount of its annual turnover, which is why **the Measures can significantly exceed the general criminal maximum prescribed by the CLLE Act, such Measures inevitably have a criminal nature** because they are designed to seize profit, and not compensate damages caused by unlawful behavior.

62. The aforementioned is confirmed by the fact that the so-called Measure is paid in favor of the Budget of the Republic of Serbia and not to injured parties, which can claim for damages in civil proceedings irrespective of the amount of the so-called Measures [private enforcement].

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[26]ECtHR, *Bendenoun v. France*, application no. 12547/86, 24 February 1994, para 47, available on: http://hudoc.echr.coe.int/eng?i=001-57990; ECtHR, *Öztürk v. Germany*, application no. 8544/79, 21 February 1984, available on: http://hudoc.echr.coe.int/eng?i=001-57553.

[27]ECtHR *Benham v. the United Kingdom*, application no. 19380/92, 10 June 1995, para 56, available on: http://hudoc.echr.coe.int/eng?i=001-57990.

[28]ECtHR, *Öztürk v. Germany*, application no. 8544/79, February 21, 1984, para 53, available at: http://hudoc.echr.coe.int/eng?i=001-57553; ECtHR, *Bendenoun v. France*, application no. 12547/86, February 24, 1994, para 47, available at: http://hudoc.echr.coe.int/eng?i=001-57990.

[29]ECtHR, *Benham v. United Kingdom*, application no. 19380/92, June 10, 1995, para 56, available at: http://hudoc.echr.coe.int/eng?i=001-57990.

[30]ECtHR, *Öztürk v. Germany*, application no. 8544/79, February 21, 1984, para 53, available at: http://hudoc.echr.coe.int/eng?i=001-57553.

Moreover, having in mind that the so-called Measures are aimed at seizing the estimated profit that can be generated from the competition infringement, clearly, said measures have a deterrent purpose, i.e. deterring the undertaking concerned from committing further competition infringements (thus, the undertaking concerned is punished, and no damages are paid to the injured party). The aforementioned particularly stems from the fact that the Guidelines on Measures provide *recidivism* as an aggravating circumstance which leads to an increase of the so-called Measures for each subsequent injury. It follows that **the nature of the so-called Measures is in fact punitive and with the aim to create deterrence.**

63. **Fourth**, the Commission's own Guidelines on Measures prescribe that when calculating the amount of the so-called Measures, the undertaking's guilt is to be taken into consideration, i.e. the amount of the Measure is increased if the intent of the undertaking concerned is established, while negligence is taken into account as a mitigating circumstance. Therefore, **the final amount of the so-called Measure(s) certainly depends on the existence of guilt, which unambiguously indicates its punitive character.**

64. **Fifth**, with regard to the classification of relevant procedures in the Member States of the Council of Europe, it is necessary to point out the most significant cases. One of the most important cases before the ECtHR is the case ***Menarini v. Italy*** [31] (hereinafter: ***Menarini***) **in which it was determined that the penalties issued by the competent competition authority had a criminal nature, although they were not qualified as such by the national legislature itself.**

65. Namely, in *Menarini*, the ECtHR applied the aforementioned three criteria in order to determine whether the nature of the measures was criminal in terms of the ECHR. First, the ECtHR established that the domestic-law criterion for classifying the offence as criminal was not fulfilled, and went on to examine fulfilment of the second criterion. Within the second criterion, the nature of the offence, the ECtHR concluded that the measures had a punitive and deterrent nature, since they were issued by a public body, which operated in the public interest and that, as in criminal law, they had a deterrent purpose and do not constitute compensation. The Court did not examine the third criterion, severity of the penalty, considering that fulfilment of the previous criterion was sufficient to assess the measures as criminal in nature. Thus, the fulfilment of even one of the criteria is sufficient to characterize competition proceedings as criminal in terms of the ECHR.

66. Additionally, in several other cases, the ECtHR also held that the nature of the administrative sanction issued by the competent administrative authority is criminal in nature. In the ***Bendenoun v. France*** case[32], the ECtHR examined the nature of tax increases under the General Tax Code of France, emphasizing that, although formally prescribed as a tax sanction, it had a criminal nature since it was introduced under a general binding rule prescribed by a statute, the purpose of which was general prevention instead of compensation.

67. The aforementioned assessment procedure, implemented in practice of the ECtHR and the Constitutional Court, resulted in incapacitating contracting states to, when defending classifications made under domestic laws, **circumvent guarantees provided under Article 6**

[31] ECtHR, *A. Menarini Diagnostics S.R.L v. Italy*, application no. 43509/08, September 27, 2011, available at: http://hudoc.echr.coe.int/eng?i=001-106438.

[32] ECtHR, *Bendenoun v. France*, application no. 12547/86, February 24, 1994., available at: http://hudoc.echr.coe.int/eng?i=001-57863.

of the ECHR in proceedings which, although qualified as administrative, are by their very nature criminal.

68. Finally, it is important to note that, in terms of the fifth criterion and comparative cases, unlike its Member States, the European Union itself, as a supranational organization, is not yet a member of the Council of Europe, although it has had an obligation to accede to the ECHR since 2009[33]. Thus, its system of competition enforcement could not be considered legally relevant for the assessment at hand. Namely, unlike the Republic of Serbia (Austria, Finland, Sweden, etc.), the European Union and its institutions are still not subject to the control of the ECtHR and have no obligation to abide by its case law. Therefore, EU law cannot be considered legally harmonized and compatible with the ECHR.

c) Severity of the potential sanction (penalty)

69. The severity of the **so-called Measures** for competition infringements, as prescribed by the Competition Act, should never be disregarded. Once again, we would like to emphasize that the so-called Measure to pay a fine of up to 10% of the total annual turnover of the undertaking generated on the territory of the Republic of Serbia, by its gravity constitutes **a sanction which is criminal in nature** (a detailed explanation is provided above) **and the highest monetary sanction in the entire legal system of the Republic of Serbia.**

2. Provisions of the Competition Act violate the unity of the legal system established by Article 4(1) of the Constitution [system coherency]

70. The unity of the legal system [system coherence] is one of the examples of the Constitutional Court's own doctrine and case law. By interpreting the above-mentioned principle, the Constitutional Court held that:

> *"regardless of the fact that the legal system does not recognize the category of the so-called organic (fundamental, basic) laws and that the Constitutional Court according to Article 167 of the Constitution and its practice, is not competent to assess the mutual compliance of laws, the basic principles and concept must be provided by specific laws, unless a fundamental statute prescribes alternatives to regulating the same matters";*[34]
>
> *"the consolidation of all legal regulations within the legal system of the Republic of Serbia* ***excludes the possibility that the law regulating one legal area may change or***

[33] *In line with the Lisbon Treaty which came into force in 2009, the European Union is obliged to sign the ECHR, i.e. to become the 48th Contracting Party and member of the Council of Europe. The process of joining the European Union lasts for eight years, and as a final outcome, the European Union and its bodies should be legally bound to respect the ECHR and accept the jurisdiction of the ECtHR, which is still not the case at present. You can learn more about the negotiations at: http://www.echr.coe.int/Pages/home.aspx?p=basictexts/accessionEU&c=*

Moreover, the Court of Justice of the European Union took the view that the draft agreement on accession of the European Union to the ECHR is not compatible with EU law, in Opinion no. 2/13 of 18 December 2014, after which all further EU accession activities are significantly slowed down to the Council of Europe. More at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d588e12da4a0fe4652be7f85e0a832cfb0.e34KaxiLc3eQc40LaxqMbN4PaN4Se0?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=59091

[34] Constitutional Court, judgement no. I Uz 231/2009, July 22, 2010, available at: http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/6917/?NOLAYOUT=1.

supplement certain legal solutions contained *in the law regulating* ***another legal area****";*[35]

"in order for a particular law to prescribe specific rules and legal exceptions in relation to fundamental statutes in a particular area (...), ***from the Constitutional point of view*** *and legal order of the Republic of Serbia* ***the legislature****, in the procedure of prescribing these specific rules and legal exceptions* ***must assess*** *the* ***fulfilment of certain preconditions****".*[36]

71. The Constitution itself does not recognize the hierarchical connection between statutes, regardless of the fact that certain statutes are passed by an absolute, and others by simple majority. However, the Constitutional Court developed the doctrine of the supremacy of a fundamental legal act derived from the principle of the unity of the legal system [system coherency], which is explicitly contained in the provision of Article 4(1) of the Constitution: "The legal order is unique [coherent]."

