

Competition Authorities as the Pillar of a Competitive Social Market Economy – a Case Study of Institution Building in Serbia

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Abstract The European economic model benefits from market forces as conditions for achieving goals of enterprises and consumers and economic efficiency is assured by necessary market infrastructure. Competition authorities are, without a doubt, one of the crucial pillars of the (social) market economy. The strength and impact of the competition rules is determined by their efficient implementation. The modest results to date of the competition policy in transitional economies militates in favor of an increase of the institutional capacity and require strengthening of the regulatory powers of public agencies in construction of an efficient economic system. Establishing a system of competitive markets through sectoral regulation, competition protection and state aid control at the national level requires a valid solution for a variety of legal, political and institutional conflicts. As the experience of the countries of South-East Europe has shown, many difficulties arising from the establishment of a functioning control system are procedural and relate to institutional building dilemmas. The purpose of this article is to shed light on the requirements the Republic of Serbia has to satisfy in accession negotiations, and in particular, those related to building an efficient system of state aid control.

Keywords: • social market economy • competition protection • state aid • institution building • Serbia •

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1 Introduction

The purpose of this article is to explain why institution building is a prerequisite for developing a workable competition protection regime in transition economies, notably in Serbia. The institutions, whose mission is to ensure the protection of competition, are critically important to ensure an effective and efficient system of enforcement of competition rules, and as such are one of the crucial pillars of the (social) market economy. The modest results to date of the competition policy in transitional economies are driving the need for an increase in the institutional capacity and require strengthening of the regulatory powers of public agencies in the construction of an efficient economic system. Establishing a system of competitive markets through sectoral regulation, competition protection, and state aid control at the national level, requires well-grounded solutions for a variety of legal, political and institutional conflicts. The strength and impact of the competition rules is determined by their efficient implementation, and that is why the establishment of competition watchdogs is an important element of EU *acquis* conditionality towards accession countries. The purpose of this article is to shed light on the requirements the Republic of Serbia has to satisfy in accession negotiations, both regarding the general framework of competition law, and in particular the difficulties in establishing a functioning system of state aid control.

The article starts with a general overview of the Social Market Economy as a concept and a model of the market system; its place in the founding acts of the EU; and, its ideological meaning. Essentially, the Social Market Economy as a concept implies “workable” competition as the foundation of the economic order and reliance on the market mechanism which, as such, has to be protected by the authorities. In view of the fact that significant experience in development aid has shown that strengthening administrative capacities and institution building is the key determinant in transition economies, it is necessary to identify the main issues in the institutional design of competition authorities. Therefore, before explaining how the process of stabilisation and association, as well as accession negotiations, motivated Serbia to build more efficient institutions, it first is necessary to scrutinize the main elements of the institutional design of a competition authority. Several aspects of the governance of authority, internal organization and the relationship with stakeholders are briefly explored in order to explain the main dimensions where the institutional capacities of Serbian institutions need to be upgraded. In particular, sections five and six of the article explore, respectively, the development of competition protection by the Commission for the Protection of Competition and the Commission for State Aid Control. Whereas the strengthening of the authority of the Commission for the Protection of Competition is undisputable, the challenge which remains is how best to upgrade the Commission for State Aid Control.

2 Social Market Economy and Competition Policy

The Social Market Economy (German: *Soziale Marktwirtschaft*), whose origins trace to the Freiburg school of economic thought (Müller-Armack, 1978; Glossner, Gregosz, 2011: 32), is a model of the market system which combines a free market capitalist economic system with social policies aiming to promote concepts of both fair competition

on the one hand and a welfare state on the other. This concept combines principles of liberalism and private entrepreneurship with state intervention through regulatory policy, in order to establish fair competition and to maintain a balance between economic growth, macro-economic policy prerogatives, public services and social welfare. Contrary to a free market economy model, under a Social Market Economy the state is not passive (i.e., laissez-faire) but instead actively implements regulatory tools in order to help ensure the framework of competitive markets (therefore it regulates to establish, protect and manage competition) and the performance of public services, among which services of general (economic) interest are crucial for the living standard and social welfare.

The Lisbon Treaty, which went into force in December 2009, among other things, was meant to strengthen the social aspects of European integration. The wording of Article 3 of the Treaty on European Union specified, as one of its objectives, to help promote “a highly competitive social market economy, aiming at full employment and social progress” (Damjanovic, 2013: 1685–1717). Centered on freedom of movement, over the years the integration has shifted towards deregulation and liberalization. However, the essence of the European economy should not be understood to focus just upon free and unfettered competition, but also on a competitive social market environment. Historically, the concept of “highly competitive social market economy” appeared for the first time in paragraph 3 of Article I-3 of the draft Constitutional Treaty.¹ This expression was conceived as a compromise between the advocates of the free market ideology, and those who favored the European social model, and had as a primary aim the connection between the economic and the social goals of European integration, as well as the EU efforts to ensure greater coherence between economic and social policies.² According to researchers, giving recognition to both social and economic interests, most likely was not intended to revert to the German economic policy after WWII. Instead, this phrase was borrowed as a possible compromise between the economic growth and competitiveness on the one hand, and the social-oriented redistributive measures on the other (Costamagna, 2011: 7).

