COMPETITION POLICY IN WESTERN BALKAN COUNTRIES

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Network of Parliamentary Commitees for Economy and Finance of the Western Balkan countries

WESTMINSTER FOUNDATION FOR DEMOCRACY

Institute of Economic Sciences

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Competition policy in Western Balkan countries

Published by
Westminster Foundation for Democracy (WFD)
Western Balkans Parliamentary network of committees for economy, finance and budget
Institute of Economic Sciences, Belgrade

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Technical edition and computer design by
ALTO

DISCLAIMER

This publication is made possible by the support of the WFD. The contents of this publication are the sole responsibility of the authors and do not necessarily reflect the views of WFD.

ACKNOWLEDGEMENTS

This study is supported by the Westminster Foundation for Democracy (WFD), with the aim to strengthen the existing cooperation among parliaments and governments from Western Balkan countries and within the network of parliamentary committees for economy, finance and budget.

The study has been structured and the research has been undertaken by Slavica Penev, Senior Research Fellow, Institute of Economic Sciences, Belgrade, as a head of the project, Ahmet Mancellari, professor at the Faculty of Economics, Tirana, Andreja Marušić, Senior business regulation specialist, the World Bank Group, Nikola Milović, assistant profesor, Faculty of Economics , Podgorica, Fikret Ĉaušević, professor at the Faculty of Economics and Business, Sarajevo and Dorarta Hyseni, NDI, Tirana, as team members.

The study was reviewed by Aleksandra Tomić, professor at ALFA university, Belgrade and chairperson of the Committee on the Economy, Regional Development, Trade, Tourism and Energy, Serbian parliament, Danijela Martinovic, asistant profesor, at the Faculty of Economics and Business, Sarajevo and chairperson of the Committee for economy, Parliamentary assembly of Bosnia and Herzegovina, Vladimir Marinković, asistant profesor at the Megatrend Faculty, and member of the Committee for finance and budget, Serbian parliament, and Boštjan Udovič, asistant profesor, Faculty of Social Sciences, Ljubljana.

The research was supported by the regional network of parliamentary committees for economy, finance, budget and the EU integration from all the Western Balkan parliaments, the competition authorities from Western Balkan countries and WFD staff.

The research benefited from the input and comments received from the participants at the regional conference of regional network of parliamentary committees for economy and finance of Western Balkan countries: Competition policy in Western Balkan countries, held in June, 1-2, 2013, Bečići, Montenegro.

Special thanks are due to Marta Todorović for her professional and devoted work on the technical preparation of this study.

FOREWORD

Regional cooperation among the parliaments from Western Balkan countries started in 2004, when the idea of conducting a regional project that focuses on the role of parliaments in the economic reform process was conceived. Since then, several country and regional studies related to the improvement of the process of economic reform legislation were conducted, including country studies for Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia, followed by the publication of a Regional Study: **Improving the Process of Economic Reform Legislation in Western Balkan Countries.** In parallel, the idea for establishing a regional network of parliamentary committees for economy and finance was initiated. A **Regional Declaration of cooperation among the Western Balkan Parliaments** was signed and the **Regional Network of Parliamentary Committees for Economy and Finance of the Western Balkan countries** was established in 2009 in Belgrade.

The Westminster Foundation for Democracy (WFD) recognized the need for the continuation of the cooperation among the Western Balkan parliaments through their Network of Parliamentary Committees for Finance and Economy. To support this regional cooperation, WFD initiated the drafting of a three-year regional programme aimed at strengthening parliaments' role in promoting competitiveness and economic growth in Western Balkan countries.

In addition to strengthening regional cooperation, the programme aims **to strengthen the role of parliaments and governments in improving the competitiveness and economic growth of countries in the Western Balkans.** As a baseline for this three year project, a regional study "Economic and European Perspectives of Western Balkan Countries" was conducted by Slavica Penev. This study is an in-depth research on the state of economic and regulatory reforms, and role of the parliaments in this process. A road-map has been also developed and agreed by the stakeholders in the six participating countries outlining the country and regional goals to be achieved by 2015.

One of the segments of the road map of this regional study is **competition policy and the role of parliamentary committees in the oversight of the work of competition authorities.** The oversight function is one of the cornerstones of democracy. In the competition framework it is a means of holding the competition authorities accountable for their work and it secures an effective implementation of the competition policy. In the oversight function, the role of parliamentary committees is of particular importance enabling the monitoring of the activities of the government and independent regulatory bodies – including the competition authority. The oversight of the implementation of the competition policy requires detailed consideration of the work of competition authorities mainly through the consideration of their annual reports. Such detailed consideration is best performed by a smaller group rather than by the parliament in plenary sessions, and it is in this respect that committees can play a vital role in performing oversight over the work of competition authorities.

The Study: **Competition Policy in Western Balkan Countries** was conducted by the members of the network of researchers from Western Balkan countries. Most of them cooperated with the parliaments from the region for almost ten years. The main objective of this Study was to make the competition policy more understandable to the members of the parliament including the members of the relevant parliamentary committees. This would result in the improvement of their competences not only of the MPs but also their supporting parliamentary staff, encouraging them to analyze the annual reports of the national competition authorities in depth, thereby making full use of their powers of oversight.

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Chapter 1

ANALYSIS OF COMPETITION POLICY IN WESTERN BALKAN COUNTRIES – REGIONAL OVERVIEW

Slavica Penev
Andreja Marušić

1.1. Competition policy in Western Balkan countries

Competition policy refers to a set of laws and regulations aimed at maintaining a fair degree of competition by eliminating restrictive business practices of private enterprises. Competition policy includes (i) *antimonopolies* (antitrust) and (ii) *regulation of state aid.*[1] *Restrictive* (or anti-competitive or unfair) *business practices* are those which limit other enterprises from entering a market or which regulate supply in a way that is deemed harmful either to other existing (or potential) producers or to consumers. Such practices include predatory pricing behavior, collusion, entry-deterrent capacity expansion and competition-reducing mergers and acquisitions. *Competition policy* is aimed at limiting monopoly in order to encourage competition and its beneficial welfare effects. A key characteristic of competitive market conditions is that *"sellers and potential sellers be as free as possible to enter and leave the market as they see fit – or, in other words, that markets be contestable".*[2]

Competition policy in the Western Balkan countries has recently gained in significance, in parallel with the acceleration of their EU accession process. Competition policy played a central role in the development of the EU, its institutions and in particular the EU internal market. The competition policy framework has been built since the Treaty of Rome in 1957 on a foundation of promoting market opening while strengthening the institutions of the European Community.[3] The main pillars of the EU competition policy are (i) anticompetitive agreements (cartels) and abuses of dominant position (antitrust policy); (ii) market liberalization (iii) merger control; and (iv) state aid control.

However, in the Western Balkan countries, the progress in this area has been generally slower than in other policy areas (Figure 1.1). This can be explained partly by the complex environment in which competition policies and regulators are set up in any country, but there could be also some other features at play, which are characteristic to the transition countries.[4]

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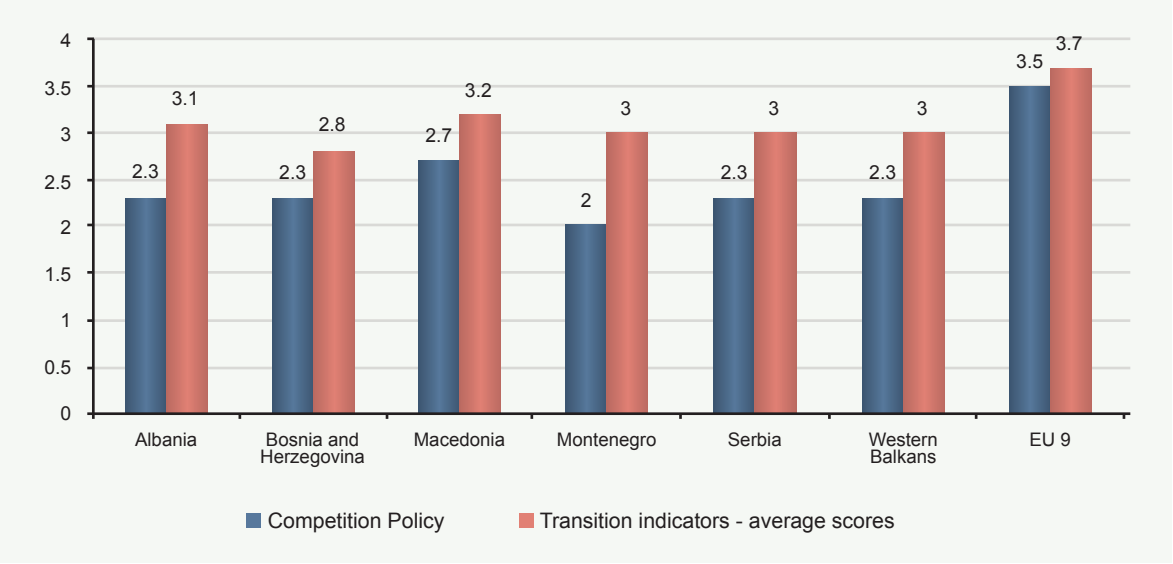
1 State Aid is not analyzed in this Study as this area is not in the competence of most of the competition authorities in Western Balkan countries.

2 Trade and Competition Policy, William Milberg, UNDP background paper for Making Global Trade Work for People, New York, 2003. http://www.newschool.edu/scepa/research/workingpapers/0211_TradeandCompetitionPolicy.pdf

3 Michael Wise, *OECD Journal: Competition Law and Policy, 2007,* vol. 9, issue 1, pages 7-80

4 EBRD Blog: Competition policy in the EBRD region: Why is it lagging behind? Authors: Svenja Petersen and Kjetil Tvedt, http://www.ebrdblog.com/wordpress/2013/02/competition-policy-in-the-ebrd-region-why-is-it-lagging-behind/

Figure 1.1: Transition indicators[1]: Competition policy and EBRD Transition indicators average scores Western Balkan countries, 2012



Source: EBRD database.
Note: 1/ Ranging from minimum 1 = no or little progress to maximum 4,3 = standards of advanced industrial economies.
1 No competition legislation and institutions.
2 Competition policy legislation and institutions set up; some reduction of entry restrictions or enforcement action on dominant firms.
3 Some enforcement actions to reduce abuse of market power and to promote a competitive environment, including break-ups of dominant conglomerates; substantial reduction of entry restrictions.
4 Significant enforcement actions to reduce abuse of market power and to promote a competitive environment.
4+ Standards and performance typical of advanced industrial economies: effective enforcement of competition policy; unrestricted entry to most markets.

1.1.1. The legal framework of competition

Competition legislation aims to prevent distortions of competition that harm the economy and, at the same time, to assure freedom of choice of economic agents.[5] In a market economy, competition is a process whereby firms fight against each other for securing consumers for their products. A competition policy should include both:

(i) *Economic policies* adopted by Government, that enhance competition in local and national markets, and
(ii) Competition law designed to stop anti-competitive business practices.[6]

In addition to areas such as external trade and investment policies, sector regulation, public procurement policies, competition legislation and its enforcement form an essential pillar of competition policy in the EU.

All Western Balkan countries have established both a legal and institutional framework in the area of competition. The first country in the region that enacted a law on competition was Albania (1995),

5 The Czech Republic's experience with competition policy and law, Sonia Gasparikova, 2011, pg.26, in Evolution of Competition Laws and their Enforcement, A Political Economy Perspective, Editted by Pradeep Mehta, Routledge, 2011.
6 Evolution of Competition Laws and their Enforcement, A Political Economy Perspective, Editted by Pradeep Mehta, Routledge, 2011.

followed by Macedonia, Montenegro and Serbia (1999) and Bosnia and Herzegovina (2001). All these laws had certain deficiencies and they did not cover all the competition policy areas.

The Albanian Law on Competition (1995) established the basis of competition policy in Albania – regulating dominant position, as well as prohibited restrictive agreements. However, it did not cover concentrations and the prescribed fines did not deter anticompetitive behavior, considering that they were set at a low level. In addition, the implementation of this law was weak and inefficient (Figure 1.4).

The Anti-Monopoly Law of Serbia and Montenegro (1996) defined abuse of dominant position and monopolistic position, while it did not regulate concentrations. Like in the case of the previously mentioned countries, implementation of the law was weak and inefficient (Figure 1.8).

The Law against Limiting Competition of Macedonia (1999) defined monopolistic agreements (horizontal and vertical), abuse of dominant position and business concentrations. This law was however not harmonized with other relevant laws in the country, and it did not set clear procedural rules that would facilitate its implementation (Figure 1.6).

The Law on Competition of Bosnia and Herzegovina (2001) regulated restrictive agreements as well as dominant position and its abuse, while it did not regulate concentrations. Implementation of the law was weak and inefficient, in particular due to the lack of harmonization of this law with other relevant laws on the State and entities level (Figure 1.5).

In the **period 2003-2006,** all the countries of the region enacted new, more comprehensive competition laws which encompassed all the relevant competition areas and were substantially aligned with the EU legal framework in this area. In this period, the EU competition legal framework was modernized through enactment of Regulation 1/2003. Aiming at further harmonization with the EU competition framework, all the countries of the region have amended the existing laws or enacted new competition laws **in the period 2009-2012** (Table 1.1 and Figure 1.2).

The Albanian new Law on Protection of Competition (2003) regulated all relevant competition areas, including concentrations. It introduced some new provisions, such as provisions on block exemptions and leniency policy. This law also represented an essential progress in approximation with the EU *Acquis*. This law was amended in 2010, introducing leniency policy and obtaining further progress in approximation with the EU *Acquis* (Figure 1.4).

The Law on Competition of Bosnia and Herzegovina (2005) also regulated all relevant competition areas, including concentrations, block exemptions and individual exemptions. This law achieved further progress in compliance with the EU *Acquis* in comparison to the previous law. This law was further amended in 2007 and 2009, whereby the time limit for issuance of decisions of the competition authority were reduced from six to three months, and more precise definition of undertakings as well as concentrations was regulated (Figure 1.5).

While the new Macedonian Law on Protection of Competition (2005) achieved a more advanced level of compliance with the EU *Acquis*, it still contained some weaknesses, such as the lack of leniency provisions and too low threshold for concentrations. A new Law on Protection of Competition was enacted in 2010, which introduced detailed leniency provisions and further aligned this area with the EU *Acquis* (Figure 1.6).

The Law on Protection of Competition of Serbia (2005) represented a significant improvement compared to the previous law. This law regulated all competition areas. It prescribed rigorous fines for violating the provision of the law. This law achieved an advanced level of harmonization with the EU *Acquis*. The remaining weaknesses of the law are related to restrictive agreements which remained insufficiently regulated, as well as the lack of powers of the competition authority to impose sanctions. A new Law on Protection of Competition was enacted in 2009, which introduced detailed leniency provisions, enabled the competition authority to directly issue sanctions and raised the concentrations notification thresholds. The new law is also more aligned with the EU *Acquis* (Figure 1.8).

The Law on Protection of Competition of Montenegro (2006) represented an improvement compared to the previous law, as it set more rigorous fines for violating the provisions of the law and it achieved further progress in the harmonization with the EU *Acquis*. The weaknesses that remained are incomplete provisions on restricted agreements, as well as a low threshold for mandatory notification of concentrations. A new Law on Protection of Competition was enacted in 2012, which introduced detailed leniency provisions. The new law is mostly aligned with the EU *Acquis* (Figure 1.7).

The Law on Competition of Kosovo* (2004) defined restrictive agreements, and abuse of dominant positions, while it did not regulate concentrations and it did not introduce provisions on leniency policy. A new Law on Protection of Competition was enacted in 2010, which included provisions on concentrations and introduced leniency provisions. The law achieved further progress in the harmonization with the EU *Acquis* (Figure 1.9).

Table 1.1: Level of harmonization of the competition laws with the EU Acquis

	Albania	BiH	Macedonia	Montenegro	Serbia	Kosovo*
Fully harmonized			√			
Mostly harmonized	√	√		√	√	√
Partially harmonized						
Early stage of harmonization						

Source: Slavica Penev, Economic and European Prospectives of Western Balkan Countries, pg.89

Even though the level of harmonization of the laws in most of the countries of the region is significant, their implementation and enforcement is substantially lagging due to institutional weaknesses of the competition authorities and the lack of rule of law and an efficient judiciary.

1.1.2. Competition Authorities

At the EU level, the institutional framework and decision-making with respect to competition was centralized since the Treaty of Rome, as well as the 1962 competition enforcement regulation, and decades after that. In that period, the Commission had exclusive powers, it created policy and decided on competition cases, without any required approvals at the level of the member states or the European Parliament.[7] Following criticisms of unaccountability and inefficiency of the EU in dealing with breaches of competition law,

[7] Laurent Warlouzet, the Rise of European Competition Policy 1950-1991: A Cross-Disciplinary Survey of a Contested Policy Sphere, EUI Working Papers, RSCAS 2010/80

the Commission responded with a reform and strategy to decentralize the implementation of the EU competition rules, which began in the late 1990s. This decentralization strategy was materialized through EC Regulation 1/2003 supplemented by the modernization package[8], which entered in force in May 2004. This Regulation devolved enforcement powers to national competition authorities (NCAs) and to national courts which are now at the heart of enforcement of Articles 101 and 102 of the TFEU.

When it comes to the Western Balkans Countries, Albania was the first country in the region to establish a competition authority (1995) as the Department of Economic Competition, which was part of the Ministry of Trade and Economic Cooperation, based on its competition law of 1995. It was followed by Serbia that established their competition authority in 1996 as the Anti Monopoly Commission within the Ministry of Economy and Internal Trade. Macedonia established its Monopoly Authority as part of the Ministry of Economy in 2000, based on the competition law of 1999. These authorities were not independent institutions and their work lacked transparency, since no information about their operation was made available to the public.

A new set of competition laws was adopted in the mid 2000s, and these laws envisaged the establishment of the competition authorities as independent and autonomous organizations in all the countries in the region with the exception of Montenegro (Figure 1.2).

Albania established its Competition Authority in 2003, which was a public entity independent in performing its tasks. It reports to the parliament (Commission for Economy and Finance) and its budget is approved by the Parliament. The members of the Authority are appointed and revoked by the Parliament (Table 1.2 and Figure 1.2, 1.3. 1.5).

Bosnia and Herzegovina established its Competition Council in 2004. It was established as a formally independent institution of Bosnia and Herzegovina (at the state level) with the main task to enforce the Law on Competition. The Competition Council publishes its report annually on its web site. The annual report is submitted to the Council of Minsters and becomes an integral part of the Council of Ministers' Annual report that is submitted for discussion to the Parliamentary Assembly of Bosnia and Herzegovina to the Joint Committee and then to the two houses of the Parliamentary Assembly of Bosnia and Herzegovina. The efficiency of the Council and its independence is impaired by the complex governance structure in Bosnia and Herzegovina, whereby the Council is partially controlled by the two entities' governments (the Government of Federation of BiH, and the Government of RS) (Table 1.2 and Figure 1.2, 1.3. 1.6).

Macedonia established the Commission for Protection of Competition in 2005, as a formally independent institution, with the main function of enforcing the Law on Protection of Competition. The Commission reports to Parliament and its annual reports are available to the public via internet. The members of the Commission are appointed by Parliament. The efficiency of the Commission is impaired by its lack of power to impose sanctions directly. In addition its financial plan needs government's approval (Table 1.2 and Figure 1.2, 1.3. and 1.6).

Serbia established its Commission for Protection of Competition in 2006, as a formally independent organization that reports to the Parliament. The level of independence and efficiency of the

[8] Council Reg. EC 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 EC; and the Commission's reform package introduced by the White Paper, which focused on the modernisation and decentralisation of EC competition law in relation to Arts 81 and 82 EC (White Paper on modernisation of the rules implementing Arts 85 and 86 of the EC Treaty, Commission Programme No 99/027, 28 April 1999).

Commission was impaired by its lack of authority to issue penalties. In addition the financial plan needed approval of the Government. Upon adoption of the new Law on the Protection of Competition of 2009, the Commission was granted the authority to directly issue penalties related to infringement of competition (Commission Table 1.2 and Figure 1.2, 1.3. and 1.9).

Unlike the previously mentioned countries, **Montenegro** was lagging behind as its first competition authority was established as a Department for Protection of Competition as part of the Ministry of Economy in 2006, lacking independence in its work and transparency. This Department was transformed in the Directorate for Protection of Competition, as a body within the Ministry of Economy in 2008. An independent competition authority was finally established in 2012, based on the new Competition Law from 2012. Based on the new law the competition authority shall report to Parliament and Government, and its members are going to be appointed by Government (Table 1.2 and Figure 1.2, 1.3. and 1.8).

Kosovo* started developing its institutional framework for competition in 2009, when it established the Competition Authority as an independent body, based on the Competition Law of 2009. Kosovo* established its Competition authority in 2009, based on the Competition Law of 2004 (Table 1.2 and Figure 1.2, 1.3. and 1.10). The members of the Competition Authority are appointed by Parliament.

Table 1.2: Institutional and administrative capacity necessary to implement EU Acquis in the filed of competition policy

	Albania	BiH	Macedonia	Montenegro	Serbia	Kosovo*
Mostly functional						
Needs to be strengthened			√			
Needs to be significantly strengthened	√	√		√	√	
Inadequate						√

Source: Slavica Penev, Economic and European Prospectives of Western Balkan Countries, pg.89

Figure 1.2: Chronology of the legislation related to the Competition policy in Western Balkan countries

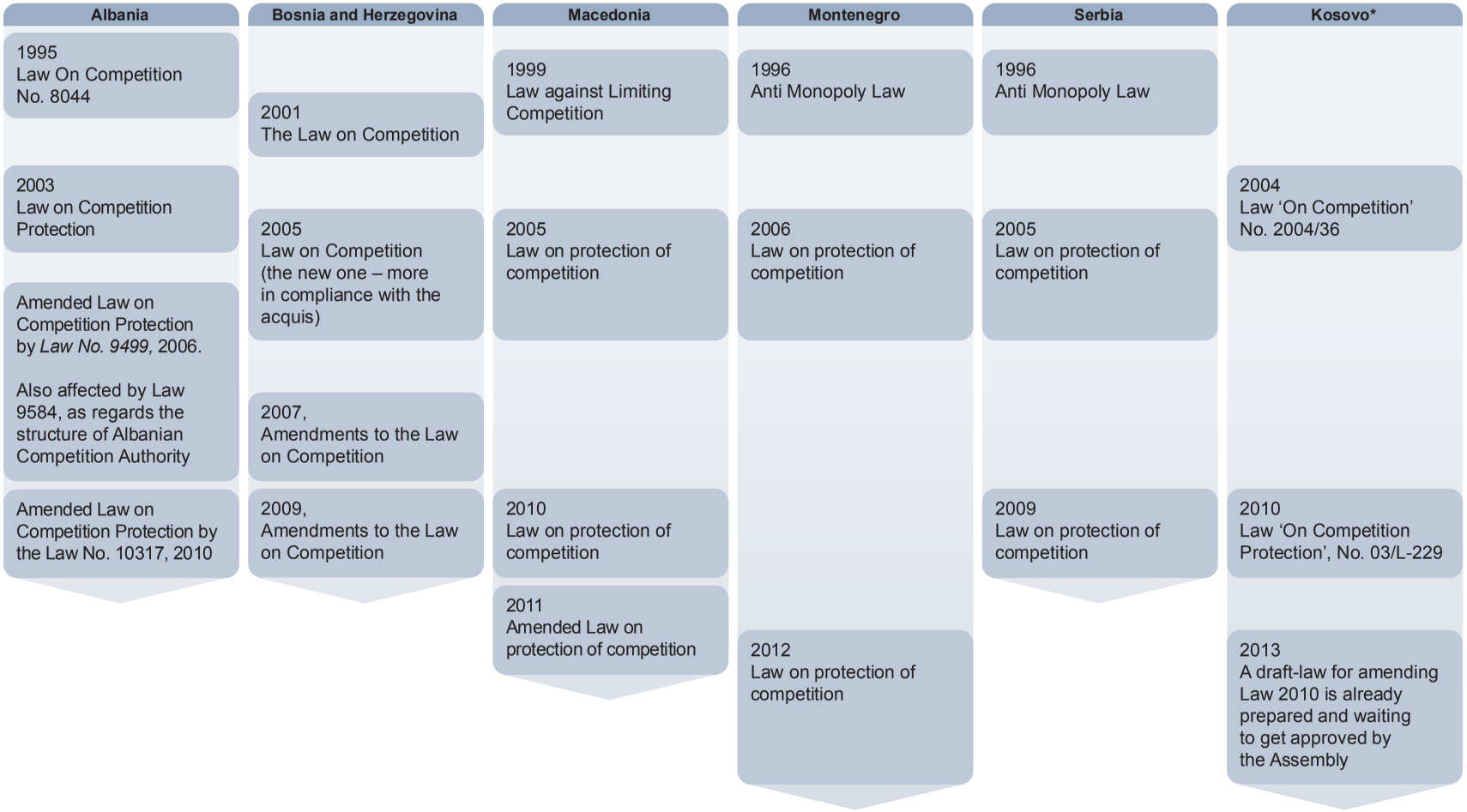


Figure 1.3: Chronology of the competition authorities in Western Balkan countries

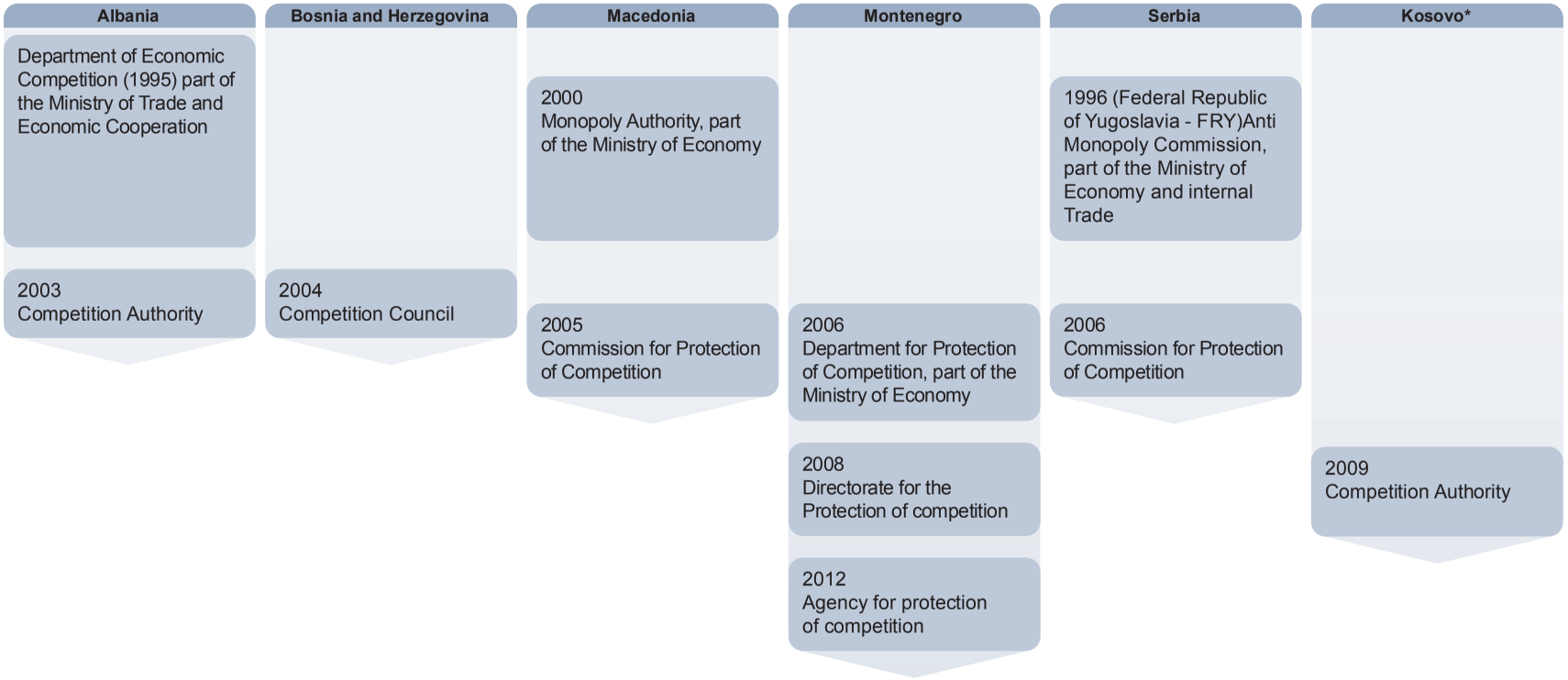


Table 1.3: Competition authorities in Western Balkan countries

	Albania	Bosnia/Herzegovina*	Macedonia	Montenegro	Serbia	Kosovo*
Name of the agency	Competition Authority	The Council of Competition	Commission for the Protection of Competition	Agency for Protection of Competition	Commission for the Protection of Competition	Competition Authority
Established by law	Law 'on Protection of Competition', 2003	Law on Competition 2001	Law on Protection of Competition 2005	Law on Protection of Competition has been adopted and is in force as of October 9, 2012	Law on Protection of Competition 2005	Law 'on Protection of Competition', 2010; Law 'on competition' 2004 - abrogated
Starting date	2004	1 May 2004	2005	2012	2006	2009 (based on Law 2004)
Legal status	Independent public institution	Independent public institution	Independent public institution	Independent public institution	Independent public institution	Independent public institution
Required to submit annual report	Yes, to Parliament	Council of Ministers of Bosnia and Herzegovina	Yes, to Parliament	Yes, to Parliament	Yes, to Parliament	Yes, to Parliament
Budget approval required	Budget approval by the Parliament, being a separate part of the overall budget	Financed from the budget of BiH institutions (the state budget)	Yes, Government	Yes, Government	Yes, Government	Budget approval by the Parliament, being a separate article of the overall budget
Autonomy in decision making	Yes	According to the Law – Yes In practice with a significant influence of the entities government bodies	Yes	Yes	Yes	Yes

Table 1.3: Competition authorities in Western Balkan countries - continuation

	Albania	Bosnia/Herzegovina*	Macedonia	Montenegro	Serbia	Kosovo*
Power to appoint members of the competition authority	Parliament	Council of Ministers of BiH and entities' governments	Parliament	Government	Parliament	Parliament (based on proposals from government)
Power to remove members of the competition authority during term	Parliament	Council of Ministers of BiH and entities' governments based on a proposal by the Competition Council	Parliament	Government	Parliament	Parliament
Annual report considered by parliamentary committee	Committee on Economy and Finance	The Joint Commission of Economic Reforms and Development (JCERD) of the BiH Parliamentary Assembly	Committee on economy	Committee on Economy, finance and budget.	Committee on Economy, Regional Development, Trade, Tourism and Energy	Committee on Economic Development, Infrastructure, Trade and Industry
Annual report considered at plenary session	Until 2012, yes. Since 2012, only if a debate is required by parliamentary groups; the 'resolution' is always approved in plenary session.	Yes as an integral part of the Council of Ministers Annual Report	Yes	No	Yes	Yes

1.2. Key areas of competition policy in Western Balkan countries

The main pillars of the EU competition policy are (i) anticompetitive agreements (cartels) and abuses of dominant position (antitrust policy); (ii) market liberalization (iii) merger control. The EU competition policy is regulated by Articles 101-109[9] of the Treaty on the Functioning of the EU (TFEU), and also by secondary legislation. All the countries in the region based their competition policies on the above pillars. Table 1.4 gives a comparative overview of the main competition policy areas. It gives merger thresholds in the countries in the region, which vary, and are lowest in Macedonia (10 million Euro worldwide turnover) up to 100 million worldwide turnover in Serbia and Kosovo*. The joint market share on the relevant market taken into account ranges between 40% in Bosnia and Herzegovina and Serbia to 60% in Montenegro and Macedonia, while in Albania and Kosovo* income from sale of goods and services between participants is not taken into account in calculating thresholds (Table 1.4).

The fees charged by the competition authorities in the countries in the region vary from a fixed fee of 500 Euro in Macedonia and 1000 Euro in Bosnia and Herzegovina, up to a percentage fee of 0,03% if the total annual income of the merging entities up to a maximum of 15,000 Euro in Montenegro and 25,000 Euro in Serbia (Table 1.4).

The threshold for defining the individual dominant position varies from 40% of the market share in Bosnia and Herzegovina, Macedonia, Serbia and Kosovo*, to 50% in Montenegro, while Albania doesn't have a quantitative threshold. When it comes to collective dominant position, the threshold varies from 50% in Serbia , 60% in Macedonia and Montenegro and 80% in Bosnia and Herzegovina, while Albania and Kosovo* have no quantitative threshold (Table 1.4).

All the countries in the region have introduced, in line with the EU *Acquis*, the same level of maximum sanctions that can be imposed on companies for the infringement of competition, which can amount to 10% of the annual turnover of the company. All the countries in the region have also introduced the leniency policy, with the objective to deal with cartels more efficiently (Table 1.4).

9 Consolidated version of the Treaty of the Functioning of the European Union, Title VII, Chapter 1 (Rules on Competition), Official Journal of the European Union, C 115/88, 9.5.2008. Section 1 of the Chapter (Articles 101-106) deals with the 'Rules applying to undertakings" and Section 2 'aid granted by states' (Articles 107-109) deals with the rules related to state aids.

Table 1.4: Key areas of competition policy in Western Balkan countries

		Albania	Bosnia/Herzegovina	Macedonia	Montenegro	Serbia	Kosovo*
Concentrations	Merger Thresholds	1. Worldwide turnover in the preceding year of all the participating undertakings exceeds ALL 7 billion (about EUR 50 million*), and the individual turnover in Albania of at least one of the participating undertakings exceeds ALL 200 million (about EUR 1.43 million)	1. All undertakings concerned have a worldwide turnover exceeding 100,000,000 KM according to the financial account in the year preceding the concentration	1. All undertakings concerned have a worldwide turnover exceeding EUR 10 million, provided that at least one undertaking has a registered local presence on the territory of Macedonia	1. All undertakings concerned have a local Montenegrin turnover exceeding EUR 20 million, provided that at least one undertaking has a local turnover exceeding €1 million	1. Worldwide turnover in the preceding year above EUR 100 million, provided that at least one undertaking's turnover realized on the market of Serbia exceeds €10 million	1. Worldwide turnover in the preceding year of all the participating enterprises exceeds EUR 100 million, and at least one of the participants is located in Kosovo.
		2. The aggregate turnover in Albania of all the participating undertakings exceeds ALL 400 million (about EUR 2.86 million), and the individual turnover of at least one of the participating undertakings on the domestic market is over ALL 200 million (about EUR 1.43 million)	2. Each of at least two participants concerned have a total annual turnover realized on the market of BiH of at least 8,000,000 KM according to the financial account in the year preceding the concentration	2. All undertakings concerned have a local Macedonian turnover exceeding EUR 2.5 million	2. All undertakings concerned have a local Montenegrin turnover exceeding EUR 5 million	2. All undertakings concerned have a local Serbian turnover exceeding EUR 20 million, provided that at least two undertakings have a local Serbian turnover exceeding €1 million each	2. Total turnover of at least 2 participants in concentration in Kosovo domestic market exceeds EUR 3 million Euros
		*Income from sale of goods and services between participants is not taken into account in calculating thresholds.	3. Joint market share of the parties to a merger on the relevant market exceeds 40%.	3. One undertaking concerned has a market share of more than 40% or combined market share in the relevant market exceeding 60%.	3. Joint market share of the parties to a merger on the relevant market which exceeds 60%.	*Joint market share of the parties to a merger on the relevant market exceeds 40%.	*Income from sale of goods and services between participants is not taken into account in calculating thresholds.
	Fees - merger control	Filing fee: - ALL 7500 (around EUR 53.5) for undertakings with a yearly turnover in Albania of ALL 200 million (about EUR 1.43 million) up to ALL 1 billion (about EUR 7.143 million). - ALL 15000 (around EUR 107) for undertakings with yearly turnover more than ALL 1 billion (about EUR 7.143 million)	Filing fee BAM 200 (approx. EUR 100).	Filing fee - 100 EUR	Filing fee: No	Filing fee: No	Filing fee: EUR 100
		Clearance (authorisation) fee: - ALL 250000 (about EUR 1786) for undertakings with a yearly turnover in Albania of ALL 200 million (about EUR 14.3 million) up to ALL 1 billion (about EUR 7.143 million). - ALL 500000 (about EUR 3571) for undertakings with yearly turnover more than ALL 1 billion (about EUR 7.143 million)	Clearance fee: BAM 2,000 (approx. EUR 1,000)	Clearance fee - 500 EUR*	Clearance fee - 0.03% of the total annual income realized by the entities that are merging, to a maximum of 15.000 EUR	Clearance fee - 0.03% of the total annual income realized by the entities that are merging, to a maximum of 25.000 EUR	Clearance fee: EUR 3000 (fee for temporary authorization: EUR 2000)

Table 1.4: Key areas of competition policy in Western Balkan countries - continuation

		Albania	Bosnia/Herzegovina	Macedonia	Montenegro	Serbia	Kosovo*
Dominant position/monopoly	Individual dominant position	No quantitative threshold	if the market share of individual undertaking on the relevant market exceeds 40%	If the market share of individual undertaking on the relevant market exceeds 40%.	If the market share of individual undertaking on the relevant market exceeds 50%.	If the market share of individual undertaking on the relevant market exceeds 40%.	An enterprise is considered to have a dominant position if it has more than forty percent (40%) presence at the market.*
	Collective dominant position	No quantitative threshold	If the market share of two or more undertakings on the relevant market exceeds 60% or in the case of four or five companies exceeds 80%.	If the market share of two or more undertakings on the relevant market exceeds 60%.	If the market share of two or more undertakings on the relevant market exceeds 60%.	If the market share of two or more undertakings on the relevant market exceeds 50%.	No quantitative threshold
Restrictive agreements: Cartel prohibition	Max Sanctions on Companies	10% of the total turnover in the previous financial year	10% of the total annual turnover in the previous financial year	10% of the total annual turnover in the previous financial year	10% of the total annual turnover in the previous financial year	10% of the total annual turnover in the previous financial year	Up to ten percent (10%) of the total turnover in the last three financial (business) years.
	Leniency Policy	Yes	Yes	Yes	Yes	Yes	Yes

*Draft Law on administrative taxes will extensively increase the clearance fees

Figure 1.4: Chronology of competition policy in Albania

1991-1995	1995	1995	2003 (including amendments of 2010)	2003
PRE-COMPETITION-LAW PERIOD **No Law; no institution; transition reforms-positive impacts but also some negative 'side' effects**	**LEGAL FRAMEWORK** **LAW ON COMPETITION**	**INSTITUTIONAL FRAMEWORK** **DEPARTMENT FOR ECONOMIC COMPETITION established**	**LEGAL FRAMEWORK** **NEW LAW 'ON PROTECTION OF COMPETITION'**	**INSTITUTIONAL FRAMEWORK** **AUTHORITY OF COMPETITION established**
– Start of transition reform: price liberalization; trade liberalization; privatization, etc. – A number of laws in support of transition (structural) reforms – A market environment in developing process ***But:*** – No law on competition protection – No institution in charge of competition protection ***Weaknesses:*** – Remained de facto unenforced	***Encompasses/defines:*** – Dominant position - forbidden – Contracts, decisions and agreement that restrict competition – prohibited – Criminal offenses against consumers and competitors ***Contribution:*** – Law 1995 created a basis for a competition policy in Albania ***Weaknesses:*** – Concentration – not in scope of law – Exemptions of public services etc from the scope – Ambiguity and contradictions in law – week implementation – Fines, in absolute terms and too low	Department for Economic Competition – under the Ministry of Economic Cooperation and Trade ***Functions:*** – Competition protection through observations, inspections, decisions and sanctions – Contribution in drafting of Law 2003 ***Weaknesses:*** – Lack of independence – Poorly staffing – Investigations, based only on request – Inspections, only by preliminary authorization of the court.	***Encompasses/defines:*** – Prohibited agreements and concerted actions – Abuse of dominant position – Concentrations ***Some improvements*** compared to Law 1995: – No exemption in the scope of law – Dominant position is not forbidden per se – only abuse of it – Introduction of 'block exemption' – Inclusion of concentrations; lower concentrations thresholds by amendments of 2010 – Introduction of the leniency policy – Essential progress in approximation with EU acquis	Authority of Competition – Commission and Secretariat – A public entity, independent in performing the tasks – Reports to the parliament (Commission for Economy and Finance) – Institutional budget, approved by Assembly – Increased power of investigation and punishment – Amendments of 2010 solved the problem of vacancies – terms of Commission members extended until being replaced Open to discussion: – Proposal and nomination of Commission members

Figure 1.5: Chronology of competition policy in Bosnia and Herzegovina

2001	2004	2005	2007	2009
LEGAL FRAMEWORK	INSTITUTIONAL SETTING	LEGAL FRAMEWORK	LEGAL FRAMEWORK	LEGAL FRAMEWORK
The Law on Competition ***Defines:*** – Relevant market, – Prohibited agreements, – Dominant position and abuse of dominant position. ***Weaknesses:*** – Insufficient compliance with other laws, – Not in compliance with the EU laws (acquis communitaire)	**The Council of Competition of Bosnia and Herzegovina** Established as a formally independent institution of Bosnia and Herzegovina (at the state level) ***Functions:*** Enforcing the Law on Competition ***Transparency:*** – Annual report is published on the Council's web site; – Annual report is submitted to the Council of Minsters and becomes an integral part of the Council of Ministers' Annual report that is submitted for discussion to the Parliamentary Assembly of Bosnia and Herzegovina (to the Joint Committee and then to the two houses of the PABH) ***Weaknesses:*** Although the Council is de jure an independent institution since its establishement its decisions have been partly controled by the two entitites' governments (the Government of Federation of BiH, and the Government of RS).	**The Law on Competition** ***Defines:*** – Relevant market, – Prohibited agreements individual exemptions and block exemptions, – Dominant position and abuse of dominant position, – Concentrations and prohibited concentrations, – Total income for the control of concentrations, and – Implementation bodies. ***Improvements compared to the 2001 Law on Competition*** Mostly in compliance with the EU legislation (acquis communaitire)	**Amendments to the Law on Competition** The only amendment to the 2005 Law on Competition was in Article 41 – the time limit for issuance of decisions (shortended from six to three months)	**Amendments to the Law on Competition** Three major amendments were to amendments to Article 2 (more precisely defined notion of undertakings), Article 9 (market concetrations), and Article 14 (the total income of intererested participants in concentrations)

Figure 1.6: Chronology of the competition authorities in Macedonia

1999	2000	2005	2005	2010	2010
LEGAL FRAMEWORK	**INSTITUTIONAL FRAMEWORK**	**LEGAL FRAMEWORK**	**INSTITUTIONAL FRAMEWORK**	**LEGAL FRAMEWORK**	**INSTITUTIONAL FRAMEWORK**
Law against Limiting Competition ***Encompasses/defines:*** – Monopolistic agreements (horizontal and vertical) – Abuse of dominant position – Business concentrations ***Weaknesses:*** – Insufficiently clear legal framework, – Incomplete harmonisation with other relevant laws in the country, – Unclear procedural rules.	**Monopoly Authority** Established as a body within the Ministry of Economy ***Functions:*** Enforcing the law against the abuse of dominant position ***Weaknesses:*** – Lack of independence – Lack of transparency (no obligation to make the information available to the public)	**Law on Protection of Competition** ***Encompases/defines:*** – Restrictive agreements – Abuse of dominant position – Concentrations ***Improvements compared to the Law of 1999:*** – Prescribes rigorous fines for violating provisions of the law – Advanced level of the EU harmonization ***Weaknesses:*** – Inefficient procedural rules lack of leniency provisions – Too low threshold for concentration AMENDMENTS FROM 2006 AND 2007 **Improvements:** – Threshold for merger notification was increased from 5 to 10 million Euro – Joint market share threshold of 60% was introduced – An additional commissioner has to be fully employed in Authority – Competition Authority was granted the authority to directly issue fines – Appeals are now placed to Administrtive Court	**Commission for Protection of Competition** Established as a formally independent institution ***Functions:*** Enforcing the Law on protection of competition (2005) ***Transparency of work:*** – Reports to the parliament – Annual reports available to the public (via internet) – Parliament appoints members of the Commission ***Weaknesses:*** – Insufficient level of independence, with too narrow and insufficient authorization – Commission's lack of power to impose sanctions on undertakings that violated competition law – Financial plan needs government's approval	**New Law on Protection of Competition** ***Encompasses/defines:*** – Restrictive agreements – Abuse of dominant position – Concentrations – Improvements compared to the Law of 2005: – Further progress in the EU harmonization – Introduced detailed leniency provisions	**Commission for Protection of Competition – enhanced competences** ***Functions:*** Enforcing the Law on protection of competition (2010) ***Enhanced competences*** *compared to the Law of 2005:* – The Commission is given the power to issue fines both for misdemeanor procedures as well as substantial infringements of competition – New procedural rules introduced, which enable Commission to operate more efficiently ***Weaknesses:*** Financial plan send to the government for the approval

Figure 1.7: Chronology of the competition authorities in Montenegro

1996	2006	2006	2008	2012	2012
LEGAL FRAMEWORK	**LEGAL FRAMEWORK**	**INSTITUTIONAL FRAMEWORK**	**INSTITUTIONAL FRAMEWORK**	**LEGAL FRAMEWORK**	**INSTITUTIONAL FRAMEWORK**
Anti monopoly law ***Encompasses/defines:*** Abuse of dominant position and monopolistic position ***Weaknesses:*** – Concentrations are not defined – Poor implementation	**Law on protection of competition** ***Encompasses/defines:*** -Prohibited operations -Abuse of dominant position -Concentrations ***Improvements compared to the Law of 1996:*** – Prescribes rigorous fines for violating provisions of the law – Mostly harmonized with the EU competition law – Advanced level of the EU harmonization ***Weaknesses:*** – Incomplete provisions regarding the restricted agreements – Relatively low threshold for mandatory notification of concentrations – Short deadline for submission of requests for approval of concentration	**Department for Protection of Competition** Established as a body within the Ministry of Economy ***Functions:*** Enforcing the Law on protection of competition (2006) ***Transparency of work:*** Reports to the Ministry ***Weaknesses:*** – Annual reports are not available to the public – Insufficient level of independence, with too narrow and insufficient authorization – Commission's lack of power to impose sanctions on undertakings that violated competition law – Lack of financial resources for the functioning.	**Directorate for the Protection of competition** Established as a body within the Ministry of Economy ***Functions:*** Enforcing the Law on protection of competition (2007) ***Transparency of work:*** – Reports to Government – Government appoints members of the Directorate ***Weaknesses:*** – Insufficient number of qualified personnel; – Strengthen human resources in the specific area of application of the law, such as telecommunications, media, financial services and others. – Lack of financial resources for the functioning.	**New Law on Protection of Competition** ***Encompasses/defines:*** – Agreements that prevent, restrict or distort competition – Abuse of Dominant Position – Concentrations ***Improvements compared to the Law of 2006:*** – Further progress in the EU harmonization – Introduced detailed leniency provisions	**Agency for protection of competition** ***Functions:*** Enforcing the Law on protection of competition (2012) ***Enhanced competences*** *compared to the Law of 2006:* – The Commission is given the power to issue fines both for administrative as well as substantial infringements of competition – New procedural rules introduced, which enable Commission to operate more efficiently ***Transparency of work:*** – Reports to the Parliament – Reports to the Government – Government appoints members of the Directorate – Annual reports available to the public (via internet) ***Weaknesses:*** – Functionally independent from the Government and Parliament, but responds for its operation to the Government – Current Agency's capacity is not sufficient for the overall market of Montenegro – Financial plan send to the government for the approval

Figure 1.8: Chronology of the competition authorities in Serbia

1996	2000	2005	2006	2009	2010
LEGAL FRAMEWORK	**INSTITUTIONAL FRAMEWORK**	**LEGAL FRAMEWORK**	**INSTITUTIONAL FRAMEWORK**	**LEGAL FRAMEWORK**	**INSTITUTIONAL FRAMEWORK**
Anti Monopoly Law ***Encompasses/defines:*** Abuse of a dominant and monopolistic position ***Weaknesses:*** – Not defined Concentrations, – Poor implementation of the Law	**Anti Monopoly Commission – established** ***Functions:*** Enforcing the law against the abuse of dominant position ***Weaknesses:*** – Lack of transparency – (no obligation to make the information available to the public) – Lack of independence-established as Department within Ministry of Economy and internal Trade (SR Yugoslavia) – Lack of restrictive measures – Potential for conflict of interest due to possibility of the Members of the commission to be entrepreneurs	**Law on Protection of Competition** ***Encompasses/defines:*** – Restrictive agreements – Abuse of dominant position – Concentrations ***Innovations:*** – Prescribes rigorous fines for violating provisions of the law – Mostly harmonized with the EU competition law ***Weaknesses:*** – Incomplete provisions regarding the restricted agreements – Relatively low threshold for mandatory notification of concentrations – Insufficiently precise definitions of actions that infringe competition – Lack of power to impose sanctions	**Commission for Protection of Competition – established** – **Formally independent organization** – **Reports to the parliament** ***Weaknesses:*** – Insufficient level of independence, with too narrow and insufficient authorization (the power of issuing administrative penalties was given to the courts, which depressed the effectiveness of sanctions) – Financial plan has to be sent to the government for approval	**New Law on Protection of Competition Law** ***Encompasses/defines:*** – Restrictive agreements – Abuse of dominant position – Concentrations – Improvements compared to the Law of 2005: – Further progress in the EU harmonization – The new law raised the notification thresholds – Introduced detailed leniency provisions	**Commission for Protection of Competition – enhanced competences** ***Improvements compared to the competences of the Commission from the Law from 2005:*** Commission got the right to impose financial penalties directly onto the undertakings concerned ***Weaknesses:*** Financial plan send to the government for the approval

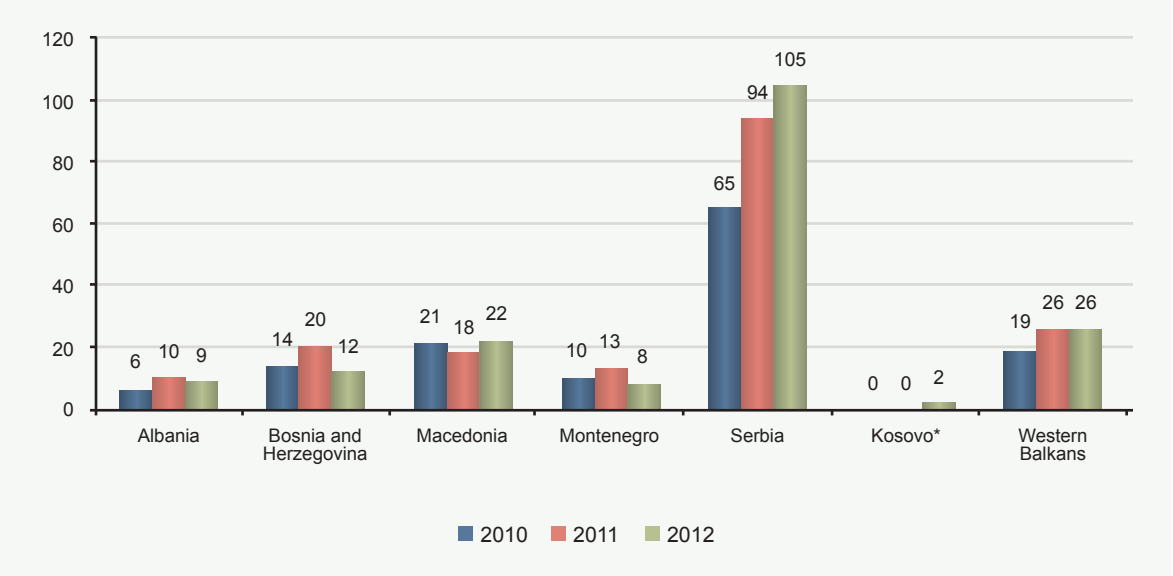
Figure 1.9: Chronology of competition policy in Kosovo*

2004	2008	2010	2010	2013
LEGAL FRAMEWORK LAW ON COMPETITION	**INSTITUTIONAL FRAMEWORK KOSOVO COMPETITION COMMISSION (KCC) established**	**LEGAL FRAMEWORK LAW ON PROTECTION OF COMPETITION**	**INSTITUTIONAL FRAMEWORK KOSOVO COMPETITION AUTHORITY established**	**LEGAL FRAMEWORK**
Encompasses/defines: – Restrictive decisions, concerted practices, and agreements – prohibition (and exclusions and exemptions) – Abuse of dominant position, prohibited ***Contribution:*** – Made possible institutionalization of competition policy in Kosovo* ***Weaknesses:*** – Concentrations – out of the scope – No provision for small value agreements – Breaches of law, punished both administratively and criminally – Fees, in nominal limits (rather than being proportional to income) – No provisions on leniency policy	KCC- established in 2008 and functional from 2009 ***Strengths:*** – Parliamentary, independent institution – Authority to pass sub-legal acts – Provisions for consultation and publication – Provisions on conflict of interest – Commission activity, financed by the state budget ***Weaknesses:*** – High involvement of government in appointing members – Limited resources and implementation capacity; limited physical and human resources – Administrative organization: no Secretariat, unclear division of work – Weak decision-making requirements (majority vote with a quorum of three)	***Encompasses/defines:*** – Restrictive agreements – Abuse of dominant position – Concentrations ***Innovations:*** – Mostly harmonized with the EU competition acquis; (a strong requirement of the law) – Concentration s, included in the scope of law – Fines, relative to income – Decriminalisation of offenses – now treated as administrative offenses – Leniency provisions – Provisions on cooperation with other institutions on law implementation – Statute of Authority, approved by Assembly ***Weaknesses:*** – Unclear provisions on dominant position of more than one enterprise – No ‘block exemption’ – High thresholds concentrations notification – Fewer transparency requirements (than Law 1995) for annual reports (not public) – Overload with procedural provisions	***Improvements:*** – From ‘Commission’ to ‘Authority’, but still unclear division between decision-making and administrative functions – Prohibition by law of any form of influence in the work of Authority that might affect its independence – Stronger decision-making requirements in Commission (3 affirmative votes) ***Weaknesses:*** – Vacant seats in the KCC, because of delays in the respective nominations (proposal from government) – Some improvements but still limited staffing and premises for Authority – Higher involvement of government in appointing Commission members (lower role of the relevant Parliamentary Commission) – Higher involvement of government in by-laws passing (lower role of KCA)	Amendments of Law 2010 already drafted and waiting for approval by the Assembly

1.3. Regional statistics

Concentrations are the predominant activity of the competition authorities in Western Balkan countries. In the last 3 years, the number of cases was more or less stable, with the exception of Serbia, which recorded extensive increase of cases, from 65 in 2010, to 105 in 2012 (Figure 1.10).

