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FOCUS ON COMPETITION

III

A Word With The Enforcers

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Interview with the President of the Competition Council of Bosnia and Herzegovina

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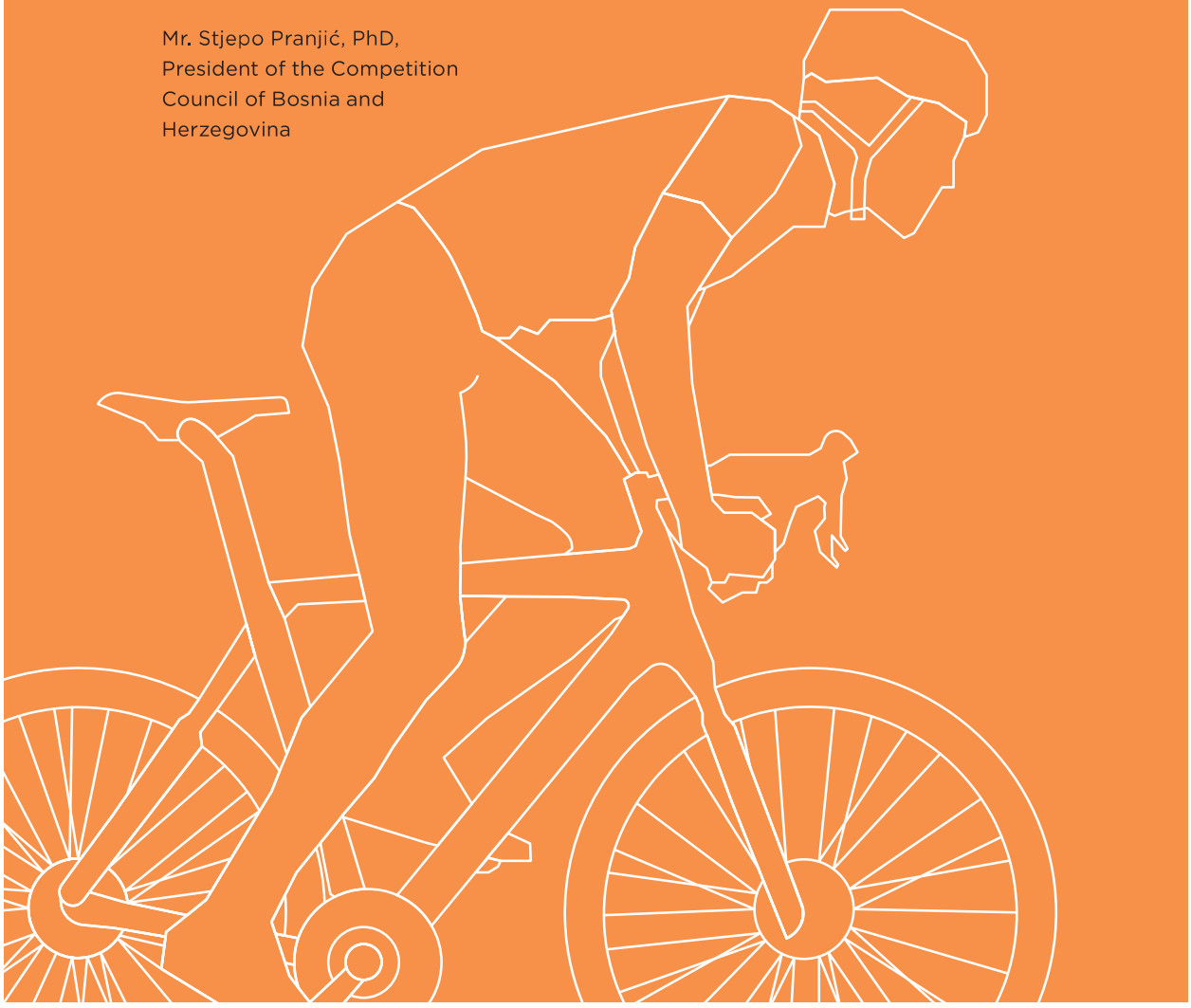

1. This year marks the 16th anniversary of the establishment of the Council of Competition (the "Council") in Bosnia and Herzegovina (BH). How would you assess the work of the Council so far? In your opinion, what were the biggest successes and what were the biggest obstacles during the work of the Council in this mandate?

