COMMENTS OF THE MEMBERS OF THE SERBIAN CHAMBER OF COMMERCE

Protection of Competition Act

October 6, 2017

I. Introduction

Effective as of 1 November 2009, the fundamental legal act that regulates the central competition law matters in the Republic of Serbia is the Protection of Competition Act ("*Official Gazette of the RS*" no. 51/09 and 95/13 – **the Competition Act or Act**). . The purpose of said act is to protect competition on the market and ensure equality of all market participants in order to enhance economic efficiency, society welfare and consumer protection. The Competition Act is crucial to the proper functioning of the national market economy, attracting new investments and Serbia's planned accession to the EU. Quality market regulations and safeguards, which include competition law as its indispensable part, are necessary in order to create an optimal business climate and legislative framework, as well as to provide consumers with the highest quality products and services.

We believe that quality and substantive amendments to the Act, all with the aim of fostering a more competitive business environment, would most certainly allow the Republic of Serbia to move up in the rankings on the *Doing Business* list and contribute to an improvement in Serbia's Global Competitiveness Index.

The Chamber of Commerce has previously carried out consultations with the representatives of the Serbian business sector in regards to the implementation of the Competition Act, given that the main purpose of this act is to enable the proper functioning of the free market. Presented below are the integrated principal comments, suggestions and proposals of the members of the Chamber of Commerce, pertaining to the application of the Competition Act, as well as specific proposals for amendments of certain articles of the Competition Act, which are of interest for the business community.

II. Comments of the Members of the Chamber of Commerce on Implementation of the Competition Act

The current Competition Act stipulates that the provisions of the General Administrative Procedure Act are to be applied in the proceedings before the Commission for Protection of Competition (**the Serbian Competition Authority or the SCA**). It follows, it is necessary to harmonize provisions of the Competition Act with the new General Administrative Procedure Act (**the New Administrative Act**). Namely, Article 3 of the New Administrative Act provides that certain administrative procedural matters can be governed by a *lex specialis*, provided that such act does not reduce the level of protection of parties' rights and legal interests guaranteed by the New Administrative Act (the so-called *minimum human rights protection standard*). Bearing in mind that one of the purposes of the New Administrative Act is alignment of its rules with that of the European Convention of Human Rights (**ECHR**) and the European Union *acquis*, and effectively raising the level of human rights protection and due process, which in turn, will have significant consequences to the application of the Competition Act as well.

Further, as a general note, regarding the proceedings conducted before the SCA, the proposed deadlines for merger filing, as well as deadlines for decision-making are not adequate, especially from the perspective of creation of a legal framework that would enable unhindered business operations and stable environment for attracting foreign investors. Additionally, powers of the SCA's officials—as well as provisions regulating dawn raids, searches of business premises, and temporary seizure of documents and other items—need to be harmonized with the criminal statute regulating corresponding procedures of the competent state authorities in criminal proceedings.

Additionally, we consider necessary to particularly regulate the following matters:

- Rules and competition proceedings pertaining to activities of general interest, services of general economic interest and public services, bearing in mind the fact that these activities and services are not conducted / provided under market conditions, especially if it is taken into account that special statutes regulate prices thereof;

- SCA's procedure prior to making a decision on initiation of proceedings pursuant to an initiative for a potential competition infringement, during which the SCA collects information and data from relevant legal entities and natural persons, as well as from competent public authorities. The experience of companies speaks for itself: the process of collecting and analyzing data by the SCA takes more than 10 months, which is a very long period;

- The severity of the measures for protection of competition and procedural penalties needs to be reassessed, especially if taken into account that these measures can amount to 10% of the overall annual turnover of the undertakings, which in the majority of cases can easily exceed the general criminal maximum prescribed by the Criminal Liability of Legal Entities Act ("*Official Gazette of the Republic of Serbia*" No. 97/08 – **the CLLEA**).

During the process of preparation of draft amendments to the Competition Act, we strongly suggest that special consideration be given to the following issues:

- The need for the provisions of the Competition Act to be tailor-made for the actual state of affairs, structure and characteristics of the Serbian market, and not only replicated from statutes adopted from jurisdictions with a much bigger, more developed markets with different characteristics;

- The need to take into account actual and reasonable interests of companies operating on the domestic market, as well as other market participants—and not only rely on theoretical models when drafting new amendments;

- The fact that the Serbian economy is still undergoing a transition process as well as restructuring of state-owned companies, legal provisions and their implementation should not favor any economic interests over local, or the ones which are in conflict with interests of the Republic of Serbia;

- The need for the Competition Act provisions to be clear and precise, so as to minimize the possibility of its discretionary implementation and necessity for the constant interpretations.

Additional Competition Act's deficiencies pertain to: the lack of appeal in a one-instance competition proceedings, the decision being final and binding, leaving the unsatisfied party to only initiate an administrative dispute. The deficiencies extend to the legislator's intention to deprive initiators for a potential competition infringement from appealing in cases of the so-called *silence of the administration* since, *ex lege*, the initiator is not a party to the proceedings. Furthermore, since the SCA's notification of the initiative's outcome addressed to the initiator does not represent an administrative act, there are no legal prerogatives to appeal. Additionally, a possibility of initiating private damages claims against competition infringements is not sufficiently explored.

Although the Competition Act stipulates the possibility of holding a public hearing, this option is seldom used in practice. For the purpose of better collection of evidence and clarification of controversial facts in the proceedings, we are of the opinion that the public hearing should be a rule, rather than an exception.

Furthermore, decisions annulled by the SCA are not sufficiently clarified, explained in detail with arguments encompassing adequate financial and economic parameters.

Also, the question of statute of limitations regarding damage claims which arise from competition infringements is not particularly stipulated, therefore implying application of the general statute of limitations prescribed by the Contracts and Torts Act. We propose a better and more adequate solution: for the statute of limitations to be applied from the moment that SCA's decision on determining the competition infringement becomes final.

One of the general comments regarding the Competition Act's implementation to date, pertains to the necessity of aligning provisions of the Competition Act and the Public Procurement Act (in terms of more precise definitions of "affiliated undertakings" and "restrictive agreements"), in order to eliminate uncertainties that arise in the practice of the Republic Commission for the Protection of Rights in Public Procurement Procedures, in cases where the validity of an independent bid statement submitted by affiliated market participants or bidders is questioned. If the SCA is of the opinion that an agreement on conditions of participation in a public procurement procedure between affiliated undertakings does not amount to a competition infringement given that a restrictive agreement can be concluded only between independent undertakings, such position of the SCA should have to obtain its legal elaboration and precise formulation, which in turn would greatly ease the work of both authorities and significantly reduce the number of initiatives for determining competition infringement on this basis. We consider it necessary to permit joint bids in public procurement procedures, as follows:

- To clearly define that an agreement on joint bidding in a public procurement procedure is not restrictive if none of the participants meet the requirements for sole participation in such procedure;

- To shorten deadlines for the SCA's decision-making. The current, 60-day deadline is too long for joint procurement agreements, especially bearing in mind that deadlines in public procurement procedures starting from the announcement of the call for bids and if the bid of a group of bidders is selected, said group is obliged to conclude an agreement (otherwise, they can obtain a negative reference letter).

Also, the State aid issues, although governed by a special statute, should in a some way be included in the Competition Act, in accordance with the EU regulations.

We propose to define coinsurance agreements as a specific category of agreements for which special conditions for exemption would be stipulated as follows:

- Coinsurance agreement for new insurance products is not considered restrictive regardless of the market share of the coinsurer;

- Coinsurance agreement is not considered restrictive if the gross insurance premium does not account for more than 20% of the relevant market (when assessing restrictiveness, the proposal is to consider the gross premiums ratio from the specific insurance agreements and the relevant market, and not the market share of the coinsurer).

- , Introduce the principle of self-assessment of restrictiveness for coinsurance agreements, or define that in the aforementioned cases participants to the agreement / coinsurers are not obliged to submit an agreement to the SCA for assessment.

The possibility of reducing fees and fines should be considered as presented below:

- Reducing the fee for the exemption of restrictive agreements. If it is not possible to accept the abovementioned solution regarding ratio of gross premiums from the specific insurance agreement and the relevant market, for the low value public procurement (public procurement not exceeding RSD 5,000,000), then one must take into consideration that the fee of EUR 1,200 makes the joint bid uncompetitive and actually limits competition, thus making the institute of a group of bidders absurd;
- Reducing the amount of measures for protection of competition consisting of the pecuniary fines;
- Reducing the amount of procedural penalties.

