**Enforcement of Competition and Consumer Law in the Mediterranean Countries**

WORKSHOP 7 & 11 - 21 – 24 March 2012

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EDITORIAL

Dear MCB friends,

This workshop panel on enforcement and the quality of the papers presented show a high commitment of partner countries and competition authorities in improving their competition policy.

The starting practice in Egypt and the efforts in the Balkan countries to reach an acceptable level of understanding of the “acquis communautaire” must be recognize as a positive step forward for economic governance.

Juan Antonio Rivière
The Effectiveness of the Enforcement Activity of Egyptian Competition Law

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ABSTRACT

The Egyptian government encountered several pressures to introduce its own competition law: First, the 1991 structural reform which transferred monopoly from the public to the private sector, and second, the commitments of the EU-Egypt Association Agreement. However, Egypt was not forced to import the EU’s acquis communautaire as a result of the agreement. It was merely requested to enact a competition law that is compatible with that of the EU, so as to provide comparable treatment conditions to EU investors in Egypt. However, enacting competition law does not in itself guarantee an efficient market structure. An effective competition authority must accompany it. Ever since its formation in 2005, the Egyptian Competition Authority has been very dynamic in settling multifaceted cases in key industries. It is argued that the Egyptian Competition Authority’s decision-making process has been relatively independent in the pre-revolutionary era, since the Competent Minister was neither empowered to control or steer the shape of its appraisal in studies nor the outcome. In addition, the neutrality of the Egyptian Competition Authority’s decision-making process is safeguarded by specific means and standards. However, post-revolutionary developments saw an increase in the degree of its independence. The main argument of this paper is that the enforcement of Egyptian Competition Law has been considerably effective prior to the revolution (or for the first 6 years of enforcement). This is demonstrated by the Cement and Steel cases. Nevertheless, the 2008 amendments were not carefully contemplated. Although the introduction of a partial leniency policy was a step forward, it still may not entirely satisfy the demands of the Egyptian market. However, the introduction of a full leniency policy, among other amendments, is nowadays under consideration. Undoubtedly, such a policy coupled with the increased degree of Egyptian Competition Authority’s independence will only be advantageous to the market. Nonetheless, the significant power of the people represented in influencing the decision-making process of courts in the post-revolutionary era may raise concerns over the potential prevalence of public opinion at the expense of justice and economic efficiency in future competition cases. To tackle this, the ECA should reinforce public awareness of the benefits of competition through regularly publishing reports and organising training sessions, and conferences for interested parties.

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INTRODUCTION

Egypt encountered several internal and external pressures to introduce its own competition law. Among these were the high concentration levels that prevailed ever since the 1991 structural reforms. The government also faced pressures from the EU by virtue of the Euro-Mediterranean Association Agreement with Egypt (‘EMAA’) to adopt its own competition law. Whether or not Egypt was forced to “import” EU competition rules as a result of the EMAA is subject to debate. Following several drafts and debates in the parliament, the Egyptian Competition Law and its Executive Regulations were introduced in 2005. The first 6 years or so of competition law enforcement in Egypt were deemed considerably effective. The Egyptian Competition Authority (‘ECA’) and competent courts were able to give meaning to the law. Although it may help to re-structure the market in the future, the 25th January revolution and the strength of public anger, whilst from a democratic perspective is impressive, it raises concerns over the predominance of public opinion in future competition decisions at the expense of justice and economic efficiency.

Egyptian Competition Law has been dealt with only on very few occasions and from a very generic perspective. The literature lacks studies that detail and comprehend to the pressures that triggered the enactment of competition law in the first place. Studies that were carried out in this respect merely focused on the EMAA in generic terms. Very few studies have focused on the enforcement of Egyptian Competition Law. In fact, there are no studies that compare the pre and post-revolutionary challenges in relation to the enforcement of Egyptian Competition Law; all of which adds to and combines with the importance of this paper.

The aim of this paper is to evaluate the effectiveness of the enforcement activity of Egyptian Competition Law. In so doing, it compares the pre and post-revolutionary challenges of the enforcement activity. The paper is divided into three parts. The first part deals with the pressures that triggered the enactment of Egyptian Competition Law, represented in the 1991 structural reform and the EMAA. The second part discusses the controversy over the independence of the Egyptian Competition Authority as one of the key elements for an effective enforcement of the law. The third and final part critically assesses the enforcement activity in the pre-revolutionary era; represented in the key cases investigated and the 2008 amendments to the law. It then discusses the 2012 draft amendments of Egyptian Competition Law, and delineates the potential effects of the 25th January revolution on the shape of competition-related decisions.

1. THE KEY PRESSURES THAT TRIGGERED THE ENACTMENT OF EGYPTIAN COMPETITION LAW IN 2005

Prior to determining the framework within which the Egyptian Competition Authority (‘ECA’) functions and delineating the challenges which the ECA and courts faced in the pre-revolutionary era and the challenges which post-revolution is likely to bring, it is imperative to understand and comprehend to the pressures which led the Egyptian government to introduce a competition law in the first place. This part deals with the two key pressures; the first is the 1991 privatisation programme, while the second is the commitments of the EMAA. These pressures shall be explained in turn.

1.1 THE CONSEQUENCES OF THE 1991 STRUCTURAL REFORM: A HIGHLY CONCENTRATED MARKET
Before laying out the consequences of the 1991 economic reform and structural adjustments programme, it is indispensable to recognize the history of the Egyptian market and how the need to introduce a competition law emerged. In 1952 a coup led by Egyptian army officers ousted the monarchy and established a republic with a nationalizing character. In particular, following the 1952 revolution, the Egyptian government started playing a significant role in the economy through nationalizing many private companies and gaining control over economic activities. While it was estimated that the private sector accounted to 76% of total investments in 1952, this volume has dropped dramatically to approximately 10%, while the public sector's share accounted to 90% of all investments during the 1960s. By the early 1970s, all economic activities but infant businesses and agriculture were run by the state. However, in the mid 1970s the Egyptian market experienced an "Open Door" (or infetah) - which was initiated by President Sadat and aimed at liberalizing the economy and encouraging foreign investments. Nevertheless, the public sector still continued to dominate the majority of economic activity.

In particular, the Egyptian government, via its state-owned enterprises, had control over economic activities, exchange rates, subsidies, the imposition of export bans, etc. It therefore had a monopoly and so competition law was thought to be of no use at the time. This was in spite of the wide perception that a market economy should be based on the principle that competition increases efficiency and innovation and that neither public nor private sector monopolies are positive. However, the government's strategy led to various structural impediments in the market by the late 1980s; this, nonetheless, being overshadowed by a substantial rise in its external resources and capital inflows. While these available resources enabled the government to maximise its expenditure to a certain degree, the economy was subject to a dramatic depression during the mid 1980s and hence, structural barriers became more and more patent. This undoubtedly gave rise to the compelling need for a stabilization mechanism and economic reform.

In 1991, an economic reform and structural adjustment programme finally took place, which was led by the International Monetary Fund (‘IMF’) and assisted by the World Bank. The main aim of this programme, as stated by the IMF was to “create, over the medium term, a decentralized market based, outward-oriented economy where private sector activity will be encouraged by a free, competitive, and stable environment with autonomy from government intervention”. This strengthened privatisation programme had a remarkable role in a substantial and rapid emergence of the private sector. However, the Egyptian experience of the introduction of the privatisation agenda was challenging. This was primarily due to the fact that the regulatory structure that existed prior to privatisation (where the state had control over most domestic projects) was adopted and implemented solely to match that particular stage. In other words, the regulatory structure that existed during the state-monopoly era did not match the post-privatisation circumstances.

Furthermore, the transfer of monopoly from the public to the private sector led to an increasing number of anti-competitive practices, in the absence of a detailed competition law. This may be attributed to the lack of effective competition culture in many sectors and, as a result, the existence of high barriers to entry. For instance, in the fresh juice and non-alcoholic beverages industry, there are only 2 or 3 firms that dominate 75% of the market. Only a few firms dominate 70% of the fabrics production industry. In the cement industry, while 9 firms operate, only 3 of them account to 70% of

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2 Privatization Coordination Support Unit (2002) “The Results and Impacts of Egypt’s Privatization Program” Special Study, pp.3-4
5 However, there were some existing laws addressing anti-competitive conducts, but in a very broad sense. For instance, Article 345 of the Egyptian Penal Code prohibits increase or decrease in prices that are aimed at attaining illegal benefits. The Egyptian Commercial Law prohibits conducts that provide unfair competition.
total production. This data shows that the Egyptian market is highly concentrated. Thus, competition law was seen as a tool to revitalize the market.

1.2 THE EU-EGYPT PARTNERSHIP: AN OBLIGATION OF CONVERGENCE WITH EU COMPETITION RULES?

The EU-Egypt trade relations first emerged in 1977 when they signed a General Cooperation Agreement. The agreement provided a preferential trade relationship that prevailed until 1996. It, moreover, provided non-reciprocal free market access for industrial Egyptian exports (with the exception of textiles and clothing) to the EU market. The agreement did not, however, include a section on competition rules. It was not until the Barcelona Conference that convened in 1995 when negotiations of Association Agreements commenced. The objective of the Barcelona Process was mainly to adopt a free trade area between the EU and its Mediterranean neighbours by the beginning of 2010. Most of the EU’s neighbouring countries, including Egypt, were involved in the negotiations. Following a series of intensive negotiations, the EU agreed to adopt the Euro-Mediterranean Association Agreement with each of its Mediterranean neighbouring countries on a bilateral basis. The EMAA in particular was signed and came into force in July 2004. Egypt was given a five-year provisional period for implementation of some of its obligations, including competition provisions; at the time Egypt was yet to enact a competition law. It is somewhat implicit from provisions of the EMAA (as discussed below) that drafters have feared the latter.

Article 34(1) of the EMAA provides that: “The following are incompatible with the proper functioning of the Agreement, insofar as they may affect trade between the [Union] and Egypt:

(i) All agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

(ii) Abuse by one or more undertakings of a dominant position in the territories of the Community or Egypt as a whole or in a substantial part thereof;

(iii) Any public aid which distorts, or threatens to distort, competition by favoring certain undertakings or the production of certain goods”.

At the outset, one may observe that any anti-competitive agreement, abusive practice, or public aid that does not affect trade between the EU and Egypt shall be subject to either EU or Egyptian

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8 At this particular stage, only a few number of agreements contained competition provisions in a manner that simply promotes fair competition practices. See for example, the Association Agreement between the European Economic Community [now EU] and Cyprus, 19th December 1972, O.J. L133/2, 21st May 1973.

9 Negotiations also involved countries like Algeria, Israel, Jordan, Palestinian Authority, Lebanon, Morocco, Syria, and Tunisia.


11 Article 34(1), Euro-Mediterranean Agreement Establishing an Association Between the European Community and its Member States, of the one part, and the Arab Republic of Egypt, on the other part [OJ L 304 of 30.9.2004]
Competition Law (depending on the territory where the practice took place) with no reference to Article 34(1) of the EMAA. This pre-requisite is indeed not surprising, since the core objective and rationale behind competition rules of the EMAA is to foster trade and not only to protect the competition process between the EU and Egypt. Hence, the effect on trade remains a turning point in any dispute within the context of the EMAA\(^\text{12}\).

Furthermore, Article 34(1) should not be read in isolation. It was rather accompanied by two Declarations. First, the Declaration made by the European [Union] on Article 34 which provides that: “The [Union] declares that, until the adoption by the Association Council of the implementing rules on fair competition referred to in Article 34 paragraph 2, in the context of the interpretation of Article 34 paragraph 1, it will assess any practice contrary to that Article on the basis of the criteria resulting from the rules contained in Articles (101, 102 and 107 of the Treaty on the Functioning of the European Union) […]”\(^\text{13}\). And, second, The Joint Declaration made by Egypt and European [Union] on Article 34 which states that: “The parties recognise that Egypt is currently in the process of drafting its own competition law. This will provide the necessary conditions for agreeing on the implementation rules referred to in Article 34(2). While drafting its law, Egypt will take into account the competition rules developed within the European Union […]”\(^\text{14}\).

At first sight, these Declarations may be construed in two ways. One reading implies that EU competition rules were meant to apply if Egypt did not introduce its own law and where trade between the EU and Egypt is hindered within the scope of Article 34(1). Indeed this in itself may have accelerated the process of introducing competition law in Egypt, due to a possible fear of the application of EU rules. Moreover, applying EU law and practice until the Association Council adopts the related implementation rules may have an inevitable influence on the shape of the latter. A second interpretation to these Declarations is that - until Article 34 is adopted, and due to the lack of any alternative replacement rules (i.e. Egyptian competition rules) at the time of entry into force of the EMAA - then EU competition rules are to apply. As for the EU competition rules influencing the drafting of the Egyptian ones, it may have intended to signify that the Egyptian regime should more or less be in line or compatible with the EU system, for the purposes of the EMAA.

In fact, it is sometimes argued that a de facto imposed harmonization with EU competition rules may be indirectly inferred from the EMAA. Not only may this be envisaged from the Declaration made by the EU on the application of the TFEU rules until adoption of the EMAA’s implementation ones, but also from the following statement in the Joint Declaration: “While drafting its law, Egypt will take into account the competition rules developed within the European Union”\(^\text{15}\). Such a statement, if narrowly construed it may imply that the Egyptian legislator should harmonize Egyptian rules with EU ones. However, these interpretations do not appear to take into account the rationale behind the entrenchment of competition provisions in trade agreements in general. The truth is that there was no intention on the part of the EU negotiators to force or oblige Egypt to import EU rules on competition. Nonetheless, it may be desirable for Egyptian Competition Law to be as compatible as possible with

\(^{12}\)The condition of the ‘effect on trade’ is not a new one to the EU. It is found in the TFEU, which requires that trade be affected between member states as a prerequisite for application of its competition rules. See the EU Commission Notice – Guidelines on the effect on trade concept contained in Articles [101 and 102 of the TFEU] [2004] OJ C 101/07. It was also a condition found in the European Economic Area Agreement as well as regional trade agreements where the EU is not a party, such as the COMESA and the MERCOSUR that contain the same condition.

\(^{13}\)Declaration made by the European Community on Article 34, EU-Egypt Association Agreement

\(^{14}\)Ibid, Joint Declaration made by Egypt and European Community on Article 34

\(^{15}\)Ghoneim, A., Greiss, M., Holmes, P. (2008) “Chapter four – Competition” Examining the Deep Integration aspects of the EU-South Mediterranean Countries: Comparing the Barcelona Process and Neighbourhood Policy, the Case of Egypt, FEMISE Project No FEM31-08, available from: (http://www.femise.org/PDF/ci2006/FEM31-08.pdf) Accessed 22-12-2011, p.87; Joint Declaration on Article 34, EU-Egypt Association Agreement
that of the EU. In particular, this is to provide a comparable treatment in Egypt for EU investors similar to that offered in the EU for Egyptian investors. In this sense, the idea was generally to encourage the Egyptian government to introduce its competition law.

Indeed prior to the introduction of Egyptian Competition Law, EU-Egypt trade relations involving competition issues would be assessed under EU competition rules, since they were the only legal reference in force at the time the EMAA was drafted. In fact, it is on this basis that one may perceive that the EMAA competition provisions have accelerated or put pressure on Egypt to adopt its own competition law. Indeed, Article 34 of the EMAA, which is generally based on Articles 101, 102, and 107 of the TFEU, merely serves as a guidance for Egypt to take into account while drafting its own law. As for the implementation rules of Article 34(1), the Association Council is yet to provide the necessary implementation rules that were initially expected within the five-year period that followed entry into force of the EMAA. However, the lack of implementation rules does not pose any problem. Since these rules merely bring cooperation between competition authorities into practical terms as soon as the effect on trade within the scope of Article 34(1) arises. In this sense, whether or not the implementation rules are issued does not affect the application of Article 34(1) per se.

After all, following numerous drafts commencing in the mid-1990s, and arguably in pursuit of satisfying these internal and external pressures, the Egyptian Parliament approved the Law No. 3 of 2005 promulgating the Law on Protection of Competition and Prohibition of Monopolistic Conducts (‘Law No. 3/2005’) on 15th February 2005. This was followed by the issuance and approval of the Prime Ministerial Decree No. 1316 of 2005 issuing the Executive Regulations of Protection of Competition and Prohibition of Monopolistic Conducts Law No. 3 of 2005 (‘Executive Regulations’) on 16th August 2005. The Law No. 3/2005 prohibits horizontal restraints (Article 6), vertical restraints (Article 7) and abuse of dominance (Article 8), all of which under certain conditions that more or less correspond to international standards. However, in contrast with EU law, the Egypt system does not cover state aid and lacks a merger control regulation for the assessment of concentrations. Articles 11(2) and 44 of the Law No. 3/2005 and its Executive Regulations respectively merely require a notification of mergers within 30 days of the transaction.

However, the introduction of competition law - whether or not modelled on EU competition rules - does not fully reflect the EU negotiators’ encouragement to the Egyptian government and does not in itself guarantee an efficient market structure in Egypt. An effective competition authority must accompany it. Ever since its formation in August 2005, and in spite of operating without any pressure from the EU to implement the latter rules and practice by virtue of the EMAA (unlike accession states in relation to Europe Agreements), the ECA has been striving to disseminate competition culture and promote a competitive economic environment that is premised on the precepts of free market and fair competition in order to tackle the highly concentrated market structure.

Nevertheless, the controversy that this raises is whether or not Egyptian Competition Law provides that the ECA shall be an independent body. Since Article 2.2.4(b) of the EU-Egypt Action Plan

16 Article 34(2), EU-Egypt Association Agreement
The Association Council is the body that administers implementation of Association Agreements. In the EMAA context and pursuant to Article 75(1) thereof, it consists of members of both; the European Council and Commission, on the one hand and members of the Egyptian Government, on the other hand. The Association Council has the authority to adopt legally binding decisions that are usually taken on a unanimous basis, as per Article 76 of the EMAA. It is worthy to note that the Europe Agreements, as opposed to Euro-Mediterranean Association Agreements, have a tighter schedule with respect to the adoption of competition implementation rules.

17 See for example the implementation rules of the EU-Morocco and EU-Algeria Association Agreements.

18 See Official Gazette No. 6 (Bis) dated 15/02/2005, entered into force on 15/05/2005.

19 See Official Gazette No. 32 (Bis) dated 17/08/2005, entered into force on 18/08/2005. Note that the Executive Regulations represent no more than an elaboration on how the provisions stipulated under Law No. 3/2005 shall be applied in practice.
stipulates the necessity to: “[…] Establish an independent and adequately-resourced competition authority.”\(^\text{20}\) While some argue in favour of the ECA’s independence, others argue, in contrast, that the ECA's institutional structure as it stands is not suitable and does not allow it to fulfil its role with full force and that its decisions are influenced to a large degree by the Prime Minister or the Competent Minister delegated by the former to administer the ECA. The question that lies beneath this controversy: Does the degree of independence of the ECA differ in the pre-revolutionary era in comparison with the post-revolutionary era?

### 2. THE DEBATE OVER THE INDEPENDANCE OF THE EGYPTIAN COMPETITION AUTHORITY

The ECA has wide-ranging powers in relation to the application of the rules of law\(^\text{21}\). This includes the power to receive complaints and initiate inquiries regarding anti-competitive practices stipulated in Law No. 3/2005, the use of judicial enforcement powers whenever needed in conducting inspections, the power to take final decisions regarding cases under inspection, the power to take necessary measures to stop violations and refer the case to the Competent Minister who may refer it to the Public Prosecution in case a violation to the Law is proven. The Second Article of Law No. 3/2005 indicates that the Competent Minister for the purposes of the application of the Law is the Prime Minister.

Prior to the 25th January revolution, and for the first five years of the enforcement of competition law in Egypt, the Minister of Trade and Industry was delegated to carry out the competencies of the Prime Minister in this respect\(^\text{22}\). These competencies (or one may so name as powers) included the power to request the ECA to conduct market studies, the exclusive power to refer studies/cases conducted or investigated by the ECA to the Public Prosecution for a criminal investigation, and the exclusive power to settle competition lawsuits before the competent court renders a final judgement\(^\text{23}\), so long as the subject pays an amount of no less than double the minimum fine and not exceeding double its maximum\(^\text{24}\).

Based on the foregoing exclusive powers that were granted to the Competent Minister, some have argued that the ECA lacks the sufficient independence to enforce the law. In particular, the fact that the ECA merely had the power to receive complaints or to start inquiries on its own initiative (i.e. without the discretion of whether to refer them to the Public Prosecution) does not reflect the true meaning of independence; that is a competition authority “should have no links to existing government ministries and should possess the power to issue binding decisions subject to judicial review”\(^\text{25}\). In fact, it is suggested that the studies requested by the Competent Minister in the pre-revolutionary era constituted a considerable volume of the ECA’s workload. On this basis, the ECA’s activities were

\(^{20}\) Article 2.2.4(b), EU-Egypt Action Plan, 2007

Note that the EU-Egypt Action Plan is not a legally binding agreement as is the case with the EMAA. It is merely an operational plan for the EMAA.


\(^{22}\) Prime Ministerial Decree No. 571 of 2006 Delegating the Minister of Trade and Industry to perform the Prime Minister’s terms of reference under Egyptian Competition Law, 1st April 2006

\(^{23}\) Competition-related disputes in Egypt are subject to the exclusive jurisdiction of economic courts, according to Article 4 of the Law No. 120/2008 Establishing Economic Courts. This law came into force in October 2008.

\(^{24}\) Article 21, Law No. 3/2005

reasonably influenced by the government’s plans at the time and that the actual implementation of competition law rested on the Competent Minister rather than the ECA\textsuperscript{26}.

Notwithstanding the foregoing, the Competent Minister (or the Prime Minister), in principle, may not interfere in the outcome of the ECA’s study or inquiry. In other words, the competencies of the Competent Minister in this regard are confined to the power to request the ECA to conduct market studies and to file a criminal lawsuit or to provide a settlement with regard to any violation, before a final judgment is rendered. Inevitably these competencies are solely based on the ECA’s analysis and outcome of the study it conducts (whether it is carried out on its own initiative or by virtue of a request from the Competent Minister). In this sense, the Competent Minister may not direct or steer the pattern or outcome of the ECA’s study and decision. Since it is the ECA’s Competent Department that carries out the requested study, including the procedures of inquiry, inspection and gathering information in accordance with the rules stipulated under Law No. 3/2005 and its Executive Regulations\textsuperscript{27}.

Another reason for the ECA’s lack of independence is the composition of its Board of Directors (‘BoD’). Under Law No. 3/2005, the BoD shall be composed of a full-time Chairperson, a Counselor from the State Council, four members representing the concerned ministries, three experts and specialists, and six members representing industry associations or unions\textsuperscript{28}. The decisions are passed by the majority vote (i.e. 8 of 15 board members). Some commentators have questioned whether it is acceptable for it to be composed of members who represent the government at least have some political affiliation. In the pre-revolutionary era, the first BoD of the ECA was formed of nine members out of a total of fifteen (approximately 60% of the BoD) who had some political affiliation to the government\textsuperscript{29}.

In fact, the Law No. 3/2005 does not set out any restrictions to the representation of political affiliations in the BoD. Thus, some have argued that the structure of the ECA’s BoD coupled with the lack of any limitation pertaining to the representation of any political party therein opens the door for interest groups to influence the ECA’s decision-making process and, as such, undermines the independence of the ECA\textsuperscript{30}. However, the Law No. 3/2005 prohibits any board member from participating in deliberations or voting in a case for which s/he have a direct or indirect interest in it, or if s/he is a relative to any of the parties up to the fourth degree, or if such member currently represents or has represented any of the parties\textsuperscript{31}. Indeed this ensures the “neutrality” of the decision-making process, as one of the values of the ECA\textsuperscript{32}.

However, the post-revolutionary era saw major procedural developments in this respect. When in office, Prime Minister/Dr Essam Sharaf, who led the revolutionary Cabinet of Ministers, issued the Prime Ministerial Decree No. 1410/2011 delegating the Chairperson of the Egyptian Competition


\textsuperscript{27} Examples of studies carried out by the ECA by virtue of a request from the Minister of Trade and Industry (acting as the Competent Minister) are those on markets like Cement, Steel, Imported Red and Processed Meat, Edible Oil, and Milk.

\textsuperscript{28} Article 12, Law No. 3/2005

\textsuperscript{29} The associations or unions represented by the six members are the General Federation of the Chambers of Commerce, the Egyptian Federation of Industries, the Banking Federation, the General Federation for Civil Associations, the General Federation for Consumer Protection and the Egyptian General Union of Labor.