72. The principle of supremacy of fundamental statutes is established by the decision of the Constitutional Court no. I Uz 231/2009 of July 22, 2010 that annulled the penal provisions of the Public Information Act. In the rationale of the decision, the Constitutional Court emphasized that "*although the legal system of the Republic of Serbia does not differentiate between so-called fundamental, 'basic' and other statutes which have stronger legal power than other 'ordinary' statutes, which results in the Constitutional Court not being competent to assess the compliance of one statute with the another, according to the provisions of Article 167 of the Constitution, the constitutional principle of the unity of the legal system requires that the* ***basic principles and legal concepts envisaged by statutes that systematically regulate one area of social relations shall be reflected in special statutes****, unless the fundamental statute explicitly prescribes an alternative to regulating these matters.*"

73. The circumstances of the specific legal issue are such that the doctrinal interpretation of the unity of legal system is further supported by the Constitutional Court and the importance of the "direct legal link" between the criminal law and the "exercise of human rights and fundamental freedoms", as well as the argument that different treatment can "seriously jeopardize equality before the Constitution and law" and "lead to discrimination", which in fact justifies the introduction of the principle related to the principle of the unity of the legal system. In the aforementioned decision, the Constitutional Court noted that "*as the specific statutes could not prescribe a sentence of imprisonment below the general minimum, or above the general maximum specified by the Criminal Code for offences not prescribed under the Criminal Code,* ***as well, penalties or any other sanctions that are not prescribed under statutes that systematically regulate proceedings and principles related to these types of offences could not be prescribed for offences.***"

74. Also, under the aforementioned decision, the Constitutional Court emphasized that "*by regulating the newspaper bans, the legislature breached the principle of the unity of the legal system and the principle of equality of all before the law, because it prescribes one type of sanction,*

[35] Constitutional Court, judgement no. I Uz 17/2011, May 23, 2013, available at: http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/8982/?NOLAYOUT=1.

[36] Constitutional Court, judgement no. I Uz 27/2011, October 3, 2013, available at: http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/9419/?NOLAYOUT=1.

which is not recognized under the Commercial Offences Act, being one of the statutes that generally regulates the area of white-collar offences, despite the fact that Article 4 of said statute explicitly stipulates that its provisions on liability and sanctions for commercial offences apply to all commercial offences, regardless of the statutes under which they were prescribed."

75. It is indisputable that **the CLLE Act, the Criminal Procedure Act and the Criminal Code** are the fundamental statutes regulating criminal liability in Serbian law. Although appropriate sanctions are prescribed by the provisions of the CLLE Act and the Criminal Code, as fundamental statutes, the Competition Act introduces a sanction, criminal in nature, of 10% of the annual turnover of an undertaking that commits a competition infringement. Although the Criminal Code allows for the regulation of criminal offences by other statutes, the existence thereof must be determined in a criminal rather than quasi-administrative proceedings. Furthermore, criminal sanctions must be issued within the limits of the general legal minimum and maximum, in line with the types of sanctions provided by fundamental statutes. Provisions of the Competition Act introduced a sanction that is not prescribed by the fundamental statute, since the CLLE Act and the Criminal Code, in any part, **do not prescribe the sanction which may exceed the amount of RSD 500 million [approx. EUR 4.2 million].** Furthermore, a sanction aimed at seizing the estimated profit is not prescribed by the fundamental statutes. Bearing in mind the aforementioned, it is undisputed that the unity of the legal system has been violated. In addition, the provisions of the Competition Act deviate from the rules and standards prescribed under the Criminal Procedure Act as the fundamental statute that regulates criminal proceedings, thus, in relation to the Criminal Procedure Act the principle of the unity of the legal system has also been violated.

76. Finally, it is important to emphasize that the Criminal Code and the CLLE Act were enacted before the current Competition Act (2009), whereby, under the Criminal Code and the CLLE Act, the aforementioned competition infringements were classified as criminal, with all procedural guarantees and protection of human rights provided by these statutes. Also, it is important to keep in mind that the original competition act of 2005 provided that the Misdemeanor Court issued penalties, and not the Commission itself.[37] In other words, in all cases, under all three statutes before 2009, only the court could issue penalties as part of criminal law, in accordance with strict requirements for the protection of human rights and fundamental freedoms under the ECHR and the ECtHR case law (as it was outlined above) (**the achieved level of human rights protection**). On the contrary, the current Competition Act has abolished all this in 2009. However, the Constitution in Article 20(2) clearly states that "**a [once] achieved level of human and minority rights cannot be reduced**". As the current Competition Act did the exact opposite, contrary to fundamental criminal statutes, as well as its predecessor, said act is unambiguously in breach of the explicit provision of the Constitution, which exists precisely in order to prevent this and similar practices.

3. The Commission's powers, as an administrative authority, to issue the so-called Measures are in breach of Article 32 of the Constitution and Article 6(1) of the ECHR

77. In addition to all the foregoing, it should be noted that in the terms of Article 6 of the ECHR, not all offences are of the same severity. Thus, when determining whether the right to a fair trial

[37] "Official Gazette of the Republic of Serbia", no. 79/2005, "IV PENAL PROVISIONS", Articles 70 through 74.

has been breached, the ECtHR makes a distinction between the so-called hard-core and soft-core of criminal law.[38]

78. In the case of the **hard-core of criminal law**, the right to a fair trial shall be deemed to have been provided only if **the first instance court fulfils all criteria prescribed under Article 6 of the ECHR**.[39] Thus, a decision on hard core criminal offences by an administrative body in which the investigative and judicial function are merged, as is the case with the Commission, even with the possibility of a full judicial review of the decision, is considered to be a breach of the right to fair trial under Article 6 of the ECHR.

79. The difference between hard core and soft core criminal offences depends entirely on the fulfilment of Engel Criteria[40] in the specific case. Thus, if an offence is **qualified** in both domestic law and autonomous interpretation of Article 6 of the ECHR **as a criminal offence**, there is no doubt that the proceedings for such an offence **will be treated as hard core criminal**, and the most stringent procedural guarantees will apply (*criminal-head guarantees*). Furthermore, in addition to the Engel Criteria, the **ECtHR** introduced an additional criterion for assessing the existence of a hard core criminal case - the **degree of stigma** for the person (**natural persons and legal entities included, as it was explained above**) against which the criminal charge was brought[41]. Thus, if a situation where legal entity is determined guilty of a criminal offence would imply **a high degree of stigma for the convicted legal entity** in terms of the ECHR and the sanction issued is of a criminal and deterrent nature, **the subject matter is to be regarded as hard core criminal matter**.