Also, the general impression is that the procedural time periods are too extensive and should be shortened to the maximum in order to make the SCA's decision-making process more efficient. As for the SCA's discretionary right to set deadlines for *ex officio* decision-making (as authorized under the Competition Act), it is necessary to consider determining said deadlines in the Competition Act as precisely as possible and introducing the obligation to abide by them. We believe, in this subject matter, the SCA's practice of decision-making should follow the EU case law.

We suggest for the new competition act (or its by-law) to specify that the amounts in foreign currency for each relevant year are calculated at the average middle exchange rate of the National Bank of Serbia for that year or at the middle exchange rate of the NBS as of January 1 of the relevant year. This is particularly important when it comes to providing information on agreements for which fees are paid annually or monthly during several consecutive years.

III. Comments of the Members of the Chamber of Commerce to Particular Articles of the Competition Act

- **Calculation of the total annual turnover of undertakings, Article 7 of the Competition Act**

The issue of calculating the annual turnover of undertakings is particularly important from the aspect of determining merger filing obligation, but also from the aspect of calculating the measures for protection of competition and procedural penalties. Namely, Article 7 Paragraph 1 of the Competition Act provides the manner of calculation of annual turnover of undertakings (the Decree on the Content and Manner of Submitting Notifications on Concentration stipulates that VAT and "other taxes directly related to merger participants" are excluded from the calculation of annual turnover, which is not precisely defined). We consider that the calculation of annual turnover is broadly set and in many cases it does not represent a real market power of undertakings and leads to a rather large number of mandatory filings, as well as to disproportionately large penalties determined on the basis of measures of protection of competition and procedural penalties.

The Competition Act incorrectly calculates the companies' turnover and wrongly estimates their market power, which results in increased costs and businesses being stymied, especially given that mergers without any economic impact on competition are being notified.

The current Act takes into account the entire turnover generated by the company, while EU law takes into consideration only turnover generated from sales of products and provision of services in the relevant market. The approach of the Serbian law artificially increases the turnover that is taken into account when assessing the merger filing obligation. Therefore, the SCA by and large assesses insignificant mergers placing an additional administrative burden on businesses. Any unfounded merger filing postpones closing of a transaction by several months and, bearing in mind substantial attorneys' fees, results in a significant burden on businesses.

In any event, the new statute ought to adopt solutions provided for in EU regulations. This implies that only profits from sales of products and provision of services (excluding rebates, VAT and similar taxes) are to be used as the basis for calculating turnover, and only if the profits are generated from regular business activities, excluding transactions within the group.

The Competition Act is almost completely aligned with EU law regarding the method of calculating the turnover of financial institutions. However, Article 7 Paragraph 1 thereof, which regulates methodology for calculating turnover of all other companies, is cumbersome and contrary to EU regulations.

In the EU (Article 5 of the Merger Regulation), the aggregate turnover of the undertaking in the preceding financial year shall comprise of the amounts derived from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. Also, if a group of companies is considered, the value of the sale of products or the provision of services between the members of the group shall not be taken into account.

On the other hand, according to Article 7 of the Act, the SCA basically calculates the aggregate turnover before taxation, as per the preceding year's financial statements. Only the Decree on the Content and Manner of Submitting Notifications on Concentration prescribes that said turnover shall be reduced by the amount of VAT and "other taxes directly related to the parties to concentration", which is a very vague term having no grounds in law.

Obviously, the turnover should reflect the market power of undertakings. Therefore, it is unclear why the legislator has opted for a definition that includes all possible sources of turnover. For example, under the current Act, a company that normally generates turnover below the thresholds, but which over the course of one year disposes of a high-value immovable property or equipment, can easily exceed the thresholds.

In the foregoing scenario, the company did not increase its market power by selling more goods or providing more services, rather it merely disposed of fixed assets on the market (for example, real estate) where the transaction in question has no bearing on its market power. In spite of this obvious fact, the company, over the course of the coming year, will bear considerable costs for any merger it embarks on.

Moreover, the Consolidated Jurisdictional Notice on the Control of Concentrations between Undertakings contains detailed rules on calculating the turnover in particular situations. With the adoption of a new statute, these rules should certainly be transposed into Serbia's legal system through a new decree on merger filing.

- **Individual exemption, Article 12 of the Competition Act**

Article 12 of the Competition Act defines the individual exemption. According to the Competition Act, in order to obtain the individual exemption of the restrictive agreement from the prohibition, it is necessary to file an advance request for exemption, i.e. there is no possibility for undertakings' self-assessment whether the agreement fulfils requirements for exemption. ***Bearing in mind that EU regulations provide for self-assessment, we deem that it is necessary to consider the possibility to implement this method in our legislation.***

- **Determination of a dominant position in the market, Article 15 of the Competition Act**

One of the most important issues stipulated by the Competition Act is determining the dominant position of undertakings in the market having in mind their responsibility as such. Article 15 Paragraph 1 of the Act prescribes that an undertaking holds a dominant position if, due to its market power on the relevant market, it can substantially independently operate in relation to actual or potential competitors, customers, suppliers or consumers.

According to the above, we consider that the definition of a dominant position under said Article is inadequate, since it also prohibits operations of undertakings who do not actually hold a dominant position. In such a setting, undertakings can be penalized for actions that are completely favorable to consumers, which results in adverse impact on the business environment as well as fair market competition and innovation.

Therefore, it is necessary to refine the above definition in accordance with EU law by introducing additional criteria, in particular the significant market power criterion. Also, only significant market power which lasts or can last for an extended period of time (not less than 2 years) should be considered. Similarly, barriers to entry, as well as factors that have led to the existing market power, must be prescribed more precisely and thoroughly.

The document, "Guidance on the European Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45/7, 24.2.2009)" (Guidance), issued by the European Commission, prescribes a far more precise general definition of a dominant position than the Competition Act does. ***We propose inclusion of this definition in the amendments to the Competition Act.***

Aside from "significant market power", another criterion should be added to the term dominance – that of duration: the existence of a market power for "a long period of time", i.e. that an undertaking was able to preserve market power over time. Otherwise, simply quantifying the current market share would be sufficient to claim that there is significant market power or dominance, even in situations where the entry of a new competitor on the market could completely change the market structure and market shares.

In addition to the aforementioned, we **propose the introduction of new legal standards** in the form of criteria for determining significant market power in accordance with the Guidance as follows:

- constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant undertaking and its competitors),
- constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry),

- constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power).

In doing so, the criteria of significant market power would be in line with the case law of the European Court of Justice and the European Commission.

In our opinion, the Act prescribes that the market power of undertakings is determined particularly based on the relevant economic and other indicators listed in Items 1 to 9 of Article 15 Paragraph 2, which is in opposition to Item 2 thereof, which provides that the market power of undertakings shall be determined particularly if the market share of undertakings whose dominant position is being determined higher than 40% in the relevant market—since the dominant position of an employer depends on the elasticity of demand for its products, participation of competitors in the market as well as the resilience of their supply.

Elasticity of demand and supply is an indispensable market category for the purpose of defining of undertakings' dominant position, and since it is not mentioned in the Competition Act, we propose its introduction in Article above as one of the relevant indicators of the undertakings' market power.

- **Definition of Merger, Article 17 of the Competition Act**

Article 17 of the Competition Act provides for a definition of merger between undertakings. However, there are uncertainties about the abovementioned Article, which relate to the issue of whether and under which circumstances a particular business transaction can be considered a merger of undertakings in terms of said Article, hence whether there is a merger filing obligation to the SCA, i.e. are the merger filing thresholds prescribed under Article 61 met.

The Competition Act also defines the term of collective domination, i.e. merger between two or more legally independent undertakings holding a dominant position if they are linked by economic relations and operate together or as one undertaking in the relevant market. In addition, the acquisition of direct and indirect control over the part or parts of other undertakings shall be considered a merger.

We believe that this Act should be a strong anti-monopoly statute in our country and it should regulate monopoly, i.e. prevent the abuse by the monopoly in the market.

