

Expanding the Definitions of ‘Undertaking’ and ‘Economic Activity’: Application of Competition Rules to the Actions of State Institutions in Bosnia and Herzegovina

by

Alexandr Svetlicinii*

CONTENTS

- I. Introduction
- II. State institutions as undertakings in EU competition law
- III. State institutions as undertakings within the meaning of the B&H Competition Act
- IV. Competition infringements committed by State institutions in the enforcement practice of the B&H Competition Council
 1. Anti-competitive agreements in the national healthcare system
 2. State institutions as undertakings in the public transport markets
 3. Reasons for exempting State institutions from competition law enforcement
- V. Concluding remarks

Abstract

State-initiated competition restraints remain a recurrent problem for competition law enforcement in transition economies characterized by a history of price controls and extensive State regulation of economic activities. The application of the concepts of ‘undertaking’ and ‘economic activity’ to the actions of State institutions, as developed in EU competition law, allows national competition authorities to enforce competition rules against public bodies. EU candidate countries, as well as States aspiring to a candidate status, have been continuously reforming their competition laws, aligning them with *acquis communautaire* and applying EU competition law concepts and standards in their domestic enforcement

* Senior Research Fellow at the Jean Monnet Chair of European Law, Tallinn University of Technology, Tallinn Law School; alexandr.svetlicinii@ttu.ee

practices. This paper deals with the particularities of the application of competition rules to the actions of State institutions in Bosnia and Herzegovina. A detailed study of emerging domestic case law demonstrates significant deviations in the interpretation and application of these well known competition law concepts. The legislative and enforcement peculiarities observed in the target jurisdiction are compared with those found in EU competition law and in the legal systems of neighbouring courtiers.

Résumé

Les restrictions de la concurrence initiées par l'Etat restent un problème répétitif pour l'application du droit de la concurrence dans les pays en transition ayant l'histoire du contrôle des prix et une réglementation vaste relative aux activités économiques imposée par l'Etat. L'application des concepts d' « entreprise » et d' « activité économique » à l'action des institutions de l'Etat, mises en oeuvre par le droit communautaire de la concurrence, permet aux autorités nationales d'imposer des règles de la concurrence contre des organes public. Les pays candidats à l'UE et les Etats qui aspirent au statut de pays candidat ont constamment réformé leurs lois sur la concurrence afin de les aligner à l'acquis communautaire et d'appliquer les concepts du droit de la concurrence et des normes européens dans leurs pratiques nationales. Le document traite sur des particularités de l'application des règles de la concurrence aux actions des institutions de Bosnie-Herzégovine. L'étude détaillée de la jurisprudence actuelle montre des écarts importants dans l'interprétation et l'application de ces concepts du droit de la concurrence bien connus. Les particularités législatives et d'exécution observées dans la juridiction sont comparées avec celles trouvées dans le droit de la concurrence de l'UE et des pays voisins.

Classifications and key words: anti-competitive agreement; antitrust enforcement; Bosnia and Herzegovina; economic activity; sanctions and penalties; State institutions; undertaking.

I. Introduction

In the context of the EU enlargement process, accession candidates (Macedonia, Montenegro, Serbia), and countries aspiring to a candidate status (Albania, Bosnia and Herzegovina and Kosovo¹)², have been required

¹ This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

² For their current status in relation to the EU see http://ec.europa.eu/enlargement/countries/check-current-status/index_en.htm.

to introduce competition and State aid rules into their national legislation. They have also been obliged to transpose a number of EU liberalization directives covering particular economic sectors³. The 'copy-pasting' of EU competition rules into small, often highly concentrated, emerging markets has provoked some criticisms concerning the functionality of this approach⁴. Moreover, for various reasons, the transplantation of EU rules and standards did not always result in their effective enforcement. Nevertheless, both Bosnia and Herzegovina (hereafter, B&H) and its neighbours have been continuously reforming their competition laws and related secondary legislation, harmonizing them with EU standards and practices. References to EU legislation and EU jurisprudence are being increasingly used by national competition authorities (hereafter, NCAs) and domestic courts in their investigations and decision-making processes⁵. In recent years, some of these countries have substantially revamped their competition law frameworks, enhancing the enforcement powers of the NCAs⁶.

³ For example, all of the above mentioned countries are parties to the Energy Community, they are committed to gradually implement *acquis communautaire* in the energy sector, to establish adequate regulatory frameworks and to liberalise their energy markets. For progress see implementation reports published by the Energy Community Secretariat at http://www.energy-community.org/portal/page/portal/ENC_HOME/DOCUMENTS?library.category=758.

⁴ In relation to the introduction of competition law in CEE countries see: M. Oiaja, *The Competition Law of Central and Eastern Europe*, Sweet & Maxwell, 1999; D. Gerardin and D. Henry, 'Competition Law in the New Member States -Where Do We Come From? Where Do We Go?', [in:] D. Gerardin, D. Henry (eds), *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*, Intersentia, 2005; M. Botta, 'Does the EU Competition Model Satisfy the Needs of Emerging Economies? Lessons from the Countries without a Carrot', [in:] K. Podstawa, L. Puccio (eds), 'Framework for Economic Development in EU External Relations' (2012) 1 EUI Working Paper (Law) 51–74.

⁵ See Z. Mekšić, 'Jurisdikcija Suda EU u praksi Suda BiH' (2012) 8 *Sveske za javno pravo* 70–76. The author comments on the Judgment of the Court of B&H No. S1 3 U 005412 10 Uvl dated 15 March 2012 which refers to the jurisprudence of the CJEU when reviewing an infringement decision of the B&H KV in an abuse of dominance case concerning refusal to deal in the automobile market.

⁶ For competition law developments in particular jurisdictions see: on B&H – S. Kavaz Hukić, 'Stanje i perspektive prava konkurencije u Bosni i Hercegovini' (2013) 3-4 *Pravna misao (Sarajevo)* 7–33; on Croatia – J. Pecotić Kaufman, *Enforcement of Competition Rules in Croatia – Challenges and the Way Forward* (November 17, 2009), available at <http://ssrn.com/abstract=1844302>; on Macedonia – R. Karova, M. Botta, 'Five Years Enforcement of Competition Law in the Republic of Macedonia – Time for an Assessment' (2010) 2 *Mediterranean Competition Bulletin* 56–72, available at http://ec.europa.eu/competition/publications/mediterranean/mcb_2.pdf; on Montenegro – I. Dajković, 'Whither Competition Law in Montenegro: Current status and future challenges' (2007) 28(2) *ECLR* 92–100; on Serbia – V. Pavić, 'Revolution, Evolution and Devolution: Overview of the Past Twenty Years of Competition Legislation in Serbia', [in:] V. Beširević (ed.), *Public Law in Serbia: Twenty*

All of the above countries have a history of State dominated, regulated economies and their liberalisation process is still ongoing with different degrees of success in various economic sectors. For that reason, State regulation of economic activity continues to exert a decisive influence on the competitive conditions of particular markets⁷. Following the EU model, accession candidates and potential candidates have linked the application of their domestic competition laws to the concepts of 'undertaking' and 'economic activity'. These concepts are based on the nature of the activity carried out by a natural or legal person (public or private) and thus allow NCAs to apply competition rules directly to the actions of State institutions. When granted with enhanced investigative and direct sanctioning powers, NCAs can apply them in order to prevent, mitigate and punish anti-competitive actions of State institutions committed in their capacity as undertakings engaged in economic activities.