80. As explained above, deciding on the existence of a competition infringement, and subsequently issuing of the so-called Measures, **by all criteria, constitute a criminal charge within the meaning of Article 6(1) of the ECHR**. Therefore, we would like to emphasize that **competition infringements are qualified as criminal offences by the Criminal Code and the CLLE Act,** that the nature of these infringements is obviously criminal, and **the possible sanction is significantly higher than the general maximum prescribed for criminal offences committed by legal entities in Serbian legal system**. Moreover, since the issuing of the so-called Measures on undertakings is always accompanied by **extensive media coverage**, a significant degree of stigma for the convicted legal entity is always present, as it can be clearly seen from the public announcements and other communications of the Commission, where the following is stated:

> *"[...] if you hold to your personal reputation and your company's rating this breach could ruin everything you have invested in its incorporation. You risk losing the trust of all your customers"[42].*

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[38] ECtHR, *Jussila v. Finland*, application no. 73053/01, November 23, 2006, paras 41-43, available at: http://hudoc.echr.coe.int/eng?i=001-78135.

[39] ECtHR, *Öztürk v. Germany*, application no. 8544/79, February 21, 1984, para 56, available at: http://hudoc.echr.coe.int/eng?i=001-57553.

[40] ECtHR, *Engel and other v. Netherlands*, applications no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, June 8, 1976, available at: http://hudoc.echr.coe.int/eng?i=001-57479.

[41] ECtHR, *Jussila v. Finland*, application no. 73053/01, November 23, 2006, para 43, available at: http://hudoc.echr.coe.int/eng?i=001-78135.

[42] Please see the Commission's "educative" materials on the following „YouTube" channel: https://youtu.be/HuRRh0Iv4wA and more at the following address: https://www.youtube.com/channel/UC4r4DQ1UM8t339x9EaGCl_w.

Therefore, there are strong legal grounds under the Constitution and the ECHR for a court to be the only authority deciding on the guilt of the accused, and for **procedural rights and guarantees to be fully respected at the highest possible level**.

81. Bearing in mind the above-described features of the current Serbian competition law, and in particular:

1. competition infringements being qualified as criminal offences under the Criminal Code and the CLLE Act (**explicitly**), as well as under the Competition Act, Secondary Legislation and Other General Regulations of the Commission (**implicitly**),

2. general criminal nature of the competition infringements in terms of the ECHR, unequivocally confirmed by the ECtHR in its decisions, as it was in Menarini case, and

3. the prescribed amount of sanction-fine for competition infringements, which can easily exceed the general maximum provided under entire Serbian criminal law, and which carries a significant degree of stigma for infringing undertaking,

it follows that a decision on the existence of a competition infringement in Serbian legal system, **can only be a decision in a hard core criminal case**, and the most stringent procedural guarantees of Article 6 of the ECHR must be applied, with the obligatory **decision** on whether an undertaking committed a competition infringement **can only be made by an independent court, and not by the Commission, being an administrative body**.

82. Although the Administrative Disputes Act prescribes the possibility of deciding in a full jurisdiction [*where a court examines both procedural and substantive law issues, and is allowed to decide on the matter directly, rather than just annulling the administrative decision and returning the case to the administrative body to repeat proceedings*] against the Commission's decision, this option is extremely rarely used in practice. Moreover, the possibility of deciding on administrative matters in full jurisdiction is very limited by the statute itself. Namely, only where the court first finds that the disputed administrative act should be annulled, due to its illegality,[43] will it decide on the administrative matter by way of a decision on merits, if the nature of the issue allows it, and if the established facts provide a reliable basis for the judgment to be rendered. Therefore, only where the Commission's decision is unlawful and should be annulled may the court decide in full jurisdiction, by examining the facts and making a decision on merits, and finally replace the disputed decision with its judgment.

83. *A contrario*, if the Commission's decision is legal, but does not fulfill the 'utility' requirement (*opportunité*), the Administrative Disputes Act does not provide a basis for the court to annul such decision and make a decision on merits in full jurisdiction. Additionally, if the court finds that the *nature of the issue* is such that it cannot decide on it independently, it will not conduct a full jurisdiction review. Equally, if the *established facts do not provide a reliable basis* for an independent ruling, the court will not decide in a full jurisdiction. These legal solutions significantly reduce, and in practice almost completely exclude the possibility of the court's decision in a full jurisdiction in cases involving competition law matters. Finally, "in the predominant number of situations, the court is not obliged to settle the administrative dispute

[43] Zoran R. Tomić, *A Commentary on the Administrative Disputes Act with Case Law*, p. 627 (Official Gazette 2012).

in full jurisdiction: **then, it only has an option, i.e. a legal possibility that it does not have to exercise**"[44].

84. None of the abovementioned legal standards is regulated in more detail by the statute, but the interpretation thereof is entirely left to the court. On the other hand, the Constitution, the ECHR and the binding practice of the ECtHR require that **disputes in competition law matters must be decided in full jurisdiction**, where the court must examine the merits of the case, with factual and legal examination of the Commission's decision (all because of the extremely repressive nature and the severity of sanctions in competition proceedings).

85. The above implies **that the proceedings to determine the existence of a competition infringement, which is a criminal offence by nature, is *de facto* decided almost exclusively by the Commission, as an administrative authority**, and not by the court, in any instance.

86. Additionally, the Commission does not fulfil the requirement of impartiality within the meaning of Article 6(1) of the ECHR, since the Commission ***de facto and de lege*** **merges prosecutorial and judicial function (*judge, jury, and executioner*)**.

87. Therefore, not only does the Commission lack the quality of a "court" in the sense of Article 6(1) of the ECHR, but also, in practice, the court only exceptionally assesses the legality of the administrative decision, while the possibility of investigating the 'utility' criteria is completely excluded by statute. According to the case law of the ECtHR, this represents a breach of the right to a fair trial.[45]

88. In doing so, parties to the proceedings before the Commission are obviously denied the right to a fair trial prescribed under Article 6(1) of the ECHR and Article 32 of the Constitution.

4. Provisions of the Competition Act which regulate the procedure for judicial review of the Commission's decisions breach the right to an effective remedy

89. *De facto* absence of effective protection of rights and legal interests, despite it being prescribed by statute, is treated by the ECtHR as a lack of **effective remedy**, and consequently as a breach of Article 13 of the ECHR and Article 36 of the Constitution.

90. Namely, in order for a particular remedy to be considered effective, it is necessary that the use of the remedy exists not only in theory, but **is implemented in practice**.[46] In other words, it is not sufficient that a specific legal remedy is prescribed by a statute, rather it is necessary for it to be effectively used in practice in each specific case[47]. As the ECtHR has clearly emphasized in the case of *El-Masri v. the former Yugoslav Republic of Macedonia*, in order for a certain remedy to be effective in practice, **it is necessary that the court can act on the party's request to**

[44] *Ibid.*

[45] ECtHR, *Société Stenuit v. France*, application no. 11598/85, May 30, 1991, paras 72 - 73, available at: http://hudoc.echr.coe.int/eng?i=001-46290.

[46] ECtHR, *McFarlane v. Ireland*, application no. 31333/06, September 10, 2010, para 114, available at: http://hudoc.echr.coe.int/eng?i=001-100413; ECtHR, *Riccardi Pizzati v. Italy*, application no. 62361/00, March 29, 2006, para 38, available at: http://hudoc.echr.coe.int/eng?i=001-72930.

[47] ECtHR, *El-Masri v. Former Yugoslav Republic of Macedonia*, application no. 39630/09, December 13, 2012, para 255, available at: http://hudoc.echr.coe.int/eng?i=001-115621.

examine the case on merits, and that the use of such remedy is not unjustifiably hindered by the acts or omissions of the authorities of the respondent State.[48] In addition, when assessing the effectiveness of a particular remedy, the formal prerequisites for the use of the remedy should be taken into account along with the political and legal context in which the remedy is used.[49]

91. Due to ambiguous statutory criteria and wide Court's discretion to decide whether to resolve the subject matter in a full jurisdiction, the request for review of the Commission's decision, as a rule, **results only in the simple control of the procedural legality** of the mentioned decision and the proceedings leading to it.

