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ROLE, SIGNIFICANCE AND ENFORCEMENT OF COMPETITION LAW IN SERBIA AS A SMALL MARKET ECONOMY

Višedecenijska je praksa da zemlje u razvoju uvode u svoje pravne sisteme pravo konkurencije kao alat u pro-tržišnim reformama i liberalizaciji istog. Ipak, sva ta mala tržišta u razvoju, kao i Srbija medju njima, moraju imati u vidu da pravo konkurencije koje one uvode u svoj sistem mora biti prilagodjeno njihovim posebnim tržišnim okolnostima, te samim tim imati i posebnu funkciju i značaj. Takodje efikasno pravo konkurencije podrazumeva efikasnu primenu koja ne postoji ukoliko se odredjeni uslovi prethodno ne ispune. Iz tog razloga važno je kritički osvrnuti se i na ulogu i položaj Komisije za zaštitu konkurencije, s obzirom da je ona osnovno telo zaduženo za primenu antimonopolskih normi, te predstaviti moguća rešenja za poboljšanje situacije u toj sferi. Dakle, Srbija kao zemlja u tranziciji sa jasnim strateškim ciljem predstavlja ekonomiju malog tržišta čije će pravo konkurencije biti uspešno i efikasno jedino ako bude bilo konstituisano u saglasnosti sa svojim osnovnim tržišnim karakteristikama.

Ključne reči: zemlja u razvoju, ekonomija malog tržišta, pravo konkurencije

Introduction

Self- regulating agreements, social deals and the so-called economy of controlled market conditionally represent in Serbia economic categories of past. Market conditions of economic activity represent new global platform on which will be built fresh economic, national and multi-national world of free market. Almost everyone introduced with legal framework of competition claims that the only goal of Antitrust Law is promotion of economic welfare encountered as an economic concept of efficiency. This exactly is the goal of transition in Serbia launched in year 1990

and still going on today. In this paper will be illustrated close relation between Serbia's economic reality, being a small market, and competition legislation in reforming frameworks of economic activity.

In the beginning of this article I shall try to explain why does contemporary Serbia need EU Competition Law as a role model for efficient institutional update in the scope of antitrust and what role this branch of law should undertake in Serbian legislative framework. Further on, I shall also indicate which are the goals of antitrust policy in Serbia and which conditions must be satisfied in order to secure its effective enforcement. Moreover, it will be given a broader insight into the legal position of the Commission for Protection of Competition, as a unique regulatory body under control of the National Parliament. It will be emphasized what are the merits and flaws of this authority and as well what needs to be done in order for the Commission to be granted with unleashed hands in Competition Law application.

The conclusion will summarize all the findings presented during my elaboration on this topic.

Serbia as A Small Market Economy

In order for readers to better understand the whole concept of small market economy and therefore the significance of Competition Law in such economy I shall give a short overview of its most important characteristics. According to M. S. Gal **" A small market economy is an independent sovereign jurisdiction that can support only a small number of competitors in most of its industries, when catering to demand"**[1]. It is necessary to add that there is no numerical standard distinguishing small economies from the large ones. Some of them like Faro Islands have only 40 000 inhabitants, while New Zealand has 4 million and Serbia approximately 9 million. But one is the same for all of them, and that is the smaller the economy the more concentrated its industries are likely to be. Moreover, main characteristic of all small economies is the monopoly and oligopoly structure in most of their industries[2]. Main factors that influence small market economy are: population size, the height of trade

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[1] M. S. Gal, "The Effects of Smallness and Remoteness on Competition Law- The Case of New Zealand", New York University, November 2006, p.3

[2] *Ibid*

barriers and population dispersion. However, not all of these factors are present in Serbia. Small population, (being present in Serbia as a seven million inhabitants country) decreases the overall demand and reduces the number of companies that can effectively serve the market. Population dispersion is not present in the case of Serbia, but generally it can have a significant impact in creating several small local markets as in the case of Australia[3]. Another factor characteristic for small market economies is the height of its artificial and natural trade barriers. In the case of Serbia, I would say that government-made barriers are far more present than natural ones, taking into consideration that Serbia being a European country is still not even a candidate for accession to the EU. So, we san say that only artificial trade barriers are currently present in Serbia.