\textsuperscript{30} Afifi (2010) op. cit p.32-34

\textsuperscript{31} Ibid; Ibrahim, A. N. & ElFar, M. (2011) "Constitutionalising the Egyptian Competition Policy in the Post Revolutionary Reforms" (3 – extra), Mediterranean Competition Bulletin, pp.10-11

\textsuperscript{32} Egyptian Competition Authority Annual Report (2006-2007), p.15
Authority to exercise certain competencies. The First Article of the Decree empowers the Chairperson to exercise the competencies of the Competent Minister as stipulated in Article 21 of Law No. 3/2005 (power to refer cases to Public Prosecution for criminal investigation or settle prior to a final judgement)\(^33\). Inevitably the Prime Ministerial Decree 1410/2011 puts an end to the debate over the independence of the ECA. In fact, Chairperson/Dr Sameh El-Torgmann, when in office, indicated that by virtue of this Decree the ECA now has great responsibility in the forthcoming period and that this requires exerting significant efforts to intervene in an appropriate and fair manner in order to protect competition and prohibit monopolistic practices in the Egyptian market\(^34\).

To conclude this part, prior to the 25th January revolution some have argued that the ECA lacked independence based on two grounds: First, it did not have the power to settle final cases or refer them directly to the Public Prosecution (as this was exclusively granted to the Competent Minister). Second, the composition of the ECA’s BoD allowed interest groups to influence its decision-making process. These arguments indeed seem to make sense. Nonetheless, one should not characterize the ECA’s decision-making process as highly dependent on the Competent Minister or the desire of interest groups. One premise for this is the fact that the Competent Minister’s competencies are confined to the power to request the ECA to conduct market studies and to file a criminal lawsuit or to provide a settlement with regard to any violation and, as such, is not empowered to control or steer the shape or outcome of the study. However, the recent procedural reform clearly ensures the independence of the ECA and has thus put an end to this debate.

As for the potential influence of interest groups, the Law No. 3/2005 prohibits any board member from participating in deliberations or voting in a case for which s/he have a direct or indirect interest in it, or if s/he is a relative to any of the parties up to the fourth degree, or if such member currently represents or has represented any of the parties. This prohibition helps to prevent the influence of interest groups and, as such, safeguards the neutrality of the ECA's decision-making process. After all, the enforcement of Egyptian Competition Law in the pre-revolutionary era (as discussed below) exemplifies the element of effectiveness.

### 3. THE ENFORCEMENT ACTIVITY OF THE EGYPTIAN COMPETITION LAW

#### 3.1 THE ENFORCEMENT ACTIVITY IN THE PRE-REVOLUTIONARY ERA

Ever since its formation in 2005, the ECA has undoubtedly been very active in settling complex disputes in key industries (e.g. Cement and Steel). In fact, many international experts rank it among the top young competition authorities that have dramatically advanced in a period of just six years. The ECA investigated various cases and conducted numerous market studies. Throughout the period 2006 – 2011, it received a total of 85 cases, 8 of which had violations, 35 cases had no violations, 13 cases were investigated on its own initiative, 14 studies were carried out based on requests from the government, and 15 complaints were found external to its competency. This part will evaluate the effectiveness of the enforcement activity of Egyptian Competition Law in the pre-revolutionary era. In so doing, the two key studies of the construction industry (Cement and Steel) conducted by the ECA up until January 2011 will be evaluated. This will be followed by a discussion on the debate over the 2008 amendments of Law No. 3/2005.

#### 3.1.1 The key cases and studies conducted by the Egyptian Competition Authority

\(^33\) Prime Ministerial Decree No. 1410/2011 delegating the Chairperson of the Egyptian Competition Authority to exercise certain competencies, published in Official Gazette, Vol. 46 dated 17 November 2011; Article 21, Law No. 3/2005

3.1.1.1 The Cement Case: A first violation findings Case in Egypt

In July 2006, the ECA received a formal request from the Minister of Trade and Industry (Competent Minister) to conduct a study on the Cement market in Egypt in order to discern whether the increase in prices was attributed to the existence of any anti-competitive agreements or practices. The ECA found that the relevant product market was Ordinary Portland Cement ('OPC') and the relevant geographical market is the Arab Republic of Egypt with nine cement companies. It then investigated the behaviour of the market players along with its impact on the performance of the market. It found that the 1991 structural reform attracted much foreign investment and led to an expansion in production activity as a result of the entry of many new firms into the market. The consequence was a dramatic increase in the volume of output, which led to fierce competition on prices and, as a result, prices dropped significantly to the extent that some companies had to sell at below-cost prices in order to remain in the market. In order to re-stabilise the market, the Minister of Public Enterprises in 2003 agreed with cement producers to divide market shares of domestic sales among them, based on each producer's production capacity. Inevitably this meant that competition in the market came to an end and as a result prices started to rise.\(^35\)

Moreover, the ECA indicated that factors which encouraged or facilitated agreement among competing firms (or ‘hard-core cartel’) were present; namely the homogeneity in producing the OPC, very few competitors in the market (potentially classifying it as an oligopolistic market), great transparency in the market (since the Ministry of Investment issues a monthly report identifying the prices and market shares of the companies), and finally, the existence of direct contact between competitors (this was confessed by some of the executives of these firms)\(^36\). The ECA found that the agreement among the competing firms that took place in 2003 was still in place (even following the adoption of Law No. 3/2005). It also found an increase in the average sales prices of OPC from 2003 to 2004 by a volume of 33% given that the average production costs have increased by a volume of only 10%. In 2006, average sales prices increased by 14% notwithstanding a decrease in production costs by 3%. Competing firms did not decrease prices in order to attract customers, but rather decided collectively to increase prices.\(^37\)

Furthermore, the ECA proved that the agreement contained a requirement to maintain certain market shares of domestic sales and to allocate a certain volume of production based on the production capacity of each firm. It, therefore, concluded that the cement firms had violated the terms of Article 6(a) and (d) of Law No. 3/2005 (price fixing and limiting the process of marketing of goods respectively).\(^38\) Like other competition jurisdictions, the ECA did not find the need to analyse or prove that the 2003 agreement that continued to prevail among the competing cement firms (horizontal agreement) had an effect on competition (and in turn consumers of OPC in Egypt) and, as such, employed a per se approach. Since hard-core cartels tend to have an effect on competition in most circumstances. This is why Article 6 of Law No. 3/2005 does not stipulate any criteria on the effects of the agreement.\(^39\)

The ECA referred its report to the Minister of Trade and Industry to file a Criminal Lawsuit. The Court of First Instance (‘CFI’) explicitly upheld the ECA’s report and fined each of the 20 executives of the 9 cement firms 10 Million Egyptian Pounds for each company for contravening the terms of


\(^{36}\) Ibid, pp.11-16

\(^{37}\) Ibid, pp.16-22

\(^{38}\) Ibid, pp.22-28

\(^{39}\) This contrasts with the prohibition under Article 7 of Law No. 3/2005 (vertical agreements), which, by virtue of Article 12 of the Executive Regulations, should be investigated by employing a rule of reason test.
Articles 6(a) and (d) of Law No. 3/2005⁴⁰. Besides being the first successful competition case in Egypt for the ECA and courts, the case provides some lessons on criminal liability – a notion that may seem equivocal under Law No. 3/2005. Prior to this judgment, some may have perceived that criminal liability rests on firms found to have violated Law No. 3/2005 (particularly given the lack of an imprisonment punishment under the latter).

However, in accordance with the general criminal rules in Egypt only natural persons (i.e. company personnel) are criminally liable. Therefore, juristic persons (i.e. companies) are not liable for criminal acts for competition-related violations, except jointly with natural persons and only in respect of payment of any fines. Article 22 of Law 3/2005 criminalizes the acts of natural persons who may be a company’s marketing manager, financial manager, sales manager, executive director and/or chairperson⁴¹. Article 25 of Law 3/2005 addresses the event where the anti-competitive practice is committed by an employee other than the person responsible for management of the company. This necessitates that the person responsible for management is aware of the contravention and that the employee commits the contravention in the name or on behalf of the company.

While Article 25 may have been confusing to some, the CFI in Public Prosecution v. National Cement Co. & Others has undoubtedly provided a clear understanding of its implementation. While nine companies were convicted over price-fixing and limiting the process of marketing, 20 of these companies’ personnel were criminally liable; all of which rested on their involvement in these practices (or awareness of these violations in the case of personnel responsible for management). Among those 20 personnel were nine of the management team of each company (responsible managers, chief executive officers or chairmen) and the remaining 11 personnel were the managers/employees involved in the cartel. The CFI’s judgment per se provides an unequivocal framework within which the notion of criminal liability operates in the context of the enforcement of Egyptian Competition Law⁴².

3.1.1.2 The Steel Study: The quest for market efficiency

Similar to the Cement Case, the ECA received a request from the Competent Minister in July 2006 to conduct a study on the Steel Rebar market in Egypt and determine whether the increase in prices was attributed to any anticompetitive agreements or practices. In pursuit of this, the ECA conducted a wide-ranging investigation of the steel firms’ agreements and practices and conducted meetings with many market players. To ensure that the study was dealt with in an efficient and appropriate manner and in the way that would benefit both the domestic market and economy, the ECA sought advice from foreign experts in the EU and the US with experience in investigating similar cases⁴³.

The ECA found that the relevant product market was Steel Rebar and the geographic market was the Arab Republic of Egypt. It also found that neither of the competing Steel Rebar firms had any verbal or written agreements in place among them. Thus, an infringement to Article 6 was excluded. In addition, the ECA found no violation to Article 7, since the relationship between Steel Rebar producers and suppliers of raw material was not based on any exclusive arrangement. The ECA then shifted its appraisal to abuse of dominance⁴⁴. Taking into account the position of the Steel Rebar


⁴¹ Article 22 of Law No. 3/2005 does not explicitly indicate the criminal liability of natural persons, but rather uses the term “whoever violates the provisions of Articles 6, 7, 8 of this law”.


⁴⁴ Ibid, pp.4-24
market players in light of the conditions stipulated under Articles 4 and 8 of Law No. 3/2005 and its Executive Regulations respectively, the ECA found that Ezz Group held a dominant position. However, as is the case under other competition jurisdictions, dominance does not in itself constitute a prohibition under Egyptian Competition Law. It merely restricts firms from being involved in certain practices (special responsibility). Having found Ezz Group to be dominant, the ECA moved on to determining the compliance of its practices with Article 8 of Law No. 3/2005.

In particular, it was concerned with the compliance of Ezz Group’s standard distribution agreement with Article 8(c), which prohibits a dominant firm from: “Undertaking an act that limits distribution of a specific product, on the basis of geographic areas, distribution centers, clients, seasons or periods of time among Persons with vertical relationships.” Article 4 of Ezz Group’s distribution agreement stipulated that: “In the event where the second party (approved distributor) refrains from receiving the quantities specified to him/her on a monthly basis by virtue of this agreement by a volume exceeding 10% of the quantity initially agreed upon due to reasons related to him/her and not the market for a period of two consecutive months, the first party (Ezz Group) shall be entitled to reduce his/her monthly quantity to the extent of the actual quantities received for the remaining period of the agreement.”

The ECA found that Ezz Group’s system of approved distributors and monthly portions did not in itself violate competition law, but the quantities clause reduction might raise competition law compliance concerns. In particular, the ECA indicated that such a proviso might lead to exclusivity in dealing with Ezz Group’s product. However, it concluded that the clause did not violate Article 8(c) on the premise that the volume of sales of other producers was not deterred. It indicated, on the contrary, that throughout the period of study, the demand on Steel Rebar in general significantly increased. The ECA then concluded that the increase in prices of Steel Rebar during the period of study was attributed to the increase in prices of raw material for which its production is reliant on.

The ECA’s appraisal demonstrates its willingness to employ an effects-based approach to this form of practice. Indeed the fact that Article 13(c) of the Executive Regulations (which stipulate the guidelines to be followed while analysing practices under Article 8(c) of Law No. 3/2005) were silent in this respect and did not necessarily signify that a per se approach ought to be followed, as some appear to suggest. While some of the nine abuses stipulated under Article 8 are limited to certain guidelines for employing an effects-based approach stipulated by Article 13, others, including paragraph (c), do not provide specific guidelines and are subject to the discretion of investigating authorities to favour between per se or effects-based approach. This potentially rests on the nature of the practice at stake and the structure of the market.

In the Steel case, the ECA favoured an effects-based approach over a per se approach on the premise that employing the latter may have led to type II errors (erroneously condemning pro-competitive practices). Since Ezz Group’s clause did not distort competition in the relevant market, and that it was on the contrary, the volume of sales of Ezz Group’s competitors have increased. Thus, employing a per se approach to this category of practices may have undermined the ECA’s credibility to the business community (and potentially foreign investors). In addition, pursuant to the ECA’s appraisal, it does not appear to be sufficient for a practice that falls within the scope of Article 8 of Law No. 3/2005 to have likely or potential effects on the competitive process (and consumers); the ECA seems to favour an actual effects-based standard rather than merely potential or likely effects. This reflects

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46 Article 8(c), Law No. 3/2005
47 Report of the Egyptian Competition Authority, Steel Study, pp.42-44
48 Ibid, p.45
the very nature of the objectives that Egyptian Competition Law seeks to achieve: To protect competition as a means for protecting consumers\(^50\).

### 3.1.2 The debate over the 2008 amendments of Egyptian Competition Law

Following three years of enforcement of the Egyptian Competition Law, several additions and amendments have been put in place in 2008\(^51\). The legislator provided amendments, inter alia, to the amounts of fines for the three central prohibitions under Egyptian Competition Law\(^52\). In particular, the Law No. 190/2008 lifted the fine for any infringement to Articles 6, 7, or 8 of Law No. 3/2005 to a minimum of one hundred thousand pounds to a maximum of three hundred million Egyptian pounds\(^53\). The fine shall be doubled in case of recurrence\(^54\). Arguably, the most important addition to Egyptian Competition Law is the introduction of a leniency policy. Leniency is term to describe a system of partial or total exoneration from the penalties that would have otherwise been applicable to a cartel member firm (usually known as ‘whistle-blower’) that reports its cartel membership to the competition authority. As a result, the competition authority decision that could be deemed lenient includes agreeing to pursue a reduction in fines or penalties or not to refer the matter for criminal prosecution.

The Law No. 3/2005 did not initially include any detailed leniency policy. Nevertheless, Article 21 - as discussed in the second part of this paper - empowered the Competent Minister (and now the ECA by virtue of Prime Ministerial Decree 1410/2011) to arrange a settlement (aside from the option of filing a criminal lawsuit). While Article 21, in a way, provides a level of leniency by way of settlement, it lacks any guidelines, or requirements on how it is pursued. As such, this may render it inapplicable to whistle blowing. In fact, Article 21 as it stood may fear a cartel member firm from being subjected to a full fine in case it considers dropping the cartel membership and blowing the whistle. Consequently, any infringement to Article 6 (as well as 7) might not be detected except by the ECA (i.e. no whistle-blowing encouraged). Since a cartel member firm may choose to remain silent and proceed with the cartel membership rather than report the violation and be subjected to the same penalty had it been detected by the ECA at a later stage (if at all). In pursuit of tackling this drawback, Article 26 of Law No. 190/2008 provides that: “In case of committing any of the crimes mentioned in Articles (6) and (7) of this Law, the court may exempt, up to the half of the sanction decided thereby, violators who take the initiative to inform the Authority of the offence and submit the supporting evidence, and for those whom the Court considers to have contributed to disclosing and establishing

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\(^{52}\) Other reforms included some minor amendments/additions to behavioural practices (Articles 6(b) and (d), and 8(e) of Law No. 3/2005). The legislator also added some investigative powers to the ECA; represented in requiring firms to provide the ECA with any documentation within a time frame it sets out, as well as the power to receive notifications relating to mergers, acquisitions, establishment of unions, amalgamations, appropriations, or joint management of two or more from firms which their annual turn-over exceeds a certain amount (Articles 11(2) and (3), and 19 of Law No. 190/2008). In addition, the Law No. 190/2008 incorporated a sanction for the failure to comply with the latter powers, represented in a minimum and maximum limit fine. This fine is doubled in the case of deliberately providing the ECA with false data. Article 22(bis) of Law No. 190/2008 also introduced a minimum and maximum fine for any violator who fails to re-adjust their breach (or abide by the decisions rendered by the ECA) of Articles 6, 7, or 8 of Law No. 3/2005.

\(^{53}\) €1 = approximately EGP 7.8

\(^{54}\) Article 22, Law No. 3/2005, as amended by Law No. 190/2008
the elements of the offense at any stage of inquiry, search, inferences gathering, interrogation and trial processes"\(^{55}\).

Article 26 as such seems to provide a partial leniency policy. The partial immunity appears to benefit all those who cooperate in submitting evidence that supports the ECA's investigation. Nevertheless, the debate that arises in this respect is whether or not Law No. 190/2008 should have opted for a full leniency policy for first time whistle blowers, like many other competition jurisdictions\(^{56}\). One possible rationale behind the introduction of a partial rather than a full leniency policy may be to protect the market and safeguard social welfare from the detrimental effects of cartels, through returning the profits assumed from the infringement. In this sense, if a full leniency policy was to be adopted in favour of a first time whistle-blower, this may have deprived the public from obtaining the sufficient amount of compensation for damages from the contravener. Since private enforcement and claims for damages under competition law in Egypt are still weak and has never been used before\(^{57}\). In fact, unlike other competition jurisdictions that provide a full leniency policy for first whistle-blowers, there exist no rules under Article 21 of Law No. 3/2005 that provide for a leniency policy without prejudice to injured parties’ rights to claim damages before courts.

However, one possible drawback of having a partial leniency policy for first time whistle blowers inter alia is that they may act to the benefit of large businesses, since infant businesses may not always opt for whistle-blowing knowing that they will still be subject to 50% of the full fine. In other words, one may argue that it does not encourage whistle blowing (as a leniency policy should normally do) and, as such, it may not be so effective to highly concentrated markets like the Egyptian. Nonetheless, the transition from a non-lenieny based policy (the initial Law No. 3/2005) into a partial leniency based policy is still in itself a step forward. In fact, one notable feature of the 2008 leniency policy is that, unlike other competition jurisdictions, not only does it apply to cartels or horizontal restraints (Article 6), but also extends to vertical restraints (Article 7).

3.2 THE CHALLENGES POSED TO THE ENFORCEMENT OF EGYPTIAN COMPETITION LAW IN THE POST-REVOLUTIONARY ERA

The 1991 privatisation programme has left Egypt with a highly concentrated market. Indeed, as discussed earlier on in this paper, this was among the domestic factors that triggered the enactment of Egyptian Competition Law in 2005. However, the positive effects of adopting and enforcing competition law do not happen overnight. In fact, it is the highly concentrated market structure coupled with the increase in market prices, among several other economic, political, and social reasons, that paved the way for the 25\(^{th}\) January revolution. Ever since the early stages of the uprising, many revolutionaries were against monopolies, high prices, and the inequitable distribution of wealth. The ousting of the Mubarak regime shows one must not underestimate the power of the people in making change. This part will evaluate the proposed 2012 reforms of Egyptian Competition Law. It will then discuss the expected shape of decisions under Egyptian Competition Law in the post-revolutionary era and the way forward.

3.2.1 The proposed 2012 amendments to Egyptian Competition Law and their future implications

\(^{55}\) Article 26, Law No. 190/2008

\(^{56}\) For instance, the EU competition regime employs a full leniency policy. It provides full immunity for first time whistle blowers as long as they submit adequate evidence that enables the Commission to carry out inspection on the firms involved in the cartel and, as a result, find a violation to Article 101 TFEU. Firms that do not qualify for full immunity may benefit from fines reduction if they provide evidence of “significant added value”. See EU Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006/C 298/11

\(^{57}\) Although there is no reference to injured parties’ rights to claim damages under Law No. 3/2005, these parties may invoke the general principles enshrined in Article 163 of the Egyptian Civil Code to claim compensation for damages caused by a cartel. However, this action is yet to be seen in practice in the context of competition law.
Not long after Egypt’s uprising and the demise of the Mubarak regime, the ECA engaged in discussions with some of the political parties and movements, and civil organisations regarding the necessary amendments to Law No. 3/2005, as amended by Law No. 190/2008. The draft amendments agreed among them, and which shall be submitted to the recently elected parliament, include, inter alia, an increase in the maximum limit of fines pertaining to the violation of Articles 6, 7, and 8 of Law No. 3/2005, and a full leniency policy for first time whistle-blowers in relation to violations that fall under Articles 6, or 7 of Law No 3/2005. As discussed in the preceding part, the Law No. 190/2008 increased the threshold of the minimum and maximum amount of fines to EGP 100,000 and EGP 300 million respectively as well as the possibility of doubling these amounts in case recurrence. The draft amendments add a significant increase in the fine amount to reach approximately 10% of the value of sales of the product subject of the breach, in the event where this value exceeds the maximum amount of fine.

Despite that the increase in the minimum and maximum amount of fines (as initiated by Law No. 190/2008) may not be seen as substantial, compared to other competition jurisdictions, some have expressed concerns over the adoption of the 10% value of sales sanction due to the “exposure” to this value at a very challenging transitional phase. This is especially the case since public opinion in Egypt often accuses large businesses for being “greedy” and “corrupt”. In this sense, not only do large businesses have to cope with the current economic crisis, but also a very costly fine awaiting breach to the law. According to El-Samad, the concern of this additional proviso is not the sanction increase, but it is the idea that this increase in exposure stands against the reduction of “antitrust activism” and the protection of firms during difficult political and economic periods.

However, the above argument may be countered on the basis that the reduction of antitrust activism does not always benefit the process of competition and, as a result, consumers. Arguably, in highly concentrated markets like Egypt, and at least at the early stages of antitrust enforcement, an activist approach should be employed and a strict stance should be adopted against infant and large businesses alike in order to gain the confidence of the business community and foreign investors. However, this is provided that type II errors (erroneously condemning pro-competitive practices) are avoided. Indeed the latter is a pivotal element for the credibility and success of any competition authority (or court). With regards to the protection of firms during difficult times, the very objective of Egyptian Competition Law is to protect the competitive process and not economic actors or competitors. That said, the additional sanction might only be beneficial, since it will alarm large firms and help minimise anti-competitive agreements and practices.

As for reform into a full leniency policy for first time whistle-blowers in relation to violations that fall under Articles 6, or 7 of Law No 3/2005, this initiative certainly is a step forward from the partial leniency policy that was adopted by Law No. 190/2008. It may well encourage the whistle-blowing process and, as a result, increase the chances of detecting hard-core cartels and vertical restraints. Since, as stressed in the preceding part, these violations were most probably detected solely by the ECA, given the lack of a full immunity policy. However, a pre-requisite for the effectiveness of a full leniency policy is the stipulation of an unequivocal framework within which whistle blowing that qualifies to full immunity should be put in place. In particular, the amendments should set out the pre-

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59 Al-Ahram Newspapers “Sameh El-Torgmann: The Draft Amendments tackled the errors committed by Mr Ahmed Ezz, but they are still not sufficient” 22-07-2011


61 According to a study, the 2002 Leniency programme enabled the EU Commission to take 19 actions involving more than 100 firms for a total of nearly €3 billion in fines only in 2002 and 2003. See Aubert C., Rey P. & Kovacic W. (2006) “The Impact of Leniency and Whistle-blowing Programs on Cartels” 24(6), International Journal of Industrial Organization, Elsevier.
conditions for full immunity qualification (first time reporting of breach, submission of adequate supporting evidence of breach, etc.). For transparency purposes, the ECA should draft the relevant procedures that govern the process and should adopt a hotline that is specifically dedicated for whistle blowing in order to ensure confidentiality.

To conclude this part, the two amendments inter alia initiated (as discussed above) should foster the competitive process in Egypt and, as a result, yield benefits to consumers. This indeed complies with the very objective of Egyptian Competition Law. In fact, it is argued that the adoption of these amendments, coupled with the high degree of independence that was recently granted to the ECA may tackle the high concentration levels that prevail in the market. Inevitably, however, this presupposes that the ECA (and equally courts) are able to give meaning to them. In fact, the question that stems from this assumption is: Does the shape of competition decisions in the pre-revolutionary era vary from that in the post-revolutionary era? Put differently, can public opinion stir competition decisions in Egypt?

### 3.2.2 The shape of decisions under Egyptian Competition Law: The way forward

The last two decades of the Mubarak regime was described by many for seeing a gradual move from a government-driven socialist market into a capitalist free market where wealth is accumulated under the control of a small minority – yet this was accompanied by stable economic growth. This led to an increase in the poor and middle class population in Egypt. This small minority who mostly own large businesses were perceived through the lens of the public as the major beneficiaries of the economy as well as achieving much of their wealth through “corruption” and “favouritism”. It was thus not surprising that public opinion was largely directed against this minority and the legitimacy of their businesses. The strength of this public rage, however, was only realised by the 25th January revolution, the ousting of the Mubarak regime, and, in particular, the pressure exerted on the ruling Supreme Council of Armed Forces (‘SCAF’) to prosecute politicians and ministers of the regime, including Mubarak and his family for corruption, among other accusations.