The purpose of this paper is to analyze the emerging competition case law in B&H. Its NCA – the Competition Council or KV⁸ – is increasingly active in treating State institutions as undertakings engaged in economic activities in order to subject them to the application of competition rules. This recent practice of the B&H NCA presents an interesting example of the transposition of EU competition law concepts into national legislation and enforcement practice. It raises a number of questions concerning the interpretation and application of EU competition rules as well as the effectiveness of such approach for the purpose of combating State-initiated competition restraints. The expanded interpretation of the notion of an 'undertaking' in B&H competition enforcement, which extends the application of competition rules to the actions of State institutions, has been noted by legal practitioners⁹. It however remains largely overlooked by academic literature¹⁰.

The article is structured as follows. Section II summarizes the application of the concepts of 'undertaking' and 'economic activity' to the actions of State

Years After, Esperia, 2012, p. 243–257; A. Svetlicinii, 'Competition law enforcement in Serbia: problems and prospects' (2012) 33(6) *ECLR* 273–279.

⁷ The effects of State regulation on competition have been discussed at the 7th ASCOLA Conference 'State-Initiated Restraints of Competition', 12–14 April 2012, Sao Paulo, Brazil, the programme is available at http://www.ascola.org/Tagungsprogramme/Sao_Paulo_Conference.pdf.

⁸ In Bosnian and Croatian – *Konkurencijsko vijeće*, in Serbian – *Konkurencijski savjet*, <http://bihkonk.gov.ba/>.

⁹ See T. Kojić and D. Gajin, *Propisi kao povreda prava konkurencije* [*Legislation as infringement of competition law*] available at <http://www.bdklegal.com/blog.288.html?bid=115&cid=0> (last access 27 February 2013).

¹⁰ For a discussion on various definitions of 'undertaking' in EU Member States see M. Szydło, 'Leeway of Member States in Shaping the Notion of an 'Undertaking' in Competition Law' (2010) 33 *World Competition* 549–568.

institutions in the practice of the European Commission and the Court of Justice of the European Union (CJEU). In Section III, the same concepts are observed in the competition law of B&H and its neighbours. Section IV discusses the emerging practice of the Competition Council applying B&H's substantive competition rules (national equivalent of Article 101 TFEU) to the actions of State institutions in particular economic sectors (healthcare, public transport). Summarised therein is also the NCA's approach to these concepts. The concluding Section V provides general comments on the observed enforcement practices and their likely impact on the development of competition law in B&H in the light of its European accession.

II. State institutions as undertakings in EU competition law

The concept of an 'undertaking' in EU competition law is separated from the legal status of the given person or entity; it focuses instead on the nature of the activities that this person or entity is performing. As summarized by the CJEU in its early *Höfner* precedent, 'the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed'¹¹. In the landmark *Commission v Italy* ruling, the CJEU made the supply of goods or services on the market a constituent element of an economic activity¹². If a person or entity, regardless of their legal status, does not engage in an economic activity, then it is exempt from the application of competition rules. Under such 'functional approach', the same entity might be categorised as an undertaking in relation to some of its activities, but not in relation to others¹³. Advocate General Jacobs has expressed the nature of determining the status of an undertaking as follows: 'the notion of undertaking is a relative concept

¹¹ Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR 1979, para. 21. In that judgment, the Court held that a public employment agency which is entrusted, under the legislation of a Member State, with the operation of services of general economic interest is subject to competition rules pursuant to Article 90(2) EC unless, and to the extent, to which the application of that provision is incompatible with the discharge of the particular duties entrusted to it. *Ibidem*, para. 24.

¹² Case 118/85 *Commission v Italy* [1987] ECR 2599, para. 7.

¹³ See generally R. Whish, *Competition Law*, 7thed, Oxford University Press, 2012, p. 84–91; A. Jones, B. Sufryn, *EC Competition Law*, 4thed, Oxford University Press, 2011, p. 124–141; V. Rose, D. Bailey, *Bellamy & Child European Union law of Competition*, 7thed, Oxford University Press, 2013, p. 83–94; Van Bael & Bellis, *Competition law of the European Community*, 5thed, Wolters Kluwer, 2010, p. 17–21.

in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest fall outside the competition rules¹⁴.

When it comes to State institutions, the CJEU confirmed the above interpretation in the *Wouters* case. It was held therein that competition rules ‘do not apply to activity, which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity... or which is connected with the exercise of the powers of a public authority’¹⁵. Therefore, public entities would not be viewed as undertakings in relation to activities where they exercise their public powers. For example, in the early *Poucet* case, local social security offices were not viewed as undertakings in administering sickness and maternity insurance¹⁶. The CJEU explained: ‘sickness funds, and the organizations involved in the management of the public social security system, fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of contributions’¹⁷. This approach was reaffirmed in the later *AOK Bundesverband* case where the CJEU held that sickness funds in a statutory health insurance scheme ‘are involved in the management of the social security system. In this regard they fulfil an exclusively social function, which is founded on the principle of national solidarity and is entirely non-profit-making’¹⁸. In the more recent *Kattner* judgment, the factors of solidarity (no link between the contribution and the benefits) and supervision by the State (operation under a statutory scheme supervised by the government), led the CJEU to conclude that an employers’ liability insurance association was not an undertaking within the meaning of Articles 101 and 102 TFEU¹⁹.

By contrast, a pension fund that makes investments, the success of which influences the amount of benefits that the fund can pay to its members, was categorised as an undertaking because its activity was not based on the

¹⁴ Opinion of Advocate General Jacobs of 17 May 2001, Case C-475/99 *Ambulanz Glockner v Landkreis Südwestpfalz*, para. 72. See also V. Louri, ‘Undertaking’ as a Jurisdictional Element for the Application of EC Competition Rules’ (2002) 29 *Legal Issues of Economic Integration* 143.

¹⁵ Case C-390/99 *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten* [2002] ECR I-1577, para 57.

¹⁶ Cases C-159/91 and 160/91 *Poucet v Assurances Generales de France* [1993] ECR I-637.

¹⁷ *Ibidem*, para. 18.

¹⁸ Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, para 51. For a discussion on the status of State owned healthcare providers in competition law see O. Odudu, ‘Are State owned healthcare providers that are funded by general taxation undertakings subject to competition law?’ (2011) 32(5) *ECLR* 231–241.