According to some authors, the evolution of the European Union (EU) towards greater consideration of the social aspects of economic development occurred at the time when the then European Economic Community (EEC) slowly began to expand to Eastern Europe. This expansionary period symbolically dated from the adoption of (not binding) the Community Charter of Fundamental Social Rights of Workers in December 1989, followed by amendments to the primary law approved especially in Maastricht and Amsterdam, until the beginning of the new millennium when this process culminated in the Article I- 3 of the draft Constitutional Treaty (Šmejkal, Šaroch, 2014: 395). After the failure of its ratification, the expression was copied to Article 3(3) of the TEU.

This article of the TEU identifies seventeen goals, five of which could be described as market-oriented objectives: internal market; balanced economic growth and price stability; scientific and technological progress; and, the requirement that the social market economy (which already points to “market”) must be highly competitive. The other objectives are social and solidarity oriented, cultural and ecological. Articles 119–120 of the Treaty on the functioning of the European Union (TFEU)³ proclaimed several other

goals (stable prices, sound public finances and monetary conditions and a sustainable balance of payments) and directly refer to the implementation of Article 3 of the Treaty on the European Union (TEU) by the EU and Member States. In laying down the basic principles, “an open market economy with free competition”, is mentioned three times.

The social market economy, as a constitutional concept, is not as clear as other “objectives” or “goals” enshrined in the Treaty on the European Union. It lacks the explicit character, and instead represents a strategic approach towards the economic and social order. As such, it refers to market-compatible corrections of the free market, as opposed to a welfare state or a social union (Joerges, Roedl, 2004: 19). Contrary to this, the inclusion of the social market economy in the context of other social provisions of the Lisbon Treaty could eventually signify a limitation to further liberalization and deregulation measures within the internal market. This implies strengthening social rights on the one hand, while strengthening of the role of the State in fostering access to services of general interest, on the other. By way of example, the Treaty could include support measures which are not purely protectionist. In that sense, this Treaty “objective” of a social market economy could be interpreted as a potential defensive clause that should prevent the internal market from neoliberal tendencies. In short, the social market economy as a concept could be interpreted as a balancing of market freedom on the one hand and protected rights on the other.

However, the EU Court of Justice neither relies on the social market economy goal as an argument, nor defines it in its judgment, notably in cases related to competition on the market.⁴ The European Commission is more transparent in this regard, and explains the purpose of Article 3 (3) TEU as an expression of the need for balance and sustainability of Europe’s own model, based on two complementary pillars: “on the one hand, the enforcement of competition, and on the other, social policy measures to guarantee social justice by correcting negative outcomes and bolster[ing] social protection.”⁵By allowing the entry of market forces into what were formerly State monopolies, the model of a social market economy expands the scope of interplay between the free market competition and the requirement for protection of those social rights, which should not be summoned to economic efficiency. The concept of a social market economy therefore could be explained as a means to achieve the sustainability of organised welfare; a new element of a “workable” competition; and, as the foundation of the economic order which provides protections both from restrictions imposed by market operators and state power (Crane, Howenkamp, 2013: 252–281).

According to Monti, the term ‘social market economy’ “stands for reliance on the market mechanism. It is based on the experience that the market mechanism is the most efficient way to meet the demand from consumers for goods and services” (Monti, 2000: 2). In his speech, Monti further explained that Member states, by creating a single market in which the market forces are to yield a maximum of benefits to the European consumers, “agreed on strong rules to protect the market forces against restriction and distortion by the Member states – e.g. by state aids - and by the economic operators themselves.” He further argued that the Treaty strikes a balance between benefits from market forces, and the goal of social cohesion, notably in the area of services of general interest. Such

services represent a key element in the European model of society and promote social cohesion, for which public authorities at the local, regional and national levels bear the responsibility. That is the basis for the authorities to establish a number of specific service provisions to meet these needs in the form of service of general interest obligations.

The basic features of the impartial role of both the Treaty on the Functioning of the EU and the Treaty on the European Union is the neutrality with regard to the public or private ownership of companies and Member States' freedom to define services of general interest. On the other side of the equation, restrictions of competition and limitations of the freedoms of the Single Market should not exceed what are necessary to guarantee the effective fulfillment of the mission. In certain situations, particularly when market forces alone do not result in a satisfactory provision of services, public authorities may entrust certain operators of services with obligations of general interest, and where necessary, grant them special or exclusive rights and/or devise a funding mechanism for their provision. It should be stressed, however, that the EU has still not agreed upon the manner on which to "integrate public policy considerations in competition decisions" and numerous exceptions could be inferred from the evolving case law (Monti, 2007: 112).

3 The main issues in the institutional design of competition authorities

In post-communist economies, the indispensable features on the agenda of priorities for development policies and the transformation process include the following: regulatory framework; institutional capacity; transparency; and, the competence and accountability of public administration, including the local level authorities (Hodgson, 1998). Experiences in development aid show that strengthening administrative capacities and institution building is the key determinant in transition economies (Graham, 2002: 97). One of the chief obstacles to developing a social market economy in Serbia is the lack of administrative capacity. The following description of the current state of affairs in the development of a Serbian institutional framework of competition authorities will explain why more independent institutions deliver better results. However, before a case study of Serbia is explained, it is worthwhile to first discuss the main issues in the institutional design of competition authorities.