In accordance with the above, we consider that the Act should ***set the criteria for merger of companies, so that their fusion would not lead to the formation of new monopolies or companies dominant in the market. We think that in this matter, the Act should incorporate antitrust solutions in accordance with the European Union regulations and the Stabilization and Association Agreement.***

Article 17 Paragraph 1 Item 2 of the Competition Act prescribes that acquiring direct or indirect control over another undertaking constitutes a merger, while the concept of control over another undertaking is defined as a decisive influence on the conduct of activities of another or other undertakings in terms of affiliated companies defined under the Companies Act (Article 5). In addition, the Competition Act refers to the provisions of the Companies Act regarding the establishment of independent or joint control. The Companies Act regulates the control in affiliated companies (Article 62) and does not regulate explicitly the issue of joint or individual control, but only defines terms of "significant participation" and "joint conduct". In line with the above, we propose to define terms of independent or joint control in the s provisions of the new Competition Act, especially since the definition of the type of control is the obligatory element of the merger notification according to the applicable Decree on the Content and Manner of Submitting Notifications on Concentration.

Having in mind the content of the provision of Article 17 Paragraph 2 of the Competition Act, we consider that merger filing obligation should not be applicable to transactions between the same undertakings, for a time period of 2 years from the date of merger approval if such transactions have not resulted in a shift of control. In line with the above, we propose a new provision:

"***There is no merger filing obligation, in case of an increase of equity or shares in the target company by its controlling shareholder following the merger approval, provided that the time period of 2 years from the date of the merger approval has not elapsed and that the merger did not result in a shift of control***."

Having in mind that the European Commission's Consolidated Jurisdictional Notice on the Control of Concentrations between Undertakings provides that the acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e. a business with a market presence, to which a market turnover can be clearly attributed and accordingly suggest the amendment of Article 17 Paragraph 1 Item 2 to read as follows:

Merger also arises in the case of:

"2) acquisition of direct or indirect control, within the meaning of Article 5 Paragraph 2 of the Act, by one or more undertakings over another or more undertakings or over part or parts of other undertakings, that may represent an independent business entity.

An independent business entity is considered to be part or parts of other undertakings that can be attributed with a market share, over which the control is acquired in order to perform permanent activity;

Merger does not arise when a land or an object with no industrial purpose is acquired."

We consider that the said solution is adequate, given the fact that it reflects the quintessence of EU regulations that the Serbian regulations are to be harmonized with. Also, the solution is partially taken from the Russian comparative legal practice (The Federal Competition Act in Russia).

- **Exemptions from merger filing, Article 18 of the Competition Act**

Article 18 Paragraph 1 Item 1 of the Competition Act prescribes the following:

"The concentration of undertakings shall not be considered to occur if: 1) bank or other financial institution or insurance company, in the course of its regular business operations temporarily acquires shares or equity for further sale, provided it sells them within one year from the date of acquisition and does not use them to influence the business decisions of undertaking in terms of its conduct in the market".

We suggest that the above-mentioned provision be supplemented with another exemption relating to cases where the financial institution, in the course of their regular business, temporarily acquires assets or part of a legal entity, for the purpose of their further sale.

In our opinion, the proposal to include not only temporary acquisition of shares or equity, but also temporary acquisition of assets as an exemption from merger filing —seems logical and founded in comparative legal practice. The above is in line with the definition of a merger in Article 17 of the Competition Act, setting as merger an acquisition of shares or equity, as well as the acquisition of assets.

The foregoing can be explained by the provisions of the Banks Act ("Official Gazette of the Republic of Serbia" No. 107/2005, 91/2010 and 14/2015) which specifies restrictions on the acquisition

of shares or equity or the performance of long activities, so that the provision of Article 18 (1) (1), as it is written now, in practice, it almost never applies. This is because, for example, the bank's investment in an entity not operating in the financial sector must not exceed 10% of the bank's capital, while the total investments of the bank in entities not operating in the financial sector, as well as fixed assets and investment property, must not exceed 60% of the bank's capital. Given many limitations for acquisition by entities operating in the financial sector, transactions of temporary acquisition of controlling interests (shares or equity) in rare cases may constitute a concentration. In practice, cases of temporary acquisition of assets as a result of claim recovery, i.e. acquisition for further sale, are more realistic, in order to partially satisfy their claims. It is therefore suggested that the exemption above be aligned with the domestic regulations and practices and includes cases of temporary acquisition of assets for further sale.

In this regard, we would suggest that the period of temporary possession is extended and that the deadline for further sale of acquired assets, shares or stakes is set for a minimum of 3 years, and even up to 5 years. The above-mentioned is in line with the fact that Serbian market is very small and with a limited demand, and therefore it is very difficult, and at times even impossible to find a buyer within a short timeframe of one year. Also, we would suggest that, in order to preserve the value of the assets acquired in the manner described above, performing certain actions in relation to that should be enabled.

In the foregoing, we propose that Article 18 Paragraph 1 Item 1 should be amended to read as follows:

"***The merger between undertakings is not considered to have occurred if: a) a bank or other financial organization or insurance company, in the course of its regular business, temporarily acquires shares, equity or assets for further sale, provided it sells them within 5 years from the date of acquisition and to use them only for the purpose of preserving value (leasing, repairs, etc.), but in such a way that it does not affect the market participants' business decisions regarding its behavior on the market***;".

- **Permissibility of concentration, Article 19 of the Competition Act**

Article 19 of the Competition Act regulates the types of permitted mergers and how the permissibility is determined. Bearing in mind the wording of said Article, we believe that it is necessary to create a precise definition of unpermitted merger, especially taking into account the need of domestic economic entities and the state as a whole to strengthen the performance of such entities, and to equally counter the tough competition coming from companies from the EU and other countries.

- **Financing of the SCA, Article 31 of the Competition Act**

Article 31 defines the financing of the SCA, whereas Paragraph 2 of the same Article prescribes that the amount of fees payable in accordance with the Competition Act is determined by the Tariff issued by the SCA, with the Government's consent. Having in mind such legal formulation, it is clear that the SCA is financed from the fees which it charges, and it is not entirely clear whether it is also financed from the penalties which imposes. Namely, we believe that neither of the solutions contributes to the SCA's independence and impartiality. We emphasize that companies complain mostly about the high merger filing fee (up to EUR 25,000). The amount thereof is not regulated by the Act, but by the SCA's Tariff. Having in mind the above, we believe that the Act should prescribe the maximum fee amount.

- **The SCA's Right to request information from third parties, Articles 48–51 of the Competition Act**

The SCA's rights to request information from third parties are extremely broad. The level of protection afforded to such information in proceedings before the SCA is markedly low and we are of the opinion that it must be harmonized with the appropriate provisions of Serbian legislation and the European Convention on Human Rights (ECHR).

Undertakings in proceedings before the SCA risk to be fined for failure to disclose information otherwise protected as business secrets. Moreover, there is a considerable risk of such information, during the proceedings before the SCA, being disclosed (public domain information), which is highly contingent on the SCA's discretionary rights.

The current Act enables the SCA to, under threat of high procedural fines ranging from EUR 500 to EUR 5,000 per day, request any third party to provide information that the SCA considers important for the proceedings. Such information is usually confidential and constitutes business secrets. Under special statutes, business secrets enjoy protection which is crucial for the entity providing the information.

By way of defining privileged communication in Article 51 of the Competition Act, consequently the right to confidentiality of information was significantly narrowed. The Competition Act regulates that only letters, notifications and other forms of communication between the investigated undertaking and its legal counsel which directly relate to the proceedings, constitute privileged communication.

Further, Article 51 Paragraph 2 of the Competition Act stipulates that the privileged information is subject to the provisions of the same Act that regulate protected information. This means that a protective measure can be approved only at the request of the person disclosing the information. The aspect most detrimental to legal certainty is that protection is provided only if the SCA decides that the interest of the person disclosing the information significantly outweighs that of the public interest in the information entering the public domain. Moreover, the person requesting protection of the information must demonstrate the risk of significant harm that may be caused due to the information in question being made publicly available. Therefore, the protection of privileged communication, depends solely on the SCA's discretion, and the said data can be left without any protection whatsoever if the SCA decides that the criteria under the Competition Act have not been met.