Apart from the main factors influencing small market economies there are as well their main characteristics: high industrial concentration levels, high entry barriers, and inefficient levels of production[4]. These characteristics are the echo of the main small market flaws - the large size of minimum efficient scales of production relative to demand[5]. One of the main characteristics of small economies is the high industrial concentration level. Industrial concentration represents an industry determined by the number of firms existing in it. What usually leads to industrial concentration is the size of the unit of production that is just sufficiently large to achieve lowest average cost of production relative to demand. It is well known that the smaller the market demand the fewer production units can operate in the market and the higher the level of industrial concentration.

Smallness of economy does not create high concentration levels only but high entry barriers as well. The main entry barriers are provoked by the economies of scale. Another entry barriers can be created by a supply constraint on factors of production[6]. Apart from these there are small population size that can influence the availability of labor and small geographic size that is present in the case of Serbia. Small geographic size usually includes a limited and not so diversified supply of natural, non-

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[3] *Ibid*

[4] *Ibid*, p. 4

[5] *Ibid*

[6] *Ibid*, p. 5

reproducible resources. The last cause of small market economies is the problem of sub-optimal levels of production. There are different reasons for sub-optimal levels of production. Economic academia is claiming that the most important factor is the high level of interdependence between firms existing in concentrated market. We are aware that in Serbia the low number of firms and high barriers to entry are resulting with the great influence among existing firms. It is obvious that in such conditions it is far more profitable for firms to cooperate rather than aggressively compete against each other in order to obtain a larger market share. Taking the foregoing into consideration, the main reasons for Serbia's limited competition are existence of disproportionately more natural monopolies, dominant firms, and oligopolies than in large markets. Yet, all of this cannot be solved only with the help of market forces. Invisible hand should be helped with up-dated competition regulation scheme.

The Role of Competition Policy in A Small Market Economy

After a thorough research in scope of small market economy it is easy to encounter that Competition Law in such environment has a rather different role than in developed big market economies. In Serbia Competition Law represents a tool for reducing the obstacles to competition in order to achieve economic efficiency. Thus, antitrust policy has a crucial role in Serbian legal system. Apart from competition policy there is another effective tool in increasing market efficiency and that is openness to trade. Thanks to the openness to trade, markets of small scale can form their internal organization, scale efficiency, competitive feature of industry, degree of product diversity and it can easily entry (exit) to (from) the industry[7]. Hence, openness to trade undoubtedly effects on global industry performance. However, Competition Law plays as well very important role in small markets such as Serbia. If the openness to trade or decrease of trade barriers serves as an effective tool then antitrust policy facilitates annulment of those barriers for foreign importers obstructed by the firms operating in small market industries[8]. Another important role of

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[7] M. S. Gal , "Market Conditions Under the Magnifying Glass: General Preconditions for Optimal Competition Policy for Small Market Economies", New York University, p. 30

[8] *Ibid,* p. 32

competition policy is prevention of anti-competitive conduct of foreign firms that are doing business in the domestic market and outside the domestic market as well[9].

Barriers to trade do not represent the ultimate impediment for efficient market. Sometimes unrestricted trade does not solve efficiency problems of small markets. In that scenario Competition Law plays a crucial role. Thus, antitrust policy definitely represents the important tool in placement of pro-efficiency pressures on domestic producers.

The Need for Competition Policy in Serbia as A Small Market Economy

The question that often arises among international academia is if Serbia is actually in need of competition policy tailored according to the EU Competition Law, taking into account that market itself and market conditions are rather different in these two regions. First, I shall give some arguments in interest of competition policy in Serbia taking into consideration its needs being a small market economy (apart form its ambitions for accession to the EU). There is a general opinion among economic analysts and legal scholars that small countries, being as well small markets, have a stronger need for Competition Law. Even though it is clear that the scope of competition in such societies is limited the conduct of market players should be regulated in order to ensure that competition takes its course in those industries in which competition is feasible, that limits are set on the conduct of firms operating in markets that are not self-regulating, and that importers do not behave anti- competitively[10].