Transition countries have demanded guidance regarding the appropriate institutional design for the newly created competition institutions. The question of institutional independence is one of the key concerns. This apprehension is often voiced by foreign investors, who fear that competition authorities might be overly dependent on the national government or domestic dominant firms (Jenny, 2016: 2). As there are a growing number of examples, country experiences and variations, well-known competition specialists have prepared influential works regarding the design of competition authorities. A consensus has developed among these authorities that it is important for competition authorities to focus more attention on the relationship between the goals of competition law, agency effectiveness and their institutional design (Kovacic & Hyman 2012; Fox & Trebilcock, 2012).

It is difficult to define what “the institutional design of a competition authority” could mean, as there are many aspects of the governance of authority, internal organization and the relationship with stakeholders and the Government/Parliament. Therefore, a limited number of elements should be scrutinized as the basis for establishing the agenda for creation or upgrade of institutional capacities of bodies in charge of competition and state aid control. In this sense, the most relevant findings, based on reports by national authorities, are collected within the works of the OECD Competition Committee Roundtable on institutional design, and other OECD roundtables dedicated to the institutional features of competition authorities.

The institutional design of competition authorities may be grouped under three main themes: the goals of competition authorities; the functions of competition authorities; and, the organization of competition authorities (Jenny, 2016: 3). In 2003, the OECD observed that “the basic objectives of competition authorities were to maintain and encourage the process of competition in order to promote efficient use of resources while protecting the freedom of economic action of various market participants”. The OECD Global forum on competition noted that it is vital for competition policy to achieve or preserve a number of other objectives as well including: pluralism; decentralization of economic decision-making; prevention of abuses of economic power; promotion of small business; fairness and equity; and, other socio-political values.⁶

The second dimension of institutional design centers upon the question of the functions of competition authorities: namely, competition enforcement and consumer protection. Reports show that nearly half of the competition authorities of the OECD countries have consumer and competition law enforcement functions whereas the other half do not.⁷ However, the function of competition authorities could be extended to state aid, sector specific regulation. This diverse vision of goals may, however, deliver negative effects and undermine the primary goals of competition policy.

A third element of institutional design relates to the organization of the competition authority, notably its competences and independence. Within the category of competences or assigned functions, one of the most important issues is the nature of its powers: prosecutorial agencies or administrative models, investigation versus adjudication. An emerging issue for transition economies is to ensure the independence and management of independent competition authorities.

As it is difficult to detect departure from an economically justified interpretation of competition laws, it is particularly important to protect competition authorities from the risk of capture by the executive branch of government or by business interests. Thus, a more independent competition authority should help guarantee not only a better quality of decisions but also the implementation of competition law more in line with economic analysis and legal principles, limiting the risk that illegitimate goals will influence the decision making process (Jenny, 2016: 29).

As Philip Lowe, the former Director General of the Directorate- General for Competition stated in 2008 “In order to fulfil their role effectively (competition policy) institutions

must constantly assess and reassess their mission, objectives, structures, processes and performances. It is only through realizing and adapting to changes in their environment and through carrying out the corresponding improvement that their competences, powers, budget and ultimately existence can be justified before a wider public” (Lowe, 2008: 11).

4 European Integration process as an impetus for a competition protection institutions in Serbia

Since democratic changes started in the early 2000’s, and after a long and still ongoing process of transition to a market economy, the Serbian government strives to pursue fiscal, structural and regulatory reforms under an IMF program that runs to 2018.⁸ The Serbian road to the EU started in November 2000, when a “Framework Agreement between the EU and the Federal Republic of Yugoslavia (FRY)” was signed, enabling the EU assistance to political and economic reforms. The Stabilization and Association Agreement between the EU and Serbia was signed in April 2008.⁹ On December 22, 2009, Serbia applied for European Union membership. In March 2012, Serbia was granted a candidate status for EU membership. On June 28, 2013, The Council of the European Union decided to open accession negotiations with Serbia.¹⁰ As a candidate country, Serbia has to adjust its system of macro-economic governance in line with the requirements set out by the EU. Namely, the Enlargement Strategy of the European Commission suggested for the first time the creation of the European Semester Light, fostering the system of national economic planning in order to assist Western Balkan states with tackling economic reforms; restructuring their economies; and, stimulating growth and employment from the early stages of the accession negotiations. Therefore, Serbia, as well as other Western Balkan countries, is exposed to a double conditionality: democratic and *acquis* conditionality (Schimmelfennig & Sedelmeier, 2004).

For more than a decade, the reforms in Serbia were guided by neo-liberal doctrine and fostered by conditionality imposed primarily through international financial institutions such as the IMF. Privatization, liberalization and deregulation were the main pillars of the reforms, followed blindly by politicians who have made a great number of ill-advised decisions in setting transitional goals. After more than two decades of transition, a partocracy still dominates in assets, and the inefficiencies of the public sector of the economy have accumulated a large structural deficit which have led to massive public debt. Drafted on the basis of the Guideline on National Reform Programs issued by the European Commission, Serbia’s Economic Reform Program (a three-year planning document), among other issues, focuses on steps that need to be taken to ensure the completion of the privatization and restructuring of the public companies; the reduction of the state’s share in the economy; and, the strengthening of competition. In sum, institutional building of the competition authorities is crucial for speeding up economic growth and progress.