For the above reasons, we suggest deleting Paragraph 2 of Article 51 of the Competition Act.

Additionally, in accordance with Article 51 Paragraph 3 of the Competition Act, in case of a doubt of abuse of privileged communication, the SCA's President is authorized to, at his sole discretion, remove any protective measures regarding the privileged communication. Under Article 38 Paragraph 8 of the Competition Act, such decision can be appealed only together with final decision. ***We consider the powers of the SCA's President as excessively broad and inconsistent with Serbian legislation, hence we propose the deletion of Paragraph 3 of Article 51 of the Act.***

Furthermore, during a dawn raid, for which a court order is almost never required, the SCA is entitled to:

- search business premises and other documents, regardless of the protection they enjoy;
- seize, copy or scan business documents, and if due to technical difficulties this is not possible, the SCA's officer can temporarily seize business documents for as long as is required for copying;
- seal all business documents during the dawn raid.

In particular, we stress that until the final decision is not made in the proceedings before the SCA, disclosure of any information primarily related to the operations of the company in question can be very risky, bearing in mind that they can critically affect the reputation of the company, its current business plans and credibility with investors and its business partners.

Also, Article 133 of the New Administrative Act envisages the possibility that the proprietor/possessor of items or premises may object to the investigation for the same reasons a witness may use to deny testifying, including the exposure to significant material damage or prosecution. This provision should be applied to Articles 48-49 of the Competition Act regulating the SCA's right to request information.

- **The SCA's right to request information from the investigated undertaking**

The SCA is also entitled to fine the investigated undertaking in the event of failure to disclose information relevant for the proceedings, upon the SCA's request. Therefore, we would like to emphasize that not even a criminal court has any similar powers as this administrative body—which seriously jeopardizes legal certainty.

As it stands, the SCA is entitled to request that the investigated undertaking discloses information the SCA regards as important for the proceedings. If the undertaking fails to do so, the SCA can impose a fine ranging from EUR 500 to EUR 5,000 per day. Such information can be, and usually is, incriminating, meaning that its publication or disclosure can expose the undertaking to extremely high fines in proceedings before the SCA. In contrast to criminal proceedings, the SCA violates the right of defendants to not incriminate themselves, guaranteed under the Serbian legislation and the ECHR.

We are of the opinion that sanctions which can be imposed on undertakings in proceedings before the SCA, due to their severity, must fall into the criminal domain. Hence, in proceedings to impose a sanction, an undertaking must enjoy the same level of protection as in criminal proceedings. Failure to do so in competition infringement proceedings would result in violation of fundamental human rights guaranteed by the Constitution and the ECHR. In accordance therewith, Article 149 Paragraph 1 of the Criminal Procedure Code (**the CPC**) regulates that the defendant is exempt from the duty to deliver items which, under the Criminal Code (**the CC**), must be seized or which can serve as evidence in criminal proceedings.

We consider that failure to provide all aforementioned has a significantly adverse impact on the business climate in Serbia, thus depriving both local and international entrepreneurs from basic legal protections. Legal certainty is one of the main factors in doing business successfully. In our opinion, the current solution falls short of making any meaningful contribution to either the business climate or consumer welfare.

- **Dawn Raids, Article 53 of the Competition Act**

A provision that should be particularly emphasized is the one stipulating dawn raids, in Article 53 of the Competition Act, which entails unannounced inspection of business premises and information, documents and other items and seizure thereof (conducted without a court order, except of search of a home in case the proprietor objects to the dawn raid, in which case the court order is necessary), whereby the dawn raid cannot be subject to direct, previous and subsequent judicial control, nor the decision on dawn raid is subject to appeal.

The SCA has powers broader even of those of a public prosecutor in criminal proceedings. Therefore, any entrepreneur is potentially at risk of having measures imposed that bear a closer resemblance to repressive mechanisms of authoritarian regimes rather than democratic market economies. The SCA's conduct over the past two years clearly demonstrates how much the current

statutory solution has contributed to its arbitrariness and amounted to the lack of private sector's confidence in impartiality of public bodies. We would like to draw special attention to the fact that, as can be seen on the SCA's web site (www.kzk.rs), the majority of proceedings have been initiated against entrepreneurs and small businesses. This gives rise to a situation in which the group that accounts for the largest part of the economy, and which at the same time has the least resources, is being made the scapegoat of the SCA's discretionary scrutiny.

Given the Competition Act contains provisions on searches being activities for obtaining evidence, therefore, dawn raids entirely correspond to a search, especially the search of a home or other premises, as regulated under Article 158 of the CPC.

In accordance with the ECtHR decisions, inviolability of home, as guaranteed under Article 8 of the ECHR, includes inviolability of business premises. In this respect, all guarantees provided under Article 8 must be applied to searches of business premises when conducted by the SCA. It is clear that the European law recognizes that a developed economy requires appropriate legal protection for businesses from discretionary powers of state.

Also, the SCA's possibility for "blind hunting" survey during an investigation (in the comparative competition law known as "fishing expedition"), opens up the possibility of collecting evidence not related to an investigation at hand, as well as the possibility, on the basis of the collected information and evidence of launching a new proceeding. Serbian legislation does not stipulate the mandatory content of the decision on conducting an investigation, as it is provided for in Article 20 Paragraph 4 of the Council Regulation No. 1/2003. The provisions of Article 133 of the New Administrative Act stipulate that home search is possible only with the consent of its owner or possessor or on the basis of a competent court's order. This provision might be extensively interpreted as to include the inviolability of business premises.

Namely, search as an action for obtaining evidence, in criminal proceedings, by default is conducted based on a court order, as regulated under Article 155 of the CPC. Only under the extraordinary circumstances listed in Article 158 of the same code, can it be conducted without a court order. Therefore, a search conducted without a court order is, pursuant to the aforementioned unambiguous statutory provision, an extremely rare event, and by no means a rule, as is the case with the wording provided under the Competition Act.

At the same time, indications that evidence of a crime or items of importance to criminal proceedings are being destroyed or concealed do not constitute statutory grounds for conducting a search without a court order. A search can be conducted without a court order only in extraordinary cases. On the other hand, the SCA uses precisely these grounds to search business premises almost entirely at its sole discretion.

Conversely, there are no such guarantees in proceedings before the SCA. In opposition to the ECHR, dawn raid on business premises under Article 53 of the Competition Act is, as a rule, being conducted without a court order, i.e. a court order is, pursuant to Article 54 Paragraph 3 of the Competition Act, necessary only for a dawn raid on a person's home or premises serving a similar function, and the proprietor thereof objects to it. Besides this, the Act does not require that a record of the search is kept, or that two adult witnesses are present during the search.

Article 156 Paragraph 7 of the CPC stipulates that the presence of two adult witnesses is not required only in clearly prescribed extraordinary cases. On the other hand, according to Article 54 Paragraph 6 of the Competition Act, the presence of two adult witnesses is necessary only if the home proprietor or their legal representative are unable to attend the dawn raid.

We are of the opinion that guarantees available to the undertaking under investigation by the SCA are far beyond the level needed for the proceedings in which a criminal sanction can be rendered, and are markedly below the levels required under Article 8 of the ECHR (as early as 2002, the ECtHR affirmed that business premises are equivalent to home, when it comes to legal entities).

Therefore, ***we are of the opinion that the statutory provisions regulating dawn raids (Articles 52, 53 and 54) need to be amended, in order to be aligned with Serbian legislation and ECHR***. ***We suggest that, as a condition for conducting the dawn raid due to the violation of competition, there is a mandatory existence of an appropriate decision of the competent court.***

- **Temporary seizure of documents and items, Article 55 of the Competition Act**

Article 55 of the Competition Act prescribes that the decision on temporary seizure of documents or items, and the return thereof, is brought by the official conducting the dawn raid, i.e. conducting the proceedings.

According to Article 38 Paragraph 5 of the Competition Act, the decision relating to procedural issues, interim measures and presentation of evidence is not subject to appeal, unless otherwise provided by the Competition Act. Article 56 Paragraph 2 explicitly stipulates that the decision on interim measures can be appealed, as opposed to the decision on temporary seizure of documents or items.

We believe that there is no reason for not allowing an appeal against the decision on temporary seizure of documents or items. Thus, we propose for the analogous wording, referred to in Article 56 of the Competition Act, be applied in Article 55 of the Competition Act and for allowing an appeal against the decision on temporary seizure of documents or items.