The major concern here is the degree of influence public opinion poses on relevant investigating authorities in the post-revolutionary era. In fact, one study found that a Cairo Court issued a decision following the revolution that contradicted with 53 previous decisions issued by the same panel of judges before the revolution with the parties, context, and allegations all being identical. The only distinction was the timing of the decision. That being said, and while competition-related disputes often involve large firms that are potentially the subject of public opinion, the ECA and competent courts should be prepared for increasing pressures to rule against these businesses.

In fact, the difference between the pre and post-revolutionary eras is that in the former, the ECA (and competent courts) was operating without any pressure from the EU (by virtue of the EMAA) to converge Egyptian Competition Law and practice with its own. Moreover, the strength of public opinion against large businesses was insignificant or, more precisely, ineffective at the time. Thus the element of expectation in relation to the settlement of disputes was more or less absent, and so competition-investigating authorities were relatively pressure free. Nowadays the relevant enforcing bodies are bound to encounter the significant pressure from an angry public.

Given the foregoing, the ECA and competent courts should be cautious in dealing with competition-related disputes. Decisions should in no way be driven by public opinion/anger at the expense of justice and economic efficiency. Otherwise, misjudgements or the condemnation of unsubstantiated accusations may reduce its credibility and, as a result, discourage trade, foreign investments, and

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63 El-Samad (2011) op. cit. p.24
innovation – effects that may be very costly to the economy. In order to overcome all these pressures, the ECA should continue to reinforce public awareness of the benefits of competition through regularly publishing studies, newsletters, bulletins, etc. It should also arrange training sessions, workshops, and conferences for this purpose with public bodies, practitioners, business associations, and the academic community. In fact, the recently launched Association for the Protection of Competition (NGO) may assist the ECA in increasing public awareness in Egypt.

CONCLUSION

The Egyptian government encountered several pressures to adopt its own competition law in 2005. Among these were the domestic pressures posed by the 1991 privatisation programme that generated some structural changes in Egypt. These structural reforms led to the transfer of monopoly from the public to the private sector, and so competition law was needed in order to revitalize the market economy. Egypt also encountered pressures from the EU by virtue of the EMAA to introduce its own competition law. The language of the EMAA’s competition provisions may at first sight imply that it imposes on Egypt an obligation to harmonize its laws with EU ones. However, deeper insights refute this and suggest it was in fact Egypt’s responsibility to adopt its own law. Nevertheless, it is implicitly desirable to approximate Egyptian Competition Law with that of the EU. This is to ensure that comparable treatment conditions are provided to EU investors in Egypt.

Ever since its formation in 2005, the ECA has been very keen to disseminate competition culture and regularly monitor the market in order to tackle the highly concentrated market structure that prevail since the 1991 structural reform. Nonetheless, many have questioned the degree of the ECA’s independence in the pre-revolutionary era, since it neither had the power to settle final cases or file a Criminal Lawsuit (which was granted exclusively to the Competent Minister), nor the composition of its BoD safeguarded its decision-making process from any influence from interest groups. Yet these arguments may be countered on the basis that the Competent Minister is neither empowered to control or steer the shape of the ECA’s appraisal in studies nor its outcome. In addition, Law No. 3/2005 safeguards the neutrality of the ECA decision-making process from the influence of interest groups, since it prohibits any BoD member from deliberating or voting in a case of direct or indirect interest, among other standards. However, recent post-revolutionary procedural reform granting the ECA the competencies of the Competent Minister has inevitably put an end to this controversy.

Notwithstanding the foregoing controversy, the ECA has been very active in settling intricate cases in key industries. The cement case was the first successful case under Egyptian Competition Law. The ECA conducted a conclusive study on the cement firms’ practices and found a hard-core cartel based on an agreement between the 9 firms. The CFI’s judgment (as upheld on appeal) demonstrates that it was able to give meaning to the competition rules and provides lessons on how the concept of criminal liability features in practice. Furthermore, the ECA’s analysis in the steel study exemplifies the importance of employing an actual effects-based standard to certain practices in order to avoid type II errors that may lead to very costly consequences on the market.

The effectiveness of the enforcement activity of Law No. 3/2005 may be attributed to the fact that the ECA and courts, unlike EU accession states, operate without any pressure from the EU to apply its acquis communautaire. Nevertheless, the 2008 amendments were not thoroughly considered. Although the introduction of a partial leniency policy was a step forward compared to the initial Law No. 3/2005, it still does not entirely satisfy the demands of the Egyptian market. However, the post-revolutionary era saw suggestions on introducing a full leniency policy. Undoubtedly, such a policy coupled with the increased degree of ECA independence will only be beneficial to the market. Yet, the ousting of the Mubarak regime and the patent power of the people through pressuring the ruling SCAF
to prosecute members of his regime (including himself), though democratically remarkable, may raise concerns over the potential prevalence of public anger at the expense of justice and economic efficiency in future competition cases. In order to tackle this, the ECA should reinforce public awareness of the benefits of competition through regularly publishing reports and organising training sessions, workshops, and conferences for public bodies, practitioners, business associations, and the academic community.

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Level of enforcement of competition regulations in candidate countries for EU Membership

(case study on Serbia, Macedonia, Bosnia and Herzegovina, Croatia, Montenegro and Kosovo)

By Srdjana Petronijević

1. Abstract

Over the past decade, all of the former Yugoslav republics holding an EU (potential) candidate country status have introduced modern competition regimes and established their national competition authorities. In signing Stabilisation and Association Agreements, the candidate countries of the former Yugoslavia recognised 'the importance of the approximation of the existing legislation to that of the Community and of its effective implementation'.

Besides being busy working on harmonising existing legislation with the Community acquis, the national competition authorities in the region claim to be under-staffed, burdened by assessing straightforward merger notifications, having little or no capacity to focus on independent investigations and sector-by-sector analyses. Further, only the changes in legislation (2009 in Serbia, 2010 in Croatia, and 2007 in Macedonia), have put the competition authorities in a position to determine violations of competition and impose sanctions directly (opposite to situation when they had to go to courts). While the majority of the competition authorities in the former Yugoslav republics have established formal cooperation with its peers in the region (usually through signing memorandums on cooperation), cooperation within and outside the boarders is still insufficient.

The aim of this paper is to detail the level of enforcement of competition regulations in selected former Yugoslav republics (Serbia, Croatia, Macedonia, Montenegro, Bosnia and Herzegovina, and Kosovo) by providing an overview of how far these target countries have come in fulfilling their obligations set in the Stabilisation and Association Agreements.

The paper attempts to find the formula for building up the strong and efficient national competition authorities as a key factor in securing efficient enforcement of the competition laws in the region of ex Yugoslavia.

2. Overview of the Competition Authorities in ex-Yugoslav Region

Over the past decade, all of the former Yugoslav republics holding an EU candidate country status have introduced modern competition regimes and established their National Competition Authorities ("NCA"). This new competition legislation replaced the anti-monopoly laws which

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65 Please see http://ec.europa.eu/enlargement/candidate-countries/index_en.htm [last visited 10 February 2012].
were considered dead-letter laws. Although the development in the competition regime has progressed, the harmonisation process and the local enforcement practices have not advanced significantly. One reason is that the local competition is rather young. Most of the former Yugoslav republics did not introduce their modern competition regimes until 2005 (save for Croatia which was the first in the region to established a NCA – as early as 1997; another example is Kosovo, which significantly delayed the process of establishing an independent competition body). Only through changes in legislation (2009 in Serbia, 2010 in Croatia, 2007 in Macedonia, 2010 in Kosovo) have the NCAs been put in a position to determine violations of competition and impose sanctions directly – all in the same procedure, which directly influenced the level of enforcement of competition rules in these jurisdictions and raised awareness among business people and professionals. Below is an overview of selected NCAs in the former Yugoslav republics.

2.1 Serbia

The Commission for the Protection of Competition (the "Serbian Competition Authority", www.kzk.org.rs) was established in 2005 as an independent administrative body and became operational in 2006. Competition rules were effectively introduced into the Serbian legal system in 2005 by the Protection of Competition Act (Official Gazette of the Republic of Serbia, no. 79/05). The new Protection of Competition Act (Official Gazette of the Republic of Serbia, no. 51/09; the "Serbian Competition Act"), currently in force, was adopted on 8 July 2009 and entered into force on 1 November 2009. This law underpinned Serbia's approach towards a modern competition law system. The decisions of the Serbian Competition Authority can be challenged before the Administrative Court.70

The Serbian Competition Authority has five members including the President and both the members and the President have equal voting rights. The Serbian Competition Authority renders decisions by a majority vote of all members. While the previous members of the Serbian Competition Authority showed a more lenient hand when it came to levying fines, the new members took a tougher line on this. The new members were elected by the Serbian Parliament on 12 October 2010 for a five-year term. As a minimum, candidates had to have a ten-year experience in the field of economics or law and a lengthy track record of achievements in the area of competition law and acquis communautaire with a reputation of impartiality.71

Under the 2005 Competition Act, the Serbian Competition Authority was largely prevented from taking efficient actions for collecting evidence and determining infringement of competition rules. This is illustrated by cases in 2009, in which the previous competition regime (i.e. the 2005 Competition Act) was still applicable. Namely, acting on the basis of a request lodged by the Ministry of Trade, the Serbian Competition Authority investigated the Serbian oil market for human consumption; however, the proceedings were suspended due to a

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66 The Protection of Competition Act [Zakon o zaštiti konkurencije] (Official Gazette of RS, no. 51/09)
67 The Protection of Competition Act [Zakon o zaštiti tržišnog natjecanja] (Official Gazette of HR, no. 79/2009)
68 The Protection of Competition Act [Закон на заштита за конкурентијата] (Official Gazette of FYRM, no. 04/05, 70/06, 22/07)
69 The Protection of Competition Act [Ligji për mbrojtjen e konkurrencës] (Law No.03/L-229)
71 Article 23 of the Serbian Competition Act
lack of authority of the Serbian Competition Authority to collect sufficient evidence, as it was, at that time, not appropriately empowered with investigation tools.\textsuperscript{72}

Under the previous competition regime applicable from 2005 until late 2009, the Serbian Competition Authority, when determining fines, had to rely on the support of courts, which proved quite inefficient in practice. Now, the new Serbian Competition Act authorises the Serbian Competition Authority to determine a violation of competition and to impose sanctions. Even the scope of sanctions is extended from fines, civil nullity and interim measures to the sanction of demerger,\textsuperscript{73} procedural penalties\textsuperscript{74} and structural and behavioural measures.\textsuperscript{75}

In order to vest the Serbian Competition Authority with the appropriate tools for public enforcement of competition rules, the new Serbian Competition Act sets out explicitly that the Serbian Competition Authority may conduct inspections of an undertaking's premises, review, seize, copy or scan business records, seal all premises and documentation, and take statements from responsible persons, including employees.\textsuperscript{76}

The work of the Serbian Competition Authority is very transparent – all decisions, statements and other announcements are regularly published on the Serbian Competition Authority's web site. The Serbian Competition Authority should be congratulated on the constant progress in this respect (the web site is subject to regular updates and improvements).

Having an insight in the Serbian Competition Authority's recent practice, one may conclude that the Serbian Competition Authority makes a great deal of use of its 'new powers'. Below is the overview of fines imposed (all relating to infringements such as: (a) abuse of dominance and (b) restrictive agreements). However, the Serbian Competition Authority does not yet make use of its powers in the merger control sector. All the listed fines were collected in 2011. The total of the fines collected so far by the Serbian Competition Authority in 2011 amounts to approximately EUR 33.31 million.

<table>
<thead>
<tr>
<th>Serbian Competition Authority Decision</th>
<th>Fined entities - sector</th>
<th>Fine in EUR million\textsuperscript{77}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decision no. 4/0-02-291/2011-8 dated 24 November 2011</td>
<td>Bus transportation case (Lasta/Evropa Bus)</td>
<td>1.11</td>
</tr>
<tr>
<td>Decision no. 4/0-02-14/11-12 dated 26 May 2011</td>
<td>Food retail chain &amp; food producer case (Idea/Grand Prom)</td>
<td>6.7</td>
</tr>
<tr>
<td>Decision no. 5/0-03-92/2011-1 dated 27 January 2011</td>
<td>Cemetery case (Gradsko groblje)</td>
<td>0.02</td>
</tr>
<tr>
<td>Decision no. 4/0-02-49/2011-03 dated 17 March 2011</td>
<td>Veterinary Chamber case (Veterinarska komora)</td>
<td>0.01</td>
</tr>
<tr>
<td>Decision no. 5/0-02-43/2011 dated 24 January 2011</td>
<td>Milk producers case (Implek/Mlekara)</td>
<td>3.1</td>
</tr>
</tbody>
</table>


\textsuperscript{73} Article 67 of the Serbian Competition Act

\textsuperscript{74} Article 70 of the Serbian Competition Act

\textsuperscript{75} Article 59 of the Serbian Competition Act

\textsuperscript{76} Articles from 47 to 55 of the Serbian Competition Act

\textsuperscript{77} For ease of reference, the amounts are shown as approximate amounts in EUR, although fines are levied in RSD.
2.2 Montenegro

Competition rules were effectively introduced into the Montenegrin legal system in 2005 by the Protection of Competition Act (Official Gazette of the Republic of Montenegro, nos. 69/2005 and 37/07; the "Montenegrin Competition Act"). The Montenegrin competition regime is regulated by the Montenegrin Competition Act, which was adopted on 10 November 2005, entered into effect on 1 January 2006, and was first amended in 2007. It provided the legal framework for establishing the Directorate for the Protection of Competition (the "Montenegrin Competition Authority"; http://www.uzzk.gov.me), which was founded as late as 2008 and did not obtain its own premises until 2010, when it was dislocated from the Ministry of Economic Development (www.gov.me). The decisions of the Montenegrin Competition Authority can be challenged before the Administrative Court of Montenegro (Upravni sud).\(^{78}\)

It may be said that the selection criteria for the members of the Montenegrin Competition Authority are rather non-transparent. The only available information is that Mr Miodrag Vujović was elected as chair of the Montenegrin Competition Authority in 2009.\(^{79}\) The publicly available information supports the rumour that the Montenegrin Competition Authority is rather overstaffed, considering its low work load.

The Montenegrin Competition Authority is vested with a wide range of investigation, supervision, analytical and decision-making powers.\(^{80}\) However, the Ministry of Economic Development has retained certain competences, such as to adopt bylaws.\(^{81}\)

Under the current competition regime, the Montenegrin Competition Authority, when determining fines, would have to rely on the support of courts, which proved to be quite inefficient in practice (the example of Serbia and Croatia). This is probably one of the reasons why the Montenegrin Competition Authority has so far never imposed any fines in practice.

It was only this year that the Montenegrin Competition Authority went public by publishing its decisions on its web site.\(^{82}\) One may conclude that the activity of the Montenegrin Competition Authority is mainly limited to merger control work. As for the fining practice, it has not advanced since the establishment of the Montenegrin Competition Authority, i.e. no fines have ever been imposed by the Montenegrin Competition Authority. The Montenegrin competition regime is still in its infancy.

\(^{78}\) Moravčević Vojnović & Partneri oad in cooperation with Schoenherr: Srdana Petronijević and Christoph Haid, The International Comparative Legal Guide to: Merger Control 2012, Chapter 35: Montenegro; Global Legal Group, November 2011, sections 1.1, 1.2 and 5.8, available at http://www.iclg.co.uk/index.php?area=4&country_results=1&kh_publications_id=218&chapters_id=4940 [last visited on 1 February 2012]

\(^{79}\) Please see www.uzzk.gov.me/director/director [last visited on 13 February 2012]

\(^{80}\) Articles 34 and 42 of the Montenegrin Competition Act

\(^{81}\) Articles 6, 7, 25, 32 and 37 of the Montenegrin Competition Act

\(^{82}\) Please see http://www.uzzk.gov.me/biblioteka/rjesenja [last visited on 14 February 2012]
2.3 Macedonia

The Commission for Protection of Competition (the "Macedonian Competition Authority"; http://www.kzk.gov.mk) was established in 2005 as an independent administrative body. An effective competition regime was introduced into the Macedonian legal system by the Protection of Competition Act (Official Gazette of the Republic of Macedonia, nos. 4/05, 70/06 and 22/07), which became effective on 1 January 2005. On 13 November 2010, the new Protection of Competition Act (Official Gazette of Macedonia, no. 145/10) ("Macedonian Competition Act") entered into force and replaced the previous, 2005 Competition Act. Decisions of the Macedonian Competition Authority can be challenged before the Administrative Court of Macedonia.83

The Macedonian Competition Authority has five members. The President and the other four members are selected by the Parliament for a five-year term. The last composition was elected in 2010. By looking at the work experience of the members, one may conclude that the majority has a law degree and that all of them have worked for the Macedonian Competition Authority since 2006. The criteria for selection of the members are rather broadly set and include the citizenship of Macedonia, a degree in law or economics and five-year work experience. In addition, specific knowledge in competition, trade law, management and finance is also requested.84

The Macedonian Competition Authority has various investigative powers. It is entitled to request certain documentation, statements from parties, witnesses and experts, issue interim measures and hold hearings. The Macedonian Competition Authority may conduct inspections of an undertaking’s premises, review, seize, copy or scan business records, seal all premises and documentation (for a period not longer than 7 days) and take statements from persons in charge, including employees.85

The Macedonian Competition Authority is quite transparent in its work. All decisions are published on its web site.86 The fining practice of the Macedonian Competition Authority has advanced significantly in recent years. The Macedonian Competition Authority has proved to be very efficient in fining infringements associated with the abuse of dominance. Below is a brief overview of the most significant cases:

83 The International Comparative Legal Guide to: Merger Control 2012, Chapter 33: Macedonia; Global Legal Group, November 2011, sections 1.1, 1.2 and 5.8, available at http://www.iclg.co.uk/index.php?area=4&country_results=1&kh_publications_id=218&chapters_id=4936 [last visited on 1 February 2012]
84 Article 27 of the Macedonian Competition Act
85 Article 41 of the Macedonian Competition Act
86 Please see http://www.kzk.gov.mk/mak/zapis_decision.asp?id=9 [last visited on 13 February 2012]
<table>
<thead>
<tr>
<th>Date</th>
<th>Decision no.</th>
<th>Party</th>
<th>Description</th>
<th>Fine (EUR) 87</th>
</tr>
</thead>
<tbody>
<tr>
<td>21 April 2011</td>
<td>n/a</td>
<td>Makedonski Telekom AD Skopje</td>
<td>Abuse of dominance</td>
<td>EUR 1 million</td>
</tr>
<tr>
<td>26 January 2009, 16 March 2011</td>
<td>07-51/1 - infringement established; 09-15/8 - fine rendered</td>
<td>EVN Makedonija AD Skopje</td>
<td>Abuse of dominance</td>
<td>EUR 500,000</td>
</tr>
<tr>
<td>26 January 2009, 4 March 2011</td>
<td>07-7/2 - infringement established; 09-13/3 - fine rendered</td>
<td>ONE-Telekomunikaciski uslugi DOO Skopje</td>
<td>Abuse of dominance</td>
<td>EUR 250,000</td>
</tr>
<tr>
<td>26 January 2009, 29 October 2010</td>
<td>07-6/2 - infringement established; 08-102/9 - fine rendered</td>
<td>T-mobile Macedonia</td>
<td>Abuse of dominance</td>
<td>EUR 780,000</td>
</tr>
<tr>
<td>7 September 2007, 27 June 2008</td>
<td>03-2/30 - infringement established; 09-167/5 - fine rendered</td>
<td>Makedonski Telekom AD Skopje</td>
<td>Abuse of dominance</td>
<td>EUR 2,400,000</td>
</tr>
<tr>
<td>7 September 2007, 11 March 2008</td>
<td>07-242/7 - infringement established; 09-133/4 - fine rendered</td>
<td>AD Elektrostopanstvo na Makedonija Skopje</td>
<td>n/a</td>
<td>EUR 1,350,000</td>
</tr>
<tr>
<td>7 September 2007, 15 February 2008</td>
<td>07-8/13 - infringement established; 09-98/ - fine rendered</td>
<td>T-Mobile Macedonia</td>
<td>This decision was annulled by the Administrative court [U.no. 4829/2007]</td>
<td>EUR 4,100,000</td>
</tr>
<tr>
<td>7 September 2007, 15 February 2008</td>
<td>07-82/7 - infringement established; 09-1/4 - fine rendered</td>
<td>Cosmofon AD Skopje</td>
<td>Abuse of dominance</td>
<td>EUR 250,000</td>
</tr>
<tr>
<td>28 December 2006,</td>
<td>07-296/3 - infringement established; fine rendered in 2007</td>
<td>Makedonski Telekom AD Skopje</td>
<td>Abuse of dominance</td>
<td>EUR 2,300,000</td>
</tr>
</tbody>
</table>

87 For Macedonia, the exchange rate applying to the amounts expressed in EUR with a 'ca.' before the number is the one effective on 18 May 2011 – EUR 1 = MKD 61.8108
Bosnia and Herzegovina

The Competition Council of Bosnia and Herzegovina (the "BIH Competition Authority"; www.bihkonk.gov.ba) was established in May 2004 as an independent administrative body. However, it did not start operating effectively until 2005. The Council is competent for enforcing competition law in the entire territory of Bosnia and Herzegovina, covering the Republic of Srpska, the Federation of Bosnia and Herzegovina and the Brcko District. The Competition Act (Official Gazette of Bosnia and Herzegovina, nos. 48/05, 76/07 and 80/09; the "BIH Competition Act") entered into effect on 27 July 2005 and was last amended in 2009. The Competition Act was a major step towards harmonisation of competition rules in Bosnia and Herzegovina with the EU competition rules (i.e. EC Regulations nos. 1/2003, 139/2004, 773/2004 and 802/2004). The decisions of the BiH Competition Authority can be appealed before the Court of Bosnia and Herzegovina (www.sudbih.gov.ba).

The BIH Competition Authority has six members. The members are elected for a 6-year term (3 members are elected by the Council of Ministers of Bosnia and Herzegovina, 2 by the Government of Bosnia and Herzegovina and 1 by the Government of the Republic of Srpska). By looking at the work experience of the members, most of have some competition experience, as they have worked with the BIH Competition Authority mainly since 2006. The election requirements are broadly set: the candidates must be 'reputable professionals'. It is questionable whether such broad criteria can secure competence in competition law.

In general, the BIH Competition Act vests the BIH Competition Authority with broad investigative powers, as it has a wide range of possibilities to acquire relevant evidence: to request data, statements and documents from the parties; to inspect documents and databases, if required at the parties' premises; as well as to acquire data, statements and documents from third parties. The BiH Competition Authority is quite transparent in its work. All decisions are published on its web site. The fining practice of the BiH Competition Authority advanced considerably in recent years.

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88 Moravčević Vojnović & Partneri oad in cooperation with Schoenherr: Srđana Petronijević and Christoph Haid, The International Comparative Legal Guide to: Merger Control 2012, Chapter 8: Bosnia and Herzegovina; Global Legal Group, November 2011, sections 1.1, 1.2 and 5.8, available at http://www.iclg.co.uk/index.php?area=4&country_results=1&kh_publications_id=218&chapters_id=4888 [last visited on 1 February 2012]
89 Article 22 of the BIH Competition Act
90 Articles 34 – 37 of the BIH Competition Act
As for the fines:

<table>
<thead>
<tr>
<th>Year</th>
<th>Fines in BAM</th>
<th>Fines in EUR (approximate amount)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>1,126,510</td>
<td>EUR 560,000</td>
</tr>
<tr>
<td>2009</td>
<td>590,000</td>
<td>EUR 295,000</td>
</tr>
<tr>
<td>2008</td>
<td>525,000</td>
<td>EUR 262,000</td>
</tr>
<tr>
<td>2007</td>
<td>1,050,000</td>
<td>EUR 525,000</td>
</tr>
<tr>
<td>2006</td>
<td>725,000</td>
<td>EUR 360,000</td>
</tr>
<tr>
<td>2005 – 2004</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

The BIH Competition Act provides for fines of up to 1% of the total annual worldwide revenue of the undertaking(s) that fail to meet the notification deadline.82 The fining policy of the BIH Competition Authority for delays in notifying transactions (i.e. notifying after deadlines for notifying have expired) has proven very strict in practice. There are numerous cases of fining for late notification.83 Besides that, the BIH Competition Authority proved to be efficient in fining infringements associated with the abuse of dominance. Below is a brief overview of significant cases:84

<table>
<thead>
<tr>
<th>Date</th>
<th>Decision no.</th>
<th>Party</th>
<th>Description</th>
<th>Fine (EUR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>21 July 2009</td>
<td>01-06-26-027-140-II/08</td>
<td>Društvo za zastupanje i trgovinu ASA AUTO d.o.o. Sarajevo</td>
<td>Abuse of dominance</td>
<td>EUR 76,694</td>
</tr>
<tr>
<td>1 December 2009</td>
<td>01-06-26-027-174-II/08</td>
<td>Društvo za zastupanje i trgovinu ASA AUTO d.o.o. Sarajevo</td>
<td>The party continued with the infringement disregarding the decision (the one described above)</td>
<td>EUR 357,904</td>
</tr>
<tr>
<td>20 November 2008</td>
<td>01-02-26-023-22-II/08</td>
<td>Institute for health insurance of Canton Sarajevo</td>
<td>Restrictive practices</td>
<td>EUR 25,565 + EUR 7,700</td>
</tr>
</tbody>
</table>

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82 Article 49 of the BIH Competition Act

83 In Telekom Slovenia/Blic.Net (Council Decision no. 01-02-26-039-3-II/07 of 30 January 2008), the Council fined the applicant (Telekom Slovenia) with BAM 200,000 (approximately EUR 100,000) for a 10 month delay. In Cez/Mol/JV (Council Decision no. 01-06-26-015-5-II/08 of 12 June 2008), the Council imposed on the applicants (Cez and Mol) a fine of BAM 150,000 (approximately EUR 75,000) for a 4 month delay, while in Volkswagen AG/Scania AB (Council Decision no. 01-01-26-012-12-II/08 of 19 June 2008), a fine in the same amount was imposed on the applicant (Volkswagen AG) for a 26 day delay. In January 2009, in the case Dukat/Kim (Council Decision no. 01-06-26-040-17-II/08 of 13 January 2009), the applicant (Dukat) was fined BAM 20,000 (approximately EUR 10,000) for a delay of only two days.