5 Building the capacity of the Serbian Commission for Protection of Competition

Less than four years following the enactment of the first Law on Protection of Competition in Serbia,¹¹ a second law regulating the same subject matter has been enacted,¹² and was amended in 2013.¹³ The independent competition authority first formed under the old law, the Commission for Protection of Competition (“Commission”) made huge gains politically and morally, in a business culture based primarily on collaboration rather than competition (Jovanić & Milutinović, 2010: 79–106).

The first Anti-monopoly Commission was established pursuant to this Law in 1999. Practically speaking, the implementation of this law had been postponed until the Anti-monopoly Commission was established. The Anti-monopoly Commission was established as an administrative body of a collective nature, attached to the Federal Ministry for Internal Trade of the former Federal Republic of Yugoslavia. The President and six members were subject to both appointment and dismissal by the Federal Government. Therefore, the Anti-monopoly Commission was not considered to be an independent and autonomous entity but, rather, an administrative organ of the State administration. The Anti-monopoly Commission also included a Technical Service and was entrusted, *among other things*, with issuing decisions regarding the abuse of monopolistic and dominant positions and the evaluation of the existence of monopolistic agreements. Overall, due to many unsolved material issues and procedural difficulties, the first Anti-monopoly Commission was practically inoperable. It ceased its activities on February 4, 2003, when the Constitutional Charter of State Union Serbia and Montenegro came into force. However, it continued to exist as the state administrative body of the Republic of Serbia and its Technical Service was taken over by the Ministry of Trade, Tourism and Services of the Republic of Serbia, and it is within that structure that it continued to operate as the Anti-monopoly Department.

The Law on Protection of Competition of 2005 established the Commission for Protection of Competition (“Commission”) as an independent and autonomous legal entity entrusted with public competencies, accountable to the National Assembly. The Commission was established in April 2006, upon the election of the President and Vice-President of the Council of the Commission for Protection of Competition, as its decision-making body. Initially, the operating staff of the new Commission was comprised mainly of members from the old Anti-monopoly Department of the Ministry of Trade, Services and Tourism.

As emphasized in Article 20 of the new Law on the Protection of Competition, the Commission for Protection of Competition has the status of a legal entity and was established as an “independent and autonomous organization entrusted with public powers”.¹⁴ However, the institutional capacity of a regulatory body should be judged not only through the prism of its independence, but also by its responsibility; and not only by those institutions to whom it is responsible by law, but also by consumers, market and the society as a whole. The Commission is accountable to the National Assembly. The

primary instrument establishing its accountability is its annual report of activities submitted to the Assembly.

The Commission is comprised of decision making bodies and the Experts' Service charged with professional activities. Its internal organization and operational rules are set forth in its Articles of Association, which are rendered upon prior consent of the Government. Decision making bodies of the Commission are the Council of the Commission and the President. The Council, which consists of the President of the Commission and four members, is a major decision-making body, authorised to render all the decisions for which the Commission is competent. Contrary to the former Law on the Protection of Competition, which stipulated that the Council should make a decision on the basis of the majority votes of the present members, if at least three members were present, the new Law stipulates in Article 25(1) that the Council shall render the decision by the majority of votes of the total number of its members.

Members of the Council are elected from among prominent lawyers and economists. A Council member must fulfill certain requirements *ad personam*, pertinent to performing public service. Personal independence is one of the components of the institutional independence which stems from political independence. Of paramount concern is the independence of the managing bodies of the regulatory agency. Guarantees of personal independence are clear criteria for appointment and dismissal of the members of the managing body. Council members, including the President, are appointed for a period of five years, with the possibility of reappointment. Strict conditions for the appointment and dismissal of the President and members of the managing bodies of the regulatory agency help to insure their personal independence. The mandate of the Council member terminates by expiry of the term for which he was appointed; relief of the duty due to the reasons stipulated by the Law; or, the existence of legal or factual reasons which make him unable to perform his duties. Further, the Council of the Commission and/or the National Assembly may relieve the member of the Council from the office in stipulated cases, namely those commonly present in the comparative law.¹⁵ The reasons for termination of the mandate of the President of Commission and the Council Members are clearly stipulated in the Law on the Protection of Competition, and include all legal or factual reasons for inability to perform duties, such as resignation, statutory retirement age, serious health conditions, etc. A member of the Council may be dismissed by the National Assembly should it be reasonably determined that information in the candidacy was inaccurate, incomplete or could have in any way reduced the possibility of the member being elected; in cases where a gross violation of the Law or Code of Ethics is established; when a conflict of interest is established; and, when a member of the Council was actively engaged in affairs of a political party or performed other functions or professional activities for profit, including consulting and advisory services, etc. To conclude, personal independence cannot be limited to competence to elect Commission's management, but that it is primarily linked to guarantees of the continuity of the performance of their activities.

Funding for the operation of the Commission is derived in numerous ways including fees charged for its administrative acts, donations and income realized by sale of its

publications. The amount of fees paid to the Commission is determined by the Commission's regulation on Tariff,¹⁶ which may come into force only upon prior consent of the Government. Financial activities and financial statements of the Commission are subject to audit by the State Audit Institution. If the annual financial statement shows that total realised income of the Commission exceeds total expenditures, the residual funds shall be transferred into the budget of the Republic of Serbia. Conversely, should the income be insufficient and the regular activities of the Commission jeopardized, the Law has foreseen the possibility of allocating funds from the budget of the Republic of Serbia (Article 32).