- **Termination of proceedings, Article 58 of the Competition Act**

Article 58 of the Competition Act prescribes the possibility of termination of proceedings if a party proposes commitments in order to voluntarily eliminate possible competition infringements.

Article 58 Paragraph 7 Item 1 stipulates that the proceedings shall be continued in case of substantial change of circumstances which served as the basis for determination in the decision on termination of proceedings.

Namely, the SCA is entitled, upon acceptance of the undertaking's commitments and rendering of decision on termination of proceedings, at its sole discretion to continue proceedings and thereby practically revoke the decision on termination of proceedings even if there is no fault by the undertaking. Such provision amounts to violation of the principle of legal certainty and contributes to arbitrary and random treatment by the SCA. ***For this reason, we suggest this item be deleted or more precisely defined in a way to exclude the possibility of continuation of proceedings upon rendering of decision on termination of proceedings, if there is no fault by undertakings***.

- **Decision on the request for individual exemption, Article 60 of the Competition Act**

Article 60 Paragraph 5 of the Competition Act provides that the SCA's individual exemption decision may be cancelled if the conditions under which the exemption was granted have substantially altered or revoked, or if the exemption was based on inaccurate or untruthful facts or if the exemption was abused. Similar to Article 58 Paragraph 7 Item 1 of the Competition Act and Article 60 Paragraph 5, it leaves to the SCA's discretion to abolish the exemption decision if the terms under which the decision was granted have altered, even if there is no fault by the undertaking. This way the principle of legal certainty is violated which further contributes to SCA's

arbitrary and random conduct, and to undertakings' extremely unenviable position, particularly bearing in mind that no transitional period is envisaged in which the revocation of the individual exemption comes into force.

We therefore propose the deletion of this part of the provision authorizing the SCA to abolish the decision, should the SCA consider that conditions under which the exemption was granted have substantially altered or to at least stipulate that the abolition is not possible if there is no fault by undertakings.

- **Merger filing obligation prescribed by Article 61 of the Competition Act**

Article 61 regulates obligation to file a merger notification. Paragraph 1 Item 1 of said Article prescribes that the aggregate worldwide turnover of all undertakings concerned in the year preceding the merger is at least EUR 100 million, provided that at least one of the undertakings concerned generated turnover in Serbia of at least EUR 10 million. Thus, we are of the opinion that it is necessary to precisely define the thresholds that trigger the obligation to file a merger notification, in order to avoid the application of the Competition Act on transactions with no effects in Serbia. Namely, the first threshold for the notification of concentration is too large because it includes takeovers that have nothing to do with Serbia. An example of such a situation is when company A, whose group earns more than EUR 100 million in revenue worldwide and EUR 10 million in Serbia, takes over company B that is active in another part of the world, with no revenues in Serbia. By the current legislation, such concentration must be reported to the SCA.

The amendments of the Act could envisage the requirement of a target company's revenues in Serbia of at least EUR 1 million in order to trigger the notification. This way, the requirement for notification of transactions with no effect in Serbia could be avoided.

We are also of the opinion that the obligation to notify a concentration must be defined not only by formal criteria, such as the total annual income, but also by the substantive criterion whether the concentration in question has or does not have a real impact (permitted or unpermitted) on the market of the Republic of Serbia. In this context, it is also important that the manner of calculation of the company's income is aligned with EU law.

In practice, the SCA held a position for concentrations that only occurred in other markets with no obligation for notification at a given market, to be subject to notification in Serbia only because the affiliated person to the party to concentration had a registered seat in the Republic of Serbia and earned the total annual turnover prescribed under Article 61 of the Competition Act.

It is necessary to significantly increase the thresholds for mandatory merger notification, in order to primarily capture concentrations with the risk of distorting competition on the Serbian market. Otherwise, the state of affairs shall remain unchanged, with over 100 annual merger notifications that are decided upon in summary proceedings, which have no impact on competition (note that the fees amount to EUR 25,000 per notification, and which, together with legal expenses, can amount to enormous and unnecessary burden on the economy).

We note that except for Serbia, Albania is the only jurisdiction in Europe with such exceptionally low thresholds for mandatory merger notifications.

As a practical consequence, these exceptionally low thresholds practically result in 99% of mergers of negligible economic effects on the market of the Republic of Serbia.

We believe that the thresholds should be increased from three to five times, similarly as the model of Austria and other European countries. This would greatly contribute to increasing legal

certainty in doing business and investment, with reduction of unjustified costs and higher efficiency in the SCA's work.

Namely, the current provisions of the Competition Act prescribe that there is an obligation to file a merger notification where (**Thresholds**):

1) *the aggregate worldwide turnover of all undertakings concerned in the year preceding the merger is at least EUR 100 million, provided that at least one of the undertakings concerned generated turnover in Serbia of at least EUR 10 million;*

or

2) *the aggregate turnover in Serbia of at least two undertakings concerned is at least EUR 20 million in the year preceding the merger, and each of at least two of the undertakings concerned generated turnover in Serbia of at least EUR 1 million*.

As a model we would like to suggest the Austrian example. Austria has a similar legal tradition to Serbia's, and is at the same time a developed market economy that has already gone through the initial stages of competition law development. It is particularly important to emphasize that the Austrian legal system **prescribes significantly higher merger filing thresholds**.

Namely, the Austrian act prescribes the following cumulative thresholds:

- the combined worldwide turnover of all undertakings concerned exceeds EUR 300 million
- the combined Austrian turnover of all undertakings concerned exceeds EUR 30 million
- the individual worldwide turnover of each of at least two of the undertakings concerned exceeds EUR 5 million.

However, even if the above thresholds are satisfied, no obligation to notify exists if the Austrian turnover of only one of the undertakings concerned exceeds EUR 5 million; and the combined worldwide turnover of all other undertakings concerned does not exceed EUR 30 million.

In addition to the foregoing, the Austrian act only applies to those mergers which may have an impact on the Austrian market. Hence, a transaction does not trigger a merger filing obligation if it has no clear and measurable national effect. This is especially the case when the target company is not active in the local market and the transaction does not enhance the acquirer's market position in Austria.

Therefore, the thresholds for obligatory merger filing in Austria are three to five times higher than those prescribed in our legal system. Additionally, the Austrian statute, unlike the Competition Act, recognizes the necessity of assessing only those mergers which have an impact on the national market. The similar approach regarding the importance of assessing only those mergers that can have real effects on the national market is contained in the Croatian statute which prescribes as a cumulative condition that at least one of the undertakings has a registered seat or a subsidiary in Croatia.

Given the above, we believe that thresholds should be increased from three to five times, based on the Austrian model. This would lead to assessing only the mergers which may have an impact on the national market (and avoiding cases of minor economic value), thereby contributing to an increase of legal certainty in doing business and investing in Serbia.

We further suggest that the merger filing fee in the Republic of Serbia does not exceed the amount of EUR 2,000, and that this amount would be significantly more adequate in view of the above.

Also, the existing legal solution leads to a situation where the threshold is met even when a business that is not located in the Republic of Serbia is being acquired (for example, notification of the concentration of acquiring portfolio of logistic parks and land for storage and construction in Poland and Romania, whereas the target business includes means for the production of fuel pumps in the United States, etc.).

Therefore, we consider that the threshold should be changed so that it creates the obligation to file a merger notification only when there are significant revenues of the target company in the Republic of Serbia.

The comparative legal practice, and especially jurisdictions of the EU member states, confirm this view. The thresholds for merger notification are commonly defined in EU member states in such a way that not only the acquirer, but also the target company or assets to be acquired are to generate significant local revenues.