Yes! The Council was established in 2004, although the first *Competition Law in the history of BH was passed in 2001 ("Official Gazette of BH", no. 30/01)* (the "**Law**"). I participated in the creation of the mentioned and currently valid Law from 2005 and I am continuing to participate in the creation of the Bosnian Herzegovinian (BH) competition practice and its scientific and professional evaluation, to this day. I can safely say that the beginnings, like always, were difficult. It was all about creating a new branch of law (competition) in the state system of BH. *Per se*, as well as the institutionalization of this law, first in terms of drafting constitutive acts by six councillors, securing workspace, and establishing the internal organization of the Council. At that time, there were no competition law experts on the labour market. Today, in addition to experts in the Council, we have several members with master's degree and PhD's who have participated in various projects for implementing regulations in the area of competition law and enforcement in BH. The Council also has a respectable number of scientific papers authors in indexed journals and other publications, as well as a few teachers who teach at higher education institutions in competition law. This means that the right to compete is recognized in the academic and, of course, in the business community. Not only do legal entities, initiate proceedings for violations of the Law, in terms of Article 2 of the Law, which are finalised within the prescribed period by a decision of the Council, but also they request opinions on laws and other acts that have impact on market competition.

With regards to your sub-question, concerning the existence of obstacles to the effective work of the Council, I can say that the first barrier is the so-called "ethnic veto". This is a voting regime according to which one councillor from each constituent nation must vote for the decision of the Council in order for it to be adopted. This problem is all the more difficult because the effective right to appeal is not ensured. Abuse of the so-called "ethnic veto" is also one of the significant indicators of violation of the principle of independence of the Council.

Although Article 21 of the Law generally stipulates that the Council is an independent body that will ensure consistent application of the Law throughout BH and that it has exclusive competence in deciding on the existence of prohibited competitive activities in the market, this is not normatively concretized in order to protect against the actions of persons in councillor election procedures, types (collective or individual mandates) and the duration of the mandate, the manner of decision-making, etc. In fact, an individual norm should stipulate that the Council members must be appointed to this position without limitation of mandate and exclusively on the basis of references from competition law, i.e. that 2/3 of the members must be from the legal profession. The mandate should be standardized in order to continuously exercise the powers of a Council member from the first election until the fulfilment of the legal conditions for retirement. After the appointment, the function of a Council member, may be terminated in the sense of Article 23 of the Law. The exercise of the powers of a Council member is in fact the performance of the function of an administrative judge. In Article 22, The Law stipulates that councillors are elected from among recognized experts in the relevant field and have a status equal to admin-

istrative judges. Legal matters decided by the Council are decided by the European Court of Justice in Luxembourg, and the judges of that court have no restrictions on the exercise of these functions when elected. The independence of the Council is also guaranteed by Article 71 paragraph 3 of the Stabilization and Association Agreement (SAA), *i.e. all state bodies and other persons are obliged to maintain confidence in the independence and impartiality of the Council by their actions and conduct*. The Council is neither a ministry nor an administrative organization, it is not established by the Law on Administration, instead, its competencies and activities are regulated by a *lex specialis* or the Law.

I must point out that the internal organization and systematization of the work and tasks of the Council have become very tense due to the increased number of proceedings before the Council, especially in terms of the number of experts and the structure of internal units. These units are organized on the classical principles of administration instead of being organized on the principles of competition activity. For example, a department for prohibited agreements should be organized on the principle of determining prohibited competitive acts. In this regard, and yet only partially, the Council adopted a new Rulebook on Internal Organization which entered into force on 30 January 2020. The adopted Rulebook incorporates three positions - heads of departments (Mostar, Sarajevo and Banja Luka), which are currently in the process of being filled.

Thus, some progress has been made with regards to the application of the Law. A special commitment is needed to improve existing anti-trust regulations and increase the Council's administrative capacity. The Law needs to be fully aligned with the *acquis* (transposition of regulations and directives in the Law) and to be devoted to ongoing training of professional service staff in order to increase investigative capacity.

2. How would you assess the current state of competition in the market of Bosnia and Herzegovina?

I have already expressed a somewhat descriptive assessment in my answer to the previous question. If I were to quantify it, then I would grade it as "successful". In fact, protection of competition on the BH market is somewhat better than the situation of BH economy and politics or from the effectiveness of BH economic and political institutions. First, the existence of the Competition Law and the Council has a preventive effect on legal entities in terms of compliance with competition rules. They know that a fine/other penalty, e.g. reversal of business management decisions, is threatened for their violation. In this way, the Council is present in the market and forces companies to be competitive. Otherwise, they would be sanctioned by the law of supply and demand or exiting the market. In this sense, the Council contributes to the development of BH economy and society in general.

On the other hand, it's a fact that BH market and political relations are in transition. This means that attempts are still being made to liberalize or establish an effective market and political democracy. In other words, this in itself restricts competition. For example, institutions at the entity level, limit the scope of the Law, by establishing legal-political and administrative-technical traps for the operation of the law of supply and demand in the single market of BH. This is a characteristic of, for example, the insurance market and reinsurance of property and persons or the pharma market, with the so-called essential drug list, energy and telecommunications sectors. As an example, there is almost no consumer from a BH entity which buys electricity from another entity. In other words,

there is simply no competitor to the provider with significant market power in the relevant telecommunications services' markets in the RS entity.