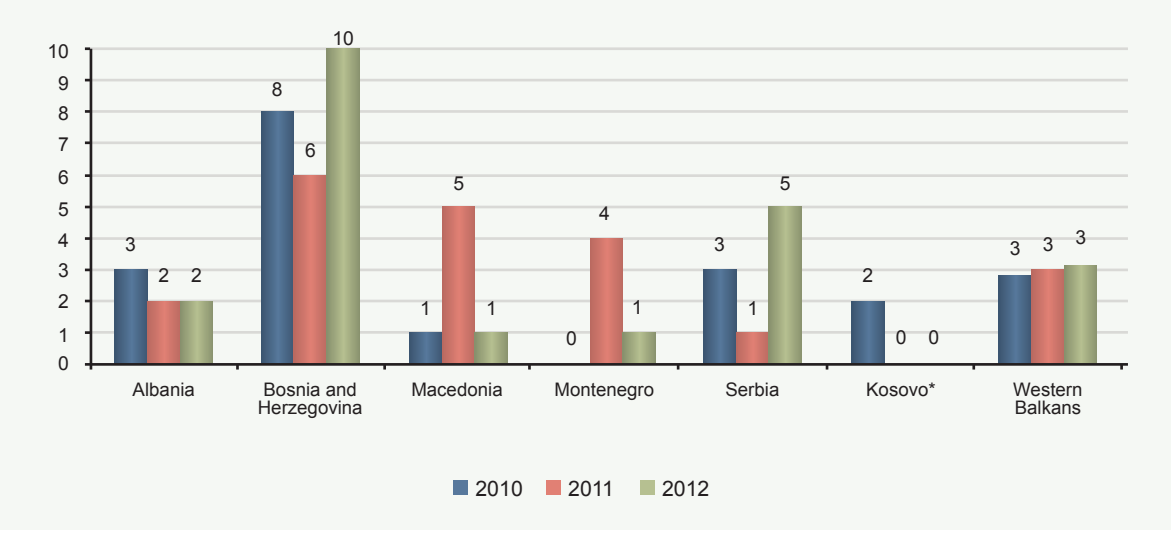
Figure 1.10: Fiscal balance, 2007-2011 (% of GDP)



Source: National Competition authorities

Abuse of dominant position. Number of cases of the abuse of dominant position varied from zero opened cases in 2010 in Montenegro and in 2011 and 2012 in Kosovo*, to 10 cases in 2012 in BiH. The biggest number of the taken decisions was in 2007 (7), while this number in 2010 was zero (Figure 1.11).

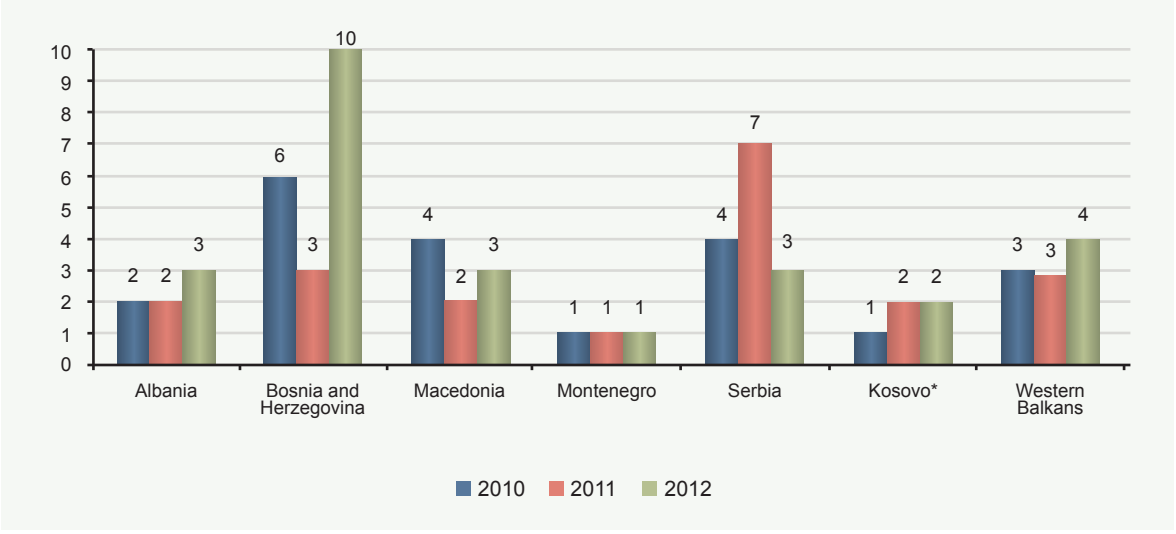
Figure 1.11: Abuse of Dominant Position in Western Balkan countries, 2010-2012



Source: National Competition authorities

Restrictive agreements. Number of restrictive agreements varied from only one case per year in Montenegro, to ten cases in Bosnia and Herzegovina in 2012. The biggest number of cases in Western Balkans was in 2012 (4), while their number in 2010 and 2011 was three (Figure 1.12).

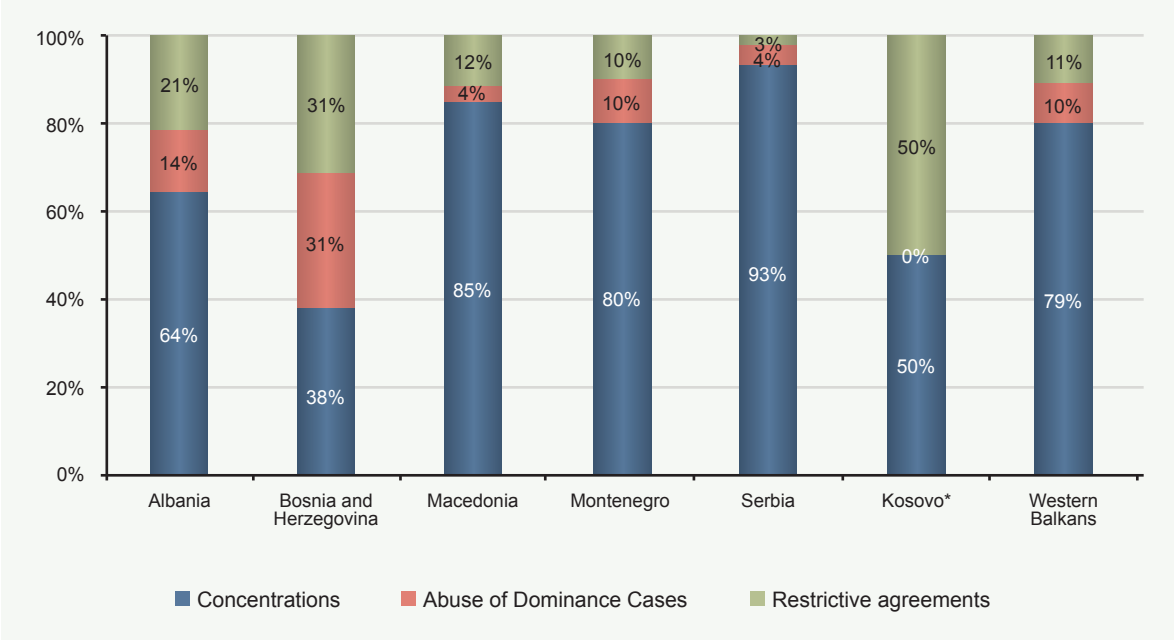
Figure 1.12: Restrictive agreements in Western Balkan countries, 2010-2012



Source: National Competition authorities

The share of reported concentrations in relation to the total number of processed cases is dominant in all the countries in the region except in Bosnia and Herzegovina (Figure 1.13)

Figure 1.13: Activities of the Commission for protection of competition, 2012, (in % of total number of decisions)



Chapter 2

COMPETITION POLICY IN GENERAL AND IN THE EUROPEAN UNION

Andreja Marušić
Slavica Penev
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2.1. Competition Policy in General

Competition policy refers to a set of laws and regulations aimed at maintaining a fair degree of competition by eliminating restrictive business practices of private enterprises. Competition policy includes (i) *antimonopolies* (antitrust) and (ii) *regulation of state aid.*[10] Restrictive (or anti-competitive or unfair) business practices are those which limit other enterprises from entering a market or which regulate supply in a way that is deemed harmful either to other existing (or potential) producers or to consumers. Such practices include predatory pricing behavior, collusion, entry-deterrent capacity expansion and competition-reducing mergers and acquisitions. *Competition policy* is aimed at limiting monopoly in order to encourage competition and its beneficial welfare effects. While competition policy may help particular firms or consumers, in principle it is aimed not at helping specific competitors but at establishing conditions of competition. A key characteristic of competitive market conditions is that *"sellers and potential sellers be as free as possible to enter and leave the market as they see fit – or, in other words, that markets be contestable".*[11]

Competition policy intends to prevent collusion among firms and to prevent individual firms from having excessive market power. Major focus includes oversight of mergers and prevention of price fixing and market sharing. Competition policy is about applying rules to make sure businesses and companies compete fairly with each other. This encourages enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality.

Competition policy can play a very important role in safeguarding the interests of consumers vis-a-vis powerful and well-connected businesses. Indeed, without competition policy, consumers and small producers in a wide range of markets, such as agricultural products, telecommunications, energy, water and transport, will typically be disadvantaged by being charged excessive prices or being paid below market prices for goods and services they produce.[12]

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[10] State Aid is not analyzed in this Study as this area is not in the competence of most of the competition authorities in Western Balkan countries.

[11] Trade and Competition Policy, William Milberg, UNDP background paper for Making Global Trade Work for People, New York, 2003. http://www.newschool.edu/scepa/research/workingpapers/0211_TradeandCompetitionPolicy.pdf

[12] Better Regulation for Growth, Regulatory Quality and Competition Policy, World Bank 2010, pg. vii.

Competition legislation requires to prevent distortions of competition that harm the economy and, at the same time, to assure freedom of choice of economic agents.[13] In a market economy, competition is a process whereby firms fight against each other for securing consumers for their products. A competition policy should include both:

(i) *Economic policies* adopted by Government, that enhance competition in local and national markets, and
(ii) Competition law designed to stop anti-competitive business practices.[14]

Competition which by definition includes sustaining a balance between supply and demand of goods and services is considered a major mechanism of the market economy. The effective competition is the engine forcing the economic agents to act in the most efficient way under the competitive pressure that threatens them to be pushed out or eliminated from the respective market.[15] *Competition policy* is a major instrument for building a modern and competitive market economy. Competition law and its enforcement form one pillar of competition policy. Other aspects of a competition policy, essential to build an efficient economy with a strong level of innovation are: (i) external trade and investment policies, (ii) sector regulation, (iii) privatization policies, (iv) public procurement policies, (v) licensing and concessions, as well as (vi) reducing barriers to entry and exit of firms.[16]

2.2. The Role of Competition Policy in Regulatory Reform

Regulatory reform and competition policy are two important and inter-related areas of regulatory policy and public administration. Both can play a key role in improving the quality of regulations, thus creating healthy and competitive markets and an attractive investment climate, which in turn leads to greater economic growth, employment and incomes.[17]

Competition policy is central to regulatory reform, because its principles and analysis provide a benchmark for assessing the quality of economic and social regulations, as well as motivate the application of the laws that protect competition. Moreover, as regulatory reform stimulates structural change, vigorous enforcement of competition policy is needed to prevent private market abuses from reversing the benefits of reform. A complement to competition enforcement is competition advocacy, the promotion of competitive, market principles in policy and regulatory processes.[18]

The links between regulatory policy and a range of structural policies has been documented: A strong link exists with competition policy which highlights a close and positive relationship between the objective of promoting competition policy principles and that of promoting high-quality regulation and regulatory reform.[19]

4th OECD 2005 Guiding Principle for Regulatory Quality and Performance, relates to the competition policy: and states: *Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy.*

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13 The Czech Republic's experience with competition policy and law, Sonia Gasparikova, 2011, pg.26, in Evolution of Competition Laws and their Enforcement, A Political Economy Perspective, Editted by Pradeep Mehta, Routledge, 2011.
14 Evolution of Competition Laws and their Enforcement, A Political Economy Perspective, Editted by Pradeep Mehta, Routledge, 2011.
15 Regional review of competition policy in the Western Balkans countries, 2004, pg.vi, http://www.westernbalkans.info
16 See more in UNCTAD 2011, Voluntary Peer Review of Competition Law and Policy: Serbia
17 Better Regulation for Growth, Regulatory Quality and Competition Policy, World Bank 2010, pg. 1.
18 The role of competition policy in regulatory reform, Poland, OECD 2002
19 Better regulation in Europe, France, OECD 2010

Box 1.1: COMPETITION POLICY'S ROLES IN REGULATORY REFORM

In addition to the threshold, general issue, which is whether regulatory policy is consistent with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

1. **Regulation can contradict competition policy.** Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division.
Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations
2. **Regulation can replace competition policy.** Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise that had supported regulation, namely that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.
3. **Regulation can reproduce competition policy.** Regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that policies which had appeared similar may have led to different outcomes.
4. **Regulation can use competition policy methods.** Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

Source: Better Regulation for Growth, Regulatory Quality and Competition Policy, World Bank 2010, pg. 5.

2.3. Competition Policy in the European Union

Competition policy played a central role in the development of the EU, its institutions and in particular the EU internal market. The competition policy framework has been built since the Treaty of Rome in 1957 on a foundation of promoting market opening while strengthening the institutions of the European Community.[20]

The main pillars of the EU competition policy are (i) anticompetitive agreements (cartels) and abuses of dominant position (antitrust policy); (ii) market liberalization (iii) merger control; and (iv) state aid control. The EU competition policy is regulated by Articles 101-109[21] of the Treaty on the Functioning of the EU (TFEU), and also by secondary legislation.

The concepts and institutions of the EU competition law appeared firstly in the European Coal and Steel Community (ECSC), created by the 1951 Treaty of Paris to administer these sectors; it became effective in 1953. However its competition provisions were not actually applied very much during the 4

[20] Michael Wise, *OECD Journal: Competition Law and Policy, 2007,* vol. 9, issue 1, pages 7-80

[21] Consolidated version of the Treaty of the Functioning of the European Union, Title VII, Chapter 1 (Rules on Competition), Official Journal of the European Union, C 115/88, 9.5.2008. Section 1 of the Chapter (Articles 101-106) deals with the 'Rules applying to undertakings" and Section 2 'aid granted by states' (Articles 107-109) deals with the rules related to state aids.

years before the Treaty of Rome established the broader Common Market in 1957. The competition rules for the Common Market build on those of the ECSC about agreements, dominance and subsidies by adding some precision to the prohibition of restrictive agreements, while strengthening rule against abuse of dominance into a prohibition.[22] The Treaty of Rome did not address mergers; an EU merger regulation came into effect in 1989. The Council gave the Commission broad powers to develop and apply the law, and the 1962 enforcement regulation centralized responsibility in the Commission.

To begin with, its institutional decision-making process was drastically centralized ever since its inception in 1962, and it remained highly centralized for another 40 years. During that time, it was the Commission that prioritized policy and decided on cases relating to anticompetitive practices, without any prior agreement from the member states or the European Parliament.[23]

During the 1990s, the number of prosecutions brought at the EU level started increasing, showing that the EU is aiming at becoming more active and efficient in the protection of competition.

Following criticisms of unaccountability and inefficiency of the EU in dealing with breaches of competition law, the Commission responded with a reform and strategy to decentralize the implementation of the EU competition rules, which began in the late 1990s. This decentralization strategy was materialized through EC Regulation 1/2003 supplemented by the modernization package[24], which entered in force in May 2004. This Regulation devolved enforcement powers to national competition authorities (NCAs) and to national courts which are now at the heart of enforcement of Articles 101 and 102 of the TFEU . The NCAs and the European Commission form a network of public authorities cooperating closely together. This so-called European Competition Network (ECN) provides a focus for regular contact and consultation on enforcement policy, and the Commission has a central role in the network in order to ensure to consistent application of the rules.[25] The Commission, together with the national competition authorities, directly enforces EU competition rules, Articles 101-109 of the Treaty on the Functioning of the EU (TFEU), to make EU markets work better, by ensuring that all companies compete equally and fairly on their merits. This benefits consumers, businesses and the European economy as a whole.

Within the Commission, the Directorate-General (DG) for Competition is primarily responsible for these direct enforcement powers. There are strict limits to its powers – DG Competition can only intervene if it has evidence of an infringement of the competition rules – and its decisions are subject to appeal before the Court of Justice of the European Union. DG Competition is therefore unlike most parts of the Commission in that, rather than proposing legislation, its work is concentrated on action against companies or Member States if it believes they are breaching the rules. DG Competition can act against several types of anti-competitive activity if it affects cross-border trade.[26]

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22 See: Competition law and policy in the European Union, OECD Report 2005, p. 9-10

23 Laurent Warlouzet, the Rise of European Competition Policy 1950-1991: A Cross-Disciplinary Survey of a Contested Policy Sphere, EUI Working Papers, RSCAS 2010/80

24 Council Reg. EC 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 EC; and the Commission's reform package introduced by the White Paper, which focused on the modernisation and decentralisation of EC competition law in relation to Arts 81 and 82 EC (White Paper on modernisation of the rules implementing Arts 85 and 86 of the EC Treaty, Commission Programme No 99/027, 28 April 1999).

25 Katalin Cseres, Multi-jurisdictional competition law enforcement: The interface between European competition law and the competition laws of the new member states, December 2007 *European Competition Journal 465*

26 European Commission – Competition policy website, http://ec.europa.eu/competition; DG Competition website http://ec.europa.eu/dgs/competition

Within its competences, with the objective to prevent or correct anti-competitive behavior, the Commission monitors: (i) **agreements between companies that restrict competition** – cartels or other unfair arrangements in which companies agree to avoid competing with each other and try to set their own rules; (ii) **abuse of a dominant position** – where a major player tries to squeeze competitors out of the market; (iii) **mergers** (and other formal agreements whereby companies join forces permanently or temporarily) – legitimate provided they expand markets and benefit consumers; (iv) **efforts to open markets up to competition (liberalisation)** – in areas such as transport, energy, postal services and telecommunications. Many of these sectors used to be controlled by state-run monopolies and it is essential to ensure that liberalisation is done in a way that does not give an unfair advantage to these old monopolies, (v) **financial support (state aid) for companies from EU governments** – allowed provided it does not distort fair and effective competition between companies in EU countries or harm the economy; (vi) **cooperation with national competition authorities in EU countries** (who are also responsible for enforcing aspects of EU competition law) – to ensure that EU competition law is applied in the same way across the EU.[27]

(i) Anticompetitive agreements and abuses of dominant position

Article 101 TFEU (ex Article 81 TEC) prohibits ***anticompetitive agreements and practices*** (cartels and other collusive business behavior) which may affect trade between Member States and which prevent, restrict or distort the competition within the internal market. However agreements or concerned practices which contribute to improving production or distribution of goods, or promote technical or economic progress and allow consumers to share the resulting benefits, are not prohibited.

[27] http://ec.europa.eu/competition/consumers/what_en.html

Article 101 TFEU (ex Article 81 TEC)

a. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
   – directly or indirectly fix purchase or selling prices or any other trading conditions;
   – limit or control production, markets, technical development, or investment;
   – share markets or sources of supply;
   – apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   – make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

b. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
c. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   – any agreement or category of agreements between undertakings,
   – any decision or category of decisions by associations of undertakings,
   – any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
   – impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
   – afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Source: http://ec.europa.eu/dgs/competition

Article 102 TFEU (ex Article 82 TEC) prohibits any ***abuse of dominant position*** by undertakings, within the internal market or in a substantial part of it, by abusing with unfair prices, limiting production, markets or technical developments etc.

Article 102 TFEU (ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:
– directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
– limiting production, markets or technical development to the prejudice of consumers;
– applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
– making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Source: http://ec.europa.eu/dgs/competition

The provisions of Articles 101 and 102 of TFEU are crucial for approximation, as they provides for a set of general rules underpinning the EU competition rules regime.

(ii) Market liberalization

Article 106 TFEU (ex Article 86 TEC) entrusted the Commission with the power to control (and where necessary address appropriate directives and decisions to Member states) public undertakings or undertakings that were granted special or exclusive rights by the Member States to ensure that their behavior is not contrary to the rules contained in the Treaty, particularly Articles 101-109 and Article 18.[28] A special treatment is given to undertakings operating in 'services of general economic interest'. Separating infrastructure (where the right of exclusive ownership may persist, as in the case telephone or electricity network) from commercial activities is a concept widely supported by the EC. The liberalizing process of public services (public utilities, including energy, transport, telecommunication, and water) has increased the effectiveness (wider choice with lower prices for consumers) and efficiency in the sector.

Article 106 TFEU (ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

(iii) Merger regulation

In order to prevent restriction or distortion of competition arising from mergers and acquisitions or structural joint ventures which create or strengthen a dominant market position, the Council adopted the *Merger Regulation 4064/89 in December 1989* replaced by *Council Regulation No 139/2004,* and *Implementing Commission Regulation No. 802/2004.* Regulation applies to acts of concentrations between the companies of a "Community-dimension" measured in terms of turnover threshold.

(iv) State Aid control

Articles 107 TFEU (former Article 87) prohibits any aid grants provided by a Member state in any form witch distorts competition (by favoring certain undertakings or production of certain goods) and intra-community trade. The Article specify state aid profiles which may be considered to be (or shall be) compatible with the internal market. Government aid designed to boost research and development, regional economic development and also promotion of small businesses, are usually permitted. Starting from the mid-1980, this article is becoming more and more important in the EU[29].

[28] Article 18 TFEC (ex Article 86 TEC) prohibits any discrimination on ground of nationality.
[29] Wigger, A. (2008) Competition for Competitiveness, p. 47-49.

Article 107 TFEU (ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
2. The following shall be compatible with the internal market:
   (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
   (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
   (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.
3. The following may be considered to be compatible with the internal market:
   (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
   (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
   (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
   (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
   (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

The institutional structure for implementation of the EU Competition rules consists of many institutional links, including:

(i) The Council of the EU – the supreme legislative body of the EU which adopted several major acts (Regulations) related to competition).

(ii) The European Commission (EC) – being at the core of the competition policy, responsible for competition legislation implementation, including the international aspects of competition policy.
   a. One of the Commissioners takes special responsibility for the competition affairs.
   b. DG COMP is the Directorate of the Commission specifically responsible for competition policy. DG COMP has a Director General and three Deputy Director General, a Chief Competition Economist who reports directly to Director General and nine administrative units. Formal decisions of the DG COMP must be verified by the Legal Service of the Commission. The Legal service represents the Commission before the EU courts.

(iii) General Court (first instance court) – assesses the legality of the decisions according to the provisions of TFEU, when annulment of the Commission decision is required.

(iv) *Court of Justice* – hears appeals from the general Court on points of law only.

(v) *Advisory Committee on Restrictive Practices and dominant position* – consisting in officials from the competition authorities of the member States

(vi) *Advisory Committee on Concentration*

(vii) *National courts*
(viii)*Parliament* – the respective standing Committees in each member state.[30]

How DG Competition works

DG Competition has around 900 staff and costs less than € 100 million a year to run.

- **Cases**

In mergers and State aid, DG Competition mostly deals with notifications; in Article 101 and 102, it opens cases on its own initiative, or following a leniency application or a complaint. When DG Competition is working on a case, details of the case have to be kept confidential. DG Competition is under a legal obligation to protect the business secrets of the companies with whom it is in contact.
If DG Competition concludes that a company or Member State has breached the competition rules or - in the case of a merger - would significantly reduce competition, it can propose that the College of Commissioners adopts a formal decision. The decision can prohibit the conduct, and can require remedial action. In antitrust cases, the Commission can also impose a fine as both a punishment and a deterrent.

- **Market monitoring**

DG Competition monitors markets and conducts sector inquiries (recent examples include energy, financial services and pharmaceutical markets) to see where competition problems might be occurring. This allows DG Competition to better understand markets and ensure a more effective enforcement by pro-actively detecting cases which are most harmful to consumers.

- **Policy development**

DG Competition produces documents that explain how the competition rules set out in the Treaty and interpreted by the Court apply. These include implementing regulations, block exemptions, guidelines and communications. When these are revised, DG Competition consults widely before issuing new versions.

- **Co-operation with other authorities**

DG Competition works with national competition authorities in the Member States to ensure a coherent and co-ordinated enforcement of the competition rules in Europe, and works with other agencies around the world to exchange information, promote best practice, and co-operate in individual cases.

- **Advocacy**

DG Competition works to embed competition principles into regulation and legislation and with other DGs to determine which markets DG Competition should investigate.

- **Annual Report to the European Parliament**

Each year, DG Competition prepares a report of its activities, and its assessment of upcoming issues for the European Parliament. This is in addition to the detailed information that DG Competition makes available to the general public on a daily basis on its website and in its press releases. The Commissioner for Competition also appears before the Economic and Monetary Affairs Committee (ECON) three times a year to discuss current policy developments and answer questions.

[30] See more in Milović N., *Common market and competition policy of the European Union,* textbook, Faculty of Economics, Podgorica, 2012.

The EU standards in competition policy are particularly and increasingly important for the market institutional reforms in Western Balkans (WB) countries, since the countries of the region entered the road of integration in the EU. The approximation of the competition policy (legislation and its implementation) is a dynamic process, very important for (i) having a functional free market in the country; (ii) fulfilling the conditions of the Stabilization and Association Agreement with the EU, and (iii) preparing the country to apply the EU legislation in the field when the EU membership is acquired.

Chapter 3

COMPETITION POLICY IN ALBANIA[31]

Ahmet Mancellari[32]

3.1. Introduction

Competition, as a core feature of a market economy, started to become important for Albania (like all the other former socialist economies) only when the country entered the road of transition from a centrally planned economy towards a market oriented one, at the beginning of the 1990s. The former system was characterized, among other features, by a high degree of economic concentration, a state of collective ownership, absence of an effective price mechanism, lack of administrative autonomy for economic entities, and an insufficient framework setting up transparent and common rules. Therefore, the transition process had to address all these issues by building a competitive economy.[33] The respective structural reforms in the first stages of transition consisted in price liberalization and trade liberalization, and also privatization (with different schemes for different sectors of the economy) as priorities in the agenda, followed by financial sector reform and liberalization in the utilities and infrastructure sectors, and accompanied by the respective pro-market legislation in a large number of areas. Within the pro-market legislative framework in Albania, as in other countries in transition, an important place belongs to the legislation related to competition. The first law on competition was presented in December 1995[34], which latter 'opened the way' to the new law on the protection of competition in July 2003.[35]

Comparing the two stages of development of the 'market economy' in Albania in 1995 and 2003 as well as the respective sets of competition legislation (laws and the respective secondary legislation), one conclusion is made clear: ***The more progress is made in the transition (structural) reforms, the more important competition law and competition policy becomes.*** In the first stages of transition,

31 This *draft* of the background paper is prepared under the Western Balkans regional project 'Strengthening the Role of Parliaments and Governments in Promoting Competitiveness and Economic Growth", sponsored by the Westminster Foundation for Democracy (WFD). Great support and contribution for preparing this paper is given by the representatives and experts of the parliamentary Committee of Economy and Finance, the parliamentary Committee of European Integration, the Directory for Oversight of Independent Institutions in the Albanian Parliament, the Internal Market Oversight Directorate in the Ministry of European Integration, and last but not least by the representatives and experts of the ACA (Albanian Competition Authority), to whom I am very grateful.

32 Lecturer of Economics, Faculty of Economics, University of Tirana.

33 OECD-Stability Pact: Competition Law and Policy in South East Europe.

34 Law No. 8044 of 7 December 1995 "On competition", Official Gazette, 1995 Vol. 25, 1153.

35 Law No. 9121 of 28 July 2003 "On the protection of competition", Official Gazette, 2003 Vol. 71, 3189.

a 'simple' mechanism of a market competition was installed through price liberalization, trade liberalization and privatization reforms, supported by the respective legislation including the 1995 law on competition. In the latter stages of transition, the reforms (including those in the financial sector and also liberalization in utilities and infrastructure sectors) are more complex, and so is the functioning mechanism of the market economy. So may also be the behavior of the market players supplying goods and services.

3.2. EU competition policy transposition in Albania

The SAA between the EU and Member States and Albania, was signed on 12 June 2006. Pending the completion of the procedures necessary for the entry into force of this Agreement, the provisions on trade and trade-related matters were implemented by means of the Interim Agreement which entered in force on December 1st 2006, while the SAA entered into force on April 1st, 2009.[36] Provisions of the SAA (Articles 71 and 72) related to competition, which embody Articles 101 and 102 TFEU, were also part of the Interim Agreement (Articles 37 and 38, respectively).

Article 71 of the SAA, in paragraph 1 considers as incompatible with the Agreement, (i) *agreements between undertakings* and concerted practices which prevent, restrict or distort competition; (ii) *abuse of dominant position,* (iii) any *state aid* which distorts competition. This Article underlines that the assessment basis for practices contrary this provision are the criteria arising from the EU competition rules, particularly Articles 81, 82, 86 and 87 TFEC and interpretative instruments adopted by the Community institutions. Article 71 also covers institutional issues related to the establishment of an *operationally independent body* for the implementation of competition rules. Within a period of 4 years from the date of entering into force of the SAA, Albania should also establish an operationally independent authority dealing with the implementation of state aid rules. This authority shall have, *inter alia,* the powers to authorize State aid schemes and individual aid grants in conformity with state aid rules. Specific tasks are assigned to the authority, including (i) establishing a *comprehensive inventory of aid schemes* and aligning such aid schemes with the criteria contained in this Article within a period of no more than four years from the date of entry into force of this Agreement; (ii) assessing within ten years from the entering into power of the SAA any public aid granted by Albania by considering the country as an area identical to those areas of the Community; and (iii) submitting to the EC country's GDP per capita figures harmonized at NUTS II level.

Article 72 underlines the obligation of the country to apply the principles of the Treaty to public undertakings and undertakings to which special and exclusive rights have been granted, within a period of 3 years after the date of entry into force of this Agreement.

Article 70 of the SAA underlines that existing and future legislation shall be gradually made compatible with the Community *Acquis* and gradually extend to all elements of the respective *Acquis* by the end of the transition period (first stage of the transition period - 5 years from the date of signing the Agreement, as defined in Article 6 of the SAA).

The EC Progress Reports of 2012 and 2011 underline the progress made in Albania in the field of competition ('some progress' and 'moderate progress', respectively in the 2012 Progress Report[37], and the 2011 Progress Report[38]). An important step in bringing the legislation closer to the *Acquis*,

[36] The Interim Agreement was repealed with the entry into force of the SAA.
[37] EC (2012), Albania Progress Report, EC Brussels, 10.10.2012, p. 36-37.
[38] EC (2011), Albania Progress Report, EC Brussels, 12.10.2011, p. 35-36

are the adoption of the regulations on Investigating Procedures, on the functioning of the Albanian Competition Authority (2011), and also on 'Agreements of Minor Importance' (*"de minimis"*) and 'Group Exemption' (for technology transfer agreements, research and development agreements, and specialisation agreements). All these regulations are aligned with the *Acquis* in all essential aspects95. An important step is also considered to be resolution issued by the Albanian Parliament that binds all executive bodies to consult the ACA whenever primary and secondary legislation is drafted95. While noting the measures taken by the ACA in terms of competition law enforcement in all the three main pillars, as well as competition advocacy, the Reports point out the need for enhancement of institutional capacity for law enforcement.

The conclusions, remarks and suggestions of the EC Progress Report of 2010[39] are particularly important because of the analytical approach towards the competition policy in Albania. Some of the main findings of the Report are: (i) Albania's legal framework for competition is largely based on EU rules and necessary legal and administrative structures are in place. However, additional efforts to align with the *Acquis* and implement it effectively in the medium term are necessary. (ii) The ACA has adequate investigating powers; however its' staff of 35 appears insufficient, particularly after lowering of threshold values for prior notification of mergers to the ACA, which could lead to increase of notifications. (iii) Law 2003 (as amended) incorporates the principles of the *Acquis* regarding services of general economic interests. Further analysis of the compatibility of the regulatory practices in these sectors with the *Acquis* will be needed.

All the other yearly EC Progress Reports analyze steps ahead but also problems with competition policy in Albania, and make respective recommendations. The 2004 Report[40] highlights delays in the establishment of the Competition Commission due to the lack of political agreement regarding its composition, and therefore also in the drafting of regulations as stipulated in the 2003 law. Meanwhile, the report assesses the contribution to the Competition Department at the Ministry of Economy in addressing complaints of unfair competition (7 cases) and antitrust (5 cases). The Competition Department at that time consisted of 9 persons.

The 2012 EC Progress Report[41] draws attention to (i) further efforts to complete a comprehensive review of the overall legal framework for state aid control to bring it in line with the *acquis*; (ii) the need for increasing administrative capacity of the State Aid Sector (SAS – the administrative body), which also serves as the SAC Secretariat; its current staff of four persons is completely inadequate; (iii) the operational independence of the SAC and the SAS has yet to be confirmed (the SAC is chaired by the Minister of Economy and the other four members are appointed by the Council of Ministers, including nominees by the Ministry of Economy (METE); and the SAS is a sector under the Department of Market Mechanisms and State Aid in the METE, while until 2010 the investigative and operational tasks were performed by a separate State Aid department at METE – (however the number of employed persons is the same, four).

As stated in the latest EC Progress Reports discussed above and also in other reports, including the Report on "Legislative Legal Analysis on Competition Law" prepared under the Project "Support to the Albanian Ministry of European Integration (SMEI II, 2011), Law 2003 (as amended) is now in line with the essential elements of the EU *acquis*, Albania's legal framework for competition is largely based on EU rules, and the necessary legal and administrative structures are in place.

39 EC (2010), Albania Analytical Report, EC Brussels, 9.11.2010, p. 63-64.
40 EC (2004), Stabilization and Association Report, EC Brussels 2004, p. 23-24.
41 EC (2012), Albania Progress Report, EC Brussels, 10.10.2012, p. 36-37

However as it stems from Article 70 of the SAA[42], Albania has not only the obligation to technically bring its national legislation in line with EU law but also to secure that it is properly implemented and enforced.[43] Law implementation and enforcement requires that any competition and state aid practices shall be assessed on the basis of criteria laid down in relevant EU provisions of the Treaty on the Functioning of the European Union (TFEU) as well as secondary legislation and soft law. The SMEI II Report draws attention to the need of 'sufficient safeguards to guarantee the operational independence and administrative capacity of the Competition and State Aid authorities so that they can enforce the legislation efficiently'. The SMEI II Report recommends moving 'the centre of gravity to law implementation', and using 'for implementation the *acquis* as a rule model, including binding *acquis* as well as soft law and case law of the General Court and Court of Justice'[44]. The last one can also help in the judicial review process.

The Ministry of European Integration oversees and supports the process of implementation of commitments and obligations under the frame of the SAA, including the approximation of legislation (and its implementation) in the competition field with the EU *acquis*

3.3. Competition policy in Albania and its developments in the first stages of transition

Competition policy in Albania, as in other countries in transition, has three main pillars: (i) law implementation and enforcement; (ii) competition advocacy; and (iii) institutional effectiveness.[45] All these pillars, being also important for any market economy, are particularly important for the transition countries. These countries inherit from the former system no legislation regarding competition, they also inherit a weak or no culture of competition, and the risk of distorting competition is coming not only by the private market players but to a large extent, by the public ones, including public administration and regulators. Thus, 'competition advocacy' becomes particularly important. From the importance of 'law implementation and enforcement' and 'competition advocacy' also is derived the importance of institutional effectiveness, related to the independence of the competition authority, administrative capacities and transparency, and the effectiveness of the appeal process in courts.

Competition policy developments in Albania have gone through several stages.[46] 1991-1995, 1995-2003, and 2003 to date. It might be reasonable to consider April 2014, the time when the full approximation of competition legislation with the aquis is expected (according to Article 70 of the SAA), as the end of the present stage.[47] In this section the developments of competition policy in the periods 1991-1995 and 1995-2003 are shortly described.

In the first stage (1991-1995) competition policy was playing its role only indirectly, through the transition policy measures and reforms which started and developed in that period, consisting in privatization; deregulation of economic activities; price liberalization and also exchange rates liberalization; trade liberalization; land and real estate market liberalization; banking and financial system reforming etc. By contributing to the establishment of the pillars of a market economy and to the creation of a favorite climate for freedom of entrepreneurship, these reforms also gradually made possible an environment

[42] See page 10 of this paper for more information about Article 70 of the SAA.
[43] SMEI II and Ministry of EU Integration (2011), p. 3.
[44] SMEI II and Ministry of EU Integration (2011), p. 5.
[45] See 'National Competition Policy' (p.11), document of the Albania Competition Authority, Approved by the ACA Decision no. 43, dated 28,12,2006, pursuant to Article 24/a, Law no. 9121 "On Competition Protection"
[46] The same, p.13
[47] State Aid approximation with the EU *acquis* is also considered.

where competition is possible. However, as stated in the National Competition Policy 'risks related to anti-competitive practices started to become evident.[48] Main sources of such threats (like also in other countries in transition) are (i) public rules and their administrative and bureaucratic implementation; and (ii) market players behavior, those empowered by the privatization process, players in the imports of goods and services, etc.

Such risks and realities made necessary an active policy for protection and promotion of competition, formalized through the respective legislation. Thus, on 7 December 1995, Law No. 8044 'On Competition' was approved by the Parliament, marking an important step in institutionalizing competition policy in Albania.[49]

The second stage (1995-2003) starts with the efforts to implement the legislation based on the 'Law on Competition' of December 1995 (hereinafter: Law 1995). The Law 1995 was modeled on the German law on the protection of competition (GWB-7 December 1989, BGBI I, S. 2486)[50] and was amended only once, in 1998.[51] Some of the characteristics of the Law 1995, are:

(i) *Dominant position* in a market is *forbidden;* such companies are obliged to split.
(ii) *Criminal (illegal)* acts against consumers and against competitors are forbidden, as *part of this law.*
(iii) A lot of *exemptions* from the Articles related to contracts and agreements which disturb competition, and/or Articles related to dominant position: *Agriculture, forest and food* sector; *public services companies such as electric energy, gas and water; telecommunications, railways and companies of aviation and shipping* when prices and contractual terms require a public approval or when their activity exceeds national borders; also *banks, insurance companies and financial institutes* under regulatory bodies, and legal foundations of copyright companies.
(iv) The institution responsible for protection of competition, the Economic Competition Department (ECD) is *not an independent authority;* it is under the authority of the Minister of Economic Cooperation and Trade.
(v) The *inspections* of business offices and the sequestration of documents require a preliminary order of the court.
(vi) The investigation process by the ECD is based on request.
(vii) *'Hearing'* is part of the procedures for taking a decision; however with the consent of both sides a decision can be taken without hearing.
(viii) *District courts* are authorized to deal with claims from the respective parties.
(ix) *Fines* for companies or individuals that infringe or allow the infringement of competition are low: from 10,000 ALL up to 50,000 ALL.

[48] 'National Competition Policy', 2006, p. 13

[49] In some documents, including the 'National Competition Policy (p.13)' and also in some papers, the adoption of this law is considered to be a step 'which concluded the stage of institutionalizing competition policy in Albania'. It is 'a border line' between the two first stages but having in mind the weak contribution of this law in the three main pillars of competition policy in Albania, it might be better to say that: 'this law opened the stage of institutionalizing competition in Albania'.

[50] See Këllezi, P. (2003), Competition Law in Albania, Concurrences N0 2-2009, Horizons, p.1. The author has advised the Albanian government on the drafting of the new law on the protection of competition of 2003.

[51] The amendment consists in a new paragraph added at Article 37, inserted after paragraph 2, related to the price of newspapers and magazines which should not be lower that their production cost (Law no. 8403, dated 10.09.1998, "Amendment to Law no. 8044, dated 07.12.1995 "On Competition", published in the Official Gazette no. 23, dated 10.10 1998, p. 897.)

The 1995 Law was an important step in the road of institutionalizing the market economy in Albania; it 'created a basis for a competition policy in Albania'[52]. However, this law was generally considered 'as insufficiently applied'[53] and its 'implementation, extremely weak'[54]. Factors affecting the low level of implementation are related to (i) the problems of the law itself (its ambiguity and apparent contradictions[55]) and the respective secondary legislation; (ii) 'the clearly insufficient resources devoted to the area'[56] with a not independent, poorly staffed body (ECD) in charge of implementing the law[57]; and (iii) social, economic and policy developments, including 'the absence of competition culture in Albania' which 'has constituted the root cause of impediments to competition'[58].

As regards the last factor, Këllezi (2007, p. 1) notes that 'the first law was guided by what can be called a "step-by-step" approach, which aimed to introduce basic rules with a low level of sanctions at the initial phase of transition and which presented a high risk of non-implementation'. The privatization process, particularly of state monopolies, resulted in high level of concentration in many markets and import cartels were apparent, while the foreign investments and the new entries in the market remained low. Such a situation 'made it very difficult to contest the strong position of recently privatized monopolies' and 'the de-concentration provision included in the first law remained unenforced, due to, among other reasons, a low incentive to break up monopolies before the privatization process' since firms possessing strong market position were capable of yielding more revenues from privatization', and the same Ministry (of Economic Co-operation and Trade) was responsible for both competition and privatization. The process of law implementation was also negatively affected by the so-called 'crisis of pyramid schemes' of 1996-1997, and by the high level of informality in the economy.

On the other hand, while the transition reforms were going ahead, the need for an effective competition policy was becoming crucial for having a free and functional market economy. Meanwhile Albania (like other countries of WB region) entered the road of integration into the EU based on the Stabilization and Association Process. The process of negotiations regarding the Stabilization and Association Agreement (SAA), gave a decisive impetus to the efforts to have an effective competition in the country. Provisions of the SAA Agreement under negotiations required, among other things, the approximation with the EU competition legislation and its implementation. The existing law (Law 1995) proved to be ineffective in its application and many of its provisions were not in line with the SAA requirement. Just amending the existing law on competition would not be sufficient[59], so a new law on competition protection was made an imperative. One of the SAA requirements was an independent body responsible for competition policy, which pushed the Economic Competition Department[60] to play a proactive role in modernizing the competition legislation. The drafting work of the new law was largely supported by the GTZ.

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52 See Këllezi P. (2009), p. 1
53 Irena Djakovic I. (2004), p. 736; Këllezi P. (2009), p. 1.
54 Commission of the European Communities 2001, p. 24.
55 See Dajkovic I. 2004, p. 736.
56 See Dajkovic I. 2004, p. 735.
57 In its report presented in the OECD Global Forum on Competition (Challenges/obstacles faced by competition authorities in achieving greater economic development through the promotion o competition – contribution from Albania (OECD CCNM\GF\COMP\WD(2004)20), as specific weaknesses of the competition structure are underlined: (i) lack of appropriate legal framework; (ii) lack of an independent institution; (iii) lack of sufficient and qualified staff; (iv) lack of financial resources in conducting surveys for market data collection. (P.2)
58 Competition Regimes in the World – Albania, CUTS International 2004, p. 313-315
59 Gruda S. and L. Milo (Lati), (2010): SMEs Development and Competition Policy in Albania, PECOB's Papers Series, December 2010, Nr. 06, p 13.
60 The Economic Competition Department (ECD) was established in Jun 2001, consisting in two sectors (the 'competition' sector' and 'consumer protection' sector'). Until 2001, the 'sector of competition' under the Directory of Trade Legislation in the Ministry of Industry, Trade and Transport, being established in July 1996 based on Law 1995.

3.4. Competition policy during the 'maturation' stages of transition

3.4.1. New law of 2003 and its amendments – the 'constitution' of competition policy

The new Law "On Competition Protection" (hereinafter, Law 2003) entered into force on December 1st, 2003. It was based on Article 11 of the Constitution of the Republic of Albania which defines the economic system in Albania 'as a market economy and guarantees the freedom of economic activity.[61]

Law 2003 is 'mainly based on EU competition rules, aims to improve the legal and institutional framework for competition in Albania and permits improved implementation of competition policy[62]'. Being a comprehensive set of competition rules, it can be called 'an economic constitution' for Albania.[63]

After entering into force, the Law 2003 has undergone several amendments. Initially it was amended by *Law No. 9499,* dated 03.04. 2006. The amendments were related only to criteria of nomination (election) of the members of the Authority of Competition Commission (Article 20/c); the conditions of the release of a Commission member from his/her position (Article 22/2/c); and the abolition of paragraph (b) of Article 24 which authorized the Commission to approve the organizational structure and the composition of the Secretariat. Afterwards, the Law 2003 was also affected by Law *No. 9584, dated 17.07 2006* "On Wages, Remunerations and Structure of the Constitutional Independent Institutions and Other Independent Institutions", related only to the operational structure of the Competition Authority. The organic structure of the Secretariat and the Authority now is approved by the Assembly and not by the Commission of Competition, as provisioned by the law in 2003.