85 For Bosnia and Herzegovina, the exchange rate applying to amounts expressed in EUR with a 'ca.' before the number is the one effective on 18 May 2011 – EUR 1 = BAM 1.95583
2.5 Croatia

The Croatian Competition Agency (the "Croatian Competition Authority", www.aztn.hr) became operational in 1997 as an independent administrative body. Competition rules were introduced into the Croatian legal system in 1995, but it was only the Competition Act (Official Gazette no. 79/2009; the "Croatian Competition Act") that entered into force on 1 October 2010 that underpinned Croatia's approach towards a modern competition law system. The decisions of the Croatian Competition Authority can be challenged before the courts.96

The Croatian Competition Authority has five members. The President and the other four members are selected on approval of the Parliament for a five-year term. On the web site of the Croatian Competition Authority, only the names of the members are made available. There are no data on the members' professional experience. The criteria for selection of the members are rather broadly set: the citizenship of Croatia, a degree in law or economics, and 10-year work experience. Surprisingly, no specific competition law requirements are envisaged.97

The new Croatian Competition Act sets out explicitly that the Croatian Competition Authority may conduct inspections of an undertaking's premises, review, seize, copy or scan business records, seal all premises and documentation and take statements from persons in charge, including employees. The parties to the investigation are obliged to submit the requested documentation and information to the Croatian Competition Authority.98

Under the previous competition regime applicable until 1 October 2010, the Croatian Competition Authority, when determining fines, had to rely on the support of courts. As indicated, this significantly slowed down the fining process. Currently, the new Croatian Competition Act authorises the Croatian Competition Authority to determine violation of competition and impose sanctions directly. The Croatian Competition Authority imposed a total of HRK 2.9 million (approximately EUR 382,500) in 2010.99 It is obvious that the Croatian Competition Authority's fining policy is rather modest and that the activities of the Authority in this respect are low, especially bearing in mind that (i) according to the law, a fine for severe infringements can reach 10% of the total annual turnover of the undertaking concerned and (ii) there is no reason to believe that there are fewer competition infringements in Croatia than in other neighbouring countries. Below is an overview of the Croatian Competition Authority's fining activities:

<table>
<thead>
<tr>
<th>Year</th>
<th>Fines in HRK</th>
<th>Fine in EUR (approximate amount)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>2,900,000</td>
<td>EUR 380,000</td>
</tr>
<tr>
<td>2009</td>
<td>1,014,000</td>
<td>EUR 135,000</td>
</tr>
<tr>
<td>2008</td>
<td>325,000</td>
<td>EUR 42,000</td>
</tr>
<tr>
<td>2003 - 2007</td>
<td>350,000</td>
<td>EUR 46,000</td>
</tr>
</tbody>
</table>

97 Article 28 of the Croatian Competition Act
98 Article 41 of the Croatian Competition Act
2.6 Kosovo

The Kosovo Competition Authority (the "Kosovo Competition Authority"; http://ak.rks.gov.net) is an independent institution which performs the duties specified under the Protection of Competition Act no. 03/L-299 enacted on 7 October 2010 (the "Kosovo Competition Act"). This is the first competition law in the history of Kosovo to introduce merger control rules. While there is a lack of practice, guidelines and regulations, the adoption of the Kosovo Competition Act is a major step forward for the Kosovo Competition Authority. Decisions of the Kosovo Competition Authority can be challenged in an administrative dispute by filing an appeal.101

The Kosovo Competition Authority has five members. It was established in November 2008. However, it took the Kosovo Competition Authority quite some time to become operational. The President and the other four members are selected on approval of the Kosovo Parliament for a five-year term. The criteria for member selection are rather broadly set and include the citizenship of the Republic of Kosovo, a degree in law, economy or 'any equivalent field with seven years of professional experience.'102 Competition education and experience are not required.

The Kosovo Competition Authority is vested with various investigative powers. It is entitled to request documentation and data, statements from the parties and witnesses, and inspections and interim measures. The Kosovo Competition Authority may conduct inspections of an undertaking's premises, vehicles and property, review, seize, copy or scan business records and documents, seal all premises and documentation, and take statements from persons in charge, including employees.103

The Kosovo Competition Authority's web site displays no decisions under the indicated section. On another location, we found a sectoral analysis of the banking sector104 and a decision on the restrictive agreement concerning the gas station business in the Vushtrri municipality105. The 2011 Progress Report106 states: "The Kosovo Competition Authority adopted decisions concerning breaches of competition rules by companies active in the markets for retail of motor fuel, fiscal cashiers and insurance. Fines were imposed on certain companies in these sectors. Actual payment of fines is subject to the outcome of any appeals by the companies. The Authority has not adopted any merger decision and it has continued to build up experience."

To sum up, the decisional practice of the Kosovo Competition Authority is scarce.

102 Article 26 of the Kosovo Competition Act
103 Article 42 of the Kosovo Competition Act
104 Please see http://ak.rks.gov.net/repository/docs/Analysis_of_Monitoring_BSK_311011.pdf [last visited on 13 February 2012]
105 Please see http://ak.rks.gov.net/repository/docs/Vendimi_i_Vushtrrise%20Eng.pdf [last visited on 13 February 2012]
3. EU Compliance Activities

In signing Stabilisation and Association Agreements ("SAA"), the candidate countries of the former Yugoslavia recognised "the importance of the approximation of the existing legislation to that of the Community and of its effective implementation." The EU signed a SAA with: Serbia on 29 April 2008; Bosnia and Herzegovina on 16 June 2008; Montenegro on 15 October 2007; FYR Macedonia on 9 April 2001; and Croatia on 29 October 2001.

Croatia, which was the first one to start, made most progress on its way to the EU. Croatia currently has the status of an acceding country. The EU and Croatian leaders signed Croatia's EU Accession Treaty on 9 December 2011. Subject to ratification of the Treaty by all the Member States and Croatia, Croatia will become the EU's 28th Member State on 1 July 2013. Montenegro (since 2010) and Macedonia (since 2005) have the status of candidate countries, while Serbia, Bosnia and Herzegovina and Kosovo are qualified as potential candidate countries for the EU accession.

SAAs between the countries of the ex-Yugoslav region and the EU define mutual rights and obligations while also establishing a free trade zone and setting the basis for a legislation harmonisation process. In general, the NCAs are currently busy working on translating and harmonising existing legislation with the Community acquis. Some countries have made greater inroads in this area than others.

The translation process is costly and time consuming. According to unofficial information, translation work costs at least 10 million EUR per country. Cooperation on translation among the countries using similar languages (such as Croatia, Serbia, Bosnia and Herzegovina and Montenegro) can be beneficial for each country in terms of money and time. Such (although one-time) cooperation was bilaterally established when Croatia handed over a set of translated pieces of legislation to Serbia. No further examples exist.

Below is an overview of the progress on the way of stabilisation and accession made by individual countries.

3.1 Serbia

The Interim Agreement, and subsequently the SAA, include competition provisions comparable to those of the EU acquis. The Serbian Competition Authority is obligated to ensure full application of the SAA. This means that the Serbian Competition Authority must fully comply with the EU competition principles deriving from the so-called 'primary and secondary' EU legislation, EU authorities' practices, as well as judgments of the European Court of Justice and General Court. Also, the Serbian Competition Authority must work towards aligning the draft bylaws with the applicable EU regulations.

In practice, the Serbian Competition Authority seems to have very good cooperation with the Delegation of the European Union in Belgrade and the DG Competition in Brussels. The Serbian Competition Authority is obliged to regularly provide and deliver information to EU

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108 Please see http://ec.europa.eu/enlargement/candidate-countries/index_en.htm [last visited on 10 February 2012]

109 Please see http://www.navidiku.rs/vesti/svet-vest/vestbroj/202550 [last visited on 10 February 2012]

110 Please see http://forum.mojepravo.net/new/b2/blogs/blog5.php/hrvatska-urua-269-ila-prevod-evropskih-p [last visited on 10 February 2012]

institutions on developments in practice and legislation, institutional capacities and implementation. The Serbian Competition Authority is subject to DG Competition Enforcement Record and it submits all necessary information and documentation on the progress made in the competition field in Serbia for the EU Progress Report.\textsuperscript{112}

Serbia must translate all EU legislation into Serbian during the process of stabilisation and accession. The Serbian Competition Authority is involved in this task together with the European Integration Office and the Ministry of Trade and Services. According to available information, 45 pieces of legislation will be translated, of which 11 relate to general competition policy, 7 to merger control, and 27 to antitrust issues.\textsuperscript{113} In addition to this, the Serbian Competition Authority completed the translation of the Serbian antitrust legislation into English, aiming to support the foreign entities doing business in Serbia.

The 2011 Commission Staff Working Paper – Analytical Report\textsuperscript{114} states: "The [Serbian Competition Authority] has started to build a track record on enforcing competition rules on the Serbian market." Moreover, the report concludes: "Serbia has established both the legal and the institutional framework in the area of competition, but additional efforts to increase administrative capacity are necessary. [...] Priority needs to be given to increasing the judiciary's knowledge of competition law. [...] Overall, Serbia will have to make additional efforts to align with the EU acquis in the area of competition and to implement it effectively in the medium term."

3.2 Montenegro

When it comes to Montenegro, it is rather difficult to report anything on EU compliance activities in this country. Montenegro is lagging behind significantly, although it declared the harmonisation with the EU competition regime as one of its goals. However, the progress is not visible.

The 2011 Commission Staff Working Paper – Montenegro 2011 Progress Report\textsuperscript{115} concludes briefly: "There has been some progress in competition policy. Yet, challenges remain on the administrative capacity of the Montenegrin Competition Authority." Further, the report states: "More efforts are needed to ensure the adoption of the law and the relevant by-laws. Resources remain a critical issue. However, there is an improvement in the law enforcement record."

3.3 Macedonia

It seems that Macedonia places significant efforts in the harmonisation of the Macedonian national legislation in the area of competition with the acquis.

The Macedonian Competition Authority in its 2010 Annual Report\textsuperscript{116} describes the enforcement level of competition in Macedonia in the following manner: "No significant progress has been achieved in the area of antitrust, which also includes mergers. The percentage of decisions issued by the [Macedonian Competition Authority] which have been

\begin{itemize}
  \item \textsuperscript{112} \textit{Ibid.}\textsuperscript{,} \textit{Id. at 65}\textsuperscript{\textsuperscript{113}}\textsuperscript{\textsuperscript{\textsuperscript{114}}\textsuperscript{\textsuperscript{115}}\textsuperscript{\textsuperscript{116}}
\end{itemize}
accepted by the Administrative Court has increased. [...] The number of employees who work in the area of antitrust and mergers remains insufficient. The general budget of [...] for 2010 and the dynamic of conducted trainings have remained stable. The number of Administrative Court judges who work on cases in the area of competition is appropriate. The judges have received training in antitrust and mergers."

The Macedonian Competition Authority has a leading position in the National Programme for the Adoption of the acquis (NPAA) and it is responsible for implementing the necessary activities at the legislative and institutional level in order to fulfil the conditions for Macedonia's membership in the EU. ¹¹⁷

The Macedonian Competition Authority has participated in the monthly meetings of the Action Committee for European Integration (ACEI) and the ACEI Sub-Committee where it reports on the progress of the plan for harmonising the national legislation with the EU acquis and the strengthening administrative capacities. ¹¹⁸

The 2011 Commission Staff Working Paper – Macedonia 2011 Progress Report¹¹⁹ concludes: "Some progress was made in the area of competition. In the field of mergers and State aid the enforcement record has improved in quantitative terms, but it remains low in the field of cartels. The [Macedonian Competition Authority] does not have adequate budgetary resources." Further, the report states: "Good progress can be reported in the area of anti-trust, including mergers. [...] Compared to 2010, the enforcement record has increased in the field of mergers but remains low in the area of cartels."

3.4 Bosnia and Herzegovina

When it comes to Bosnia and Herzegovina it is rather difficult to report anything on EU compliance activities in this country. Bosnia and Herzegovina showed some effort in declaring the harmonisation with the EU competition regime as one of its goals. However, the progress is not visible.

Some progress was recorded in the area of antitrust in the recent years. The BIH Competition Act is mostly in line with the EU acquis, but needs further alignment. The BIH Competition Authority’s activities have focussed primarily on mergers and abuses of dominant market position for the last 6 years. The European Integration Office of Bosnia and Herzegovina seems to have undertaken two tasks: to translate (a) the EU legislation into the local language and (b) the local legislation into English. ¹²⁰

The 2011 Commission Staff Working Paper – Bosnia and Herzegovina 2011 Progress Report¹²¹ concludes: "Overall, preparations in the area of competition remain at an early stage."

¹¹⁷ Id. at page 37
¹¹⁸ Ibid
¹²⁰ Although the home page of the web site http://prevodi.freehostia.com/index.php?jezik=bih indicates that significant progress has been made to this end, the web site is not accessible without a password. On the other hand, obtaining a register user status appears to be extremely time consuming and difficult.
3.5 Croatia
According to Article 70(2) SAA between Croatia and the European Union and its Member States, competition law provisions of the EU are to be regarded as the basis for the interpretation and application of the Croatian competition law legislation. It was only the 2010 Croatian Competition Act that introduced far-reaching changes in Croatian competition law and brought the Croatian competition regime one step closer to EU competition standards. Pursuant to the SAA, in case of legal gaps or uncertainty in terms of interpretation, competition law provisions of the EU should apply. This is not limited only to EU Commission decisions, but also relates to decisions of the European Court and other EU institutions. Such application of the law is even verified by the Croatian Federal Constitutional Court.

Needless to say, Croatia has made the biggest progress in translating the EU legislation into the local language. Croatia had an early start.

The 2011 Commission Staff Working Paper – Croatia 2011 Progress Report concludes: "Substantial progress has been achieved in the field of competition policy [...]. A high level of alignment has been achieved. Further efforts are required in order to continue developing the Croatian Competition Authority's enforcement record against cartels following the entry into force of the new Competition Act."

3.6 Kosovo
The Kosovo Competition Act is relatively new. While there is a lack of practice, guidelines and regulations, the adoption of the Kosovo Competition Act is a major step forward for the Kosovo Competition Authority. On the other hand, the Kosovo Competition Authority is rather young and inexperienced body.

The 2011 Commission Staff Working Paper – Kosovo 2011 Progress Report concludes briefly: "Overall, some progress has been made in the field of competition. Implementation of antitrust and merger policy is still at an early stage. The competition law needs to be amended to be aligned more closely with the EU acquis. The administrative capacity of the Kosovo Competition Authority is insufficient for the tasks assigned to it and existing staff need further training."

4. Overcoming Main Challenges in Enforcing Competition Rules
The most important means of securing efficient enforcement of the competition law is strong and efficient NCAs. The overall impression is that NCAs in the ex-Yugoslav region made significant progress, but will still need further significant assistance in years to come. Here are some ideas on how to achieve the goal of 'strong and efficient NCAs': (i) shift the work from merger control to abuse of dominance/cartels/sectoral analyses; (ii) reinforce

human capacities; (iii) strengthen cooperation at all levels; and (iv) ease the administrative burdens.

4.1 Shift the Focus of NCAs From Merger Control to Antitrust

In order to free the capacities of NCAs on the one hand and to reduce the administrative burden on people doing business in the ex-Yugoslav region, the NCAs (national legislators) should consider:

- Increasing the merger control thresholds, which are unreasonably low in some jurisdictions (such as Montenegro and Macedonia); and
- Explicitly recognise the domestic effect doctrine, so that a transaction producing no effect on the territory of a particular ex-Yugoslav country does not need to be notified in that country.

These measures would help especially the competition authorities dealing with a large number of mergers to reduce its merger control work load and to shift its focus on antitrust. The table below shows that the Serbian Competition Authority could benefit from the proposed measures. 67 merger notifications dealt with in 2010 meant that significant human resources were engaged in performing this task.

<table>
<thead>
<tr>
<th>Year 2010</th>
<th>Serbia</th>
<th>BiH</th>
<th>Croatia</th>
<th>Macedonia</th>
<th>Montenegro</th>
<th>Kosovo</th>
</tr>
</thead>
<tbody>
<tr>
<td>Merger notification</td>
<td>67</td>
<td>18</td>
<td>Ca. 12</td>
<td>22</td>
<td>12</td>
<td>n/a</td>
</tr>
</tbody>
</table>

4.1.1 Increase Merger Control Filing Thresholds

As a general rule, a transaction must be notified whenever the financial thresholds set by the local competition law are reached. In order for such filing obligation not to be considered as a mere administrative burden (that is, costly and timely in most jurisdictions), the thresholds should be set at a level appropriate to the size of the country. This is usually not the case. The thresholds are often set rather low (as in Montenegro and Macedonia), in which case any transaction performed by a company making a turnover of EUR 10 million (for Macedonia)\(^{129}\) or EUR 15 million (for Montenegro)\(^{130}\), which at the same time has a subsidiary (even a non operational one) registered in Macedonia or Montenegro, respectively, fulfills the filing requirement and the company is obliged to suspend the transaction until Macedonian/Montenegrin Competition Authority's clearance is issued.

On the other hand, some authorities include the market share as an alternative filing criterion (as in Bosnia and Herzegovina\(^{131}\) and Macedonia\(^{132}\)). In a situation where competition authorities are rather young and have scarce practice, it is not possible to define the market with certainty, as there is no reliable practice to rely on. Some markets can be sub-segmented, in which case 40% market share thresholds can be easily triggered. Usually, the investor is required to commence a lengthy procedure and find out from the relevant competition authority how it would define the market in the particular circumstances. It has been proven in practice that market share

\(^{127}\) Information collected from the NCAs' official web sites

\(^{128}\) Certain discrepancy in the number of filed and solved cases is found when comparing the data in the 2010 Annual Report and on the Croatian Competition Authority's web site ([http://www.aztn.hr/rezultati-odluke-trzisno-natjecanje/?casenumber=&dateearlier=&datelater=&area=tn&text=&submit_odluke=&page=1](http://www.aztn.hr/rezultati-odluke-trzisno-natjecanje/?casenumber=&dateearlier=&datelater=&area=tn&text=&submit_odluke=&page=1)) [last visited on 3 February 2012]

\(^{129}\) Article 14 of the Macedonian Competition Act

\(^{130}\) Article 25 of the Montenegrin Competition Act

\(^{131}\) Article 14 of the BIH Competition Act

\(^{132}\) Article 14 of the Macedonian Competition Act
thresholds are fit for jurisdictions with a long competition culture, in which the NCAs did a great deal of work in establishing a reliable practice. Market share thresholds somehow seem to be inappropriate for young competition jurisdictions.

The 2010 Kosovo Competition Act is the first competition law in the history of Kosovo to introduce merger control rules. The Kosovo Competition Authority has, so far, assessed no merger control filings. The 2011 Kosovo Progress Report assessed that 'The turnover thresholds for the obligation to notify planned mergers ought to be adjusted to a level appropriate to the size of the Kosovo economy.'

Bosnia and Herzegovina and Croatia provide the requirement of 'at least two entities'. This criterion secures that the transaction produce at least some effect on the domestic market. The Bosnian Competition Act does not expressly recognise 'the related party concept' within the context of the following requirement: 'each of at least two undertakings concerned in the last business year preceding the concentration amounts to (or exceeds) BAM 8 million (approximately EUR 4 million). The Bosnian Competition Authority failed to develop its decisional practice in the sense that 'related parties' are considered as a single undertaking on the market for the purpose of running the financial threshold test. This means that the Bosnian Competition Authority can consider that the thresholds are fulfilled even if a group of undertakings has two companies incorporated and operating in Bosnia and Herzegovina, each generating a turnover in excess of EUR 4 million.

Serbia dealt with low thresholds in 2009 when the new Competition Act was adopted. At the end of 2009, less merger control work was necessary due to increased thresholds. However, no significant decrease in the workload occurred, mainly because the domestic effect doctrine has not yet been recognised.

Below is an overview of the thresholds in the ex-Yugoslav countries. It clearly shows that Macedonia and Montenegro must work on either increasing their thresholds or combining the worldwide and local thresholds. On the other hand, the Bosnian Competition Authority should swiftly render a reliable opinion on the 'related party' concept and acknowledge that 'at least two entities' means one entity belonging to the target group and another to the acquirer's group.

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134 Article 14 of the BIH Competition Act
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Jurisdictional Test</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bosnia and Herzegovina 135</td>
<td>At least one participant to the concentration is registered in BiH and the total worldwide turnover of all participants exceeds BAM 100 million (approximately EUR 50 million); AND At least two companies have a turnover of at least BAM 8 million (approximately EUR 4 million) in BiH or their combined market share in the relevant market exceeds 40%.</td>
</tr>
<tr>
<td>Croatia 136</td>
<td>The total turnover of all the undertakings – parties to a concentration realised through sale of goods and/or services in the global market amounts to at least HRK 1 billion (approximately EUR 130.6 million) in the financial year preceding the concentration; AND The total turnover of each of at least two parties to the concentration realised through sale of goods and/or services in the domestic market amounts to at least HRK 100 million (approximately EUR 13.6 million) in the financial year preceding the concentration.</td>
</tr>
<tr>
<td>Macedonia 137</td>
<td>The combined worldwide annual turnover of the undertakings concerned in the preceding financial year exceeds EUR 10 million in MKD counter value, and at least one of the undertakings is registered in the territory of Macedonia; OR The combined domestic annual turnover of all the undertakings concerned in the preceding financial year exceeds EUR 2.5 million in MKD counter value; OR The market share of one of the undertakings concerned is over 40%, or the joint market share exceeds 60%.</td>
</tr>
<tr>
<td>Montenegro 138</td>
<td>The combined total annual turnover of all undertakings involved in a concentration on the market of the Republic of Montenegro exceeds EUR 3 million according to the annual financial statements of the undertakings for the previous financial year; OR The combined total annual turnover of undertakings involved in a concentration realised on the global market in the previous financial year amounts to EUR 15 million according to the final accounts of undertakings for the previous financial year, and at least one of the undertakings involved in the concentration is registered on the territory of the Republic of Montenegro.</td>
</tr>
<tr>
<td>Serbia 139</td>
<td>The combined worldwide annual turnover exceeds EUR 100 million in the preceding business year; and at least one undertaking achieves a turnover exceeding EUR 10 million in Serbia; OR The combined domestic turnover of at least two undertaking concerned exceeds EUR 20 million, and each of at least two undertakings concerned achieves a domestic turnover exceeding EUR 1 million.</td>
</tr>
</tbody>
</table>

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135 Article 14 of the BIH Competition Act  
136 Article 17 of the Croatian Competition Act  
137 Article 14 of the Macedonian Competition Act  
138 Article 25 of the Montenegrin Competition Act  
139 Article 61 of the Serbian Competition Act
The worldwide turnover of all participants concerned exceeds EUR 100 million in the financial year preceding the concentration, and at least one of the undertakings concerned is located in the Republic of Kosovo;

**AND**

The local turnover of at least two participants to a concentration in Kosovo exceeds EUR 3 million in the year preceding the concentration.

### 4.1.2 Explicitly Recognise Domestic Effect Doctrine

In principle, foreign-to-foreign mergers are caught by the local competition laws as long as the jurisdictional thresholds (which are relatively low in most jurisdictions) are met.