Although, there is a general opinion that the need for specially tailored competition policy in small markets exists because of much weaker corrective tendency of an invisible hand, scale economies and high entry barriers, on the other side it has been proven that various doctrines and principles that apply to large jurisdictions can equally be applied to small ones[11]. However, concentrated market conditions in smaller economies may cause a set of trade-offs and therefore competition norms taken from

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[9] *Ibid*

[10] *Ibid,* p. 9

[11] M. S. Gal, "The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing countries", New York University, p. 11

legislation of large economies should at least be slightly adjusted before application. In the case of Serbia it should be done the same way.

So, the need for the EU Competition Law in Serbia is not justified only from legal and economic prospective but it can also be observed as Serbia's strategic determination according to National Association Strategy adopted in year 2005 and Resolution about Association to the EU adopted in year 2004. In order for Serbia to successfully prepare itself for European integration it should follow the guidelines outlined through criterions of procedure for stabilization and accession, Copenhagen Criterions and "acquis communitaire". Furthermore, Serbia should overcome political and legal obstacles, harmonize the existing regulations and adjust the functioning of state subjects according to the EU standards. As I mentioned before, one of the crucial requirements that must be fulfilled is the reform of the legal system and its harmonization with the EU legal rules. This also applies to Competition Law, meaning that apart from social and economic welfare reasons Serbia should follow the path of the individually adjusted EU Competition Law in order to be able to join the Union of developed European countries.

General Preconditions for Enforcement of Competition Law in Developing Countries

Developing countries having an interesting competition framework are usually followed with enforcement problems that are simply the result of several factors. First of all, Serbia as developing country has following issues that are distorting efficient enforcement. Serbia is currently facing a low level of economic development, institutional design problems, complex and outdated government regulation and ineffective and slow bureaucracy. All this is obstructing the introduction of modern European antitrust policy. And, it is far from obvious that we desperately need one to cure our market circumstances. As I have mentioned earlier in my paper, Serbia has accepted the principles of free market economy and is seeking to become the member of European family. Yet, in order to achieve that, Serbia must successfully perform principles of free market and fully conduct liberalization process. However, liberalization is not the only objective that must be realized, since without completely updated modern regulatory framework governmental barriers to trade can just easily be sub-

stituted with private ones[12]. Still these are not the only reasons that justify the need for efficient Serbian Antitrust Law. The other perspective is that international market circumstances have changed as well. The huge merger wave occurred, globalization is the present trend worldwide and all that resulted with fact that Serbian market is jeopardized with large international corporations and their market power. Therefore, Serbia needs strong antitrust policy to increase consumer welfare and enable the country to enjoy some of the EU benefits.

In the light of foregoing, we can see that market conditions and economy level is rather different than in developed European countries and that the significance of Competition Law for country in such situation is huge. Therefore we conclude that Serbia is, due to certain problems, experiencing inefficient enforcement that has to be mended in order to achieve the economic goals in front of her.

First of all, in order for Competition Law to be successfully implemented and enforced certain preconditions must be satisfied: the pro-competitive socio-economic ideology, the institutional and organizational conditions, and the political economy conditions[13]. These preconditions are of crucial importance especially for developing countries such as Serbia, because of low level of economic development and other problems with regulation, bureaucracy and institutional organization.

Pro-competitive socio-economic ideology is the essential precondition for successful application of competition policy. It is necessary to eliminate governmental impediments to competition and to create a real change in public policy in order to create an ideal atmosphere for firms to invest and compete efficiently[14]. This is especially related to situation in Serbia where because of general ignorance regarding importance of Competition Law, absence of strong pro-competitive governmental microeconomic policy and the lack of belief about power of market's invisible hand in a battle with direct regulation it is hard to secure efficient competition policy. It is a fact that for the first time Competition Law was adopted in Serbia in year 1996, however due to inappropriate socio-economic ideology the Government was not expressing strong will for effi-