The Commission does not consider itself as a “regulatory body” such as agencies established to regulate telecommunications, the energy sector and the other public utilities. These agencies address irregularities in the functioning of the market caused by lack of competition and apply regulatory measures (e.g. price controls, conditions of performing business, licensing etc). The Commission independently monitors all these sectors and the overall market, with the main goal being to preserve and strengthen competition. Accordingly, its activities may overlap with the activities of regulatory agencies. As an instance of last resort, the Commission shall take necessary action when a regulatory agency fails to implement the measures from its competence, by sanctioning the behaviour of market participants that inhibits the competition in the regulated sectors.

During the last few years, the trend of agencification has stimulated the establishment of agencies as quasi-administrative bodies in the domain of Serbian governance structure (Milenkovic & Milenkovic, 2013). These agencies, established under various laws, differ among themselves in terms of their status and organisation. By enacting the Law on Public Agencies in 2006, the legislator has attempted to create a unifying framework for these quasi-administrative subjects which perform developmental, professional and regulatory tasks of a general interest. While the establishment of an agency is proposed by the ministry or the ministries in whose domain the operations to be transferred to the agency lie, the government exercises the rights of the founder in the name of the Republic of Serbia. Agencies are not considered to be organs of the state administration, but instead “organizations which perform public interest activities” (Law on Public Agencies, article 1). The supervision of the execution of conferred administrative authorities is exercised by the ministry into which field of competences those authorities belong, while their financial operations are supervised by the Ministry of Finance.

Both the Commission for the Protection of Competition and the Securities Commission are established by law as independent and autonomous entities, like the National Bank of Serbia (‘NBS’). The status of the NBS, as the central bank, is, in principle, higher than that of other organisations, as its existence is guaranteed by the Constitution, which, in its Article 95, provides that the NBS is independent and subject to the control of the National Assembly. Although they do not enjoy the NBS's “constitutional status as “organisations“ both the Securities Commission and the Commission for Protection of Competition are not administrative organisations which belong to the classic administrative apparatus, nor are they public agencies. As the Law on Public agencies is

not directly applicable to them, it seems that these two Commissions are in a vacuum between public agencies and the NBS, as an independent state entity.

Finally, regarding the relationship between the Commission and other agencies and autonomous entities, the new LPC introduced, in its Article 49, new rules for cooperation between the Commission and other “public authorities.” All other public authorities, whether state or local, must respond to a request for information from the Commission. If they fail to comply, the Commission has the right to report the non-compliance to the public authority’s supervising body (usually a Government Ministry in the case of agencies). If failure to comply persists, the Commission ultimately has the right to publish information regarding such non-compliance. The legislator thus stopped short of providing outright legal sanctions for failure to cooperate with the Commission but sought, instead, to make non-cooperation a public issue and something that the responsible public authority is called upon to *justify* in the eyes of the public and of the state apparatus.

6 Challenges of reforming the institutional framework of state aid control

The Serbian government adopted the Plan for the Implementation of Priorities Contained in the European Partnership in 2006. The adoption of a law on control of State aid was one of its priorities. State aid, together with the competition law related issues, was one of the most important issues considered during the negotiation of the Stabilization and Association Agreement (SAA) and of the accession process. Further, in the text it will be explained why the system of state aid prevented opening of the Chapter 8 in accession negotiations.

Serbia's first-ever Law on the Control of State Aid came into force on January 1, 2010.¹⁷ It was, again, a result of a conditionality of *acquis* harmonization, as one feature of the national systems of state aid control which appeared throughout the 1990’s in the European countries that had applied for membership in the European Union. For Serbia and other Western Balkan countries, the requirements for establishing the system of state aid control were stipulated in the SAA. As Cremona (Cremona, 2003) rightly points out, this agreement is the main instrument through which the European Union seeks to ensure acceptance of the rules of the common market from the countries that are potential candidates for membership. Establishing a system of state aid control at the national level presupposes a number of legal, political and institutional conflicts. Experience of the CEE countries shows that many difficulties arising from the establishment of a functioning control system are procedural in their nature (Atanasiu, 2001: 263, cited in Milenkovic, 2016: 36).

By signing the SAA, Serbia accepted the institution-building for state aid assistance and a duty to develop a functioning system of state aid control in line with Article 73 of the SAA (“Competition and other economic provisions”). According to the SAA, the parties shall ensure that an operationally independent authority is entrusted with the powers necessary for the full application of paragraph 1(i) and (ii) of this Article, regarding private and public undertakings and undertakings to which special rights have been

granted. It is also envisaged for Serbia to establish an operationally independent authority which is entrusted with the powers necessary for the full application of paragraph 1(iii) within one year from the date of entry into force of this Agreement. This authority shall have, *among other things*, the powers to authorize State aid schemes and individual aid grants in conformity with paragraph 2, as well as the powers to order the recovery of State aid that has been unlawfully granted.

The Community, on the onehand, and Serbia, on the other, shall ensure transparency in the area of State aid, *among other things*, by providing to the other parties a regular annual report, or the equivalent, following the methodology and the presentation of the Community survey on State aid. Upon request by one party, the other party shall provide information on particular individual cases of public aid. Serbia shall also, according to SAA, establish a comprehensive inventory of aid schemes instituted before the establishment of the authority and shall align such aid schemes with the EU criteria within a period of no more than 4 years from the entry into force of that Agreement.

