



Republic of Serbia
**COMMISSION FOR
PROTECTION OF
COMPETITION**

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MINISTRY OF INFORMATION AND TELECOMMUNICATIONS

Nemanjina 22-26
Belgrade

The Ministry of Information and Telecommunications submitted to the Commission for the Protection of Competition the Draft Law on Electronic Communications (hereinafter: Draft law), along with the explanation and Analysis of the effects of the law, for the purpose of giving an opinion.

Council of the Commission for Protection of Competition, following the consideration of the submitted Draft Law, pursuant to Article 22, and in relation to Article 21, paragraph 1, item 7) of the Law on Protection of Competition ("Official Gazette of the Republic of Serbia", 51/2009 and 95/2013), at its 112th meeting held on February 3, 2023, passes the following

OPINION

The Commission for the Protection of Competition gave its opinion on the Draft Law on Electronic Communications, which was submitted in September 2021 by the Ministry of Trade, Tourism and Telecommunications (act of the Commission No. 9/0-02-658/2021-2 dated September 29, 2021).

Remaining with the views expressed in the aforementioned opinion, and taking into account the amendments in the provisions in the Draft Law in relation to the Draft Law from 2021, we wish to indicate the following:

1. Provision of Article 67, paragraph 1 of the Draft Law, sets forth that:

"At least once every five years, the regulator shall perform an analysis of existing relevant markets (hereinafter: market analysis), i.e. at least once every three years, an analysis of new markets that are not subject to regulation, taking into account, to the greatest extent possible, the appropriate recommendations of the European Union on the market analysis and determining significant market power."

Although the submitted Draft Law in terms of this article has been improved in relation to the Draft Law from 2021, the Commission believes that it is necessary to bear in mind that the market of electronic communication networks and services is extremely dynamic, and that it would be necessary to shorten the deadlines of the aforementioned analyzes to three i.e, two years, so that the provision reads:

"At least once every **three** years, the regulator shall perform an analysis of existing relevant markets (hereinafter: market analysis), i.e. at least once every **two** years, an analysis of new markets that are not subject to regulation, taking into account, to the greatest extent possible, the appropriate recommendations of the European Union on the market analysis and determining significant market power."

The provision of paragraph 3 of the same article of the Draft Law stipulates that:

"In the process of market analysis, the Regulator shall cooperate with the authority responsible for the protection of competition."

The Regulator and the Commission have cooperated intensively in the previous market analysis procedures carried out under the current Law on Electronic Communications, but only from the moment of conducting public consultations, as provided for in the Draft Law in Article 67, Paragraph 4. As assessed by the Commission, the cooperation between the Regulator and the Commission in connection with market analysis is necessary at the earliest possible stage, certainly before the implementation of public consultations, so the Commission proposes to amend the provisions of Article 67, paragraph 3 of the Draft Law , so that it reads:

"In the process of market analysis, the Regulator cooperates with the authority responsible for the protection of competition, and **prior to conducting public consultations.**"

2. The provisions of Article 68 of the Draft Law, which regulate the criteria for determining operators with significant market power, in paragraphs 4 and 5 of this Article, set forth the following:

"Common significant market power is shared by two or more economic entities, which may be mutually legally and economically independent, but which, from an economic point of view, have a common interest, that is, **which have adopted a common policy of coordinated anti-competitive behavior on the market.**"

The existence of an agreement between economic entities or other legal, structural or economic ties is not necessary for the determination of joint significant market power, but it can be based on other forms of connection, i.e. on **tacit coordinated joint action** and depends on the economic assessment, and especially on the assessment of the market structure ."

In connection with the cited provisions of the Draft Law, the Commission indicates that joint significant market power can be viewed in the context of the institution of collective dominance, which is known in the field of competition law and which is similarly defined. However, the content of the aforementioned provisions is not acceptable from the aspect of application of regulations in the field of competition protection, regarding the parts of the text marked in bold letters. Namely, as the existence of a dominant position is not contrary to the Law on Protection of Competition, neither is the existence of collective dominance. If two or more market participants possess a collective dominant position, this does not necessarily mean that it exists because the market participants have adopted a policy of concerted anti-competitive behavior and tacit concerted action, especially for the reason that such actions may constitute competition infringement under the conditions prescribed by law . Therefore, the wording used to define common market power automatically indicates the possible existence of actions and/or acts contrary to the Law on Protection of Competition, for which reason they are not adequate for the Draft Law in question.

In accordance with the aforementioned, and in order to harmonize the aforementioned provisions of the Draft Law with the provisions of the Law on Protection of Competition, we propose that the provisions of Article 68, paragraph 4 and 5 of the Draft Law, read as follows:

“Common significant market power may be observed with two or more economic entities that are legally independent but connected by economic relations, have a common business interest, that is, act jointly or act as a single participant on a relevant market.

Common significant market power, in addition to specified or implicit agreements, concerted practices or other legal, structural or economic relations, may be based on other types of association and depends on economic assessment, especially the assessment of relevant market structure.”

In addition to the above, the provision of the same article, in paragraph 7, prescribes the following:

"When determining the significant market power of an economic entity on a certain market, its significant market power can also be determined on a closely related market, if the connections between these markets are such that the power from one market can be transferred to a closely related market in a way that strengthens the market power of the economic entity."

The Commission therefore proposes, that in Article 68, of the Draft Law, following the cited paragraph 7, a new paragraph 8 be added which would say:

"The provisions of paragraph 7 of this article shall be applied accordingly when determining the common significant market power of a business entity."

The above is proposed, considering the same effects of "transmission" to closely related markets, described in the provision of Article 68, paragraph 7 of the Draft law, which are possible in the case of significant market power of one economic entity, can also occur in the case of common significant market power of two or more economic entities.