¹⁹ Case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- and Metall-Berufsgenossenschaft* [2009] ECR I-1513.

principle of solidarity. As such, it represented an economic activity²⁰. In the same way, an ambulance service organization that provided some of its services for remuneration was qualified as an undertaking performing an essentially economic activity²¹. The mere presence of remuneration is not, however, sufficient to qualify a public entity's activity as economic in nature. That is so when the collection of such remuneration is indispensable from the exercise of public powers²². The above precedents show that the concept of an economic activity would encompass at least the following elements: (1) offering of goods or services on the market and, (2) that the same activity could also be carried out by a private entity for profit²³.

The activity of a State institution is evaluated in the same way when the institution is acting as a purchaser of goods or services on the market. However, where such purchase is undertaken for the purpose of non-commercial or social activities or for services of general economic interest (such as the administration of a national health system), the purchasing activity of a State institution is not considered economic in nature, not even in the case of monopsony²⁴. The CJEU upheld this approach and stressed that it is the purpose of a purchase which defines the economic activity, rather than the purchase itself: 'there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity'²⁵. This more teleological approach, based on a complex evaluation of public powers and public objectives of a given State institution (instead of a technical separation of the various activities carried out by a public body), was upheld by the CJEU in its *SELEX* judgment²⁶.

²⁰ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, para. 71–87.

²¹ Case C-475/99 *AmbulanzGlöckner v Landkreis Südwestpfalz* [2001] ECR I-8089, para. 19–22.

²² Case C-138/11 *Compass-Datenbank GmbH v Republik Österreich* of 12 July 2012 (not yet reported), para. 49.

²³ *Ibidem*, para. 19–22, Case C-205/03P *FENIN v Commission* [2006] ECR I-6295, para. 25.

²⁴ Case C-205/03P *FENIN v Commission* [2006] ECR I-6295, para. 37. See commentary in V. Louri, 'The FENIN Judgment: The Notion of Undertaking and Purchasing Activity: Case T-319/99, Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental v. Commission [2003] ECR II-00357' (2005) 32 *Legal Issues of Economic Integration* 87–97.

²⁵ Case C-205/03P *FENIN v Commission* [2006] ECR I-6295, para.26.

²⁶ Case C-113/07P *SELEX Sistemi Integrati SpA v Commission*, [2009] ECR I-2207. See also J. Nowag, 'SELEX Sistemi Integrati SpA v Commission of the European Communities (C-113/07 P) [2009] E.C.R. I-2207: redefining the boundaries between undertaking and the exercise of public authority' (2010) 31(12) *ECLR* 483–486; A. Svetlicinii, 'Back to the Basics:

The application of the purpose-based functional approach to the concept of an undertaking, which revolves around the exercise of an economic activity as opposed to the public powers carried out by State institutions and other entities, provides for a balanced application of competition rules designed for undertakings (market players and competitors). State institutions become subject to competition law only in relation to their economic activities, even though the exercise of public powers might be equally harmful to market competition. This functional approach to the determination of the addressees of competition rules and subjects of competition law enforcement has been transplanted into national competition law systems modelled on EU substantive rules and standards. The following section addresses the regulation of the concept of an undertaking in Bosnia and Herzegovina and its neighbouring countries positioned at various stages of their EU accession process.

III. State institutions as undertakings within the meaning of the B&H Competition Act

The harmonization of Bosnia and Herzegovina's legislation with *acquis communautaire* and, more specifically, the influence of EU competition law on domestic competition law enforcement, is determined by the Stabilization and Association Agreement (SAA)²⁷ and the Interim Agreement on trade and trade-related issues (the Interim Agreement)²⁸. The latter explicitly required B&H's authorities to assess anti-competitive practices (anti-competitive agreements, abuse of dominance, anti-competitive State aid) 'on the basis of criteria arising from the application of the competition rules applicable in the Community... and interpretative instruments adopted by the Community institutions' insofar as such practices 'may affect trade between the Community and Bosnia and Herzegovina'²⁹.

Pursuant to these international treaties, Bosnia and Herzegovina's duty to apply EU competition rules is conditioned upon a given practice's effect on trade between the EU and B&H (similar to the obligation of EU Member

Concepts of Undertaking and Economic Activity in the SELEX Judgment' (2009) *European Law Reporter* 422–427.

²⁷ Stabilisation and Association Agreement (SAA) between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, signed on 16 June 2008, has not yet entered into force.

²⁸ Interim Agreement on trade and trade-related matters between the European Community, of the one part, and Bosnia and Herzegovina, of the other part, signed on 16 June 2008, entered into force on 1 July 2008, OJ [2008] L 169/13.

²⁹ Interim Agreement, Article 36(2); SAA, Article 71(2).

States to apply EU competition rules under Regulation 1/2003)³⁰. The drafters of the B&H Competition Act went further, however, and provided that the 'Council of Competition, for the purpose of the assessment of a given case, can use the case law of the European Court of Justice and the decisions of the European Commission'³¹. This provision effectively authorized the KV to apply EU competition law to purely domestic cases – even those not covered by B&H's obligations under the Interim Agreement or the SAA.

The current B&H Competition Act is in force since 2005 with some minor later amendments³². It defines the application of competition rules as follows: 'This Act applies to all natural and legal persons who are directly or indirectly engaged in the production, sale of goods and services, involved in trade of goods and services and who with their actions can prevent, restrict or distort competition in the entire territory of Bosnia and Herzegovina or significant part of its market (hereafter, economic entities)³³. More specifically, the B&H Competition Act regards as undertakings 'bodies of State administration and local self-government, when they directly or indirectly participate in or influence the market'³⁴. The literal reading of the above provisions highlights the two alternative criteria that natural or legal persons have to satisfy in order to be seen as „economic entities“ or undertakings for the purposes of competition law enforcement. The first criterion relates to the active participation in the market, which can involve the production, sale or trade in goods and services. The second criterion, applied specifically to State authorities, provides that in order to be categorised as an undertaking, State authorities should „participate in“ or „influence“ the market. While 'participation' in the market refers to the active engagement in economic activities as defined above, the understanding of 'influence' can be inferred. While State authorities might not engage in economic activities themselves, the exercise of their regulatory and other public powers can clearly have an 'influence' on the market.

In order to assess the originality of the approach followed by the B&H legislator in placing State authorities within the scope of the application of

³⁰ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, OJ [2003] L 1/1, Article 3. The concept of 'effect on trade' is further explained in the Commission Notice Guidelines on the effect on trade concept, contained in Articles 81 and 82 of the Treaty, OJ [2004] C 101.

³¹ B&H Competition Act (*Zakon o konkurenciji*), *Službeni glasnik BiH* No. 48/05, 76/07 and 80/09, Article 43(7).

³² According to the EU Commission's 2011 Bosnia and Herzegovina Progress Report, 'the Competition Law is mostly in line with the EU *acquis*, but needs further alignment'. See SEC(2011) 1206 final, Brussels, 12.10.2011, p. 37, available at http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/ba_rapport_2011_en.pdf.

³³ B&H Competition Act, Article 2(1).