The last and most important amendments of the Law 2003 are made by the Law No. 10317, dated 16.09.2010. These additions and amendments aimed at increasing the effectiveness of the competition policy by reflecting the practical challenges in the application of the law and/through further (almost completely) approximation the Law with the EU *acquis*. Amendments are particularly related to (i) exclusive and special rights (by including provisions related to public companies and other companies with rights given from state); (ii) prohibition of agreements restricting competition (providing *bloc exemptions* and specifying the cases of *'de minims'* agreements); (iv) dominant position (removal of paragraph 3 of Article 9 to avoid misinterpretations regarding the 'objective reasons' for justifying dominant position); (v) concentration (a significant reduction of the thresholds for notifying concentration and an increase of the deadline of notification – from one week to 30 days); (vi) fines (removing of the minimum limit of heavy fines); (vii) investigative procedures by approximating them almost completely with the *acquis* (particularly complain handling, complainant's identity confidentiality, etc) (viii) public involvement; etc. Amendments also improve 'the wording of definitions' and enhance the clarity of concepts, competences and procedures.[64]

Some of main characteristics of Law 2003 are:

(i) Following the model of the EU competition law, Law 2003 is relevant to any type of *agreement,* formal or informal, tacit or explicit, horizontal or vertical, which may prevent, restrict or distort competition in the market. There is no *exemption* in the scope of Law 2003 regarding agreements, it applies to all the sectors of the economy (unlike the Law 1995 with exemption of agriculture,

61 Official Gazette, 1998, Vol. 28, 1073).
62 Dajkovic, Irena (2004), p. 736
63 Broka, P. and E. Nazif (2011), Economic Constitution in practice: the enforcement of competition law in Albania, Journal of Advanced Research in Law and Education, Volume II, Issue 2(4), Winter 2001, p. 109.
64 See ACA "2010 Annual Report, p. 32-33; Comments by E. Shraja at Hoxha Memi & Hoxha

forestry and food sectors) and it extends to electricity, gas and water (unlike the Law 1995 with exemption of public services, including electricity, gas and water) and all types of enterprises or associations thereof, public and private ones, those operating in the Republic of Albania and those operating abroad, but whose operations have effects in the domestic market.

(ii) Still regarding *agreements,* a particular novelty of the law is the introduction of a *black list*[65] (agreement prohibited and void – Article 4) and a *grey list*[65] (agreements invalid, unless exempted from prohibition by a decision of the Authority – Articles 5, 6, and 7). The exemptions from prohibition can be justified on grounds of *economic efficiency* (block exemptions) when benefits are shared with consumers and competition is not substantially restricted[66] as the case of *'de minimis'* (participants together, with a market share less than 10-15%). The law in its 2003 version did not provide a *white list* (agreements which do not restrict competition); this was made possible through the amendments of 2010.[67]

(iii) *Dominant position* is not prohibited per se; abuse is forbidden –it is a significant novelty of the law.[68] The law expressively provides for structural remedies as one of the measures in cases of abusive conduct. The dominant undertakings have the possibility to prove that they had objective grounds – technical or legitimate commercial reasons, to adopt certain conduct. In Law 1995, dominant position was prohibited, although there were many exemptions related to public service companies and other companies with exclusive or special rights.

(iv) *Concentrations* of undertakings represent a very important innovation of the law[69] and this part of the law is in accordance with the respective EU legislation.[70] The new law 'strengthened the provisions of a prior notification and authorization of concentrations between undertakings and considerably raised the thresholds'[71]. However the thresholds were reduced by amendments of 2010.

(v) The institution responsible for protection of competition, the *Authority of Competition,* is a public entity, independent in performing its tasks. The Authority is composed of the Commission - the decision-taking body, and the Secretariat – the executive (administrative and investigative) body. The institution responsible in the case of Law 1995 was not independent; it was under the authority of the Minister of Economic Cooperation and Trade.

(vi) The Law 2003 provides *appropriate law enforcement powers:* investigating powers and power to impose sanctions. The investigation process by the Authority is opened not only on the basis of a formal request as in Law 1995, but also on its own initiative (*ex officio*). The inspections of business premises and the sequestration of documents do not require a preliminary order of the court as in Law 1995; only the decision of the Commission and its notification is needed. The authority is also empowered to compel witnesses to testify or to impose sanctions for the delayed or incomplete provision of relevant documents.

(vii) *Fines* for companies or individuals that infringe or allow the infringement of competition are relatively high and proportional to the gravity and to the duration of the infringement. Fines are in percentages of the proceeding year's turnover, being up to 1% for non-serious infringements and up to 10% for serious infringements. Only for individuals fines are in absolute

65 Dajkovic 2004, p. 737
66 Këllezi, P. 2009, p. 2
67 A 'white list' is recently being embodied in the concept of 'block exemptions'
68 Dajkovc 2004, p. 736
69 The same, p. 737
70 According to Dajkovic (2004, p. 737), it 'essentially replicated the provisions of EU Council Regulation 4064/89' of 1989, which was amended in 1996 and modified by Reg. 1310/97 of 1997. Since then, new Council Reg. 139/2004 has been adopted, coming in force on May 1, 2004. Amendments of Law 2003 in 2010 reflected the new EU legislation in the field.
71 Këllezi, P. 2000, p. 5

figures: up to 50 million ALL. Leniency is applied regarding fines. In case of Law 1995, fines were very low.

(viii) Law 2003 provides a *judicial remedy* for parties who have suffered loss from an anti-competitive behavior of a particular entity: they can seek compensation against that entity from the civil chamber of the Tirana District Court and such procedures can run independently from the administrative procedures undertaken by the Authority. However, Law 2003 deals only with economic competition; unfair competition – acts against consumers and against competitors are not under the jurisdiction of the Law 2003; in Law 1995 they were.

(ix) 'Hearing' is part of the procedures for taking a decision; there is no exemption about it, as it was the case in Law 1995.

(x) Only the Tirana District Court is authorized to deal with claims against the decisions of the Competition Authority. In the near future it will be substituted by the Administrative Court. According to Law 1995, all district courts were authorized.

(xi) An increasing and important role is given to the Authority regarding regulatory reform and overall climate of competition in the economy through *competition advocacy.* Publication of decisions and notifications, and also of legislation (law on competition, regulations, instructions, Competition Policy Document), are required by Law.

(xii) *In general,* Law 2003 is almost fully approximated with the EU *acquis*: featuring the same main pillars of competition infringements: anti-competitive agreements, abuse of dominant position, and concentration; the same exemptions for horizontal and vertical agreements; and procedures oriented to EU ones.

In conclusion, Law 2003 is a solid base for an effective competition policy in Albania. However, its implementation is made possible only on the instrumental bases of the relevant secondary legislation. Pursuant to Article 84 of the Law 2003, the Competition Authority developed the relevant regulations, with the support of GTZ expertise.[72] Also the Amendments 2010 of the competition law were accompanied with amendments to the secondary legislation, namely regulations on: agreements of minor significance[73]; the implementation of concentration procedures[74]; setting of expenses and application of procedures with the Competition Authority[75]; and on the operation of the Competition Authority.[76] The compiling and approval of regulations and instructions by the Competition Commission is a continuing process, based on impositions from new developments in the real life and also the need to further approximate the legislation with the EU *acquis*. A number of regulations and guidelines are approved during 2011 and 2012.

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72 The Regulations required by Article 84 are: (i) "Regulation on the functioning of the Authority" (approved by Decision nr. 58, dated 15.10.2007 of the Commission of Competition (CC), amended in 2009, 2010 and 2011 by decision nr. 189, dated 26.05.2011); (ii) "Regulations for determining the costs to follow the procedures of the Competition Authority"; (approved by Decision nr. 10, dated 29.06.2004 of CC; amended in 2010 by Decision nr. 167, dated 21.12.2010, and in 2012); (iii) "Regulations for the implementation of undertaking concentration procedures" (Decision nr. 80, dated 05.06.2008; amended in 2010 by decision nr. 82); (iv) "Regulation on fines and their leniencies" (approved by Decision of CC nr. 120, dated 10.09.2009.

73 CA Decision no. 164 of 14 December 2010 on "Amending the Regulation on agreements of minor significance"

74 CA Decision no. 165 of 14 December 2010 on "Amending the Regulation on the implementation of undertaking concentration procedures".

75 CA decision no. 167 of 21 December 2010 on "Amending the Regulation on the setting of expenses and application of procedures with the Competition Authority'

76 CA decision no. 168 of 21 December 2010 on "Amending the Regulation on the operation of the Competition Authority.

3.4.2. Institutional capacity and power in competition policy and law implementation

All developments in a market economy and rules affecting the behavior of the market agents are reflected in the effectiveness of competition policy. The institutions directly involved in the protection and promotion of competition are the Assembly (particularly the Committee for Economy and Finance, and the Committee for the European Integration), the Competition Authority which is directly responsible for the implementation of the law, and the Tirana District Court. An important role is also played by central and local administrative bodies and also regulatory entities and other regulatory institutions.

(i) *The Assembly* approves the law on competition; elects (appoints) the Competition Commission Chair and its members; approves, by law on competition, the competences of the Commission and its Chairperson as well as the competences of the Secretariat and the General Secretary, and by decision, the organization structure of the Competition Authority and the compensation of the Commission members. The Assembly approves the Yearly Reports of the Competition Authority and the respective Resolution containing assessments, comments and recommendations for the Authority of Competition. The Assembly also approves the annual budget (which constitutes a separate article in the state budget) for financing the activity of the Authority. Within the Assembly, the Committee for Economy and Finance deals directly with the issues related to competition policy and law implementation, and the EU Integration Commission monitors and analyzes the work of the Authority and developments in the competition policy, from the point of view of the implementation of commitments in the framework of the Stabilization and Association Agreement. The Assembly also contributes to the coordination of actions of the Competition Authority and the Regulatory Agencies on issues related to competition policy – advocacy of competition. A special directory in the Assembly[77] covers the oversight of independent and regulatory agencies.

(ii) Competition Authority is the institution directly responsible for the implementation of competition law.

(iii) Pursuant to Law 2003, the parties affected by the decisions of the Commission have the right to complain in the Tirana District Court, to be followed at the Appellate Court.[78] The judicial system plays an important role in competition policy.

(iv) Central and local administrative bodies and also regulatory entities and other regulatory institutions, although not directly involved in competition law enforcement, indirectly affect competition via their normative acts and regulations.

3.4.2.1. Competition Authority

The body responsible for the implementation of Law 2003 is the Competition Authority, which as defined in Article 18 of Law 2003, is a public and legal entity, independent in performing its tasks. The Authority is composed of the Commission – the decision-making body, and the Secretariat – the administrative and investigating body. Unlike the Department of Economic Competition responsible for the implementation of Law 1995 ,which was part of the Ministry of Trade and Economic Cooperation, the Competition Authority is an *independent* body.

[77] Monitoring (Oversight) Department of Independent Institutions.

[78] The Administrative Court is expected to get established soon (after the approval in the Parliament); it will cover the competition infringement cases.

The independence of the Authority and its power in the implementation of the law and competition protection and promotion, stem from:

(i) The way the decision-making body members are elected, and the requirements they should comply with;
(ii) The power provided by law to the body, related to the decision-making, monitoring, and investigating competencies, and the power to impose sanctions;
(iii) The administrative capacity; and
(iv) The effectiveness of the cooperation with other institutions and the improvement of competition culture.

Let's look more closely at these factors.

(I) The Commission members are elected (appointed) by the Assembly, by the majority of votes in the presence of more than half of the Assembly members, for a period of five years[79] with the right to be elected not more than twice consecutively. Law 2003 defines the criteria that a candidate must meet to be elected as a member: (a) be an Albanian citizen; (b) have a working professional experience of no less than 15 years; (c) be for at least 5 years a member of a university-level academic body, or have a title or scientific degree in relevant fields (economics or law); (d) not have been dismissed from work or civil service by disciplinary action. Also, Commission members cannot be persons that are part of senior leading structures of political parties, members of leading structures of commercial associations or persons exercising economic activities. Commission members are appointed by the Assembly among alternative candidates on the basis of proposals coming from (a) the president – one member; (b) the Council of Ministers – two members; and (c) the Assembly – 2 members.

There have been discussions and suggestions[80] about the procedures of appointments of Commission members, mostly regarding the sources of proposals. The independence of the Commission might be more guaranteed if proposals are not coming from governmental institutions. An intensive involvement of the Committee for Economy and Finance in the selection process of the best candidates that comply with the requirements, based also on recommendations from relevant institutions, would help in this process. The experience of a vacant position for about two years due to the delayed proposal from the President favors an enhanced role of the Committee for Economy and Finance in the selection process of the candidates. Suggestions are also related to making requirements regarding the educational and professional experience more stringent,, adding as a requirement an educational background on European competition law, and having a higher representation of lawyers in the Commission.[81] The Assembly also appoints the Chairperson of the Commission (by the proposal of the Committee for Economy and Finance) while the Vice-Chairperson is elected by the majority of votes of all the members in the first meeting of the Commission. It would be more effective if the application for the Chairperson position is addressed directly to the Committee for Economy and Finance (with a technical support provided by an ad-hoc commission of experts). The Law also determines the conditions for the replacement of Commission members, including commitment of a penal offence when pronounced by court. The Assembly can decide, via a majority vote, to release a member if, among other things (absence of more than one month unjustifiably, loss of Albanian citizenship etc), he/she has strongly infringed work ethics

[79] Pursuant to Article 21 of Law 2003, only for the first time of appointment when this law enters into force, the mandate is five years for the Chairperson, 4 years for the Vice-Chairperson and three years for other members.
[80] *See:* Council of Europe, Preliminary assessment of the Albanian Competition Authority for the purpose of Anti-corruption risk assessment, technical paper, CMU-PACA-01/2011, p. 17, 18, 19. See also: Broka, P. and E. Nazifi, Economic Constitution in practice: the enforcement of competition law in Albania, Journal of Advanced Research in Law and Education, Volume II, Issue 2(4), Winter 2001, p. 112.
[81] The same, p. 19.

as carrying out his/her duties. According to the Amendments 2010, the Commission notifies the Assembly three months before the mandate of a Commission member has been completed; however the member continues to carry out duties until he is replaced by an Assembly decision. This amendment helped in filling the vacancy of a member of the Committee for a period of about 2 years.

(II) The Authority competences and power in monitoring, investigating and imposing sanctions are well described in Law 2003, and also in Regulation "On the Functioning of Competition Authority" (Competition Commission Decision, dated 26.02.2010, which abrogated the Regulation of 17.03.2004), and also the Regulation "On Investigating Procedures of Competition Authority" (Competition Commission Decision, dated 24.02.2011). Pursuant to Articles 18 and 19, the Authority is composed of Commission and Secretariat.

The Commission is a decision-making body; it is composed of five members and acts as a permanent collegial body. Compiling of the national competition policy; approval of the internal functioning regulation of the Authority; issuing by-laws and guidelines in compliance with this law; supervision of Secretariat work for the application of the provisions of this law; setting priorities and deadlines for investigations; and taking decisions on the basis of this law, are among main competences and duties of the Commission regarding the implementation of the law, as defined in Article 24. The other important set of duties and competences have to do with the institutional relations of the Commission (Authority). In relation to the Assembly, the Commission has the obligation to submit the Authority's annual report within the first quarter of the consequent year, and also to give evaluations on issues related to competition and legislation in the field, with the request of Assembly or its Committees. Evaluations and recommendations are to also be given to central and local administration and other public institutions, trade associations, labor unions, consumer associations, commercial and industrial chambers on issues related to competition. The Commission represents the Authority within the country and abroad, particularly in relation with homologue institutions.

The *Commission Chairperson,* as defined in Article 25 of the Law 2003 and specified in Article 5 of the Regulation "On the Functioning of the Competition Authority", is the executive manager of the daily work of the Authority; he chairs the meetings of the Commission and co-ordinates work among the Commission members. The chairperson's specific power as a meeting chair is that their vote (or the vice-Chairperson's vote, or one of the Commission members's vote who substitutes the chairperson when absent), is decisive in cases of equal divisions of votes. Commission meetings for decision-making are valid only when at least four members are present.

The *Secretariat* is managed by the Secretary General, who is elected by the Commission. In particular, he coordinates the cooperation of the various departments and the sector of market analysis and research. The Secretariat employees enjoy the status of civil servants. Pursuant to Article 28 of the Law 2003 and the respective Regulation, the Secretariat is responsible for: monitoring and investigating the conditions in the market; conducting investigation and compiling and submitting investigation reports to the Commission for decision-making; ensuring publication of decisions taken and of by-laws and annual reports of the Authority; supervising the implementation of the decisions. For issues that fall within the scope of two or more departments, working groups are created.

As regards the *investigation power* of Authority, the respective provisions of the Law 2003 (Chapter II and Chapter III) are mostly[82] in line with the European Council regulation (EC) no 1/2003

[82] The Answers to EC Questions belong to year 2010, while Amendments of 2010 further approximated the investigating procedures with the *acquis*.

of 16 December 2002 "On the Implementation of the rules on competition laid down in Article 81 and 82 of the Treaty.[83]

Some of main features of the Authority's investigative and decision-taking power are as follows:

(i) Authority may conduct a *general enquiry* into *any sector of the economy* if the rigidity of prices or other circumstances suggest that competition is restricted or distorted in the market (Pursuant to Article 41 of Law 2003, approximated with Article 17 of Regulation 1/2003). The Secretariat by its own initiative or by a complaint of a third party, may initiate *preliminary investigations* with the approval the Commission, and always when it is required by the Commission. If signs of restraint or distorted competition exist, the Secretariat, by Commission approval or request, opens an *in-depth investigation* (pursuant to Articles 42-43). As regards *complaints,* Article 29/1 of Law 2003 underlines the obligation of the Authority for the protection and guaranteeing of anonymity of the complainant, whenever it is requested. Article 15 of Authority Regulation "On Investigating Procedures of the Competition Authority" defines the conditions for the consideration of a complaint, stating also that the Commission may reject a complaint when it provides insufficient evidence and when afterwards, the complaint is not supported with the required evidence within the time provided (Maybe the Regulation can leave space for restarting a complaint from scratch.)

(ii) Undertakings (those under investigation, or applying for investigation, or participating in a concentration, or other undertakings or individuals who might have valuable information for a specific case) are *obliged to provide* (a) *any information* needed for the investigation process, (b) at *any stage of proceedings,* (c) including data containing *business secrets* (pursuant to Article 33, in line with Article 17 of Regulation 1/2003).

(iii) The Secretariat performs the required inspections of undertakings and associations of undertakings pursuant to *a written Commission authorization* which contains the purpose of inspection and also the respective sanctions as provided by Law (Article 35 of Law 2003, in line with Article 20/3,4 of EC Regulation 1/2003). Investigation can start *after the notification* of the respective undertakings and persons for the Commission decision, *or simultaneously with the notification.* (It was for the first time in 2012 that Authority conducted an investigation without previous notification to all the involved parties at the same time[84]). Under the Commission authorization, the Secretariat inspectors and other authorized persons, may: (a) access premises, vehicles and territories of undertakings during working hours; examine books and other business records in any form they are stored and/or secure copies or extracts, seal premises or books or records (for no longer than 72 hours) if necessary; ask any representative or member staff about the information required etc (Article 36 of Law 2003, in line with Article 20/2 of Regulation 1/2003). When the conduct of investigations is hampered, the *assistance of State Police is required,* as defined in Article 35/3 of Law 2003 (in 2012 it was for the first time Authority inspectors have conducted inspections in cooperation with the State Police[85]). Meanwhile, for inspections to the domiciles (or other places equivalent to domicile) of undertaking managers, directors or any employees, staff members and other persons, natural or legal, related with the business management, in case of serious infringements of competition, an *order issued by a court which have the respective jurisdiction* is required, as defined in Article 37 of Law 2003 (in line with Article 21 of regulation 1/2003). The Authority inspectors have the right to seize items considered to comprise evidence

83 Republic of Albania, Council of Ministers: Albania's Answers to EC Questionnaire", p.790 (Chapter 8, Q. 20).
84 ACA Yearly Report 2012-2013, p 9
85 ACA Yearly Report 2012-2013, p 9

in the investigation, by giving a copy to the relevant persons and informing them of the right to appeal in the court. Increasing investigation efficiency is one of the main goals and also challenges of Authority[86], including increasing the level of clarity of reports, of legal arguments and also economic arguments based on more detailed and contemporary economic analysis.[87]

(iv) After completing the investigation, the Commission makes the decision in accordance with Law 2003, based on the Secretariat report and also by considering the claims of the parties in a hearing session. When infringements of competition are found as described in Articles 4 (prohibited agreements) and Article 9 (abuse of dominant position) the Commission requires the undertakings or associates of undertakings to put an end to restrictions and distortions of competition, including remedies of a structural nature, as defined in Article of Law 2003. By Commission decision, agreements maybe exempted from prohibition, but exemptions are limited in time and granted subject to conditions and obligations. As regards concentrations, after preliminary or/and in-depth procedures, the Commission can decide on authorization of a concentration; authorization for temporary concentration, under certain conditions and obligations; or re-establishment of competition by requiring the participant undertakings to take the necessary steps to restore the necessary situation.

In all cases, decisions, as well as notifications, are published. Decisions of the Commission can be appealed at the district court of Tirana, pursuant to Article 40 of Law 2003. The Authority follows the appeal process and judicial protection at all levels of the judicial process.

(v) The Authority has the power to take *punitive measures* against undertakings or associations of undertakings, for non-compliance with the requirements of Law 2003 and the relevant investigative rules of procedures. Law 2003 provides for two categories of fines: (a) *fines for not serious infringements* going up to 1% (form 0.1% up to 1% as defined in Regulation on "Fines and Leniency" of ACA, Article 4; the Regulation is in line with the Commission Notice 2006/C 298/11 and the Guideline of the EC 2006/C 210/2) of the previous fiscal year total turnover, imposed when undertakings refuse to get inspected by the Authority (it was for the first time in 2012 that Authority penalized with a fee, an undertaking that refused the inspection[88]), refuse to provide the required information, or the information given is incorrect, incomplete or misleading, or if seals authorized by Authority are broken (Article 73 of the Law 2003); and (b) *fines for serious infringements* going up to 10% of the previous fiscal year total turnover, imposed when undertakings: violate Article 4 on prohibited agreements or Article 9 on abuse of dominant position; do not respect Authority decisions on temporary measures; fail to comply with the conditions and obligations laid down in the Authority decision; have not notified concentration or proceed with concentration without respecting the relevant provisions of Law 2003. *Gravity and duration* of infringements are the main components used in calculating the amount of fine, and then aggravating or attenuating factors are taken into consideration, as defined in Article 75 of the Law 2003 and further detailed in Regulation on "Fines and Leniency", Articles 3-6. The Commission may by a decision provide total or partial relief from fines, in proportion to the contribution made by the parties to identify and prohibit the infringement, as defined in Article 77 of Law 2003. In addition to the fines described above, *periodical daily fines* (up to 5% of the average daily turnover

86 ACA 2011-2012 Yearly Report, p. 6.
87 ACA 2012-203 Yearly Report, p. 7
88 ACA 2012-203 Yearly Report, p. 9.

in the previous fiscal year), and *individual fines* (up to ALL 5 million) are also applied on persons who violate Law 2003, as defined in Article 76, and Article 78, respectively.

Considering the entire 2005-2012 period and referring only to the number of fines already executed or under the process of execution, 6 are heavy fines (50%) and 6 are light ones (50%). As regards the fines under the process of judicial review, heavy fines constitute the overwhelming part (about 83%).[89]

However, the efficiency of the Authority's competition policy and its decisions on the protection and promotion of competition directly depend on the degree of the implementation of decisions. Commission's decisions are subject to judicial review as a rule at all levels: Tirana District Court, Court of Appeal, and the Supreme Court. The statistics show that starting from 2005 (when the first fine was imposed by the Authority) until the end of 2012, 26 Commission decisions are appealed at the Court of First Instance and only 15 cases have been won by the Authority, while the trial process has continued in other levels of the judiciary, as shown in table 3.1.

Table 3.1: Cases reviewed in the Judicial system, 2005-2012

	Total cases	Cases accepted for review	Cases won by Authority	Cases lost by Authority	Cases still in process
First Instance Court	26	26	15	6	5
Appellate Court	21	18	11	5	2
Supreme Court	12	12	2	1	9

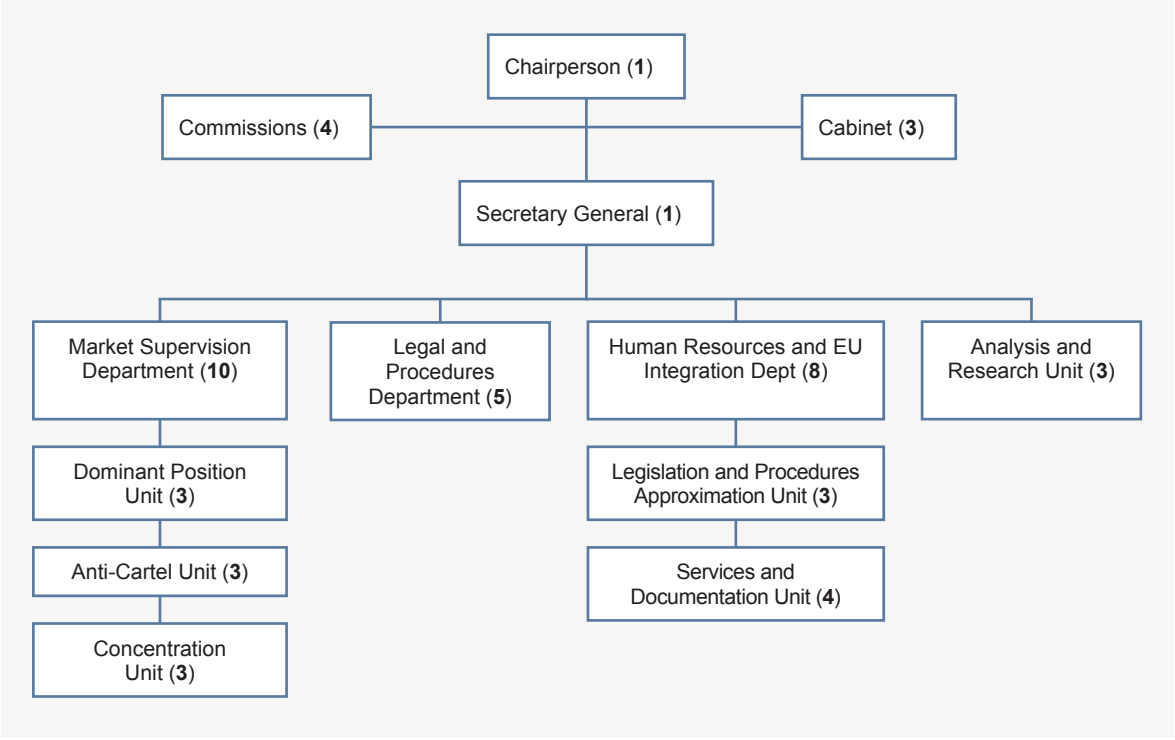
Source: Data from ACA Yearly Report 2012-2013, p. 36-37 and own calculations.

Referring only the decisions on fines, out of a total of 17 Commission decisions, only 8 have taken a final form and are turned into executive titles and only half of them are already executed by the Bailiff Office.[90]

(III) The administrative capacity of Authority is a very important factor in the implementation of the law. Pursuant to Assembly[91] Decision No. 7/2012, dated 2.2.2012 "On the Approval of the Organizational Structure and Staffing of the Competition Authority", the Authority structure is shown in the following scheme (Figure 1) and the total number of employees, including the Commission (5), was 35 persons.[92] The Cabinet (3 persons) is a support office for the Chairperson and the Commission, an office aiming at harmonized internal functioning of the Authority and responsible for the organization of the Commission meetings, the writing of its decisions, the provision of legal evaluation etc. The Cabinet also assists the Chairperson in relationships with third parties and the media.

89 Based on information taken from the ACA.
90 ACA Yearly Report 2012-2013, p. 36-37
91 According to Article 24/b of Law 2003, one of the duties and competences of the Commission was approval of the organic structure and number of employees of the Secretariat. By Law 2006, Article 24/b was abolished; this competence passed to Assembly.
92 Actually, in 2012, the fifth member of the Authority was nominated, and an expert on legislation was also recruited. The recruitment procedures haven't finished yet for an IT expert. (ACA Report 2012-2013). Based on Assembly Decision No. 7/2012, dated 2.2.2012, it was made possible the substitution of two suspended positions (drivers) with two technical staff.

Figure 3.1: Competition Authority structure and staffing



The Secretariat is chaired by the Secretary General. The organizational chart of the Secretariat consists of three Departments and one Analysis Unit. (i) The *Market Supervision Department* (10 employees) supervises the market behavior of undertakings Pursuant to Law 2003 and the respective Regulations and other secondary legislation; it consists of three units: Abuse of Dominant Position Unit, Anti-cartel Unit, and Concentration Unit, corresponding to the three main pillars of competition protection. (ii) The *Legal and Procedures Department* (5 persons) is responsible for the juridical aspects of the procedures followed by the Monitoring Department and represents the Authority in court proceedings to defend Commission decisions. (iii) The *Human Resources and European Integration Department* (8 persons), consisting of two units: the Legislation and Procedures Approximation Unit, and Internal Services (human resources, budget, services, and documentation). (iv) The *Market Analysis and Research Unit* (3 persons), is created via Assembly Decision no. 96, dated 30.04.2007 "On the Approval of the Organizational Structure and Staffing of the Competition Authority" with the duty to conduct economic analysis as to identify spots of potential anti-competitive activity in the market.

Overall, the organization structure and staffing of the Authority has been almost the same, since 2007.[93] with the same three Departments and the Analysis Unit, and the same total number of staff (35). The main changes in 2012 are (i) the switching of Legislation and Procedures Approximation Unit from the Legal and Procedures Department to Human Resources and EU Integration Department, accompanied by minor changes in staffing of these Departments. However the *actual total number*

[93] Assembly Decision no. 96, dated 30.04.2007 "On the Approval of the Organizational Structure and Staffing of the Competition Authority", pursuant to Law no. 9584, dated 17.07.2006 "On Wages, Remuneration, and Structure of Independent Constitutional Institutions and Other Institutions Created on the of the Law".

of personnel has been 32 since 2007 until 2012, due to **failure to replace** (through the nominating procedures in the Assembly) a member of the ACC (the former deputy Chairperson) after the expiry of his term[94], and also due to suspension of two internal service positions (drivers) until the Parliament approved their change to technical positions (February 2012).

When compared with the Authority organizational structure and staffing in the period 2004-2007 (and before 2004), changes are significant. The overall staffing was around 14 during 2004 and increased to 20 in 2005. In 2007 the overall number increased by 15 employees, of which 12 were technical (expert) staff, while the organizational structure changed by restructuring the three main existing departments (Market Analysis and Investigation; Legal Issues; and Human Resources and Services) and adding the Research Analysis and Unit[95] (aiming at preceding market investigations with market analysis[96]). Before 2004, the institution responsible for the implementation of Competition Law was the Economic Competition Department within the Ministry of Economic Cooperation and Trade, staffed only with 3 persons, reaching 9 persons in 2004.[97]

According to the ACA Annual Report 2012-2013 (p. 52-54), from the total personnel of 35 persons, 24 (69%) are technical staff including 12 economists (50%), 9 lawyers (38%), 2 computing specialists and 1 specialist in foreign languages. The decision-making body (the Commission, after having been completed with the fifth member in 2012), has 3 economists and 2 lawyers. In terms of *functions,* 14 percent is decision-making staff; 69 percent are technical staff, and 17% are supportive staff. As regards *scientific degrees and titles,* one is Prof. Dr. and another one in the process of acquiring this title; two (2) are Prof. Assoc. Dr.; four (4) are in the process of doctorate degree; 10 have master degrees (3 of them have got the diploma abroad) and 2 in the process of acquiring a master degree. Two staff members have graduated abroad.[98]

A very important factor in increasing the capacity of the Authority is the process of staff training, including the managerial and technical one, through the participation in training courses and also in national and international activities, such as seminars, workshops, conferences, etc. The contribution in this process comes mostly from the EU and also some other international support programs, including GTZ, CARDS[99], TAIEX (Technical Assistance and Instrumental Exchange Network) training agency, IPA 2008[100], OECD particularly through its Regional Center for Competition (RCC); ICN (International Competition Network), etc.[101] In 2011, 150 training days were conducted

94 A solution to such a problem is given by the Amendments of 2010: a commissioner stays in his position even after the expiry of his term until a new commissioner is elected by the Assembly (Article 21, paragraph 3.1).

95 ACA Yearly Report 2007-2008, p.

96 Based on Law 2003 (before the amendments of 2006) the organizational structure of the Authority was a competence of Authority itself. Based on Authority Decision of 25.04.2011 the organizational structure was as follows: Commission (5 persons); Cabinet (2); Secretary General (1); Directory of Market Analysis (4); Directory of legal issues (3); Directory of human resources and internal services (5).

97 EC (2004), Stabilization and Association Report, EC Brussels 2004, p. 23-24.

98 ACA Yearly Report 2012, p. 43.

99 CARDS has provided technical support, including training courses, during 2004-2006.

100 IPA 2008 consists in two EU programs: Expertise/Technical Assistance Programme, and Twinning Programme. The first one was focused on legislation approximation with the *acquis* in the field of competition and state aid, while the second on strengthening the institutional capacities through providing assistance and training in increasing professionalism and expertise in the field of competition. These programs were implemented in Albania from April 2010 till December 2011.

101 The Authority budget is also used and the ITAP (Institute for Training of Public Administration) has given a contribution.

under EU-funded Projects only, including almost all employees of Authority.[102] During 2012, about 100 days of training have been developed by experts of the EU, Italy and Hungary, and 18 training days have been delivered in the framework of cooperation with the OECD, with a regional centre in Hungary. For the first time, econometrics modeling and instruments were part of Secretariat's technical staff training programs. Staff also benefited from seminars and roundtables organized from the regulatory entities or other institutions. Table 2 shows number of persons (not only the Authority staff, but also employees of other institutions including judicial ones, personnel from regulatory authorities, students etc) who have benefited from the training programs and activities, and training-days for each year starting from 2006.

Table 3.2: Number of training activities, trained persons and training-days per year

Year	Number of training activities	Number of trained persons	Number of training-days
2006	5	5	30
2007	7	11	20
2008	16	103	53
2009	17	90	51
2010	17	119	53
2011	23	365	150
2012	21	342	112
2006-2012	106	1035	469

Source: ACA Yearly Reports, other information from the Authority, and own calculations.

The highest figures belong to years 2011 and 2012 because of the special role of EU project IPA 2008.

While capacity building is considered to be a constant challenge for the Authority, for 2012 onwards the weight of financing training programs may fall more on the budget of the institution, as stated in the Yearly Report 2012-2013 (p. 58). Efforts to ensure expertise and financial support from the EU and international institutions must be accompanied with more efforts to further increase the effectiveness of the training programmes.

(IV) Institutional cooperation effectiveness, competition advocacy and competition culture are also very important for the implementation of Law 2003 and for an effective competition policy. As stipulated in Law 2003 (Article 60), the Authority has the obligation to assess the restriction or prevention of competition (particularly related with quantitative restrictions concerning trading and market access; exclusive or special rights in certain zones for certain undertakings or products; imposing uniform practices in prices or selling conditions), brought by draft normative acts compiled by central and local administration bodies. The authority also has the obligation to assess the regulatory barriers to competition incorporated in the economic and administrative regulations, and to give the appropriate recommendations. In regulated sectors, the cooperation of the Authority with regulatory entities and other regulatory institutions is required (Article 70). The exchange of information and cooperation with homologue authorities pursuant to bilateral or multilateral agreements is also required by law (Articles 71 and 72).

A closer look at Articles 69 and 70 allows distinguishing the responsibilities of the Authority in the case of normative acts of central and local administration bodies, from the responsibilities related to normative acts of regulatory entities and other regulatory institutions. In the first case (Article 69), the

[102] ACA Yearly Report 2011-2012, p. 8.

requirement for assessment and recommendations is coming from the central and local administration bodies; in the second case (Article 70) it is the obligation of the Authority to make relevant assessment and recommendations as regards barriers to competition incorporated in economic and administrative regulations. Although not explicitly expressed, it is implied (and it should be obviously expressed in the law) that (i) the Authority can with its own initiative assess normative acts of central and local administration bodies, and (ii) the regulatory entities and other regulatory institutions can require the Authority to make relevant assessments and provide recommendations.

A *specific problem* in the *first case* is that requirements for assessment may be too selective and not cover all the cases with the problems stipulated in Article 69. Various reasons may be at work, including the lack of expertise in the respective institution, and a solution is called for.

A *common problem* in both cases is that the Authority's obligations defined by law are limited to the provision of assessments and appropriate recommendations. What happens after the recommendations? Are they reflected in the relevant normative acts? A solution in this case might be the obligation of the relevant institution to notify the Authority and at the same time the Committee for Economy and Finance on the acceptance of the recommendation and for the appropriate measures for its implementation, or for not accepting the recommendation, in full or partly, accompanied by respective arguments. Sometimes it does not happen.

In particular more attention is required from the Authority as regards the privatization process of concession licences given by the government, which may distort competition in the respective markets.

The number of assessments and recommendations by the Authority has been relatively small. The total number of recommendations to the public institutions for all the period 2004-2012 was 37, reaching the peak in 2009 (10 recommendations) and decreasing to 5 recommendations each year after 2009 until 2012.[103] If both the assessment of normative acts and recommendations are accounted for, the total number for the period 2006-2012 is 81, including 60 assessments and recommendations on the request of the relevant institutions, and 21 assessments and recommendations made by Authority's initiative.[104]

Assessments of normative acts and the respective recommendations from the ACA are the main components of 'competition advocacy', which is a very important pillar of competition policy.[105] As defined in the Report "Advocacy and Competition Policy", prepared by the Advocacy Working Group, presented in the International Competition Network's Conference (ICN) in 2002, *"Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competition environment for economic activities by means of non-enforcement mechanism, mainly through its relationship with other governmental entities and by increasing public awareness of the benefits of competition"*[106]. Several points are to be underlined from this definition: *first,* competition advocacy is a function of the competition authority[107]; *second,* this function implies activities aiming at promotion of competition by means of non-enforcement mechanisms; and third, non-enforcement mechanisms include (a) activities directed at other public authorities and performed

103 ACA Yearly Report 2012-2013, p. 50.
104 Based on the specific information provided by the ACA.
105 ACA (2006), National Competition Policy, p. 33-38.
106 ICN Working Group, 'Advocacy and Competition Policy',-Report presented in the ICN Conference Naples, Italy, 2002, p. i.
107 However, in literature there are views that see the advocacy of competition as a function of other governmental and non-governmental institutions as well. See: Evenett, S. (2006), Competition Advocacy: Time for a Rethink? P. 5

in co-operation with them, and (b) activities directed at all the constituencies of the society aiming at raising their awareness of the benefits of competition and the role of competition policy in promoting and protecting competition. So advocacy of competition is closely related to the promotion of competition culture.

Rules imposed by the regulatory authorities in the regulated sectors (by making use of *preliminary control* mechanism) and the competition legislation designed to ensure protection of competition (by ensuring occurrence of *ex-post control*), are complementary in their aiming at public interest and consumer protection. However, they are to a certain extent substitutes as well. The liberalization reforms in the public utilities, an ongoing process also in Albania, increases the scope of enforcement mechanisms in protection and promotion of competition in these regulated sectors: the greater the opening of the market and the competition in the market, the lesser the need for specific regulations governing preliminary control.[108] The reforming processes in the transition economies make 'competition advocacy' a particularly important component of competition policy.

However, as underlined in the National Competition Policy[109], the administration of competition advocacy is no easy task because of possible counteractions by different players in the market, including businesses and their associations, different private or public institutions, and various groups of interest. Examples of such confrontations are not lacking in the case of Albania.

Cooperation with the Regulatory Entities and other institutions is very important for competition advocacy. The Authority has concluded Memoranda of Cooperation with all the regulatory entities and institutes in Albania.

As regards competition culture, the Authority has used all the ways presented in the National Competition Policy, including co-operation with business organizations (such as Chamber of Commerce etc) and public institutes; publications (including the website); conferences and workshops; communication in media; training and lectures etc. Conduction of occasional surveys, as emphasised in the National Competition Policy, will contribute in building up effective dialogue with the business community and the public.[110] Also, the Authority webpage would be more effective if all laws and secondary legislation are translated in English and also if the main EU *acquis* are available in the web.

One of the indicators of 'competition culture' is the number of complaints coming to the ACA from businesses, business associations, or citizens as regards to competition prevention, restriction or distortion. Table 3 provides information on complaints and their distribution, by years, according to main pillars of competition protection. In 2012 the total number of complaints was 20 (about twice as much as in 2010); 14 were within the object of Law 2003 while 6 were considered by ACA to be outside the scope of the law. Most of complaints were addressed on prohibited agreements and a considerable number on abuse of dominant position; no complaints addressed concentrations.

108 ACA (2006), National Competition Policy, p. 26-27.
109 ACA (2006), National Competition Policy, p. 34.
110 ACA (2006), National Competition Policy, p. 39.

Table 3.3: Complaints to ACA by years

	Total	Prohibited agreements	Abuse of dominant position	Concentrations	Revision of normative acts	Outside the scope of Law 2003
2008	1					
2009	7					
2010	11					7
2011	14					9
2012	20	7	5	-	2	6

Source: ACA Yearly Reports; ACA additional information and own calculations.

Cooperation with the EU[111] and other international institutions such as the OECD etc is of a particular importance for institutional capacity through training programs, conferences and workshops, as well as for legislation approximation with the *acquis* and implementation of the law. The ACA is a member of the International Competition Network since 2003, and it has concluded Memoranda of Cooperation with several Counterpart Competition Institutions at the international level. The regional Competition Authorities in the region of Western Balkans will also benefit from regional cooperation within the regional parliamentary network.

3.4.3. Competition policy effectiveness

Competition policy effectiveness depends, first of all, on the implementation of competition law and the effectiveness of the investigating procedures and decisions taken by the ACA.

Table 4 provides information on ACA decisions according to three main pillars of competition protection: prohibited agreements, abuse of dominant position, and concentrations.

Table 3.4: Albania, ACA investigation cases and decisions, 2004-2012

	Abuse of Dominant Position		Restrictive Agreements[1]		Concentrations		Decisions on fines	Recommen-dations
	Cases initiated for inve-stigation	Cases finalized by ACA decision	Cases initiated for investigation	Cases finalized with ACA decision	Cases initiated for investiga-tion[2]	Cases finalized by ACA decision		
2004-2009		3		7		38	9	22
2010	3	3	3	2	6(+5)	6	2	5
2011	3	2	2	2	10(+7)	10	1	5
2012	1	2	7	3	8(+6)	9	7	5
Total 2004-2012		10		14		59	19	37

Source: ACA Annually Reports

1 Including 'prohibited agreements' (11) and 'agreements excluded from prohibition' (3)

2 Numbers in brackets imply cases notified for concentration permission but that not meet the criteria to be considered as concentration.

Note: For 'cases initiated' the information is 'gathered' from the yearly reports of ACA, so it is not complete for the entire period, while for 'cases finalized' the statistics are produced by ACA and tabled in the 2012-2013 Report.

111 Of a particular importance is the assistance provided through CARDS, GTZ, TAIEX and IPA 2008 Projects etc.

ACA decisions on ***prohibited agreements*** and also decisions on exemption from prohibited agreements are relatively few and almost constant during the entire 2004-2011 period, adding up to 11 for the period 2004-2012 (the decision for 3 cases was 'exclusion' from prohibition).

Box 3.1: Bread market

Prohibited agreement of bread producers in Fieri (ACA Annual Report 2007) and Korça (ACA Annual Report 2010) are clear examples of the importance of the culture of competition. Bread producers in these cities had explicitly agreed to fixing high prices for bread in the respective markets. In the case of Fieri, the ACA decision along with announcing the agreement as a prohibited one, imposed low fines to them. In the case of Korça, the ACA decided to close the inquiry and to accept the commitment of the parties to restoring competition in the market.

Another very significant case on the importance of information and culture of competition is the Memorandum of Understanding between some TV operators in the Albanian media market, which stated, among other things, the terms related with a minimal price for TV advertising. The Memorandum did not enter into force, due to an open investigation process by the Department of Competitiveness, which operated at the time as the competition authority (CUTS International (2006), Albania, p. 314

The main markets under preliminary and in-depth investigating procedures and affected by ACA decisions on prohibited agreements are the *insurance market* (binding insurance product known as the Internal TPL, ending up with a decision imposing fines on all insurance companies that had fixed the prices of TPL; however the fine decision is still in the process of judicial review); *fuel* market; urban *passenger road transport* market (in the city of Tirana); *public procurement* market (the case of new vehicles procurement; and the case of personal and physical security procurement); *bread* (production and trading) market (in case of city of Vlora; in case of city of Korça); import market of *wheat and flour* production; market of importing and wholesaling of rice and sugar and the market of importing and manufacturing vegetal cooking *oil;* market of production, import and wholesaling of *cement;* etc.

Boxes 3.1, 3.2 and 3.3 described in more detail cases that reflect the importance of competition culture (market for bread, and the media market) and the market for public procurement.

Box 3.2: Public procurement

The public procurement market is considered to be an important one for two reasons: (i) its volume reaches almost 15% of the country's GDP and thus makes it an essential factor when discussing market competition; and (ii) public procurement is done with taxpayers' money (ACA, Yearly Report, p. 13). Prohibited agreements between parties are found on both cases, and fines are set in accordance with the law. The decisions were accompanied with recommendations to the Council of Ministers and the Agency for Public Procurement. These cases demonstrate the importance of effective cooperation between the Competition Authority and the responsible administrative bodies.

The ACA has also taken decisions on exemptions from prohibited agreements, such as the case of mandatory border insurance (contract) of motor vehicles - liabilities to third parties (TPL) in 2012.

Box 3.3: Mobile communication market

A case investigated by the ACA is the one of *two companies in the mobile communication market, AMC sh.a and Vodafone sh.a.* The investigation procedures started in the second half of 2005 by ACA initiative. AMC sh.a. did not provide the required information to the ACA and was penalized by a fine of ALL 160 million. The fine decision was also confirmed by the Tirana District court, but the fine was not collected by the tax police despite the formal addresses of the ACA to the Directory General of Taxation. In 2007, in-depth investigation concluded and in its decision ACA proved that AMC and Vodafone had dominant position in the respective market and that during 2004-2005 they had abused with the dominant position by imposing unfair prices. A fine of 2% of the 2005 turnover was imposed to each of the companies. The fine decision was appealed in the District Civil court of Tirana. The judicial review process for Vodafone finished only in 2012; for AMC the process is still suspended. The decision of ACA was accompanied with a recommendation to the Council of Ministers and Telecommunication Regulation Entity for liberalizing the mobile communication market through the licensing other operators in the market. ACA also suggested the approximation of the law regulating the market with the respective EC Regulation.

Source: ACA Yearly Reports of 2005; 2006; 2007; 2012

The decisions on ***abuse of dominant position,*** as shown in table 1, are still limited but have increased in number in the last three years, adding up to 10 for the period 2004-2012. Some of the markets affected by ACA decisions on abuse of dominant position are the *LPG loading-unloading* market in Porto-Romano (the "Romano Port" company was abusing with its dominant position in the market by refusing certain companies to allow loading and un-loading the liquefied petroleum gas in Porto Romano; a fine of 2.35% of 2010 turnover was imposed to the company in 2012 – ACA Yearly report 2010; 2011; 2012); *treasury bill* market (related with an uncompetitive behavior in the banking system by limiting the participation of bank clients in the treasury bill market); *mobile communication* market etc. In some other markets, investigations have not resulted in the abuse of dominant position as stated by the ACA, and in some other ones (such as pre-paid fix line telephony services; and retail mobile telephony market) investigating procedures are going on.[112] The ACA decisions in the respective cases have been accompanied with recommendations and suggestions to market regulatory entities and other administrative bodies. In the following box, the case of mobile communication is described in more detail.

As regards ***concentrations,*** the number of notifications has been increasing. No ACA decisions state the notified concentrations as prohibited; all these concentrations are *authorized* (without any conditions - remedies) including those investigated by ACA's own initiative. The ACA's decisions on concentrations are based on Law 2003, as well as the ACA Regulation on Concentration and the ACA Guideline "On the control of concentrations between undertakings" of 2012, which approximate the respective EC Regulation and Guideline). The capability of ACA for concentration investigations on its own initiative is increased after having received full access in the National Center of Registration (NCR) database. The authorized concentrations belong to various markets, particularly to banking and financial markets, telecommunication and mobile communication markets, etc.

Having in consideration the overall small Albanian economy[113], concentrations (as well as abuse of dominant position), may deserve more attention. *First,* although there is a clear positive trend,

[112] ACA Yearly Reports of 2005; 2006; 2007; 2008; 2009; 20010; 20011; 2012.

[113] ACA, National Competition Policy (2006), p. 21-22; Gruda, S., P. Melani and B. Bushati, Application of Competition Policy and law in Small and Transition Economies – Albanian Case, EuroEconomica, Issue 4 (30)/2011, p. 65-66.

more market analysis and investigations on ACA's own initiatives are needed. *Second,* except for the 'general' (relative) indicators of market concentration (share of 3, or 5 companies in the respective market overall turnover – C_3 or C_5; the Herfindahl-Hirshman Index (HHI), or the Lorenz Curve) and testing practices, indicators of *profit margins and relative profits* of the respective companies, and also indicators of consumer benefits, have to be taken into consideration as well. *Third,* in order to have effective indicators in the investigation process, informality and the use of double financial statements, as well as cases of subjective attitudes of tax bodies (inspectors) to business could also be considered. When clear signs of informality are present, in-depth investigations are necessary.

Competition policy effectiveness depends not only on the performance of the ACA (including its contribution to competition advocacy and competition culture) but also on the effectiveness of other policies such as those related to business climate and the formalization of economy, the regulatory reforms, fiscal and crediting policies, and particularly the policies on foreign trade liberalization and promotion of competitiveness, as well as policies for promotion and supporting of small business.