3. Provision of Article 77 of the Draft Law, regulates joint investments in very high capacity networks.

The Commission therefore proposes, that in Article 77, of the Draft Law, following paragraph 6, a new paragraph 7 be added which would say:

"A joint investment, referred to in paragraph 1 of this article, made by two or more market participants, may be subject to assessment in accordance with the regulations governing the protection of competition."

The aforementioned proposal of the Commission is based on the relevant provisions of the Law on Protection of Competition.

Namely, the provisions of Article 17, paragraph 1, item 3) of the Law on the Protection of Competition stipulate that the concentration of market participants occurs in the case of joint investment by two or more market participants with the aim of creating a new market participant or acquiring joint control in the sense of Article 5, paragraph 2 of this Law, over an existing market participant, which operates on a long-term basis and has all the functions of an independent market participant.

In addition to the above, the provisions of Article 18, paragraph 1, item 3) of the Law on the Protection of Competition stipulate that it is not considered that a concentration of market participants has occurred if a joint venture aims to coordinate market activities between two or more market participants who retain their legal independence, whereby such a joint investment will be assessed in accordance with Articles 10 and 11 of this Law.

In the light of the aforementioned provisions of the Law on the Protection of Competition, the proposed amendment to the Draft Law indicates the obligation to notify the concentration, which also includes market participants who take part in a joint venture within the meaning of Article 77 of the Draft Law, i.e. on compliance with the provisions of Articles 10 and 11 of the Law on the Protection of Competition, which regulate the issues of exemption of restrictive agreements from the ban, and on which the decision is made exclusively by the Commission.

4. Provision of Article 83 paragraph 3, item 1 of the Draft Law, which regulates the obligations of providing retail services under certain conditions by operators with significant market power, prescribes the following:

When determining the obligation from paragraph 1 of this Article, taking into account the nature of the identified deficiency in the relevant market, as well as the proportionality and justification of the obligations in relation to the goals from article 7 of this Law, the operator with SMP **may be imposed:**

"1) prohibition of calculating excessive prices, prohibition of hindering entry into the market or limiting competition with too high or too low prices, prohibition of giving unjustified advantages to certain end users, **prohibition of unjustified tying of certain services** and/or obtaining formal consent of the Regulator for the method of formation and change of prices of services in case of tying them into packages;"

According to the Commission's assessment, the said provision requires clarification. Namely, the current situation is such that a certain number of end users are unable to use an individual Internet service at a fixed location because it is connected to either a fixed telephony service or a cable television service. Therefore, it is necessary to specify or provide an example of what type of unfounded binding of services is in question, given that the previously specified example cited by the Commission is an example of bound services, which end users could view as "unfounded binding of certain services" in the case that they want to use the Internet service at a fixed location, but without a fixed telephony service, i.e. cable television.

Given the increasing number of users who have access to the Internet via the optical network, in which case it is possible to provide an Internet access service at a fixed location (which is no longer linked to fixed telephony), but also the difference in the prices of the Internet service, it is necessary for the proposer of the regulations based on the analysis of the market situation and projected development, assess the need to retain this provision.

We also note that determining the restriction, distortion or prevention of competition on the market of the Republic of Serbia or its part is within the competence of the Commission for the Protection of Competition in accordance with the Law.

5. Article 113 of the Draft Law, titled "Protection of competition in the field of radio frequency spectrum", which stipulates that when granting or changing the right to use the radio frequency spectrum, appropriate measures can be taken in order to ensure effective competition on the electronic communications market, and in particular, in item 5):

"5) determining the conditions under which the transfer of the right to use radio frequencies is prohibited or determining the conditions under which the transfer of those rights is carried out, when the transfer of rights has not defined by the regulation on the protection of competition, if it is certain that such a transfer of rights would significantly impair the competition in the electronic communications market;"

Given that neither the Law on Protection of Competition, nor any other regulation in the field of protection of competition, does not regulate the issue of the transfer of the right to use radio frequency spectrum, it is proposed to amend the aforementioned provision in order to harmonize them with the provisions of the Law on Protection of Competition, so that it now reads:

"5) determining the conditions under which the transfer of the right to use radio frequency spectrum is prohibited or determining the conditions under which the transfer of those rights is carried out, when the transfer of rights has not **previously been decided by an individual legal act adopted in accordance** with the regulation on the protection of competition,

Paragraph 2, of the same Article of the Draft Law, states that:

"Within their competences, the Regulator and the Ministry shall apply the measures from paragraph 1 of this Article, in cooperation with the authority responsible for the protection of competition, based on a comprehensive assessment of the conditions of competition on the market, which takes into account the circumstances from Article 67, paragraph 2 of this Law."

Given that the Commission has proposed the amendment of provision of Article 67, paragraph 3 of the Draft Law (item 1 of this Opinion), which also refers to the cooperation of the Regulator and the Commission, but in the course of the market analysis, within the same meaning, the amendment of Article 113, paragraph 2 of the Draft Law is also proposed, so that it reads:

"Within their competences, the Regulator and the Ministry shall apply the measures from paragraph 1 of this Article, in cooperation with the authority responsible for the protection of competition, **in the manner prescribed in Article 67, paragraph 3 of this Law**, and based on a comprehensive assessment of the conditions of competition on the market, which takes into account the circumstances from Article 67, paragraph 2 of this Law."

Apart from the above, the Commission has no other objections to the submitted Draft Law from the point of view of the application of the Law on Protection of Competition.

PRESIDENT OF THE COMMISSION

Nebojša Perić, m.p.