³⁴ *Ibidem*, Article 2(1)(b).

domestic competition rules, a cross-country comparison seems helpful. The most meaningful comparison of B&H's competition law would be with relation to its neighbours, former Yugoslavian republics of Croatia, Macedonia, Montenegro and Serbia. All of these jurisdictions share a common legal history and all have harmonized their competition laws with EU standards during the course of their EU integration process.

The Serbian Competition Act employs the traditional 'functional' approach to the definition of undertakings – these are the entities that 'directly or indirectly, permanently, occasionally or ad hoc, perform economic activities in trade of goods and services'³⁵. Serbian competition law can thus be applied to 'State institutions, bodies of territorial autonomy and local self-governments'³⁶ only under the condition that they 'perform economic activities'. The Serbian NCA emphasised in 2011 in a public statement that its competition rules can be applied to State authorities only in situations where the latter directly or indirectly participate in the exchange of goods or services on the market³⁷. As such, the authority refused to initiate infringement proceedings in cases where applicants complained about the actions of State institutions carried out within the scope of the exercise of their public powers. Similarly, the Croatian Competition Act provides that competition law is applied to 'State authorities and local and regional self-government units where they directly or indirectly participate in the market'³⁸. This provision also requires some sort of market participation or market activities. Pursuant to the Macedonian Competition Act, a State authority³⁹ can be considered an undertaking if it performs economic activities⁴⁰ which are further defined as 'trade of goods and/or services on the market regardless whether the purpose of such trade is making a profit or not'⁴¹. The Macedonian NCA can thus enforce competition rules against State authorities only when they are engaged in economic activities on the relevant market. In the same way, the competition law of Montenegro applies to State authorities only 'when they engage in an economic activity directly or indirectly and participate in the trade in goods

³⁵ RS Competition Act (*Zakon o zaštiti konkurencije*), *Službeni glasnik RS* 51/2009, Article 3.

³⁶ *Ibidem*, Article 3(2).

³⁷ <http://www.kzk.org.rs/kzk/wp-content/uploads/2011/07/prema-drzavnim-organima.pdf>.

³⁸ HR Competition Act (*Zakon o zaštiti tržišnog natjecanja*), *Narodne novine* 79/09, Article 3(1).

³⁹ The definition of State authority covers the Government of the Republic of Macedonia, ministries, bodies of the ministries, independent bodies of State administration, administrative organizations, bodies of local self-government and the City of Skopje. MK Competition Act (*Zakon za zaštita na konkurencijata*), *Služben vesnikna PM* 145/10 Article 5.

⁴⁰ *Ibidem*, Article 5.

⁴¹ *Ibidem*, Article 5.

and/or services'⁴², that is, when they are considered to be undertakings under the Competition Act.

The result of this cross-country comparison highlights the originality of the policy choice made by Bosnia and Herzegovina's legislator. It appears, at least from a literary reading of the competition laws of its neighbours, that they all chose to use the 'functional approach' that regards State authorities as undertaking only when they participate in the market by engaging in economic activities. By contrast, the B&H Competition Act provides an alternative criterion that can place State institutions in the category of 'undertakings' when they directly or indirectly influence the market by their actions or decisions. Although the B&H Competition Act does not further clarify this term, it can be implied that influencing the market can be achieved without engaging in activities of an economic nature.

This interpretation raises the difficulty of applying traditional competition rules (aimed at undertakings engaged in economic activities) to State authorities which are also classified as undertakings even when they merely influence the market, without actually participating in it. Moreover, the B&H Competition Act provides for two basic competition law violations: anti-competitive agreements and the abuse of a dominant position (modelled after Articles 101 and 102 TFEU). The difficulty of applying the national equivalent of Article 102 TFEU⁴³ to public authorities that do not engage in economic activities is obvious – it would often be problematic to establish such entity's dominant position on a given relevant market seeing as it does not 'engage' in it in the first place⁴⁴. As a preliminary observation, it should thus be expected that public authorities that influence the markets without engaging in economic activities cannot be charged with an abuse of dominance

⁴² ME Competition Act (*Zakon o zaštiti konkurencije*), *Službeni list CG* 44/12, Article 3(3).

⁴³ B&H Competition Act, Article 10.

⁴⁴ *Ibid.*, Article 9: "Economic entity has a dominant position in the relevant market of goods or services, when owing to its market power it can behave in the relevant market considerably independently of its actual or potential competitors, buyers, consumers or suppliers, taking into account the market share of that economic entity in the relevant market, market shares of its competitors in that market, as well as the legal and other barriers to the entry of other economic entities in the market". The definition of dominance is further specified in the Regulation on definition of a dominant position adopted by KV Decision No. 01-01-26-102-I/06 dated 21 February 2006, available at <http://bihkonk.gov.ba/en/regulation-on-definition-of-a-dominant-position.html>. Article 2(2) of the Regulation provides that 'An undertaking is in dominant position in the relevant market of products and services where it faces no competition or insignificant existing competition'. These definitions clearly require the undertaking to be active on the relevant market so that its market share and market power can be assessed in the view of determining its dominance on that market. See also M. Gogić, 'Određivanje relevantnog tržišta u pravu konkurencije Bosne i Hercegovine i Evropske unije' (2012) 3–4 *Pravna misao (Sarajevo)* 84–101.

infringement. The only remaining alternative is the substantive provision prohibiting anti-competitive agreements. In its definition of agreements, the latter contains traditional agreements, contracts, concerted practices ‘as well as decisions and other acts of economic entities’ that have as their object or effect the prevention, restriction or distortion of market competition⁴⁵. Given that public authorities can be considered undertakings or economic entities, their decisions and ‘other acts’ could thus fall into the somewhat broad definition of prohibited agreements provided by the B&H Competition Act. However, while Article 101 TFEU was designed to apply to agreements and concerted practices of undertakings or to the decisions of associations of undertakings, its domestic equivalent appears to cover situations where a unilateral decision or action of any entity (including State authorities) can fall into the category of agreements.

If the above interpretations are correct, then State authorities can be found in violation of the national equivalent of Article 101 TFEU – a fact that can trigger antitrust sanctions. The B&H Competition Act authorizes the Competition Council to impose on undertakings that entered into prohibited agreements a financial penalty of up to 10% of their total annual turnover⁴⁶. Domestic competition law also provides for sanctions to be imposed on responsible individuals within the economic entities engaged in the infringement. These fines range from BAM 15.000 to BAM 50.000 (approx. € 7.500 to € 25.000)⁴⁷. An apparent specific feature of this manner of setting fines for competition law infringements is that they were primarily designed for undertakings engaged in economic activities. In case of State institutions that do not engage in economic or income generating activities, the closest equivalent of annual turnover would be their annual budget. Fines of up to 10% of such budget could, however, seriously undermine the ability of a public authority to carry on with its public functions.