92. In this way, the **right to an effective remedy** of the undertaking against which the Commission conducts proceedings, guaranteed under Article 13 of the ECHR and Article 36 of the Constitution, **is obviously breached.**

5. Provisions of the Competition Act which regulate proceedings before the Commission are in breach of rights of the accused party

93. Having in mind the fulfilment of the abovementioned criteria established by ECtHR, it is evident that in Serbian legal system, which include the ECHR, **the proceedings to examine whether a competition infringement occurred are criminal in nature.** Therefore, it is necessary to secure full implementation of all rights of the accused, as regulated under Article 33 of the Constitution and Article 6(2) and (3) of the ECHR.

94. Despite the aforementioned, proceedings before the Commission grant almost any standard procedural guarantees which are indispensable in proceedings of criminal and punitive nature, putting them in clear breach of the Constitution and ECHR.

a) Right of defense

95. Article 33(2) and (3) of the Constitution clearly regulate that anyone accused of a criminal act has the right to defend themselves and the right to appoint counsel of their choice, to communicate freely with such counsel and to be granted sufficient time and conditions for preparing their defense. Moreover, if the accused is unable to afford a counsel, they have a right to free counsel, provided the interests of justice require so.

96. Given that the Competition Act contains no provisions regulating these matters, the applicable rules would be Article 49(3) of the Administrative Act, which regulates that a party's representative can be every person with full legal capacity. This solution is not fit for purpose, especially considering that during criminal proceedings, under Article 73(1) of the Criminal Procedure Code, a party can only be represented by an attorney at law, even in matters where the sanction that can be rendered is significantly lower than that regulated under Article 68(1) of the Competition Act. Moreover, the absence of the right to free counsel constitutes a direct breach of the rights of the accused guaranteed by the Constitution and the ECHR.

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[48] *Ibid.*

[49] ECtHR, *Djordjevic v. Croatia*, application no. 41526/10, July 24, 2012, para 101, available at: http://hudoc.echr.coe.int/eng?i=001-112322.

97. Moreover, under the CLLE Act, for criminal offences that carry a prison sentence of up to 8 years for natural persons, a fine of 5 to 10 million RSD [approx. EUR 42 to 84 thousand] can be issued on the legal entity. Therefore, in each matter where a fine of over **five million RSD** [approx. EUR 42 thousand] **can potentially be issued**, mandatory defense is a statutory right of the accused, in accordance with Article 74 of the Criminal Procedure Act. Failure to guarantee said right to the accused is a gross breach of their rights. Finally, it is necessary to point out that this inconsistency in statutory solutions results in a breach of the constitutional principle of the unity of the legal system.

b) Rules of evidence

98. Article 33(5) of the Constitution stipulates that anyone standing trial for a criminal offence has the right to, either on their own or through counsel, present evidence in their favor, question prosecution witnesses and request that defense witnesses are questioned under the same conditions as prosecution witnesses in the presence of the accused or their counsel.

99. To ensure these guarantees are observed an oral hearing must be held so that the witnesses and expert witnesses can be examined and evidence presented.

100. **However, the Competition Act does not contain provisions regulating the evidentiary procedure, rather it adduces to rules of the Administrative Act.** Furthermore, Article 109(2) of the Administrative Act regulates that an oral hearing may be scheduled, *ex officio* or on a party's proposal, only if that would be beneficial for examining the matter in question. **Therefore, direct decision-making** [*i.e. decision-making based on evidence presented to a court directly, rather than through examination of e.g. witness testimony reports*] **is not a rule but an exception.**

101. The abovementioned solution in the Competition Act is in complete breach of the right of the accused to question prosecution witnesses and be present at the questioning of the defense witnesses, since a Commission official can decide that an oral hearing would not be beneficial for examining the administrative matter. The ECtHR's position on this matter is completely opposite. The case law of this court clearly stipulates that if any party to the proceedings proposes questioning of a witness or expert witness, the opposing party must have the opportunity to question the witnesses and experts, orally, at a public hearing before the court[50]. In the case concerning administrative misdemeanor (as defined in the law of Lithuania), the ECtHR found that there was an obligation to hold a public hearing for questioning of the witnesses and expert witnesses. Therefore, it is clear that in the proceedings before the Commission, which are clearly of a strictly criminal nature, the public hearing should constitute a legal obligation, which is not the case with the Competition Act.

102. The rule is also confirmed by principle 6 of the Recommendation on Administrative Sanctions, which clearly stipulates that a sanction can be issued only if the accused party is heard before the decision is made. Likewise, it is not sufficient just to hear the party, but it is necessary to provide it with all the necessary information about the charges against it, the nature of the evidence, as well as enough time to **prepare the defense for an oral hearing**. In contrast, the Competition Act obliges the Commission only to send a statement of objections to the accused

[50]ECtHR, *Balsytė-Lideikienė v. Lithuania*, application no. 72596/01, November 4, 2008, para. 66, available at: http://bit.ly/2x3ghNI.

party for response, but does not provide a guarantee to the party that it will have sufficient time to prepare the response, or to present its defense at an oral hearing.

103. Moreover, the principle B.4 of the Recommendation on Judicial Review of the Administration envisages that **an oral hearing is mandatory in an administrative dispute**. The subject principle particularly implies the following mandatory features of a fair oral hearing: (i) principle of equality of arms, (ii) adversarial procedure (i.e. the right of each party to get to know and reply to the evidence and allegations made by the opposing party), (iii) public hearing (unless specific legal criteria are met). It is obvious that the Competition Act does not provide for any rules of this nature when it comes to judicial review of the Commission's decisions, and thus does not meet the standards required for administrative proceedings, let alone for criminal ones.

104. The Instructions on Communicating with Parties, which were adopted by the Commission itself based on the Competition Act, introduce an extremely limited possibility of holding meetings and consultations. While non-proprietors have a limited opportunity to organize a meeting with the Commission officials, parties to the proceedings are explicitly refused the right to a meeting. The party to the proceedings can only schedule the so-called "consultations" and not with a member of the Council, as the decision-making body, but exclusively with the Commission official who is conducting the investigation. The consultations imply an explicitly limited communication with the Commission official.

> "*[The Commission official] shall, when communicating with the party to the proceedings, take into account the nature and content of the data and information it reveals, with the aim of protecting the integrity of the data and the proceedings, in sense that it may refuse to communicate certain information or data.*"

105. Thus, in its Instructions on Communicating with Parties, the Commission, again without any legal authority, limits already scarce guarantees of oral hearings provided by the Competition Act and the Administrative Act, and completely contrary to the guarantees provided by the Constitution, the ECHR and the principle 6 of the Recommendation on Administrative Sanctions, it breaches the party's right to the oral hearing and direct decision-making on the possible sanction, and in doing so, it also significantly limits the party's right to become acquainted with the evidence against it.

106. **It stems from the abovementioned, oral hearings before the Commission are an exception**, and are rarely conducted (at the sole discretion of the Commission), **which results in a direct breach of rights of the accused guaranteed by the Constitution, the ECHR and acts of the bodies of the Council of Europe.**

107. Moreover, with respect to the rights of the accused, except in a few circumstances, **the Competition Act does not incorporate the *in dubio pro reo* principle**, established under Article 16(5) of the Criminal Procedure Act. According to this principle, the court will decide in favor of the accused when in doubt regarding facts on which any of the following depends: (i) conditions for continuing the criminal proceedings, (ii) existence of any element of the statutory definition of a criminal offence or (iii) implementation of any other provision of criminal law (in other words, the burden of proof never lies on the accused). Contrary to the above said, this fundamental procedural guarantee which, under the existing legislative solution of the Competition Act, is not available to anyone accused of committing a competition infringement

punishable by **the highest fine known to the legal system of the Republic of Serbia**, and which is without doubt **punitive in nature**, i.e. serves to punish the undertaking concerned for the illegal conduct.