The last two policies are particularly important for small economies like the Albanian one, where market concentration is potentially a major problem.[114] Regarding *free trade,* the positive effects on competition are obvious. Free trade, by enabling the integration of the Albanian market into the Balkan, European and international market, 'will impede isolation of the Albanian market and its separation on account of undertakings entering the market'[115]. However, particularly in the case of small economies, the risk of concentration and abusive behaviour is present even in the foreign trade markets, particularly the import ones. As regards foreign trade, an issue that deserves attention are 'reference prices' which, as asserted by business representatives, actually damage competition in the market and are not 'the best' solution to informality. Closely and positively related with free trade in the case of small and developing economies are foreign investments, which 'enable entry and trading of new goods in the market, increased supply of the existing ones, and the spread of new technologies, by also having a major role in free trade and the opening of the market'[116]. Again, the risk of anti-competitive effects is still present: FDI may result in a dominant position or may be granted a special position through special rights given by the respective institutions, and may potentially abuse this position. The 'golden rule' to protect competition might be 'ensuring equal conditions for all undertakings operating in the country'. The favouring of FDIs (such as fiscal differentiations etc.) compared to national investors, is not positively related with the quality of investment and a competitive environment.

As regards *SMEs* (small and medium enterprises), on one hand, Law 2003 directly 'protects' them by generally excluding them from the scope of law enforcement. On the other hand, the promotion of SMEs, particularly of those oriented towards innovation and advanced technologies help in developing a more competitive business environment, and in increasing the competitiveness of the economy as a whole.

Creating a competitive market and increasing the country's competitiveness is one of the main bridges of Albania's integration in the European Union.

As regards State Aid[117], the 2005 law was amended in 2009 to further align with EU rules. A state aid inventory was compiled in January 2008.[118] The regional state aid map has been adopted by the State

114 ACA, National Competition Policy, 2006, p. 21-24.
115 ACA, National Competition Policy, 2006, p. 23.
116 The same, p. 23.
117 State Aid is a very important component of competition policy in addition to antitrust and merger policy; however in this paper the focus is on antitrust and merger policies.
118 EC (2010), Albania Analytical Report, EC Brussels, 9.11.2010, p. 63-64.

Aid Commission (SAC – the decision-making body), based on the NUTS II division of the country and in line with the *acquis*.

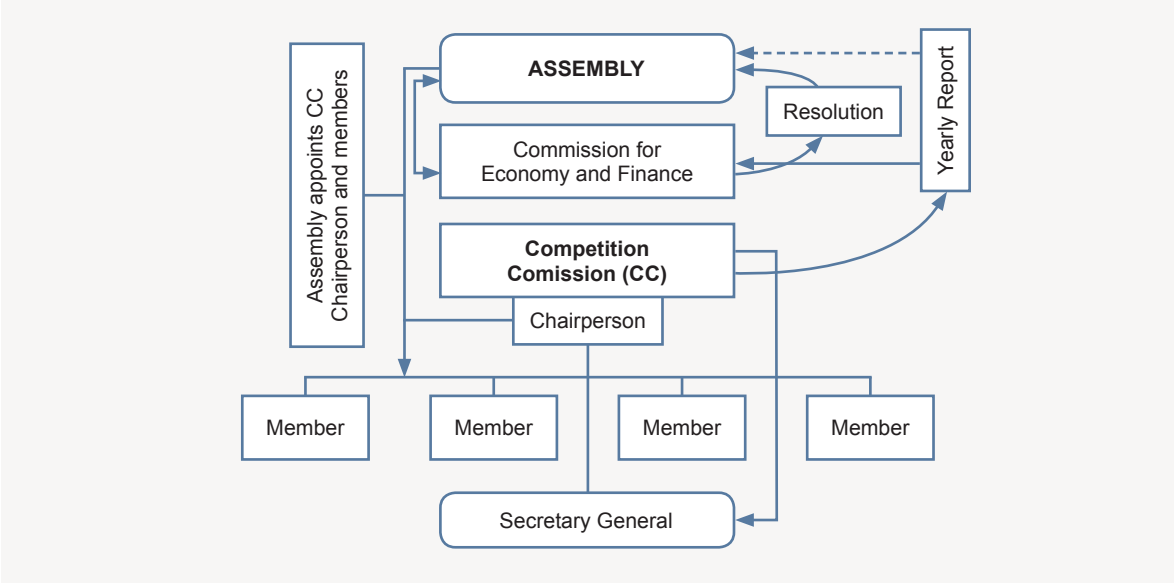
3.5. Oversight of the work of Competition Authority by the Parliament

The role of the Parliament in competition policy is stipulated in the Law 2003 and Rules of Procedures of the Parliament. According to Law 2003 (and its amendments in 2006 and 2010), the parliament has the power to (i) nominate the ACC members and Chairperson; (ii) define the organic structure and staffing (and the remuneration) of the ACA; (iii) approve the budget of the ACA; (iv) to monitor the ACA activity in implementation of Law 2003, and debate and approve of ACA Annual Report on competition policy; and (v) support institutional cooperation in competition policy implementation.

Appointment of the Commission members and the Chairperson

As stipulated in the Law 2003, Competition Commission members are appointed by the Assembly, based on the proposals coming from the President (two proposed candidates for one post); Prime minister (four proposed candidates for two posts); and Parliament (four proposed candidates – two from the majority and two from the opposition – for two posts).

Figure 3.2: Role of Parliament in ACA establishment and functioning



A hearing session is initially held by the Committee for Economy and Finance, where fulfilment of the formal requirements as stipulated by Law 2003 are verified, and the platform of each candidate is provided and discussed. The Committee for Economy and Finance then prepares a report for the plenary session of the Assembly, with a list of one candidate for each post, where the members of the CC are nominated by majority of votes. Then based on proposals coming from the parliamentary groups, one of the CC members is elected by majority of votes as CC Chairperson.

The 2010 amendments of Law 2003 made it possible to overcome the problems of vacancies in the ACC, by extending the expired term of the Commission member until the nomination by Parliament of the substitute member.

The appointment procedures of the ACA members and Chairperson and the institutions involved in the process, raise questions over the independence of the Authority. Such issue is open to discussion and one of the proposals could be the establishment of an ad-hoc commission consisting of experts of the field, to work with the Committee for Economy and Finance in screening candidates for the ACA Commission.

The organic structure and staffing of the ACA is determined by the Assembly, as stipulated by Law *No. 9584, dated 17.07 2006.* Since 2006, the organic structure of the ACA has changed three times. *The budget of the ACA* is approved by the Parliament, having firstly discussed in the Committee for Economy and Finance and then approved as a part of the state budget. As defined in Law 2003, all the expenses of the Authority are financed by the state budget and also all the money entering in the account of Authority through fees and fines, pass to the state budget account.

Monitoring process of competition law implementation by the ACA

The Parliament monitors the implementation of competition legislation by the ACA. Responsible for the monitoring process is the Committee for Economy and Finance; supported in its function by the Monitoring Department of Independent Institutions, part of the Parliament's administration.

Debating and *approval of the Authority's Annual Report* is a main part of the monitoring process of the ACCA by the Assembly. Starting from 2012, the discussion and approval of Authority's Annual Report is made in the Committee for Economy and Finance, although each of the Assembly members are provided with the ACA Yearly Report sent to the Assembly at least 2 weeks before the meeting. Each MP belonging to other Committees can take part in the meeting but with no right to vote. A debate on the ACA Report can be organized in a plenary session of the Assembly after the discussion in the Committee for Economy and Finance if such debate is required by any of the parliamentary groups. In any case, the Resolution of the Committee for Economy and Finance as regards the ACA Yearly Report discussion in the Committee meeting is approved in the plenary session. The Resolution consists of three main parts: (i) evaluation of the Authority's work and achievements; (ii) recommendations for improvements of the Authority's work in the coming year; (iii) requirement to all the central and local executive institutions to cooperate with ACA.

The *Monitoring (Oversight) Department of Independent Institutions* was established by the decision of Parliamentary Bureau in 2007 with the task of monitoring fourteen (14) independent institutions. The monitoring plan takes into account the yearly analysis, during the time the independent institution reports in the relevant Parliamentary Committee. The Monitoring Department periodically compiles information on independent institutions and along with the annual report, passes it to the relevant Committee. As regards the yearly reports of independent institutions sent to the Parliament, the Monitoring Department prepares its comments and recommendations and passes them to the relevant committee. The Department specialist responsible for the institution takes part in the meeting of the relevant committee on the independent institution's yearly reporting. Thus, the committee resolution sent to the plenary session takes into consideration the comments and recommendations from the Monitoring Department as well. However because of lack of staff[119], the Monitoring Department is currently only partly playing its function. As regards the ACA, the monitoring process from the Department during the last two years has been only partial. Completion of the Department with the necessary and trained staff, focusing of monitoring on issues of implementation of competition protection legislation, and also increasing its contribution in 'competition advocacy' by supporting

119 Such a reason was discussed in the meeting of the Project experts with the representative of the Oversight of Independent Institutions Department, Albania Assembly, 10 April 2013.

the cooperation of the ACA with the regulatory entities and central and local governmental institutions on competition protection issues (particularly as regards the ACA recommendations for other institutions' normative acts), could essentially contribute to the effectiveness of the Assembly's monitoring role in competition legislation implementation.

The enhancement of the effectiveness of the parliamentary monitoring process also *requires:* inclusion of the research department (no analysis for competition policy yet because of lack of staff and expertise), more effective training programmes of the respective staff, use of external expertise, and provision of required financial support.[120]

To summarize, the focal role in the monitoring process of the Parliament in competition legislation implementation by the ACA, belongs to the Committee for Economy and Finance which, in particular is responsible for: (i) playing a 'filtering role' in the appointment process of Competition Commission members; (ii) discussion of the ACA budget; (iii) discussion and approval of the Authority Annual Report and draft-Resolution with relevant recommendations, presented in the plenary session; (vi) following-up the implementation of recommendations to the ACA; (v) requiring from the ACA the initiation of sectoral investigations when deemed necessary; (iv) promoting ACA in its 'competition advocating' function and supporting institutional cooperation between the Authority, the central and local public institutions and regulatory agencies as regards competition policy.

Competition policy is an important objective of the SAA in the economic field. So an important role in competition legislation approximation with the *acquis* belongs to the *Committee for European Integration,* although it has no special role as regards the ACA monitoring process. In order to enhance the role of the Committee for European Integration in competition policy, in addition to 'tracking' the process of approximation of legislation and competition policy with the *acquis*, the proposal coming from the Committee[121] is that ACA should present its yearly reports to a joint meeting of both the Committee for Economy and Finance and the Committee for European Integration. In addition, a continuous involvement of the Committee for European Integration in the monitoring process is considered to be important due to the current shift in the 'focus' of legislation approximation from legislation drafting to legislation implementation.[122]

3.6. Concluding remarks and issues open to discussion

Competition protection policy has been encountered with many difficulties and challenges in its rode of progress, but achievements are present in all its dimensions, including the (i) completion of legislation basis – law on competition protection and the secondary legislation; (ii) institutional capacities and the required expertise; (iii) competition advocacy and institutional cooperation in competition protection; (iv) competition culture and promoting and supporting of a pro-competition environment; and last but not least (v) competition legislation and competition policy approximation with the EU *acquis*.

However, more achievements, more challenges ahead! As regards challenges, it is best to start from 'the end': the competition legislation and competition policy approximation with the EU *acquis*. As recently underlined in the EU progress reports, the focus of approximation of competition

120 Such issues were discussed in the meeting of the Project experts with the head of Committee for Economy and Finance, in 8 April 2013.
121 This proposal was pronounced by head of Committee, in the meeting with the Project experts, in 10 April 2013.
122 As stated in EU Progress Report 2012, and also the Report under the Project of SMEI II, 2011.

protection legislation is already turning from 'law drafting' to implementation of legislation. Law 2003 (as amended) is considered 'almost fully' approximated with the EU competition legislation, although some issues have already started being under discussion. For example: according to the EU *acquis*, companies that agree on a concentration should instantly notify the concentration act to the Authority; in the case of Albania the law foresees a term of 30 days after the agreement for such notification. Although the respective Article of Law 2003 prohibits the application of concentration agreements before a positive response by Authority, it may adversely affect companies as regards the implementation of the concentration agreement before the ACA decision. A discussion on a potential amendment of Law 2003 on this topic would be effective.

As regards *competition law enforcement,* of a particular importance are (a) the effectiveness of investigative procedures (and the required expertise), which requires further updating and improvement of the respective regulations and instructions – e.g. in case of concentrations: indicators of relative concentration should be combined with indicators of relative profit; (b) the orientation of Authority decisions first of all on 'restoring completion' (through temporary measures, and restructuring measures) in cases of competition restrictions and damages; and (c) the effectiveness of enforcement procedures, including the judicial review procedures by considering the application of the EU experience (particularly from the judicial institutions) of the adoption of *soft law* (decisions of the General Court) and relevant *case law* (decisions of the Court of Justice). Lengthy procedures of judicial review on appeals against Authority decisions – a serious harm to effective competition, reflect the need for in-depth expertise and for more precise rules on the judicial review process.

Concerning the *institutional capacity,* in addition to appropriate staffing and the need for more 'sophisticated' qualification and expertise in EU competition legislation, in investigative procedures and instruments, and in market research and analysis, an open question for discussion is the institutional independence. Although the ACA is very much devoted to competition legislation implementation, its institutional independence is to a certain extent affected by the nomination procedures of ACC members and the Chairperson by the Assembly. The current procedures (as stipulated by Law 2003) leave much room for 'subjective' approaches of the institutions proposing candidates. An increased role of the Committee for Economy and Finance and a technical 'filtering process' of candidates from an ad-hoc commission consisting of experts of the field, as well as more requirements or better specified requirements for ACC members and ACC Chairperson, may help in guaranteeing the Authority's independence. As regards *the products* of the ACA, the contribution of ACA in competition protection has increased significantly. The Yearly Reports describe the activity of the ACA in competition protection, including investigation procedures and decisions taken, and provides respective statistics. However a more inclusive and more detailed classification of statistics on the investigative and monitoring processes during the years (including the early years of the ACA functioning), the respective decisions, the assessments and recommendations of relevant normative acts etc. would be useful if it were made available by the institution, although not necessary all would get published in the Yearly Reports.

As regards *competition advocacy,* the statistics show an increasing role of the ACA. However problems are evident too. Recommendations on normative acts (draft-legislation or ones already in power) are not always taken into consideration by the respective institutions and relevant arguments are not given back to the ACA – requiring a more effective role of the Assembly (the Committee for Economy and Finance, and the Supervising Department). The role of ACA in protection of competition has been increasing in the 'regulated' sectors', however a more effective cooperation with the regulatory entities is needed and again the role of Parliament is important

as regards the compliance of regulation measures with the requirements of competition legislation. In particular, a more pro-active role of the ACA is expected as regards the privatisation process, including concessions –the special rights given to certain companies provides them with a monopoly position. Monitoring and in-depth investigation procedures are needed in such markets in order to protect and restore competition.

Regarding *competition culture,* the ACA is giving an increasing contribution via numerous media such as publications, workshops, website etc. The suggestion of the Authority to include knowledge on competition protection in the school curricula should be supported. As regards the ACA website, some suggestions would be related to pages in English, which look rather 'shrank' compared with the respective pages in Albanian. The 'English' pages serve as windows for foreign investors and potential ones, so it would be useful if translation in English of the respective materials is done as soon as possible. This is particularly important for legislation. An example is Law 2003, with amendments of 2010, which are very important ones. Also more space could be devoted to EU competition legislation, including the most recent one.

Chapter 4

COMPETITION POLICY IN BOSNIA AND HERZEGOVINA

Fikret Čaušević
Andreja Marušić

4.1. Bosnia and Herzegovina and the Road Map

After the 1992-1995 war in Bosnia and Herezgovina, the European Union (the EU) has played one of the most important roles in the post-war recovery and reconstruction programme along with the World Bank, and the USA. In the first phase of reconstruction (1996-1999) Bosnia and Herzegovina (BiH) benefited from PHARE and OBNOVA projects financed by the EU. In 1997, the EU defined and established its Regional Approach to the region and BiH.

In 1998, the EU Declaration on „Special Relations between the European Union and Bosnia and Herzegovina" led to the establishment of the EU – BiH Consultative Task Force in order to assist the prepration of contractual relations. In 1999, the SAP offered the prospect of integration into the EU, and in 2000 the EU Road Map identified the first concrete steps on this journey.

The BiH Roadmap toward the EU was prepared in cooperation between the Council of Ministers of BiH and the Euroepan Commission. The Roadmap was presented by the representatives of the European Commission in the first half of 2000, and it included reformes in following three groups of priorities:

1. Regulatory framework for changes in the structure of political system;
2. Regulatory reform in the fields of democracy, human rights, and the rule of law; and
3. Regulatory framework for the reform of economic system.

COMMISSION STAFF WORKING DOCUMENT BOSNIA AND HERZEGOVINA 2012 PROGRESS REPORT *accompanying the document* COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Enlargement Strategy and Main Challenges 2012-2013 {COM(2012) 600 final}

Some progress was made on anti-trust. The Competition Law remains to be fully aligned with the *acquis*. The Competition Council's (CC) activities focused on mergers and abuses of dominant market positions. The CC adopted 7 anti-trust decisions and 8 merger decisions. The CC imposed fines totaling about 201,500 KM on companies that infringed competition rules. No mergers were prohibited, no authorized mergers subject to remedies and no mergers authorized unconditionally. The CC's staff require further training to increase the authority's investigative capacity.

Bosnia and Herzegovina did not fulfill its commitment, under the Interim Agreement, to apply the EU's competition principles by 1 July 2011 to public undertakings and undertakings to which special and exclusive rights were granted.

Some progress was made in the area of competition. Further efforts have to be made to improve the current anti-trust legislation and to increase the administrative capacity of the Competition Council. To comply with the Interim Agreement, the country must fully implement State aid legislation and set up the institutional framework necessary for effective control of all State aid granted in Bosnia and Herzegovina. The country's commitment, under the Interim Agreement, with regard to public undertakings remains to be fulfilled. Overall, preparations in that area remain at an early stage.

Regulatory framework for the reform of economic system of BiH defined following priorities:

- closing the Payment Bureaus under the entity governments' monopoly in the control over the internal payment operations;
- establishing the BiH Treasury;
- removing inter-entity trade barriers;
- establishing the Institute of Standardization and Measurement;
- establishing the Institute of Standardization and Measurement;
- adopting the Law on Competition and Consumer Protection at the BiH level;
- establishing the Competition Council of BiH as a single regulatory body at the BiH level; and
- implementing the Law on Foreign Direct Investment.

4.2. The Competition Council of Bosnia and Herzegovina

The Competition Council (the Council) was established in May 2004 as an independent public body mandated to ensure consistent implementation of the Law on Competition passed in 2001. The Council is located in Sarajevo and it has exclusive competence to decide on the presence of prohibited competition activities in the market of Bosnia and Herzegovina (BiH).

For the first time, this Law establishes the competition policy as one of more important instruments and pillar in creation and strengthening the single market in BiH. The Law on Competition, passed in 2001, comprised the basic rules of the competition within the meaning of Article 81 and 82 of the EC Treaty, but it did not apply to practices and resolutions of the modern European legislation – *acquis* in this field. Therefore, a new Law was passed in June 2005 and it has been in effect since the end of July, 2005[123].

[123] „Official Gazette of BiH", No. 48/05.

Compatibility of new Law on Competition with stipulations and regulations of the European Union legislation in the field of the market competition[124] ensures the effective and transparent application of the law, simple procedures, reduced duration of the proceedings and in general, reduced level of the state intervention in this field.

Comparing to the Law on Competition adopted in 2001, the new Law grants the motivated penalty policy for undertakings (leniency policy), effective mechanism of market control and establishes the cooperation with international agencies in this field. This Law applies to all forms of prevention, restriction and distortion of the market competition on the whole territory of BiH or out of the territory of BiH having the substantial effect on the market of BiH. The special attention is directed towards the agreements on dominant position and abuses of dominant position, and on rules and procedures concerning the competition between undertakings.

The Law on Competition adopted in 2005 ensures precisely defined competences of the Council of Competition (hereinafter: the Council) in conducting the administration and professional duties referred to different aspects of the market competition control – more specifically on:

- methods of carrying on the proceedings,
- final decision making,
- penalty policy, and
- duration of the proceedings.

As some items and matters are defined in general by the Law on Competition, they are more closely defined by the following bylaws:

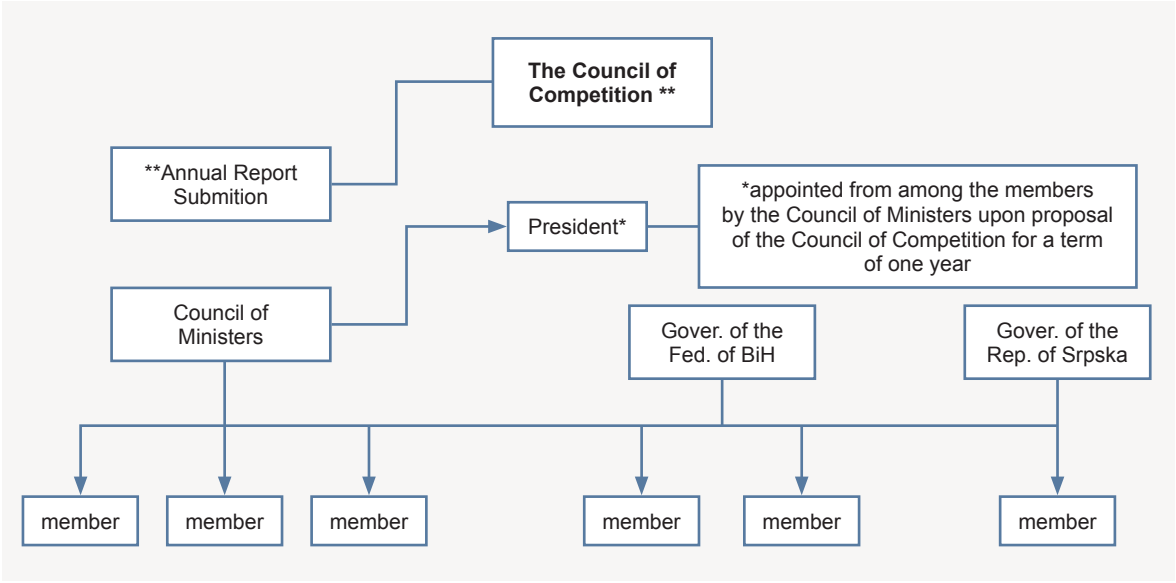
- Regulation on Agreements of Minor Importance, October 2005.
- Regulation on Block Exemption Granted to Insurance Agreements, December 2005.
- Regulation on Block Exemption Granted to Certain Categories of Technology Transfer Agreements (Licence and Know-how Agreements), December 2005.
- Regulation on Block Exemption Granted to Certain Categories of Horizontal Agreements (Between Undertakings Operating on the Same Level of Production or Distribution Chain) Relating Particularly to Research, Development and Specialization Agreements, December 2005.
- Regulation on Distribution and Servicing the Motor Vehicles, January 2006.
- Regulation on Block Exemption Granted to Agreements on Distribution and Servicing of Motor Vehicles, February 2006.
- Regulation on the Definition of a Dominant Position, February 2006.
- Regulation on the Definition of a Relevant Market, February 2006.
- Regulation on the Procedure for Granting Immunity from Fines (Leniency Policy), February 2006.
- Regulation on Notification and Criteria for Assessing a Concentration, October 2006.
- Regulation of the Amount of Administration Taxes Relating to the Practices Before the Council of Competition (Consolidated Text), January 2011.

The purpose for adoption of the above mentioned bylaws has been twofold:

- to provide clearly defined rules for the implementation of the Law on Competition, and
- better compliance of the BiH legislation in this field with the *acquis* communitaire ensuring the predictable and transparent conducting of some procedures and proceedings before the Council.

[124] Regulations adopted in 2003 and 2004. – EC Council-No. 1/2003; 139/2004; 773/2004; 802/2004.

The Council consists of six members and they are appointed for a six-year term of office with the possibility of one more reappointment. Three members of the Council are appointed by the Council of Ministers of Bosnia and Herzegovina, two members are appointed by the Government of Federation of Bosnia and Herzegovina and one member is appointed by the Government of Republic of Srpska. The Council of Ministers of Bosnia and Herzegovina appoints a president of the Council (among the members of the Council) for one-year term without the possibility of reappointment during the term of office of the Council members. Members of the Council are selected among recognized experts in the certain professional fields and their status is equal to such of administrative judges. This status is incompatible with any direct or indirect, permanent or periodical duty, with the exception of academic activities.



Expert Unit is the basic organizational unit of the Council and it performs administrative and professional activities: conducts the proceedings, prepares the decision making proposals, proposes bylaws. Pursuant to the Law on Competition, the proceedings may be initiated at the party's request or ex-officio when the Council finds that the practice concerned is likely to cause considerable obstruction, restriction or distortion of competition. When the proceeding is completed (duration of the proceedings depends on the case concerned), the Council issues a final decision on which the injured party to the proceedings may apply an appeal before the Court of Bosnia and Herzegovina. The Council ensures by means of the continual promotion program closer approach to the various aspects of market competition to business associations and other respective institutions for the purpose of the proper law enforcement and increases the knowledge and awareness.

The Rules on internal organization and systematization of the Council are adopted with the consent of the Council of Ministers of Bosnia and Herzegovina. In accordance with Article 24 of the Law on Competition, the Council may make valid decisions if the session is attended by at least five members of the Council. Decisions of the Council shall be made by majority vote of members present, provided that at least one member from among the constituent peoples must vote for each decision. A member of the Council of Competition cannot be restrained from voting.

According to Article 60 of the Law on Competition it is stipulated that fees and fines that are imposed in decisions of the Council are the Budget revenues of institutions of Bosnia and Herzegovina. The

Council submits for adoption to the Council of Ministers of Bosnia and Herzegovina a report on the performance and annual report. Adopted annual report on the performance the Council of Competition is published.

The Council has been a member of the International Competition Network since the middle of 2005. The Council had been actively engaged in negotiations on the Stabilization and Association Agreement between Bosnia and Herzegovina and the European Union that was signed on in June 2008.

4.2.1. The Budget of the Council

According to the 2011 Council's Annual Report (adopted by the Council of Ministers of Bosnia and Herzegovina) in 2011 the total number of employees in the Council was 28. In the same year the budget of the Council amounted to 1.556 million KM and its share in the Budget of Institutions of Bosnia and Herzegovina was 0.154% of the total budgetary expenditures.

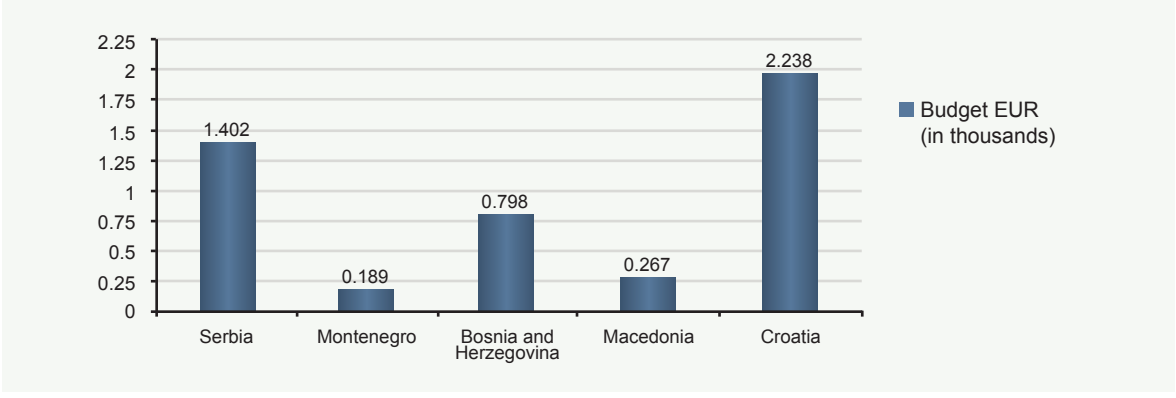
Table 4.1: The Budget of the Competition Council in 2011

	In KM
Salaries and compensations to employees	1.244,751
Leasing of equipment and renting costs	165,910
Other costs	145,883
Total	1.566,544

Source: The BiH Audit Office Annual Report 2011.

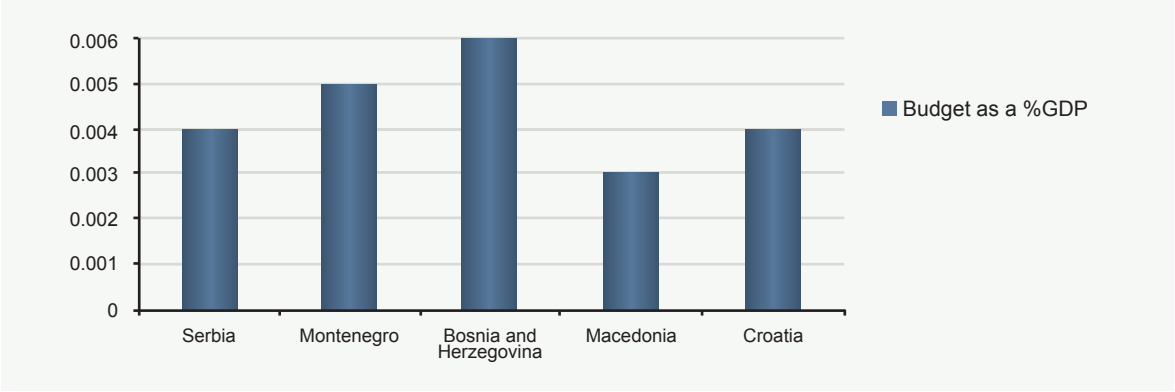
When compared with the budgets of competition authorities in other Western Balkan countries the BiH Council's budget represents 35.6% of the Croatian Competition Council budget and 56.9% of that in Serbia. On the other hand, it is 422% of the Montenegro's Competition Authority budget and almost 300% of the Macedonia's Competition Council budget.

Figure 4.1: Budgets of the competition authorities in Western Balkan countries



However, when measured as percent of GDP of respective countries in the Western Balkans the BiH Competition Council budget was the highest – it is 1.5 times higher than that in Serbia and Croatia, and 1.2 times higher than that in Montenegro.

Figure 4.2: Budgets of the competition authorities in Western Balkan countries relative to their GDP



4.3. The Competition Law of 2005

4.3.1. Restrictive Agreements and Practices

Restrictive agreements and practices are defined in the same way as in Article 101 of the TFEU. Pursuant to the article 4, paragraph 1 of the Law prohibited are agreements, contracts, certain provisions of the agreement or contract, joint actions, explicit and tacit agreements of economic entities, as well as decisions and other acts of economic entities aimed at and resulted in prevention, restriction or distortion of market competition in the relevant market, which relate to:

- direct or indirect fixing of selling and purchase prices or any other trade conditions;
- limit or control on production, markets, technical development or investment;
- share of markets or sources of supply;
- application of dissimilar conditions to equivalent transactions with other economic entities, thereby placing them at a competitive disadvantage;
- conclusion of contracts subject to acceptance by the other parties of additional obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

According to the paragraph 3 of the same article agreements are not prohibited if they contribute to improving the production or distribution of goods and/or services within Bosnia and Herzegovina or if they contribute the promotion of technical or economic progress, allowing consumers a fair share of the resulting benefit which impose only restrictions necessary to the achievement of these objectives, and which do not allow the exclusion of competition in an essential part of the subject products or services.

4.3.2. Individual Exemptions

In this case (when the agreement contributes the promotion of technical or economic progress and fulfills the above conditions) Article 5 prescribes that the Council may issue an individual exemption from the prohibited agreement. The Council may ex officio or upon request of a party, reconsider already exempted agreements if it finds that the decision was based on incomplete or incorrect data and information, or material conditions and facts on the relevant market changed. The individual exemption as a rule may

not exceed five years in accordance with Article 6. It may be extended for an additional period of five years if the agreement continues to satisfy the requirements defined by the law.

4.3.3. Block Exemptions

Block exemptions are regulated by Article 7 which prescribes that the Council shall adopt group exemptions for implementation of the exemptions prescribed in Article 4 in the case of:

- horizontal agreements, in particular the agreements on research, development and specialization;
- vertical agreements, in particular the agreements on exclusive distribution, selective distribution, exclusive purchase and franchising;
- agreements on transfer of technology, license and know how agreements;
- agreements on distribution and servicing of motor vehicles;
- agreements on insurance.

Agreements that meet the conditions referred to in Article 4 of the Law need not be submitted for assessment to the Council for granting individual exemption under Article 5 of the Law. The Council, ex officio or at the request of a party, may initiate proceeding to assess each of the agreements referred to in paragraph (3) of this Article if effects of such agreement do not meet the conditions under Article 4 paragraph (3) of this Act.

4.3.4. Agreements of Minor Importance

Article 8 of the Law regulates that the restrictive agreement provisions shall not be applied to agreements of minor importance. An agreement is agreement of minor importance when the joint market share of the parties to the agreement and economic entities under their control in the relevant market is insignificant, except in the case of severe constraints. It is presumed that an agreement is of minor importance:

- where the total market share of participants to the agreement in the relevant market does not exceed 10%, in a case when the agreement is concluded between companies that are actual or potential competitors, that is, they operate on the same level of production or trade;
- where the market share of each party in the relevant market does not exceed 15% , in a case when the economic agreement is concluded between economic entities which are not actual or potential competitors, that is, they operate at different levels of production or trade;
- where it is difficult to determine whether they are concluded between competitors or companies that are not competitors, the threshold of 10% shall be applied.

Market share relating to parallel network of agreements is defined by Article 4 of the Regulation on Agreements of Minor Importance. The article stipulates that in cases where competition on the relevant market is restricted or infringed by the cumulative effect of agreements on the sale of products or services concluded between different suppliers or distributors the insignificant market share of each of the parties to the agreement or their controlled undertakings shall be deemed a market share of up to five per cent (5%), for agreements concluded between competing undertakings and for agreements concluded between non-competing undertakings. If the relevant market is covered by parallel network of agreements which market share is less than thirty per cent (30%), it means that a cumulative effect of a parallel network of agreements does not restrict or distort market competition.

4.3.5. Dominant Position

Article 9 of the Law prescribes that a company has a dominant position when, due 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.

It is assumed that a company has a dominant position in the market when it holds more than 40% of the market share in the relevant market. It is assumed that two or more companies have a dominant position in the market, when they have a market share which exceeds 60%. Finally, it is assumed that four or five companies have a dominant position in the market have a joint market share which exceeds 80%.

Article 10 regulates the abuse of dominant position and defines it as:

- directly or indirectly imposing unfair purchase and selling prices or other trading conditions which restrict competition;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent or similar transactions with other parties, thereby placing them at unequal and unfavorable competitive position;
- conclusion of the contracts subject to acceptance by the other party of additional obligations which, by their nature or according to commercial practice, have no connection with a subject of such contract.

Besides the criteria set out in Article 10 of the Law on Competition, according to Article 9 of the Regulation on Definition of a Dominant Position adopted by the Council[125] for the purpose of determination of abuse of a dominant postition by one or more undertakings stipulates the folowing criteria that shall be taken into consideration when deciding on abuse of a dominant position:

- price discrimination (different prices) of the certain product or service in the different relative geographic markets;
- permanent supply and sale of products and services to buyers at law prices which diverting the buyers to purchase similar products or services from competing supplier;
- fixing a price of the product or service below the production costs with the view to eliminate the competitors;
- unjustifiable cancellation or reducing of the production or sale of products or services having negative consequences for consumers;
- the limitation of production and market as result of exclusively made contracts (special rebates, discounts, financial accounts);
- forcing the consumers to purchase additional product or service together with the marketed product or service;
- the undertakings ability to determine operating terms of supply and demand in the relevant market, providing to it unjustifiable increase of profit.

In adition to the above mentioned criteria, the refuse of the access of other undertakings, by providing them a reasonable financial fee charging, to facilities, equipment, relocated network or other infrastructure facilitates, possessed or used by the dominant undertaking in a case when other undertakings are not able,

[125] The Competition Council of Bosnia and Herzegovina, „Regulation on Definition of a Dominant Position“, Sarajevo, February 2006.

due to legal or other reasons, to operate in the same market (where the dominant undertaking operates) without possibility to use the same capacities/equipment and in a case when the dominant undertaking does not prove that the common use is not practicable due to operative, technical or other reasons or that such a use may not be asked from them, is also considered as the criteria for abuse of a dominant position.

Case 1 – Investigation by the Competition Council of Bosnia and Herzegovina of an abuse of dominant position in the BiH electricity market

In the electricity market the Council has investigated an abuse of dominance complaint lodged by *Elektrokontakt SA d.o.o. (Elektrokontakt)* against the incumbent electricity distributor, public undertaking *JP Elektroprivreda BiH d.d. (Elektroprivreda)* and its 100%-controlled affiliate *Eldis-tehnika d.o.o.* The two companies have entered into a business cooperation agreement, which granted to *Eldis-tehnika* the status of an exclusive supplier of the metering cabinets to *Elektroprivreda. Elektrokontakt* argued that by concluding the BCA *Elektroprivreda* and *Eldis-tehnika* have committed an abuse of dominant position on the market for the metering cabinets and deprived the final consumers of the possibility to choose the producer of these products. In its reply to the submissions of the applicant, *Eldis-tehnika* submitted that the exclusive purchase obligations under the BCA could not lead to exploitative abuse of dominance because under the sector specific regulations the electricity distributor had to provide the meters and metering cabinets to the final consumers free of charge while the latter could only choose the distributor, who retained the ownership over the meters, metering cabinets and other network infrastructure. Therefore, according to *Eldis-tehnika,* there was no limitation of choice for the final consumers. Given the fact that the electricity distributor and not the final consumers were the final purchasers of the metering cabinets, the Council found no abuse of dominance in the application of the BCA, as alleged by *Elektrokontakt.*

Source: Alexandar Svetlicinii, „Abuse of Dominance in South Eastern Europe: Enforcement Practices of the National Competition Authorities in Bosnia and Herzegovina, Croatia, Macedonia and Serbia“, Mediterranean Competition Bulletin, May 2012, p.9.

4.3.6. Merger Thresholds

Article 13 prescribes that concentrations which have as a result a significant distortion of the efficient market competition, in the entire market of BiH or its significant part, especially those which create new or strengthen an existing dominant position, are prohibited.

The thresholds for notification of the concentration are defined by Article 14 of the Law on Competition, which prescribes that notification is mandatory if:

- total annual income of all participants to the concentration achieved by selling goods and/or services in the world market is 100,000,000 KM[126] according to the final account in the year preceding the concentration; and
- total annual income of each of at least two companies - participants to the concentration realized by selling goods and/or services on the market of BiH is at least 8,000,000 KM according to the

[126] A single currency of Bosnia and Herzegovina (the convertible mark – the KM) was introduced into the payment transactions in June 1998. Since the introduction of the euro (in January 1999) the KM has beeen pegged to the euro. Since then the official exchange rate of the euro in BiH has been: 1 EUR = 1.95583 KM.

final account in the year preceding the concentration, or if their joint share in the relevant market exceeds 40%.

According to Article 16, the companies – participants in the concentration are mandated to submit a notification to the Council within 15 days of signing the agreement, the publication of public offering or acquisition of control, depending on which happens first.

4.3.7. Fees and Penalties

Concentration fees are two-fold: one fee is charged for filing, and a second fee is charged for issuance of the clearance. The filing fee amounts to 200 KM and the clearance fee amounts to 2,000 KM. In accordance with Article 48, the Council may impose a fine for serious violations of competition can be issued up to 10% of the total annual income of company, for the year preceding the year in which the violation of competition happened. A fine in the amount between 15,000 to 50,000 KM can be imposed on the responsible person in the company.

For procedural infringements, the Council can impose a fine to the company of up to 1% of the total income in the previous year of business. A fine in the amount between 5,000 to 15,000 KM can be imposed on the responsible person in the company. In accordance with Article 50 the Council may impose periodic penalties not exceeding 5% of the average daily income in the previous year.

Fines may be imposed to persons that are not a party to the proceedings in accordance with Article 51, for legal entities in the amount of 5,000 KM to 15,000 KM and for the responsible person in legal entities in the amount of 1,500 KM to 3,000 KM, and for natural persons in the amount of 1,500 KM to 3,000 KM.

4.3.8. Statute of Limitation

Article 55 provides that the statute of limitation for imposing fines is five years for serious violations and three years for procedural violations, counted as of the day the violation was made. In accordance with Article 56 the statute of limitations for the enforcement of fines is five years, starting from the day the decision becomes final.

4.3.9. Leniency

In accordance with Article 54, the Council may reduce or revoke a fine imposed on a company for violation of competition, if such company has voluntarily provided important evidence for determining the violation and if at the time of submission of the evidence it has stopped with the prohibited activity. The Council may apply a reduction or exemption from fines:

- when the evidence is submitted at the time when the Council of Competition does not have the necessary information to initiate proceedings ex officio;
- when the company effectively cooperates with the Council of Competition throughout the process; and
- if, at the time of giving evidences, a company breaks off its participation in the agreement, arrangement or joint practice and does not oblige the other economic entities to participate in the agreement.

According to Article 15 of the Regulation on the Procedure for Granting the Immunity from Fines (the Regulation) issued by the Council[127], the Council shall determine: (a) whether the evidence provided by an undertaking, at the time of submission, significantly contributes to the establishment of infringement of the Law on Competition; and (b) the level of reduction of a fine for an undertaking, in proportion to the fine which may be otherwise imposed at the end of the proceedings, as follows: (i) a reduction of a fine of 30-50% will be granted to the first undertaking which meets the conditions defined in Article 13. of the Regulation; (ii) a reduction of a fine of 20-30% will be granted to the second undertaking which meets the conditions defined by Article 13. of this Regulation; (iii) a reduction of a fine up to 20% will be granted to any other subsequent undertaking which meets the conditions defined by Article 13 of the Regulation.

4.3.10. Judicial Oversight

The decisions of the Council are final. Article 46 of the Law on Competition prescribes that the unsatisfied party may initiate administrative proceedings before the Court of Bosnia and Herzegovina within 30 days from receipt of the decision, or from the date of publication of the decision.

4.4. The Council's Activities

In the last four years, the Council made 214 final decisions of which 23 were decisions on forbidden agreements (10.7%), 23 decisions were on abuse of dominant position (10.7%), 87 were decisions on concentrations (40.7%), and 81 were experts opinions (37.9%).

In 2009, the Council made 69 final decisions while 7 remained under procedure. In the same year, the Council reached 90% ratio of finished to unfinished cases, which was the highest ratio in the last five years.

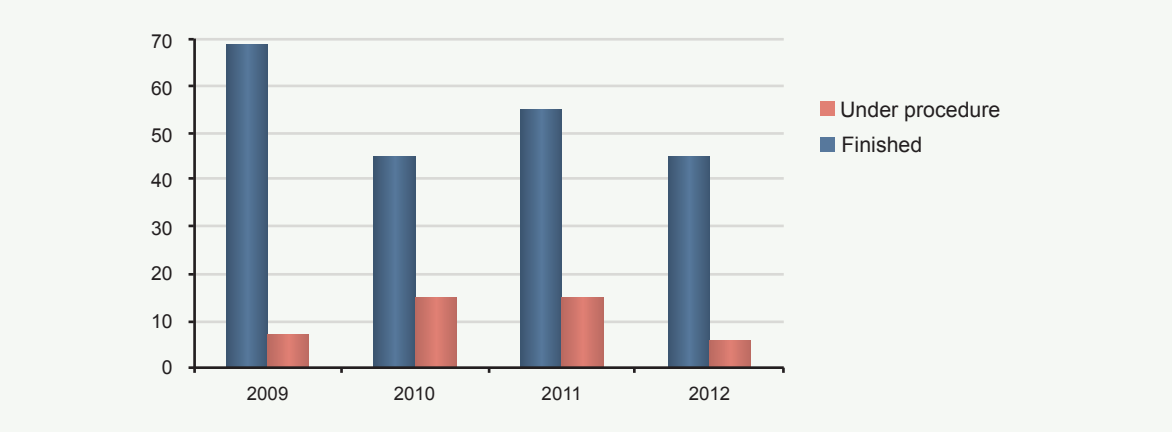
Table 4.2: The Competition Council's classification of cases in 2009

Classification	Status of cases			
	Finished	Under procedure	Total	Percent of finished
1. Forbidden agreements	4	2	6	66
2. Abuse of dominant position	6	2	8	75
3. Concentrations	41	1	42	97
4. Experts opinions	18	2	20	90
Total	69	7	76	90

Source: The Competition Council Annual Report 2009.

127 The Competition Council of Bosnia and Herzegovina „The Regulation on the Procudure for Granting the Immunity from Fines“, Sarajevo, January 2006.

Figure 4.3: Number of finished cases and cases under procedure of the Council of Competition of Bosnia and Herzegovina



Sources: The Competition Council of Bosnia and Herzegovina; The Council of Ministers of Bosnia and Herzegovina.

In 2010, the number of finished cases dropped by almost 35% in comparison with the previous year. The most important difference in the number of decisions made in the two years was the difference in the decisions made on concentrations. While the Council made 41 decisions on concentrations in 2009, it made only 14 final decisions of the same type in 2010.

Table 4.3: The Competition Council's classification of 2010 cases

Classification	Status of cases			
	Finished	Under procedure	Total	Percent of finished
1. Forbidden agreements	6	5	11	54
2. Abuse of dominant position	8	2	10	80
3. Concentrations	14	4	18	78
4. Experts opinions	17	4	21	81
Total	45	15	60	75

Source: The Competition Council Annual Report 2010.

The ratio of finished to unfinished decisions made dropped to 78% in 2011, but it increased to 87% in 2012. In the last two years, the largest share in the total number of the Council's decisions was the share of experts opinions (56%). Out of the total of 90 final decisions made by the Council in the 2011-2012, 51 were experts opinions, 32 decisions on concentrations, 13 decisions on forbidden agreements, and 9 decisions on abuse of dominant position.

The total amount of fees and fines charged by the Council over the last four years was 4.726 million of KM. Out of the total amount charged in the period, 52.8% was charged in 2012, 25.2% was charged in 2010, while the smallest amount was charged in 2011 (the share of only 5.9%).

Figure 4.4: Comparison of the levels of total fees and fines charged by the BiH Council of Competition in 2009-2012

Sources: The Competition Council of Bosnia and Herzegovina; The Council of Ministers of Bosnia and Herzegovina.

The total amount of administrative fees charged by the Council over the last four years was 399,344 KM of which 43.1% was in 2009. The smallest amount of administrative taxes was charged in 2010 and 2012 – the shares in the respective years were 16.7% and 18.1%. The total amount of fines charged in the same period was 4.327 million KM, of which 55.6% was charged in 2012.

Table 4.4: Administrative fees and fines charged by the BiH Competition Council - in KM

	2009	2010	2011	2012
Administrative fees	172,000	66,750	88,500	72,094
Fines	590,000	1.126,510	189,500	2.421,355
Total	762,000	1.193,260	278,000	2.493,449

Source: The Competition Council of Bosnia and Herzegovina: Annual Reports for the respective years.

4.5. Control functions of the Parliamentary Assembly of Bosnia and Herzegovina The Joint Commission for Economic Reform and Development of the Parliamentary Assembly of Bosnia and Herzegovina

The legal basis for the work of the Joint Commission of Economic Reforms and Development (JCERD) of the Parliamentary Assembly of Bosnia and Herzegovina (the PABH) is a permanent working body of the PABH. Its jurisdiction is governed by the provisions of Article 56 of the Rules of the House of Representatives[128] and Article 50 of the Rules of the House of Peoples.[129] The general provisions of the commissions of both Parliamentary houses and the general provisions of the Joint Committees of both houses the rules of procedure are regulated with respect to: establishment of the joint committees, the number and structure of the members of respective committees, duties, organization of work, convening meetings, decision-making committees, cooperation with other committees and bodies; methods , the establishment of sub-committee or working group. The Joint Committee on Economic Reforms and Development of the PABH (hereinafter: JCERD) is a joint committee of both houses of the BiH Parliamentary Assembly.

The JCERD is one of the six joint committees of both houses of the Parliamentary Assembly – the House of Representatives and the House of Peoples. It consists of 12 members, six members from each house. The two-thirds of its members are elected from the Federation of BiH, and one-third from the Republic of Srpska.[130] The decisions of JCERD are valid if they vote for by seven members, having at least one third of the representatives of each constituent peoples, and at least one vote from both chambers. Thus, JCERD is to decide by simple majority of those attending the meetings, provided that such majority includes at least one third of the members of each House, and one representative of each constituent people.[131]

In accordance with the rules of both houses of the PABH the scope of work of JCERD is specified. The JCERD discusses issues related to following matters:

a) economic reforms that are under the jurisdiction of the institutions of Bosnia and Herzegovina;
b) reform proposals or initiatives to amend the laws to the Commission the representatives of civil society, and industry associations, union employers, unions, regional development agencies, civic associations and other non-governmental stakeholders;
c) monetary policy;
d) foreign debt policy;
e) relations with international financial institutions;
f) the policy and reconstruction development programs;
g) economic policy measures;
h) fiscal and credit policy of Bosnia and Herzegovina;
i) banking policy;
j) statistics, measurements and standards.[132]

The Commission also considers other issues in the field of economic reforms, reconstruction and development programs. In addition, the decision of the joint colleges of JCERD are responsible for

128 "The Official Gazette of Bosnia and Herzegovina", No. 33/06, 41/06, 81/06, 91/07, 91/06, 87/09 and 28/12.
129 "The Official Gazette of Bosnia and Herzegovina", No. 33/06, 41/06, 91/06, 91/07 and 32/12.
130 Article 42 of the Rules of the House of Peoples, and Article 48 of the Rules of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina.
131 Article 43 of the Rules of the House of Peoples, and Article 49 of the Rules of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina.
132 Article 50 of the Rules of the House of Peoples, Article 56 of the Rules of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina.

the control function of the work of a number of agencies, authorities and offices: the Directorate for Economic Planning, the Institute for Standardization, Institute for Intellectual Property, the Institute for Accreditation of BiH, the BiH Food Safety Agency, the BiH Insurance Agency, the Labour and Employment Agency of BiH, the BiH Statistics Agency, the Agency for Foreign Investment Promotion, the BiH Directorate of Plant Protection, the State Veterinary Office, the investment guaranty agency – IGA. The JCERD is responsible for the control over the Competition Council of BiH. In accordance with the Rules of internal organization adopted in January 2013, the State Aid Council will be under the direct control of the Council of Ministers of BiH and the Minister of Foreign Trade and Economic Relations.