The above interpretations and concerns have been made on the basis of the literal interpretation of the various concepts and rules contained in the B&H Competition Act as well as in related secondary legislation adopted by the KV. The ensuing section of this paper is aimed at verifying the above interpretations and assumptions through the analysis of the Competition Council’s enforcement practice in cases where State authorities have been the subject of infringement proceedings.

⁴⁵ B&H Competition Act, Article 4(1).

⁴⁶ *Ibidem*, Article 48(1)(a).

⁴⁷ *Ibidem*, Article 48(2).

IV. Competition infringements committed by State institutions in the enforcement practice of the Competition Council

1. Anti-competitive agreements in the national healthcare system

A recent line of cases investigated by the KV has targeted the healthcare sector – an industry heavily regulated by the State, especially with respect to the national health insurance system. Bosnia and Herzegovina's federal structure is reflected in its health sector. Its cantonal governments establish lists of approved medicines that can be sold to insured individuals and subsequently reimbursed from funds administered by cantonal health insurance offices. The recommended prices at which the approved medicines can be sold to the insured are also set by cantonal administrations.

The first relevant case in this field was investigated by the Competition Council in 2008 and concerned a complaint lodged by the association of foreign pharmaceutical producers in B&H (the Association) against the Sarajevo Cantonal Government⁴⁸. The latter ordered its Committee for Medicines to replace foreign drugs with domestically produced equivalents, where available. The Association argued before the NCA that the cantonal government's decision strengthened the dominance of domestic producers, facilitated the abuse of such position and effectively excluded foreign competitors from the relevant market. The representatives of Sarajevo's administration argued instead that the investigation should be suspended on the basis that the provisions of the B&H Competition Act, which prohibit anti-competitive agreements and practices, cannot be applied to the acts of State authorities⁴⁹.

The KV made reference in its decision to Article 2(1)(b) of the B&H Competition Act, which provides for the application of its provisions to the actions of central and local governments if they can directly or indirectly affect competition on the relevant market. The NCA found the Sarajevo Cantonal Government liable for anti-competitive practices because its decisions regarding the replacement of foreign drugs with their domestic equivalents were not based on qualitative criteria (or other objective factors), but merely on the origin of the manufacturers⁵⁰. According to the Competition Council,

⁴⁸ *Vlada kantona Sarajevo*, <http://www.ks.gov.ba/>.

⁴⁹ B&H Competition Act, Article 5.

⁵⁰ KV Decision 01-01-26-048-36-II/07 dated 22 October 2008. See A. Svetlicinii, 'The Bosnian & Herzegovinan Competition Authority prosecutes regional Government for intervening with competitive process on the market for pharmaceuticals reimbursed under the national health insurance scheme (Association of Foreign Pharmaceutical Producers in Bosnia & Herzegovina/Cantonal Government Sarajevo)' (2008) *e-Competitions* No. 26125.

Sarajevo's government excluded foreign pharmaceutical companies from the relevant market where they were placed at a competitive disadvantage in relation to their domestic rivals. It should be noted here that the KV did not impose any sanctions on the Sarajevo Government despite it being found in violation of national competition rules.

Also in 2008, this time following a complaint submitted by a pharmaceutical multinational Novo Nordisk, the KV established that the Sarajevo Cantonal Health Insurance Office⁵¹ excluded from the approved medicines list certain insulin products supplied by the complainant as well as a range of pharmaceutical products of other suppliers⁵². The NCA qualified the actions of the scrutinised Office as an anti-competitive agreement because they resulted in a reduction of competition on the relevant market. The exclusion of the specified products from the list of medicines approved under the State reimbursement scheme effectively placed the undertakings concerned at a competitive disadvantage with respect to their rivals. The Competition Council rejected at the same time the complainant's request to qualify the Office's actions as an abuse of dominance because the Office itself was not active on the relevant market and the influence on market competition alone can only be prosecuted as an anti-competitive agreement. As a sanction for the established infringement, the KV imposed on the Sarajevo Cantonal Health Insurance Office a fine in the amount of BAM 50,000 (approx. € 25,000). A fine of BAM 15,000 (approx. € 7,500) was also imposed on the responsible individual – the Director of the Office. According to the NCA, its primary objective in formulating the above sanctions was not to punish the infringement, but to correct its consequences. As a result, the imposed fines were minimal⁵³.

Actions of State authorities in the healthcare sector have re-emerged in the KV's enforcement practice in 2012 when the Competition Council investigated the activities of the Zenica-Doboj Cantonal Health Insurance Office (Ze-Do Office)⁵⁴. In order to be reimbursed for medicines provided to customers covered by the national health insurance scheme, all pharmacies were required to conclude reimbursement agreements with cantonal health insurance offices. The procedure for the execution of these agreements was regulated on the

⁵¹ *Zavod zdravstvenog osiguranja kantona Sarajevo*, <http://www.kzzosa.ba/>.

⁵² KV Decision 01-02-26-023-22-II/08 dated 20 November 2008. See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina prosecutes anticompetitive agreements from the regional health insurance office (Novo Nordisk v. Health Insurance Office of the Sarajevo Canton)' (2008) *e-Competitions* No. 25923.

⁵³ The B&H Competition Act provides for a minimal BAM 15,000 fine for responsible individuals, while the calculation of the fines imposed on undertakings is based on their annual turnover (Article 48). In this case the KV has not specified which percentage was taken as a basis for the determination of the fine.

⁵⁴ *Zavod zdravstvenog osiguranja Zeničko-dobojskog kantona*, <http://www.zzozedo.ba/>.

cantonal level – it was prescribed by cantonal governments. In order to qualify for the conclusion of a reimbursement agreements with the Ze-Do Office, the Ze-Do Cantonal Government⁵⁵ required all privately owned pharmacies to pay their employees salaries no lower than the average salary paid by State-owned pharmacies. The complainant argued before the KV that the above minimum salary requirement constituted an anti-competitive agreement, which was discriminatory towards private pharmacies and undermined their competitiveness vis-à-vis State-owned pharmacies.

The KV qualified the actions of the Ze-Do Government and Ze-Do Office as an anti-competitive agreement in the form of making the conclusion of contracts subject to the acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, had no connection with the subject of those contracts.⁵⁶ Although the B&H Competition Act sanctions anti-competitive agreements with fines of up to 10% of the undertaking's relevant turnover, the KV noted that in this case its objective was not to penalise, but to draw the attention of cantonal authorities to the need to comply with competition rules. As a result, the fine imposed on the Ze-Do Government totalled BAM 20.000 (approx. € 10.000). The Ze-Do Office was punished with a fine of BAM 10.000 (approx. € 5.000).

2. State institutions as undertakings in the public transport markets

Another sector targeted by the Competition Council with respect to the anti-competitive actions of State authorities was public transportation. According to a 2004 Decision of the Sarajevo Cantonal Assembly⁵⁷, taxi operators who satisfied certain mandatory technical conditions laid down in cantonal legislation, should be issued special markings for their cabs and should adhere to the standard agreement for the use of taxi terminals arranged by the cantonal transport ministry⁵⁸. The same Decision also provided that special taxi markings are issued to eligible taxi operators only after they conclude a taxi terminal agreement with the cantonal ministry. The ministry was concluding these agreements on the basis of its annual plans but the

⁵⁵ *Vlada Zeničko-dobojskog kantona*, <http://www.zdk.ba/>.