108. Furthermore, neither the Competition Act nor the Administrative Act regulate the **standard of proof that must be satisfied in order for the Commission's decision to be made**, as is guaranteed under the Article 16(3) of the Criminal Procedure Act (**presumption of innocence**). When assessing the significance of this guarantee and the unconstitutionality of the lack thereof in proceedings before the Commission, one needs to reemphasize the severity of the potential effects of a decision rendered in such proceedings, in particular the so-called Measures.

109. With regard thereto, under the Competition Act, **the economic analysis, i.e. establishing economic facts of relevance for deciding on the case, is conducted by the Commission itself.** Conversely, under Article 113 of the Criminal Procedure Act, when establishing facts that are not legal in nature, meaning that expert knowledge is necessary for their establishment, an expert witness is called. Under Article 119(3) of the Criminal Procedure Act, expert witnesses are obliged to conduct their analysis and present their conclusions in good faith and without any bias. This is precisely the reason why, under Article 116 of the Criminal Procedure Act, expert witnesses may be exempt from the duty to take the stand or recused from the proceedings where they have a **connection or relationship with the parties to the proceedings**. Therefore, one must point to the flagrant breach of guarantees necessary for this type of proceedings, consisting of the fact that the regulatory solution - which provides that an analysis of unprecedented importance for deciding on the case, is conducted by the very body authorized to decide in the matter, and is at the same time *de facto* the opposing party - is evidently in breach of the guarantees necessary for proceedings of this nature. Therefore, the inconsistency of these rules with the general principles of criminal proceedings results in violation of the unity of the legal system, given that the provisions of the Competition Act, significantly deviate from the provisions of the Criminal Procedure Act, which is the fundamental statute for the subject matter.

110. Moreover, Article 53 of the **Competition Act** regulates **so-called dawn raids**, a sudden and unannounced inspection of premises, data, documents and other items located at the premises. A dawn raid is conducted in cases where there are reasonable grounds to suspect that there is a risk of evidence in possession of the party or a third party being tampered with or concealed. The party or third person in question is notified of the dawn raid on the spot. Key in all of this is that **a so-called dawn raid <u>can be conducted without any court warrant whatsoever</u>**, neither prior to nor following the dawn raid, said being a power the Commission avails of extensively (the only judicial review is theoretically possible only after the proceedings before the Commission are completed, in a possible administrative dispute).

111. The Criminal Procedure Act provides rules on searches as a form of evidence, the aforementioned procedure under the Competition Act is by its very nature a **search, primarily search of a home or other premises stipulated under Article 158 of the Criminal Procedure Act**.

112. In accordance with the **binding case law of the ECtHR**, the right to respect of one's home, guaranteed under Article 8 of the ECHR, **includes the inviolability of business premises**.[51] Therefore, all Article 8 guarantees are applicable to searches of business premises conducted by the Commission.

113. As rule, **a search** is conducted on foot of a warrant, under the guarantee provided for in Article 40(2) of **the Constitution** and Article 155 of **the Criminal Procedure Act**. Only **exceptionally**, in especially significant circumstances, i.e. instances enumerated in Article 158 of the Criminal Procedure Act, may a search can be conducted without a warrant. Therefore, a search without a warrant, under clear statutory rules, is an extraordinary situation, and by no means a rule, as is the case under the provisions of the Competition Act. At the same time, obvious existence of preparation or commencement of destroying evidence of a criminal offence or other items of significance for criminal proceedings does not constitute statutory cause for a search without a warrant. As in the previous instance, the provisions of the Competition Act are in breach of the fundamental statute for the subject matter and are therefore in violation of the unity of the legal system principle.

114. Moreover, Article 158(3) of the Criminal Procedure Act stipulates that, where a search has been conducted following entry to a home or other premises without a warrant or in the absence of witnesses, a search record must be prepared and must explicitly contain the grounds for entering and searching the premises. According to the ECtHR decision in *Camenzind v. Switzerland* (21353/93, 16 December 1997)[52], searches may be conducted without a warrant only in circumstances necessary in a democratic society and **proportionate to the legitimate aim pursued**.

115. **Contrary to the aforementioned, in proceedings before the Commission there are no such guarantees**. Contrary to the guarantees set forth under the ECHR, dawn raids under Article 53 of the Competition Act are almost exclusively conducted **without a warrant**, given that, under Article 54(3) of the Competition Act, a warrant is necessary only where the dawn raid is to be conducted at home or other premises having the same, similar or connected purpose, and the owner or other resident objects to the dawn raid. Moreover, there is no obligation to make a record for the search nor to have two witnesses present during the raid.

116. While under Article 156(7) of the Criminal Procedure Act the presence of witnesses is not mandatory only in extraordinary circumstances, Article 54(6) of the Competition Act requires the **presence of two witnesses only if the resident or their legal representative are not present during the dawn raid**.

117. Finally, unlike Article 160 of the Criminal Procedure Code, which provides for an obligation to **immediately** notify a judge after a search without a previous court order, nothing similar is provided for by the Competition Act. Therefore, the Competition Act is the only current statute in Serbian law in accordance with which it is possible to search premises without any obligation to notify the court, even immediately following such a search.

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[51] ECtHR, *Société Colas Est and others v. France*, Application No. 37971/97, 16 April 2002 available at: http://hudoc.echr.coe.int/eng?i=001-60431; ECtHR, *Delta Pekárny v. Czech Republic*, Application no. 97/11, 2 October 2014, available at: http://hudoc.echr.coe.int/eng?i=001-146675.

[52] ECtHR, *Case of Camenzind v. Switzerland*, Application no. 21353/93, 16 December 1997, paras 36-47, available at: http://hudoc.echr.coe.int/eng?i=001-58125.

118. **Therefore, it is clear that the procedural guarantees afforded to an accused party in proceedings before the Commission pale in comparison to those in domestic proceedings where a sanction of a criminal nature and severity can be issued, and especially those guaranteed under Article 8 of the ECHR.**

c) Right against self-incrimination

119. Article 33(7) of the Constitution stipulates that an accused or other person tried for a criminal offence is not obliged to provide statements to their detriment or the detriment of persons close to them, nor do they have an obligation to admit guilt.

120. However, Article 70 of the **Competition Act** stipulates that an company shall be subject to a **so-called procedural penalty ranging from EUR 500 to EUR 5.000** for each day of failure to comply with a Commission order to disclose, deliver, make available or allow access to requested information, refuse to allow access to its premises or otherwise hinder a search, or if the undertaking discloses inaccurate, incomplete or false information.

121. On the other hand, Article 149(1) of the **Criminal Procedure Act stipulates that the accused has no duty** to surrender any items which, under the Criminal Code and the CLLE Act, must be seized or which can serve as evidence in criminal proceedings.

122. Therefore, the aforementioned **provision of the Competition Act not only introduces an unconstitutional self-incrimination obligation for the accused**, but also introduces **significant penalties** for failure to comply. On the other hand, the relevant provision of the Criminal Procedure Act explicitly alleviates the accused from any duty to surrender any items that could be used as evidence in criminal proceedings, which undoubtedly reflects the legislature's intent to fully respect the constitutional rights of the accused.