In accordance with the rules of both houses of the PABH the scope of work of JCERD is specified. The JCERD discusses issues related to following matters:

a) economic reforms that are under the jurisdiction of the institutions of Bosnia and Herzegovina;
b) reform proposals or initiatives to amend the laws to the Commission the representatives of civil society, and industry associations, union employers, unions, regional development agencies, civic associations and other non-governmental stakeholders;
c) monetary policy;
d) foreign debt policy;
e) relations with international financial institutions;
f) the policy and reconstruction development programs;
g) economic policy measures;
h) fiscal and credit policy of Bosnia and Herzegovina;
i) banking policy;
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Parliamentary oversight of the Competition Council

The Competition Council submits its Annual Report for approval to the Council of Ministers of Bosnia and Herzegovina. The Council of Competition is obliged to publish its Annual Report once it is approved the Council of Ministers. The report contains an overview of the most important activities undertaken by the CC, followed by a review of international treaties, the activities related to the harmonization of market legislation with the relevant EU legislation, and an overview of planned and fulfilled program objectives in the given period. The report concludes with an overview of the budget - the amount of money at disposal with the Council and the amount of administrative fees and fines collected pursuant to a decision

[133] Article 50 of the Rules of the House of Peoples, Article 56 of the Rules of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina.

of the Council, which represented the budget revenue. Annual Report of the Competition Council adopted by the Council of Ministers becomes an integral part of the Council of Ministers' Annual Report. In other words, the Council's Report is included in the Annual Report on the work of the Council of Ministers. The Annual Report on the work of the Council of Ministers is subject to discussions at the plenary stage of both houses: the House of Representatives, and House of Peoples of the PABH.

Before the plenary stage, individual reports of each agency and office are sent to the respective commission – the commission in charge of their supervision. Thus, the Report of the Council, as part of an integral Annual Report of the Council of Ministers, is sent for consideration to JCERD. At the JCERD regular session, the representatives of the Competition Council are obliged to submit the Council's Report and they are obliged to answer any question raised from the MPs. Presentation and discussion about the Council's Annual Report is followed by its adoption or rejection by JCERD. In case when JCERD adopts the Report, the Report is submitted to the representatives in both houses of the PABH. In case of rejecting the report by JCERD the procedure is not clearly defined. So, there are no procedural or legal steps that should be undertaken in that case, and there are no repercussions or sanctions clearly defined against the institutions and ministries whose report is not adopted. As a result, the current practice has shown that the reports are discussed and adopted on a predominantly formal basis. The JCERD may adopt conclusions, comments, and recommendations to the institutions, but they become valid only if both houses adopt the original text. Conclusions of the respective Parliamentary houses should theoretically be binding on the institutions, but due to set a legal vacuum and ambiguities in laws and regulations, in practice they are not.

Limits and obstacles in the work of the Competition Council

Since the beginning of its functioning the Council has been limited in its work because of the inconclusive legal framework. In fact, the Law on State Aid was adopted by the PABH only in February 2012. Thus, selective state intervention and preference of certain, mostly state and "eligible" companies, the allocation of budget funds without clearly defined and transparent criteria has led to violating of the Law on Competition in some cases by the state and entities.

Case 2 – The Council's investigation into the potentially abusive practices by telecom operators in Bosnia and Herzegovina

In February 2010 the Council opened an investigation into the potentially abusive practices by *BH Telecom* and *Telekom RS*. The investigation was prompted by the complaint submitted by the independent telecom operator *Akt.online,* who claimed that *BH Telecom* and *Telekom RS* have abused their dominant positions by obstructing access to their fixed line networks and applying discriminatory access conditions to the domestic providers. *Akt.online* argued that *BH Telecom* has effectively delayed the implementation of the interconnection and conditioned it with unrelated commercial arrangements. Similarly, the conclusion of the interconnection agreement with *Telekom RS* was delayed because the latter invoked lack of capacities and non-fulfillment of technical conditions, which eventually led *Akt.online* to agree on 50% reduction of the initially requested capacities. Based on the behavior of the public telecom operators *Akt. online* argued before the Council that *BH Telecom* and *Telekom RS* have abused their dominant position based on the ownership of the essential facility (fixed land line networks) thus preventing liberalization of telecommunications market in BiH and preserving their monopolistic positions. The complainant also alleged the existence of margin squeeze practices which put independent providers at a competitive disadvantage. On the basis of the available evidence the Council decided to open an investigation and following the analysis of the information supplied by the parties it was expected to issue a decision on the merits. The Law on Competition mandates the Council to issue its final decision within 4 months after the commencement of the investigation. The law also allows the Council to prolong this period for the further 3 months where it is necessary for the collection of additional evidence or where the investigation concerns important industries or markets, as was the case with the telecommunications. The Council ordered the extension of the investigation in *BH Telecom* case. Upon the expiration of the additional 3 month period the Council has not issued the decision on the merits and upon request of *BH Telecom* the competition authority confirmed that in the absence of the decision on the merits it should be concluded that *BH Telecom* has not abused its dominant position. Thus, instead of issuing a decision on the merits the Council has made use of the default provision intended to provide legal certainty to the undertakings subject to investigations. An opportunity to deliver a decision on a margin squeeze case which could be the first precedent in this area was missed.

Source: Alexandar Svetlicinii, "Abuse of Dominance in South Eastern Europe: Enforcement Practices of the National Competition Authorities in Bosnia and Herzegovina, Croatia, Macedonia and Serbia", Mediterranean Competition Bulletin, May 2012, pp.7-8.

The composition of the Council and decision-making are also debatable. The Council has been under significant influence of political parties and the three major ethnic groups in BiH. When it come to the content of reports of the Council – specifically indicating the number of cases being decided and the nature of violations of competition rules, essentially, there is no real detail and insight into the nature of the breach of competition. The reports themselves do not provide a clear insight into the scope of work of the Council or the more concrete problems that the Council meets. There is no proactive approach to the PABH and to the Council of Ministers.

Chapter 5
COMPETITION POLICY IN MACEDONIA

Slavica Penev
Andreja Marušić

5.1. The legal framework of competition in former SFR Yugoslavia

A certain degree of competition in some sectors of the economy was present in the period when Macedonia was part of former Yugoslavia. Even though the regime was socialist, there were some segments of competition policy reflected in some laws, including the federal ***Law on price control system.*** This law provided the state and local institutions with authority to monitor the price movements and undertake measures to prevent or remove the distortions. This Law strictly prohibited monopolistic agreements, but it did not mention setting the criteria for the formation of prices of public utilities. It also contained a regime for price formation in some other fundamental areas of the economy, such as the production and distribution of oil and oil derivatives, natural gas, coal etc. According to these provisions, enterprises from these sectors were obligated to submit their criteria for price formation to the federal authorities. However, this process was primarily aimed at state regulation of the economy rather than anti-monopolistic legislation.[134]

5.1.1. The legal framework of competition in Macedonia in the period of early transition (1992-2002)

The first provisions against monopolistic behavior in Macedonia were introduced by the Constitution[135] (November 1991), and were followed by the adoption of the Trade Law of 1995[136] and the Market Inspections Law[137] from 1997. The article 55 of the Constitution guarantees the freedom of the market and entrepreneurship, and equal legal position to all parties in the market. According to the Constitution the Republic has an obligation to take measures against monopolistic positions and monopolistic conduct on the market.

The first legal framework for the regulation of monopolies and competition policy was created by the adoption of the ***Law against Limiting Competition (1999)***[138], and it prescribed the following activities:

- Monopolistic agreements (horizontal and vertical)
- Abuse of dominant position
- Business concentrations

134 Penev, S, 2006, Serbia and Montenegro, in Competition Regimes in the World - A Civil Society Report, (2006) Edited by Pradeep S Metha:482
135 Constitution of the Republic of Macedonia, Official Gazette of RM No. 52/91.
136 Trade law , Official Gazette of RM 23/95, 30/95, 43/95, 23/99 and 43/99
137 Law for Market Inspection, Official Journal of RM 35/97 and 23/99.
138 Law against Limiting Competition, Official Journal of RM 80/99, 29/2002 and 37/2004.

The main weaknesses of this law were related to the (i) insufficiently clear legal framework, (ii) incomplete harmonization with other relevant laws in the country, and (iii) unclear procedural rules. These weaknesses resulted with inefficient implementation and as a consequence insufficient protection of competition in Macedonia.

The Law Against Limiting Competition was amended in April 2002, in order to make an initial step towards harmonization of domestic legislation with the EU *acquis*.

5.1.2. The presence of the Competition authority in Macedonia in the period of early transition

A Monopoly Authority, charged with the implementation of The Law against Restraints of Competition, was established in 2000, as a body within the Ministry of Economy.

The Authority's mandate included:
- concentrations
- abuses of dominant position
- evaluating practices and agreements which may cause restriction of competition

Monopoly Authority had to publish, every two years, a report on its work in the previous two calendar years and a report on the conditions and trends in the area of its competence. The year in which the Monopoly Authority published the biannual report should not coincide with the year in which the Commission on Monopolies published its report.

5.2. Development of competition policy in Macedonia during the "mature" stages of transition

5.2.1. The Competition Law of 2005

The Macedonian Law on the **Protection of Competition**[139] was adopted in 2005. It defined all three main areas of potential market competition distortion: (i) restrictive agreements (cartels), (ii) abuse of dominant position, and (iii) concentration causing distortion of competition. Under the Stabilization and Association Agreement (the SAA) with the European Union, Macedonia formalized its commitment to harmonizing its legislative framework with that of the EU (Table 5.1).

In addition to harmonization with the EU competition legal framework, several additional reasons for enacting the new law were:
- ***harmonization with the positive acts of the Republic of Macedonia,*** especially with the amendments in the area of trade law, as well with the conditions on the market;
- ***the need for a new institutional set-up of the body for the protection of competition*** on the basis of the principles of autonomy, collaboration and independence in the decision-making process, as well as appointment and accountability before the legislative powers;
- ***regulation of the procedure*** to be adopted by the body for protection of competition in accordance with the procedural rules of the EU; and
- ***Strengthening of the coercive measures,*** respecting the provisions of the law and enforcement of the decisions made by the bodies.[140]

139 Law on the Protection of Competition, Official Gazette of Macedonia, no. 04/05, 70/06 and 22/07.
140 Efremova, V, Macedonia, in Competition Regimes in the World – A Civil Society Report, (2006) Edited by Pradeep S Metha, pg. 441.

5.2.2. Commission for the Protection of Competition (Competition authority) according to the Law of 2005

By virtue of this Law the previously existing Monopoly Authority was transformed into the Commission for Protection of Competition (Commission). The 2005 Law prescribed that the Commission is an independent administrative body responsible for the implementation of the Competition Law. According to this Law the Commission is responsible to the Macedonian Parliament and each year it has an obligation to submit an annual report to the Parliament until 31 March (Table 5.2).

The Head and the four members of the Commission were appointed by the Parliament in 2005, at the proposal of the relevant parliamentary committee. They were appointed for a 5-year term, with the possibility of repeated appointment (Table 5.2).

5.2.3. The weaknesses of the Competition Law of 2005

Misdemeanor Proceedings. The provisions of the Competition Law of 2005 needed the enhancement and improvement of the management of proceedings before the Commission. The Law prescribed a separate administrative procedure for determining competition infringements, with a subsequent misdemeanor procedure if such an infringement was determined. The parties had the right to pursue certain legal avenues if they were not satisfied with the decision handed down in the administrative procedure. This led to an inability to initiate a misdemeanor procedure until the final completion of the administrative proceedings. In practice, this proved to be time consuming and inefficient, if we take into consideration that an unsatisfied party could initiate an administrative dispute before the ***Administrative Court*** on the basis of the resolution of the administrative procedure, and furthermore, could then appeal to the Supreme Court if it was unsatisfied with the decision of the Administrative Court. Additionally, when the misdemeanor procedure was finally initiated, the party once again had the right to address the higher court instance seeking legal remedies. In other words, the timeframe from the moment an infringement of competition regulations was determined to the moment of the actual execution of the sanction for the same was simply far too great[141] (Table 5.2).

An additional weakness of this law was the lack of provisions regulating the leniency policy.

This Law has undergone several amendments, including in 2006 and 2007. These amendments extended the statute of limitations to 5 years for substantive infringements and 3 years for procedural infringements of competition. In addition, the Competition Authority was granted the competence to directly impose fines for infringements of competition, thereby eliminating the involvement of the court in the procedure of imposition of fines, which delayed the enforcement of sanctions.

The Competition Law amendments of 2006 introduced two principal changes. Firstly, the thresholds of merger notification were modified, and within this modification the value of the worldwide turnover threshold was increased from 5 to 10 million EUR. Secondly, a joint market threshold of 60% was introduced, in addition to the single 40% market share threshold. The objective of these amendments was to reduce the level of involvement of the Competition Authority in merger controls. Amendments were also aimed at strengthening the capacity of the Authority by introducing the requirement that an additional commissioner has to be fully employed by the Authority.

[141] Focus on Competition, Karanović – Nikolić, 2011, pg.23

The amendments of 2007 also introduced two relevant chances. Firstly, the procedure to impose fines was modified, and the Competition Authority was granted the authority to directly impose fines. Prior to these changes of the law, the Competition Authority had to initiate an administrative procedure before the court, rendering sanctioning of anticompetitive practices inefficient and slow. Secondly, the appeal procedure was changed, mandating now that appeals against the decisions of the Competition Authority should be placed before the Administrative Court. This reform, adopted in the framework of a broader reform of the Macedonian administrative law, was positive. The Administrative Court has conducted an active review of the Commission's decisions during the last years, which has triggered improved quality of its decisions.[142]

Using its new powers by the end of 2008 the Competition Authority imposed a total of € 8,093,606 on five undertakings abusing their dominant positions with the highest individual penalty of €4,100,000 imposed on telecom operator *T-Mobile Macedonia.* Finally, in November 2010 the new Competition Act has entered into force replacing the 2005 Act. The 2010 Act introduced a number of substantive and procedural changes that have been aimed at harmonizing Macedonian competition law with the EU standards and increasing the efficiency of antitrust enforcement carried out by the Competition Authority.[143]

142 See more: Rozeta Karova and Marco Botta, Macedonia: Five Years of Competition Enforcement: Assesment, Mediterranean Competition Bulletin, November, 2010.

143 A. Svetlicini: Abuse of Dominance in South Eastern Europe: Enforcement Practices of the National Competition Authorities in Bosnia & Herzegovina, Croatia, Macedonia and Serbia, editerranean Competition Bulletin MCB, No. 8, May 2012.pg. 16-17.

Figure 5.1: Chronology of the competition authorities in Macedonia

1999	2000	2005	2005	2010	2010
LEGAL FRAMEWORK	**INSTITUTIONAL FRAMEWORK**	**LEGAL FRAMEWORK**	**INSTITUTIONAL FRAMEWORK**	**LEGAL FRAMEWORK**	**INSTITUTIONAL FRAMEWORK**
Law against Limiting Competition ***Encompasses/defines:*** – Monopolistic agreements (horizontal and vertical) – Abuse of dominant position – Business concentrations ***Weaknesses:*** – Insufficiently clear legal framework, – Incomplete harmonisation with other relevant laws in the country, – Unclear procedural rules.	**Monopoly Authority** Established as a body within the Ministry of Economy ***Functions:*** Enforcing the law against the abuse of dominant position ***Weaknesses:*** – Lack of independence – Lack of transparency (no obligation to make the information available to the public)	**Law on Protection of Competition** ***Encompases/defines:*** – Restrictive agreements – Abuse of dominant position – Concentrations ***Improvements compared to the Law of 1999:*** – Prescribes rigorous fines for violating provisions of the law – Advanced level of the EU harmonization ***Weaknesses:*** – Inefficient procedural rules lack of leniency provisions – Too low threshold for concentration AMENDMENTS FROM 2006 AND 2007 **Improvements:** – Threshold for merger notification was increased from 5 to 10 million Euro – Joint market share threshold of 60% was introduced – An additional commissioner has to be fully employed in Authority – Competition Authority was granted the authority to directly issue fines – Appeals are now placed to Administrtive Court	**Commission for Protection of Competition** Established as a formally independent institution ***Functions:*** Enforcing the Law on protection of competition (2005) ***Transparency of work:*** – Reports to the parliament – Annual reports available to the public (via internet) – Parliament appoints members of the Commission ***Weaknesses:*** – Insufficient level of independence, with too narrow and insufficient authorization – Commission's lack of power to impose sanctions on undertakings that violated competition law – Financial plan needs government's approval	**New Law on Protection of Competition** ***Encompasses/defines:*** – Restrictive agreements – Abuse of dominant position – Concentrations – Improvements compared to the Law of 2005: – Further progress in the EU harmonization – Introduced detailed leniency provisions	**Commission for Protection of Competition – enhanced competences** ***Functions:*** Enforcing the Law on protection of competition (2010) ***Enhanced competences*** *compared to the Law of 2005:* – The Commission is given the power to issue fines both for misdemeanor procedures as well as substantial infringements of competition – New procedural rules introduced, which enable Commission to operate more efficiently ***Weaknesses:*** Financial plan send to the government for the approval

5.3. Current Law on the Protection of Competition (2010)

The current framework Law with respect to competition issues in Macedonia is the Law on the Protection of Competition (hereinafter: LPC), enacted in 2010 (Official Gazette of the Republic of Macedonia 145/10). The new LPC regulates prohibited forms of prevention, restriction or distortion of competition, as well as measures and procedures regarding the restrictions of competition (Figure 5.1).

The new Competition Law aims to further harmonize the legal framework in this area with the EU *acquis*, as well as to further improve the efficiency of the legislation. The new Competition Law tried to resolve the inefficiencies identified in the implementation of the previous legislation, and strengthen the role and authorities of the Commission for the Protection of Competition (Figure 5.1).

This approach was reflected in two areas:

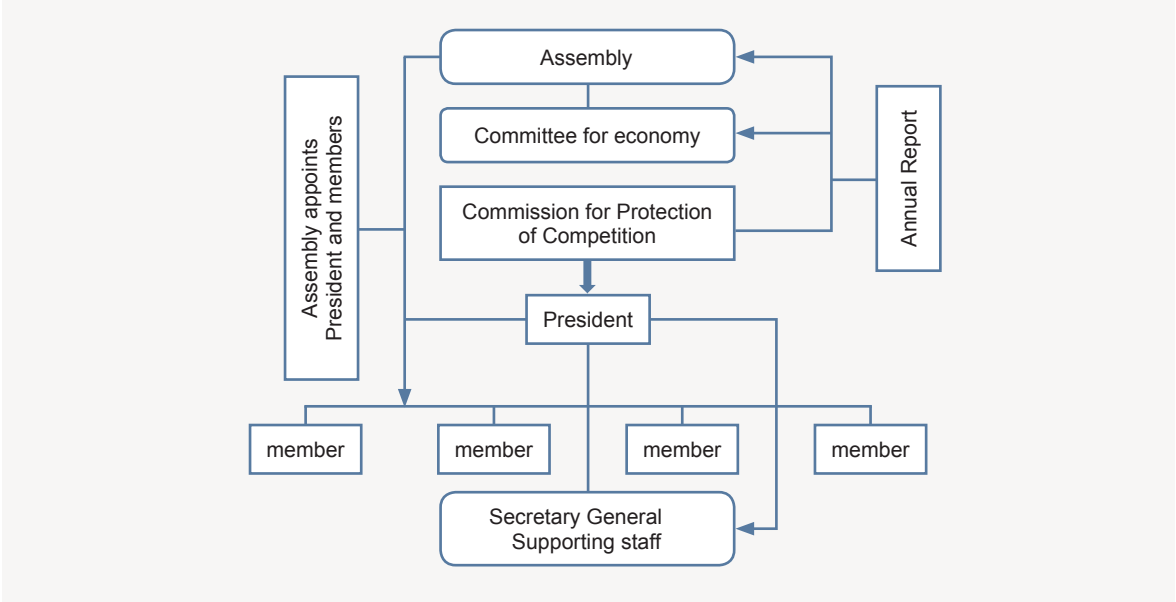
(i) more detailed regulation of misdemeanour proceedings before the Commission aiming to rendered them quicker and more efficient, and
(ii) Introduction of leniency provisions.

5.3.1. Competition Authority/Competition Commission

The Commission for Protection of Competition (the Commission) was empowered (Article 6 of the Law) to supervise the implementation of the Law on Protection of Competition.

The Commission is an independent state authority, established in 2005 by the previous Competition Law, consists of a President, four members, and a team of supporting staff. The Commission is financed from the budget and it is accountable for its work to the Assembly of the Republic of Macedonia. It submits an annual report for its activities to the Assembly until March 31st for the previous calendar year (Article 26) (Figure 5.1).

Figure 5.2: Relations between the Commission for protection of competition and the legislator



The President and members of the Commission are appointed and revoked by the Assembly, upon proposal of the Commission (Article 27). They are appointed for a term of five years with the right to reappointment. The President and two members of the Commission for Protection of Competition are professionally engaged in the Commission's work. The Law defines the conditions for being President or member of the Commission – which are that they must be citizens of Macedonia, with completed university education – Faculty of Law or Economics, and working experience of over five years, as well as special knowledge in the field of competition, trade law, management and finances. Either the President or one of the members who are professionally engaged in the Commission's work must be a Bachelor of Law with bar examination and at least five years working experience in legal matters. While they perform this function, the President and members may not be members of parliament, members of the government, hold positions in bodies of political parties, be members of management boards of a company or members of any other form of association of legal and natural persons that might lead to a conflict of interest.

5.3.2. Competencies of the Commission for Protection of Competition

The competencies of the Commission for Protection of Competition are set by Article 28 of the Law on Protection of Competition.

Functions of the *Commission:*

(i) Enforcing the competition law
- The Commission oversees the implementation of the Law on Protection of Competition as well as the Law on State Aid.
- It conducts administrative procedures and adopts decisions in such procedures, in accordance with the Law on Protection of Competition and the Law on State Aid.

(ii) Supervising markets
- The Commission monitors and analyzes the conditions on the market to the extent necessary for the development of free and efficient competition.

(iii) Counselling the Government on competition rules
- The Commission provides opinions on draft laws and other regulations related to economic activities that may influence competition on the market.
- While performing its competences, the Commission shall cooperate with other state authorities as well as exchange data and information necessary for performing its competences.

(iv) International cooperation
- The Commission shall undertake international cooperation not only with respect to the European Union but also with authorities of other countries and their institutions in the area of competition.

The decisions of the Commission for Protection of Competition are adopted by the President and four members with a majority vote of the total number of members. A member of the Commission may not abstain from voting.

The budget necessary for the operation of the Commission for Protection of Competition is provided from the Budget of the Republic of Macedonia. The Commission reports to Parliament and its annual reports are available to the public via internet. The members of the Commission are appointed by Parliament. The efficiency of the Commission is impaired by its lack of power to impose sanctions directly. In addition its financial plan needs government's approval. (Table 5.1).

Table 5.1: Macedonian Competition authority

Name of the agency	Commission for the Protection of Competition
Established by law	Law on Protection of Competition 2005
Starting date	2005
Legal status	Independent public institution
Required to submit annual report	Yes, to Parliament
Budget approval required	Yes, Government
Autonomy in decision making	Yes
Power to appoint members of the competition authority	Parliament
Power to remove members of the competition authority during term	Parliament
Annual report considered by parliamentary committee	Committee on economy
Annual report considered at plenary session	Yes

5.3.3. Restrictive Agreements and Practices

Restrictive agreements and practices are defined in the same way as in Article 101 of the TFEU. Article 7 of the Competition Law regulates prohibited agreements, decisions and concerted practices as all agreements and decisions which have as their object or effect the distortion of competition, and in particular the ones which:

1) Directly or indirectly fix purchase or selling prices or any other trading conditions;
2) Limit or control production, markets, technical development or investments;
3) share markets or sources of supply;
4) apply dissimilar conditions to equivalent or similar transactions with other trading parties, thereby placing them at a competitive disadvantage;
5) Make the procedural order of agreements subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such agreements.

These agreements shall be considered null and void.

Agreements, decisions of associations of undertakings and concerted practices that contribute to promoting the production or distribution of goods and services or to promoting technical or economic development, are exempt from the application of these restrictions under certain conditions defined by the law.

Finally the law prescribes that, as an exception and when necessary for protecting the public interest relating to the application of Article 7 of the Law, the Commission for Protection of Competition may, acting on its own initiative, establish by means of a decision that these restrictions are not applicable to an agreement or a decision or concerted practice, for reasons defined by the law.

Block and individual exemptions. However the Law on Protection of Competition contains the system of (i) **block exemption** and (ii) **individual exemption.**

Block exemptions shall apply to: (i) vertical agreements for exclusive right of distribution, selective right of distribution, exclusive right of purchasing and franchising; (ii) horizontal agreements for research and development or specialization; (iii) agreements for transfer of technology, license or know-how; (iv) agreements for distribution and repairing motor vehicles; (v)insurance agreements; (vi) agreements in the transport sector.

If a block exemption is not possible, parties may apply for an **individual exemption** under Article 7 paragraph (4) hereinabove – the condition being that the agreement contributes to "promoting the production or distribution of goods and services or to promoting technical or economic development, provided that the consumers have a proportionate share of the resulting benefit" or that it does not have as its object or effect the distortion of competition (Table 5.2).

The Law provides an **exemption for agreements of minor importance** (Article 8), when the joint market share of the parties to the agreement and undertakings under their control on the market does not exceed the threshold of 10% where the agreement is horizontal or the threshold of 15% where the agreement is vertical. In case where it is not possible to classify the agreement as either horizontal or vertical, the 10% threshold shall apply. The exemption shall also apply if the market share of the undertakings has not increased by more than 2% in the last two consecutive business years.

5.3.4. Dominant Position

As regulated by Article 10, an undertaking is presumed to have a dominant position if: **(i)** it has no competitors on the relevant market; or **(ii)** compared to the competitors, has a leading position on the relevant market based on several criteria (market share and position, and/or financial power) The undertaking shall be presumed as having dominant position, if its share of the relevant market amounts to more than 40% (Table 5.2).

Article 11 prescribes that the abuse consists, in particular in:

1) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
2) limiting production, markets or technical development to the prejudice of consumers;
3) applying different conditions to equivalent or similar legal transactions with other trading partners, thereby placing them in a position of competitive disadvantage;
4) making the procedural order of agreements subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such agreements;
5) unjustified refusal to deal or encouraging and requesting from other undertakings or association of undertakings not to purchase or sell goods and/or services to a certain undertaking, with an intention to harm that undertaking in a dishonest manner;
6) unjustified refusal to allow another undertaking access to its own network or other infrastructure facilities for adequate remuneration, if without such access, as a result of legal or factual reasons, the other undertaking becomes unable to operate as a competitor on the relevant market.

5.3.5. Merger Thresholds

There is an obligation to notify a merger to the Commission for Protection of Competition (Article 14) if:

(i) the aggregate turnover of all undertakings participants, generated by sale of goods and/or services on the world market, amounts to at least 10 million euro in denar equivalence according to the exchange rate valid on the day of compiling the annual account, realized in the business year preceding the concentration and provided that at least one participant must be registered in the Republic of Macedonia, and/or

(ii) the aggregate turnover of all undertakings participants, generated by sale of goods and/or services in the Republic of Macedonia, amounts to at least 2.5 million euro in denar equivalence according to the exchange rate valid on the day of compiling the annual account, realized in the business year preceding the concentration; and/or

(iii) the market share of one of the participants amounts to more than 40% or the total market share of the participants in the concentration amounts to more than 60% in the year preceding the concentration (Table 5.2)

The Law prescribes that the merger will not be implemented before its notification to the Commission (Article 15), with certain exceptions.

Table 5.2: Key Areas of Competition Policy in Macedonia

Concentrations		Dominant position/monopoly		Restrictive agreements: Cartel prohibition	
Merger Thresholds	Fees – merger control	Individual dominant position	Collective dominant position	Max Sanctions on Companies	Leniency Policy
1. All undertakings concerned have a worldwide turnover exceeding EUR 10 million, provided that at least one undertaking has a registered local presence on the territory of Macedonia 2. All undertakings concerned have a local Macedonian turnover exceeding EUR 2.5 million 3. One undertaking concerned has a market share of more than 40% or combined market share in the relevant market exceeding 60%.	Filing fee – 100 EUR Clearance fee – 500 EUR*	If the market share of individual undertaking on the relevant market exceeds 40%.	If the market share of two or more undertakings on the relevant market exceeds 60%.	10% of the total annual turnover in the previous financial year	Yes

5.3.6. Sanctions

A company that infringes competition may be fined by the Commission up to 10% of the value of the total annual turnovers earned in the last business year, calculated in absolute and nominal amount for which the company has compiled an annual account.

The Commission may also fine a company for procedural issues, up to up to 1% of the value of the total annual turnovers earned in the last business year, calculated in absolute and nominal amount for which the company has compiled an annual account, including if it fails to act in accordance with the procedural order of the Commission, related to submission of data, if it submits false, misleading or incomplete data etc.

In certain cases, the Commission may impose to the legal person, in addition to the fine, a temporary ban on the performance of specific activity in duration of 3 to 30 days.

The Law provides a statute of limitations, regulating that a misdemeanor procedure may not be initiated or conducted after the expiry of:

- three years regarding the "procedural" misdemeanors as defined in Article 61 of the Law, and
- five years regarding "serious" misdemeanors as defined in Articles 59 and 60 of this Law.

As for the procedural provisions, the new Competition Law improves the efficiency and management of the procedures before the Commission. The new Law has also been harmonized with the law regulating misdemeanors. The new provisions of the law enable the Commission to simultaneously determine the existence of a Competition Law infringement and the existence of the respective misdemeanor, as well as impose an adequate sanction for the infringement in question.

Misdemeanor Proceedings. The provisions of the new Competition Law enhance and improve the management of proceedings before the Commission. Namely, the Competition Law is now in full compliance with the law regulating misdemeanors. With these amendments, a single misdemeanor procedure is introduced, in which the Commission would at the same time determine the existence of a Competition Law infringement and the existence of the respective misdemeanor, as well as impose an adequate sanction for the infringement in question.

5.3.7. Leniency

The new law has for the first time introduced the legal institute of leniency policy. The Law provides that a company is granted full immunity from the fine prescribed by the law, if it is the first one to present evidence enabling the Commission to initiate a procedure related to an infringement, or the first one to present evidence enabling the Commission to complete a procedure and establish the existence of an infringement. If a company has admitted to participation in a cartel but it fails to meet the conditions for full immunity, the fine may be reduced if the company presents to the Commission additional evidence which is of decisive importance for the adoption of the decision which confirms the infringement.[144]

Full immunity will only be granted if several cumulative conditions have been fulfilled, including but not limited to: that the company has ended its involvement in the cartel immediately after its leniency

[144] Focus on Competition, Karanović – Nikolić 2011, pg. 24

application, that it cooperates with the Commission, that it does not notify the other members of the cartel of the existence of the leniency application etc.

5.3.8. Judicial Oversight

The decisions of the Commission for Protection of Competition issued in an administrative procedure are final. A legal action on instituting an administrative dispute before the competent court may be brought against such decisions of the Commission for Protection of Competition.

The legal action on instituting an administrative dispute shall be brought within 30 days as of the day of receiving the decision and it shall not defer the enforcement of the decision.

5.4. Overview of the activities of the Commission for protection of competitiont

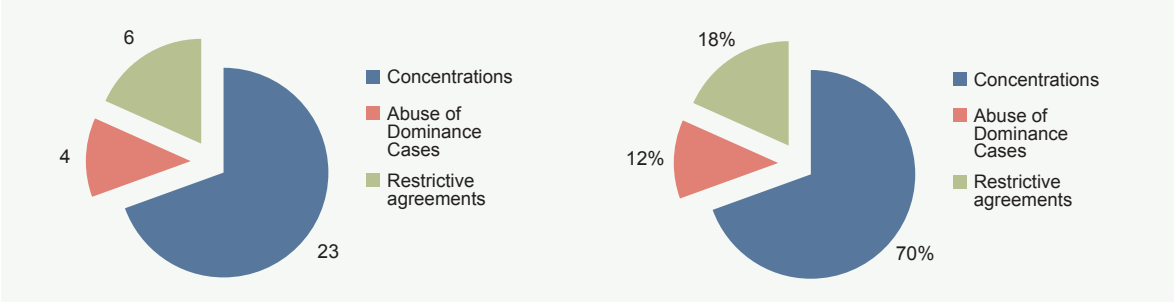
The main functions of the Commission are related to the enforcement of the Law on protection of competition, including the keeping the records (i) on notified agreements, (ii) on undertakings holding a dominant position on the market and (iii) on concentrations (Article 12, item 12 LPC)

According to its annual report for 2012, mergers/concentrations were by far the predominant activity of the Macedonian Competition Commission. It opened 23 merger cases (70% of total cases opened by the Commission), and issued 22 merger clearances (85% of total decisions taken) (Figure 5.3, 5.4, 5.5 and 5.6).

The number of the opened restrictive agreements was 6 (18%), and 3 decisions were taken in 2012 (11%). (Figure 5.3, 5.4, 5.5 and 5.6), while 3 of them were transferred to the next year (Figure 5.3, 5.4, 5.5 and 5.6).

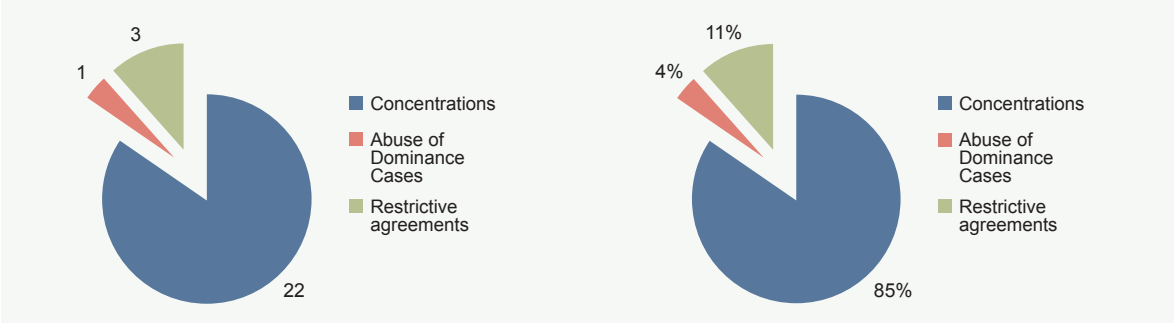
The number of opened cases of the abuse of dominant position was 4 (12%), 1 decision was taken in 2012, while 3 of them were transferred to the next year (Figure 5.3, 5.4, 5.5 and 5.6).

Figure 5.3 and 5.4: Activities of the Commission for protection of competition, cases opened, 2012



Source: Annual report of the Commission for protection of competition, 2012.

Figure 5.5 and 5.6: Activities of the Commission for protection of competition, decisions taken, 2012

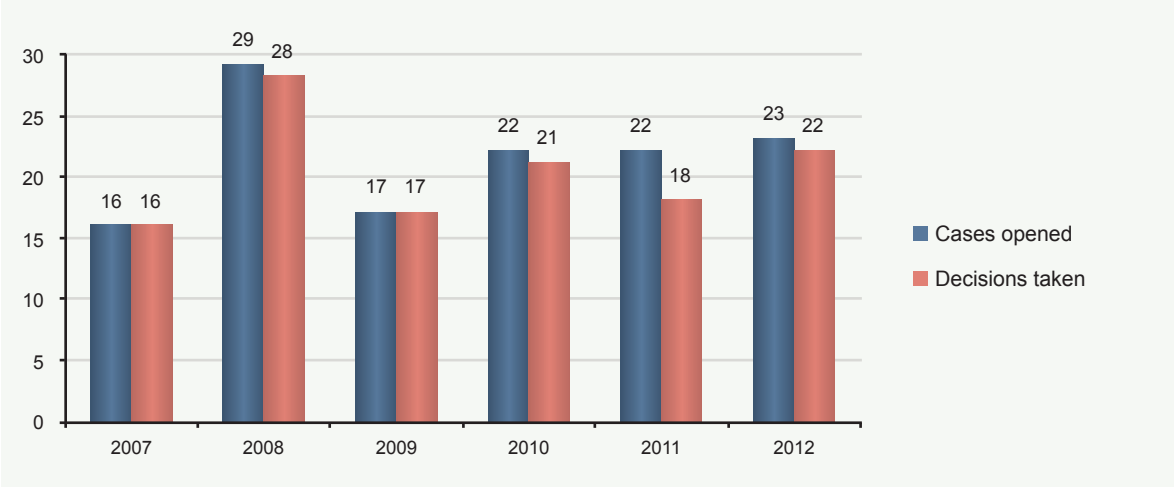


Source: Annual report of the Commission for protection of competition, 2012.

5.4.1. Concentrations

In the last 5 years, the Commission had an average of around 20 merger cases per year (Figure 5.7). Their number varied from 16 opened cases in 2007, to 29 opened cases in 2008, the number of closed cases varied from 16 in 2007 to 28 in 2008.

Figure 5.7: Concentrations in Macedonia, 2007-2012



Source: Annual report of the Commission for protection of competition, various years.

Box 5.1: Commission's investigation of cartels

Recently the Commission has started to investigate a larger number of cartels. For instance, in July 2010 the Commission sanctioned a cartel involving the driver's association of the majority of the municipalities in the country. The latter agreed to fix the prices for the services of technical inspections to the auto- vehicles. This shows that the COMMISSION has focused on more detailed examination of certain sectors throughout the country, thereby making its activities more visible to the business sector and adding to development of competition culture in the country.

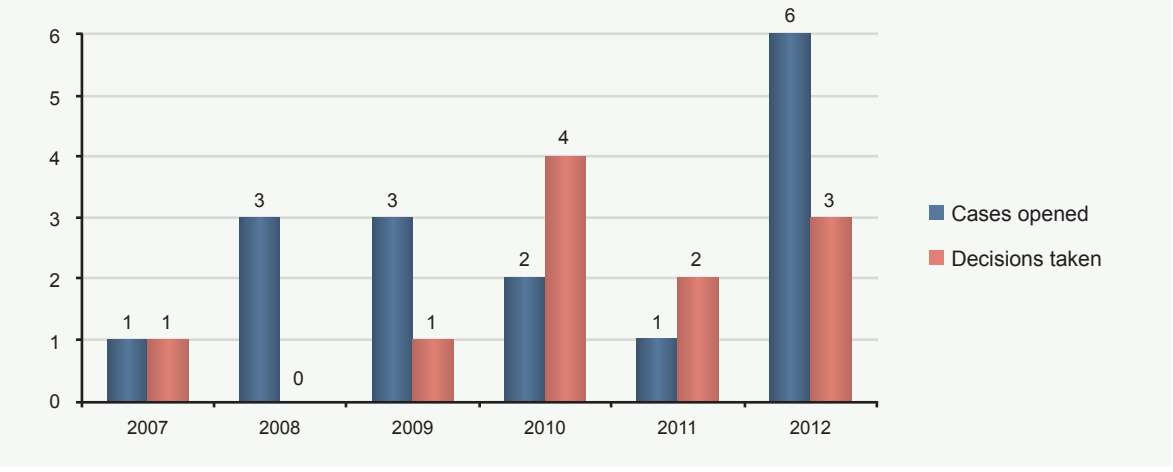
However, the lack of human resources of the Commission, and the lack of a leniency program are factors which still undermine the enforcement efforts of the Commission against anti-competitive agreements, by preventing the Commission to start undertaking more complex investigations.

Source: Rozeta Karova and Marco Botta, Macedonia: Five Years of Competition Enforcement: Assesment, Mediterranean Competition Bulletin, November, 2010, pg.65-66.

5.4.2. Infringements of competition/anticompetitive practices

Restrictive agreements. The number of opened cases for restrictive agreements varied from only 1 opened case in 2007 and 2011, to 6 opened cases in 2008. The biggest number of taken decisions was in 2010 (4), while no decisions were taken in 2008 (Figure 5.8).

Figure 5.8: Restrictive agreements in Macedonia, 2007-2012



Box 5.2: Restrictive agreements: Alkaloid Joint Stock Company and Dr Panovski Joint Stock Company – bid for the generic drug Docetaxel injection

In 2012 the Competition Authority initiated ex officio a procedure of investigating a prohibited agreement between Alkaloid Joint Stock Company and Dr Panovski Joint Stock Company, to determine that the aforementioned companies that performs the wholesale of drugs in the Republic of Macedonia, while submitting a bid for the generic drug Docetaxel injection / vial 20 mg / 0,5 ml and Docetaxel injection / vial 80 mg/2ml, for the contractor PHI University Clinic of Radiotherapy and Oncology, Skopje and PHI Clinical Hospital "DR.Trifun Panovski", have agreed to change intentionally the structure of the relevant market with the objective to distort competition through directly or indirectly fixing sale prices. The two companies were fined with a total of 47,380,447.00 MKD denars.The companies filed an appeal against this decision before the Administrative Court. The appeal procedure is underway.

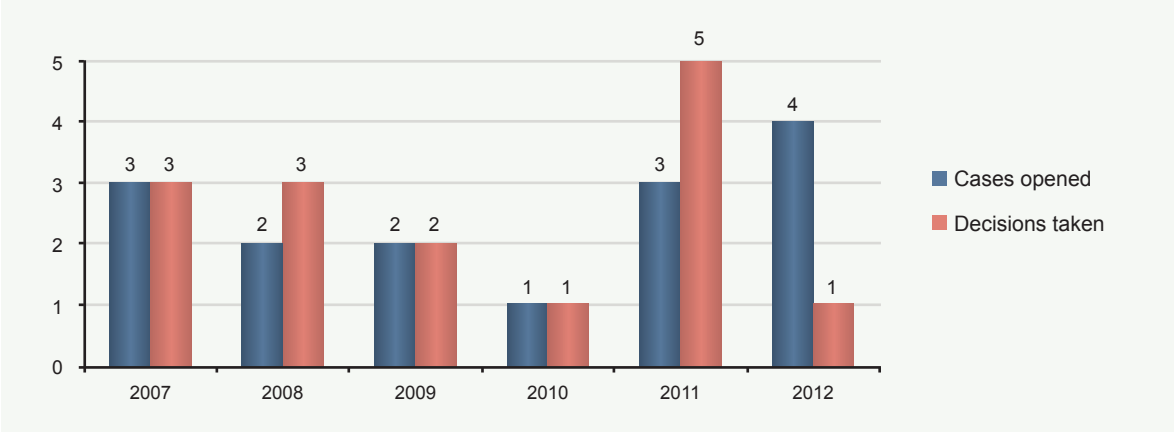
Source: Annual report of the Macedonian Commission for protection of competition, 2012

Abuse of dominant position. Number of opened cases of the abuse of dominant position varied from 1 opened case in 2010, to 4 open cases in 2012. The biggest number of the taken decisions was in 2011 (5), while only 1 decision was taken in 2010 (Figure 5.9).

The majority of the enforcement efforts of the Commission during the 2011 years focused on the abuse of dominance, while in 2012 the focus of Commission's enforcement activity was on Restrictive agreements (Figure 5.8 and 5.9).

The decisions in this area abuse of dominance were characterized by two common denominators: the addressees of the decisions were usually companies which managed a State concession in a certain economic area. Secondly, the Commission sanctioned mostly exploitative, rather than exclusionary abuses (e.g. unfair prices, unfair contractual clauses)[145].

Figure 5.9: Abuse of dominant position in Macedonia, 2007-2012



Source: Annual report of the Macedonian Commission for protection of competition, various years.

145 R. Karova and M. Botta, Macedonia: Five Years of Competition Enforcement: Assesment, Mediterranean Competition Bulletin, November, 2010. pg.72.

Box 5.3: Macedonian Telecom: abuse of dominant position on the market for Internet services

In July 2008 the Competition Authority established an abuse of dominant position on the market for Internet services provided via digital lines on the part of the incumbent telecom operator – Macedonian Telecom. Macedonian Telecom provided Internet access to final consumers (ISA – Internet Symmetrical Access), which it was marketing as a bundle of two services: IDA (Internet Direct Access) and DLL (Digital Leased Lines). At the same time independent Internet providers had to purchase the DLL services from Macedonian Telecom so that they can subsequently use the digital lines in order to provide IDA services to its own final consumers. The pricing set by Macedonian Telecom led to the situation where independent Internet providers had to pay for DLL services purchased from Macedonian Telecom higher prices than final consumers were charged for ISA package. As a result, the access packages offered by Macedonian Telecom always represented cheaper and therefore more attractive options for the final consumers. Due to the existing price squeeze the independent providers where unable to effectively compete with Macedonian Telecom. The Competition Authority ordered Macedonian Telecom within 60 days to compile and announce on its web-site two different price lists for wholesale (digital lines leased to independent Internet providers) and retail (digital lines used for provision of Internet services to final consumers). The Competition Authority specified that wholesale prices should be at least 30% lower than prices on retail level.

The competent court confirmed the decision of the Competition Authority in 2011, and upon an appeal, the superior court confirmed such decision in 2012.

Source: Annual report of the Macedonian Commission for protection of competition, 2012

5.5. Supervisory function of the Assembly of the Republic of Macedonia and its Working bodies in terms of consideration of reports submitted by independent state authorities and bodies

One of the main segments of the supervisory role of the Macedonian Assembly is supervision of independent state authorities, organizations and bodies. The Assembly appoints the officials – representatives of these regulatory bodies. These regulatory bodies are required to submit to the Assembly and its working bodies its operation and progress reports.

By examination of these reports the Assembly and its working bodies (competent committees) get acquainted with the possible problems in implementation of legislation and by-laws, including failures and unlawful exercise of power on the part of some executive authorities and this is, therefore, one of the significant instruments used by the Assembly in order to control the executive authorities' operation.

The annual reports of the regulatory bodies supervised by the Assembly are submitted in accordance with the Law on the National Assembly and its Rules of Procedure, and particular laws which established the regulatory bodies which are supervised by the National Assembly. In the case of the competition authority – the Commission for Protection of Competition, its obligation to submit an annual report of operation to the National Assembly is prescribed by the Law on the Protection of Competition.

Rules of Procedure of the Parliament: Article185, prescribe that:

- The Assembly may debate on analysis, reports, information and other documents submitted by the Government or other authorized initiators.
- The Assembly may also discuss information submitted by the Government to a Member of the Assembly on his/her demand, if the Member of the Assembly proposes this.
- A debate on documents mentioned above shall, as a rule, be concluded with adoption of a conclusion.

Committee for Economy is a competent working body of the Macedonian parliament in charge of considering the Annual reports of the Commission for the protection of Competition. After the consideration at this committee, the Annual report is sent to the plenary session for consideration.

Chapter 6

COMPETITION POLICY IN MONTENEGRO

Nikola Milović[146]
Andreja Marušić

6.1. Introduction

The legal framework of the EU competition policy is represented by the four elements. First – the founding treaties of the European Union; second – the regulations and directives of the EU Council and the Commission; third – a number of rules and recommendations which are not binding, but they explain and elaborate how the European Commission understands and implement competition policy; fourth – the rulings of the European Court of Justice relating to disputes between companies, governments, the European Commission and other stakeholders.

Existing regulative framework relates to four types of activities that are prohibited or significantly limited, as follows: illegal trade agreements, abuse of dominant market position, certain forms of companies merging, mutual purchases of companies, and some forms of state aid.

Competition policy in the total share of individual economic policies is of great importance for the further integration of the economy of Montenegro. Through building of the regional integration and wider forms of economic integration with the European Union, the question of legal framework order is raised as well. Quality legislation and institutional framework is precondition for functioning of the economic system and increasing of the economic activity. Efficient application of competition rules will ensure a transparent, user-friendly, and accessible legal framework that will represent the basis for building up the economy of Montenegro.[147]

6.1. Legal framework for the implementation of competitiveness policy in Montenegro

Quality legislation and institutional framework is precondition for functioning of the economic system and increasing of the economic activity. Efficient application of competition rules will ensure a transparent, user-friendly, and accessible legal framework that will represent the basis for building up the economy of Montenegro. Competition policy in the total share of individual economic policies is of great importance for the further integration of the economy of Montenegro. Through building of the regional integration

146 PhD, Lecturer at the Faculty of Economics, University of Montenegro

147 Milović N., *Common market and competition policy of the European Union,* textbook, Faculty of Economics, Podgorica, 2012

and wider forms of economic integration with the European Union, the question of legal framework order is raised as well.[148]

In framework of the competition policy of Montenegro, legal framework in its origin and development can be divided in several periods:

1. **The period 1996-2006,** when the law adopted in 1996 was in effect, during the Federal Republic of Yugoslavia, after the State Union of Serbia and Montenegro. This period is characterized by the application of Antimonopoly Law of Yugoslavia ("FRY Official Gazette", no. 29/96), on the basis of which we can say that Montenegro did not have a system of competition law. In addition, federal authority, the Antimonopoly Commission was responsible for the implementation of this law. The staff, organization and jurisdiction of this Commission was taken over by the Republic of Serbia, while Montenegro did not have established specialized body responsible for the implementation of this law, and the Montenegrin judicial practice, until the new law was adopted in 2006, did not record any case run due to the impairments in this field.[149]
2. **Period 2006-2012,** when the implementation of the competition rules was regulated by the Law on Protection of Competition of the Republic of Montenegro[150], which entered into force on January 1, 2006, and it was valid until the new law on Protection of Competition was adopted in 2012;
3. **Actual period 2012-** which is characterized by adoption and implementation of the new Law on Protection of Competition of Montenegro[151], which entered into force on October 8, 2012.