⁵⁶ KV Decision 02-26-2-06-56-II/11 dated 28 February 2012. See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina addresses anti-competitive regulations in the regional market for medicines reimbursed under national health insurance system (Cantonal Government of Zenica-Doboj and the Cantonal Health Insurance Office of Zenica-Doboj)' (2012) *e-Competitions* No. 47337.

⁵⁷ *Skupština kantona Sarajevo*, <http://skupstina.ks.gov.ba/>.

⁵⁸ *Ministarstvo saobraćaja kantona Sarajevo*, <http://ms.ks.gov.ba/>.

2009 plan, for instance, provided that the ministry would not conclude any new taxi terminal agreements that year. At the same time, taxi operators who concluded their terminal agreements in 2005 or earlier were allowed to automatically extend them for the year 2009. As a result, new taxi operators were unable to receive a taxi marking and could not commence operations even if they satisfied all mandatory technical conditions.

The Public Prosecutor representing the Sarajevo Cantonal Assembly argued that the assembly is a legislative body and therefore should not be subject to competition rules. In its decision, the NCA noted however that when adopting the above Decision, the Assembly acted as an administrative body issuing by-laws implementing federal legislation in the domain of public transport⁵⁹. The KV found that the Assembly's Decision and the Ministry's 2009 plan have effectively restricted competition on the relevant market by preventing new market entry and favouring existing competitors that have concluded their taxi terminal agreements in 2005 or earlier. Applying its sanctioning powers under the B&H Competition Act, the Competition Council imposed on the Ministry a fine in the amount of BAM 50.000 (approx. € 25.000), which represented 0,1% of its budget for 2008. The NCA noted also that the purpose of the fine was not to punish, but to draw the Ministry's attention to the need to comply with competition rules. Interestingly enough, both the Assembly and the Ministry challenged the KV decision before the Court of B&H⁶⁰. Both appeals were dismissed and the KV's decision was upheld by the court⁶¹.

Public transport in Sarajevo became once again the focus of an inquiry in 2012. The Competition Council found that the Sarajevo Cantonal Ministry of Transport entered into an anti-competitive agreement prohibited under the national equivalent of Article 101 TFEU.⁶² The Ministry committed an infringement by granting to the public undertaking KJKP Gradski Saobraćaj d.o.o. (GRAS) the exclusive right to supply subsidized transport services for local schools. In its reply to KV's information request, the Ministry stated that the organization of subsidized transportation for local schools falls under the scope of the exercise of its public power. According to the Ministry,

⁵⁹ KV Decision 01-02-26-041-36-II/09 dated 14 June 2011. See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina addresses anti-competitive regulations on the taxi market of one of the cantons (Ministry of Transport of the Sarajevo Canton and Assembly of the Sarajevo Canton)' (2011) *e-Competitions* No. 39258.

⁶⁰ *SudBosne i Hercegovine*, <http://www.sudbih.gov.ba/>.

⁶¹ Judgment No S13u00138010U dated 21 December 2012 and Judgment No S13u00127610U dated 24 December 2012.

⁶² KV Decision 06-26-3-026-67-II/11 dated 18 April 2012. See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina prosecutes the regional government for public procurement infringements that resulted in restriction of competition in the transports market (Centrotrans-Eurolines)' (2012) *e-Competitions* No. 45896.

agreements concluded with local administrations did not prevent the latter from procuring transport services from other providers. The Ministry took the principled position that the scrutinised contracts did not have as their object the limitation of competition because they were concluded on the basis of laws regulating the organization of the public education system. Seeing as relevant provisions stated that local administrations had to choose their transport providers through an open public procurement process, the NCA held that the Ministry has infringed these regulations by selecting GRAS as an exclusive service provider. The Competition Council concluded that the Ministry, by acting contrary to relevant regulations and public procurement rules, has restricted competition on the relevant market (limit or control production, markets, technical development) and has thus committed an infringement of the national equivalent of Article 101 TFEU. The KV stated once again that it did not intend to penalise the State authority but merely to draw its attention to the need to comply with competition rules. As a result, the fine imposed on the Ministry totalled BAM 26.000 (approx. € 13.000), which was equal to 0,0113% of its budget for 2010.

3. Reasons for an exemption of State institutions from competition law enforcement

The above cases illustrate the instances when State authorities were treated as undertakings under the B&H Competition Act and were found in violation of the national equivalent of Article 101 TFEU. The following case law examples demonstrate various reasons for the exemption of State authorities from competition law prosecution.

In 2009, the Competition Council investigated a case where two cantonal governments have allegedly given privileged treatment to a State-owned company (engaged in raw wood processing activities) through State subsidies and long term procurement contracts.⁶³ On the basis of market data obtained from the national statistics office, the KV established that the two cantons accounted for 8,9% and 10,1% of raw wood production in B&H respectively. The NCA established ultimately that only one of the cantons had actually entered into binding contracts with the State-owned company, but that the agreements in question affected an insignificant part only of the total wood supplies available on the market. As such, they did not have substantial anticompetitive effects.

⁶³ KV Decision 01-05-26-050-53-II/08 dated 21 July 2009. See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina holds that State subsidies to the wood-processing industry does not represent an anti-competitive agreement (The Union of Independent Entrepreneurs Olovo)' (2009) *e-Competitions* No. 28747.

The case against the cantonal governments was ultimately closed on the basis of the provisions on agreements of minor importance⁶⁴.

In 2010, following a complaint by a pharmaceuticals trader Pharma-Maac, the Competition Council initiated an investigation into the alleged anti-competitive agreement between the Sarajevo Cantonal Health Insurance Office (the Office) and Pharma-Maac's rival, Medimpex. The Office announced in 2008 a public tender for the supply of seasonal flu vaccines for the seasons of 2009/2010, 2010/2011 and 2011/2012. The conditions of the tender required bidders to provide evidence that their vaccines had been certified by the Office for Drug Control of the Federation of B&H for the season of 2008/2009. Since Pharma-Maac failed to present such evidence, its bid was considered ineligible and the supply contract was awarded to Medimpex. Pharma-Maac submitted that the certification requirement for the 2008/2009 season was unjustified and that it was introduced in order to favour its competitor. In Pharma-Maac's view, the Office concluded an anti-competitive agreement with Medimpex for the purpose of dividing the market and limiting output, thus significantly reducing competition. On the basis of the available evidence, the Competition Council found, however, no anti-competitive agreements. The NCA stressed that the requirement to provide evidence of vaccine certification could not be viewed as a discriminatory condition favouring one of the bidders above the other because it had to be satisfied by all tender participants. At the same time, the KV refused to decide whether the scrutinised Office had correctly applied sector-specific rules when setting the tender requirements; this decision was left to the sector regulator⁶⁵.