So the threshold requirements in Austria are such that each of the market participants (target company or assets) earns a revenue of at least EUR 5 million. Also, cases where only one participant generates significant incomes in Austria are exempted from merger notification. Furthermore, the threshold in Bulgaria requires that at least two participants in the concentration or only the target company earn an income of EUR 1.5 million in the local market. Almost identical examples are found in other European jurisdictions such as Slovenia, Croatia, Germany and Romania (listed in the table below):

Jurisdiction	***Merger threshold***
Austria	*A merger must be notified if the following thresholds are met:* *a) the combined worldwide turnover of all the undertakings concerned exceeded EUR 300 million;* *b) the combined Austrian turnover of all the undertakings concerned exceeded EUR 30 million; and* *c) the individual worldwide turnover of at least two of the undertakings concerned each exceeded EUR 5 million.* *If the aforementioned thresholds are met, the transaction will be exempt from the filing requirement if:* *a) only one of the undertakings concerned has an Austrian turnover of more than EUR 5 million,* *b) and the combined worldwide turnover of the other undertakings concerned does not exceed EUR 30 million.*
Bulgaria	*A merger must be notified if the following thresholds are met:* *a) the combined aggregate annual turnover of all the undertakings participating in the concentration in the territory of Bulgaria during the preceding financial year exceeding BGN 25 million (approx. EUR 12.8 million); and either* *b) each of at least two of the participating undertakings in the concentration in the territory of Bulgaria during the preceding financial*

	year exceeding BGN 3 million (approx. EUR 1.5 million) and the undertaking(s)being acquired had a turnover of more than BGN 3 million (approx. EUR 1.5 million) in the preceding financial year.
Romania	*A merger must be notified if the following thresholds are met:* *a) the combined aggregate annual turnover exceeds the equivalent of EUR 10 million in the preceding financial year and* *b) each of at least two of the undertakings concerned achieved Romanian turnover exceeding the equivalent of EUR 4 million in the preceding financial year.*
Germany	*A merger must be notified if the following thresholds are met:* *a) the transaction value amounts to more than EUR 400 million* *b) the combined aggregate worldwide turnover of all participating undertakings exceeds EUR 500 million;* *c) at least one participating undertaking has a turnover in Germany exceeding EUR 25 million; and* *d) the target undertaking has significant activities in Germany*
Slovenia	*A merger must be notified if the following thresholds are met:* *a) The combined aggregate annual turnover of all undertakings concerned (including undertakings belonging to the same group) exceeded EUR 35 million in the Slovenian market in the preceding financial year;* *b) The annual turnover of the target (including undertakings belonging to the same group) exceeded EUR 1 million in the Slovenian market in the preceding financial year; or* *c) In the event of the creation of a joint venture, the annual turnover of at least two participating undertakings (including undertakings belonging to the same groups) exceeded EUR 1 million in the Slovenian market in the preceding financial year.* *Even where these turnover thresholds are not met, the undertakings concerned should inform the Agency of the concentration, if a combined market share of the undertakings concerned exceeds 60 per cent in Slovenia, in accordance with Article 42 (3) of the Competition Act.*
Croatia	*A merger must be notified if the following thresholds are met:* *a) The combined worldwide turnover of all undertakings concerned was at least HRK 1 billion (approx. EUR 135 million) in the financial year preceding the concentration and at least one of the parties to the concentration has its registered seat and/or a branch office in Croatia* *b) The aggregate national turnover in Croatia of each of at least two undertakings concerned was at least HKR 100 million (approx. EUR 13.5 million) in the preceding financial year.*

According to the current statistics, the European Commission processes about 300 requests annually in relation to concentrations of relevance to the internal market (for example, in 2016, 12 merger notifications were filed in Greece, 102 in Spain, 23 in Slovenia). On the other hand, the SCA dealt with as many as 111 merger notifications in 2016, of which 109 were subject to summary proceedings. Such a large number of applications for concentration clearly indicates too low concentration thresholds, while on the other hand the fact that 90% of the same are approved in the summary proceedings shows that the SCA is overflowed with requests that have no effect on the Serbian market. Therefore, this is considered to be one of the most important issues to be addressed through the amendments to the Act, in order to unbind unnecessary bureaucracy on the one hand and focus on issues that are really relevant to our market, and on the other hand, this issue is tremendously important for entrepreneurs, as the current system of merger notifications imposes excessive costs and significantly delays the implementation of the intended business activities.

Having in mind the above, we suggest that Article 61 Paragraph 1 Item 1 reads as follows:

"***The concentration must be notified to the SCA in the event that: 1) the total annual worldwide turnover of all parties to concentration in the preceding financial year exceeds EUR 100 million, with at least one party to concentration on the Republic of Serbia's market having a turnover exceeding EUR 10 million and that the target i.e. part of the undertakings - parties to concentration exceeds EUR 3 million of turnover generated in the market of the Republic of Serbia".***

- **Merger filing, Article 63 of the Competition Act**

Article 63 of the Competition Act stipulates that merger notification shall be submitted to the SCA within the period of 15 days from the date of conclusion of an agreement or contract, announcement of public invitation, or offer or closing of public bid and acquisition of control. ***We propose to extend the deadline for merger notification of 15 days to a minimum 30 days, since in practice this deadline has proven to be short, given the scope of data and documentation that must be submitted with this notification.***

- **Decision in Merger Control Proceedings, Article 65 of the Competition Act**

Article 65 Paragraph 1 of the Competition Act stipulates that the SCA is obliged to make a decision on merger notification within one month from the date of receipt of complete notification (documentation). Article 65 Paragraph 4 of the Competition Act provides that if the applicant fails to supplement the incomplete notification upon SCA's request, the notification shall be rejected.

Therefore, the Competition Act stipulates that the SCA is obliged to make a decision on merger notification within one month from the date of receipt of the complete notification, but does not regulate in detail the procedure in case such notification is incomplete. We believe that it is necessary to specify the deadline in which the SCA is obliged to issue a request for supplementing the incomplete notification in order to avoid the situation in which the SCA for a long period of time, neither makes a decision on merger notification due to its incompleteness, nor issues a request for its supplementation, which could, in turn, lead to unnecessary procedural delays, contrary to the principle of procedural economy and, ultimately, interests of the parties to concentration.

For this reason, we propose that the Article 65 of the Competition Act is supplemented with the following paragraph: "***If it is established that a merger notification is incomplete in in accordance with this Act, the SCA will issue a request for supplementation of said notification***

within three days from the date of receipt of the notification. If the SCA fails to issue the order to the applicant within the prescribed deadline, the notification shall be deemed complete".

- **Measures for Protection of Competition, Article 68 of the Competition Act (according to which a fine of up to 10% of total annual of the undertaking's turnover generated on the territory of the Republic of Serbia may be imposed on an undertaking for a competition infringement)**

Article 68 of the Competition Act governs measures for protection of competition, and Paragraph 1 of this Article prescribes that an undertaking shall be imposed a measure for protection of competition consisting of an obligation to pay a fine which can amount to 10% of an undertaking's total annual turnover generated on the territory of the Republic of Serbia. Therefore, account is taken of the entire turnover, not just the relevant turnover as this is the case in the EU (the relevant turnover would only be a turnover that is directly or indirectly related to the competition infringement for which the measure is imposed). ***Bearing in mind the aforementioned, we believe that the current method of calculating the maximum amount of fines would need to be more precisely regulated***.

We consider that the maximum amount up to which the measure for protection of competition can be imposed is inadequate and that such sanction is too severe, given that it can lead to winding down of a significant number of companies in Serbia, even if they are imposed in the amount lower than the foreseen maximum. The CLLEA prescribes that the maximum amount of a fine that can be imposed on a legal entity for criminal offense is RSD 500 million. Thus, all legal entities with total annual turnover is over RSD 5 billion (approx. EUR 42 million) may be fined in competition proceedings by the SCA in the amount way ***above*** the general criminal maximum. The number of such legal entities operating in the Republic of Serbia, especially considering the provisions of the current Competition Act on affiliated undertakings on the market (Article 5) and the calculation of annual turnover (Article 7), is extremely high.

Having in mind the aforementioned criminal law regulations and the effects that the sanctioning by this amount would have on the economy of the Republic of Serbia and market participants, ***we propose to limit the maximum amount of fine that can be imposed in competition proceedings to the maximum amount prescribed by the relevant criminal law regulations.***

Measures of this kind are purely of criminal nature, therefore they can be imposed solely in criminal proceedings, with the application of all procedural guarantees prescribed for said proceedings.

In contrast, in proceedings before the SCA, any company with an annual turnover of over RSD 5 billion (approx. EUR 42 million), may, pursuant to Article 68 of the Competition Act, without any criminal procedural guarantees, be fined with an amount above the general criminal maximum, not by the court, but the SCA, as an administrative body. It is important to note that, according to publicly available financial statements, over 200 companies in the Republic of Serbia, i.e. half of the entire Serbian economy, currently belong to this group (i.e. companies with an annual turnover of over RSD 5 billion (approx. EUR 42 million) per year).