6.1.1. Law on Protection of Competition adopted in 2006

The Law on Protection of Competition that was adopted in 2006 is the first adopted law in this area in Montenegro, which establishes and regulates basic institutes of competition law and the institutional framework for their implementation. The law was largely compliant with the EU law, competition law standards set forth in Sections 101, 102 and 106 of the Consolidated Treaty on European Union and the Treaty on the Functioning of the European Union, as well as with the key EU regulations and directives in this field. The first amendment of this Law was adopted in May 2007.[152]

In addition to abovementioned, there is a number of laws in Montenegro that define the competition issues as follows: the Law on Electronic Communication[153]; the Law on Energetic[154]; the Law on Banks[155], as well as the Broadcasting Law.[156]

The most important bylaws adopted on basis of Competition Law adopted in 2006 relate to the following: Decree on detailed conditions for the exemption by species and determining the types

148 Milović N., *Competition of Montenegrin Economy,* PhD Thesis, Podgorica, 2010.
149 See more in Penev, S, and S. Filipović , 2011, Competition law and policy in Serbia in the context of the EU accession process, Slavica Penev and Sanja Filipović, in Evolution of Competition Laws and their Enforcement, A Political Economy Perspective, Editted by Pradeep Mehta, Routledge, 2011.
150 Law on Competition Protection (OG of RMNE no 69/05).
151 Law on Competition Protection (OG of MNE no 44/2012)
152 Law on Competition Protection (OG of RMNE no 37/07)
153 Law on Electronic Communication (OG MNE no 50/08 and 53/09).
154 The Energy Law (OG of RMNE no. 39/03, and OG of MNE no 53/09)
155 The Law on Banks (OG of MNE no 17/08)
156 The Broadcasting Law (OG of RMNE no 51/02, 62/02, 46/04, 56/04, 77/06., OG of MNE no 50/08, 79/08 and 53/09)

of agreements that may be exempted from the law[157], which was aligned with the key provisions that are implemented in European law; Rulebook on content of the request for individual exemptions[158]; Rulebook on content of the application of agreement and manner of keeping the record[159]; Rulebook on form and content of the application for registration of approved concentrations and form of register and manner of keeping it[160]; Rulebook on form and content of the request for procedure initiating[161]; Instruction on form and content of the request for issuance of approval for concentration application[162]; Instruction on criteria for determining relevant market.[163]

The 2006 Competition Law established and regulated basic institutes of the competition right and institutional framework for its application through elaboration of subject into VI parts:

I General provisions – They define the subject of the law, types of acts and actions that violate competition, competent authority for implementation (state administration body competent for economic affairs), territorial and personal application of the law, and relevant market in relation to market where it is assessed if competition right is violated.

II Impairments of competition on market – closely define types of acts and actions that would violate competition right in following manner:

Impairment of competition, in the Article 2 of this Law, defines that following acts and practices are considered to impair competition:

1) Prohibited agreements are agreements, decisions of associations and concerted practice which prevent, restrict or distort competition, except in cases envisaged by the law that are considered to have larger public interest that would allow temporary impairment of competition;
2) Abuse of dominant position: it is not forbidden for the participant in the market to develop and grow to a point where other participants in the market can not influence on his business decisions, which makes it dominant, but abuse of dominant position is prohibited on the market in the sense that, for example, the dominant participant sales, for a while, products at a price lower than the cost of production and marketing, in an effort to destroy the competition and seize the entire market for themselves (dumping) and other similar practices.
3) Concentrations: control over the market participants merging is introduced, especially of those who already have significant economic and financial power, so it is very likely that their merging would create a new market participant who would be dominant in the market, and such merging of parties that would result in the violation of competition are prohibited, and it is practically the prevention of the abuse of dominant position

1. Prohibited agreement

The abovementioned Law was fully aligned with the basic principles set forth in the Article 101 of the TFEU, which actually contains general prohibition and invalidity of the agreement that impairs the competition (Article 7, paragraph 2, of the CPL), and especially as follows:

1) directly or indirectly fix purchase or selling prices or any other trading conditions;
2) limit or control production, market, technical development or investment ;

157 OG of RMNE no. 10/07.
158 OG of RMNE no. 36/06.
159 OG of RMNE no. 54/06.
160 OG of RMNE no. 36/06.
161 OG of RMNE no. 36/06.
162 Sl. list RCG br. 77/05
163 Sl. list RCG br. 77/05

3) share markets or sources of supply;
4) apply dissimilar conditions to equivalent transactions with different undertakings, thereby placing them at a competitive disadvantage;
5) make the conclusion of agreements subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements.

Directorate for Competition Protection was competent and authorized to annul the prohibited agreement and a party concerned cannot file a civil suite, although this do not exclude right of the subject, who was a damaged party by annulling the agreement, to request the reimbursement of the damage in the court procedure.

2. Abuse of the Dominant Position

The provisions of the Article 20 of the CPL prescribed the actions to prevent, restrict, or distort competition, and particularly those which:
1) directly or indirectly impose unfair purchase or selling price or other unfair trading conditions;
2) limit production, markets or technical development thus causing harm to consumers;
3) apply dissimilar conditions to identical transactions with different undertakings, thereby placing them at a competitive disadvantage on market;
4) make the conclusions of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial customs, have no connection with the subject of such contracts.

In addition, CPL from 2006, also treats the collective dominance - Article 19, especially paragraphs 3 and 5. Collective dominance is situation where two or more undertakings having aggregate market share exceeding 60% in the relevant market, within the meaning of this Law. Two or more undertakings having aggregate relevant market share below 60% may be considered collectively dominant, in which case the burden of proof rest on the competent body that is on claimant.

3. Concentrations

In accordance with the Article 23 of this law, Concentrations of undertakings are deemed to arise in the following situations:
1) establishment of a new undertaking by merger of two or more previously independent undertakings or their parts (merger);
2) when one or more natural persons that already have the control over at least one undertaking, or when one or more undertakings, acquire control over the entire or parts of other undertaking;
3) establishment and joint control by at least two independent undertakings over a new undertaking that performs on a lasting basis all the functions of an autonomous economic entity and has an access to market (joint venture).

The 2006 Law envisaged prior reporting of the concentration by filing the request to approve concentration, envisaged in the Article 25, if the conditions set forth in Article 23 are fulfilled. The reported concentration, in accordance with the Article 27, was submitted to the Directorate within seven days from the day when the agreement was signed, or by publishing public offer, or by taking control over market participants. Request for approving the concentration could have been submitted in case when concentration participants show serious intention to conclude agreement, by signing the letters of intent, or when participant in the market announce the intent to make an offer by buying the shares.

Basic criteria for request for concentration referred to following:

- combined total annual income of all undertakings involved in concentration on the market of Montenegro exceeds the amount of 3 (three) million EURO according to the annual statements of the undertakings for the previous financial year;
- combined total annual income of undertakings involved in concentration realized on international market in the previous financial year amounts to 15 (fifteen) million Euros according to final accounts of undertakings for the previous financial year, whereby at least one of undertakings involved in concentration is registered on the territory of Montenegro.

III Implementation of the law – closely defines competencies of the responsible body and closely regulates procedure that would be conducted before the responsible body in individual cases, emphasizing specifics in relation to general rules of the administrative procedure. Basic specifics is that decision passed by the responsible body is final and administrative procedure can be initiated.

IV Supervision – The competent body is responsible for supervising the enforcement of this Law and other regulations by Law.

V Penalty Clauses – Determine sanctions for law infringement. The proposal is more specific because it puts the emphasis on the imposition of extremely high penalties for breach of competition rules. Violation of competition rules is one of the most serious offenses against the economy with far-reaching negative consequences for the society as a whole, and its perpetrators are by rule powerful economic entities, so that the absence of severe punishment that has the power to deter potential violators from committing offenses would constitute the undermining of the very law. High penalties for perpetrators will also be a significant source of budget income that will contribute on the market to the elimination of harmful effects of competition injuries.

VI Transitional and final provisions – Procedure in current relations is defined, deadlines for passing the bylaws, cessation of the application of existing regulations, as well as date when the new law enters into force.

This Law regulates manner, procedure and measures of competition protection on the market and defines the competencies of the competition protection body.

The Competition Protection Law was at large extent, even in first version, aligned with the EU law, standards of the competition law that are defined in following EU acts:

- Articles 101, 102 and 106 TEUF,
- EC Regulation 2790/1999,
- EC Regulation 139/2004,
- EC Regulation 17/62,
- EC Publication OJ C 372/1997,
- EC Publication OJ C 368/2001.

6.1.2. The weaknesses of the 2006 Competition Protection Law

Experience and practical application of this Law emphasized following **weaknesses and lacks of the Law**[164]:

- Practice in the implementation of the law has shown that the threshold of annual income is set low, which results in the obligations to report concentration, so it is necessary to set a higher threshold of annual income to take into consideration a significant concentration, which would have a major impact on competition. Also, this lack influenced the inability to focus on cartels and abuse of dominant position,
- A short deadline for submitting the request for issuing approval for concentration,
- Penalty provisions that disable and significantly hamper actions against the perpetrator
- Necessary authorization concerning direct insight – lack of process authorization is evident problem for accessing the data stored with party or third persons.
- Lacks in defining of privileged communication
- Not informing the party in procedure before passing the decision on impairments of competition,
- Lack of special authorization of the Agency (Leniency program)

6.1.3. Competition authority – Directorate for the Protection of Competition

Institutional subjects that were bearers of the CPL were as follows:

- Ministry of Economy;
- Directorate for Competition Protection

Ministry of economy, as competent body, performed following tasks and duties:

1) proposes development and protection of competition policy;
2) monitors implementation of policy of development and protection of competition policy;
3) adopts by lows;
4) defines methods for competition surveys;
5) other tasks defined by the law.

Pursuant to the Decree on amendments to the decree on organization and functioning of state administration (Official Gazette of RM, no. 06/07, which came into force 24.11.2007), the **Directorate for the Protection of Competition** was established. It took over tasks in field of competition protection in accordance with the amendments to the Law on Protection of Competition (Official Gazette of RM no. 37/07). Directorate for the Protection of Competition is registered in the Statistics Office of Montenegro on 14.02.2008. **Directorate for Protection of Competition** represented operationally independent body for the protection of competition.

The competencies of the Directorate are as follows:

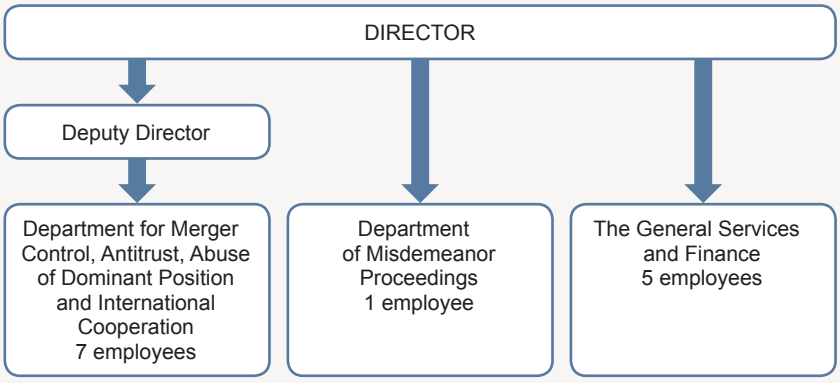
1) Monitor and analyze conditions of competition in the general market as well as in the markets of particular economic sectors;
2) Approve exemptions from the prohibition of certain agreements and approve concentrations of undertakings, under prescribed conditions and take decisions in other matters, in accordance with this Law;
3) Make decisions in procedure of determining the impairments of competition as defined by this law;

164 Milović N., *Competitivness and institutional framework for implementation of competition policy in Montenegro,* University of Niš, Faculty of Economics- Economic themes, No. 4, Niš 2010.

4) take measures against undertakings and associations of undertakings for impairment of competition in the market, or take measures with a view to preventing the occurrence of or terminating the infringement and eliminating harmful effects for undertakings and consumers;
5) Analyze market situation from the aspect of free and efficient competition and submit its report to the Ministry;
6) Prepare expert bases for drafting laws and secondary legislation, implementation of European and other international standards and instruments in field of competition protection;
7) Establish international cooperation with competent bodies of other countries and international organizations;
8) Publish statistical data in field of competition protection;
9) Carry out other tasks in accordance with this Law.

Directorate for Competition Protection consisted of three internal organizational units: Department for Merger Control, Antitrust, Abuse of Dominant Position and International Cooperation, Department of Misdemeanor Proceedings and the General Services and Finance Department.

Figure 6.1: Organizational scheme



6.1.4. Lacks and weaknesses of the Directorate for the Competition Protection

Four-year experience in the functioning of the Directorate has turned out the following **limiting factors** of its development:

- Insufficient number of qualified personnel, which would guarantee the smooth functioning of the Directorate; It is largely hampered by inability to plan to increase the number of employees and the crumbling of the existing staff;
- In addition to improvement of legislation, it is necessary to strengthen the capacities in specific areas of law enforcement, such as telecommunications, media, financial services, etc.;
- Lack of financial resources for the functioning of the Directorate;
- Annual reports are not available to the public;
- Insufficient level of independence, with too narrow and insufficient authorization;
- Commission's lack of power to impose sanctions on undertakings that violated competition law

6.1.5. Strategy of the Competition Policy from 2008

In the framework of the mentioned legislation and institutional framework, in June 2008, the Ministry of Economy drafted the Strategy of Competition Policy[165] that has defined the situation in the field of competition, objectives, priorities, and means to achieve them, as well as the necessary resources for the effective implementation of the competition rules. The ultimate goal of this strategy was to complete the harmonization of competition and legal provisions with European provisions as well as the effective implementation of policies through independent functionality of the competent authorities.

Strategy presented a basis for future phases of the development of competition policy in Montenegro, especially in the field of analysis of progress in the application of competition rules and the establishment of professional and independent institutions. The Strategy was aimed to provide a transparent, clear, and useful Law on Protection of Competition harmonized with EU legal framework in the field of competition.

As stated in the Strategy itself, the task of the Directorate responsible for the protection of competition is: "To ensure that competition functions in favor of the consumer, the common good and the competitiveness of the economy." In addition, the performance of the competition in favor of consumers means ensuring such market conditions that will increase the safety of consumers and provide more choices, more efficient price determining, through innovation, as well as better quality and variety of products. Given the fact that the businessmen are at the same time consumers, ensuring the functioning of competition to the benefit of consumers means functioning to the benefit of the economy and as a result, to the common good and competitiveness. The core objective is the interests of consumers, not the protection of any market participants. According to this document, competition policy is a clear philosophy guiding the process of proper decision-making of the body responsible for the protection of competition and has several important roles. First, it is a path through the fundamental principles in order to ensure effective implementation. Second, ensuring the legality through a clear philosophy in the work of the administration body responsible for the protection of competition and the criteria on basis of which they would evaluate the work of the organization. Third, the extra motivations, and spreading beyond the scope of legality, focus on the work of the administration body responsible for the protection of competition.

6.2. The valid 2012 Law on the Protection of Competition

The Law on the Protection of Competition (Official Gazette of the Republic of Montenegro, no. 44/2012) entered into force in October 2012. The Law regulates restrictive agreements, abuse of dominant position and mergers.

The Law provides for an exemption of application for companies that perform activities of public interest (Article 5) if the application of the Law would significantly prevent the performance of such activities. This could put such companies at an advantage and impair competition on the market.

6.2.1. Restrictive Agreements and Practices

The definition of restrictive agreements is given in Article 8 and is essentially a literal translation of Article 101 of TFEU.

165 The Government of Montenegro, Ministry for Economic Development, *Strategy of the Competition Policy,* Podgorica, 2008.

Article 8 defines that the agreements that have or may have as its objective or consequence the prevention, limitation or infringement of competition are forbidden and null, hence agreements which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
(f) define the obligation of application of a certain price in further sale or in another way ensure the application of the proposed price.

Article 9 prescribes that the agreements from article 8 can be exempted from the prohibition if they contribute to improving the production or distribution of goods or services, i.e. promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 11 regulates block exemptions of the Law, and the conditions, procedure and criteria for group exemptions are determined by regulation of the Government.

Individual exemptions can be granted, if the agreement fulfills the above conditions prescribed by article 9 of the law.

Agreements of minor value are defined by article 13 of the Law as agreements between participants on the market whose total market share on the relevant market does not exceed:

- 10% of the market share for horizontal agreements
- 15% of the market share for vertical agreements
- 10% of the market share for agreements which are neither horizontal nor vertical

6.2.2. Dominant Position

Article 14 defines that a participant on the relevant market has a dominant position if he has no competition or has a significant market power that enables it to limit or prevent the development of efficient competition on the market of Montenegro or its part, or has a significantly better position with respect to the competition, which enables it to undertake significant business operations, independently of the competition, suppliers, buyers or final users, taking into consideration:

- the market share and power
- the level of concentration of the market, market share and market power of the competitors
- dynamics of the market in the previous period
- financial power
- power of the buyers
- access to sources of offer and demand
- connection with other participants on the relevant and connected markets

- legal or other barriers to entry of other participants on the market
- capability of the participants on the market to dictate market conditions with respect to offer and demand

The legal presumption is that the participant on the market has a dominant position if his share on the relevant market is greater than 50%, and 60% in the case of two or more participants on the market (collective domination).

The definition of abuse of dominant position is given in Article 15 of the Law and is a literal translation of article 102 of the TFEU. It prescribes that abuse of dominant position consists in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

6.2.3. Merger Thresholds

Article 16 of the Law defines mergers as:

- Merger of two or more independent participants on the relevant market or its parts
- When one or more natural persons who already control at least one participant on the market or one or more participants on the market acquire indirect or direct control over another participant on the market or its part
- When two or more independent participants on the market establish a new participant on the market or when the acquire a joint control over an existing participant on the market who operates independently on a long term basis and has all the characteristics of an independent participant on the market (joint investment)

Article 50 defines the merger thresholds for applying for a permission of the Agency. The application is to be submitted, under the conditions that:

- The total joint annual revenue of at least two participants in the merger, realized on the market of Montenegro exceeds five million Euro in the previous financial year;
- The total joint annual revenue of the participants in the merger realized on the global market in the previous financial year, exceeds 20 million Euro, if at least one of the participants of the merger realized in the same period one million Euro of revenue on the territory of Montenegro

The Agency can require the parties to a merger, to submit an application after it has found out for the merger, if their joint market share on the relevant market of Montenegro exceeds 60%.

6.2.4. Fees and Penalties

The Agency has the right to issue procedural penalties in accordance with Article 60 of the Law. Such penalties can be issued in the amount from 500 Euro to 5000 Euro for each day of non-compliance, and up to 3% of the total revenues realized in the financial year that precedes the year in which the procedure has been initiated. The procedural penalty can be issued for several reasons, including if the company does not act in compliance with the request of the Agency to submit or declare

requested data, or submits incorrect, incomplete or false data, not respecting an injunction order, abusing privileged communication, destroying evidence etc.

However, in the case of penalties related to the infringement of competition, the Law provides for a system in which the Agency has only the authority to determine that an infringement of competition has occurred and initiate a misdemeanor procedure before the misdemeanor court for the determination of the fine. Article 67 prescribes a penalty which can range from 1% to 10% of the total annual revenues in the financial year that proceeded the year in which the infringement occurred. This penalty includes the situation in which abuse of dominant position occurs, which was not sanctioned by the previous law.

If the participant on the market fails to request approval of a merger, Article 68 prescribes a penalty which can range from 4,000 Euro to 40,000 Euro.

In addition to the above, penalties have been prescribed for the responsible person in the company for the above mentioned infringement, which can range from 1,000 to 4,000 Euro.

Article 70 prescribes a statute of limitations for infringements of competition, in which the procedure cannot be initiated after 2 years from the day the infringement was made expire. In addition, for issuing fines the statute of limitations amounts to four years.

6.2.5. Leniency

The Law introduces a **leniency policy** in Article 69. If the company notifies the Agency of a prohibited agreement of which the Agency did not know, or provides evidence of a restrictive agreement in which it has taken part but was not the instigator, the Agency can decide not to initiate misdemeanor proceedings or drop the charges already initiated, as well as propose more lenient fines.

The above still remains to be seen in practice. The involvement of the misdemeanor courts in this procedure increases legal insecurity, as it cannot be predicted how the court will act upon the proposal of the Agency. In Serbia, for example, leniency is automatic, if the legal preconditions have been fulfilled.

6.2.6. Judicial Oversight

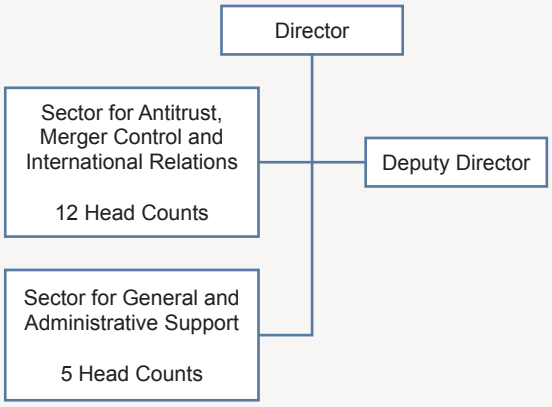
The Agency is responsible for competition law but as stated hereinabove, **when it comes to fines for the infringement of competition, they are determined by misdemeanor courts.** Decisions rendered by the Agency can be challenged before the Administrative Court of Montenegro.

6.3. Competition authority – Agency for Protection of Competition

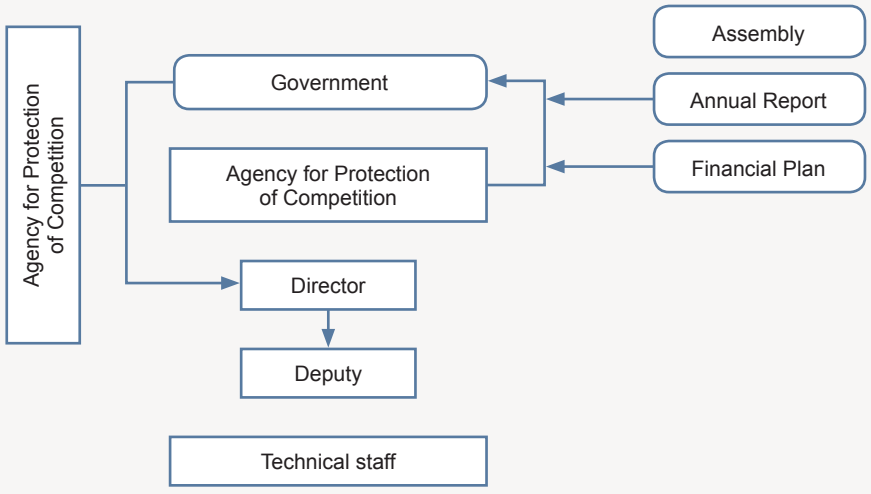
The Law establishes the Agency for Protection of Competition. Article 19 of the Law provides that the Agency is established as an independent body that performs the activities prescribed by the Law. However, the Agency is in practice the successor of the Directorate for the Protection of Competition which was established under the Ministry of Economy in 2008, under the previous law.

Article 20 prescribes that the Agency responds for its operation to the Government. The Agency is registered in the Central Register of Commercial Entities, and it has its Articles of Association to which the Government has to issue and approval, and which are published in the Official Gazette of the Republic of Montenegro.

Figure 6.2: Proposal of new organizational scheme



Article 21 prescribes that both the Director as well as the Deputy Director of the Agency are appointed by the Government, for the period of four years. The Director is appointed upon proposal of the Ministry of Economy. The Director and Deputy Director must be citizen of Montenegro with residence in Montenegro, must have a university education degree and at least five years of working experience.



Article 25 of the Law prescribes that the Agency submits its financial plan for approval to the Government, at the latest until 1 November of the current year, for financing in the following year. The Agency also submits its annual Report of Operation to the Government and Assembly for adoption, until the end of the second quarter of the current year.

6.3.1. Competencies of the Agency for Protection of Competition

Article 19 of the Law prescribes the competencies of the Agency, including the competence to:

(i) analyze the conditions of competition on the market and sectors;
(ii) allows individual exemptions and mergers;
(iii) undertakes measures for infringements of competition;
(iv) issues opinions related to the application of regulations in the protection of competition area;
(v) determines the level of fees for decision making in accordance with the Law, with the consent of the Government;
(vi) decides in the administrative procedure on particular cases;
(vii) submits requests for initiating the misdemeanor procedure;
(viii) issues opinions on regulations that have an impact or could have an impact on competition;
(ix) cooperates with national institutions and international organizations in the competition area.

Article 19 also prescribes that the Agency shall publish its Report of Operation for the previous year and financial account with auditor report on its web page.

In 2011, the Agency (then the Administration), had received 14 merger notifications, and had cleared 13 mergers (the final clearance had been issued in 2012). Furthermore, 1 individual exemption request for a restrictive agreement had been submitted to the Agency, and it was cleared.

Since very similar numbers were seen in 2010, this might represent a steady trend for the Agency's deliberation.

While no restrictive agreement proceedings have been initiated, the Agency did determine in 3 cases that an abuse of dominance had occurred, referring the matter to the misdemeanor courts for sanctioning. In three dominance abuse cases, the proceedings were dismissed due to a lack of evidence (KN).

6.3.2. Weakness of the Agency for Protection of Competition

Current Agency's capacity is not sufficient for the overall market of Montenegro and in particular the Agency is vulnerable at what it should be its strongest base – i.e. the number of case-handlers. Agency is currently having only four (4) employees working on antitrust and only two (2) on merger control cases. This is not allowing the Agency to initiate assessments, investigations and handle all cases upon request of undertakings. It is expected that the Ministry of Finance should support intake of at least two (2) additional case handlers and at least one (1) IT specialist for the purpose of proper building of current administrative staff and establishing of strong authority for the future. There is currently a budget deficit to support these HR activities, although initially asked by the Agency and cut by the Ministry of Finance.

The major weakness of the work of the Authority is that it has not initiated or investigated any possible **cartel agreement over the last three (3) years.** The major reason for such lack of activity in establishing what is the core authority of the Agency was the inability to efficiently collect evidences due to the lack of tools and resources under the previous Law. Namely, the previous Law was not allowing any authority of the authority employees to conduct on the spot investigation

or penalize the undertakings for refusing to cooperate with the authority in due course of proceeding. This led to the consequence as inability of the authority to collect proper evidence, while providing protection of rights for undertakings subject to proceeding, and thus poor instruments for collection of both direct and/or indirect evidence of collusive market behavior.

In addition to problems encountered in cartel cases, there has not been provision on penalties for established abuses of dominant position. This has had a negative effect on deterring the undertakings from abusing its dominant position and has been amended in the new Law.

In merger control cases the authority was not allowed to issue structural remedies or order demerger in case of prohibited concentration allowing for increase of market power or significant lessening of competition that was not notified nor approved by the authority. This has also been remedied in the new Law by providing for possibility of both structural and behavioral remedies.

All listed shortcomings and weaknesses of the previous law provisions, not allowing the work of the authority have been identified by the Ministry in its efforts to amend the Law and provide for the rights of inspection both on business premises, land and movables of the undertakings involved or holding required information or documentation.

We believe that the newly provided instruments will allow better implementation of legal provisions and better enforcement record of the Agency in fighting cartels, abuses and protection of market from mergers significantly negatively affecting the market.

6.4. Overview of the activities of the Agency for Protection of Competition

The main functions of the Agency for Protection of Competition are related to the enforcement of the Law on protection of competition, including the keeping the records of:

1) agreements preventing, restricting or distorting competition;
2) abuse of dominant position, and
3) concentrations preventing, restricting or distorting competition or free development of open market economy, and in particular, creation and/or strengthening of a dominant position in the market. (Article 7), Also Agency shall, within the limits of its powers(Article 19).

Table 6.1: Statistical data on the decisions, 2009-2012

Year	Prohibited agreements	Abuse of dominant position	Concentrations
2010	1		10
2011	1	4	13
2012	1	1	8
2013 march	3		2
Total	6	5	33

The Authority issued in total 31 merger decision by the end of 2012, out of which were 20 horizontal mergers, 10 vertical mergers and conglomerate merger. Out of the total number of approved mergers, 12 were directly affecting Montenegro market while 19 were with no effect and out of which total 9 had significant effect on Montenegro market. Three major mergers were in the grocery retail market (Merkator, Pantomarket & Plus Comerc, Delhaize/Delta), 3 from energy sector (Petrol Invest/Euro

Petrol; Petrol, Ljubljana/Petrol Bonus), one in beer production market (Molson Coors/Niksicka) and steel production market (Toscelik/Zeljezara).

Five (5) abuses of dominant positions have been established by decision of the Authority and three (6) vertical and horizontal cooperation agreements have been subject to analysis and approval in individual exemption procedure. In addition, the Authority was conducting continuous market analysis in the sectors of: non-alcoholic beverages; pharmaceuticals, natural gas and oil, grocery market and distribution of newspapers. The analysis made ending with March 2013. year.

Figure 6.3: Activities of the Agency for Protection of Competition, enforcement record over the last three years 2010-2012.

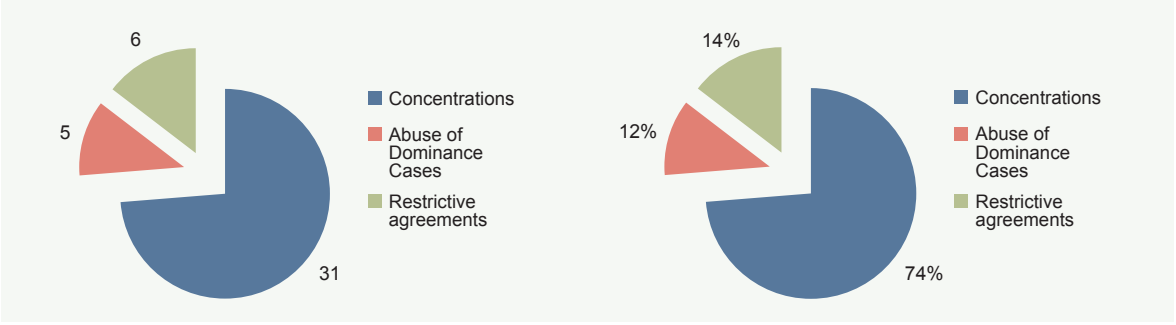
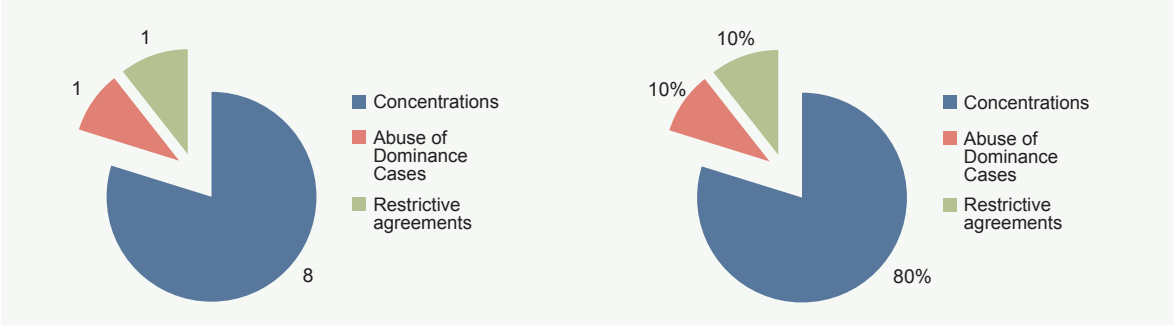


Figure 6.4: Activities of the Agency for Protection of Competition, decisions taken, 2012



6.4.1. Concentrations – Example of the activities of the Directorate for protection of competition

Example of the activities of the Directorate for protection of competition, on the solved case of concentration from Montenegrin practice, that was published in the EC Questionnaire in the part 08 Annex – Competition Policy.[166]

DECISION ON APPROVAL OF CONCENTRATION OF MARKET PARTICIPANTS Resulting the acquisition of control of the limited liability "Ceres" SpA over the limited liability company "Knjaz Tobacco."

Directorate for Competition Protection, deciding upon the Request to issue approval for concentration, submitted by »Cerere« S.p.A., located in Via Torrebianca, 43 CAP 34122, Trieste, Republic of Italy, registered as the holding company in the Chamber of Commerce of Trieste, under the number 92633, represented by attorney Rastko Petaković from the Lawyer Company Karanović & Nikolić, located in Lepenička 7 st, Belgrade, pursuant to the Article 30, para 1, item 3 in relation to Articles 23 and 25 of the Law on Competition Protection (»OG RMNE«, no 69705), Article 6b of the Law on Amendments to the Law on Competition Protection (»OGRMNE«, no 37/07) in relation to the 28g Decree on Amendments to the decree on organization and functioning of state administration (»OG MNE, no 06/07) and Article 196, para 1 of the Law on General Administrative Procedure (»OG MNE, no 60/03), passes

D E C I S I O N

ON GRANTING the concentration of market undertakings resulting from the acquisition of control of the limited liability company "Ceres" SpA over the limited liability company »Knjaz Tobacco«.

R e a s o n i n g

Limited Liability Company "Ceres" SpA, in accordance with Article 25 of the Law on Protection of Competition, turned to the Directorate for the Protection of Competition on 28.02.2008, with a Request for approval to conduct concentration, which was supplemented on 03.04.2008 and 24.04.2008. Data from the Request are published in the Official Gazette of Montenegro, no 37/08 as of 13.06.2008, in accordance with the Article 28 of the Law on Protection of Competition.

Subject of concentration

Pursuant to Article 23 of the Law on Protection of Competition, through the subjected concentration, a limited liability company "Ceres" SpA will acquire control over the "Knjaz Tobacco" limited liability company, through the purchase of 100% of ownership. Concentration, in the legal sense, is qualified as acquisition of control by one of the participants in the market over the other market participants.

Concentration participants

LLC **"Ceres" SpA** is engaged in the following **commercial activities:** wholesale, import export and transit of agricultural and fruit vegetable products, fish and meat, citrus fruits and food products, including sugar, coffee and other products from trade countries as well as zoo-technical (beef and pork) and industrial products. The company carries out the following types of **financial activities:** buying, selling and managing always on own behalf and for its own account, all kinds of securities and shares of the company, buying, selling and managing real estate, buying, selling and management of companies; perform factoring and leasing. In addition, the company manages Directorate for maritime affairs. The company also performs other activities in its own name and for its own account,

166 www.upitnik.gov.me

on behalf of and for the account of others (commission), on behalf of and for the account of others (representation). The company may carry out any commercial, industrial and financial activities, activities of movable or immovable properties that are related or not with the goals of the company. The company may also have interests in other companies or companies that perform the same activities, or a related activity in connection, in Italy and abroad. Prevailing activity of the company as of 01.11.2003 is **wholesale in sugar.**

»Knjaz Tobacco« is a limited liability company, with headquarters located at Trg Save Kovacevic 20, Niksic, registered in the Central Registry of the Commercial Court in Podgorica under registration number 5-042691/001 with activity code 51350-wholesale tobacco products.

The legal basis of concentration

Directorate for the Protection of Competition received a copy of the **Contract on Purchase of the Shares,** concluded on 20.12.2007 between Slobodan Knezevic from Niksic, St. Dimitrija Bulatovića 12, and "Ceres" SpA, a limited liability company, with its registered office at Via Torrebianca 43, CAP 34122, Trieste, Italy. The request was made in full compliance with the **Instructions on the form and content of a request for approval to concentration** ("Official Gazette of Montenegro", no. 77/05), and it represents a quality documented and analytical basis for passing a decision on on approval, since the assessment of effects, based on Article 29 of the Law on Protection of Competition, determined that this concentration does not significantly prevent, **does not limit or distort competition in the market of Montenegro.**

According to the assessment of the applicant, concentration does not lead to the prevention, restriction, or distortion of competition in the market of Montenegro nor to the creation or strengthening of a dominant position.

Bearing in mind that the **total combined income of the participants in concentration** on the domestic market exceeded 3 million, and 15 million in the world market, in terms of Article 25 of the Law on the Protection of Competition, it is mandatory to submit the request for approving the concentration.

Relevant market

The relevant geographic market in this case is the **territory of Montenegro,** while the relevant product market for the concentration is the **market of wholesale** and distribution of tobacco products.

According to the applicant's statement, tobacco products are purchased from manufacturers in Montenegro, or from importers of foreign brands of cigarettes, and distributed to retailers for final consumption (consumer retail facilities - supermarkets, gas stations, etc.).

According to data submitted by **the Tobacco Agency of Montenegro,** letter no 01-41/2 as of 05.06.2008, **market share** for the first four months of 2008 for wholesalers of tobacco products on the market of Montenegro is as follows:

- »Rokšped« D.O.O. 53%
- »Bar Kod« D.O.O. 33%
- »Knjaz Tobacco« D.O.O. 12,7% i
- »Duvankomerc« D.O.O. 1,3%

Effects of Concentration

According to the applicant, from the standpoint of the interests of the participants, in the concentration by **vertical integration** of companies, a profitable and efficient **distribution** network will be built.

In that sense, Cerere will achieve better quality control, while from the standpoint of the interests of consumers, it may increase the quality of products as well as their control.

Based on the analysis of the request for the approval of the concentration, it is indicated that **it will not lead to significant changes in the structure of the relevant market,** and is resolved as cited above.

LEGAL REMEDY: This decision is final and an administrative dispute cannot be initiated against it before the Administrative Court of Montenegro within 30 days of receiving the decision.[167]

6.4.2. Abuse of dominant position – Examples of the activities of the Commission for protection of competition

Example of the activities of the Directorate for protection of competition, on the solved case of dominant position abuse from Montenegrin practice

DECISION ON ABUSE OF DOMINANT POSITION ON MARKET
by Jugopetrol A.D. Kotor 19.07.2011

Directorate for Competition Protection, in proceeding initiated ex officio in order to determine existence of abuse of dominant position by Jugopetrol A.D. Kotor, with headquarters located on address Trg Mata Petrovića br:2, Kotor, pursuant to the Article 6b, para 1, items 3, 21 of the Law on Protection of Competition (OG RMNE, no 69/05 and 37/07) and Article 196, para 1 of the Law on General Administrative Dispute (OG MNE, no 60/03) passes a Decision[168]:

It is established that Jugopetrol A.D. Kotor, with headquarters located on address Trg Mata Petrovića br:2, Kotor, **has a dominant position** on the relevant market of providing services of the oil and oil products storage by sea on a narrow relevant geographic market of the Port of Bar.

It is established that Jugopetrol A.D. Kotor **performed the action of abuse of dominant position** on the relevant market of providing services of the oil and oil products storage by sea on a narrow relevant geographic market of the Port of Bar, limiting the market to the detriment of potential users of these services.

It is ordered to the company Jugopetrol A.D. Kotor to establish the conditions for doing business with potential customers-tenants of storage capacity, in transparent and clear manner, as the principal mean for transshipment of oil and oil products by sea through the Port of Bar, in a manner, which will:

- Inform all interested companies to date on the conditions of the lease or reservation of stored capacity on an equal and non-discriminating basis;
- Establish business conditions and the provision of storage services, for the capacities that Jugopetrol AD does not use for its business, in an amount that covers operating costs, fixed and variable, and exercise of reasonable profit;
- Continuously inform Directorate for Competition Protection during the next two years as of the day this decision is passed on the application of each interested party by submitting the request, with registered names and headquarters address of the interested company.

[167] Dokuments of the Directorate for Competition Protection, Ministry of Economy, 2010.
[168] Dokuments of the Directorate for Competition Protection, www.uzzk.gov.me

Chapter 7
COMPETITION POLICY IN SERBIA

Slavica Penev
Andreja Marušić

7.1. Competition policy in Serbia in the pre-transition period

7.7.1. The legal framework of competition in former SFR Yugoslavia

A certain degree of competition in some sectors of the economy was present in the period when Serbia was part of former Yugoslavia. Even though the regime was socialist, there were some segments of competition policy reflected in some laws, including the federal ***Law on price control system.*** This law provided the state and local institutions with authority to monitor the price movements and undertake measures to prevent or remove the distortions. This Law strictly prohibited monopolistic agreements, but it did not mention setting the criteria for the formation of prices of public utilities. It also contained a regime for price formation in some other fundamental areas of the economy, such as the production and distribution of oil and oil derivatives, natural gas, coal etc. According to these provisions, enterprises from these sectors were obligated to submit their criteria for price formation to the federal authorities. However, this process was primarily aimed at state regulation of the economy rather than anti-monopolistic legislation.

7.1.2. The legal framework of competition in former FR Yugoslavia (1992-2000)

After the disintegration of SFR Yugoslavia and the establishment of FR Yugoslavia in 1992 (comprised of Serbia and Montenegro), the importance of competition policy was limited for a number of years and was not directly regulated by law.

This area was partially regulated:

(i) by the federal Constitution and the Constitution of member republics (Serbia and Montenegro), which established the basic rules of monopoly prohibition and fair market competition.
(ii) by several laws that indirectly regulated some of the issues related to competition behaviour of economic entities in the single market.

The FR of Yugoslavia Constitution (1992) proclaimed the equality of all economic entities and equal working conditions for everyone, and proclaimed as unconstitutional every act and measure that creates or instigates a monopoly position that in any way constrains the market. ***The Constitution of the Republic of Serbia*** (1990), apart from stipulating the equality of economic entities in greater detail, essentially contained the same legal arrangement.

In addition, several laws contained segments which regulated the behavior of economic entities on the market and they included:

(i) ***Foreign Trade Law*** (1992), which defined unfair competition and defined a number of acts that constituted unfair behaviour,

(ii) ***Trade Law*** (1993) defined loyal competition and the obligation to respect good business practices and consumer protection. This law also defined disloyal competition, speculation and single market restrictions as forms of competition infringement, and

(iii) a series of other laws, including: Law on Contracts and Torts, Law on Commodity Reserves, Law on Statistics, Law on Federal Market Inspection, Company Law, and Law on Foreign Investment. While some of these laws partially sanctioned disloyal market competition in their acts, they were in collision with other laws, such as the Law on Railways and Law on Public Enterprises, which represented the basis for the formation of monopoly.

The first law to directly regulate the rules of market behavior of economic entities was the Federal ***Anti-monopolistic Law from 1996.*** The Law sanctioned the abuse of a dominant and monopolistic position. However, the definitions of anti competitive practices were not sufficiently clear, allowing for discretionary decision-making of the Anti-monopolistic Commission. In addition, the law did not define concentrations as a frequent form of distorting market competition.

7.1.3. The presence of an independent regulator in Serbia (and FR Yugoslavia)

The ***Anti-monopoly Commission*** was established in 1997 and became operational at the federal level in 1998 within the Federal Ministry of Economy and Internal Trade. The law gave the Commission the functions of enforcing the law against the abuse of dominant positions, analyzing the acts of dominant market players, examining the existence of dominance in particular markets and anticompetitive agreements, and issuing decisions about abusive practices and agreements. The work of the Commission was not transparent, since it was not obligated to make information available to the public. The law did not provide the necessary authorities for the Commission to issue restrictive measures, and it included a provision that allowed members of the Commission to also be entrepreneurs.

7.2. Development of competition policy in Serbia during the "mature" stages of transition

7.2.1. The 2005 Competition Law

After the revival of the transition process in Serbia, it was recognized that competition policy was one of the less developed fields. Due to a number of limitations and drawbacks of the Federal Anti-monopolistic Law from 1996, there was a need to adopt new competition legislation in order to:

- Combat and prevent cartels;
- Enhance and foster privatization and economic restructuring;
- Increase the economic freedom of firms and private entrepreneurs;
- Decrease uncertainty for all parties, especially for firms and private entrepreneurs;
- Avoid price control as a mechanism of competition policy, and
- Influence other polices that have an impact on market competitiveness, particularly those that create barriers to entry.

The Law on Protection of Competition was adopted in September 2005, which is the first law based on modern rules for protection of competition (see UNCTAD, 2010). It was based on the models

of Slovenian, Croatian, Polish and French laws on the protection of competition. Overall, the Law on Protection of Competition reached a considerable level of compliance with the EU standards. This Law, as opposed to the Federal Law from 1996, defined all three practices of potential market competition distortion, including:

- prohibited agreements;
- abuse of dominant position;
- concentration causing distortion of competition.

Unlike the Federal Law, the new Law made a clear distinction between horizontal and vertical agreements and defined the provisions that could distort market competition. The abuse of a dominant position was defined in this Law as the use of an already existent dominant position in a way that involves unequal trading, defined by the Law. For the first time, this Law introduces mechanisms for monitoring the concentration of market participants and requires them to report any act of concentration that could lead to the prevention of market distortion or to the restriction of competition. Contrary to the prior Federal Law of 1996, this Law prescribed rigorous fines for violating provisions of the Law, both for legal and natural persons.

The implementation of this Law required the constitution of a competition authority, as well as the enactment of corresponding by-laws.

7.2.2. Commission for the protection of competition according to the Law of 2005

The Law envisages the establishment of the Commission for the protection of competition as an independent and autonomous organization, which is responsible to the National Parliament of the Republic of Serbia for its work and is obliged to submit its annual report of the activities to the National Parliament (Table 7.1).

The Commission drew experience and staff from the Antimonopoly Commission of Yugoslavia. According to this Law, the Commission was an independent and autonomous organization entrusted with public competencies within the scope defined by this Law.

In April 2006, Serbian Parliament appointed five members to the Council of the Commission as a separate body. Upon constituting the Commission, the Antimonopoly Department within the Ministry of Trade, Tourism and Services ceased to exist as such and its personnel were reappointed in the newly established Technical Service of the Commission.

Funds necessary for the Commission's establishing and first year of activities were provided from the budget of the Republic of Serbia (Table 7.1). Further funding necessary for the Commission's activities were provided through the income generated from tax charges for issued services.[169]

According to the law of 2005 the Commission was responsible for (i) determining abuses of monopolistic position, (ii) determining abuses of dominant positions and (iii) concentration control in the market. In the first two instances, the Commission was empowered to act only when market distortion occurred, whereas it acted preventively in the third case. The Commission had a limited capacity and was not able to independently monitor the behavior of market entities, but only acts at request.

[169] Report on the Activities of the Ministry of Trade, Tourism and Services for the period April-June 2006, pg. 7.

7.2.3. Weaknesses of the Competition law from 2005

Although the Law on Protection of Competition of 2005 has been harmonized with the EU competition policy to a great extent and presented significant progress in relation to the Federal Law, its application had shown certain limitations and deficiencies (Figure 7.1).

The basic problems in the implementation of the Law resulted from:

- insufficiently precise definitions of actions that infringe competition, and
- limitations that are primarily related to the Commission's authorizations and the level of its independence and lack of authority to issue penalties for anti-competitive practices.

The provisions of the Law of 2005 regarding the restricted agreements were incomplete, unclear and did not provide a legal basis for certain types of disqualification present in the European competition law. Practice showed that the criteria for the determination of a threshold for concentration control were inadequate because they were set too low and therefore burdened the Commission's work (Figure 7.1).

The implementation of the Law of 2005 pointed to certain problems related to the Commission's work because it provided the Commission with authorizations that were too narrow and an insufficient level of independence. It was within the authority of the Commission to order temporary bans on trade in goods and services or performing of activities, while the competence for imposing fines rested on the Misdemeanor Court.

The procedure of sanctioning of competition infringement was two fold, and required the determination of the infringement by the Commission followed by a disciplinary procedure before the Misdemeanor Court for the purpose of imposing fines for competition infringement (Figure 7.1).

Table 7.1: Competition authority in Serbia

Name of the agency	Commission for the Protection of Competition
Established by law	Law on Protection of Competition 2005
Starting date	2006
Legal status	Independent public institution
Required to submit annual report	Yes, to Parliament
Budget approval required	Yes, Government
Autonomy in decision making	Yes
Power to appoint regulators	Parliament
Power to remove regulators during term	Parliament
Annual report considered by parliamentary committee	Committee on Economy, Regional Development, Trade, Tourism and Energy
Annual report considered at plenary session	Yes

Figure 7.1: Chronology of the competition authorities in Serbia

1996	2000	2005	2006	2009	2010
LEGAL FRAMEWORK	**INSTITUTIONAL FRAMEWORK**	**LEGAL FRAMEWORK**	**INSTITUTIONAL FRAMEWORK**	**LEGAL FRAMEWORK**	**INSTITUTIONAL FRAMEWORK**
Anti Monopoly Law ***Encompasses/defines:*** Abuse of a dominant and monopolistic position ***Weaknesses:*** – Not defined Concentrations, – Poor implementation of the Law	**Anti Monopoly Commission – established** ***Functions:*** Enforcing the law against the abuse of dominant position ***Weaknesses:*** – Lack of transparency – (no obligation to make the information available to the public) – Lack of independence- established as Department within Ministry of Economy and internal Trade (SR Yugoslavia) – Lack of restrictive measures – Potential for conflict of interest due to possibility of the Members of the commission to be entrepreneurs	**Law on Protection of Competition** ***Encompasses/defines:*** – Restrictive agreements – Abuse of dominant position – Concentrations ***Innovations:*** – Prescribes rigorous fines for violating provisions of the law – Mostly harmonized with the EU competition law ***Weaknesses:*** – Incomplete provisions regarding the restricted agreements – Relatively low threshold for mandatory notification of concentrations – Insufficiently precise definitions of actions that infringe competition – Lack of power to impose sanctions	**Commission for Protection of Competition – established** – **Formally independent organization** – **Reports to the parliament** ***Weaknesses:*** – Insufficient level of independence, with too narrow and insufficient authorization (the power of issuing administrative penalties was given to the courts, which depressed the effectiveness of sanctions) – Financial plan has to be sent to the government for approval	**New Law on Protection of Competition Law** ***Encompasses/defines:*** – Restrictive agreements – Abuse of dominant position – Concentrations – Improvements compared to the Law of 2005: – Further progress in the EU harmonization – The new law raised the notification thresholds – Introduced detailed leniency provisions	**Commission for Protection of Competition – enhanced competences** ***Improvements compared to the competences of the Commission from the Law from 2005:*** Commission got the right to impose financial penalties directly onto the undertakings concerned ***Weaknesses:*** Financial plan send to the government for the approval

7.3. The Current 2009 Competition Law

The framework law in the area of competition is Law on Protection of Competition (hereinafter: LPC), enacted in 2009 and published in the Official Gazette of the Republic of Serbia, no. 51/09.