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[12] *Ibid*, p 20

[13] *Ibid*

[14] *Ibid*, p. 21

cient enforcement of antitrust policy. It is necessary to stress out the fact that in developing countries such as Serbia, the real objective of Competition Law is actually competition advocacy[15] conducted by the competition authorities. Such authorities should seek to promote antitrust policy and therefore create necessary socio-economic framework. Competition authorities should create and apply certain strategies in order to create public support for competition law enforcement. There are two strategies or advocacy roles conducted by antitrust agencies. The first is the governmental advocacy and the second one is the public advocacy. The governmental advocacy is the representation of competition benefits to the Government and its institutions. And the public advocacy is the promotion of Competition Law to the public in general. Public advocacy can also be observed as indirect governmental advocacy. First, it can promote in acceptance of pro-market policies and second, it can provoke public pressure over the Government in order to change its policies. Even thought the government advocacy seems much more important, public advocacy has the significance of its own as well. Therefore, a lot has to be done in order for consumer organizations, private sector and media to accept and endorse the importance of competition policy. In the light of the above mentioned, it is necessary to outline the significance of socio-economic ideology for effective competition enforcement and decrease of private barriers to trade. However, if Serbia wants to introduce efficient antitrust framework simple adoption is not enough and it must be supported with broader pro-competitive microeconomic policy strongly respected by the Government.

Political economy preconditions are the other crucial condition for efficient competition policy in all developing countries and especially in the case of Serbia that is still going through reforms and privatization. In other words, such a long and slow reforms provided excellent field for certain structures to sabotage the decentralization of decision-making, shrinking of the size of public sector and reduction of state interventionist role in the economy. It is necessary to stress out the effect of political pressures can be very strong and can have many different forms. It can even obstruct the adoption of Competition Law, or it can lead to adoption of certain less efficient competition norms or reduction of the Commission's independence and authority.

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[15] *Ibid,* p.24

In order for Competition Law to be efficiently enforced the optimal organizational and institutional conditions must be created in which the enforcing bodies will operate[16]. Moreover, the competence and credibility of Competition Law enforcement is necessary weapon for powerful strike against anticompetitive conduct. In order for the Commission to effectively prohibit anti-competitive conduct ex-post it should be more efficient in detecting and sanctioning legal violations. That would further result in stronger deterrence effects on market participants and therefore less Competition Law violations[17]. Deterrence could therefore be perceived as an indirect Competition Law regulation no less important than direct regulation itself. In order for market participants to deter from harmful conduct they should be aware of Competition Law significance and possible consequences in the case of its violation. However, that is all part of competition authority's responsibility and their efficient performance is based on organizational and institutional conditions. Deterrence also depends on the scope of available human resource for monitoring and detection[18]. Apart from organizational problems Serbia is as well facing institutional problems that impede the efficient antitrust enforcement. Those are the inadequate judicial system, excessive bureaucracy, a lack of resources and professional expertise within the competition authority, extensive capture by regulatory groups and weak professional and consumer groups[19]. In order to overcome this problem Serbia should tailor a specific institutional and organizational framework corresponding to its current situation.

Legal Position of the Body in Charge for Application of Competition Law

Numerous bodies may be involved in the creation and application of Competition Law, among which Competition Commission or currently known as Commission for Protection of Competition Law has a central role. Besides that, antitrust authorities create or exercise competition policy.

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[16] *Ibid*, p. 20-38

[17] *Ibid*

[18] *Ibid*

[19] *Ibid*

Competition policy has a main role in creation of positive environment for business activities, which is as well a basic condition for permanent economic growth. Competition policy through its impact on elementary industry branches secures market's acquisition of flexibility necessary for initiation and innovations. In order for this competition policy to be fruitful it must rest on two pillars that have as its goal efficient competition for consumers and intensification of national economy competitiveness. First pillar is strong and energetic application of antitrust rules that prohibit company's involvement in restrictive agreements or abuse of dominant position. And the second pillar represents opening of economic sectors in which efficient competition is still not stabile enough[20].