From the presented examples, it can be concluded that BH has not fulfilled its obligation from the SAA, according to which it should apply the EU competition principles to public companies and companies that have been granted special and exclusive rights. Economic freedoms are limited: movement of people, goods, services and capital, which is an objective precondition for the geographical application of the Law in the entire territory of BH (Article 4 of the Constitution of BH). Economic freedoms have a constitutional meaning, not only in the state, but also in the constitutional law of the EU. Therefore, they represent the constitutional basis for the adoption and effective application of the Law. The Law is an instrument of constitutional protection of economic freedoms of movement of people, goods, capital and services in the entire territory of all EU member states and presumably BH as well.

3. How would you assess the existence of awareness of the importance of conducting business in accordance with competition law among market participants? Is that awareness more present in the private or public sector?

One of the most important obligations from Article 1 of the Law is that the Council has the duty to promote the protection of free market competition (i.e. competition advocacy). The number of cases pending before the Council give an indicative answer on raising awareness of the business community about the existence of the Competition Law which establishes the rules of competition and the powers of the Council to protect these rules. Permanently and continuously, a Council member oversees 3-5 cases. This information per se provides the answer to your question. There is sufficient awareness of the importance of doing business in accordance with competition law among market participants, whether they come from the private or public sector.

4. What are the most common competition infringements in Bosnia and Herzegovina, according to the Council's experience?

The most common violations of the Law are the abuse of a dominant position, followed by prohibited agreements, i.e. prohibited actions deriving from prohibited agreements or cartels. Given that BH competition law does not prohibit competitive actions but presented cases, these actions also appear as individual cases of abuse of a dominant position. This means that there are approximately the same number of violations of Article 4 (prohibited agreements) and Article 10 (abuse of dominant position) of the Law, and less violations of Article 16 of the Law (obligations to notify a concentration).

5. Does the Council communicate regularly with their colleagues in the region, e.g. in Croatia or Serbia?

The Council is obliged, pursuant to Article 25 paragraph 4 of the Law, to cooperate with international and national organizations in the field of competition, on the basis of which it may provide, and request data and information related to factual or legal issues. The Council implements this obligation by being a member of the International Competition Network (ICN) and the European Competition Network (ECN). The status of a network member leads to obligations of global, regional and bilateral cooperation with all competition regulators in the world, including Europe. In order to improve cooperation between institutions for the protection of market competition freedom, the Council has so far signed Memoranda of Understanding with competition authorities of Croatia, North Macedonia, Bul-

garia, Serbia, Turkey, Slovenia and Montenegro. Also, last year, a Memorandum was signed with the Secretariat of the Energy Community in Vienna.

6. You have recently been appointed President of the Working Group for the Adoption of the New Competition Law. What are the biggest challenges for the Working Group in the coming period?

The current Law was adopted back in 2005 with minor amendments in 2007 and 2009, and its implementation created practice that gave the incentive for amendments. Here, the initiatives were recognized by individual public officials who subsumed general norms on specific cases. They submitted to the President of the Council, in writing, the shortcomings of the current text of the Law, in terms of eliminating legal gaps and doubts (e.g. typos or some inadequate wording-phrases, vagueness, ambiguity, polyvalence, and thus incompleteness of a legal norm) in the process of intended application of the law. Having this in mind, and other deviations that do not correspond to the type of regulations and are not substantially harmonized with the *acquis* in terms of Article 70 of the SAA, the Council formed a working group tasked with creating a working draft explaining the new, or an amended current Law, depending on the number of new norms. So, the biggest challenge is to solve the problem of the so-called "ethnic veto" with regards to the principle of the constitutional structure of BH. Then, in the second instance, to solve the problem of the right to appeal or judicial protection on the merit. The Court of Justice of the EU in the second instance examines the facts and conclusions, i.e. the measures and sanctions imposed by the European Commission (the "**EC**"). In addition, in EU countries there have courts or chambers specializing in competition law with judges trained to decide on cases competently. From the above, it can be concluded that securing the right to a legal remedy, as a right of full jurisdiction, is a necessity. All the more problematic, the right to a remedy is not ensured as a legal and factual issue within the existing law, which may constitute a violation of the rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "**Convention**").