The revision of the law of 2005 was prompted primarily by procedural deficiencies, which negatively affected the effectiveness of the Commission's work.

One of the main drawbacks of the 2005 Law consisted in the Commission's lack of power to sanction undertakings in violation of competition law. Sanctions could be imposed only by the court. The previous legal framework prescribed a two-tier system, with the Commission being in charge of determining that an infringement had taken place, and the misdemeanor courts (traditionally in charge of sanctioning minor offences) actually imposing fines. The new 2009 law provided the Commission with the right to impose financial penalties directly (Figure 7.1).

An additional deficiency of the 2005 Law concerned the relatively low thresholds for mandatory notification of economic concentrations, which flooded the Commission with numerous merger notifications, which in majority of cases did not present any anticompetitive concerns.

The LPC is aligned with the most advanced countries. The reorganization of the legal text has now a clear distinction made between rules of substance and rules of procedure. The new legal framework was completed during 2010 by the adoption of eight by-laws.[170] The LPC has overall been harmonized with EU competition law. Under the Stabilization and Association Agreement (the SAA) with the European Union, Serbia formalized its commitment to harmonizing its legislative framework with that of the EU (Article 72).

The LPC contains provision regulating mergers, abuse of dominant position and restrictive agreements and practices. It sets the structure and authorities of the Commission for the Protection of Competition as well as the rules and procedures under which it operates.

7.3.1. Competition Authority

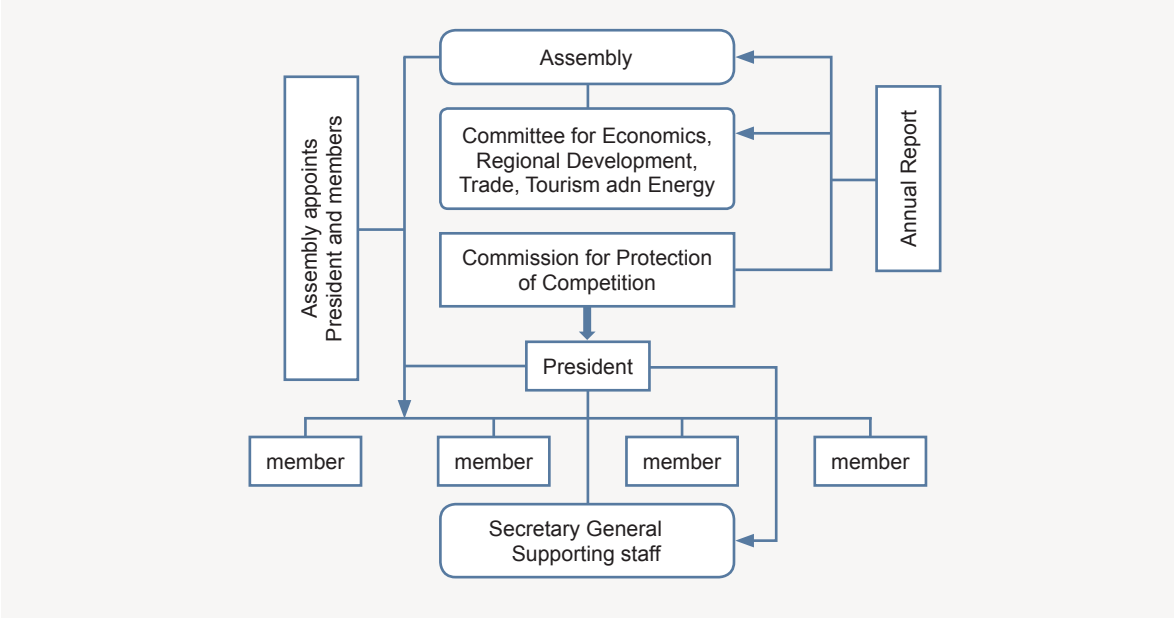
The Commission for Protection of Competition is an independent and autonomous organization that performs public competencies in accordance with the LPC. The Commission has a status as a legal entity. The Commission is accountable for its work to the National Assembly, to which it submits an Annual Report on its activities by the end of February of the current year for the preceding year (Article 20).

The bodies of the Commission are the Council of the Commission (hereinafter: the Council), the President of the Commission. The Council consists of the President of the Commission and four members. The Council passes decisions and acts on the issues within the competence of the Commission, unless it is prescribed differently by the Law and the Statute. The President of the Commission represents and acts on behalf of the Commission, passes decisions and performs other duties in accordance with the Law and the Statute. The Commission has a Technical Service which is managed by Secretary who is appointed by the Council by majority of the votes. The Secretary shall hold a university degree in law or economics, with at least ten years of work experience in relevant field and knowledge of competition protection.

[170] UNCTAD Peer review of Serbian competition law and policy, 2011

Pursuant to Article 23, paragraph 2, of the Law, the National Assembly of the Republic of Serbia elects the President and Council of the Commission for Protection of Competition (Table 7.1).

Figure 7.2: Relations between the Commission for protection of competition and the legislator



The President of the Commission and the members of the Council are elected among eminent experts in the field of law and economics, with at least ten years of relevant working experience, and considerable achievements and practice in relevant area, in particular in the field of competition protection and *Acquis* Communautaire, and with reputation of being objective and impartial persons. The President of the Commission and the members of the Council are elected and relieved by the National Assembly, upon the proposal of the Committee in charge of trade operations. The election of the President of the Commission and the members of the Council is made on the basis of two separate candidate lists that contain at least the same, or at the most a double number of candidates, than the number to be elected.

In accordance with Article 27. the President of the Commission and members of the Council cannot perform any other public function or professional activity during their term of office, i.e. they cannot conduct any other public or private affair with a fee, including consulting and advisory services, with the exception of scientific activities, lecturing at the university and activities concerning specialized training. The President of the Commission and members of the Council cannot be members of bodies of political parties, nor promote program or views of political parties in public.

The President of the Commission and members of the Council are elected for a five year term of office, with a possibility to be re-elected.

Article 25 of the Law prescribes that the Council passes decisions with the majority votes of all members.

7.3.2. Competencies of the Commission for Protection of Competition

The competences of the Commission are defined by Article 21 of the Law.

Functions of the *Commission:*

(i) enforcing the competition law
- deciding on rights and obligations of undertakings,
- imposing administrative measures,
- enacting instructions and guidelines for the implementation of the Law,
- keeping the records on notified agreements, on undertakings holding a dominant position on the market and on concentrations,
- organizing, performing and controlling the implementation of measures taken for the protection of competition,

(ii) supervising markets
- monitoring and analyzing competition conditions in particular markets and sectors,

(iii) counselling the Government on competition rules
- cooperating with State authorities, as well as bodies of territorial autonomy and local self-government for the implementation of the Law,
- defining rules to be passed by the National assembly in the field of protection of competition,
- proposing regulations for the implementation of the Law to the Government,
- submitting opinions on draft rules and existing rules which affect competition on the market to the competent authorities,
- issuing opinions in view of implementation of rules in the field of competition,

(iv) advocacy
- performing activities of competition advocacy, with a view to raise awareness on the need for the protection of competition,

(v) international cooperation
- establishing international cooperation in the field of protection of competition in order to fulfill international obligations in this area, and gather information on protection of competition in other countries.

One of the changes brought about by the new law and long awaited by the Commission was the increase and detailed regulation of its investigatory powers. Under the old law the Commission could conduct searches and confiscate documents and other materials of relevance to the investigation only based on the approval of the court.

The Commission's general power to investigate comprises any action aimed at the provision of evidence which is necessary for establishing a true and complete reasoning of the case under investigation. Article 41(1) enumerates as examples:
- taking of statements of parties and witnesses,
- experts opinion,
- collection of data, documents and other items, and
- performing of inspections and temporary dispossessions.

Inspections are carried out by Authorized officials provided with official identifications in accordance with Article 42. Pursuant to Article 52 the inspectors have the following rights:
- Enter and search business premises, vehicles, land and other premises at the seat of the party and other places where the party or third party perform their business or other activities;

- Inspect business and other documents, regardless of the manner in which these documents are stocked;
- Confiscate, photocopy or scan business documentation;
- Seal all business premises and business documents for the time of the investigation;
- Take oral or written statements from the representative of the party or its employees, as well as documents on the facts which are the subject of the investigation.

7.3.3. Restrictive Agreements and Practices

Restrictive agreements and practices are defined in the same way as in Article 101 of the TFEU.

Restrictive agreements are defined as agreements between undertakings the object or effect of which is to considerably restrict, distort or prevent competition on the territory of the Republic of Serbia.

Restrictive agreements could be contracts, single provisions in contracts, tacit or explicit collusion, concerted practices, as well as decisions of associations of undertakings, in particular those which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- apply dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- share markets or sources of supply.

Restrictive agreements are prohibited and void, unless exempted from prohibition pursuant to this Law. Restrictive agreements may be exempted from prohibition if they contribute to improvement of the production and distribution i.e. facilitate a technical or economic progress, while allowing consumers a fair share of resulting benefit, under condition they do not impose on undertakings concerned restrictions which are not indispensable for achieving the objective of the agreement, i.e. do not eliminate competition in a relevant market or its substantial part. At the request of parties to the restrictive agreement, the Commission may decide on exemption of particular restrictive agreement from prohibition (hereinafter: individual exemption).

The LPC also regulates **block exemptions,** if the conditions for individual exemptions are fulfilled, as well as other special conditions pertaining to the kind, contents of the agreement and its duration.

The Law provides an exemption for **agreements of minor importance,** when the joint market share of the parties to the agreement and undertakings under their control on the market does not exceed the threshold of 10% where the agreement is horizontal or the threshold of 15% where the agreement is vertical. In case where it is not possible to classify the agreement as either horizontal or vertical, the 10% threshold shall apply. 30% of the market share, in the case of agreements with similar effects on the market concluded by different undertakings, if individual market share of each undertaking does not exceed 5% on each particular market, on which the effects of the agreement are manifested. Agreements of minor importance are allowed, unless the objective of a horizontal agreement is to fix prices or limit production or sale, or share markets or sources of supply, as well as if the objective of a vertical agreement is to fix prices or share markets (Table 7.2).

7.3.4. Dominant Position

The abuse of a dominant position under article 16. is defined as practices which: (i) directly or indirectly impose unfair purchase or selling price or other unfair trading conditions; (ii) limit production, markets or technical development; (iii) apply dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage; (iv) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. The definition is a literal translation of article 102 of the TFEU.

An undertaking is presumed to have a dominant position, if its market share on a relevant market is equal to or exceeds 40% (Table 7.2).

7.3.5. Merger Thresholds

The concentration of undertakings shall be deemed to arise, according to Article 17. in following cases: (i) merger and other status changes leading to acquisition of undertaking, pursuant to the Law stipulating the position of companies; (ii) acquisition by one or more undertakings of direct or indirect control over other undertaking or undertakings, within the meaning of Article 5, paragraph 2 of this Law; (iii) joint venture by two or more undertakings aimed at setting up of a new undertaking or acquiring joint control, within the meaning of Article 5, paragraph 2 of this Law, over an existing undertaking performing its operations on a long-term basis and with all functions of an autonomous undertaking. Two or more transactions between the same undertakings, conducted within the period shorter than two years, shall be deemed to constitute one concentration, whereas the day of its occurrence shall be the day on which the last transaction was effected.

A concentration must be notified to the Commission in case: (i) aggregate annual worldwide turnover of all parties to the concentration in the preceding financial year is above €100 million, whereby at least one party's turnover realized on the market of the Republic of Serbia exceeds €10 million; (ii) aggregate annual turnover of at least two parties to the concentration realized on the market of the Republic of Serbia is above €20 million in the preceding financial year, whereby at least two parties' annual turnover realized on the market of the Republic of Serbia exceeds €1 million each, in the same period. On calculation of the aggregate annual turnover, the income that undertakings concerned realize between themselves will not be included. Concentration made through a company bid pursuant to regulations on takeover of shareholding companies, must be notified, even if the above prescribed conditions have not been met (Table 7.2).

After having learned that a concentration has been implemented, the Commission may conduct investigation, if it finds that the aggregate market share of the parties to the concentration realized on the market of the Republic of Serbia is at least 40%, or if it reasonably presumes that the relevant concentration does not comply with other conditions prescribed by the law (Table 7.2).

Table 7.2: Key Areas of Competition Policy in Serbia

Concentrations		Dominant position/monopoly		Restrictive agreements: Cartel prohibition	
Merger Thresholds	Fees - merger control	Individual dominant position	Collective dominant position	Max Sanctions on Companies	Leniency Policy
1. Worldwide turnover in the preceding year above EUR 100 million, provided that at least one undertaking's turnover realized on the market of Serbia exceeds €10 million	Filing fee - No	If the market share of individual undertaking on the relevant market exceeds 40%.	If the market share of two or more undertakings on the relevant market is above 60%.	10% of the total annual turnover in the last business year	Yes
2. All undertakings concerned have a local Serbian turnover exceeding EUR 20 million, provided that at least two undertakings have a local Serbian turnover exceeding €1 million each	Clearance fee - 0.03% of the total annual income realized by the entities that are merging, to a maximum of 25.000 EUR				

7.3.6. Fees and Penalties

The fees that the Commission charges in merger proceedings are significant. They are set as a percentage of the total annual income realized by the entities that are merging (0.03%) could amount to a maximum of 25.000,00 Euro in the case of issuance of a permission to merge, while in inquiry proceedings it is 0.07% and up to a maximum of 50.000,00 Euro (Table 7.2).

When it comes to fines, **the process of their** determination is regulated by the LPC, an implementing regulation, and the Commission's Guidelines on Fines. Fines are tied to the total turnover, not income realized on the relevant market or from the infringing agreement.

The fine for infringement of the competition may amount to up to 10% of the total annual turnover of the previous business year (Table 7.2).

The Law introduces a new concept which is a statute of limitations for fines. Fines may not be imposed or charged three years from the day the infringement took place. All the actors in the proceeding, i.e. the Commission as well as the courts, must be very efficient and quick. This time deadline however also creates the incentives of the party involved to delay proceedings, in particular the incentive to raise an appeal against the Commission's decision in front of the Administrative Court. The Administrative Court does have a deadline of two months to issue a decision based on the appeal, but the practice is that it reverts the decision back to the Commission, never deciding on the substance and with a not very elaborate statement of reasons. Once the Commission issues a new decision, the party involved can place a new appeal. The party involved may also opt for extraordinary measures against the final decision of the Administrative Court before the Supreme

Court of Cassation. Neither of the above decisions of the courts suspends the Commissions decision, unless it is annulled in the final instance, and therefore the party involved would have to pay the fine proclaimed by the Commission upon issuance of the decision of the Commission. However, the Commission does allow for postponement of the payment upon request and justification of the party involved, if the party has initiated administrative proceedings before the court.

For procedural infringements, the Commission can fine a company from between EUR 500 to EUR 5,000 for each day that they violate a procedural decision, and up to 10% of the total annual turnover realized in the previous business year. The statute of limitations for procedural penalties is one year as of the moment that the violation has been committed.

7.3.7. Leniency

The law clarifies the leniency policy. Under the 2009 Law, a company should be automatically granted leniency if it notifies the prohibited agreement to the Commission or provides evidence that an infringement has occurred, should the Commission not have been aware of the infringement or where it did not have enough evidence to initiate proceedings. The company must not be an instigator of the prohibited agreement. If an undertaking does not fulfill the requirements for leniency, the fine may be reduced should it provide evidence which was not available to the Commission and which enables the closure of the case.

While the Commission did take advantage of the leniency policy in several instances, its track record is less than desirable. When the current Competition Law was supposed to come to force, many companies applied for leniency, since the criteria for clemency under the 2009 Law were harsher than in the previous regime. The Commission ignored or did not act in any manner whatsoever to the great majority of such pleas and in a few cases, it even treated the leniency applicants unfavorably through the retroactive application of the law. This led to protracted proceedings and damaged the Commission's reputation somewhat, making it seem capricious and unfair. Many companies are now reluctant to apply for leniency, expecting that the authority ought to first restore its credibility.[171]

7.3.8. Judicial Oversight

The 2009 law prescribes that the decisions of the Commission for Protection of Competition issued in an administrative procedure are final. A legal action on instituting an administrative dispute before the Administrative Court may be brought against such decisions of the Commission for Protection of Competition. The Administrative Court can remand the decision to the Commission, if it finds the appeal to be founded, and this happens almost with no exception in all cases of appeal. The Administrative Court should issue its decision in the term of two months, but this deadline is rarely respected in practice. Once the Commission issues a new decision, the party may place a new appeal on such decision. An extraordinary legal remedy may be placed against the decision of the Administrative Court to the Supreme Court of Cassation.

Until relatively recently, due to procedural errors, the courts have annulled all of the decisions of the Commission. This had not been the case in several cases in 2011 and 2012, however, as the court had upheld a number of decisions. It is noticeable, however, that the Administrative Court's decisions often lack a detailed statement of reasons and proper economic and legal analysis of each case, making the decisions seem arbitrary and ill-considered (both to the Commission and the infringing party). The Supreme Court of Cassation sanctioned such practice in a pivotal recent case.[172]

171 Focus on Competition, Karanovic Nikolic, 2012, pg.13
172 Focus on Competition, Karanovic Nikolic, 2012.

7.4. Overview of the activities of the Commission for protection of competition

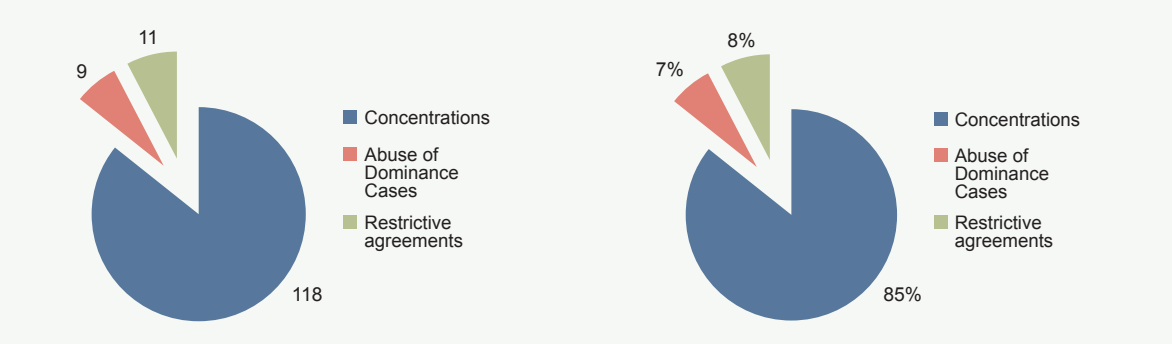
The main functions of the Commission are related to the enforcement of the Law on protection of competition.

According to its annual report for 2012, mergers/concentrations were by far the predominant activity of the Serbian Competition Commission. It opened 118 merger cases (85% of total cases opened by the Commission), and issued 105 merger clearances (90% of total decisions taken) (Figure 7.3, 7.4, 7.5. and 7.6).

The number of the opened restrictive agreements was 11 (8%), 7 decisions were taken in 2012 (8%), while 4 of them were transferred to the next year (Figure 7.3, 7.4, 7.5. and 7.6).

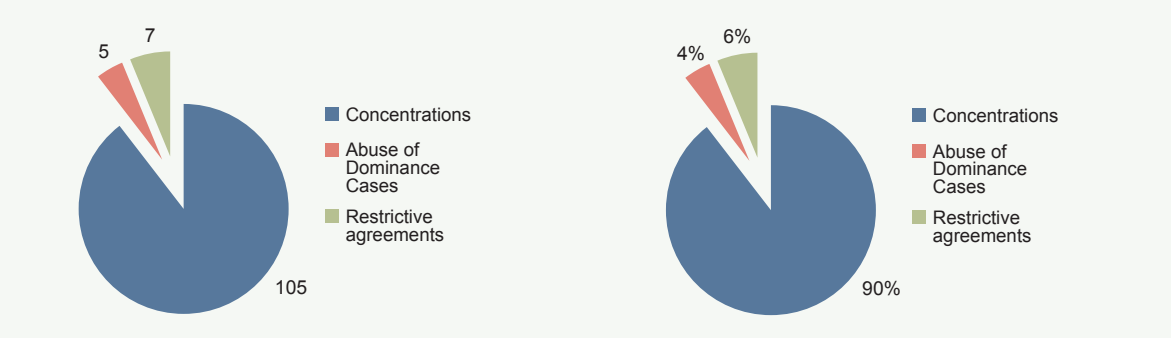
The number of opened cases of the abuse of dominant position was 9 (7%), five decisions were taken in 2012, while 4 of them were transferred to the next year (Figure 7.3, 7.4, 7.5. and 7.6).

Figure 7.3. and 7.4: Activities of Serbian Commission for protection of competition, cases opened, 2012



Source: Annual report of Serbian Commission for protection of competition, 2012.

Figure 7.5 and 7.6: Activities of Serbian Commission for protection of competition, decisions taken, 2012

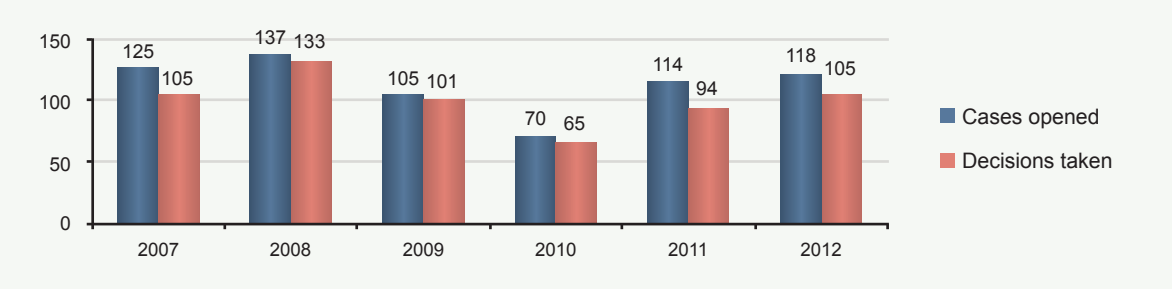


Source: Annual report of Serbian Commission for protection of competition, 2012.

7.4.1. Concentrations

In the last 5 years, the Commission had an average of about 110 merger cases per year. Their number was radically reduced in 2010, partly as a result of the increased thresholds introduced by the new LPC which came into force in November 2010, but in the next two years their number increased, amounted 114 opened cases in 2011 and 118 in 2012. In more than 2/3 of the cases were involved foreign companies (Figure 7.7).

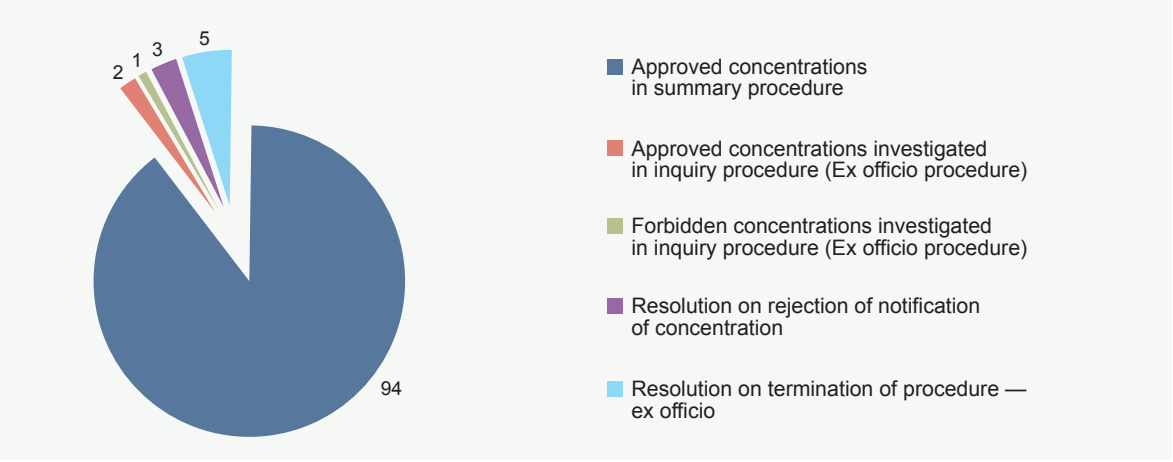
Figure 7.7: Concentrations in Serbia, 2007-2012



Source: Annual report of Serbian Commission for protection of competition, various years.

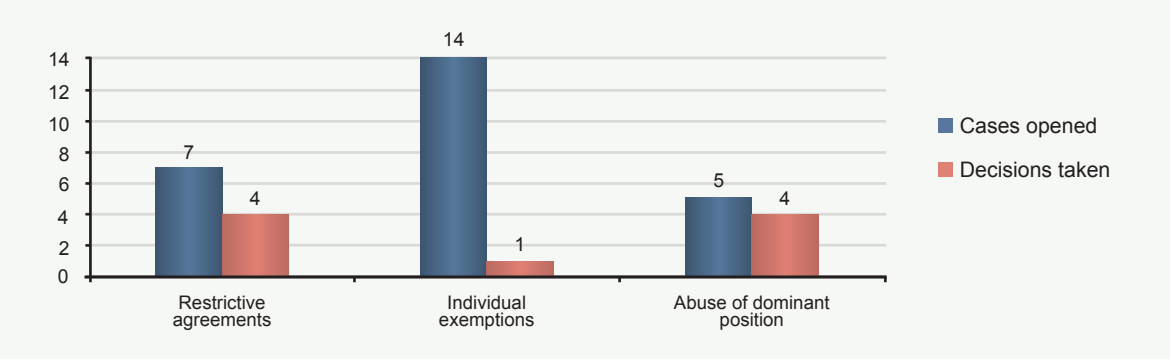
In 2012, 94 cases were finalized by issuing decisions to approve the implementation of concentration (Approved concentrations in summary procedure), while 12 were transferred to the next year. Two investigated concentrations were approved in inquiry procedure (Ex officio procedures) while one was transferred to the next year, One forbidden concentration was investigated in inquiry procedure (Ex officio procedure). Eight procedures were completed on the basis of resolution, of which three resolutions on rejection of notification of concentration and five resolutions on termination of procedure – ex officio (Figure 7.8 and 7.9).

Figure 7.8: Structure of concentrations: finalized – decisions taken, 2012



Source: Annual report of Serbian Commission for protection of competition for 2012.

Figure 7.9: Structure of Concentrations – decisions taken and procedures in course, 2012



Source: Annual report of Serbian Commission for protection of competition for 2012.

Box 7.1: Concentrations in Investigation Procedures: Approved concentration: Delhaize Group – Delta Maxi

In **Ex Officio** investigation, **the Commission approved the concentration of market participants** resulting from:

- **acquisition of direct control** by the company "Lion Retail Holding" S.a.r.l Luxembourg, based in Luxembourg, a member of Delhaize Group SA / NV, with head-office in Belgium, over the company Delta Maxi d.o.o, located in Belgrade, and
- **indirect control by the following companies:** Pekabeta ad located in Belgrade, C Market a.d. located in Belgrade, TP Srbija a.d. located in Kragujevac, Zvezdara a.d. TP Stadel d.o.o located in Kragujevac, Bel Investment Property d.o.o. located in Belgrade.

During the **ex officio procedure,** the applicant, the target company, and major competitors were requested to submit relevant data and argumentation. In addition, Commission used data made available by the (i) Tax Administration of the Republic of Serbia, (ii) Serbian Companies Registry Agency, and (iii) the Statistical Office of Serbia.

The Commission assessed that **subject concentration** represents ***a merging of companies that operate at the same level of production chain, but in different geographic markets.***

As one of the crucial fact that the Commission had in mind when making decisions in the relevant administrative matter, is that ***the implementation of this concentration does not result in cumulative market share of participants,*** as the acquirer of control has not been active in the determined relevant market up to date.

This concentration essentially represents the situation of t***aking over the current domestic company and its overall business capacity,*** which at the time of concentration, or taking control from Delhaize Group, will take position and market share as the target company held, before the creation of this concentration.

The subject concentration displays such characteristics, if assessed only as concentration of companies operating on the same level of production. However, the Commission had in mind the fact that the target group of companies until now operated as part of a ***vertically integrated Delta Group in Serbia,*** and the market position of the target group of companies in the relevant retail market to a considerable extent had been conditioned (and "privileged") by this fact as well. The implementation of subject concentration eliminates any potential negative effects that might arise from the relationship at different levels of production or distribution.

The Commission concluded that this concentration will not cause any adverse effects, as the acquirer of control had no presence in Serbia so far, and is not vertically integrated company in Serbia, and the allegations in the report show that there is no intention of investment, or any intention to do so. On the contrary, if examined on a wider scale - the macro effects of this concentration, which go beyond the consequences of its implementation related to the relevant market and the balance of power as participants active on it, the Commission considers that is a realistic expectation that Delhaize Group induce serious business momentum with a number of domestic producers of this group and suppliers.

This, certainly, does not apply only and exclusively to the supply of facilities within the national territory, but also for the supply of a large number of retail outlets owned by the controller of the future target group of companies, which are outside Serbia borders.

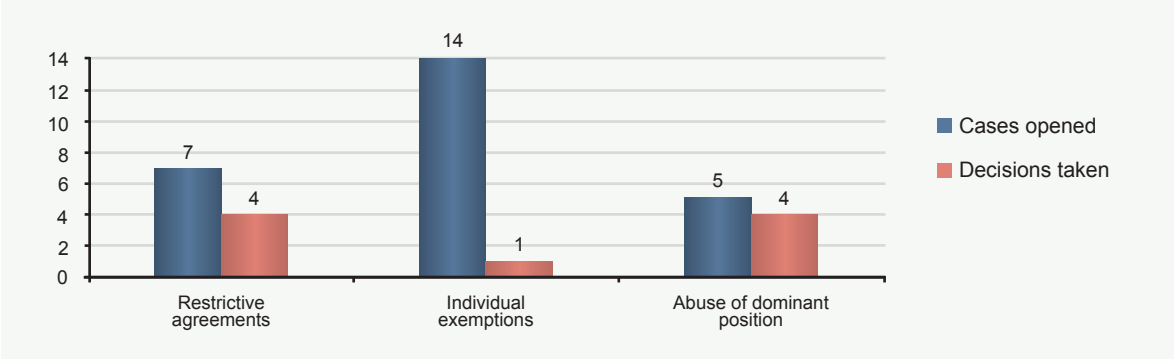
The effects of concentration in relation to consumers and benefits for them, i.e. direct result from the implementation of the concentration, are related to the experience and undoubtedly the best practices of multinational specialist retailer operating in this business for over 140 years. The Commission based its decision on the approval of the concentration based on the fact of significant changes in the structure of the relevant markets that have occurred over the past few years, as well as the current ones - the changes are reflected in the entry of new competitors in the relevant market in 2011. It was concluded that these trends confirm the view that there is no existence of any alarming signals that indicate the existence of entry barriers for access to this market.

Source: KZK Serbia, Annual Report 2011, pg.50.

7.4.2. Infringements of competition/anticompetitive practices

Infringements of competition encompass encompass: (i) *restrictive agreements* (article 10 LPC), (ii) *individual agreements exempted from prohibition* (article 11 and 12 LPC), and (iii) *abuse of dominant position* (article 16 LPC).

Figure 7.10: Anticompetitive practices, 2012

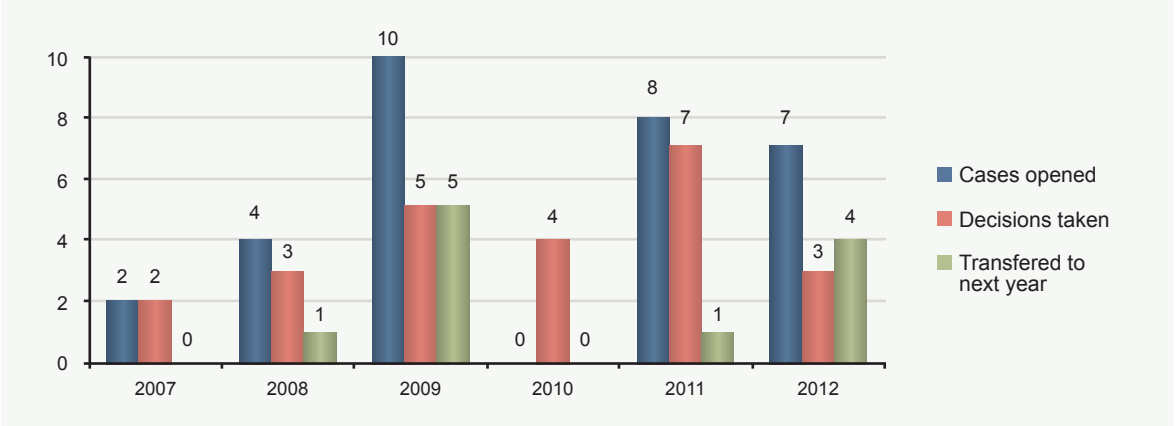


Source: Annual report of the Commission for protection of competition, 2012.

In 2012, 26 cases of anticompetitive practices were decided, while nine were transferred to the next year. The number of the opened restrictive agreements was 7 (5%), but only 3 decisions were taken in 2012 (3%), while 4 of them were transferred to the next year (Figure 7.3, 7.4, 7.5. and 7.6). Fourteen individual agreements were exempted from prohibition, as the Commission accepted the claim that they contribute to improvement of the production and distribution, while only one has been transferred to the next year.

Restrictive agreements. The number of open cases related to restrictive agreements varied from only 2 opened cases in 2007, to 10 open cases in 2009. The biggest number of the taken decisions was in 2011 (7), while only two decisions were taken in 2007 (Figure 7.11).

Figure 7.11: Restrictive agreements in Serbia, 2007-2012



Source: Annual report of the Commission for protection of competition, various years.

Box 7.2: Restrictive agreement – Decision on the application of a unique price for taxi services

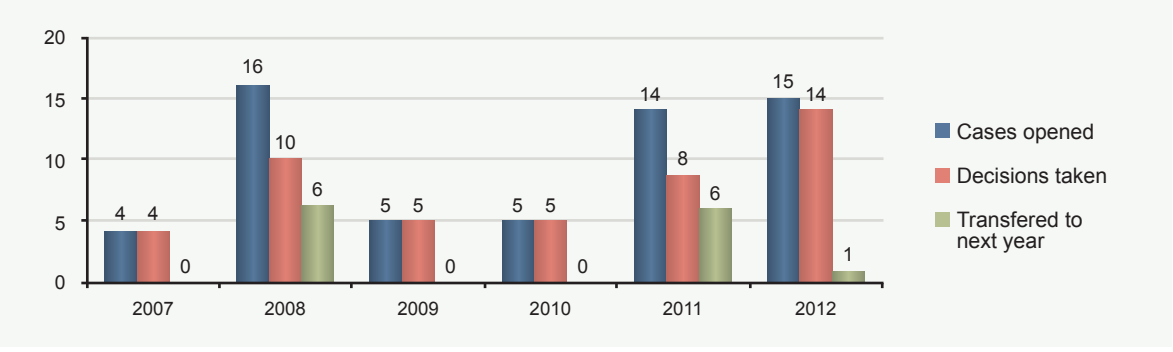
Several taxi associations (BEOTAKSI, BEOGRADSKI TAKSI, LUX TAXI etc) agreed on a Decision of the application of an unique price for taxi services. The Competition Authority determined that such decision represents a restrictive agreement, which infringes competition on the market of taxi services in Belgrade. The final decision issued by the Competition Authority, prescribed a prohibition for any future activities which could infringe competition based on the above mentioned decision.

Upon appeal, the decision was annulled by the court, but upon removal of certain administrative flaws, the Competition Authority reissued such decision. The associations of taxi drivers resubmitted an appeal, and the Administrative Court issued a decision rejecting the appeal of the associations of taxi drivers, whereby the decision of the Competition Authority determining the infringement of competition (restrictive agreement) became final.

Source: Commission for protection of competition, Serbia, Annual Report 2011, pg.16

Number of individual agreements exempted from prohibition varied from four opened cases in 2007, to 16 open cases in 2008. The biggest number of the taken decisions was in 2012 (14), while this number in 2007 was only four (Figure 7.12).

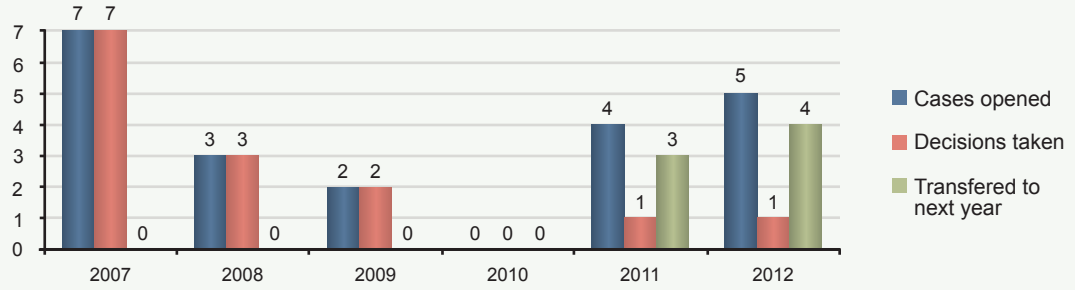
Figure 7.12: Individual agreements exempted from prohibition in Serbia, 2007-2012



Source: Annual report of the Commission for protection of competition, various years.

Abuse of dominant position. Number of opened cases of the abuse of dominant position varied from zero opened cases in 2010, to seven open cases in 2007. The biggest number of the taken decisions was in 2007 (7), while this number in 2010 was zero (Figure 7.13).

Figure 7.13: Abuse of dominant position in Serbia, 2007-2012



Source: Annual report of the Commission for protection of competition, various years.

Box 7.3: Abuse of Dominant Position: *Frikom AD, Belgrade*

The Competition Authority determined that Frikom has abused its dominant position on the market of wholesale of industrial ice cream on the territory of the Republic of Serbia, by inserting in its formular agreements that it concluded with the buyers:

- An obligation of exclusive sale of the Frikom products, with prohibition of sale of competition products;
- A elaborate system of incentives of the retail sellers, influencing the business decisions of the buyers to select Frikom as their only supplier of the relevant product; introduced an obligation of the buyers to pay unreasonably high damages in case of non compliance with the contractual obligations, including the exclusivity provisions;
- Provisions with unreasonably short terms in which Frikom could realize its right of unilateral termination of the contract if the buyer/retail seller does not comply with his contractual obligations, including the exclusivity provisions;
- Provisions related to different conditions for the same operations with different buyers, in particular with respect to the payment terms, return of the goods in case of bad sales and before the expiration date, as well as terms for termination of the contract.

The Competition Authority determined that the above represented an infringement of competition with the objective to:

- Weaken and squeeze out existing competitors,
- Create significant barriers for entry on the market of new competitors,
- Reinforce its own dominant position on the market,

Which had as its impact a significant limitation and infringement of competition on the relevant market.

The Competition Authority issued a decision mandating the company to pay a penalty of 4% of its annual turnover realized in 2009, amounting to 301.950.520,00 RSD (app. 400.000 Euro). In addition the Competition Authority issued measures of removal of infringement of competition and terms in which Frikom was to comply with such decision. Frikom appealed the decision. The Administrative Court issued a decision rejecting the appeal of Frikom and confirming the decision of the Competition Authority that determined the abuse of dominant position.

Source: Commission for protection of competition, Serbia, Annual Report 2012, str.14

7.5. Supervisory function of the National Assembly of the Republic of Serbia and its Working bodies in terms of consideration of reports submitted by independent state authorities and bodies[174]

One of the main segments of the supervisory role of the National Assembly is supervision of independent state authorities, organizations and bodies (hereinafter: regulatory bodies). The National Assembly appoints the officials – representatives of these regulatory bodies. These regulatory bodies are required to submit to the National Assembly and its working bodies its operation and progress reports. By examination of these reports the National Assembly and its working bodies (competent committees) get acquainted with the possible problems in implementation of legislation and by-laws, including failures and unlawful exercise of power on the part of some executive authorities and this is, therefore, one of the significant instruments used by the National Assembly in order to control the executive authorities' operation.

The annual operation reports of the regulatory bodies supervised by the National Assembly are submitted in accordance with the Law on the National Assembly and its Rules of Procedure. This obligation is also prescribed by the particular laws which established the regulatory bodies which are supervised by the National Assembly. In the case of the competition authority – the Commission for Protection of Competition, its obligation to submit an annual report of operation to the National Assembly is prescribed by the Law on the Protection of Competition.

The National Assembly's competences where, for the first time, precisely defined by the Law on the National Assembly, which came into effect on 27th February 2010. The functions of the National Assembly are: representative, legislative, supervisory and electoral. Article 27 of the Law stipulates that committees shall, within their competence, monitor the operation of the Government and other authorities and bodies, whose work is supervised by the National Assembly according to the Constitution and law, and to consider reports of authorities, organizations and bodies submitted to the National Assembly as provided by the law. It is stipulated by Article 58 of the Law that the National Assembly shall consider reports submitted by the state authorities, organizations and bodies as specified by the law, while the manner of maintaining relations between the National Assembly and other state authorities, organizations and bodies shall be regulated by the National Assembly's Rules of Procedure. The Law on the National Assembly thus prescribes the consideration of the reports at the competent committee session and at the National Assembly session not only as a possibility, but as an obligation.

The Rules of Procedure, that became effective as of 5th August 2010, and amended in 2011, provide detailed defined procedure for consideration of reports submitted by independent state authorities, organizations and bodies. By virtue of Articles 237 - 241 of the National Assembly's Rules of Procedure the procedure of consideration of the reports submitted by the state authorities, organizations and bodies is regulated in detail.

The above represents a significant improvement in respect to the previous Rules of Procedure of the National Assembly, which did not prescribe the procedure of consideration of the reports submitted by the regulatory bodies.

174 The text is based on the unpublished material prepared for the WFD project: Competition policy in Western Balkan countries, by Mirjana Radakovic, Assistant Secretary General of the Serbian Parliament.

The Rules of Procedure of the National Assembly prescribe detailed steps in consideration and approval of the reports submitted by regulatory bodies which are supervised, as follows.

After the National Assembly receives a report, the Assembly Speaker forwards it to all the MPs and the competent committee. The committee in charge of the issue shall have the obligation to consider the report within 30 days after its submission to the National Assembly. The representative of the state authority, organization, or a body the report of which is under consideration shall be invited to attend the session. Following consideration of the report, the committee files a report to the National Assembly, containing the *proposed conclusion or recommendation.*

The content of the conclusion proposal is defined by Article 237 of the National Assembly's Rules. The competent committee may propose to the National Assembly the following:

- to approve the report of the supervised regulatory body, in cases it deems the report is a comprehensive in form and substance,
- to mandate the Government and supervised regulatory body to undertake appropriate measures and activities from the realm of powers vested in them,
- to require from the supervised regulatory body to revise the report,

By virtue of Article 239 of the National Assembly's Rules of Procedure, it is stipulated that National Assembly shall consider, at its first following session, the report submitted by the regulatory body and the competent committee's report with the proposed conclusion.

The representative of the supervised regulatory body shall be invited to attend the National Assembly session. Following the closure of the debate, the National Assembly shall adopt the conclusion, or recommendation, by majority vote of MPs at the session attended by the majority of MPs.

The role of the competent parliamentary committee shall be to supervise the regulatory body's submission of report, and shall inform the National Assembly in case the supervised body fails to submit the report within the timeframe envisaged by the law, or at the committee's request. In that case the committee shall propose the measures to the National Assembly, aimed at determining the accountability of the official of the supervised body. The competent committee may require the supervised regulatory body to provide information and data from their competence.

Since adoption of the new Rules of Procedure, the National Assembly has considered the reports of supervised regulatory bodies at sessions held in July 2011. Upon a competent committees' proposal, the National Assembly has adopted conclusions with recommendations and measures related to the reports submitted to by the State Audit Institution, Ombudsman, Commissioner for Protection of Equality, Commissioner for Information of Public Importance and Personal Data Protection, and Anticorruption Agency, concerning their operation in 2010.

The reports submitted by Commission on the protection of competition are considered by the Committee on Economics, Regional Development, Trade, Tourism and Energy. This committee, as Article 54 of the National Assembly's Rules of Procedure provides, also considers draft laws, general acts and other issues from the domain of market operation, prevention of monopolistic activity and unfair competition.

Chapter 8
COMPETITION POLICY IN KOSOVO*

Ahmet Mancellari
Dorarta Hyseni

8.1. Introduction

Competition, as a core feature of a market economy, started to become important for Kosovo* (as for all other former socialist economies) only when the country entered the road of transition from a centrally planned economy in the former SFR Yugoslavia, which it was part of, towards a market oriented one. The history of Kosovo*'s transition is a specific one, passing through the period 1999-2008 under the administration of UNMIK (and provisional institutions of self-government), and from 2008 onwards, under the administration of Kosovo* Authorities.

The former system was generally characterized, among other features, by a high degree of economic concentration, a state of collective ownership, absence of an effective price mechanism, lack of administrative autonomy for economic entities, and an insufficient framework setting up transparent and common rules[174], although in former SFR Yugoslavia there was more space for market transactions. Therefore, the transition process had to address all these issues by building a competitive economy through the respective structural reforms, consisting of price liberalization and trade liberalization, and also privatization (with different schemes for different sectors of the economy) as priorities in the agenda, followed by financial sector reform and liberalization in the utilities and infrastructure sectors, and accompanied by the respective pro-market legislation in a large number of legislative areas. Within the pro-market legislative framework in Kosovo*, like in other countries in transition, an important place belongs to the legislation related to competition. The first law on competition was approved in September 2004,[175] which was then followed by the new law on the protection of competition of October 2010.[176]

The experience of transition in Kosovo*, like in the other countries of the region, shows that ***the more progress is made in the transition (structural) reforms, the more important competition law and competition policy becomes.*** The reforms become more complex, and so does the functioning mechanism of the market economy. So may also become the behavior of the market players supplying goods and services.

174 OECD-Stability Pact (2003): Competition Law and Policy in South East Europe
175 Law no. 2004/36 "On Competition", approved by the United Nations Interim Administration Mission in Kosovo*, and the Assembly of Kosovo*, September 8, 2004 (UNMIK Regulation no. 2004/44, date 29 October 2004)
176 Law No. 03/L-229 "On the Protection of Competition", approved by the Assembly of the Republic of Kosovo*, October 7, 2010. (Official Gazette no. 88/25 November 2010).

8.2. EU competition policy influence and transposition in the Kosovo competition policy

The EU rules on competition are applied in a zone larger than the EU itself. In 1994 entered into force the European Economic Area Agreement (EEA) between the EU and Member States and the EFTA (European Free Trade Area). The EEA consists of the Members States of the EU and Norway, Iceland and Liechtenstein; Switzerland remained outside because of the negative result of the referendum. Articles 101, 102, 106 and 107 TFEU were incorporated in EEA competition rules.

The area of EU competition rules then increased again, based on the 'European Agreements' between the EU and the Members States and the countries of Central and Eastern Europe that became members of the EU between 2004 and 2006. Euro-Mediterranean Association Agreements[177] also contain provisions based on EU competition rules.

The EU standards in competition policy are particularly and increasingly important for the market institutional reforms in Kosovo* (and other Western Balkans (WB) countries), since the country is practically and now also formally on the road of integration in the EU. The approximation of competition policy (legislation and its implementation) is a dynamic process, very important for (i) having a functional free market in the country; (ii) fulfilling the conditions of the Stabilization and Association Agreement with the EU, and (iii) preparing the country to fully apply EU legislation in the field before and when EU membership is acquired.

The Stabilization and Association Process between the EU and Members States and the WB countries[178] contributes to the extension of the area where EU competition rules apply. WB countries, including Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, and Serbia are involved in a process of integration in the EU through the Stabilization and Association Agreements (SAA) between the EU and Members States and each of these countries individually. Croatia is expected to get full membership in the EU in July 2013 while Macedonia, Montenegro, and Serbia already have the status of a candidate country. The EU competition rules are incorporated as obligations for the WB countries in the respective SAAs.

Kosovo* is already involved in the Stabilisation and Association Process Dialogue with the EU Commission (since March 2011) and in February 2012 the Council required from the EU Commission 'to launch the feasibility study for a Stabilisation and Association Agreement (SAA) between the European Union and Kosovo*' which is already completed and communicated by the Commission to the European Council.[179] Meanwhile, the EU is officially present in Kosovo* with an enhanced role. Kosovo*, on the other hand, has gradually strengthened its structures dealing with the European integration process by establishing a National Council for EU integration, chaired by the President, and by the important role played by the Ministry of European Integration in leading a task force for European integration. An important role is also played by the parliamentary Commission for EU Integration.[180]

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177 See Communication from the Commission to the Parliament and the Council: Barcelona process: Union for the Mediterranean COM (2008) 319 final, 20 May 2008 (www.ec.europa.eu/euromed/index_en.htm).

178 Stabilization and Association Process with the Western Balkans countries started with Thessaloniki Summit of 21.06.2003.

179 Communication from the Commission to the European Parliament and the Council 'On the Feasibility Study for a Stabilisation and Association Agreement between the European Union and Kosovo*, Brussels, 10.10.2012, COM (2012) 602 final.

180 See also: Penev, S. 2012, Economic and European Prospectives of Western Balkan Countries, Westminster Foundation for Democracy, Western Balkans Parliamentary network of committees for economy, finance and budget and Institute of Economic Sciences, 2012.

In the Commission Staff Working Document accompanying the document "Commission Communication on a Feasibility Study for a SAA between the European Union and Kosovo* of October 2012,[181] a number of steps are suggested as regards to legal improvements in the field of competition and state aid, also related to institutional and administrative capacity for the implementation of the law. Attention is drawn to the obligations arising from the SAA on the implementation of the main components for the protection and promotion of competition policy, such as prohibited agreements; abuse of dominant position, and any state aid which distorts or threatens to distort competition. Special attention is paid to public enterprises and enterprises with special rights, and public procurement and transparency in the area of state (public) aid by establishing comprehensive inventories of aid schemes and by reporting to the European Commission annually.