However, all of this would not be possible without the crucial role of the Commission for Protection of Competition Law in the scope of antitrust. This authority was formed with enactment of Law on Protection of Competition on September 14th 2005. The Commission represents an independent organization that performs public duties and is responsible for its work to the National Parliament[21]. The Commission was constituted on April 12th 2006 with election of President and Vice-President. The Commission is obliged to represent in front of the Parliament a yearly report about its performance. Report for the past year is to be handed out latest until February of the current year. Another important organ is a five member Council[22]. The Council is in charge for decision-making and emission of certain documents. Members of Council are being chosen from the group of respectful scholars in the area of Law or Economics, but they also must be well acquainted with Competition Law. The Commission is in charge of:

1. deciding on rights and duties of market participants in accordance with the law
2. participating in emission of regulation in the area of protection of competition
3. proposing to the Government creation of regulation for application of this law

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[20] Sinisa Varga, "Pravo konkurencije", Prometej 2007, p. 101

[21] Law on Protection of Competition, article 32

[22] *ibid*, article 33

4. following and analyzing conditions for competition in certain markets and in certain sectors
5. giving opinions to competent authorities about regulation propositions and enacted regulation that violate Competition Law
6. giving opinions about application of regulation in the area of Competition Law
7. accomplishing international cooperation in the area of competition protection in order to fulfill international obligations and to collect information about competition protection in another countries
8. cooperation with national authorities, local governance authorities, in order to provide necessary conditions for consistent application of this law and other regulations that are arranging the questions valuable for protection of competition
9. undertaking of actions with impact on developing the conscience about necessary protection of competition
10. keeping the records about reported agreements, participants that have dominant position in the market and concentrations
11. organizing and controlling the conduct of measurements that secure protection of competition .[23]

The Effects of the Commission's Work after the First Year of its Establishment

Already after the first year of the Commission's work it was easy to see that earlier mentioned shortcomings were completely well founded. Numerous scholars were trying to convince legislators that threshold for concentration registration was too low and that the Commission's authorities were as well rather symbolic. Something had to be done if Serbia wanted to have strong and fully protected competition.

During the first year of its establishment the Commission was financed from the national budget. After that year the Commission continued as an independent body financing itself from its own profits. The Commission is financed in accordance with its financial plan that is being created for every year and presented to the Government until November 1 of current year. Excess in costs is being covered from reserves, and in case

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[23] *Ibid*, article 35

that those funds are not enough they will be covered from the national budget.[24]

Procedure in front of the Commission is being regulated with general Law on Administrative Procedure. The Commission's decisions are irrevocable. But it is possible to initiate administrative procedure against the Commission's decision in front of the authorized court.[25]

There are two types of procedure that can be set up in front of the Commission. The first one is the procedure initiated by the Commission itself being a result of its public duty. And the second one is the procedure initiated on the request of private parties.

The Commission can initiate the procedure itself when the client presents certain facts:

1. that there is a conduct that prevents, restricts and distorts competition
2. that he\she does not have enough funds for procedure initiation, or when public duty procedure is necessary for protection of client's identity

The deadline for decision-making is four months from the day the request was submitted (if the procedure has been initiated on the client's request). And in the case of public enforcement procedure the deadline is six months starting from the day of issuing the conclusion that confirms procedure initiation.[26]

There are two types of penalties for law infringement. The first are the measurements ordered by the Commission when market participants do not proceed in accordance with the Commission's decision. In that case the Commission can order temporary business prohibition for the period not longer than three months. Or, if that does not show as successful, the Commission can temporary prohibit the performance of its functions for the period not longer than four months.

Other types of penalties are the penalties for conducting an infringement ordered by the court.

The violator will be fined with the amount of 1 to 10% of his total turnover in the passed year if he:

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[24] *Ibid*, article 51

[25] *Ibid*, article 52

[26] *Ibid*, article 66

1. concludes or performs forbidden agreement
2. does not perform the measurements ordered by the decision about prohibition of agreement or abuse of dominant position[27]
3. abuses dominant position on the relevant market
4. installs a concentration for which it has not been issued an approval
5. installs a concentration for which it has been issued an approval based on incorrect data
6. does not behave according to other decisions

Analyzing the Commission's position it is easy to encounter that this Commission has rather limited authority. Basically this Commission is only presenting requests for initiating the procedure in front of the Court. Furthermore, it is also not nominated to decide about penalties, which is as well duty of the Court. The other impediment of the Commission's efficient work is extremely low threshold of yearly turnover for reporting the existence of concentration. This leads to conclusion that the Commission is overloaded with insignificant cases and therefore will pay less attention to the problems of cartels and dominant position. Also, in connection with concentrations, the nullity of concentrations is not anticipated and the Commission is also not authorized to order a de-concentration. On the contrary, the European Commission is authorized to decide about penalties while Courts are only controlling its decisions. In this aspect Serbia should follow the EU competition policy.