123. Consequently, **the obligation to pay procedural penalties for failure to hand over requested information clearly serves to punish natural or legal persons that fail to comply with the Commission's orders, which is their constitutional right,** making said provision in clear breach of Article 33(7) of the Constitution.

6. Provisions of the Competition Act regulating proceedings before the Commission breach the constitutional principle of legal certainty in criminal law

124. The fact that **proceedings for establishing whether a competition infringement has occurred are by their nature *criminal proceedings***, and that the provisions of the Competition Act fail to provide any rights to the accused, results in breach of the principle of legal certainty in penal law.

a) Nullum crimen, nulla poena sine lege (principle of legality)

125. Under Article 7 of the ECHR, no one shall be held guilty of any criminal offence which did not constitute a criminal offence under statute at the time when it was committed, while Article 34(2) of the Constitution explicitly stipulates that criminal offences and criminal sanctions can be prescribed only by statute. This principle is confirmed by the Council of Europe through principle 1 of the Recommendation on Administrative Sanctions, which stipulates that sanctions

and circumstances relevant for determining and issuing sanctions can only be prescribed by statute.

126. The Competition Act only provides for (***a relative***) general maximum amount of the so-called Measures, while in accordance with Article 56(6) of the Competition Act, the **criteria and circumstances** to be taken into account in determining the amount of the so-called Measure in each case, as well as the manner and deadlines for payment, are established by the **Secondary Legislation** – the Regulation on Measures, the Leniency Regulation, and even in part by the Guidelines on Measures which were adopted by the Commission itself and which can be freely modified by the Commission in accordance with the Competition Act.

127. It is important to note that the boundaries of liability for criminal offences, which include abuse of monopoly/dominance, have been regulated under the Criminal Code and the CLLE Act, being the fundamental statutes for the subject matter.

128. Therefore, it is unclear how the so-called Measures, which can be higher than the absolute maximum under the CLLE Act **can be rendered based on the Regulation on Measures and the Leniency Regulation,** *as the Secondary Legislation*, **and even less so on the Guidelines on Measures and Guidelines on Leniency, as Other General Regulations rendered by the Commission itself**.

129. In addition, the Competition Act only states in general terms the types of competition infringements, whereas the actions of competition infringements are more closely regulated by a series of Secondary Legislation, such as the BER for Horizontal Agreements on Specialization, BER for Horizontal R&D Agreements, BER for Vertical Agreements, Individual Exemption Regulation and Relevant Market Regulation. The Secondary Legislation stipulates and defines the elements of a competition infringement, and in determining it weighs whether the conditions prescribed thereby have been fulfilled. Accordingly, a competition infringement is not determined by statute, as prescribed by the ECHR and the Constitution, but by the Secondary Legislation and Other General Regulations.

130. Likewise, the Instructions on Implementing Article 58, which was adopted by the Commission itself, prescribes conditions under which proceedings against a party may be terminated and a commitment decision made. The commitment decision includes determination of commitments which are to eliminate the infringement of competition. Consequently, the parties against which a commitment decision is made shall not be fined in the form of the so-called Measures. Therefore, the act in question specifies the conditions for issuing the so-called Measure, i.e. the circumstances under which said Measure will not be issued.

131. The Instructions on Implementing Article 58 goes even further in breach of the principle of legality, precisely because it, *contra legem*, narrows the possibility of making a commitment decision under Article 58 of the Competition Act, as follows:

> *"**The termination of the proceedings [making of a commitment decision], in the sense of the provision of Article 58 of the [Competition Act], is not appropriate in the proceedings for examining the most serious competition infringements**, the purpose of which is to determine the prices or limit the production or sale, i.e. the division of the supply market, and, as a rule, in such procedures, commitments offered by a party in the proceedings shall not be accepted."*

132. Additional proof that the Instructions on Implementing Article 58 is unconstitutional, in breach of the provisions of the ECHR, and even unlawful, is the fact that the criminal law tool corresponding to the commitment decision – plea bargain, as well as conditions under which it can be applied, is regulated in full by statute, i.e. Articles 313 through 319 of the Criminal Code. Thus, by adopting the given instructions, the Commission committed a grave breach of the principles of legality and legal security in criminal law, as guaranteed by the Constitution, ECHR, Criminal Code and the CLLE Act, and even provisions of the Competition Act itself.

133. Furthermore, the Commission, in another one of its general acts - the Instructions on Individual Exemption, *a priori* limits the possibility of terminating proceedings conducted for competition infringement consisting of conclusion of a restrictive agreement, despite the fact that the Competition Act does not contain such a restriction. Said instruction, contrary to the provisions of the Competition Act, introduces an additional requirement that is to be fulfilled for the exclusion of liability for the mentioned competition infringement:

> *"In proceedings before the Commission initiated ex officio in order to determine the existence of a competition infringement, it is not possible to terminate the proceedings, even in the situation where the parties against which the proceedings were initiated succeeded in proving the fulfillment of the conditions for individual exemption of the restrictive agreement from the prohibition. In such a situation, the fact that conditions laid down by law are cumulatively fulfilled, which, in the event that a request for an individual exemption was previously submitted, would be sufficient for a positive decision of the Commission, could possibly be appreciated only as mitigating circumstances in determining the measure for protection of competition - the obligation to pay a certain amount of money - which is always determined in the event of competition infringement."*

134. It is absolutely contrary to the basic principles of criminal law that the Commission, by its general acts, expands the statutory definition of the competition infringement – conclusion of restrictive agreement, which unambiguously breaches the principle of *nullum crimen sine lege* clearly provided for by the Constitution, the ECHR, the Criminal Code, the CLLE Act and principle 1 of Recommendation on Administrative Sanctions, and even provisions of the Competition Act itself.

135. The foregoing clearly indicates that the Commission breaches the rule *nullum crimen sine lege*, prescribed by Article 34(2) of the Constitution, Article 7 of the ECHR, as well as Article 1 of the Criminal Code and the CLLE Act., by regulating the conditions for liability of undertakings for competition infringements by its general acts - the Instructions on Implementing Article 58 and the Instructions on Individual Exemption.

136. It follows, Articles 57(6), 69(5), 13(3), 12(4), 6(4), 57, 70 and 69 of the Competition Act, and Secondary Legislation and Other General Regulations based on said articles and Article 21(1) of the Competition Act, are in breach of the fundamental principle of *nullum crimen, nulla poena sine lege* enshrined in both the Constitution and the ECHR.

b) Presumption of innocence

137. One of the fundamental rights of the accused is undoubtedly the presumption of innocence guaranteed under Article 34(3) of the Constitution, Article 6(2) of the ECHR and Article 3 of the

Criminal Procedure Act. This right guarantees that the accused shall be deemed innocent until proven guilty by a final decision of a court of law.

138. The Competition Act not only fails to guarantee the presumption of innocence, but quite to the contrary, enables the Commission to **force, under the threat of procedural penalties, the party to incriminate itself**. Moreover, when the investigative-prosecutorial and judicial functions become fused in an administrative body, there is a clear risk of **prosecutorial bias,** which runs directly contrary to the presumption of innocence (the Commission being "**judge, jury and executioner**").