In other words, we can hypothetically examine the transaction in which company A located in the EU intends to acquire 50% of the shares in a target company located in Asia from company B (also located in EU), while company B will continue to hold the remaining 50% of the shares in the target. Neither company A nor the target has sales in ex-Yugoslav countries, but company B has some sale or some shelf company in these jurisdictions. Obviously the transaction has no bearing on the ex-Yugoslav countries. However, under almost all competition rules in the ex-Yugoslav countries, this transaction is notifiable (subject to financial thresholds being exceeded).

The fact that the domestic effect doctrine is not recognised creates a significant administrative burden on investors in case they opt for filing, or exposes them to certain risk in case they decide to refrain from filing. On the other hand, the NCAs are snowed with merger notifications that at the end of the day need no competition assessment. Recognising the domestic effect doctrine would bring legal certainty to investors and free the capacities of NCAs.

In general, NCAs in the ex-Yugoslav region have not yet adopted any guidelines or reliable decisional practice which would exempt foreign-to-foreign mergers that arguably have no impact on the domestic market. Although there was a "placeholder" (an article in the competition law dealing with the principle of territoriality), the "domestic effect doctrine" has not been explicitly recognised so far. The language usually reads "transactions that might affect competition on the territory of the state". This language could be deployed to argue that only such mergers require notification that may, at least potentially, impact the market.

Furthermore, in everyday practice, the local NCAs are accepting competence over notifications dealing with foreign-to-foreign mergers (i.e. not rejecting the notifications due to a lack of domestic effect) and clearing these transactions in summary proceedings.

Under the local competition laws, the parties are under the obligation to suspend the implementation of a transaction until clearance is issued, subject to fines which can reach up to 10% of the total turnover realised by the undertakings involved in the preceding financial year. The transaction agreement relating to the acquisition of interest in the target company-establishment of a JV (and all measures bringing about the transaction) is exposed to the sanction of nullity. Furthermore, the competition laws usually contain provisions which grant the Commission the right to impose sanctions (structural or behavioural) in order to remedy or prevent competition infringements.

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140 Article 15 of the Kosovo Competition Act

141 The International Comparative Legal Guide to: Merger Control 2012, Global Legal Group, November 2011, sections 1.3 and 2.6, available at [http://www.iclg.co.uk](http://www.iclg.co.uk) [last visited 1 February 2012], (country chapters: Serbia, Macedonia, Kosovo, Croatia, Montenegro and Bosnia and Herzegovina)
4.2 Adequate Financial Resources

Adequate financing of the NCAs can secure that the NCAs work efficiently and with full integrity.

The Peer Review\textsuperscript{142} provides for two options for securing the financing: (i) \textit{First policy option}: 'The Government should establish an annual budget allocation to the NCA transferring the funds in the same way as to any other governmental department'; or (ii) \textit{Second policy option}: 'Enact legislation to allow the NCA to participate in the amount of revenues collected by regulatory agencies from regulated firms.' In this paper, I am not going to analyse which option is more adequate for which NCA, but rather propose some ideas and stress why dealing with this issue is essential for some authorities, such as the Serbian Competition Authority.

The Serbian Competition Authority is the only competition authority in the region that is actually financed by the fees collected in the process of merger control. According to available information, the budget collected in the merger control process by the EU member states' competition authorities represent from 20\% to 25\% of their total revenue.\textsuperscript{143} On the other hand, the fees charged by the Serbian Competition Authority are the highest in the region. Please see below:

<table>
<thead>
<tr>
<th>Country\textsuperscript{144}</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Slovenia</td>
<td>Filing fee: EUR 850</td>
</tr>
<tr>
<td>Bosnia and Herzegovina</td>
<td>Filing fee: EUR 1,000</td>
</tr>
<tr>
<td></td>
<td>Clearance fee: EUR 1,250 (phase I)</td>
</tr>
<tr>
<td></td>
<td>Clearance fee: EUR 12,500 (phase II)</td>
</tr>
<tr>
<td>Croatia</td>
<td>Clearance fee: EUR 1,400 (phase I)</td>
</tr>
<tr>
<td></td>
<td>Clearance fee: EUR 20,000 (phase II)</td>
</tr>
<tr>
<td>Macedonia</td>
<td>Filing fee: EUR 100</td>
</tr>
<tr>
<td></td>
<td>Clearance fee: EUR 500</td>
</tr>
<tr>
<td>Montenegro</td>
<td>No filing / clearance fee</td>
</tr>
<tr>
<td>Kosovo</td>
<td>No filing / clearance fee</td>
</tr>
<tr>
<td>Serbia</td>
<td>Clearance fee: EUR 25,000 (phase I)</td>
</tr>
<tr>
<td></td>
<td>Clearance fee: EUR 50,000 (phase II)</td>
</tr>
</tbody>
</table>

As long as the Serbian Competition Authority is financing itself from collected fees, the fees will not be reduced to the level applicable in the other countries in the region. Conversely, the Serbian Competition Authority even increased the fees (from EUR 20,000 to EUR 25,000 for phase I clearance and from EUR 40,000 to EUR 50,000 for phase II clearance) by adopting a new Tariff Code on 14 July 2011.\textsuperscript{145}

Although merger fees are the main source of financing of the Serbian Competition Authority, they create a significant administrative burden. In solving this situation (securing an adequate financing of the NCA on the one hand and reducing the barriers to trade on the other), the option of collecting and transferring a part of the fines to the Serbian Competition Authority as

\textsuperscript{142} United Nations Conference on Trade and development, Voluntary peer review of competition law and policy: Serbia, Full Report, 2011, pages 80-83

\textsuperscript{143} United Nations Conference on Trade and development, Voluntary peer review of competition law and policy: Serbia, Full Report, 2011, page 81

\textsuperscript{144} Information obtained from the official web sites of the NCAs

well, and not only to the budget, should be considered (in addition to the two options proposed in the Peer Review).

4.3 Reinforcing Human Capacities

One general observation is that, in a vast majority of cases, the initiation of proceedings before the NCAs depends on complaints by third parties, press articles or notifications by implicated undertakings. For the most part, this is due to the lack of sufficient personnel in the NCAs.

In addition to procedural instruments (wide investigation powers of NCAs and the right to determine and impose fines all in one procedure before the NCA), the NCAs must have sufficient human capacities in order to apply competition norms proactively and not only to address the initiatives put in place by third parties/undertakings concerned.

Most of the ex-Yugoslav jurisdictions have remedied the deficiencies of their previous competition regimes (namely, the courts were only competent for imposing fines). Back in 2005 (when most of the former Yugoslav republics introduced their modern competition regimes), the NCAs were not vested with the power to fix fines, but had to apply to a court for the infringement to be sanctioned. Only through changes in legislation (2009 in Serbia, 2010 in Croatia, and 2007 in Macedonia) have the NCAs come in a position to determine violations of competition and impose sanctions directly – all in the same procedure. This change proved to have an immediate effect on the level of competition compliance in the local jurisdictions. The NCAs in the region claim to be understaffed, burdened by assessing merger notifications, and having little or no capacity to focus on independent investigations and sector-by-sector analyses. Below is an overview of the number of employees working for NCAs in the region:

<table>
<thead>
<tr>
<th>No.</th>
<th>Country</th>
<th>No. of Employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Montenegro</td>
<td>12</td>
</tr>
<tr>
<td>2</td>
<td>Macedonia</td>
<td>25</td>
</tr>
<tr>
<td>3</td>
<td>Bosnia and Herzegovina</td>
<td>26</td>
</tr>
<tr>
<td>4</td>
<td>Serbia</td>
<td>28</td>
</tr>
<tr>
<td>5</td>
<td>Austria</td>
<td>32</td>
</tr>
<tr>
<td>6</td>
<td>Albania</td>
<td>35</td>
</tr>
<tr>
<td>7</td>
<td>Croatia</td>
<td>45</td>
</tr>
<tr>
<td>8</td>
<td>Slovakia</td>
<td>60</td>
</tr>
<tr>
<td>9</td>
<td>Hungary</td>
<td>120</td>
</tr>
<tr>
<td>10</td>
<td>Czech Republic</td>
<td>126</td>
</tr>
<tr>
<td>11</td>
<td>Bulgaria</td>
<td>130</td>
</tr>
</tbody>
</table>

This review should be viewed conditionally, considering that some national bodies also perform tasks relating to consumer protection, state aid and public procurement. For instance, the Austrian authority has 24 case handlers out of a total of 32 employees; the Czech body, with its 126 employees, also includes sectors covering consumer protection, public procurement and state aid, while only 50 of them deal with competition issues. The Hungarian body also deals with consumer protection, while only 32 employees out of 120 deal directly with competition cases. Serbian Competition Authority has 28 employees but only 18 are case handlers.

If the data relating to the number of employees are put in conjunction with the number of competition cases, one may conclude that some of the authorities do need more manpower. In

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146 Montenegro still needs to expand the competences of the NCA to determine and impose fines in a single procedure. As announced, the new law that will settle this issue is in the pipeline.
148 Ibid.
particular, this is a case with the Serbian Competition Authority, which dealt with 87 cases in 2010 but has only 18 case handlers.

<table>
<thead>
<tr>
<th>2010149</th>
<th>Serbia</th>
<th>BiH</th>
<th>Croatia150</th>
<th>Macedonia</th>
<th>Montenegro</th>
<th>Kosovo</th>
</tr>
</thead>
<tbody>
<tr>
<td>Merger Notification</td>
<td>67</td>
<td>18</td>
<td>Ca. 12</td>
<td>22</td>
<td>12</td>
<td>0</td>
</tr>
<tr>
<td>Restrictive agreements</td>
<td>14</td>
<td>11</td>
<td>Ca. 5</td>
<td>4</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Abuse of Dominance</td>
<td>6</td>
<td>10</td>
<td>Ca. 13</td>
<td>1</td>
<td>0</td>
<td>n/a</td>
</tr>
<tr>
<td>Total:</td>
<td>87</td>
<td>39</td>
<td>30</td>
<td>27</td>
<td>14</td>
<td>3</td>
</tr>
</tbody>
</table>

According to the 2011 Progress Reports, it is evident that most of the authorities need more personnel for conducting their day-to-day work. Usually, there is a need for highly qualified lawyers, economists and IT specialist (who can help in particular with dawn raids). It goes without saying that investing into the existing employees through trainings and education is essential for increasing the efficiency of the NCAs. All authorities obviously do invest into the trainings (from Fordham University Summer School and Antitrust Conference to Japan Fair Trade Commission's programmes and various seminars organised by the Federal Trade Commission, International Competition Network, OECD, UNCTAD, etc).151

The 2011 Progress Reports for the ex-Yugoslav countries show that all their authorities have insufficient staff to fulfil their tasks. The Serbian Competition Authority needs to reinforce its capacity for economic analyses. Currently, the Serbian NCA outsources this work.152 The Macedonian Competition Authority hired one additional person in the last year to boost its antitrust and merger team, which is still insufficient.153 As regards the administrative capacity of the Montenegrin Competition Authority, little progress has been made.154 The administrative capacity of the Croatian Competition Authority is ranked as sufficient in terms of number of employees. However, it can be further strengthened through management and

149 Information obtained from the official web sites of the respective NCAs
150 Certain discrepancy in the number of filed and solved cases is found when comparing the data in the 2010 Annual Report and on the Croatian Competition Authority’s web site (http://www.aztn.hr/ruzultati-odluka-trzisno-natjecanje/?casenumber=&&dateearlier=&&datelater=&&area=tn&text=&submit_odluke=&&page=1) [last visited on 3 February 2012]
training, particularly in the fields of restrictive practices and abuse of dominant position. The same applies to the BIH Competition Authority, which needs, in addition to more manpower, further training to increase the authority's investigative capacity. Very notably, the existing staff of the Kosovo Competition Authority needs also further training.

Training and permanent education of the existing staff is essential for raising the quality of work in local NCAs. Further efficiencies can be achieved either through an increase of the number of employees (supporting the current teams with highly qualified lawyers and economists), or by reducing the commodity work imposed on the local NCAs (through increasing the thresholds and introducing the domestic effect doctrine). The best solution would probably be to combine both approaches.

4.4 Shortening Decision-Making Deadlines/Abolishing Filing Deadline

Shortening the decision-making deadlines of the competition authorities and at the same time abolishing the filing deadlines would significantly help investors in overcoming administrative barriers.

The purpose of the fining deadline is quite unclear if the competition regime provides for a suspension obligation. In other words, strict filing deadlines (that often prove to be too short in practice) make no sense if the transaction cannot be implemented before the clearance by the NCA is issued (the fine for pre-implementation may go up to 10% of the total annual turnover realised by the undertaking concerned in the year preceding the transaction). The deadlines for notifying are either 15 days (Serbia and Bosnia and Herzegovina) or only 7 days (in Montenegro). The Bosnian Competition Authority makes frequent (ab)use of its fining powers when it comes to fining late notifications.

The legislators in Serbia, Bosnia and Herzegovina and Montenegro should consider following the examples of the neighbouring countries (Austria, Slovenia, Croatia, Macedonia, etc) and abolishing the deadline for notifying transactions. As long as there is a clear prohibition of implementing a transaction prior to the clearance of the competition authority, there is no valid argument for keeping the provisions on the filing deadlines in the competition law and imposing unnecessary burden on undertakings concerned.


158 In Telekom Slovenia/Blic.Net (Council Decision no. 01-02-26-039-3-II/07 of 30 January 2008), the Council fined the applicant (Telekom Slovenia) with BAM 200,000 (approximately EUR 100,000) for a 10-month delay. In Cez/Mol/JV (Council Decision no. 01-06-26-015-5-II/08 of 12 June 2008), the Council imposed on the applicants (Cez and Mol) a fine of BAM 150,000 (approximately EUR 75,000) for a four-month delay, while in Volkswagen AG/Scania AB (Council Decision no. 01-01-26-012-12-II/08 of 19 June 2008), a fine in the same amount was imposed on the applicant (Volkswagen AG) for a 26-day delay. In January 2009, in the case Dukat/Kim (Council Decision no. 01-06-26-040-17-II/08 of 13 January 2009), the applicant (Dukat) was fined BAM 20,000 (approximately EUR 10,000) for a delay of only two days.
In addition to a burdensome filing deadline, the decision-making deadlines set by the competition law may in practice create a significant burden for people doing business in local jurisdictions. In principle, Phase I clearance can be obtained within approximately 1 month. Naturally, the deadlines for phase II, which address transactions raising competition concerns, are longer.

An one-month waiting period (some jurisdictions provide for 25 working days, others for 30 days, and yet others for 1 month) is optimal length and the investors should count on the procedure before the NCAs lasting as long. In practice, however, these procedures can go for much longer than one month. The reason behind this is that no rules set the precise moment when the one-month deadline starts running. For instance, it is once the filing has been completed that the clock starts ticking. On the other hand, the NCAs can make numerous requests for additional documents and data before the official certificate of completeness of the filing is delivered (some authorities, like Serbian, even do not provide for official certificates). Due to some extreme cases seen in past, the local NCAs should be urged to act promptly when delivering Phase I decisions. Where more time is required, this usually means that the transaction is likely to raise competition concerns and that Phase II proceedings should be opened. Anyhow in these cases, the NCAs do have significant time at their disposal (usually 4 months in total). In another words, the NCAs shall be motivated and urged to deliver the decisions (and allow carrying on the transaction) within one month from filing. In order to allow the NCA to act swiftly, the applicants shall make sure to submit the complete notification in accordance with the applicable bylaws on form and substance of the merger notification.

<table>
<thead>
<tr>
<th>Country</th>
<th>Filing deadline</th>
<th>Suspension</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>-</td>
<td>✓</td>
</tr>
<tr>
<td>Slovenia</td>
<td>30 days</td>
<td>✓</td>
</tr>
<tr>
<td>Bosnia and Herzegovina</td>
<td>15 days</td>
<td>✓</td>
</tr>
<tr>
<td>Croatia</td>
<td>-</td>
<td>✓</td>
</tr>
<tr>
<td>Macedonia</td>
<td>-</td>
<td>✓</td>
</tr>
<tr>
<td>Montenegro</td>
<td>7 days</td>
<td>✓</td>
</tr>
<tr>
<td>Serbia</td>
<td>15 days</td>
<td>✓</td>
</tr>
<tr>
<td>Kosovo</td>
<td>-</td>
<td>✓</td>
</tr>
</tbody>
</table>

The national competition acts, available at the official web sites of the NCAs, are used as the source of information.

An extreme, but unfortunately not isolated, example is the decision rendered by the BIH Competition Authority – dismissing a notification as the filing threshold was not met (Schiebra Beteiligungsverwaltungs GmbH, Vienna, Austria; no. 03-26-1-04-20-II/1; decision available at [http://www.bihkonk.gov.ba/](http://www.bihkonk.gov.ba/) [last visited on 3 February 2012]). The filing was lodged on 14 February 2011 and the decision rendered on 6 July 2011.
<table>
<thead>
<tr>
<th>Country</th>
<th>Timing phase I &amp; II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>I: 4 weeks</td>
</tr>
<tr>
<td></td>
<td>II: 5 months</td>
</tr>
<tr>
<td>Slovenia</td>
<td>I: 25 working days</td>
</tr>
<tr>
<td></td>
<td>II: 60 business days</td>
</tr>
<tr>
<td>Bosnia and Herzegovina</td>
<td>I: 30 days</td>
</tr>
<tr>
<td></td>
<td>II: 3 months</td>
</tr>
<tr>
<td>Croatia</td>
<td>I: 30 days</td>
</tr>
<tr>
<td></td>
<td>II: 3 months</td>
</tr>
<tr>
<td>Macedonia</td>
<td>I: 25 working days</td>
</tr>
<tr>
<td></td>
<td>II: 90 working days</td>
</tr>
<tr>
<td>Montenegro</td>
<td>115 working days</td>
</tr>
<tr>
<td>Serbia</td>
<td>I: 1 month</td>
</tr>
<tr>
<td></td>
<td>II: 4 months</td>
</tr>
<tr>
<td>Kosovo</td>
<td>I: 30 days</td>
</tr>
<tr>
<td></td>
<td>II: 60 days</td>
</tr>
</tbody>
</table>

An important step in overcoming unnecessary administrative barriers is to speed up the decision-making process in simple merger control work (Phase I) and to abolish the filing deadlines. This will save time and money to people doing business in local jurisdictions and signal to investors that their investments are appreciated in the given jurisdictions and that the competition authority is not an administrative burden, but a professional institution that acts swiftly.

4.5 Reinforce Cooperation at All Levels
There is no prospect of the competition authority building the reputation of a stand-alone authority. For creating a strong and efficient local competition authority, cooperation between NCAs at all levels (at national, regional and European) is essential.

4.5.1 National Cooperation
Cooperation within the country should include: (i) cooperation with state bodies, institutions and agencies; and (ii) cooperation with the professional community and business people.

The NCA should maintain close relations with the Government and other state bodies while preserving its independence and integrity of its work. A specific Ministry (usually the Ministry of Trade) is in charge of proposing/adapting competition guidance and bylaws, while the Parliament appoints and dismisses members of the decision-making bodies within NCAs, which are obliged to report annually on their work to the Parliament.

In addition, NCAs occasionally must investigate/assess competition on the regulated markets. In these particular cases, cooperation with different agencies operating in the insurance, telecommunications, banking and other sectors is essential. In fact,

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161 The national competition acts, available at the official web sites of the NCAs, are used as the source of info.
most NCAs in the region have signed memorandums of understanding and thus officially recognised their cooperation with bodies such as: the Telecommunications Agency, Energy Agency, Anti-corruption Agency, Agency for the Prevention of Money Laundering, Agency for Pharmaceuticals, Chamber of Commerce, etc. These cooperation agreements usually set a basis mainly for cooperation in information exchange between these authorities.\textsuperscript{162}

In addition to their cooperation with institutions, the NCAs should not disregard the importance of cooperation with professional community and business people. Although the NCAs tend to 'close' themselves before practitioners, the latter can be a valuable source of information. Namely, lawyers are aware of all the weakness and strong points of the competition procedure before the NCA on the one hand, as well as problems that business people experience, on the other. Practitioners can serve as a source of valuable information. Further, professors and university elite not only have an overview of different practices and solutions, but by offering competition courses they can educate students and equip them with proper 'competition' tools for their future careers as judges, in-house lawyers, commission case handlers etc. As the area of competition requires a symbiosis of experts in law and economics, it is difficult to imagine a good competition team without an economist on board. This speaks in favour of the notion that professors/university elite and economists should be involved in the work of NCAs. Very often, NCAs lack specific knowledge (of the administrative procedure or a specific regulated sector). In these cases, consultations with experts in these fields can be of significant help to the NCA. The risk of potential damage claims and the fact that the goal of the competition law is to create a competitive market for the benefit of consumers both speak in favour of cooperation of NCAs with consumers and consumer protection agencies. In many countries, consumer protection is also one of the segments covered by the NCA.

Further, any major decision rendered by an NCA often ends up in court. In other words, the authority's decisions are subject to judicial review by the Administrative Court. A series of both Serbian and Croatian Competition Authorities' decisions have been overturned on appeal for procedural reasons as stated in annual reports of these authorities. The Bosnian Competition Authority seems not to have such experience. According to available information (which is limited), no decision issued by the Montenegrin Competition Authority has ever been challenged before the court. The reason behind this is rather simple – the Montenegrin Competition Authority's work load is low and no fines have ever been imposed. In other words, there are no grounds for complaints. In general, judges are not trained for handling competition cases. This issue should be actively addressed. Simply, the capacity of the judiciary to assess complex legal and economic evidence in competition cases remains weak in all the ex-Yugoslav countries. Significant efforts are needed to equip judges to decide on competition cases. The 2011 Progress Report\textsuperscript{163} on Macedonia shows that Macedonia made some progress in this respect. Namely, the judges in the Administrative Court working on competition cases received some training on antitrust and mergers.

\textsuperscript{162} The International Comparative Legal Guide to: Merger Control 2012, Global Legal Group, November 2011, available at: \url{http://www.iclg.co.uk} [last visited on 1 February 2012]; section 6.1 (country chapters: Serbia, Macedonia, Kosovo, Croatia, Montenegro and Bosnia and Herzegovina)

Finally, cooperation with business people is also essential. Business people are aware of all the hurdles to doing business in Serbia. Solutions that would help business people overcome unnecessary administrative barriers would also strengthen trade and overall development.

Due to the obvious lack of a culture of compliance, it seems that the NCAs are gradually gaining the credibility in the eyes of business people and of the public. In the past, NCAs were mainly kept busy with assessing merger notifications filed by foreign investors from jurisdictions with well established competition traditions, while on the other hand local business people ignored the competition rules. NCAs should work hard on building the competition culture/culture of compliance. Significant developments have already been achieved, especially bearing in mind that most of the competition authorities in the region are not older than 7 years (save for the Croatian authority, which has 15 years of experience). NCAs should set as one of their prime goals to continue advocating the benefits of a competition policy among business people, consumers, professional community, judges, students, and government officials.

4.5.2  Cooperation Within The Region

While the majority of NCAs in the former Yugoslav republics have established formal cooperation with foreign competition authorities in the region (usually through signing memorandums of cooperation), regional cooperation is still insufficient.

Most NCAs made significant efforts in entering into bilateral agreements on cooperation with neighbouring countries. As an example, Serbia concluded cooperation agreements with Austria, Hungary, Slovenia, Croatia, Bulgaria, Bosnia and Herzegovina, Montenegro, Macedonia and Albania. The list of Croatia's and Macedonia's bilateral agreements is also quite long. Montenegro stands out, as the Montenegrin Competition Authority entered into one cooperation agreement only, in 2011 with Bulgaria.

Looking in from outside, it seems that, save for regular visits between case handlers and officials from one authority to another, NCAs can benefit from cooperation with other regional authorities. Closer cooperation can take different forms: (i) joint awareness initiatives; (ii) organisation of regional conferences; (iii) sharing of experiences in overcoming the difficulties in implementing the competition regime; and (iv) collaboration on major cross-border merger control or cartel cases.

On the other hand, cooperation with more experienced NCAs is also essential. We can take the Austrian Competition Authority as an example. The Austrian Competition Authority is an experienced body, well organised and operating within the EU network, and yet geographically close to the ex-Yugoslav countries. Austrians are the leading investors in this region (especially in Serbia), meaning that the Austrian Competition Authority is familiar with all the competition hurdles encountered by Austrian investors. NCAs should thus benefit from cooperation with this, and other more experienced competition authorities.

__164__ The International Comparative Legal Guide to: Merger Control 2012, Global Legal Group, November 2011, section 6.1, available at: [http://www.iclg.co.uk](http://www.iclg.co.uk) [last visited on 1 February 2012]; (country chapters: Serbia, Macedonia, Kosovo, Croatia, Montenegro and Bosnia and Herzegovina)

4.5.3 Cooperation Within EU

However, of particular interest to NCAs is their relationship with the DG Competition of the EU Commission. The relationship is primarily based on the Stabilisation and Association Agreements signed between these individual countries and the EU and its Member States. Pursuant to the Agreement, the NCAs are, *inter alia*, under obligation to take into account relevant EU rules and developments when resolving cases, as well report to the EU Commission on legislative and enforcement efforts.\(^{166}\)

Competition authorities are busy with transposing the know-how and EU decisional practice. This is primarily done through the translation of the EU legislation into local languages, close cooperation with EU bodies, training and education organised by the EU, assistance offered to NCAs relating usually to technical and organisational issues.