The requirement to develop an “operationally independent” body leaves open the option to a prospective member state to adjust the setting to its respective administrative systems and traditions. On the other hand, the standard of “operational independence” is not defined by law but rather is being gradually interpreted by the European Commission (European Commission, 2014).

In its Screening Report of November 2015, the European Commission, assessing the alignment and implementing capacity, has stressed that a key challenge for Serbia will be to strengthen its administrative capacity and to develop a solid enforcement record, in particular in the area of State aid (European Commission, 2015: 10).

“Overall, Serbia has broadly aligned its national legislation with the EU acquis on antitrust and merger. Serbia's legislation in the area of State aid is only partially aligned. A key challenge for Serbia will be to strengthen its administrative capacity and to build up a solid enforcement record, in particular in the area of State aid.” ... „The capacity and enforcement record of the CSAC [Commission for State Aid Control] and its Department are largely insufficient. The CSAC urgently needs further qualified staff, in order to establish a good enforcement record. The CSAC cannot be considered as an operationally independent authority within the meaning of Article 73(4) of the SAA, since most of its members are nominated by aid granting ministries, and since the Department for State Aid Control, which assists the CSAC in investigating State aid and preparing decisions, is part of the Ministry of Finance. The knowledge of civil servants and administrative staff employed in other ministries and aid granting bodies dealing with State aid issues is not sufficient and needs to be strengthened” ... “The Commission notes that a certain number of aid measures are not notified to, and approved by the CSAC before being granted. Serbia needs to urgently improve its enforcement record in the field of State aid.” (European Commission, 2015: 10 and 14)

The Commission has defined six benchmarks, all of them related to the State Aid, to be addressed before the negotiations of the chapter 8 are opened, particularly in order for

Serbia to ensure “that the State aid authority is operationally independent and that it has the powers and the resources necessary for the full and proper application of State aid rules.”(European Commission, 2015: 15)

Therefore, the European Commission expects Serbia to make significant progress in aligning its legislation on state aid control with the *acquis* and to make the Commission for State Aid Control more independent and effective.

Building a system of state aid control requires the implementation of several steps. The first is to establish an inventory in terms of internal evaluation of everything that the government makes at various government levels. The next is to create a monitoring system to oversee the changes in the coming years relating to the basic inventory. The third step requires mapping in the sense of determining the level of development of regions, which should provide that the maximum amounts of certain types of state aid will be approved only to certain parts of the country. The final step involves the introduction of national measures of state aid control in accordance with the EU principles and *acquis* into national structures (Stojanović, Stanišić, Radivojević, 2013: 169).

There are two aspects to consider when evaluating the results Serbia has achieved in the establishment and implementation of the system of state aid control. One is institutional, in the sense of providing the necessary legal framework and capacity for the implementation of the law on state aid control. The other aspect is practical, in terms of analysis of effects that implementation of the law and the work of the Commission of state aid control have. While Serbia's progress in institutional terms is self-evident, the evaluation of the effectiveness of state aid control in practice may be undertaken both through a comparative analysis of the granted state aid in Serbia towards the EU, in absolute terms, and also by comparison of the objectives of granting state aid. The authority that controls State aid must be independent in order to be able to make objective decisions authorizing aid schemes and executing their applications. Particularly, this means that “the authority cannot be dependent upon the organs of administration engaged in the granting process, nor upon the beneficiaries of State aid.” (European Commission, 2015: 15)

The members of the Commission for State aid control were appointed in December 2009 according to the Law by a Decision of the Government. By virtue of the law, no aid may be granted without a prior decision by the Commission. Serbian legislators opted for a hybrid solution by forming an independent commission entrusted with control tasks, but without a separate budget or administrative capacity. This body was entrusted with controlling State aid measures until Serbia's prospective accession to the European Union, when this obligation will cease to exist, and the power to scrutinize State aid measures will be transferred to the European Commission. However, this approach has demonstrated some weaknesses to which European Commission Reports have pointed as outlined above.

The Commission has no separate legal personality, and no budget or separate administrative capacities, but rather, is served by the Ministry of Finance (Department

for State Aid). Members of the Commission are proposed by relevant ministries, with one member from the Commission for Protection of Competition, appointed for a five-year period pursuant to the decision of the government. This institutional design makes the Commission too dependent on the Ministry of Finance. Other State aid grantors evidently weakened the standard of operational independence as outlined above (Milenkovic, 2016: 36–37). The Commission has five members and is established by the Government.¹⁸ The Commission is charged with adopting its rules of procedure and is explicitly defined as “operationally independent”. The Commission has no separate budget; rather, the Law prescribes that funds for the activities of the Commission shall be provided from the budget of the Republic of Serbia, and that the Ministry of Finance provides the premises and other technical requirements for the activities of the Commission. The current secretariat is based in the Ministry of Finance within the Department for State Aid.

In 2000, Slovenia had established the Commission for State Aid Control, by virtue of the same legal act the State aid control section was established, to conduct “specialist, administrative and technical tasks for the Commission” within Ministry of finance/economy (Jagodic Lakocevic, Pelka, Vosu, 2004). Due to the close cooperation between colleagues from Serbian and Slovenian ministries of Finance, this model had been used for composition of Serbian CSAS. Upon entry into the EU, the Commission ceased to exist and remaining national competences were transferred to the Ministry of finance.