139. The aforementioned is in direct breach of Article 33 of the Constitution and Article 6(2) and (3) of the ECHR. Proceedings before the Commission concern acts punishable by law, and having in mind that the Criminal Code regulates criminal sanctions for certain competition infringements (even against natural persons). Moreover, as was mentioned above, Article 232 of the Criminal Code specifically regulates the criminal offence of abuse of monopoly/dominance, punishable also under the CLLE Act.

c) Breach of the *ne bis in idem* principle

140. Article 34(4) of the Constitution as well as Article 4 of the Criminal Procedure Act guarantee the *ne bis in idem* principle, meaning that no one can be prosecuted for a criminal offence for which they have been found guilty or innocent by a final court decision or for which the charges have been finally dismissed or the proceedings have been finally ceased, while the Constitution also regulates that proceedings for **all other punishable acts** are subject to the same restrictions. Moreover, the ECtHR decision in case of *Grande Stevens and Others v. Italy* (18640/10, 18647/10, 18663/10, 18698/10, March 4, 2014)[53] has taken a position that even a final **administrative** sanction can be an obstacle for conducting criminal proceedings, provided that the criminal proceedings refer to the same facts.

141. ECtHR has to a significant extent consolidated its approach to this matter, hence in the cases of *Maresti v.* Croatia[54] and *Muslija v. Bosnia and Herzegovina*[55] it took a fact-based approach, instead of an approach based on the identity of statutory classifications or protected public goods. Therefore, the ECtHR has maintained its position that Article 4 of Protocol 7 of the ECHR must be construed as prohibiting criminal prosecution or trial for other acts to the extent that they are based on the same facts which are materially the same as the ones based on which the court decision for the first punishable offence had been made. Thus, a uniform interpretation of the *idem* element in *ne bis in idem* has been established.

142. Furthermore, **the Constitutional Court has consistently taken the position that, with a goal of protecting the predominant interest, besides establishing the identity of the facts of the punishable action, the court must in each case take into account additional, so-called corrective criteria:**

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[53] ECtHR, *Grande Stevens and Others v. Italy*, Applications no. 18640/10, 18647/10, 18663/10, 18698/10, March 4, 2014, para 229, available at: http://hudoc.echr.coe.int/eng?i=001-141794.

[54] ECtHR, *Maresti v. Croatia*, Application no. 55759/07, 25 June 2009, available at: http://hudoc.echr.coe.int/eng?i=001-93260.

[55] ECtHR, *Muslija v. Bosnia and Herzegovina*, Application no. 32042/11, 14 January 2014, available at: http://hudoc.echr.coe.int/eng?i=001-139988.

a) identity of the protected public good and severity of the consequences,

b) identity of sanctions,

in order to answer the question whether the accused is being prosecuted or has been convicted for the same actions (*idem*)[56].

143. Moreover, incrimination of the same behavior in the Competition Act as in the Criminal Code and the CLLE Act, clearly reflects the criminal nature of the proceedings before the Commission, and breaches principle 3 of the Recommendation on Administrative Sanctions, which requires that the sanction in the administrative proceedings cannot be issued beyond the sanctions for the same act or other act that protects the same protective object, prescribed by other statute. This principle is clearly breached by *de facto* double incrimination of certain competition infringements through the Competition Act and in addition to already existing provisions of the Criminal Code and the CLLE Act.

144. Both legal and natural persons can find themselves **in a situation where they are punished <u>for the same behavior</u> before the Commission as well as before a criminal court**, whereby the amount of the so-called Measure, as a sanction before the Commission, can be significantly higher than the one issued in criminal proceedings.

145. The **obvious criminal nature of proceedings for prosecuting and punishing competition infringements** would in essence result in two criminal proceedings for one and the same act.

146. Therefore, **both proceedings (before the Commission and a criminal court)** would be conducted for behavior which is **based on the same facts**, with fulfilment of the aforementioned corrective criteria since <u>both criminal and competition infringement sanctions have the goal of protecting competition on the market</u>, and they can both result in issuance of fines.

147. These inconsistencies could lead to a situation in which **the same legal entity is acquitted of the criminal charges, but still remains open to potential prosecution before and by the Commission, where it may face more severe sanctions than those in the criminal trial**, which would be a major breach of the *ne bis in idem* principle.

148. Taking into account that the Constitutional Court recognizes the possibility that **a conviction of a person or entity in proceedings for "another punishable act"** can be a **procedural obstacle** to taking **criminal proceedings** against them for the same action, and under the same conditions under which criminal proceedings and a court verdict for a criminal offence activate a ban on conducting another penal proceeding for the same actions, it is clear that proceedings conducted before the Commission in accordance with the Competition Act **breaches the principles of legal certainty in penal law guaranteed under Article 34(4) of the Constitution and supported by principle 3 of the Recommendation on Administrative Sanctions**.

[56] Constitutional Court, decision no. Už 1285/12 from 26 March 2014, available at http://www.ustavni.sud.rs/page/predmet/sr-Cyrl-CS/10166/?NOLAYOUT=1.

7. Provisions of the Competition Act which regulate proceedings before the Commission violate the right to privacy of correspondence under Article 41 of the Constitution and Article 8, in connection with Article 6 of the ECHR

149. Article 41(1) of the Constitution prescribes that the **secrecy of personal letters and other communication is inviolable.** Paragraph 2 of this article regulates that exceptions to the principle are only allowed for a limited time **and based on a court order, if such actions are necessary for conducting criminal proceedings** or **protecting the national security of the Republic of Serbia**, all in the manner prescribed by law. Similarly, Article 8 of the ECHR regulates that everyone has the right to **respect for their private correspondence**, and there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Within the context of proceedings before public authorities, the case law of the ECtHR established that the confidentiality of attorney-client communication was protected under Article 6 of the ECHR due to the fact that violation of the confidentiality of such communication could obstruct an accused's defense, and did result in breach of their right to a fair trial.[57]

150. In implementation of Article 8 of the ECHR, the ECtHR especially established that interference by public authorities in rights established thereunder is possible only if the proportionality condition had been met, meaning that such interference **must be in proportion to the objective thereof**. In other words, a measure which in any way breaches the guarantees of Article 8, shall not be regarded disproportionate **if it is limited in its implementation with a number of protective measures which ensure that the individual is protected from arbitrary actions of public authorities**.[58]

151. Despite the aforementioned guarantees, **the Competition Act** "protects" confidentiality **in a manner that is in clear breach of the guarantees enshrined in the Constitution and the ECHR**. Therefore, Article 51 of the Competition Act has a very narrow definition of the term "privileged communication" and consequently the procedural protections of confidentiality. Paragraph 1 of the foregoing article of the Competition Act regulates that letters, notifications and all other forms of communication between the accused and its representatives that directly pertain to the proceedings at hand are privileged communication. Therefore, only communication **directly pertaining to the case in question** before the Commission is privileged, while all other attorney-client communication which may end up in the Commission's case file and does not directly pertain to the case in question (the existence of which is almost inevitable, taking into account that dawn raids are comprehensive in scope and the collected data often has little to no connection with the case in question), is potentially excluded from privileged treatment.

152. Moreover, Article 51(2) of the Competition Act regulates that the provisions on protected information of the Competition Act shall apply to privileged communication. This would mean that, **only if the party disclosing the information requests protection, can the Commission**

[57] ECtHR, *Case of Scherer v. Switzerland*, Application no. 12629/87, 28 November 1991, para 48, available at: http://hudoc.echr.coe.int/eng?i=001-57709; ECtHR, *Case of Golder v. United Kingdom*, Application no. 4451/70 21 February 1975, available at: http://hudoc.echr.coe.int/eng?i=001-57496.