Most of the NCAs are members of the International Competition Network and participate in the OECD Competition Committee, also maintaining relations with UNCTAD. It appears that only Montenegrin and Kosovo Competition Authorities are lagging behind in this respect.

The ultimate goal is compliance with EU competition rules. Many people ignore the fact that immediate ‘copy paste’ of the EU legislation into local jurisdictions is not an option. The local jurisdictions have proved to have rather different and complex political, historical and cultural contexts, which require the transposition of the competition culture in tranches.

In their decisional practice, the NCAs look to the relevant EU legislation and case law. However, some issues that still await (more detailed) regulation include abuse of dominance, implementation of structural and behavioural measures and negotiation of remedies. For example, in 2010 only, the Serbian Government adopted several block exemption bylaws (regulating distribution agreements, R&D and specialisation agreements, as well as issues pertaining to fining and leniency),\(^{167}\) while the Croatian Competition Authority was vested with fining powers as late as 2010, after 14 years of work. On the other hand, the Montenegrin competition authority still has one rather general block exemption regulation\(^ {168}\) governing all issues related to restrictive agreements. If an immediate transposition of EU competition rules were an option, we would not be facing this situation in practice nowadays. Further efforts to strengthen the NCAs are a prerequisite for creating a strong competition compliance culture.

5. Conclusion

The aim of this paper is to detail the level of enforcement of competition regulations in selected former Yugoslav republics (Serbia, Croatia, Macedonia, Montenegro, Bosnia and Herzegovina, and Kosovo) by providing an overview of how far these target countries have come in fulfilling their obligations set in the SAAs.


\(^{167}\) Please see the overview of the secondary legislation at [www.kzk.org.rs/uredbe](http://www.kzk.org.rs/uredbe) [last visited on 13 February 2012]

\(^{168}\) Please see [www.uzzk.gov.me/biblioteka/uredba](http://www.uzzk.gov.me/biblioteka/uredba) [last visited on 14 February 2012]
The 2011 Progress Reports\textsuperscript{169} show that Serbia "has started to build a track record on enforcing competition rules on the Serbian market.' The Report moreover states that "further efforts are required in order to continue developing the Croatian Competition Authority's enforcement record". As for Bosnia and Herzegovina, Macedonia and Kosovo, the 2011 Progress Reports acknowledge that "some progress was made in the area of competition", but that there is still room for improvement, from building administrate capacities (Bosnia and Herzegovina and Macedonia) to aligning the legislation with the EU \textit{acquis} (Kosovo in particular). In summary, it seems that there is an overall need to further develop competition regimes and increase enforcement in the target countries.

Thanks to foreign investment on the one hand, and the adoption of national sets of competition rules on the other (which occurred as late as 2005 in most countries), the competition culture was introduced in this region. It was only when the NCAs were vested with direct authority to fix fines that the competition compliance level among companies and awareness level in the public were further raised (2009 in Serbia, 2007 in Macedonia, and 2010 in Croatia).

Although progress was made for the past 6 years (all NCAs started from scratch), there is quite some room for further improvement. Below is a tentative 'checklist' for a stronger and more efficient NCA:

- **Cutting on commodity work (such as straightforward merger notifications).** The legislator can easily achieve this by increasing the extremely low filing thresholds (Montenegro, Macedonia), and/or the NCA by recognising the domestic effect doctrine (Serbia, Kosovo, Croatia, Macedonia, Montenegro), and/or expressly acknowledging the 'related party concept' (Bosnia and Herzegovina).
- **Shifting the focus to complex merger notifications, abuse of dominance, market investigations, uncovering cartels and other hard core competition infringements.** This can help the authority in building its credibility by undertaking 'attractive' enforcement actions. Such measures would draw the attention of public and, ultimately, affect the awareness (and compliance) levels.
- **Reinforcing the human capacities in the NCAs and courts through the training, education and recruitment of highly qualified staff.** This task should be performed by the NCAs/courts with the help of EU/international institutions providing support in developing and strengthening the national competition authorities. The 2011 Progress Reports show that one of the major weaknesses of all targeted NCAs are human capacities.
- **Reinforcing the collaboration of NCAs at three main levels: (i) within its borders; (ii) within the region; and (iii) at the EU/international level.** The importance of the NCAs' regional cooperation in sharing their experiences and overcoming the obstacles to enforcement of competition rules is significant and the NCAs should make use of it. International collaboration seems to be an effective tool for transposing EU rules and standards into national legislations. Cooperation within at national level should not be disregarded either, as practitioners, professors, judges, economists, consumers, students and others can contribute significantly to building the competition culture.
- **Shortening the decision-making deadlines and abolishing the filing deadlines, which will relieve the administrative burden of long waiting periods and tight notification deadlines.** This will save time and money to people doing business in local jurisdictions and signal to investors that their investments are appreciated and that the competition authority is not an administrative burden, but a professional institution that acts swiftly.

\textsuperscript{169} Please see for individual 2011 Progress Reports (http://ec.europa.eu/enlargement/press_corner/key-documents/reports_oct_2011_en.htm) [last visited on 10 February 2012]
In concluding this paper, we must go back to the declared aims of this workshop - the "three scenarios of the importation of competition rule-sets in the Mediterranean region."

One thing is certain: all the targeted countries developed competition regimes due to demands or inducements by the EU as part of their stabilisation and accession process. This partially qualifies all of the targeted countries for "Scenario I".

When it comes to "no regulatory and enforcement activities", Montenegro and Kosovo qualify under this requirement. The activities of the Montenegrin and Kosovo Competition Authorities are insignificant. More efforts are needed to ensure competition enforcement. Implementation of the competition policy is still at an early stage, while competition rules must be amended to be further aligned with the EU acquis. Bearing this in mind, **Montenegro and Kosovo qualify under Scenario I**.

Further, by looking at the BIH Competition Authority, one has to acknowledge that it has adopted a set of competition laws (more or less) aligned with the EU acquis, established a competition authority (back in 2006) and started with enforcement activities (relatively) promptly. Further, there is one additional element that qualifies Bosnia and Herzegovina under Scenario II, and that is the complex constitution of the decision-making body of the BIH Competition Authority. It consists of 6 members (three members elected by the Council of Ministers of Bosnia and Herzegovina, two members by the Government of Bosnia and Herzegovina and one member by the Government of the Republic of Srpska). In other words, reflecting the multi-ethnic community, two out of six members should belong to the Serbian ethnic group, two should be Croats and 2 Bosniaks. During the summer of 2010, the BIH Competition Authority experienced significant hiccups in its work process as the new members were not elected in a timely manner due to a complex composition mechanism (three different bodies to elect, in addition to the nationality requirement). This leaves quite a strong impression that the NCA is to a large extent influenced by the political situation in Bosnia and Herzegovina.

**Scenario III** seems to fit well the Serbian, Macedonian and Croatian Competition Authorities. These NCAs worked hard towards adopting the EU acquis, established regulatory capacities and developed appropriate enforcement activities. Some of the NCAs had an early start (Croatia, in 1997), while others (Macedonia and Serbia, in 2005) placed tremendous efforts to catch up with the work. Early enforcement actions of the Croatian Competition Authority seem to be focused on "low-hanging fruit" cases. This will probably change with the new competition act empowering the Croatian Competition Authority to fine directly without

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171 Scenario I: "The country develops a competition or consumer protection law either due to demands or inducements by the EU (or the IMF or IBRD for that matter), but develops no regulatory/enforcement institutions."

172 Scenario II: "Both a competition/consumer protection law and regulatory institutions are put in place; however, the enforcement body is largely maintained under political control, with no autonomous sources of knowledge or authority to create enforcement capacity. The competition/consumer enforcement body is used as an extended hand of the government, either to provide some outlet for the build up of political pressure or for the provision and adjustment of patronage."

173 Scenario III: "A country establishes both a competition/consumer protection law and enforcement institutions with resulting enforcement activity. Being out of the immediate focus of elites, and acting somewhat under the radar screen, allows the enforcing authority to work without provoking too much interference (at least at the outset). Taking on early enforcement actions can allow the build up of enforcement capacity (sometimes by picking "low-hanging fruit" cases where there are no powerful losers). This also results in regulatory credibility of the institution, allowing the authorities to sometimes open the lid on economic sectors that are uncompetitive and where entry is foreclosed due to bargains between political/economic interests."
going to court. As for the Serbian and Macedonian Competition Authorities, it seems that they had a tough start. The Macedonian NCA started with imposing EUR million fines on rather powerful telecom sector market players\textsuperscript{174}, while the Serbian Competition Authority 'dared' to go after all major pharmaceutical companies in Serbia in addition to the all insurance companies and certain food retail chains.\textsuperscript{175}

As a concluding remark for this paper, it must be stressed that all competition authorities in the ex-Yugoslav region have done, so far, a significant job. They placed tremendous efforts in building their regulatory and enforcement capacities and implementing pieces of the EU \textit{acquis} into their legislations. However, although the overall impression is good, there is still room for further progress.

\textsuperscript{174} Please see section 2.3 of this paper for an overview of telecom sector cases
\textsuperscript{175} Please see section 2.1 of this paper for an overview of pharmaceutical/insurance/retail chain cases
Penalties and Procedural Safeguards under Serbia’s New Competition Law Two Years on

Veljko Milutinović

1. Introduction

In November 2009, the application of Serbia’s second Competition Protection Law (“CPL” or “second CPL”) began, after a five-month transitional period from the date of its coming into force. The new law replaced the “first CPL”, which was in force for a mere four years, from 2005.

Although the results achieved under the first CPL by Serbia’s competition authority—the Commission for the Protection of Competition (“Commission”)—are significant, considering the novelty and complexity of this legal field in Serbia and the severe political and business opposition it faced, the Government and the Commission itself were not satisfied with the text of the old law. Their main grievance was the inability of the Commission to impose fines on its own but, rather, through misdemeanour proceedings before a court.

Apparently, under the first CPL, despite the adoption of seven cartel decisions and five decisions finding an abuse of dominance, the obligation to go through a court of law has lead to a dismal success rate of zero final judgments imposing fines. The second most significant grievance was the inability of the Commission to carry out dawn raids. Despite the fact that the law contained only these two major flaws, the Government decided to proceed to draft a completely new law, rather than amending the old one and an EU-funded project was used to aid in the drafting of the second CPL.

The substantive antitrust rules of the second CPL, like the first CPL, follow the Article 101/102 TFEU model very closely, not least due to Serbia’s obligations under the Central European Free Trade Agreement and the Stabilisation and Association Agreement with the EU and its Member States. A significant difference is the existence of a prior notification/individual exemption system for restrictive agreements. The CPL contains a de minimis rule identical to the EU model, while recently block exemption regulations have also been adopted, with a more diluted Brussels ‘heritage.’

Under the second CPL, in addition to the introduction of several unnecessary and counterproductive changes, some of which actually distanced the law from the EU example (instead of bringing it closer to it), the level of protection of fundamental rights in competition proceedings was eroded further in comparison to the first CPL, which was already considered exceptional in several ways for the standards of Serbian administrative law.

Until recently, Serbia (like all of former Yugoslavia) had notoriously “defendant-friendly” criminal, civil and administrative procedural frameworks. Criminal cases were often dismissed for the most banal procedural errors of the police or the prosecution and many civil cases have dragged on indefinitely due to the ability of defendants not to appear in court without presenting a sound excuse. In contrast to the picture of violence painted by the conflicts of the 1990s, most domestic legal professionals would agree that, as long as proceedings remained within judicial and/or administrative

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176 Serbia is a party to the Central European Free Trade Agreement (“CEFTA”) of 2006 and it has signed a Stabilisation and Association Agreement (“SAA”) with the EC and its Member States. The former agreement is partially DG force, while the latter is awaiting ratification by the twenty-seven Member States, while a transitional version thereof (the “Interim Agreement”) was recently ratified by the EU, in addition to Serbia. All three agreements provide for general rules prohibiting restrictive agreements and abuses of dominance (Article 20(1) CEFTA, Article 73(1) SAA, Article 38(1) of the Interim Agreement) insofar as they affect trade between the Parties.

177 This issue is discussed in detail in V Milutinovic, ”Novi Zakon o zaštiti konkurencije: početak pravog posla”, 8 Izazovi evropskih integracija (2010) 155.
channels and as long as one was examining the written rules, the defendant/accused was relatively well-off. The fact that civil defendants were too well off remains a heavy burden on the Serbian economy, with judicial enforcement of debts being a particularly difficult problem.

In a way, the second CPL came in on a broader pattern of increasingly “defendant unfriendly,” “zero tolerance” lawmakers and legal procedure. It stands out, however, as the political justification for its adoption lies directly in EU economic integration, whereby the resultant reduction of fundamental rights protection is (for the most part, wrongly) perceived as a necessity of harmonization with the EU Acquis. Nevertheless, the second CPL is accompanied by a ray of hope that may indicate that the tide is turning: the long-awaited and significantly improved new Administrative Disputes Law (“ADL”). The drafting and adoption of that law took place in the context of another type of European integration: compliance with Serbia's obligations towards the Council of Europe under the European Convention on Human Rights (“ECHR”).

The subject of the present paper is the evaluation of the second CPL from the perspective of fundamental rights, in particular the rights of the defence, two years after its coming into force.

2. Fines
As was mentioned in the introduction to this paper, under the first CPL, the Commission was unable to impose fines on its own. Instead, following a finding of infringement, it was obliged to bring proceedings before a misdemeanour court and it was that court that was competent to impose a fine.

In the four years of application of the first CPL, not one final judgment imposing fines has been adopted. Even in cases where the Commission prevailed at first instance, it lost on appeal. Admittedly, the legislative choice to give competence to the lowest penal courts of the country (similar to what are known, in some countries, as justices of the peace), who are generally tasked with addressing relatively minor traffic code violations and misconduct in public places, ran counter to the complexity of the competition rules.

The crux of the problem lay elsewhere, however, not in the merits but, for the most part, in conflicts between the 2004 Misdemeanour Law (“ML”) and the CPL. While the CPL regulated administrative proceedings before the Commission (in conjunction with the General Administrative Procedure Law, or “GAPL” as the framework lex generalis in this field), the ML regulates the procedure and penalties in the misdemeanour system which, until November 2009, included proceedings initiated by the Commission to impose fines.

The relationship between the CPL and the GAPL has been and still is explicitly regulated within the CPL itself (the GAPL shall apply to proceedings “unless provided otherwise” under the CPL). This is a relatively clear-cut and typical (continental European) lex specialis/lex generalis situation, of so-called subsidiary application of a general law in a specific field. While far from being trouble free, theoretically at least and, for most intents purposes, also practically, the relationship between the two laws remains relatively clear-cut. In contrast, the legislator was not so provident with regard to the ML, which applied to what were, strictly speaking, completely distinct proceedings. Indeed, one set of rules applied to the administrative procedure before the Commission, while another set applied to the misdemeanour procedure before the misdemeanour courts. Although “full faith and credit” is given to state institutions, including the Commission, the courts were not bound by any of the Commission's findings (of fact or law) and the Commission was constrained, in fact, to plead its case from the start before a court that had no experience in economic law in general and competition law in particular.

What made matters worse is that there were two direct, formal and practical conflicts between the CPL and the ML. The first and more important one concerned limitation periods: the CPL foresaw a limitation period of five years for pursuing infringements (in administrative proceedings), while the general limitation period for prosecution under the ML was set at one year, with very few (enumerated) exceptions, which did not include infringements of the CPL. In addition, it seemed that most misdemeanour judges disagreed with the Commission’s EU law-inspired understanding of a
“continuous infringement” in restrictive agreements, which, admittedly, had no legal basis in the Serbian CPL. Instead, for misdemeanour limitation periods, the courts took the time of execution (of a written agreement— as only such agreements were pursued by the Commission under the first CPL), to the exclusion of subsequent application of the restrictive clauses.

The second discrepancy was in the level of fines: the ML foresaw rather modest maximum fines set at RSD 1,000,000 (circa EUR 10,000), again, with very few enumerated exceptions that did not include the CPL, while the CPL set the maximum at a hefty ten percent of a company's turnover which could, hypothetically at least, amount to billions of euros. Again, the courts refused to side with the Commission, which held the position that the CPL was both a lex posterior and a lex specialis, which abrogated the relevant provisions of the ML. This was due, at least to some extent, to the “defendant-friendly” mindset of misdemeanour judges, who were guided by a general principle of criminal law, whereby all offences must be clearly set out in a statute and any discrepancy or lack of clarity should be interpreted in favour of the defendant (in dubio pro reo). 178

Ultimately, towards the end of the lifetime of the first CPL, the misdemeanour courts did “cave in” to the Commission's lex specialis interpretation of limitation periods (to the extent that there is such a thing as a continuous infringement in the EU sense), while the ML was specifically amended so as to envisage fines of up to 10% of turnover for infringements of the CPL.

Nevertheless, this was not enough for the Serbian legislator and the Government, as the proponent of the second CPL, decided to empower the Commission to impose fines autonomously, in the manner of the EU Commission. Indeed, under the second CPL, decisions on fines are final in the administrative procedure and subject to judicial review. The reviewing court (now the Administrative Court) has unlimited jurisdiction over the level of fines and, under limited circumstances, over the entire decision (see below).

It should be noted at this juncture that, to allow an administrative authority to impose fines is an exceptional measure for the Serbian legal system, which, generally speaking, maintains a strict (and stark) distinction between the administrative and penal functions of the State. The former function is entrusted to administrative authorities (including Government Ministries), while the latter is entrusted to courts of law, with the occasional exception in the form of inspection authorities (health inspection, labour inspection) operating as an administrative/penal authority, subject to an appeal to the relevant Minister. This is why the first CPL was drafted in the way it was, in order to maintain the systemic coherence of the legal system.

It must be admitted that the Serbian misdemeanour system (just as, one supposes, any misdemeanour system) is ill-equipped for combating complex white collar crime. Most economic misdemeanours result in fines that are far from being deterrent. Meanwhile, economic offences set out under the Penal Code are badly defined, while some of the most frequently enforced provisions are unknown in many Western legal systems (e.g. the “abuse of official position”, an offence involving a director of a company—public or private—who willingly or recklessly concludes a deal which is unfavourable to the company's interests) and even then are, in all cases of significant complexity, applied by the criminal courts and not the misdemeanour courts. Generally speaking, the legal system is only now adapting to some of the more complex white collar crimes that have been pursued in the West for decades, such as securities fraud, insider trading and so on.

It remains unclear, therefore, why, in the light of the ongoing reform of the criminal justice system (including the ML), the competence to impose fines based on the CPL could not have been granted to either the criminal courts (by making the fines criminal in nature), or higher than normal

178 Much has been made informally in legal circles of the alleged greater influence of domestic defendants and their counsel over misdemeanour judges. In the opinion of the present author—such influence, if ever it existed, was completely unnecessary: the misdemeanour judges were bound by the law not to side with the Commission as regards the above discrepancies between the CPL and the ML.
misdemeanour appeal courts. If it is economic and business law expertise that was needed and if Serbia is too small a jurisdiction to justify the creation of a specialist “competition court”, then the commercial courts could have been considered. Indeed, although the combination of the roles of “investigator, prosecutor and judge” is the dominant model in Europe today, there are some significant and well-functioning exceptions (e.g. Austria and Ireland), where the systemic coherence of national law was not sacrificed for the sake of more “vigorous” enforcement of the competition rules and where the competition authority acts as investigator and prosecutor, while leaving adjudication to the judiciary.

The above-mentioned combination of investigatory, prosecutorial and judicial roles is copied from the EU Commission. It must be remembered, however, that the EU Commission is a unique institution, with supranational powers and that the EU did not have (and still does not have) courts with jurisdiction to impose penalties on individuals, except (and even then to a very limited extent) EU civil servants. Finally, it must also be remembered, as the Serbian and many EU Member State legislators seem to have forgotten, that this combination of roles has been highly controversial in the context of the right to a fair trial by an impartial tribunal within the meaning of Article 6 of the ECHR. To an extent, this problem is addressed at EU level through the existence of a quasi-independent Hearing Officer and the need for final decisions to be adopted by a detached political body—the College of Commissioners. Neither of these safeguards exists in Serbia.

3. Access to Information by Complainants
One of the significant retrograde steps of the second CPL is that complainants are no longer parties to the proceedings (Article 33(2)). They have been relegated to the role of the observer and they merely have the right to be "kept apprised" of the progress of the case (whatever that means). The decision-making body within the Commission (the Council of the Commission) is empowered to adopt rules on how complainants shall be informed. At the time of writing, two and a half years after the coming into force of the second CPL, no such rules have been published. The denial of status of party to the proceedings has significant implications, of course, in terms of the lack of privileged access to the file. Rather than troubling itself with devising a complex system of access to the file along the lines of the EU system, complainants have the same rights as the general public: they may obtain compulsory access under the Law on Access to Information of Public Importance, which means that they can be flatly denied access to any evidence that is labelled a business or other secret.

More importantly, perhaps, the fact that complainants are not parties to the proceedings has procedural implications beyond access to evidence. Complainants will no longer have the right to face the alleged infringers and participate in investigations conducted by the Commission. Also, the deprivation of party status makes it more difficult for them to file an action for annulment before the Administrative Court, as their locus standi will no longer be automatic —instead, they will have to prove “legitimate interest” to challenge the decision which, under the general administrative law rules, is extremely difficult.

4. Legal Privilege

179 The Commission did adopt two sets of guidelines in this field: one on complaints against alleged abuses of dominance (Упутство о садржини иницијативе за испитивање повреде конкуренције из члана 16. Закона о заштити конкуренције, available at: http://www.kzk.org.rs/kzk/wp-content/uploads/2011/08/uputstvo-sa-obrascem1.doc, last viewed: 3 February 2012) and one on communication with the parties. (Упутство о раду о странкама, available at: http://www.kzk.org.rs/kzk/wp-content/uploads/2011/08/Uputstvo-o-radu-sastrankama.pdf, last viewed: 3 February 2012). The former not only relates only to abuse cases but does not set out, much less elaborate, any right of the complainant to be informed but merely imposes a structure on the complaint. The latter refers to communication with parties, i.e. not complainants.

180 This does not apply, of course, to actions for annulment of a decision not to initiate proceedings or actions for failure to act in failing to address a complaint, as in these cases the complainant is the only party with a legitimate interest, for administrative law purposes.
In terms of secrecy, the issue of legal professional privilege (privileged information) has given cause for concern under the second CPL. The first CPL did not explicitly address the issue of legal professional privilege; only state and business secrets were addressed, to the extent that they may not be released by the Commission to third parties without permission from the source of the information in question (Article 55). In the absence of specific regulation, the provisions of the Attorneys' Law and the Attorneys' Code of Conduct applied. In a system that did not yet have follow-on private enforcement and where there was no real demand for Commission documents to be used in other proceedings, the combination of these acts was sufficient to allow a sufficient level of protection for the parties.

The second CPL addresses the issue of legal professional privilege but only partially and in the most unclear of ways. Article 51 now provides that the provisions regulating protected information will also apply to privileged information. The relevant provisions are to be found in Article 45, which merely provides that information (business, official, state and military secrets) may be protected from third party access (including freedom of information access) upon request from a party and subject to approval from the Commission. In addition, Article 51 specifically provides that the Commission may withdraw the status of legal professional privilege if it finds that the parties are abusing such privilege.

It must be noted, in that connection, that “abuse” of legal professional privilege is only defined in the Attorneys' Code of Conduct, which defines it as an abuse against the client or other interested parties but not against the opposing party. It is not clear, therefore, which criteria could possibly be applied by the Commission to find an abuse of privilege in competition proceedings, as the Attorneys' Code of Conduct was drafted primarily for use in judicial proceedings with two clearly opposing sides (i.e. in civil and criminal cases) and not in the largely inquisitorial administrative procedure. This was a reasonable choice in the past, as attorneys have traditionally played a relatively minor role in administrative proceedings, or, at least, they had fewer secrets to keep (prior to the enactment of the first CPL and the proliferation of EU-style administrative bodies with quasi-judicial powers). Unlike the “good old days” of administrative procedure, which concerned, in the main, building and other permits, competition enforcement is a different “ballgame” altogether, as it requires quasi-criminal law safeguards. In addition, unlike judicial proceedings, where the judge has no interest in the outcome of the case, here the administrative body often has a clear political interest in obtaining and demonstrating “results”. Thus, closer regulation of business secrets seems necessary in this context, not to say indispensable.