Furthermore, the Working Group should normatively concretize the principle of independence of the Council so that it is no longer just a platitude and solve the structural problem of the law in terms of separating the function of conducting proceedings from the decision-making function (separate inquisitorial from the accusatory principle), so that there is no place for pronouncing the famous local proverb "*Kadija te tuži, kadija te sudi*" (meaning that the person suing you is also the judge in the case). That is, this structural change is necessary given that there are judgments of the European Court of Human Rights (the "**ECHR**") in competition protection cases (e.g. *Dubus v. France*), according to which, inter alia, a violation of Article 6 is considered to have been committed when imposing fines by a body that combines the roles of investigator, prosecutor and judge. In a figurative sense, this would mean that the Council cannot initiate proceedings, conduct investigations, and impose penalties which, according to the cited case law, has a criminal offence character. This means that all the provisions of Article 6 of the Convention have to be applied in competition cases. That is, having in mind the severity of the threatened fines prescribed by Article 48 of the Law, their retributive and preventive character, i.e. the example of the Council imposing a multimillion fine on a legal entity in the banking services market. When compared with fines for legal entities from the BH Criminal Code, ranging from BAM 5,000

to BAM 5,000,000, it is already certain that the ECHR would consider the position of the party before the Council from the point of view of the accused in the criminal proceedings.

7. In your opinion, what are the biggest shortcomings of the existing legal framework, i.e. what are the areas where we can expect changes in the legal framework?

So far, we have presented several shortcomings that have made our work difficult, and herein we can add the standardization of the rules of procedure, especially bearing in mind the implementation of some specific institutes, such as dawn raids, issuing of penalties, the possibility of initiating proceedings. Also, specifying the term "legal entity" and the definition of a "prohibited agreement", which according to the current law deviates in one part from the definition set out in Article 101 of the TFEU. Also, solving the problem of the deadline for the merger notification obligation (calendar date or per action - before implementation) or the duration of the procedure for determining if an agreement is prohibited, etc.

8. Does the Council use dawn raids as a part of the investigation? If so, what are the Council's experiences with this investigative tool?

Just as stated in the previous question, our law is very scarce in the procedures regarding dawn raids. The BH state system is very complicated. It consists of a number of police bodies and agencies, i.e. courts that would be competent in matters of dawn raids, with which we should actively cooperate when conducting a dawn raid. On the other hand, the Council is under-staffed, which is evidenced by the fact that we currently have 11 officers working on cases. Therefore, so far, we have not had a single dawn raid case, apart for performing announced searches in certain cases, in most of which we achieved very good results.

9. Does the Council take into account the case law of the European Commission and the courts of the European Union, and to what extent?

Yes! Article 43 of the Law provides for the possibility of using the case law of the EC and the European Court of Justice, so, in its Decisions, the Council very often refers to cases brought before the European institutions. Certainly, our aspiration is to completely harmonize the practice with the European practice, which we believe we are successful in. It is important to mention that BH has signed the SAA with the EU, which entered into force when executed by all member states, and it is this agreement that obliges us to apply the practice of the European Commission and the European Court of Justice when issuing decisions in the field of competition.

10. What is the Council's experience in fining competition infringements? Do the competent courts usually confirm the Council's decisions?

When the Council determines the existence of a violation of the Law, penalties are imposed. The Council's experience in imposing penalties can simply be expressed by the following phrase: "Without the possibility of imposing penalties by competition authorities, there is no protection of competition". The Council has had the possibility to impose penalties from the initial legal framework to the current rules, while for an example, the competition authorities in Slovenia, Croatia, Serbia, etc. did not have that possibility incorporated in their first laws. Regarding the decisions by the Court of BH, we as an institution, are not satisfied that the Court of BH does not resolve cases in full jurisdiction, especially those that the Council could not resolve due to the "ethnic veto".

11. How would you evaluate the work of the courts when examining the Council's decisions?

Here I can give a short answer that reads "not satisfactory". At our faculties, competition law, as a rule, is a non-compulsory course. Also, the bar exam does not include the exam or any mention of competition law. Therefore, it is not surprising that, despite the huge practice that has been carried out for 70 years, since the Treaties of Rome in EU member states, in BH, competition law and policy is new, and for most judges it is still unknown. Since the establishment of the Council, the Court of BH has not decided on competition protection cases in full jurisdiction. Therefore, the training of the Court of BH is necessary.

12. What is your view of the current role of the Council, as well as its role in the future? What are your plans and future steps? Can we expect you to focus on specific sectors and industries?

These days, the topics related to the acquisition of the candidate status for EU accession are being brought up again. And that is where we see our opportunities to strengthen the institution. Certainly, our focus in the coming period is to conduct an analysis of general economic services, banking services, telecommunications sector, and the pharmaceutical industry. Given that we are all working in the coronavirus pandemic which inevitably affects the economy, I think it will be very interesting to see if the Council's response to the pandemic is effective.

13. Finally, would you like to say something else to our readers?

If there is only one manufacturer, retailer and service provider at your home you are not happy right now. There is simply no choice of goods and services, different prices, quality, method of payment and design. Competition is what puts a smile on your face.