The most recent case relevant in this context concerns the influence exercised by State authorities on the electricity market through subsidies accorded to renewable energy power plants⁶⁶. The Government of the Federation of B&H⁶⁷ adopted in ... a federal Regulation on the exploitation of renewable energy sources and co-generation⁶⁸. The Regulation provided a series of measures meant to stimulate renewable energy generation including

⁶⁴ B&H Competition Act, Article 8.

⁶⁵ KV Decision 01-02-26-036-19-II/09 dated 23 March 2010. See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina investigates tender procedures for the supply of the vaccines organized by the State health insurance office (Pharma-Maac)' (2010) *e-Competitions* No. 31409.

⁶⁶ KV Decision 03-26-3-010-40-II/11 dated 4 October 2012. See A. Svetlicinii, 'The Competition Authority of Bosnia and Herzegovina rejects the complaint alleging the anti-competitive character of the government subsidies for energy generation from renewable sources (APEOR)' (2012) *e-Competitions* No. 50855.

⁶⁷ *Vlada Federacije BiH*, <http://www.fbihvlada.gov.ba/>.

⁶⁸ *Uredba o korištenju obnovljivih izvora energije i kogeneracije* published in *Službene novine FBiH* 36/10, 11/11 and 88/11.

State subsidies for the construction of new power generation plants. It also gave producers of renewable energy the right to conclude electricity purchase agreements with public electricity companies at guaranteed prices. Such agreements could be concluded for a period of up to twelve years starting from the year when the eligible power plant has commenced its operations. As a result, newly built power plants were able to benefit from guaranteed prices for a period of twelve years. By contrast, those that started operation prior to the adoption of this Regulation would be able to supply energy at guaranteed prices for a reduced period of time only, that is, twelve minus the number of years they have already been in operation. The Association of renewable energy producers (APEOR)⁶⁹ argued that the Government has distorted competition among renewable energy producers by favouring newly built power plants. Hence, claiming the existence of dissimilar conditions applied to similar transactions, as well as the imposition of unfair trading conditions, APEOR suggested that the Government's measure should be viewed as an anti-competitive agreement under the B&H Competition Act.

The KV accepted the Government's submission that the Regulation did not have as its objective the discrimination of existing renewable energy producers. Instead, it was meant to promote the use of energy from renewable sources and incentivize the construction of new power generation plants. Without addressing the actual effect of the above measures, the Competition Council concluded that there was no discrimination between renewable energy producers because the Regulation provided for purchase obligations at guaranteed prices that set equal conditions for all renewable energy producers for the period of twelve years. Interestingly, the allegedly anti-competitive character of this specific State action was assessed almost exclusively based on the objective of this measure. The KV justified its rejection of the discrimination claim by the fact that the Government attempted to incentivize the construction of new power plants. In this regard, all renewable energy producers could benefit from the maximum of twelve years guaranteed purchase prices.

V. Concluding remarks

The Competition Council's enforcement practice in cases where State institutions were charged with competition law infringements after being classified as undertakings highlighted the original choice made by Bosnia and Herzegovina's legislator when adopting the current Competition Act. Based

⁶⁹ *Asocijacija proizvođača električne energije iz obnovljivih resursa u BiH*, <http://www.apeor.com/>.

on the well known concepts of 'undertaking' and 'economic activity' developed in EU competition law, the provisions of the B&H Competition Act allow for an extremely wide interpretation of the motion of an undertaking. As a result, State institutions are classified as undertakings even when they influence market competition merely by exercising their public powers to legislate or to enforce existing laws, without actually engaging in any economic activity. Since the regulation of economic activities is one of the public functions of the State, it is inevitable that regulatory or enforcement actions of State authorities will have an effect on market competition. It appears that under the B&H Competition Act, such link between State actions and negative effects on competition will suffice for the Competition Council to treat State institutions as undertakings for the purpose of the application of competition rules.

This legal qualification allows the KV to order the annulment and/or amendment of State acts qualified as anti-competitive agreements under the national equivalent of Article 101 TFEU. State institutions will then be faced with the challenge of contesting the NCA's decision before the judiciary. As a result, theoretically any act of an executive authority that causes anti-competitive effects can be overruled by the NCA as being contrary to the B&H Competition Act. As demonstrated in the above discussion on the KV's emerging enforcement practice, the Competition Council has used its powers to order the annulment and/or amendment of acts issued by both federal and cantonal administrations. Moreover, this interpretation and application of the B&H Competition Act has been upheld by the judiciary seeing as the Court of B&H dismissed appeals lodged against KV's infringement decision in the aforementioned Sarajevo tax case. Judicial statistics demonstrate that the Competition Council has a strong record in defending its decisions before the court: no successful appeals were made in 2012⁷⁰ or 2010⁷¹ and only one in 2009 (not related to actions of State authorities)⁷².

As demonstrated in the discussion on the enforcement practice of B&H's NCA, the application of competition rules to the actions of State authorities has expanded the coverage of another substantive competition law concept also – that of an 'anti-competitive agreement'. When State authorities do not participate in the relevant market directly, it is not possible to determine their dominance and thus in turn apply the national equivalent of Article 102 TFEU. As a result, the NCA regards the actions of State authorities influencing competition on the relevant market as anti-competitive agreements

⁷⁰ See KV 2012 Annual Report, available at <http://bihkonk.gov.ba/datoteka/IZVJESTAJ-ZA-2012-GODINU.pdf>.

⁷¹ See KV 2010 Annual Report, available at <http://bihkonk.gov.ba/datoteka/IZVJESAJ-o-radu-2011bos.pdf>.

⁷² See KV 2009 Annual Report, available at http://bihkonk.gov.ba/datoteka/izvjestaj_2009.pdf.

sanctioned under the national equivalent of Article 101 TFEU. Following the Competition Council's practice, it appears that such category of 'agreements' does not require the existence and/or consent by another party – it is sufficient to show that a State authority has issued a binding regulation that undertakings are obliged to comply with.

Another inconsistency caused by the extended interpretation and application of the two discussed concepts emerges at the stage where a State authority is in fact found in violation of the national equivalent of Article 101 TFEU. Since State authorities can be treated as undertakings under the B&H Competition Act, there should be no reason for distinguishing between State entities and private companies when determining the amount of fines to be imposed. According to applicable rules, anti-competitive agreements can be sanctioned by a financial penalty of up to 10% of the undertaking's annual turnover⁷³. When determining the amount of the fine, the KV should take into account the aim and the duration of the violation⁷⁴. However, the NCA's enforcement of the B&H Competition Act in relation to State authorities demonstrated a significant leniency in sanctioning public bodies for competition infringements – fines did not exceed € 25,000 and never reached even as much as 1% of the infringing State institutions' turnover (budget).