The greatest source of uncertainty under Article 51 is that protected information under Article 45 could be virtually anything (mainly business secrets) that the party wishes not to disclose to third parties. However, non-disclosure of business, state or similar secrets to third parties is an entirely different legal notion from legal professional privilege, as non-disclosure to third parties means that the authority (court, competition authority) may still use the information to reach a decision. Legal professional privilege, in contrast, means that access can be denied to the public authority or, if access is obtained, that such information becomes inadmissible in legal proceedings. The second CPL fails to distinguish between these two fundamentally different concepts.

The lack of clarity regarding legal professional privilege has been the source of heated debate surrounding the second CPL and legal (and constitutional) challenge is likely, should the Commission ever decide to use privileged information to reach a decision. At a very general level, disrespect for legal professional privilege runs counter to constitutionally guaranteed rights to privacy and fair trial, rights which are also guaranteed under the European Convention on Human Rights, which is binding on Serbia. In principle, a lawyer faced with a request to disclose privileged information to the Commission would have to refuse disclosure, if he is to comply with the Attorneys' Code of Conduct. This is because situations that may arise under the CPL do not match any of the three exceptions envisaged in Article 94 of the Code (waiver from the client, prevention of a crime with significant danger to the public and the defence of the attorney himself or his associate). On the other hand, Article 50 of the CPL compels the provision of all information—including secret information—upon request by the Commission, subject to periodic penalty payments of EUR 500 to EUR 5,000 per day.
for non-compliance. In view of this very high potential for controversy, it remains unclear why the examination of suspected abuses of privilege was not entrusted to a court (or at least, as in the case of the European Commission, to an independent independent Hearing Officer).

5. Inspections

All parties are obliged to make available for inspection relevant data held in written, electronic or any other form, as well as any other items that may constitute evidence. These items may be temporarily seized, pending the determination of all relevant information and material facts contained in such documents/belongings and must be returned to the parties no later than at the time of termination of proceedings.

While conducting an investigation, the Commission is vested with broad powers of inspection, which include seizure, copying or scanning the business documentation, sealing off business premises, while the Commission may also perform “any other activities in accordance with the purpose of the proceedings”. Article 53 of the second CPL introduced the possibility of an unannounced inquiry, a sudden examination of premises and/or data, documents and belongings which are found at such premises, of which the party or holder of the premises and belongings shall only be informed at the moment of carrying out of the inquiry at the place of inquiry (“dawn raids”). Dawn raids shall be carried out when there is reasonable fear that evidence may be destroyed or tampered with.

If this is necessary for the collection of evidence, Commission officials may enter business premises. Forced entry may be performed with police assistance, should the parties unreasonably oppose the raid. The second CPL also introduced the power to search homes. A judicial warrant will be required if the owner or occupant of the home opposes the search. The owner/occupant has the right to be present during the raid himself or through a representative, together with two adult witnesses. Without the owner/tenant or his representative, the inquiry is allowed only in the presence of two adult witnesses.

These new provisions on dawn raids significantly reduced the possibility of parties under investigation to withhold evidence. As such, although less “friendly”, they do seem to be generally compliant with the Constitution and the ECHR. So far, in the two and a half years of application of the second CPL, there has been no dawn raid by the Commission, to the knowledge of the author. Indeed, as will be seen below, much of the Commission's enforcement activity is based on leniency applications, which seem to be “filling the dockets” for the time being.

6. Use of Evidence

The first CPL has failed to sufficiently regulate the collection and use of evidence in complex cases, where an analysis of the broader market situation is needed and the second CPL has not tackled this issue at all.

Indeed, under both the first and the second CPL, the Commission is authorized to carry out sectoral inquiries. It is notable that, in a recent case, the Commission carried out such an inquiry, in the guise of an "analysis of the relevant market", while hiring a subcontractor (a research institute) to carry out the "research."

The way in which the subcontractor conducted the "research" and the way in which the Commission converted this "research" into evidence arguably ran counter to the rules of the General

181 Articles 43 and 44 CPL.
182 Ibid, Article 55.
183 Ibid, Article 45(1).
184 Ibid, Article 54.
185 Ibid, Article 54(3) to (6).
Administrative Procedure Law ("GAPL"), which applies by default to all proceedings under the CPL, to the extent that the CPL does not explicitly provide otherwise.

Article 149 of the GAPL provides that the only types of evidence admissible in administrative proceedings in Serbia are:

- documentary evidence
- witness testimony
- parties’ representations during the proceedings
- expert opinions and
- findings and inspections carried out by the administrative authority itself.

In addition, Article 173 of the same law provides that “when the establishment or analysis of a certain fact requires expertise which the persons conducting the procedure lack, expert testimony shall be ordered”. Accordingly, the Commission is bound to order expert testimony to be provided if it lacks the necessary expertise.

Instead of all this, the Commission used a subcontractor (a privately owned and operated “research institute”) to collect responses from an entire economic sector. The subcontractor asked the parties to provide value judgments as to whether the parties were compelled, in fact, to act in a way provided by a seemingly restrictive clause, as well as to provide assessments directly relevant to the definition of the relevant market.

Had the Commission followed the procedure set out under the GAPL, it would have been obliged to allow the parties to: (i) to appeal the decision of the President of the Commission to hire the subcontractor and carry out the analysis in the first place and/or (ii) treat the subcontractor as an expert witness and request that the expert witness be excluded if in doubt over its competence or bias and/or (iii) ask questions and request clarifications, i.e. to confront the witness, which is part of the fundamental principle of confrontation in administrative proceedings.

Ultimately, the Commission rejected all of these pleas and allowed the parties to see the raw data put into the analysis only after they requested access to the file, with no real possibility to counter the claims of the subcontractor. This point was raised by the parties in a subsequent action for annulment but was dismissed by the newly established Administrative Court, which failed to see the glaring violation of administrative procedure and proceeded to support the Commission.

7. Appeals and Judicial Review

Like Article 22 of the old (1990) Constitution, Article 36 of the current (2006) Constitution provides a right to appeal or other legal recourse. In addition, Article 12 of the GAPL sets out a general principle of “dual instance” in administrative proceedings.

The CPL is famous in Serbia for the lack of dual instance in its final decisions—most notably, decisions finding an infringement. This runs counter to the norm in Serbian administrative procedure: normally, a decision-making body acts at first instance, while an administrative appeal lies before a higher administrative authority (most commonly, a Government Minister). Under the Government Law, the framework statute setting out the competences of the various Ministries, the protection of competition falls within the remit of the Minister of Trade and Services. Nevertheless, the CPL does not provide for the possibility of an appeal to that or any other Government official or institution. Instead, the Commission’s final decisions are subject only to judicial review before the Administrative Court and, ultimately, the Supreme Court of Cassation, under the Administrative Disputes Law (“ADL”).

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Many practitioners in Serbia who are not well-versed in administrative or constitutional law have often misinterpreted this solution as being unconstitutional. It is not. Dual instance in administrative proceedings is a general principle of administrative law (and not the Constitution) that may be abstained from by explicit statutory provision (as in the case of the CPL). Increasingly, decisions of state institutions do not follow the dual instance model, as this model mostly makes sense in the context of decisions adopted by local authorities appealed to a state authority (to prevent the oppression of locals by other locals on personal grounds or, alternatively, to ensure uniformity in the application of the law or, ultimately, the obedience of state authority by the local authority).

Without doubt, judicial review through an action for annulment represents “other legal recourse.” In the only published dual instance case decided under the new (2006) Constitution, in 2009, the Serbian Constitutional Court heard a challenge against legislation regulating promotions in the Police Force and found that, by making first-instance decisions final (i.e. without appeal) and denying judicial review, said legislation was in breach of Article 36 of the Constitution. The position is similar to that under Article 6 ECHR, which also guarantees the right to judicial recourse, which, in the context of competition proceedings, is guaranteed throughout the EU (including recourse against decisions of the EU Commission before the General Court of the EU).187

The GAPL knows two classes of acts adopted by an administrative authority in the course of administrative proceedings: the conclusion (zaključak) and the decision (rešenje). Generally speaking, a conclusion is an interim decision, which does not affect the legal position of the parties (to borrow from EU terminology). Many or most conclusions may be appealed before a higher administrative authority but may not, generally speaking, be subject to judicial review. In contrast, a decision is, generally speaking, final, it does affect the legal position of the parties and is thus subject to appeal to a higher administrative authority, as well as judicial review.

The CPL sets up the Council of the Commission as the higher authority that hears appeals against conclusions adopted by the President of the Commission (to conduct an investigation, provide evidence, etc.). The President is a Member of the Council and is not precluded from voting in appeals against her own conclusions.

An important innovation in the second CPL is that, while, similarly to the first CPL, the President adopts a conclusion to initiate proceedings, that decision can no longer be appealed to the Council of the Commission, insofar as proceedings to establish antitrust infringements are concerned at least (Article 35 of the second CPL). This is a significant concentration of power in the hands of the President; faced with a decision to open proceedings, the accused party has no choice but to bear out the proceedings and then apply for judicial review before the Administrative Court. If a party were to launch an action for annulment against a conclusion, the Administrative Court would most likely reject such an application on the grounds that a conclusion is not final and does not alter the rights and obligations of the parties. This is similar to the situation under EU law, where an action for annulment does not lie against a statement of objections issued by the EU Commission.188 The fact that a solution is “European” does not make it right, in and of itself, of course. The inability to question the decision to open proceedings exposes the parties to great expense, potentially also harassment, with no legal recourse for the waste of time and money incurred. Hypothetically, a claim could be brought for vexatious administrative proceedings but such a claim is most unlikely to succeed (both in the EU and


in Serbia), due to the deference granted to administrative authorities' “margin of discretion”.\(^{189}\) In the case of Serbia, where the average action for damages takes upwards of five years, the parties would be faced by an ineffectiveness barrier as well. Nevertheless, taking all of this into account, it may be questioned, once more, why “Europeanisation” has been used to adversely affect the right to legal recourse of the parties under the CPL. It will be recalled, in addition, that in the EU the European Court of Justice, after finding that a decision to initiate proceedings and a statement of objections do not alter the rights of the applicant as they are not final, left open the possibility that such measures may, exceptionally, be subject to an action for annulment if they “lacked even the appearance of legality.”

In contrast to the first CPL which envisaged the jurisdiction of the Supreme Court of Serbia (Administrative Division), the second CPL provides that judicial review can be launched before the Administrative Court within 30 days of receipt of the Commission’s decision (the same deadline as under the first CPL).\(^{190}\) The role of the Supreme Court (now operating under a different name and much narrower jurisdiction as the Supreme Court of Cassation) as a judicial review court of first instance has been transferred to the Administrative Court. Pending the establishment of the new Administrative Court, in the period between 1 November 2009 and 1 January 2010, the Higher Commercial Court in Belgrade was entitled to hear judicial review cases under the CPL.\(^{191}\) Indeed, at the time, the Government praised the jurisdiction of the Higher Commercial Court in its Proposal for the second CPL, on the grounds that this court has experience in business law matters which is necessary in competition cases. What remains unclear is why, then, was the jurisdiction of that court only temporary?

Although, due to the nature of "cassation" as opposed to a supreme court of general jurisdiction, the grounds on which an appeal from the Administrative Court to the Supreme Court of Cassation may be launched are restrictive, at least one of these grounds will exist in all final competition decisions cases namely, that the contested administrative decision was not subject to appeal.\(^{192}\) Thus, the ADL compensates, to a some extent, the absence of a dual instance in the adoption of infringement decisions under the CPL.

It must be noted that the new ADL, which regulates proceedings before the Administrative Court, came into force two months after the commencement of the application of the second CPL and that the new law introduces many important improvements, from the viewpoint of the party challenging an administrative act.

Article 72(3) of the CPL explicitly sets out the unlimited jurisdiction of the Administrative Court with regard to fines, which is in line with the rules at EU level, where the General Court of the EU has a similarly defined jurisdiction vis-à-vis decisions of the EU Commission. The Administrative Court can annul a decision of the Commission, in whole or in part, without substituting it with a decision of its own-according to the CPL.

The CPL does not provide the full picture, however, as the new ADL provides for unlimited jurisdiction over entire administrative decisions (i.e. findings of substance, fines and all other remedies). Indeed, Article 43 of the ADL provides that the Administrative Court may rule in unlimited jurisdiction over entire administrative decisions (i.e. findings of substance, fines and all other remedies). Indeed, Article 43 of the ADL provides that the Administrative Court may rule in unlimited

\(^{189}\) It will be recalled that the European Court of Justice, after finding that a decision to initiate proceedings and a statement of objections do not alter the rights of the applicant as they are not final, left open the possibility that such measures may, exceptionally, be subject to an action for annulment if they “lacked even the appearance of legality” \(Ibid\), para. 23.

\(^{190}\) Article 71(1) of the CPL.

\(^{191}\) The Administrative Court was created by the Law on Organisation of Courts (Zakon o organizaciji sudova), Official Gazette of the Republic of Serbia, No. 63/01, 42/02, 27/03, 130/03, 29/04, 101/05, 46/06; the current version of this law came into force on 1 January 2010.

\(^{192}\) The other two grounds for appeal are: a) that it was envisaged explicitly by law or b) that the judicial review by the Administrative Court ended in a decision in full jurisdiction. The latter of these two may also be applicable in some competition cases.
jurisdiction, in which case the judgment shall replace the decision of any administrative authority (including the Commission) in its entirety. However, in order for the court to rule in unlimited jurisdiction, the case must be such that the knowledge of facts and law held by the court in the particular case is sufficient to adopt such a ruling. This principle was also set out in Article 41 of the old ADL, which previously regulated rulings in unlimited jurisdiction. The need to have all the facts and law is, without doubt, an acknowledgement of the margin of appreciation which is granted to administrative authorities. Thus, it would seem that a judgment in full jurisdiction is meant to be issued only exceptionally, where the case is relatively straightforward (e.g. when an administrative authority is refusing to issue a permit although it is entirely evident that the applicant fulfils all the criteria).

Having said that, the new ADL introduces several important novelties and clarifications with regard to unlimited jurisdiction. First, unlimited jurisdiction shall not exist where excluded by law or where the administrative decision is the subject of a discretionary assessment by the administrative authority (arguably, the second of these criteria may apply in competition decisions). These are codifications of previous judicial practice that were not explicitly set out by the old ADL. As a real novelty and on the bright side, unlike the situation under the old ADL, if a party requests that the Administrative Court rule in unlimited jurisdiction, the Administrative Court is now bound to provide reasons for refusing to do so. This is an important innovation because, under the old regime, the administrative division of the Supreme Court flatly refused unlimited jurisdiction in an overwhelming majority of cases. The new ADL, like the old ADL, provides that the court shall be obliged to rule in unlimited jurisdiction if the administrative authority adopts the same unlawful act twice or if the administrative authority fails to act upon a previous finding of annulment within the prescribed deadline. Thus, unlimited jurisdiction is set to serve as a fail-safe mechanism for hard-headed or abusive administrative authorities.

In view of the provisions of the new ADL, Article 72(3) of the CPL remains useful, as it grants the Administrative Court unlimited jurisdiction over fines even when unlimited jurisdiction is otherwise excluded under the ADL. What is not in accordance with the EU law model is that the CPL does not provide a power for the courts to suspend the enforcement of a decision pending judicial review; indeed, suspension of enforcement is only provided for fines and it can only be granted by the Commission itself, under exceptional circumstances. In other words, there is a “pay first, complain later” system, which offers a clearly insufficient level of protection of the rights of the parties.

Fortunately for the parties, this provision of the CPL effectively became obsolete just two months after enactment (which demonstrates a stunning lack of intra-governmental coordination in the drafting of legislation). In response to pressure from the Council of Europe and in order to ensure compliance with Article 6 of the ECHR, Article 23 of the new ADL allows the Administrative Court to suspend the enforcement of an administrative decision itself. Under the old ADL, suspension of enforcement could only be granted by the authority that issued the decision. It is this old, absurd provision of the ADL that Article 71(2) and (3) of the second CPL embody.

Under both the old and the new ADL, enforcement could be suspended if:
1. Enforcement would entail a loss for the applicant that would be difficult to compensate;
2. Suspending enforcement would not be contrary to the public interest and
3. Suspending enforcement would not cause greater or irreparable loss to another party.

The difference is, obviously, that now suspension can be granted not only by the administrative authority itself but also by the Administrative Court. In addition, again for the sake of compliance with Council of Europe demands, the new provision envisages, for the first time that, in cases of urgency, a request to suspend enforcement can be submitted before filing the action for annulment.

193 Article 71(2) and (3) of the CPL.
In principle, the test envisaged under Serbian law is in line with the requirements developed in the context of Article 278 TFEU (formerly Article 242 EC) to suspend enforcement of a decision of the EU Commission before the General Court. In such cases, the President of the General Court must balance the likelihood of serious and irreparable damage against the harm to be suffered by other parties if suspension is granted.

In practice, there has been one ruling by the new Administrative Court acting on a request to stop enforcement of a competition decision under the new ADL. This ruling indicates that the Serbian test will be very stringent, if not impossible to satisfy in practice. In the context of a decision of the Commission finding an abuse of dominance and a request to suspend the duty of the parties to amend commercial agreements with more than 20 other companies, the Administrative Court rejected the request on the grounds that:

1. The parties did not demonstrate that they will suffer loss
2. Stopping enforcement is against the public interest, as the decision concerns an abuse of dominance.

Contrary to the Court's findings, the parties argued extensively in their submissions to the Court about the complication involved in re-negotiating contracts with 20+ companies in the space of just 30 days (as ordered in the contested decision), as well as the fact that, once re-negotiated, what is done is extremely difficult to undo. The argument of the court that, simply because the decision concerns an abuse of dominance, to stop enforcement would be against the public interest—defies the very notion of administrative review of competition decisions. Indeed, if such reasoning were to become standard practice, it will be impossible to stop the enforcement of any abuse of dominance decision.

Perhaps in order to alleviate or shorten the suffering incurred by the parties in the interim, the second CPL provides that proceedings for judicial review shall be completed within two months of the date of filing. There are, however, no sanctions for the Administrative Court for failing to comply with this time limit. It is submitted that such a time limit makes no sense, for two reasons. Two months is a very short time period for examining a complex competition decision, so that, if the Court did observe it, this would unduly prejudice the rights of the parties in all cases that entail any degree of complexity. In addition, setting a limit on decision-making runs counter to the principle of independence of the judiciary and therefore, even if the second CPL had provided for sanctions against the Administrative Court, these would be unenforceable.

Finally, the new ADL makes public hearings the rule in judicial review cases, while restricting the case to a written procedure becomes the exception, which is the exact reverse of the situation under the old ADL. The near-impossibility of having a hearing at all under the old ADL, let alone a public hearing, forced the Government of Serbia to insert a reservation to Article 6 ECHR in 2003, when Serbia was acceding to the ECHR. Following the enactment of the new ADL, this reservation has been withdrawn.

8. Leniency Applications and Legal Certainty

The first CPL contained a controversial provision on leniency (Article 71(5)), which stipulated:

No penalty shall be imposed on a party to [a restrictive agreement] nor on the responsible individual, if the party has reported the existence of the agreement to the Commission and the other parties thereto prior to the adoption of a conclusion to initiate proceedings against that party.

In the run up to the commencement date of the application of the second CPL, a major retail chain, spurred by competition problems in other jurisdictions, decided to "clean out its closet" and report all potentially restrictive agreements it had with its co-contractors in Serbia, so as to avoid the severe consequence of the Commission being able to impose fines on its own under the second CPL. The retailer invited its co-contractors to present a "joint" leniency application to the Commission, presumably in order not to upset business relations with them.
In what must be a European record, the Commission received around 150 leniency applications within a period of just two months, most of which were related, directly or indirectly, to the controversial retailer and/or his competitors.

The provision of the first CPL was controversial for two main reasons. First, it was unclear whether it applied to horizontal and vertical agreements alike and second (and more importantly), it was unclear whether"joint" applications could be made or whether it was only the first undertaking that could benefit from leniency.

The Commission allowed leniency to proceed in vertical agreements cases, in line with the lack of definition in the law and contrary to the EU leniency notice. It disagreed with some of the applicants, who claimed that "joint" applications could be made and insisted that only the first undertaking to apply would benefit, something which was evident, the Commission found, from the text of the law which speaks of "the party" and not of "the parties". This solution seemed to make sense in the context of vertical agreements, which normally have just two parties in total, thus rendering leniency less useful if both parties could benefit from it.

The text of the law and an opinion of the Ministry of Trade and Services ran counter to the Commission's interpretation. Under Serbian law, neither the Ministry nor the Commission can issue binding interpretations of the law: only the Parliament can. However, looking at the text of the law itself, it must be underlined that, as a general principle of statutory drafting and interpretation in Serbia (which the Commission flatly ignored), the singular is taken to include the plural unless specifically provided otherwise.

All of the leniency applications were submitted prior to 1 November, in the hope of avoiding the applicability of the second CPL and, thus, the risk of directly imposed fines. Article 74 of the second CPL provided that the first CPL shall apply to all proceedings that were commenced before the date of application of the second CPL. Thus, the first CPL would apply to those leniency proceedings that were submitted before 1 November.

However, the Commission disputed the interpretation of the leniency applicants and maintained that the relevant date, on which the proceedings are "commenced", is the date when the Commission issues a conclusion opening proceedings against a company and not the date of submission of the leniency application. Since there is no deadline for responding to a leniency application (or any duty to respond at all), the Commission could issue a conclusion opening proceedings at any time. Thus, if a leniency application was submitted, e.g. on 25 October and the Commission chose to open proceedings on 27 October, the first CPL would apply. If the Commission waited until 1 November before opening proceedings, then the second CPL would apply. The application of less favourable rules would thus be entirely subject to the will of the Commission.

The GAPL, which applies to all matters not explicitly resolved by the CPL, provides, in its Article 115(1), that proceedings shall be deemed to have commenced when the first procedural step is taken by the administrative authority. Thus, in this respect, the Commission had the positive law on its side. It is submitted, however, that not only is this provision not suited to the unique context of leniency applications, where it is the applicant that commences the procedure, the GAPL and the CPL must be interpreted in line with Article 197 of the Serbian Constitution, which prohibits retroactive legislation, save where justified by the public interest and, in the case of criminal proceedings, save where the new law is more favourable to the defendant. Likewise, the ECHR also prohibits punishment on the basis of retroactive application of the law (Article 7).

This concern over retroactive punishment is not only hypothetical. So far, the Commission has reached one infringement decision with fines based on the October 2009 leniency application. In the IDEA/Grand Prom case, the Commission fined the Serbian subsidiary of a Croatian supermarket chain (IDEA) EUR 4.2 million and a Serbian chocolate and processed foods manufacturer (Grand Prom) EUR 2.4 million, respectively for engaging in resale price maintenance. According to the Commission's decision, by setting up a system whereby IDEA was rewarded by Grand Prom for observing Grand Prom's recommended retail prices, the two parties have infringed Article 10 of the second CPL (the functional equivalent of Article 101 TFEU).

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194 Decision n. 4/0-02-14/11-12 of 26 May 2011.
In substantive terms, the case was non-controversial, as this was a clear-cut case of resale price maintenance. What is controversial is that the decision is based, almost entirely, on a leniency application submitted by counsel for IDEA on 30 October 2009 (i.e. one day before the second CPL and its new procedural and fining provisions came into force). The purpose of IDEA's counsel was defeated, as the Commission found IDEA to be the “ringleader” in this anticompetitive agreement and thus not eligible for leniency. The grounds for the Commission's findings in this respect are shaky, to say the least. The gist is the following. Although the Commission had insight into numerous emails sent by Grand Prom to IDEA, whereby Grand Prom was openly asking IDEA to maintain its retail price and although IDEA argued before the Commission that it had no interest in maintaining such price, the Commission took into account the “fact” that Grand Prom did not have similar arrangements with certain other supermarket chains, as well as the statement of a Grand Prom executive (!), to the effect that IDEA was the “initiator” of the restrictive agreement.

Had the Commission interpreted the second CPL to the effect that leniency applications submitted before 1 November 2009 were to be handled under the first CPL, it would have been irrelevant who the ringleader was: as the first party to notify, IDEA would have benefited from leniency. Instead, through the Commission's interpretation of the law, IDEA had to pay a (substantial, for Serbian standards) fine. Thus, the transition period caused legal uncertainty not only with respect to the fining powers of the Commission but also with regard to who, exactly, can benefit from leniency or immunity.