[58] ECtHR, *MS v. Sweden*, Application no. 20837/92, 27 August 1997, available at: http://hudoc.echr.coe.int/eng?i=001-58177.

approve an appropriate measure of protection, if it concludes that the **interests of the party submitting the information** are **justified** and **significantly outweigh** the **public interest** in having access to the information concerned. The party requesting protection is also obliged to demonstrate that, should the information be made public, it would suffer **significant damage from the disclosure thereof**. It follows that the Commission's sole discretion is the deciding factor in whether the privileged information will be protected in proceedings before the Commission, namely since the interpretation of the exact meaning and scope of the aforementioned vague criteria, comes under the **sole remit of the Commission. The President of the Commission** decides on requests for protection of information, and his decision to refuse protection can be appealed to the **Council of the Commission – i.e. another body of the Commission, and without any judicial control whatsoever**. It is evident that even information defined under the Competition Act as privileged can be left without any guarantee of confidentiality if the Commission finds the aforementioned criteria have not been met.

153. Finally, **the most flagrant breach of Article 41 of the Constitution and Article 8 in conjunction with Article 6 of the ECHR arises from the Article 51(3) of the Competition Act.** In accordance therewith, where there is suspicion that the privilege of communication has been abused, **the President of the Commission is authorized to personally inspect the content of the communication in question**, i.e. to ***decide on the revocation of any protection of information contained therein***. *A decision of the President of the Commission to revoke the privileged status* of certain information **cannot be appealed on its own**, i.e. **it can be appealed only by appealing against the final decision of the Commission in the proceedings**. This is due to the fact that the right of appeal is not explicitly guaranteed, while Article 38(8) of the Competition Act prescribes that decisions on procedural matters can be appealed on their own only if such right is explicitly guaranteed under the Competition Act.

154. It is clear from the aforementioned that, **if the Commission had access to attorney-client communication** that the Commission does not deem privileged communication because: 1) it does not directly pertain to the case in question, 2) the Commission finds that the strict criteria under Article 52 of the Competition Act have not been met, or 3) the President of the Commission decides that the privileged status of said communication needs to be revoked, **such information would, in accordance with Article 45(4) of the Competition Act, paradoxically, *be regarded as information of public interest***, with all the consequences stemming therefrom.

155. Moreover, the wide-ranging powers of the Commission in respect of acquiring documents during an investigation significantly increase the risk of the Commission gaining access to attorney-client communication, but the privileged status of which could be left without any protection in proceedings before the Commission. Therefore, during dawn raids, which almost never require a court warrant, the Commission is authorized to: 1) **examine all business and other documents**, regardless of the protection guaranteed to such documentation; 2) **seize, copy or scan business documents**, and if that is not technically possible, the Commission official can **seize** the documents and **keep the documents for as long as it takes to copy them**; 3) **seal all documents** for the entire duration of the dawn raid.

156. For the purposes of implementation of its powers under the Competition Act, the Commission adopted the Decision on Redactions. The decision, not published in an official gazette but on the notice board and the web site of the Commission, regulates the manner in which the Commission will, if it decides to approve protective measures regarding certain information, redact such information from its published decisions. The Commission adopted said act based on ambiguous

grounds of Article 22(2) of the Competition Act – "*The Council shall adopt all decisions and acts on matters from the Commission's jurisdiction, save as otherwise regulated under the Competition Act or the Bylaws*".

157. Therefore, not only does the Competition Act breach the right to attorney-client privilege and protection of business secrets guaranteed under the Constitution and the ECHR, it grants the Commission powers to arbitrarily, without strict statutory boundaries, decide on the manner in which it will redact protected information. Thus, the Commission is *de facto* authorized to remove another layer of protection of sensitive information. For example, the Commission may decide to, instead of replacing precise market share information with a relatively broad range (e.g. if market share is 34.5%, Decision on Redactions provides that it should be expressed as /30-40/%), regulate that just the last digit will be removed. Such a solution would result in a *de facto* removal of protection of business-sensitive information, given that undertaking's competitors would have little difficulties in estimating its exact market share. We would like to reiterate that the Competition Act in no way prevents the Commission from arbitrarily limiting the scope of attorney-client privilege and protection of business secrets, contrary to the statutory, constitutional and ECHR-based safeguards.

158. It is evident that the Competition Act has failed to regulate the attorney-client privilege, protection of business secrets and privacy of correspondence in accordance with the Constitution and the ECHR, therefore clearly breaching guarantees provided thereunder.

159. The foregoing clearly shows that the Commission's powers to infringe on the secrecy of letters and other forms of communication, in proceedings ***qualified under the Competition Act as administrative***, are extensive and disproportionate to their objective. Given that the Commission can exercise these powers independently of any court decision, and that for the most part it is contingent on the Commission's discretionary evaluation as to whether the criteria for allowing protective measures have been met, it is clear that such provisions breach the secrecy of personal letters and other communication guaranteed under the Constitution and the ECHR.

8. Provisions of the Competition Act which regulate proceedings before the Commission are contrary to international human and minority rights standards, as well as the case law of institutions overseeing their implementation, as guaranteed under Article 18(3) of the Constitution

160. Article 18(3) of the Constitution provides that the provisions on human and minority rights are to be construed in favor of promoting the values of a democratic society, in accordance with applicable international human and minority rights standards, as well as the case law of international institutions entrusted with overseeing their implementation.

161. Therefore, any conduct contrary to applicable international human and minority rights standards, and especially those established by ECtHR case law, the most prominent role model for the Constitutional Court's decision making in matters of human rights, is in breach of the aforementioned provision of the Constitution.

162. As detailed on several occasions in the text above, the Commission implements provisions of the Competition Act, Secondary Legislation and Other General Regulations that are in breach of

applicable international human and minority rights standards, and therefore the established case law of the ECtHR, resulting in the direct breach of Article 18(3) of the Constitution.

9. Conclusion

163. From the foregoing only one conclusion can be drawn: provisions of Articles 34, 35, 38, 41, 48, 53, 54, 55, 57(6), 70, 71 and 72 of the Competition Act (as well as all the Secondary Legislation and Other General Regulations adopted in accordance with said articles) are in direct breach of the Constitution and the ECHR, since these articles authorize the Commission, as an administrative body, to decide on criminal matters, and confer to the Commission powers that exceed even those of the public prosecutor or criminal court.

164. In particular, due to the non-observance of the principle of *nullum crimen sine lege* and *nulla poena sine lege*, the Regulation on Measures, the Leniency Regulation, the BER for Horizontal Agreements on Specialization, the BER for Horizontal R&D Agreements, the BER for Vertical Agreements, the Individual Exemption Regulation, the Regulation on Relevant Market, the Guidelines on Measures and the Guidelines on Leniency, the Instructions on Implementing Article 58 and the Instructions on Individual Exemption, are all in breach of the Constitution and the ECHR, given that these acts more closely regulate competition infringements and sanctions for these infringements.

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R E Q U E S T

For the reasons elaborated above, and borne out of the necessity to prevent further irreparable damage to undertakings, the most important of which is the severity of sanctions that can be higher than general statutory maximums, as well as long-term damage to undertakings' reputation, the petitioner hereby requests from the Constitutional Court to:

1. Adopt a decision to initiate the procedure for the review of the Competition Act, Secondary Legislation and Other General Regulations, in terms of their conformity with the Constitution and the ECHR, in accordance with Article 53(1) of the CCA;

2. Suspend the enforcement of individual acts and actions adopted and/or undertaken pursuant to the Competition Act, Secondary Legislation and Other General Regulations, as well as all proceedings which can result in consequences pursuant to Article 68 of the Competition Act, until a final decision has been made, in order to prevent further irreparable adverse consequences on undertakings, in accordance with Article 56(1) of the CCA;

3. Adopt a decision by which it would declare the contested provisions of the Competition Act, Secondary Legislation and Other General Regulations to be in breach of the Constitution and the ECHR and repeal them, and determine the manner in which the damage caused by implementation of the unconstitutional provisions of the Competition Act, Secondary Legislation and Other General Regulations is to be remedied.

The Petitioner

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