Bosnia and Herzegovina remains a transition economy with continuous State regulations and little or no experience in enforcing competition rules. One could thus attempt to justify its legislator's choice to give extensive powers to the NCA in order to facilitate efficient enforcement of competition law against State-initiated competition restraints. Indeed, the emerging enforcement practice of the Competition Council should contribute to growing awareness of public officials concerning competition rules. It should also improve B&H's competition culture at the national, regional and local levels. At the same time, the way in which the KV applies substantive rules and concepts to deal with anti-competitive effects stemming from the actions of State authorities remains questionable. The concepts of 'undertaking', 'economic activity' and 'anti-competitive agreement', as well as fines for antitrust infringements calculated as a percentage of annual turnovers, were all transposed into national legislation from EU competition law. As the above cases demonstrate, these concepts have lost their original scope and meaning when applied to State institutions under the B&H Competition Act. Even though B&H's obligation under the Interim Agreement and SAA to apply EU competition rules is limited to cases where B&H-EU trade is affected, the current application of these concepts appears to contradict the legislator's intention to use EU

⁷³ B&H Competition Act, Article 48(1).

⁷⁴ *Ibidem*, Article 52.

competition law (CJEU's judgments and EU Commission's decisions)⁷⁵ for the assessment of domestic competition cases.

Interestingly enough, the European Commission's 2012 Progress Report for Bosnia and Herzegovina stated that the national Competition Act is still to be fully aligned with *acquis communautaire* and B&H is still to fulfil its commitment to apply EU competition principles to public undertakings and undertakings with special and exclusive rights.⁷⁶ It remains to be seen whether this comment will result in legislative amendments harmonizing the concepts of 'undertaking' and 'economic activity' applied to State authorities under the current B&H Competition Act.

Literature

- Beširević V. (ed.), *Public Law in Serbia: Twenty Years After*, Esperia, 2012.
- Dajković I, 'Whither Competition Law in Montenegro: Current status and future challenges' (2007) 28(2) ECLR.
- Gerardin D., Henry D. (eds), *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*, Intersentia, 2005.
- Gogić M., 'Određivanje relevantnog tržišta u pravu konkurencije Bosne i Hercegovine i Evropske unije' ['Determination of relevant market in the competition law of Bosnia and Herzegovina and the European Union'] (2012) 3–4 *Pravna misao (Sarajevo)*.
- Jones A., Sufrin B., *EC Competition Law*, 4thed, Oxford University Press, 2011.
- Karova R., Botta M., 'Five Years Enforcement of Competition Law in the Republic of Macedonia – Time for an Assessment' (2010) 2 *Mediterranean Competition Bulletin*.
- Kavaz Hukić S, 'Stanje i perspektive pravakonkurencije u Bosni i Hercegovini' ['Current situation and perspectives for competition law in Bosnia and Herzegovina'] (2013) 3–4 *Pravnamisao (Sarajevo)*.
- Louri V., 'The FENIN Judgment: The Notion of Undertaking and Purchasing Activity: Case T-319/99, Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental v. Commission [2003] ECR II-00357' (2005) 32 *Legal Issues of Economic Integration*.
- Louri V., 'Undertaking' as a Jurisdictional Element for the Application of EC Competition Rules' (2002) 29 *Legal Issues of Economic Integration*.
- Mekšić Z., 'Jurisdikcija Suda EU u praksi Suda BiH' ['Jurisprudence of the CJEU in the practice of the Court of B&H'] (2012) 8 *Sveske za javno pravo*.
- Nowag J., 'SELEX Sistemi Integrati SpA v Commission of the European Communities (C-113/07 P) [2009] E.C.R. I-2207: redefining the boundaries between undertaking and the exercise of public authority' (2010) 31(12) *ECLR*.

⁷⁵ *Ibidem*, Article 43(7).

⁷⁶ Bosnia and Herzegovina 2012 Progress Report, SWD (2012) 335 final, Brussels, 10.10.2012, p. 36, available at http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/ba_rapport_2012_en.pdf.

- Odudu O., 'Are State owned healthcare providers that are funded by general taxation undertakings subject to competition law?' (2011) 32(5) *ECLR*.
- Pecotić Kaufman J., *Enforcement of Competition Rules in Croatia – Challenges and the Way Forward* (November 17, 2009), available at <http://ssrn.com/abstract=1844302>
- Podstawa K., Puccio L. (eds), 'Framework for Economic Development in EU External Relations' (2012) 1 *EUI Working Paper (Law)* 51–74.
- Rose V., Bailey D., *Bellamy & Child European Union law of Competition*, 7thed, Oxford University Press, 2013.
- Svetlicinii A., 'Back to the Basics: Concepts of Undertaking and Economic Activity in the SELEX Judgment' (2009) *European Law Reporter*.
- Svetlicinii A., 'Competition law enforcement in Serbia: problems and prospects' (2012) 33(6) *ECLR*.
- Svetlicinii A., 'The Competition Authority of Bosnia & Herzegovina prosecutes anticompetitive agreements from the regional health insurance office (Novo Nordisk v. Health Insurance Office of the Sarajevo Canton)' (2008) *e-Competitions* No. 25923.
- Svetlicinii A., 'The Bosnian & Herzegovinan Competition Authority prosecutes regional Government for intervening with competitive process on the market for pharmaceuticals reimbursed under the national health insurance scheme (Association of Foreign Pharmaceutical Producers in Bosnia & Herzegovina / Cantonal Government Sarajevo)' (2008) *e-Competitions* No. 26125.
- Svetlicinii A., 'The Competition Authority of Bosnia & Herzegovina holds that State subsidies to the wood-processing industry does not represent an anti-competitive agreement (The Union of Independent Entrepreneurs Olovo)' (2009) *e-Competitions* No. 28747.
- Svetlicinii A., 'The Competition Authority of Bosnia & Herzegovina investigates tender procedures for the supply of the vaccines organized by the State health insurance office (Pharma-Maac)' (2010) *e-Competitions* No. 31409.
- Svetlicinii A., 'The Competition Authority of Bosnia & Herzegovina addresses anti-competitive regulations on the taxi market of one of the cantons (Ministry of Transport of the Sarajevo Canton and Assembly of the Sarajevo Canton)' (2011) *e-Competitions* No. 39258.
- Svetlicinii A., 'The Competition Authority of Bosnia & Herzegovina prosecutes the regional government for public procurement infringements that resulted in restriction of competition in the transports market (Centrotrans-Eurolines)' (2012) *e-Competitions* No. 45896.
- Svetlicinii A., 'The Competition Authority of Bosnia & Herzegovina addresses anti-competitive regulations in the regional market for medicines reimbursed under national health insurance system (Cantonal Government of Zenica-Doboj and the Cantonal Health Insurance Office of Zenica-Doboj)' (2012) *e-Competitions* No. 47337.
- Van Bael & Bellis, *Competition law of the European Community*, 5thed, Wolters Kluwer, 2010.
- Whish R., *Competition Law*, 7thed, Oxford University Press, 2012.