The benchmark of the screening report requires a reform of the institutional status of the Commission, which may go in two directions: strengthening of the institutional capacity of the Commission, or the merger with/aquisition by the Competition Commission. In the first case, some legislative changes would have to be introduced, such as gaining a distinct legal personality; having a separate budget; having personal independence guarantees; and, adding more administrative staff. Limiting factors, however, are the austerity policy and fiscal stance, which, along with other limiting factors, assume the reduction in the number of civil servants. In the second case, financial concerns would be solved as the Competition Commission has financial independence, along with a record of independence. Experienced staff could join the special department or sector of the Competition Commission. Although at first blush this looks like an appealing solution, on closer examination there are practical difficulties of integrating those functions within an agency. For example, there is the potential for one mission to dominate the other to the detriment of both; a lack of clarity of purpose of the agency, resulting in diminished support for the agency’s overall mission; and, the potential for “destructive rivalry” between the competing missions within an agency for prestige, headcount, and budgetary resources (Kovacic & Hyman, 2013: 38).

Apart from the above two models, a rare institutional solution may be adopted. Namely, Slovakia and Cyprus created the bodies with the great extent of independence and in charge solely with state aid control. Slovakia established the Office for State Aid in 1999¹⁹ which was a separate agency for state aid control. In Cyprus, a specific model of state aid control was introduced during the EU integration process in 2001 and the body

entrusted with the tasks of controlling state aid measures was the Office of the Commissioner for Public Aid.²⁰

7 Conclusion

Competition authorities are, without a doubt, one of the crucial pillars of the (social) market economy. The strength and impact of the competition rules is determined by their efficient implementation. That is why the building of competition watchdogs is an element of EU *acquis* conditionality towards accession countries.

Establishing a system of competitive markets through sectoral regulation, competition protection and state aid control at the national level, requires a valid solution for a variety of legal, political and institutional conflicts. As the experience of the countries of South-East Europe has shown, many difficulties arising from the establishment of a functioning control system are procedural and relate to institutional building dilemmas. The purpose of this article was to give some historical overview of the creation of competition protection institutions and the requirements the Republic of Serbia has to satisfy in accession negotiations, in particular those related to building an efficient system of state aid control.

The development of the system of state aid control, as the field of competition policy, is an important segment of the pre-accession commitments of the countries in the process of integration into the European Union. The obligation of building a system for the Western Balkan countries was created by signing the Stabilization and Association Agreement. The comparative legal analysis showed that there is an inverse correlation between the level of development of the system of state aid control and the potential time required to obtain the status of a full member of the European Union (Milenkovic, 2016).

Notes

¹Official Journal of the European Union C 310 Vol 47, December 10, 2004.

²Final Report of Working Group XI on Social Europe CONV 516/1/03, Brussels, 4 February 2003, p. 12.

http://www.europarl.europa.eu/meetdocs_all/committees/conv/20030206/cv00516-r1.en03.pdf

³Title VIII TFEU “Economic and monetary policy”.

⁴For an overview see: Šmejkal (2015).

⁵Andor, L., *Building a social market economy in the European Union*. EU Commissioner responsible for Employment, Social Affairs and Inclusion, speech 11/695, 2011. Manchester, 20th October.

⁶OECD Global Forum on Competition 2003, Session I “ The objectives of Competition Law and Policy, available at www.oecd.org/competition/globalforum/GlobalForum-February2003.pdf; Note by the Secretariat, The objectives of Competition Law and Policy, OECD Global Forum on Competition 2003, available at www.oecd.org/competition/globalforum/GlobalForum-February2003.pdf

⁷Note by Allan Fels and Henry Ergas, Institutional Design of Competition Authorities, OECD Competition Committee, 17-18 December 2014, Doc DAF/COMP/WD(2014)85, available at <http://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm>

⁸GDP Annual Growth Rate in Serbia averaged 2.81 percent from 1997 until 2016.

⁹The Agreement entered into force on 1 September 2013. Stabilisation 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 RS-International Agreements”, No. 83/2008) signed on 29.4.2008.

¹⁰The First Intergovernmental Conference took place on 21 January 2014.

¹¹Official Gazette of the Republic of Serbia No. 79/05. The old LPC was the first EU-style competition law in Serbia. Prior to that, there was the Antimonopoly Law of 1996, which was flanked by isolated provisions in the Law on Obligations of 1978, the Yugoslav Constitution of 1992 and the Serbian Constitution of 1990, which prohibited the creation of monopolies/monopolistic positions.

¹²Law on Protection of Competition (Official Gazette of the Republic of Serbia No. 51/09

¹³Official Gazette of the Republic of Serbia No. 95/13.

¹⁴Law on Protection of Competition, Article 20(1).

¹⁵Law on Protection of Competition, Article 24(4).

¹⁶Tariff on the level of fees for activities within the competency of Commission for Protection of Competition, Official Gazette of the Republic of Serbia, No. 49/2011.

¹⁷Official Gazette of the Republic of Serbia, No 51/09.