Therefore, it is important to note the following:

- The most severe sanctions in each legal system can be imposed only by the judiciary, and not by the administrative body;
- Decision-making by independent and impartial courts represents a fundamental guarantee for providing safe business environment. The lack of judicial decision-

making as a primary body on offences and fines has extremely adverse consequences on legal certainty and doing business.

In accordance with the Serbian legislation and the ECHR, as well as the case law of the ECtHR, the most severe sanctions in each legal system are reserved exclusively for criminal law, and such sanctions can be issued only by a criminal court. In terms of the criminal liability of legal entities in Serbian law, the CLLEA stipulates a general maximum sanction, and prescribes that the maximum fine that can be imposed on a legal entity is RSD 500 million.

On the other hand, the Competition Act stipulates a special maximum when it comes to measures that can be imposed by the SCA – they cannot exceed 10% of the overall annual turnover of the undertakings. Thus, the amount of the so-called Measure that can be imposed by the SCA depends on the business performance of a particular undertaking. In other words, in the event that the undertaking is operating successfully, the sanction prescribed by the Competition Act in so-called administrative proceedings may, in an absolute amount, easily exceed the general criminal maximum prescribed by the CLLEA.

Furthermore, the general purpose of prescribing and imposing criminal sanctions is to deter offences that violate or compromise values protected by criminal legislation[1], i.e. to achieve special and general prevention (deterrence). This results in a completely unjustified exclusion of entrepreneurs and other businesses from the general principles of criminal law.

The CC itself prescribes that the abuse of monopoly/dominance is a criminal offence which penalizes certain competition infringements (Article 232). The so-called Measures imposed by the SCA serve the same purpose and are aimed at deterring competition infringements, and achieving special and general prevention in relation to undertakings.

In this regard, Article 12 of the CPC prescribes that a criminal sanction can be imposed only by a competent court in criminal proceedings, and it is undisputed that a sanction consisting of the obligation to pay a fine which can amount to 10% of an undertaking`s total annual turnover generated on the territory of the Republic of Serbia, in terms of its severity, constitutes a criminal sanction, as stated above. Namely, one should always bear in mind the fact that, for undertakings with outstanding performance, the above amount can easily exceed RSD 500 million (approx. EUR 4.2 million), that is, the general *criminal* maximum fine that can be imposed on a legal entity as a criminal offence sanction, in accordance with Article 14(2) of the CLLEA.

We suggest that the decision under Articles 68 and 70 is not stipulated as final and enforceable, but to allow the possibility of appeal against it, with the obligation of the second instance body to act with the utmost urgency.

We believe that, on the one hand, this solution would balance the need for urgent protection of competition, and on the other, entail a two-instance decision-making for protection of rights of undertakings being the subject to such measures.

This would also prevent irreparable damage to market participants, which currently occurs in cases in which the Administrative Court, after a long decision-making process, nevertheless decides in favor of the market participants.

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

- **The proceedings to examine whether a competition infringement occurred are criminal in nature**

We are of the opinion that the competition infringement proceedings are criminal in their very nature. Therefore, it is necessary to reform them so as to include all procedural guarantees available in any other criminal proceedings.

Their criminal nature is clearly visible from similarities of the below discussed provisions of the Competition Act and those of the criminal statutes – the CC, CPC and the CLLEA.

Competition infringement measures regulated under the Competition Act are in essence criminal sanctions. The CC regulates the criminal offence of abuse of monopoly / dominance (Article 232), which is aimed at protecting competition on the market. Moreover, when it comes to the criminal liability of legal entities under Serbian law, the CLLEA provides for a general maximum fine, setting the maximum at RSD 500 million (approx. EUR 4.2 million). It is undisputable that competition infringements are criminal in nature given that a number of competition infringements regulated under the Competition Act are also explicitly defined as criminal offences, and that the perpetrators are also liable under the CC and the CLEA.

The SCA's Statement of Objections (SO) is essentially the same as a criminal indictment. Article 38 Paragraph 2 of the Competition Act regulates that the SCA shall, before rendering the final decision, notify the undertaking of all key facts, evidence and other circumstances which it will use as a basis for its decision. The undertaking shall be invited to respond to the SO. On the other hand, an indictment under Article 332 Paragraph 1 of the CPC has a very similar content: detailed description of the criminal offence in question, i.e. of all relevant facts, as well as a motion to introduce evidence. The indictment is also delivered to the accused for response.

The leniency program under the Competition Act is comparable to the cooperating defendant/witness in criminal proceedings. Article 69 of the Competition Act regulates that a party to a restrictive agreement, which is the first to notify the SCA of the infringement or voluntarily delivers evidence based on which the infringement is proved, shall be exempt from paying the pecuniary portion of the competition infringement measure (Measures). This concept is comparable to that of the cooperating defendant/witness. A plea bargain can be concluded with an accused who confessed that he committed a criminal offence, provided that his testimony is of sufficient importance for detecting, proving or preventing the criminal offence. On the basis of such a plea bargain, the accused may avoid sanction or full criminal liability.

Termination of proceedings (commitment decision) under the Competition Act almost mirrors the plea bargain mechanism in criminal proceedings. Article 58 of the Competition Act regulates the termination of proceedings before the SCA, and envisages that the SCA is authorized to terminate competition proceedings if the undertaking proposes measures to remedy the infringement. In that event, the SCA decides whether to approve such measures.

The amount of the Measure is determined on the basis of criteria from criminal law. Guidelines on Measures regulate that when determining the Measure, the SCA will consider the guilt of the undertaking. The amount of the Measure will increase if the undertaking committed the infringement with intent, while mere negligence is to be considered a mitigating circumstance. Moreover, recidivism will be considered an aggravating circumstance, even more so in the case of homogenous recidivism.

- **Procedural Penalty, Article 70 of the Competition Act**

Article 70 of the Competition Act stipulates that a so-called procedural penalty cannot exceed 10% of the total annual turnover. Therefore, the Competition Act does not stipulate explicitly that the maximum is 10% of the total turnover generated in Serbia. **Accordingly, we find it necessary to link the maximum amount of the procedural penalty with the turnover generated in Serbia and explicitly provide for this in the amendments.** Additionally, we are of the opinion that procedural penalties are **extremely high, ranging from EUR 500 to EUR 5,000 for each day of failure to comply with the SCA's request, for all market participants**.

We find the stipulated amounts of minimum EUR 500 to maximum EUR 5,000 extremely high and inadequate. Also, we consider inadequate to set the upper limit of procedural penalties to 10% of the total annual turnover.

We are of the opinion that the range of procedural penalties needs to be adjusted so as to match the financial power of the majority of local undertakings, thus we suggest a range from EUR 50 to EUR 500, with the upper limit of 2% of total annual turnover generated on the market on which the procedural penalty is being imposed.

- **Judicial Review of the SCA's Decisions by the Administrative Court, Articles 71-73 of the Competition Act**
  (according to which an appeal against the final SCA's decision may be filed within 30 days from the day the decision was delivered to the defendant, while the appeal does not postpone enforcement of the decision)

According to the Competition Act, the SCA is entrusted with broad powers, both investigative and 'judicial', given that it both decides on the existence of competition infringement and imposes (monetary) measures for protection of competition. This fusion of investigative and quasi-judicial function in one authority is not completely unknown in foreign jurisdictions, however, it represents one of the most disputed issues in the EU Competition law (*Menarini* case, ECHR No 43509/08), especially due to the much debated question of prosecutorial bias.

We find it absolutely reprehensible that the SCA, as an administrative body, has the remit to initiate proceedings, collect evidence and render a final, enforceable decision, acting as judge, jury and executioner, thereby directly violating the Constitution and the ECHR.

In order to safeguard the fundamental right to a fair trial, it is necessary to place the decision-making function within the exclusive jurisdiction of an independent court. We believe that by entrusting the SCA with an adjudicative function in competition matters, entrepreneurs and other undertakings are unjustifiably discriminated.