Generally, the Commission has too narrow authorizations to successfully apply the law. It should be added to few of the Commission's authorizations that it is able to collect fines in cases when the law is not respected. In order to protect competition it is crucial to react on time, because it is not possible to repair the damage inflicted on competition. The other impediment to successful procedure is the fact that the Commission does not have the right to punish the ones refusing to cooperate in investigation. Therefore, the Commission should be enabled to punish the parties refusing to participate in investigation. However, there are two problems aligned with this proposal.

First, there is a reasonable doubt that some Courts are not qualified enough to decide in cases of competition protection. Even though there are judges acquainted with economic analysis, it is considered unreasona-

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[27] *Ibid*, article 71

ble that such cases are handled by the Courts that are actually not the part of judicial system (since they are being elected by the Government). It is considered that cases in the area of Competition Law are too complicated and that possible damages are too high to be imposed by the Court deciding on traffic offences.

The other problem is the possibility to begin two procedures with the same subject in front of different authorities. The Commission's decision about restrictions of Competition Law can be challenged in front of Superior Court, and the Commission is also the one initiating the procedure in front of the Court. As a consequence it may occur that Superior Court will revoke decisions of other authorized Courts. This all can be the result of different procedural laws followed by these Courts[28].

Thorough analysis testifies that punishments stipulated with the Law on Protection of Competition are opposite to what was agreed in the National Admission Strategy. According to the Strategy the Commission is in charge for administrating the procedure and imposing the sanctions as well. Moreover, punished companies also shared the right for judicial protection against the Commission's decision in front of Administrative Court. This decision enables Court to conduct procedure efficiently and also to impose the sanctions shortly after the infringement is discovered.

In the light of all above mentioned, my position is that the Commission should and must have the authority to impose sanctions in situations of violation of material law as well as in situations of procedural disturbance.

The major flaw of the Commission's position is the fact that the Government of Serbia is approving the Commission's budget. This is directly opposite to the notion that the Commission should be an independent body. On the other hand, the Commission is elected by the National Parliament that should as well be entitled to decide about the Commission's budget and in that sense guard its independence, as it is in the case of other regulatory bodies (for instance Agency for Energetic or Telecommunication).

Therefore it is easy to conclude that new law must be introduced. This law should regulate the procedure in front of the Commission since

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[28] Z. Skopljak, "Godinu dana od primene Zakona za Zastitu Konkurencije", p.67, "Kvartalni monitor", no.8, januar-mart 2007

Administrative Law gives opportunity to parties to delay the procedure and to contract around the law.

However, that is not all regarding the flaws of the Commission's position. The last but not the least is the regulation of electing the members of the Council for protection of competition. The members of Council are being proposed by the Serbian Chamber of Commerce, Association of lawyers of Serbia, BAR association and the National Government. The problem is that members of BAR association and Chamber of Commerce can easily be personally involved in cases processed by the Commission and conflict of interest may occur.

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ROLE, SIGNIFICANCE AND ENFORCEMENT OF COMPETITION LAW IN SERBIA AS A SMALL MARKET ECONOMY

Various developing countries owning legal competition framework have significantly grown over the past decades. Passing of competition law in those economies has been regarded as a path towards pro-market reforms and market liberalization. Taking into consideration that Serbia is both developing and a small market economy, Competition Law in this setting has a rather different role and significance than in developed, big markets. This notion makes Serbian Competition Law far different and peculiar, but its mere adoption is not enough to secure us its efficient enforcement. In order to achieve the latter, certain preconditions must be met and antitrust policy must be adjusted to existing market structure.

Key words: developing countries, small market economy, Serbian Competition Law.