8.3. Competition policy in Kosovo

The three dimensions of competition policy: competition law (legislation), the institutional capacities and power in law enforcement, and competition policy effectiveness and approximation with the EU *acquis*, are addressed as follows.

8.3.1. Competition law chronology

The law on competition in force in Kosovo* is Law No. 03/L-229 "On Protection of Competition", of October 7, 2010 (hereinafter: Law 2010). This law was preceded by Law "On Competition", No 2004/36 (hereinafter: Law 2004). A short description of main provisions of the two laws is followed by a comparison of their main features by emphasizing the steps needed for further approximation of competition legislation with the EU *acquis*.

8.3.1.1. Law 2004 – main features

With the support of UNMIK[182] a law on competition was drafted and then approved in the Kosovo* Assembly in 2004. The aim of this law was 'to bring the regulation of anti-competitive practices in Kosovo* into compliance with European Union requirements and internationally recognized best standards and practices.[183]

Some main characteristics of Law 2004:

(i) The Law covers some main directions of competition policy, including prohibition of acts, decisions, concerted practices and agreements (horizontal and vertical ones) that prevent or distort competition; prohibition of abuse of dominant position; competition advocacy and competition culture. However, concentration - one of main pillars of competition protection policy – is not covered.

(ii) Cases of exemptions from prohibition are described in the Law, which are based on the principles of economic efficiency, public benefits and protection of competition. However, 'low value agreements' and 'en block exemptions' are not treated in the law, while 'mergers and acquisitions' are exempted although they feed concentrations.

(iii) As regards dominant position, a more complete explanation is required, referring not only the market position but also the openness of market to other companies entering, and the reactive power of customers.

181 SWD(2012) 339 final/2, Brussels, 23.10.2012
182 UNMIK: United Nations Interim Administration Mission in Kosovo*.
183 Law No. 2004/36 'On Competition' dated 31 July

(iv) As stipulated by Law 2004, the institution responsible for the protection and promotion of competition is the KCC, a public and independent regulatory body, with monitoring, investigative and enforcement functions, as well as obligations and competences in the adoption of sub-normative acts. However, there is no clear division of decision-making and administrative functions, and procedurally, the requirements for quorum (3 members out of 5),majority of votes (simple majority), and the right of abstention may create problems the in decision-making process. In addition, the Government is highly involved in the selection (nomination) and the replacement of KCC members (and chairperson).

(v) The KCC has power to investigate and take decisions on the protection of competition. However, (a) court authorization is required for unannounced inspection; (b) KCC has duties to deal with concerned with criminal offences; and (c) as regards punitive measures, fines are expressed in nominal limits; fines in relative terms to revenue would be more effective.

8.3.1.2. Law 2010 – important improvements but need for further alignment with the *acquis*

Law 2004 (dated 08 September 2004) entered in force by UNMIK Regulation no. 2004/44, dated 29 October 2004. However the implementation of Law 2004 actually started only in March 2009, when the KCA was made effective (although established since November 7, 2008 – the delay was due to lack of adequate premises). The efforts for law implementation made evident the need for revision of the law, including (i) approximation with the EU *acquis*; (ii) inclusion of concentrations; (iii) improvements of provisions related with function of the KCC and with general administrative procedures; (iv) improvements in provisions related to 'definitions', etc.[184] So a new law "On Protection of Competition" (Law No. 03/L-229) was approved by Parliament in October 2010, which entered in force in December 2010.

Some main characteristics of Law 2010:

(i) The law now addresses all three main pillars of competition protection: prohibited agreements and concerted practices, abuse of dominant position, and concentrations.

(ii) Exemptions from prohibition are limited in time (up to 3 years) and the procedures are transparent, but 'bloc exemptions' are still not part of the law and '*de minimis*' agreements have not a size limit specification, the determination of which is a competence of Government. On dominant position, a better definition is provided but the definition of dominant position of more than one undertaking is vague. As regards concentrations, the thresholds are too high.

(iii) From 'Commission' (KCC), to 'Authority' (KCA). KCA is independent and accountable to parliament, financed by the state budget. A special provision in the Law 2010 guarantees the independence of Authority by prohibiting any form of influence in the work of Authority that might affect its independence. However, a clear division of decision-making and administrative functions is yet to be provided.

(iv) The proposals for Commission members and for the Commission Chairperson still come from Government, which now has a *stronger role:* one proposal for each seat (from two proposals for each seat in Law 2004) and proposals go directly to the plenary session. Recommendations on dismissal from the Commission also come from the Government. A greater role of the Commission for Economic Development, Infrastructure, Trade and Industry is expected, supported by a selective technical ad-hoc commission of experts in the field.

(v) The Government is also highly involved in the passing of by-laws, with a limited role of the KCA in the process.

184 KCA Yearly Report 2009-2010, February 210, p. 12-14.

(vi) Decision making of KCA has been strengthened – with 3 affirmative votes required (with a quorum of three). However, there are vacancies in the Commission seats, because of delays in the respective nominations (proposals from the government). The term for the Commission member should be postponed until the new member is nominated.
(vii) The KCA has authority to investigate, including inspection and sequester, to take decisions and pronounce punitive measures. Investigative procedures and rights of parties involved are well described. KCA can require support from Interior Ministry and Tax Authorities on investigation and execution procedures; their cooperation is obligatory. All KCA decisions are public and published on the website of the Authority. Execution of decisions is not stopped during the appeal process.
(viii) Fines are proportional to income and also to damage. Failure of parties to cooperate is treated as an administrative violation and not a criminal one. Statute of limitations for decisions and for execution punitive measures is five years, for a maximum of two cycles (10 years).

8.3.2. Institutional capacity and power in competition policy and law implementation

All developments in a market economy and particularly the structural reforms, as well as all rules affecting the behavior of market agents are reflected in the effectiveness of competition policy. However, the institutions directly involved in the protection and promotion of competition are the Assembly (particularly the Committee for Economic Development, Infrastructure, Industry and Trade; the Committee for Budgeting and Finance, and the Committee for the European Integration); the Competition Authority which is directly responsible for the implementation of the law, and the Competent Courts.

(i) *The Assembly* approves the law on competition; appoints the Competition Commission Chairperson and its members; approves (by *law on competition* and the KCA Statute) the competences of the Commission and its Chairperson, the competences of the Secretariat, and by *decision,* the Statute of the Competition Authority. The latter addresses the organizational structure of the Competition Authority, its responsibilities and working rules, the status of Authority employees apart from the Commission members, the competences of the Commission and Chairperson and also the competences of the Authority's Secretary, and other issues important for the work of the KCA. The Assembly also approves the secondary legislation deriving from Law 2010, based on proposals of the Authority. The Assembly adopts the Yearly Reports of the Competition Authority and the respective Resolution containing assessments, comments and recommendations to the KCA. The Assembly also approves the annual budget (which constitutes a separate line in the state budget), financing the Authority's activity. All the expenses of the Authority are covered by the state budget and all the Authority 'revenues' go directly to the state budget account. Authority budgetary issues are supervised by the Committee for Budget and Finance. The Committee for Economic Development, Infrastructure, Industry and Trade deals directly with the issues related to competition policy and law implementation, and the EU Integration Committee monitors and analyzes the approximation of competition legislation and policy with the EU *acquis*. The Assembly also contributes to the coordination of actions of the Competition Authority and the Regulatory Agencies on issues related to competition policy.

(ii) The Kosovo* Competition Authority (KCA) is the institution directly responsible for the implementation of competition law.

(iii) Pursuant to Law 2010, the parties affected by the decisions of the Commission have the right to file law suits against the Authority decision at the Competent Court (District Court). The judicial system plays an important role in the competition policy.

(iv) Central and local administrative bodies and also regulatory entities and other regulatory institutions significantly affect competition policy through their normative acts and regulations. The professional opinion of the KCA on these normative acts and regulations is very important for the effectiveness of competition policy.

8.3.2.1. Competition Authority

The body responsible for the implementation of Law 2010 is the Kosovo* Competition Authority (KCA), which as defined in Article 24 of the Law, is a public institution and a legal entity, independent but accountable to the Assembly in performing its duties specified by this law. The Authority is composed of the Commission - the decision-making body, and the Secretariat – the administrative and investigative body.

The independence of the Authority and its power in the implementation of the law and in competition protection and promotion, stem particularly from:

(i) the legal guarantee of the Authority's independence, and the way the decision-making body members are appointed along with the requirements they should meet;
(ii) the power provided by law to the body, related to the decision-making capabilities, the monitoring, investigating and imposing sanctions power;
(iii) the administrative capacity; and
(iv) the effectiveness of the cooperation with other institutions and the improvement in competition culture.

Let's have a closer look at these factors.

(I) Legally, ***the independence of the KCA*** is guaranteed by Law 2010, particularly Article 24, paragraph 3, which states that 'every form of influence which might affect its independence and impartiality, is prohibited'. The Commission Chairperson and members are *appointed* (elected) by the Assembly, based on the selection made by the *government* through an open announcement (and by an ad-hoc commission), for a five year mandate with the right to be reappointed for an additional mandate on proposal of the *government*. Law 2010 (Article 26) defines the criteria a candidate must meet to be appointed as a Commission member, as: (a) being a Kosovo* citizen; (b) having a senior qualification in the field of law, economy or any equivalent fields; (c) having a professional experience of no less than 7 years. Law 2010 (the same Article) also defines the conditions when a person cannot be a member of the Commission, related to conflict of interest (ownership interests, contractual relationship or work and managing relationship with an enterprise established in Kosovo*); and convictions (imprisonment more than 6 months) by a competent court. The Assembly can dismiss the Chairperson or a member of the Commission based on the proposal of the government in case of resignation; in case of conflicts of interest or if sentenced for committing a crime; and in case of physical or mental incapacitation.

At least two points may be open to discussion:

First, the Authority's independence is legally guaranteed but it seems that the government is too involved in the procedures for the nomination and dismissal of the Commission Chairperson and members. The Assembly itself, maybe the Committee for Economic Development, Infrastructure,

Trade and Industry can directly deal with the selection of candidates through an open and transparent process, based on more specifically designed requirements for candidates, and via an ad-hoc commission.

Second, for a relatively long time now, only three members of the Commission are in place; the mandate of two others has finished about a year ago and these two places are vacant. Such a situation is avoidable if the mandate of the nominated members is prolonged until the new members are nominated by the Assembly. That's the way a similar problem was solved in Albania through the legal amendments of 2010.

(II) The Authority's competences and power in monitoring, investigating, imposing sanctions and taking decisions for reestablishment of effective competition are well described in Law 2010, and in the Statute of the KCA[185] (hereafter: the Statute). The Statute was approved by the Assembly, based on the proposal of the KCA. Law 2010 deals directly only with the Commission for Competition Protection (the Commission) duties and responsibilities (Article 28), while the Authority's administrative and professional responsibilities as well as the Authority management, are described in detail in the Statute pursuant to Article 24/4 and Article 30 of Law 2010.

According to Law 2010 (Article 28), the *Commission* as a decision-making body (i) proposes secondary legislation acts; (ii) makes decisions for initiating investigating procedures and supervise these processes; (iii) pronounces punitive measures for violations of competition law and defines procedures for their execution; and (iii) makes decisions and announces measures, conditions and deadlines for reestablishment of effective competition in the respective market when the investigating procedures are finalized. The provision of professional opinion for the compatibility of draft laws and other normative acts with competition law and the promotion of competition culture, are among other functions of the Commission.

The *Statute* specifies the administrative and professional responsibilities of the KCA as regards the protection of competition and also the permission, monitoring of implementation, and recovery (pay back) of state aid. State aid is regulated by a special law[186] and administered by a special Commission, however the KCA is obliged to (i) give preliminary opinion; (ii) cooperate with the State aid Authority (including budget preparation and the preparation of the yearly Report on State aid) and require that it makes decisions according to the Law on State aid, and (iii) collect, process and give evidence on state aids, their use and effectiveness (Article 7, and Article 8 of the Statute)

According to the Statute (Article 10), the structure of the Authority consists of: (1) the Commission; (2) Secretary; (3) Market Investigation Department; (4) Legal and Administrative Department; and (5) State Aid Office.

The Statute (Article 12) specifies the Commission responsibilities as regards (i) the secondary legislation and normative regulations; (ii) competition policies; (iii) investigative procedures (iv) Authority management; (v) budgeting; and (vi) other responsibilities deriving from Law 2010 and Law on State Aid.

The *Commission Chairperson,* as defined in the Statute (Article 13), is responsible for all the activity and work of the Authority. Particularly he (i) manages the work of the Authority; (ii) prepares, calls and chairs the meetings of the Commission; (iii) co-ordinates the work among the Commission

185 Assembly of Republic of Kosovo*, 04/V-312, 24.08.2012.
186 Law on State Aid, no. 04/L-024, made effective in January 2012.

members; and (iv) represents the Authority. In the absence of the Chairperson, all these tasks are performed by the Vice-Chairperson, or the specified Commission member. The Vice-Chairperson is proposed by the Chairperson and elected by the majority of votes of the Commission members.

The *Secretary* (Article 14 of the Statute) (i) directs the administrative work of Authority; (ii) monitors the implementation of internal regulations and the enforcement of the Commission decisions; (iii) notifies the Assembly in advance (at least 90 days) as regards the ending of the mandate of each of the Commission members.

All the Authority employees, except members of the Commission, have the status of the civil service employees. They are technical staff working in the Market Investigation and Legal and Administrative departments, and the State Aid office. The Secretary, the departments, and office for state aid belong to the Secretariat, which 'monitors the market conditions, conducts administrative investigations and prepares reports for investigations, which are submitted to the Commission for appropriate decisions'.[187]

Market Investigation Department is responsible for implementation of market investigation procedures based on the respective decisions of the Commission, and for market monitoring.

Legal and Administration Department is responsible for (i) personnel management; (ii) drafting of legislation; (iii) legislation approximation with the EU *acquis*; (iv) budgeting process; and (v) registration and maintenance of Authority assets.

State Aid Office is responsible for the supervision of State aid, as stipulated in the Law on State Aid, Article 4. In particular, it supervises notifications and data related to state aid schemes and individual aids; and state aid implementation. It also compiles the yearly report for the supervision of state aid.

As regards the ***Authority's investigative and decision-making power,*** they are described in the legislation chronology section of this paper (pages 16-18); however, briefly, some of the main features are as follows:

The procedures for ascertaining prohibited agreements as well as abuse of dominant position shall be initiated by the Authority, based on complaints. Law 2010 gives the KCA the authority to investigate, inspect and sequester information and assets. An authorization from the District Court is required in order to conduct *unannounced inspections* of business premises and other objects. Authorized persons may check documents, obtain or copy documents, take to make copies (file report), place lead stamp, request verbal statements from representatives and employees, and request written comments along with respective deadlines. Temporarily confiscated material is kept until the ascertainment of facts, or at the latest, until end of the procedure (decision by Authority). When inspection is refused or hindered, the Authority is assisted by the Ministry of Internal Affairs.

As regards the KCA *decisions,* a multiple-level procedure is foreseen – notification on start of investigation, notification on facts defined in procedure and hearing (which can be repeated), noting of the violation of competition, ascertainment of facts for punitive measures, and the pronouncement of KCA final decision which states violation of law on competition, level of punitive measures, and the bailiff process. Pursuant to Article 53 decisions are taken within 60 days from the ascertainment of punitive measures

[187] The Secretariat is not namely mentioned in the Law 2010 or the Statute, but is referred to in the KCA Yearly Report 2012, p.11.

or in the case of concentrations, from the start of procedure. The Authority concludes the procedure based on the decision of the Commission.

Undertakings may propose to *take over obligations* that would redress disturbance of competition. On urgent cases – when there is risk of irreparable damage – the Authority can initiate procedure and make a decision on *temporary measures* by requesting termination of unlawful activity and fulfilment of specific measures. Temporary measures cannot be longer than 6 months, but may be extended.

The Authority has the power to pronounce *punitive measures* against undertakings or associations of undertakings, for non-compliance with the requirements of competition law and the relevant investigative rules of procedures. According to Law 2010 fines are provided for: (a) serious infringements going up to 10% of the previous fiscal year total turnover; (b) not serious infringements going up to 2% of the previous fiscal year total turnover; and (c) other violations, from 1,000 Euros to 3,000 Euros, imposed on undertakings which are not parties in procedure and fail to provide information. The amount of fines is calculated according to *gravity and duration* of violation. Law 2010 does not foresee the imposition of fines on individuals.

The Authority may apply a *leniency policy* – release from penalties fully, or partly. The release from penalties cannot be applied to the instigator of a cartel. The criteria for dismissal or reduction of penalties are proposed by Authority and approved by Government.

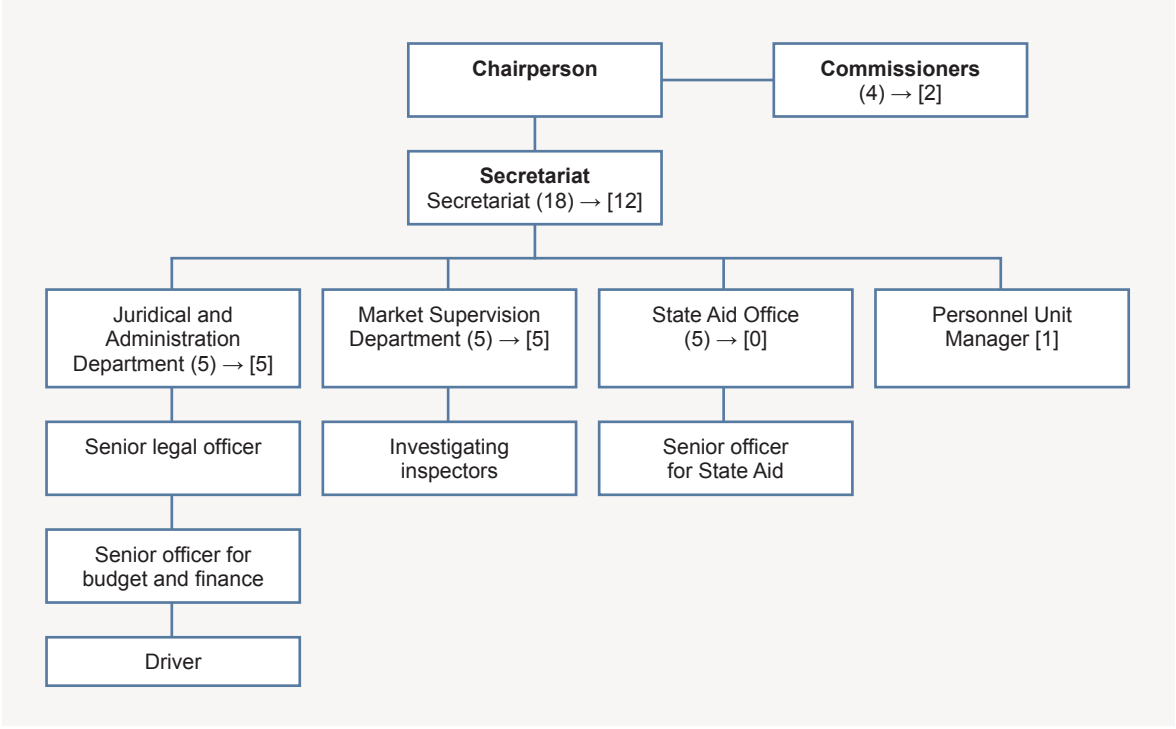
(III) The administrative capacity of the Authority is a very important factor in law implementation.

The independent Kosovo* Competition Commission is in place and became operational in March 2009. Staffing of the KCA according to the organizational structure is specified neither by Law 2010 nor by the Statute. However, each year the Assembly approves the KCA budget on the basis of the number of KCA employees by departments and in total, although the actual numbers for each year do not correspond with the 'budgeted' number of staff members.

The staffing situation is 2012 is shown in Figure 1. The total 'budgeted' number of KCA employers is 23 while the actual number for the year is only 15.[188] The difference of 8 persons implies 2 vacant Commission seats (members), 5 vacant positions in the State aid office, and 1 (one) in the Market supervision department. One of the main reasons for such situation is the lack of appropriate premises of the institution. The number of offices was increased from 2 (until 2012) to 5, but the premises of the institution remain inadequate.[189]

[188] KCA Yearly Report 2012-2013 (p. 10), and KCA Progress Report for 2012 (p. 1-2)
[189] KCA Yearly Report 2012-2013 (p. 10).

Figure 8.1: KCA structure and staffing – as refers to the budget 2012 (.), and the actual one [.]



In 2011, the total number of employees was 10, including 5 commissioners appointed by the Assembly and 5 civil servants (the Secretary; 3 administrative officers and 1 driver), while the approved (budgeted) positions were 18. Among the main reasons for not filling the vacant positions was lack of space for staff accommodation.[190]

During 2010, the KCA staff was the same as in 2011, while in 2009, for most of the time (March to October), the KCA consisted of only 5 Commission members and no other employers. Only in October 2009, 4 employees were recruited, mostly involved in ancillary activities rather than technical functions.[191] At the beginning of 2010 the number of employers reached 10 (including 5 Commissioners).

Referring to the staffing problem, the Parliamentary Commission for Economic Development, Infrastructure, Trade and Industry in its Report of May 2012 underlines that 'the staff is not specialized and is small in number, so the Commissioners must exercise three duties at the same time: investigate, take decisions and vote those decisions. This constitutes a conflict of interest...'[192].

The institutional capacity of the KCA is very much dependent on the technical expertise of the staff, so a very important factor in enhancing the capacity of the KCA is the process of staff training, including managerial and technical training through participation in training courses and activities,

190 KCA Yearly Report 2012-2013 (p. 8-9); and Office of Audit General, Audit Report, Document No: 24.28.1-200108 (p. 14)
191 KCA Yearly Report 2009-2010 (p. 7).
192 Parliamentary Commission for Economic Development, Infrastructure, Trade and Industry (2012), Report "On supervision of the implementation of the Law no.03/L-229 for the Protection of Competition", Pristine, May 2012, p. 9; and KDI (2011), 'Kosovo* Competition Commission – Case study, p. 3.

and also in other national and international activities such as seminars, workshops and conferences. During 2010, the advisor of KCA sponsored by the Capacity Development Facility (CDF – supported by the UNDP and Kosovo* Foundation for Open Society – Soros), in addition to assisting in the daily work of the Commission, developed with the KCA staff some basic theoretical topics related to competition.[193]

According to the KCA Report 2011-2012[194], opportunities for training and qualification of KCA staff increased significantly in 2011 due to international engagements, agreements and relations of the KCA, such as the membership in the International Competition Network (ICN), the position of an observer member in the European Network of Competition, and the membership in the Regional Training Centre (sponsored by the OECD) in Budapest. In addition, the active participation in conferences organized by UNCTAD, as well as by the Mediterranean countries have contributed in enhancing opportunities for staff training and benefits from participation in workshops and conferences. Training courses are also organized by the Training Institute in the Ministry of Economic Cooperation, Infrastructure, Trade and Industry.

The training process and participation in international seminars and conferences has been high in 2012 as well, with a special contribution coming from the Regional Training Centre in Budapest. An increasing contribution is given by the regional network of competition authorities. However statistical data on trained persons and training days are still not available.

(IV) Institutional cooperation effectiveness, competition advocacy and competition culture are also very important for the implementation of Law 2010, and for an effective competition policy. As stipulated in Law 2010 (Article 23/1), the Authority has the obligation to provide the Assembly, government, central institutions of public administration, legal persons with public authorities, and local government bodies, by request, professional assessment and recommendations for laws, regulations and other secondary legislation which significantly affects market competition. The Authority can also provide its professional opinion on the compatibility of existing laws and bylaws with the Law 2010 (Article 23/2) as well as solutions in the field of competition policies. The Authority promotes knowledge on competition legislation and competition policy (competition culture). Cooperation with international institutions and organizations in the field of competition is also a responsibility of the Authority (Article 28/1.12).

The reforming processes in the transition economies make 'competition advocacy' a particularly important component of competition policy. On the other hand, the administration of competition advocacy is not an easy task because of possible counteractions by different players in the market, including businesses and their associations, various private or public institutions, and various groups of interest. Examples of such confrontations are not lacking in the case of Kosovo* and the number of assessments and recommendations by the Authority has been relatively small. In 2009, one of the recommendations was addressed to the Ministry of Transport and Communications, on the technical inspection of vehicles. KCA recommended to the Ministry to void Article 36 of Administrative Instruction No. 2008/13 which defined that 'technical inspection of vehicles should be carried out in the centre, which is in the territory of the Municipality, in which that party is a resident'. In its decision the KCA declares that this Article is inconsistent with the 2004 Law on Competition.[195] A relatively small number of assessments and recommendations were provided by KCA during 2010.

193 KCA Yearly Report 2009-2010 (p. 25).
194 KCA Yearly Report 2011-2012 (p. 810)
195 KCA Yearly Report 2009-2010, p. 19-20.

In 2011[196] there were 13 KCA decisions whose object was the assessment and recommendations related with draft laws and secondary legislation. During 2012, the professional opinions of the KCA were addressed to the draft law on prohibition of smoking in public spaces, the prevention of exposure to tobacco products based on the request of "Kalo & Associates"; and a draft law on public transport, related to public transport tariffs.[197]

Cooperation with Regulatory Entities and other institutions is very important for competition advocacy. The Authority has concluded Memoranda of Cooperation with the regulatory Entities, or the analogue institutes in Kosovo*.

As regards *competition culture,* the Authority has used different ways and instruments, including co-operation with business organizations (such as Chamber of Commerce) and public institutes; publications, including electronic ones on the Authority's website; conferences and workshops; communication in media; training and lectures; etc. The first activity in the field is the seminar organized on September 15th, 2009, with the participation of representatives from the Assembly, government, business community, international institutions etc, and the KCA. The seminar had two dimensions: training for KCA experts, and competition culture for all other representatives.[198]

Particularly, the Authority webpage would be more effective if (i) in addition to laws, secondary legislation is also published and translated in all required languages, and also if the main EU *acquis* are made available in the web, particularly the regulations and guidelines; (ii) all KCC decisions are published and also translated in all required languages (e.g. decisions of 2012 are not published yet); (iii) the information is always updated.

One of the indicators of 'competition culture' is the number of complaints coming to the KCA from businesses, business associations, or citizens as regards to competition prevention, restriction or distortion. The number of complaints is still quite small.

Of a particular importance for institutional capacity-building through training programs and conferences and workshops, is cooperation with the EU and some international institutions such as the OECD etc. The KCA is a member of the International Competition Network since 2011, and it has concluded Memoranda of Cooperation with several Counterpart Competition Institutions at an international level. Two important events in 2012 were the signing of the agreement on the establishment of the Community Energy Network in the field of competition, and the signing of a memorandum between the competition authorities of the countries of the region (Sofia Statement)[199]. The regional Competition Authorities in the region of the Western Balkans will also benefit from the regional cooperation within the regional parliamentary network.

8.3.3. Competition policy effectiveness and approximation with the EU *acquis*

Competition policy effectiveness is first of all defined by the effectiveness of investigating procedures and decisions taken by the KCA. The number of market monitoring efforts, investigations, and KCA decisions is a relatively small one, reflecting the short history of the KCA (effective from March 2009) but also other factors, including the lack of administrative capacities and problems with the premises of the institution.

196 KCA Yearly Report 2011-2012, p. 16.
197 KCA Yearly Report 2012-2013, p. 18.
198 KCA Yearly Report 2009-2010, p. 21.
199 KCA Yearly Report 2012-2013, p. 18

The total number of ***final*** decisions[200] as regards the protection of competition, directly related with the three main competition protection pillars (table 1) for the entire 2009-2012 period is eleven (11). The number was two (2) in 2009, three (3) in 2010, two (2) in 2011, and four (4) in 2012. As regards competition pillars, for all the period 2009-2013 then number of decisions was two (2) for abuse of dominant positions, seven (7) for restrictive agreements, and two (2) for concentrations. The number of cases initiated for investigations is also small, although it is higher for competition restrictive agreements, as shown in Table 8.1.

Table 8.1: KCA investigation cases and decisions, 2009-2012

	Abuse of Dominant Position		Restrictive Agreements[1]		Concentrations	
	Cases initiated for investigation	Cases finalized with ACA decision	Cases initiated for investigation	Cases finalized with ACA decision	Cases initiated for investigation	Cases finalized with ACA decision
2009	-	-	3	2	-	-
2010	-	2	11	1	-	-
2011	-	-	5	2	3	-
2012	4	-	4	2	1	2
Total 2009-2012	4	2	23	7	4	2

Source: Statistics provided by the KCA.
1 Including 'prohibited agreements' and 'agreements excluded from prohibition'

Among *prohibited agreements* during the period 2009-2011, are the agreement between bread producers (2009 and 2012), the concerted practices on electronic fiscal tapes (2010), the concerted practices related to the sales of oil derivatives (2010), the forbidden agreements as regards the interurban transport tickets (2012) etc.

Some of these cases are shortly described in boxes 8.1, 8.2 and 8.3.Cases described in box 8.1 testify the lack of competition culture and the need to dedicate more attention to this issue.

200 The information is provided by the KCA.

Box 8.1: Prohibited agreements – lack of competition culture

– Kosovo Competition Commission (KCC), based on the information from the media that the owners of some bakeries have agreed to fix the price of standard bread, decided to initiate an ex-officio investigation. Once a copy of the agreement was in the hands of the Commission and after reviewing this agreement, the Commission decided to invite the owners of bakeries at a hearing session on 07. 04.2009. The participants in the hearing session, after discussions and debates, unanimously agreed to abrogate the agreement and to liberalize the price of bread. The Commission decision of April 14, 2009 declared the agreement a prohibited one. No fine was imposed on the signatories of the agreement.

– The Kosovo Competition Commission, based on information from customers and the public, decided on 07. 02. 2011 to initiate an in-depth investigation for the concerted practices in determining prices of the petroleum derivatives in the Vushtrri municipality. From the investigation process in several fuel stations of that municipality, it resulted that the fuel stations had equal prices of petroleum derivatives. The Kosovo Competition Commission, after the hearing session held with the owners and representatives of the respective fuel stations on 05.05.2011, in the subsequent meeting of 13.06.2011 decided *to prohibit the agreement among the owners of the fuel stations for retail sale of fuel in the Vushtrri municipality, on determining and leveling petroleum prices.* The parties that participated in the hearing session agreed with the need to put an end to the concerned practices and to allow free and competitive prices, so the KCC decision was not accompanied by any punitive measure.

Source: KCA website: www.ak.rks-gov.net

The case described in box 8.2 reveals the abuse of dominant importance – the two other pillars (prohibited agreements' and 'concentration') can 'merge' with the third one – abuse of dominant position.

The other case, briefly described in box 8.3, underlines the importance of effective cooperation between the competition protection Authority and regulatory entities in the respective markets, and also the importance of technical expertise to the effectiveness of investigative procedures.

Box 8.2: Prohibited agreement and abuse of dominant position

– Kosovo Competition Commission (KCC), based on some public information as regards the licensing of two companies ('Dukagjini' and Gekos') for the sale, installment and maintenance of r electronic fiscal tapes in the whole territory of Kosovo, while one of these companies was not practically involved in this activity, decided to initiate an in-depth investigation in June 9, 2010. The results of the inspections (after a three-month investigation) confirmed the Commission's suspicion that one of the companies had not been practically engaged in contracting, selling and/or maintaining electronic fiscal tapes, so these concerted practices made possible a dominant position in the market for the other firm and the abuse of that dominant position.

After the hearing session of 10.08.2010, the Commission took the decision by imposing administrative punitive measures:

One of the companies ('GEKOS') was punished with €100.000 for the abuse of dominant position in the overall market of the Republic of Kosovo, and the other company ('DUKAGJINI') was punished €100.000 for concerted practice that enabled the other company to create a monopoly and abuse its dominant position in the market of the Republic of Kosovo.

Liberalization of the respective market by licensing other economic operators was recommended to the Ministry for Economy and Finance.

Source: KCA website: www.ak.rks-gov.net

One of the prohibited agreement cases (concerted practices on electronic fiscal tapes-2010) is also treated as ***abuse of dominant position*** by one the companies involved in the prohibited agreement (Box 8.2). Decisions for in-depth investigations in 2012 are taken for the insurance market, concerning market sharing as regards the TPL, and the banking sector, with regards to deposits and credits interest rates.

Box 8.3: Prohibited agreements – importance of effective cooperation

Insurance market as regards the price and market-share of TPL is still under the monitoring process. The reasons why the process has not finished yet are the challenges the KCA is enfaced with.

First, the Central Bank of Kosovo has not supported the inspectors despite the cooperation memorandum between the two institutions.

Second, the insurance companies also have not properly cooperated with the inspectors.

Third, the KCA do not have IT experts, necessary for carrying out the relevant investigations.

Source: KCA Yearly Report 2012-2013, p. 14-15.

Until 2012, there have been no notification on concentrations, while during 2012 two notifications on concentration were addressed to the KCA, one on milk product and dairy byproducts (evaluation procedure suspended due to new circumstances in the relevant market), and the other in the energy distribution market (evaluation still in process). The main reason for such a low number of notifications may be the high threshold for notification as stated in the Law 2010, which does not consider the size of the Kosovo* economy and the relevant markets.

Taking into account the overall situation of the Kosovo* economy as a small one (the same as the Albania case), concentrations (as well as abuse of dominant position) may deserve more attention. *First,* in addition to the promotion of a competition culture, a more intensive proactive approach of the KCA is needed, including the privatization process. *Second,* a proactive approach (market analysis and ex-officio investigations) of KCA is also important because of the problem of informality, reflected also in the financial statements of businesses. *Third,* a more effective collaboration with the respective institutions (such as tax directorate etc) would increase the investigative capacities of the KCA. Forth, the effectiveness of the investigation process is very much dependent on the indicators used to analyze market concentration. In the literature[201], it is suggested that such analysis utilize a combination of the general indicators of market concentration (share of 3, or 5 companies in the respective market overall turnover – C_3 or C_5; the Herfindahl-Hirshman Index (HHI), or the Lorenz Curve), with indicators of profit margins and relative profits of the respective companies, as well as indicators of consumer benefits.

The effectiveness of competition policy depends not only on the performance of the KCA (including its contribution to competition advocacy and competition culture) but also on the effectiveness of other policies such as those related to business climate and the formalization of the economy, structural reforms including privatization, regulatory reforms; fiscal and crediting policies, particularly policies on foreign trade liberalization and promotion of competitiveness, as well as policies for the promotion and support of small business.

The last two policies are particularly important for small economies like Kosovo*'s. Regarding *free trade,* the positive effects on competition are obvious. Free trade, by enabling the integration of the Albanian market into the Balkan, European and international market, impedes the isolation of the country's economy and opens it to the pressure of competition, thus inducing technological progress and competitiveness. However, we have to look at the other side of the coin as well: particularly in case of small economies, the risk of concentration and abusive behaviour is present even in the foreign trade markets, mostly import ones. Closely and positively related with free trade in case of small and developing economies, are foreign investments, which enable the country to have new goods in the market, increase supply of existing ones, use new technologies and also to more intensively integrate in e international trade. Again, the risk of anti-competitive effects is still present: FDI may result in a dominant position or may be granted a special position through special rights given by the respective institutions, and potentially, may abuse of this position. The 'golden rule' to protect competition might be 'ensuring equal conditions for all undertakings operating in the country'. Favouring FDIs (such as fiscal differentiations etc.) compared to national investors is not positively related with the quality of investment and a competitive environment.

As regards *SMEs* (small and medium enterprises), Law 2010 directly 'protects' them by generally excluding them from the scope of law enforcement. On the other hand, the promotion of SMEs, particularly of those oriented to innovation and the advanced technologies helps in developing a more competitive business environment, and in increasing the competitiveness of the economy as a whole.

201 Evenett, S. (2006), *Competition Advocacy: Time for a Rethink?*

Creating a competitive market and enhancing the country' competitiveness is one of the main bridges of Kosovo*'s integration in the European Union. However, positive developments before 2010 as regards competition in Kosovo* are stated only in the 2005 EU Progress Report and the 2009 Progress Report. In the first, one the Law on Competition of October 2004 was considered as 'a first step towards the development of a sound market economy in Kosovo* by prohibiting acts that restrict, suppress or distort competition.[202] In the second one (the 2009 EU Progress Report), 'some progress in the field of competition was asserted", mainly related with the establishment of the Competition Commission in November 2008, when the Assembly appointed the Commissions' five members. Being operational since March 2009, the Commission performed a review of the existing competition regulations by concluding that a new law on competition was required 'to further align competition practices in Kosovo* with European standards'[203]. However the Report draws attention to the lack of resources of the Commission.

The in-between EU Progress Reports on Kosovo* (of the years 2006, 2007 and 2008) generally declare no progress in the field of competition by particularly underlining the need for the establishment of the Competition Commission.

In the subsequent EU Progress Reports (of 2010, 2011, and 2012) 'some progress' is declared in the field of competition.

Some of the main points underlined in the *2010 EU Progress Report*[204] are the progress in the field of competition legislation, administrative capacities, competition law implementation, and competition culture and advocacy.

- As regards the legislation on competition, the Report states that the Law on Protection of Competition was adopted in early October with the purpose of aligning Kosovo*'s competition rules with the EU *acquis*, particularly through (i) clarifying dominance abuse rules; (ii) introducing merger rules; and (iii) strengthening enforcement procedures.
- Regarding administrative capacities, it is stated that some support staff to the Commission was added, but experienced and specialized staff is lacking.
- Despite limited progress in the legislative framework, overall the *implementation* of competition and state aid policy *is at an early stage.*
- The Report underlines the need for the Commission to get more involved in the competition aspects of privatization of large state-owned enterprises.

202 EC, Brussels, 9 November 2005, SEC (2005) 1423 Kosovo* (under UNSCR 1244) 2005 Progress Report, p. 41
203 EC, Brussels, 14.10.2009, SEC (2009) 1340, Kosovo* under UNSCR 1244/99 2009 Progress Report, p. 31
204 EC, Brussels, 9 November 2010, SEC(2010) 1329, Commission Staff Working Document Kosovo* 2010 Progress Report.

Box 8.4: Kosovo competition protection under the expected SAA

Under an SAA, Kosovo would commit itself to prohibit and police i) all agreements between undertakings and concerted practices which prevent, restrict or distort competition; ii) abuse of a dominant position by one or more undertakings, iii) any state (public) aid which distorts or threatens to distort competition by favoring certain undertakings or certain products.

Kosovo would commit itself to apply these rules to public undertakings and undertakings with special rights. Kosovo would also commit itself to adjust state monopolies of a commercial character so that no discrimination exists regarding the conditions under which goods are procured and marketed. Kosovo would also need to ensure transparency in the area of state (public) aid by establishing comprehensive inventories of aid schemes and by reporting annually to the European Commission.

Source: Commission staff working document, accompanying the document *'Commission Communication on a Feasibility Study for a Stabilisation and Association Agreement between the European Union and Kosovo* {COM(2012) 602 final}; Brussels 23.10.2012*

The Kosovo 2011 EU Progress Report*[205] highlights some aspects of competition policy, such as efforts to complete the secondary legislation on competition, progress on the implementation of legislation, lack of staff and appropriate premises of the Authority, and the adoption of the law on state aid (July 2011) which entered into force in January 2012.

- As regards secondary legislation complementing Law 2010, the statute and working methods of the KCA are mentioned. It is to be noted that the Report underlines the need for Law 2010 amendments to be more closely aligned with the EU *acquis*, particularly as regards the *definition of a dominant market position* and the adjustment of the *turnover threshold* for the merger notification.
- Regarding competition law implementation, KCA decisions concerning breaches of competition rules in the markets for retail motor fuel, fiscal cashiers, and insurance are highlighted.
- Regarding State aid policy, the Report underlines that it is in a very early stage. The KCA has a monitoring role on State aid.

The Kosovo 2012 EU Progress Report*[206] underlines the main efforts required in order to meet the obligations of the Stabilisation and Association Agreement (SAA), particularly as regards (i) amendments in Law 2010 to make it compatible with EU competition rules (especially for the definition of dominant market position); (ii) the institutional capacities and the need to strengthen the administration in charge of competition; (iii) the commitment in law enforcement in all the pillars of competition protection policy (prohibited agreements; abuse of dominant position; and state aid); (iv) state monopolies and public procurement; and (v) state aid.

- As regards State aid, the Report emphasizes the need for (i) supplementing State aid law with the necessary secondary legislation; (ii) establishing State aid board and the independent State aid commission; (iii) producing a comprehensive inventory of State aid schemes; and (iv) annually reporting to the EU.
- As regards 'competition advocacy', the Report underlines that the KCC has not been involved in the competition aspects of privatization of large state owned enterprises.

[205] EC, Brussels, 12.10.2011, SEC(2011) 1207 final, Commission Staff Working Document Kosovo* 2011 Progress Report.

[206] EC, Brussels, 23.10.2012, SWD(2012) 339 final/2, Commission Staff Working Document accompanying the document 'Commission Communication on a Feasibility Study for a stabilization and Association Agreement between the European Union and Kosovo*, p. 24.

8.4. Supervisory role of the Parliament on competition policy

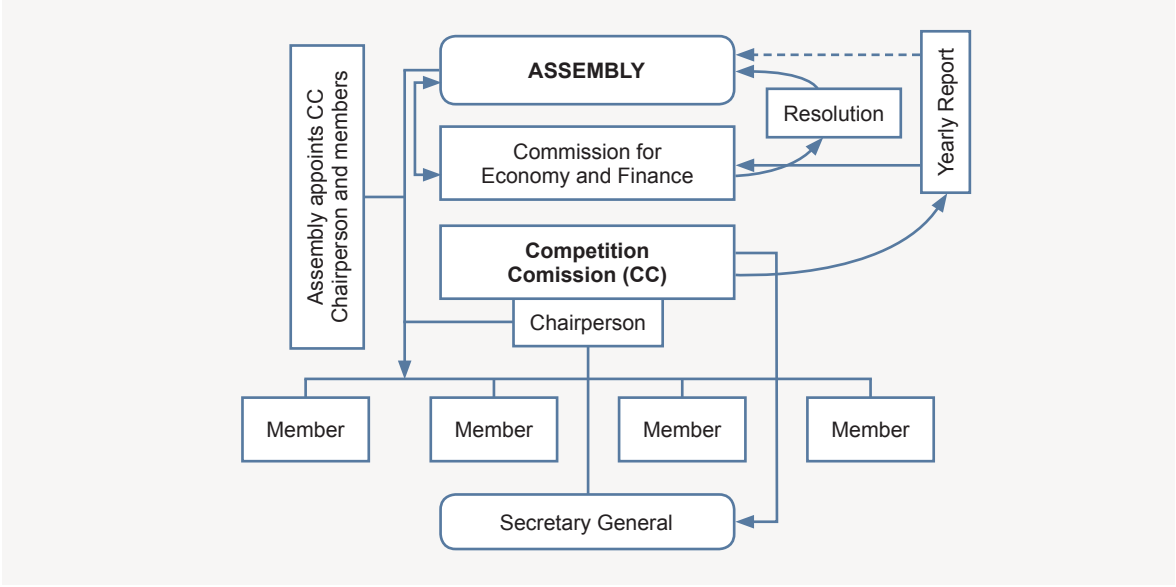
The Parliament has a crucial role in competition policy in Kosovo*, including (i) approval of competition law and its amendments, and also the secondary legislation deriving from the law, based on proposals of the Authority; (iii) appointment of the members and the Chairperson of the KCC and also their reappointment or dismissal, as stipulated in law 2010; (iii) approval by a special decision of the KCA Statute[207], where the organizational structure, competencies and responsibilities of the KCA are stipulated in detais; (iii) approval of the KCA annual budget – the staffing of the KCA according its structure is thus 'indirectly' approved; (iv) supervising the role of KCA in competition policy and competition law enforcement; (v) initiation of investigation procedures in special cases or sectors; (vi) promotion of 'competition advocacy' and institutional cooperation (including cooperation of the KCA with the regulatory entities) in protection of competition; (vii) discussion and adoption of the KCA's Yearly Reports and the respective Resolutions containing assessments, comments and recommendations to the KCA.

Figure 2 describes the role of Parliament (Assembly) in competition policy and its relation with the Competition Authority (Competition Commission). Within the Assembly, the Committee for Economic Development, Infrastructure, Industry and Trade deals directly with the supervision of the competition policy and competition law enforcement, while the Committee for the EU Integration monitors the approximation of competition legislation and policy with the EU *acquis*, and the Committee for Budget and Finance deals with the Authority's budget issues. The effectiveness of the use of public recourses by the KCA is monitored and reported to the Assembly by the Committee for Public Finance Oversight.

As shown in the figure above, a special role within the Assembly belongs to the Committee for Economic Development, Infrastructure, Trade and Industry (hereinafter 'the Committee'). In particular, the Committee (i) discusses and approves the Authority's Yearly Report and the respective Resolutions which are then discussed and adopted in the plenary session; (ii) supervises the activity of the KCA, in particular the implementation of recommendations of the Assembly Resolution – a surveillance team was established with an approved supervision programme and the report with the findings prepared by the team is discussed in the Committee in the presence of KCA representatives, and adopted; (iii) supports institutional cooperation in competition protection and promotion; and (iv) proposes, when judged necessary, the initiation of investigative procedures in specific sectors.

[207] The KCA Statute was approved by the Assembly in August 24, 2012.

Figure 8.2: Role of Parliament in KCA establishment and functioning



As regards to Law 2004, the Committee had a role in the discussion and selection of the proposed members of the Competition Commission, and the passing of names for the vote in the plenary session. Based on Law 2003, the proposed number of persons by the Government is equal to the seats in the Commission, so the proposal is passed directly to the plenary session, without any discussion in the Committee.

8.5. Conclusions and issues open for further discussion

Competition policy in Kosovo* is institutionalized only about four years ago, however achievements are notable in all its dimensions: (i) progress in competition legislation and also relative progress in law implementation; (ii) steps forward, particularly during 2012, in terms of institutional capacities; (iii) improvements in competition advocacy and institutional cooperation, and also some improvements in competition culture; (iv) last but not least, progress in approximation of competition legislation and competition policy with the EU *acquis*.

The improvement of *competition legislation* is a need deriving from the practical difficulties faced in competition policy and law implementation, also aiming at further approximation with the EU *acquis*. Amendments of Law 2010 are already drafted and awaiting approval in Parliament. These amendments are particularly related to: group exemption from prohibited agreements, clarification of 'dominant position', lowering of concentration notification threshold, addition of State aid monitoring as a duty of the KCA, improvement of procedures for nomination and reappointment of KCC members and the extension of the mandate of a Commission member until his/her replacement, Authority's professional administration competencies and responsibilities, declaring the administrative court as the competent court in matters of competition etc. These amendments can contribute to the solution of practical problems of law enforcement, and represent an important step in the approximation of legislation with the EU *acquis*. Other possible improvements in competition law may also deserve discussion, such as the specification of public service companies and companies with special rights in the scope of the competition protection law; a better specification of the KCA duties in 'competition

advocacy'; the excessive involvement of Government in secondary legislation approval and in the proposals for nomination of KCC members and Chairperson, etc.

The effectiveness of competition law enforcement, except for the law itself, depends on many factors including secondary legislation, effectiveness of monitoring and investigation procedures, effectiveness of KCA decisions and judicial reviewing process, and institutional capacities.

As regards *secondary legislation,* the power of the Authority in drafting and approval of the relevant acts should be increased – Law 2010 provides more power to the Government, and the need for appropriate regulations and guidelines that are missing should be addressed.

Institutional capacity continues to be a weak point despite the improvement in 2012. *First,* the Commission continues to have two empty seats as the new members are not yet nominated by the Parliament (the respective proposals not yet provided by the Government) – the proposed amendments are expected to solve the problem. *Second,* the professional capacity of the administration is still quite low, even lower that the projected capacity in the budget of the Authority. The improvements in the Authority premises during 2012 are still insufficient to facilitate the completion of Secretariat staffing. It seems that administrative staffing is subject to the decision on the Authority's budget approval; a special decision of the Parliament would be a more stable solution. *Third,* the independence of the Authority in its decision-making process is guaranteed by Law 2010, however the nomination of Commission members requires an increased role of the Committee for Economic Development, Infrastructure, Trade and Industry, supported by an ad-hoc technical screening commission. *Fourth,* during the completion of staffing, attention should be paid to qualification as well effective training on monitoring and investigation, as well as decision-making functions of the KCA.

A stronger role of the KCA is also expected as regards *competition advocacy* and institutional cooperation, another important dimension of competition policy, particularly related to government normative acts and decisions on privatization of state companies and public services, as underlined in the recent EU Progress Reports on Kosovo*. Proactive engagement of the KCA in competition protection by intensifying the monitoring process and promoting research in relevant sectors (such experience already exists) through the use of external expertise as well, are particularly important for competition protection.

Regarding *competition culture,* of a particular importance, among other things, are (i) publication (also electronically in the Authority's website) of the Authority's Annual Reports (which should be a legal requirement and the respective amendment of Law 2010 is needed); (ii) publication (including electronically in the Authority's website) of all the KCA decisions and the secondary legislation, instructions, notifications etc related to competition; (iii) timely information on main activities of the KCA, including conferences, workshops, training activities etc; (iv) processing of all the statistics related to monitoring, investigative and decision-making activities of the KCA by key dimensions of competition protection and competition policy, and making of them transparent to the public or interested persons, including those not incorporated in the Yearly Reports; (v) translation of all materials published in the Authority's website in all the required languages; (vi) updated information on the KCA website as regards EU competition legislation developments; (vii) incorporation of competition topics in the school curricula etc.

A special provision of Law 2010 underlines that the implementation of competition legislation should be conform the EU *acquis*, but the enforcement of this provision needs more efforts from the Authority and all other institutions involved, both in the drafting and implementation of competition legislation.

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