First of all, filing an appeal against a SCA's decision does not automatically suspend the enforcement of that decision, rather any suspension is left to the sole discretion of the SCA and the Administrative Court. Additionally, the 2013 amendments to the Competition Act repealed the provision binding the SCA to pay interest (from its own budget) in the event the amount of a measure for the protection of competition was reduced or abolished.

Second, although the Administrative Disputes Act provides for the possibility of full jurisdiction against the SCA's decisions, this option is rarely used in practice. Moreover, the possibility of

resolving administrative matters in full jurisdiction is very limited by the statute itself. Namely, only where the court finds that the disputed SCA's decision should be annulled, the court will make a decision on the merits, if the nature of the issue allows it, and if the established facts provide reliable grounds for the judgement to be rendered.

None of the abovementioned legal standards is regulated in more detail by the statute, but the interpretation thereof is entirely left to the Administrative Court. On the other hand, the Constitution, the ECHR and the binding case law of the ECtHR require that competition matters must be decided in full jurisdiction, whereby the administrative court cannot decide the opposite (all because of the extremely repressive nature and the level of sanctions in competition proceedings).

The above implies **that a competition infringement, being a criminal offence by nature, is almost exclusively determined by the SCA, as an administrative authority**, and not by an independent court.

Additionally, the SCA does not fulfil the requirement of impartiality within the meaning of Article 6(1) of the ECHR, since the SCA ***de facto and de lege*** **has a dual prosecutorial and judicial function**.

From all of the foregoing, not only does the authority deciding on competition infringements 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.

Even when a SCA's decision is reviewed in full jurisdiction, the court having jurisdiction to decide thereon is the Administrative Court, a court which 1) applies procedural guarantees that are significantly lower than those applied by a criminal court, and 2) is not competent to decide in complex competition law cases.

Also, we are of the opinion that the claim against the SCA's final decision that is filed to the Administrative Court needs to suspend enforcement of said decision.

Article 72 Paragraph 7 of the Competition Act stipulates that the Supreme Court of Cassation will decide on the extraordinary legal remedy within 3 months from the receipt of the response to said remedy, that is, 3 months from the moment the deadline for submission of such response elapses.

In the procedure before the court, in order to investigate the legality of the SCA's decision, the provisions of the law regulating administrative disputes are applied, while the Administrative Disputes Act provides for two extraordinary remedies: 1) a request for review of a court decision on which the Supreme Court of Cassation is to decide, and 2) reopening of the proceedings. Pursuant to Article 58 of the Law on Administrative Disputes, a lawsuit for reopening of the proceedings is decided upon by the court that made the original decision that is the subject to the reopening of the proceedings. The Supreme Court of Cassation is not in any case competent to decide on an extraordinary legal remedy.

Bearing in mind the foregoing, and for the sake of accuracy, we propose that in Article 72 Paragraph 7 of the Act, the term Supreme Court of Cassation be replaced by the competent court. Also, taking into account the specificity and importance of the subject of protection of competition, as well as the comparative legal regulations and practice, we consider that

specialized judicial panels should be formed, trained for decision-making in the field of protection of competition.

The Competition Act does not adequately and precisely regulate the possibility of filing a claim for compensation for damage caused by violation of competition law. Article 73 of the Act provides that the SCA is not competent to decide on the compensation of damages, but the competent court is. In addition, the existence of damage is not presumed, but the plaintiff must prove it in the judicial proceedings. The Act therefore does not explicitly stipulate that the SCA's decision establishing the infringement of competition is binding on the court which decides in the subsequent damages claim. If the court does not grant compensation to the claimant for damages due to violation of the competition right determined by the SCA's decision, the conclusion is that the SCA's decision has practically only a declaratory character.

The damage caused by the infringement of competition law often results in consequences that affect a large number of individuals and companies, and our legal system does not include appropriate procedural institutes that would regulate the participation of a large number of persons in litigation (collective lawsuit).

Bearing in mind all the submitted comments, suggestions and proposals of the SCC members on the application of the Law on Protection of Competition, we can conclude that the Austrian model is the most adequate for implementation in our legislation. Below we provide a brief overview of the Austrian model.

- **AUSTRIAN MODEL OF COMPETITION PROTECTION (RESTRICTIVE AGREEMENTS)**

The legal basis for cartel prohibition in Austria is the Cartel Act (Kartellgesetz 2005).

The Austrian law provides for specific laws for those areas which are regulated in our law by the Competition Law, and therefore there are the Austrian Competition Act, the Cartels Act, the Local Supply Act, the Unfair Competition Act, the Consumer Protection Authority Act, the Broadcasting Corporation Act, and direct application of EU acquis.

The biggest and most significant difference in relation to the Serbian Competition Act is the division between the investigative procedure and decision-making, competencies and powers of the Austrian Federal Commission for the Protection of Competition and Special Competence Courts specializing in the protection of competition (two-step decision-making), with the existence of a special prosecutor in charge of competition violations. According to this legislation, the competencies, powers and structure of the Federal Commission are regulated by a special law, which defines that the Federal Commission can participate as a party to judicial proceedings, to conduct a general investigation in cases of suspected infringement of competition rights, to provide aid, assistance and necessary information to courts, prosecutors, authorities and the European Commission, as well as to give opinions and propose legal framework concerning the competition law. Accordingly, the Federal Commission has the right to request information from legal entities, to request access to business documents, to copy them, as well as to search business premises, but only and exclusively with an accompanying court order.

The Special Prosecutor represents the public interest in matters of competition law before the courts. However, in some cases, the prosecutor does not initiate proceedings before a court, but only conveys his knowledge on the subject matter to the Federal Commission, which subsequently initiates them. Precisely due to the fact that in some segments there is no clear division of

competencies between these two bodies, there are tendencies for the institution of the special prosecutor to be abolished. This division of competencies contributes to the independence, impartiality and efficiency of proceedings, since the body conducting the investigation does not make a decision on the eventual violation of competition law, nor does it impose measures or penalties. The Federal Commission has the role of an investigative authority, and courts make decisions concerning the violation of competition law, with the imposition of measures and penalties.

The Higher Court of Vienna as the Cartel Court (*Kartellgericht*) and in second instance the Supreme Court as the Higher Cartel Court (*Kartellobergericht*), have exclusive jurisdiction to decide on violations stipulated by the Cartel Act.

The Cartel Court does not decide and initiate proceedings *ex officio*. The Federal Commission, the Federal Cartel Prosecutor, regulators of certain economic branches, the Chamber of Commerce, and any other undertaking or association of undertakings with legal or economic interest in a decision can report violations to the Cartel Court.

The Federal Commission is Austria's independent investigative authority and therefore files most of the petitions. The Federal Cartel Prosecutor represents the public interest in competition matters and is accountable to the Minister of Justice.

- **The basic procedural steps between the opening of an investigation and the imposition of sanctions**

The opening of an investigation is usually conducted by the Federal Commission. The Federal Commission – or any of the other authorized parties – files a petition to the Cartel Court. This petition can request the adoption of a decision to impose fines (if filed by the Federal Commission or the Federal Cartel Prosecutor) or request the determination of an infringement or issuance of court order to cease with the infringement. The Cartel Court then conducts the proceedings and files a court order or dismisses the petition. The parties may appeal this decision to the Supreme Court acting in capacity of the Higher Cartel Court (i.e. the highest court instance for cartel matters).

The submission of the appeal postpones enforcement of the decision of the first instance court.

- **Summary of general investigative powers:**

Request the delivery of specific documents or information	Yes*
Carry out compulsory interviews with individuals	Yes*
Carry out an unannounced search of business premises	Yes**
Carry out an unannounced search of residential premises	Yes**
Right to retain original documents	Yes**
Right to require an explanation of documents or information supplied	Yes**
Right to secure premises overnight (e.g. by seal)	Yes**

* The right of the parties to object to access to or the seizure of documents is limited. This is possible only if recognized confidentiality obligations and rights to refuse to give evidence under **the Criminal Procedure Act of Austria** could be violated.
** The investigative measure **requires court authorization or the authorization of another body independent of the competition authority**.

It is clear from the table provided above that the Federal Commission does not make the final decision on a competition infringement or the sanction, but its investigative powers are largely limited, both by procedural guarantees prescribed by the Criminal Procedure Act of Austria, as well as by the decision of the court or other independent body as a prerequisite for taking certain action.