¹⁸Its members are elected by the Government upon the proposals of: the ministry responsible for finances; the ministry responsible for the economy and regional development; the ministry responsible for infrastructure; the ministry responsible for environmental protection; and the Commission for the Protection of Competition. The representative of the ministry responsible for finances is, at the same time, the Chairperson of the Commission, and the representative of the Commission for the Protection of Competition is the Deputy Chairperson.

¹⁹Law No.231/1999.

²⁰Public Aid Control Law (Law 30(I)/2001), www.publicaid.gov.cy/

References

Andor, L. (2011) Building a social market economy in the European Union. Speech 11/695, 2011. Manchester, 20th October.

- Atanasiu, I. (2001) State Aid in Central and Eastern Europe, *World Competition*, 24 (2), pp. 257–283.
- Costamagna, F. (2011) The Internal Market and the Welfare State after the Lisbon Treaty, Research Paper Observatoire social européen, No. 5.
- Cremona, M. (2003) State Aid Control: Substance and Procedure in the Europe Agreements and the Stabilisation and Association Agreements, *European Law Journal*, 9(3), pp. 265–287.
- Crane, D.A., Hovenkamp H. [ed.] (2013) *The making of competition policy. Legal and economic sources*, (Oxford: Oxford University Press).
- Damjanovic, D. (2013) The EU Market Rules as Social Market Rules: Why the EU can be a social market economy, *Common market Law Review*, 50(6), pp. 1685–1717.
- Fox, E.M., and Trebilcox, M.J. (2012) The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project, *New York University Law and Economics Working Papers*, 8-1-2012.
- Glossner, C. L.; Gregosz, D. (2011) The Formation and Implementation of the Social Market Economy by Alfred Müller-Armack and Ludwig Erhard (Berlin: Sankt Augustin).
- Graham, C. (2002) Strengthening Institutional Capacity in Poor Countries: Shoring Up Institutions, Reducing Global Poverty. *Brookings Policy Brief Series*, April 2002, pp. 97–99.
- Hodgson, G. (1998) Institutions and the viability of macroeconomics: some perspectives on the transformation process in post-communist economies, *Journal of Institutional Innovation, Development and Transition*, 2, pp. 5–18.
- Jagodic Lekocevic L., Pelka, P., Vosu, A. (2004) Future Role of the Former National Monitoring Authorities and Existing Aid in Slovenia, Poland and Estonia, *ESTAL*, 3(3), pp. 375–384.
- Jenny, F. (2016) The institutional design of Competition Authorities: Debates and Trends, January 2016, <https://polcms.secure.euoparl.europa.eu/cmsdata/upload/e557fdce-07bc-44f5-8a8d-8cad9081803b/Frederic%20Jenny%20The%20institutional%20design%20of%20Competition%20Authorities.pdf>
- Joerges, C. and Roedel, F. (2004) Social Market Economy as Europe’s Social Model? *EUI Working Papers Law*, No. 8.
- Jovanić, T. and Milutinović, V. (2010) „Serbia's New Law on Protection of Competition: Innovations and Challenges for a Young Competition Regime“, *Comparative Law Yearbook of International Business*, 32, Kluwer Law International, pp. 79–106.
- Lowe, P. (2008) The design of competition policy institutions for the 21st century- The experience of the European Commission and DG Competition, *Competition Policy Newsletter*, No. 3, 11. http://ec.europa.eu/competition/publications/cpn/2008_3_1.pdf
- OECD, Global Forum on Competition 2003, Session I “The objectives of Competition Law and Policy, Note by the Secretariat, The objectives of Competition Law and Policy, www.oecd.org/competition/globalforum/GlobalForum-February2003.pdf Kovacic, W.E. and Hyman, D.A. (2012) Competition Agency Design: What’s on the menu, *GWU Legal Studies Research Paper n°2012–135*.
- Milenkovic, M. and Milenkovic, M. (2013) Administrative Reform and Debates over Public Agencies’ Role in Serbia”, *Belgrade Law Review*, 61(3), pp. 135–150.
- Milenkovic, M. (2016), EU integration and the introduction of State aid control in Serbia: Institutional challenges and reform prospects, Discussion Paper, Europa-Kolleg Hamburg, Institute for European Integration, No. 1/16.
- Monti, G. (2000) Speech by Commissioner at the Conference of the European Parliament and the European Commission on ‘Reform of European Competition law’ in Freiburg on 9/10 November 2000.
- Monti, G. (2007) *EC Competition Law* (Cambridge: Cambridge University Press).
- Müller-Armack, A. (1978) The Social Market Economy as an Economic and Social Order, *Review of Social Economy* 36(3), pp. 325–331.

- Schimmelfennig, F. and Sedelmeier, U. (2004), 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe', *Journal of European Public Policy*, 11(4), 661–679.
- Stojanović, B., Stanišić, T., Radivojević, V. (2013) State Aid Control: Theoretical Aspects and Empirical Evidences, *FactaUniversitatis, Series: Economics and Organization*, 10(2), pp. 165–177.
- Šmejkal V., Šaroch S. (2014), EU As a Highly Competitive Social Market Economy – Goal, Options, and Reality, *Review of Economic Perspectives*, 14(4), pp. 393–410.
- Šmejkal, V. (2015) Competition law and the social market economy goal of the EU, *International Comparative Jurisprudence*, 1(1), pp. 33–43.