IDEA was fined once again in the IDEA/Swiss lion decision, which was adopted six months later, based on leniency applications from the same period (immediately preceding the application of the second CPL). In this case, the vertical agreement concerned IDEA and another Serbian chocolate manufacturer, Swisslion. The facts and law were very similar to IDEA/Grand Prom, with two very important twists. First, the Commission found that IDEA had obliged Swisslion to ensure that the same resale price maintenance policy was observed by IDEA's competitors (i.e. other supermarket chains). Second, in this case, Swisslion filed a leniency application four days before IDEA (they filed on 26 October and 30 October 2009, respectively). The Commission found, once more, that IDEA was the “ringleader” in this restrictive agreement, by imposing resale price maintenance on Swisslion. That finding, albeit somewhat less elaborate than in the IDEA/Grand Prom case, was entirely unnecessary this time around, as Swisslion was the first to file for leniency/immunity. As IDEA was second to file, it was, by definition, excluded from leniency. As if to “ratchet up” the punishment on a repeat offender, IDEA's fine was higher the second time around, amounting to circa EUR 5.5 million.

Arguably, therefore, in the IDEA/Grand Prom case, had Grand Prom filed as well, it could have avoided fines. It is worth wondering if Grand Prom would still have to file first, or whether the finding that IDEA was the ringleader would be sufficient. Under Article 69(1) of the second CPL, only the first party to file could obtain immunity, with the others only being eligible for leniency, or partial reduction of the fine. Furthermore, in order to obtain leniency, Grand Prom would have had to file evidence not previously submitted by IDEA (which, historically, was the case). Thus, the most likely outcome, if Grand Prom filed second, would have been leniency, with immunity being possible if the Commission treated IDEA's prior application as void (the second CPL is silent on the possible scenario of the first party to file being the “ringleader”). Had the Commission decided to apply the first CPL, it would not have been able to consider who is the first to file, as this issue was not addressed under the old law (just like the issue of “ringleaders” was also not addressed).

Aside from the gross legislative negligence which was the transition period between the first and the second CPL, the second CPL, once operational, did provide clearer guarantees for leniency applicants. Article 69 of the second CPL, which is far more detailed than the old provision on leniency and is generally in line with EU law, provides that full immunity shall be granted to the first


196 The Commission did not specifically rely on repeat infringement, which makes sense, as the infringements were, essentially, simultaneous. Instead, it relied on what it found to be IDEA's subjective fault, especially its willingness to see an anticompetitive market outcome to the restrictive agreement.
undertaking to submit evidence, provided that such evidence shall enable the Commission to establish the existence of a restrictive agreement. Undertakings that do not benefit from full immunity may receive leniency, i.e. a reduction in fines, provided that they provide evidence which the Commission has not previously obtained. As in the IDEA/Grand Prom decision, neither immunity nor leniency shall be granted to the “ringleader”, i.e. the initiator of a restrictive agreement.

Under the second CPL, the Government must prescribe in detail the conditions for immunity/leniency, through secondary legislation. What the government ultimately prescribed was a one-pager. In the Decree on Conditions for Exemption from the Obligation to Pay Pecuniary Measures of Protection of Competition (“the Leniency Decree”), the Government elaborated linguistically on the “ringleader” exception and extended it to undertakings that “coerced or incited” other undertakings to restrict competition (Article 2). Article 3 of the Leniency Decree obliges all leniency/immunity applicants to agree to full cooperation with the Commission, full disclosure of all relevant documents and information in their possession and the immediate cessation of infringing activity from their side. The same provision also obliges leniency/immunity applicants to undertake not to disclose corporate statements or evidence submitted to the Commission to third parties or destroy or conceal evidence.

9. Conclusion

Under the guise of Europeanization, the second CPL has introduced several further inroads into the rights of the defence and made proceedings before the Commission perceptibly less "friendly" for the accused undertakings. The inroads have begun with the first CPL and the new law has taken them further. Some of the human rights concerns involve issues that apply equally at the EU level, while others result from "home-grown" (but EU-inspired) Serbian solutions.

Having said that, the CPL does not operate in a legal vacuum. The GAPL and the ADL are also very relevant. The innovations brought in by the new ADL namely, the competence of the judicial review court to suspend enforcement of a decision on its own—even prior to the submission of the action for annulment—the introduction of public oral hearings and the duty for the court to provide reasons for not ruling in full jurisdiction are all very significant. The different solutions complement and offset each other, as they are the result of two entirely different philosophies and political backgrounds. While the second CPL is the result of cries for more competition, a hard line on "monopolists" and faster EU integration, the new ADL is largely a product of the human rights "circuit." As such, the involvement of different "foreign" actors represents a system of checks and balances in the process of drafting the laws related to European integration. It is this interaction of the EU free market agenda and the ECHR human rights agenda that has already produced interesting problems in the EU and will continue to do so in Serbia.

The “transitional period” between adoption and application of the second CPL remains a cautionary tale of how not to draft legislation on any topic, in particular on the protection of competition. The unprecedented flood of leniency applications and the unacceptable legal uncertainty that surfaced were an unmitigated disaster, which seriously upset the hard-earned trust between the Commission and private practitioners that was built in the four years of application of the first CPL. The Commission's interpretation of the law and its handling of the entire affair was counterproductive, to say the least. Faced with the only two options that it had come November 2009—of doing nothing and doing what it did—it should have chosen the former option. Not only did the Commission trample on legal certainty by treating pre-1 November leniency applications under post-1 November procedures, it did so, it seems, quite selectively. The two cases that resulted in fines were taken out of a total of 150, with another two cases currently being pursued. Which criteria were used to single these cases out remains unclear. The Commission's choice has so far netted a little over EUR 12 million-the

197 Article 69(5) second CPL.

198 “Pecuniary measures of Protection of Competition” is the term used for fines in the second CPL. The term “fines” was avoided deliberately, in order to buttress the notion of competition proceedings being “administrative” and not “criminal” in nature.
revenue which the State would have foregone, had it opted for legal certainty. It also netted a dangerous “precedent,” which, if observed in the future, may make it extremely difficult for distributors to prove they did not initiate resale price maintenance. Indeed, the key concept here is found in the negative: it is difficult for them to prove that they did *not* do something—rather than the Commission having to prove that they did.

The second CPL also brought to prominence some hitherto irrelevant inadequacies of the administrative law system. One is the principle of administrative law that enabled the Commission to impose fines in the two leniency cases namely, that the date of commencement of proceedings is the date on which the administrative authority (and not the party) takes the first procedural step. While this rule is adequate for most types of administrative proceedings, it proved horribly inadequate for a leniency system—especially one faced with a “transition period.” The other is the *de facto* exclusion, by the Administrative Court, of any possibility of suspending the enforcement of behavioural measures in an abuse of dominance case. By ruling that the fact that the decision of the administrative authority concerns an abuse of dominance excludes the possibility of the balance of interest being on the side of suspension, the Administrative Court seems to have rendered the entire institute of suspension meaningless in such cases. Fortunately, Serbia is not a common law country and the Administrative Court will not be obliged to distinguish its earlier decision if it decides to suspend enforcement in a similar case in the future. It is hoped that it will, at some point, move away from this “precedent.”

Overall, the transition from the first to the second CPL can be understood as an infant disease, which the Serbian legal system will grow out of. To the praise of the Administrative Court, some competition judgments are now available on-line, which should lead to greater transparency. With time and specialist training, administrative judges will become more versed in the complexities of reviewing competition decisions. As regards the Commission, it is to be hoped that the steam of pursuing cases based on the October 2009 leniency applications will soon blow over. In any event, such cases will be time-barred by November 2012, at least for those leniency applicants that ceased their anticompetitive conduct at the time they submitted their applications.
MARKET ECONOMY AND ITS PROTECTION IN KOSOVO

By Dr. Sc. Gani Asllani

Abstract

At the transition economies as the economy of Kosovo is, the activity for protection of competition is faced with many challenges. Those challenges result also from the fact that Kosovo was the last country in South-eastern Europe to start implementing the principles of a free market economy after 1999. Like other Western Balkan countries, which are well on their path toward European integration, competition remains a challenge for Kosovo. The importance of protection and development of competition in Kosovo is seen as an issue that should be the basis for determination of the quality of goods and services, the competition brings dynamism, therefore competition has to ensure that businesses to be in continuous pressure in order to offer the best possible goods and services for consumers and with the best possible prices. Competition also obliges the enterprises to improve its products and to induce development of new technologies and finally the development of competition makes obstruction for creation of monopoles that are damaged phenomenon for the economy and consumers. To economies in transition, three types of anti competition practices that are object of the law on competition draw particular importance. These anti-competitive practices are: prohibited agreements-cartels, mergers of enterprises and abuse of dominant position of the enterprises that have relevant influence on the market. Competition damage in those economies may be done in two directions: from the side of enterprises that make agreements, mergers, abuse with the dominant position and in these activities they damage the market structure, at the other hand the state by creating legal monopoles, giving the exclusive rights and other activities that may create discrimination as well as from the non-transparence of the politics of state aid. This paper investigates development and protection of competition in Kosovo, legislative aspect of its adjustment, the most sensitive sectors where the competitions is damaged and finally are presented the measures on improvement based on the EU practices.
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8. Literature

1. Historical, political and economical environment

a) Historical Environment
Kosovo is situated in the middle of the South-East Europe, positioned in the centre of Balkan Peninsula. It represents an important crossroad between South Europe and Middle Europe, Adriatic sea and Black sea. The Kosovo’s area is 10.908 km².
It is forecasted that Kosovo has approximately 2 million residents and the density of the population is around 193 persons per km², and it is divided in 33 Municipalities. In April of 2011 has been organized the general registration of the population, apartments and households, but the Statistical Office of Kosovo has not come out with the final results of this. The last registration of the population has taken place in 1981.

b) Political
Kosovo was under UNMIK administration since 1999. During this time Kosovo was administered by United Nations Mission and Provisional Institutions of Self-Government, while the security issues were trusted to NATO- (KFOR) troops. On 17th February 2008 the Kosovo’s Assembly has declare the independence of Kosovo. The Kosovo’s independence has been recognized most democratic countries of the world where with now is created a new reality in Kosovo and South-East Europe. The recognitions are in the process and 85 countries have recognized the Kosovo’s independence so far.

c) Economical
After the conflict, Kosovo began to build economical policies oriented towards market economy. These economical policies include building and implementation of modern concepts of market economies, EU rules and most advanced international standards. After the conflict owing to international assistance and donations Kosovo has achieved to enclose emergency phase very successfully, phase of creation institutions and sustainable economy. The Gross Domestic Production (GDP) of Kosovo has been increased every year since 2006. For example: there was a growth of real GDP–4.0% in 2006, in 2007 there was a growth of GDP 4.0%, in 2008–5.4%, in 2009–4.0%, 2010–5.0% growth of real GDP. The last macroeconomic projections the average growth of real GDP during
the planned period 2011-2013 is expected to be 5.6%. In this growth of GDP shall contribute the growth public capital investments and concentration of these expenditures in large projects as well as the growth of new private investments. Approximately 40% of Kosovo’s citizens are unemployed (the unemployment of youth is estimated to be 50% to 75%). Every year 30,000 new work force are available to the job market. There should be an economic growth of 7% for a 15 years period to reduce the level of unemployment in half. The young population of Kosovo mostly (50 % of the overall population is 25 years old) presents a challenge and opportunity.201

d) Privatization in Kosovo
The mission of the Kosovo Privatization Agency is administration, support, sale and liquidation of the social owned enterprises (SDE) and their assets in compliance with law on foundation of the Kosovo Privatization Agency. The KPA continues the privatization of the social owned enterprises by using two methods: Spin-off method and Voluntary Liquidation. Based on the last reports of Kosovo Privatization Agency (KPA), there have been privatized 290 enterprises so far, and it is realized over than 520 million euro revenues in the credit fund. Now KPA has finalized the process initiated earlier for the amendments of current legislation and harmonization of this legislation with the Constitution of the Republic of Kosovo, as vital amendments on the Law of KPA, the promulgation of the Law on Special Chamber. Over than 599 Social Owned Enterprises have been identified as a potential enterprises representing the actual portfolio of the agency which KPA shall privatize or liquidate them with the fully and best transparency of the Kosovo’s economy. Currently KPA is in the 53rd wave of privatization. Concessioning the Pristina International airport, preparation of the bids for privatization of the PostTelecom (VALA), and preparation of the bidding documents for privatization of the energy sector (distribution of the energy) shall have the great impact in Kosovo’s economy.202

e) Energy
The deficiency in credible supply of electricity is the main obstacle for the development of private sector and economic growth in Kosovo. Electricity sector is also one of the sectors which expend a part of national budget due to the subvention for import of energy that continues. In 2009 and 2010 this import was at the level of 40–60 million € per year. The existing power plants (Kosova A and B) are old and not in a good state and always exposes to risk of large break up. The both power plants run on coal as the only resource available in Kosovo. The general reform of the sector includes the privatization and it is very crucial to achieve this by attracting new financially and technically well prepared investors. As signatory of Energy Community Treaty for South-East Europe (ECT), reform and restructuring of Kosovo’s energy sector shall respect the obligations and requirements of the ECT as well as EU obligations for markets and environmental standards.203

f) Financial sector
The banking sector in Kosovo and the development of financial system has been done after 1999, based on market principles and it was a very important element to Kosovo’s economy. Foundation of Banking and Payment Authority in 1999 and latter in 2008 was transformed in Central Bank of the Republic of Kosovo presents an important success in this sector. Banking sector is consisted by two levels, where the Central Bank of Kosovo operates as bank of first level and commercial banks that operate as banks of second level. Banking system forms an important component of Kosovo’s financial system consisted of banking sector, insurance market and micro financial institutions. Now in Kosovo operate 8 commercial banks, two most important are: Pro-Credit Bank and Reiffesien Bank which their credit activity and their deposits cover approximately 68%. There is a high concentration of the banks. At the same time should be highlighted that the continuous growth of activity of small banks has influenced that concentration level in a banking market to be reduced continuously since the anticipatory year.204 The banking sector in Kosovo persists to be one of the most productive sectors.

203 http://mem.rks-gov.net. Ministry of Economic Development
Regardless of the enforcement of the conditions for loans, loans permitted by commercial banks are increased in their volume.

g) Telecommunication
Telecommunication and business operators in the field of telecommunication offer a good quality of their services, but the prices for some products are still highest in the region (roaming calls). For this reason the development of competition in this field remains a permanent challenge. There are two business operators in the field of telecommunication so far Vala 900 and Ipkonet. Vala 900 has taken the possession the assets of Kosovo’s Post and Telecom and it’s in the phase of privatization. Regarding to the mobile phone, market have been licensed two network business operators (2G-MNO) by TRA: In 2004, PTK-Vala was licensed in the waves 900MHz and in 2007 was licensed the consortium IPKO/Telecom Slovenija/Mobitel (waves 900/1800MHz). After approval of the framework for Mobile Virtual Network Operator (MVNO) by Telecommunication Regulatory Authority in May of 2008, have been licensed another two operators in the field of telecommunication: Dukagjini Telecommunications (D3mobile) operates based on the commercial agreement with IPKO, and Dardafon.net (Zmobile) has signed the agreement with public company PTK/VALA. Even that all telecommunication services are liberalized, even so there is an authentic competition in the sector of internet services and mobile telephony, and whereas for cable telephone services we can say that they are partly competitive. The problem in this field presents that Kosovo does not have its own international code.205

h) Investment environment
The business environment in the Republic of Kosovo is becoming more and more competitive. The continuous efforts in improvement of tax system, usage of natural resources, comparative advantages we are having with others fast and easy registration of business, permanent improvement of the road infrastructure, transparent laws for foreign investments, etc, become the Kosovo’s environment more attractive and favourable for investors. Still needs to be done more in this way.206

2. History of functioning of competition policy in Kosovo
Kosovo Competition Commission has been established by a decision of the Assembly of the Republic of Kosovo, in 2008, but in fact was active in March 2009. Now the competition in Kosovo is regulated by the Law on Protection of Competition nr.03/l-229, of October 7th 2010 (official gazette of Republic of Kosovo). This law amended the Law 2004/36. The law set out the opportunity of market monitoring by two methods:
- By controlling actions of enterprises, and
- By controlling the market structure

3. Legal aspect of the competition control–Law on Protection of Competition

The Constitution of the Republic of Kosovo, article 10 lays down economic system of Kosovo as a system based in free market economy and freedom of economic activity. Free market means the economy where the decision about production and consumption are taken by individuals and private companies. Private companies produce products bringing profit, whereas the consumption is defined by individuals who benefits from their work or ownership. Price, quantity and production method is set out by market. To fulfil this function the market must have competition rules and such rules to be implemented. There shall not be a free market economy where the production opportunities are kept away from companies with dominant position in market, whether they are private or public. When a company achieves to have a considerable position in market (point where the demand equals with offer), by this company itself, in this case consumers are not able to play their role in setting the prices and are affected by loosing.

205 http://www.art-ks.org, Telecommuniucation Regulatory Authority, annual report 2010
206 http://www.mti-ks.org, Ministry of Trade and Industry
The difference between the investigation of agreements and the dominant position from one side and concentration of companies in the other side consists by analyzing two cases: in the first case is based on:

- Past (is performed *ex post*), whereas in the second case
- Is based prognosis for the future (*performed ex ante*)

Law on protection of competition respects share of control *ex ante and ex post*, by treating from one side forbidden agreements and excluding from prohibition (article 4 of Law) and abuse of the companies in dominant position (article 10) and the other side and anticipatory control of concentrations (article 13). In the other part the law lays down the competition authority as responsible body for law implementation (article 24).

The authority is consisted by the Commission as decision-making body and Secretariat as investigative body. By this structure is respected the share of investigative function with decision-making function. The commission is an independent state body with a status of a legal entity, is independent in its work, and in making the decisions with the scope of its competencies determined by the law on Protection of Competition. The Commission must report to the assembly of republic of Kosovo, and must submit to the Assembly a detailed annual work report. The Commission consists of a President and four members. The president and members of the KCA are appointed by the Assembly of Kosovo for the period of five years, with the right to reappointment. The president represents and manages the work of the KCA. The investigative and other expert activities of the Commission are performed by a department, managed by a Secretary General. The total staff at the moment, including the Commission members is 10.

### 4. The objective and the field of implementation of the law on Protection of Competition

The objective of the law on Protection is the protection of the free and effective competition in the market. This can be achieved by setting rules for actions of the companies. Market participants are clients and consumers demanding goods and services from the companies which are offering them. The law lays down economical rules of these participants with the view to make them act fairly in the competition. By protection of legal interest of every participant in the market, in this way can be indirectly protected fair competition. The implementation of the Law on Protection of Competition is not limited only to practices undertaken within the territory of Republic of Kosovo but also abroad, if they produce certain effects within the territory of Republic of Kosovo.

**a) Prohibited agreements**

The Law on protection of competition (article 4) determines the term “agreement” as agreement of any form, signed by companies with or without obligatory power, decisions or recommendations of the groupings of the companies as well as coordinated practises between companies acting in the same level, which means horizontal agreements or in different levels, vertically.\(^{207}\)

As it is clearly written in the law, the agreement with the meaning of this law can be contracts or other agreements between companies, even when they do not have obligatory power, and other acts «unilateral», as are the recommendations of the associations of the companies.

**b) Abuse of the dominant position**

Pursuant to article 10, any abuse by one or more companies with dominant position is prohibited. This article clearly explains the principle of misuse. Based on this principle the dominant position is not prohibited. In article 10 is given the definition about dominant position, while in article 11 are given criteria for evaluation of the dominant position, individual or joined. A company can be considered to have a dominant position if the participation in the market of such company is more than (40%). This participation is not considered dominant position if such company can argue that is exposed in front of competition or does not have superior position in the market comparing with other competitors.

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\(^{207}\) Law for Protection of Competition, Nr. 03/ L-229, 7 October 2010,
c) Concentrations between companies

Article 13 of the law on competition treats the system of authorizations about concentrations of the large commercial companies. According to this article; the concentration between companies is considered the joint of two or more companies, to benefit the control in one or more companies as well as foundation of a joined company.\footnote{Regulation (EEC) no 4064/89 “Merger Procedure”}

\footnote{http://ak.rks-gov.net, Kosovo Competition Authority of the Republic of Kosovo}

d) Competition advocacy

Competition advocacy is an important element of the competition policies in the economies in transition, also for Kosovo’s economy. It reflects comments provided (offered) by competition authorities for the impact of competition in other policies, particularly in the field of regulative policies and privatization. Benefits coming out by incorporation of the competition principles in the laws and regulations are very high, in particular for economies in transition have privatised infrastructure network for which there was no adequate regulatory expertise. The competition advocacy is not only one of the law standards, but it is a vital need for activities of the competition authority to have a real influence in achievement of functional market.

5 The most sensitive sectors where the competition in Kosovo is violated

The law on competition is implemented in all fields where there is a violation of the competition. Correction of unfair competition is oriented in those fields where economic subjects have relevant influence in the market.

The reason of investigation and their correction consists that these large companies have influence in the market and easy control such market. Some of the most sensitive sectors are:

- Telecommunication (telephony operators, fix prices and agreements for fixing of the prices, share of the products and market),
- Insurance Companies (insurance policies, agreements in price fixing for services offered),
- Banking system (price fixing for interest rates for the services offered by banks, payments and other provisions),
- Import of oil (agreements on price fixing, share of market, geographical and regional share of market),
- Energy sector (fixing of tariffs for electricity and other forms of monopoly),
- Health sector (granting of licensed for import of medicines or for import of only one medicinal product),
- Procurement sector (tendering without economical justification and disorganization of market and competition),
- Media (granting of different licenses for operation with frequencies) and others.

6. Analyses of Agreement cases prohibited for period 2010-2011

a) The investigation of the in the market of cash-boxes

In November 2009, was taken a decision by the Ministry of Economy that all business operators must be equipped with fiscal cash-box. Also the Ministry has drafted and Administrative Instruction by which shall be founded a Commission for licensing of business operators (through tendering) for sale, installation and maintenance of the fiscal cash boxes. In December of 2009, the Commission through the tendering process has licensed only two business operators for sale, installation and maintenance of these equipments such as: “Dukagjini” and “Gekos”.\footnote{From the licensed business operators, only the second business operator “GEKOS” has started to implement this program, while the business operator is justifying in the malpractice of the laboratory for licensing of products. The competition authority has investigated this matter and took the decision: “On coordinated practice for sale of fiscal cash boxes among the above mention business operators”. Based on the inspections carried out in these companies, the Commission has provided the documentation considering appropriate for investigation of this market, as it is the decision for selection of business operator, license and}
appropriate legal base. After the assessment that there is a dominant position in the Kosovo’s market
Kosovo Competition Commission has decided to invite the owners, respectively the representatives of
L.L.C.“GEKOS” and L.L.C.“DUKGJINI” in a meeting. After the discussions in this meeting resulted that
cash box fiscal equipments within the territory of the Republic of Kosovo is sold, installed and
maintained by the Company L.L.C.“GEKOS”, through a sub-contractor with joint logo of three
Companies “ENTERNET”, for this reason both Companies have been sanctioned with 100.000 euro
for each Company individually. Also the Competition Commission has recommended to Ministry of
Economy and Finance to liberalize the market and they should license more business operators, who
sell, install and maintain fiscal electronic equipments (FEE).

b) Investigation of the Insurance market for obligatory vehicle insurance (TPL)
The Competition Authority has investigated the market of insurance for obligatory vehicle insurance
product (TPL) applicable within the Republic of Kosovo. At the end of investigation, the Competition
Commission has taken a decision on price fixing for sale of the vehicle insurance polices among the
insurance companies:²¹⁰ The Object– Agreement of Insurance Companies to fix the prices for sale of
insurance policies of vehicle insurance policies at third parties (TPL). Parties in investigation were 10
Insurance companies, operating in Kosovo’s market. The Kosovo Competition Commission after a
couple of months investigations and completion of the documentation, collection of facts and meetings
has noticed that there is a based suspicion for cooperative practice among the Insurance Companies in
price fixing of the insurance polices for vehicle insurance. During these investigations the Competition
Commission has found the copy of the written agreement by Insurance Companies, of 03.07.2009,
held in Gjakova to disallow the price discount of the insurance market. Even though the fact that the
Insurance Companies always have refused that exists an agreement for price fixing, the Kosovo
Competition Commission during the investigations carried out and has found a written agreement
signed by 10 Insurance Companies, with the following text “No price discount by insurance
companies, and at the same time the insurance market must be kept”, which has meant that there was a
cooperated practice for price fixing of insurance polices. The Kosovo Competition Commission has
assessed this as horizontal agreement and it is in contradiction with Law on Competition. The
Competition Commission has verified that there is an agreement between insurance companies. By
this agreement there was a price fixing of the insurance polices and in this way the consumer was
enabled to choose the most favourable company. In this way there was limitation and disorder in the
market which is in contradiction with article 3 of the Law on Competition. It has proved that insurance
companies mentioned above as parties under the investigation have signed this agreement and has
sanctioned them in amount 100.000 euro (one hundred thousand euro), each company which in total is
1.000.000 euro.

7. Recommendations

Based on the researches made by scientific literature, other resources taken by national and
international institutions dealing with competition issues and competition protection, as well as the
Kosovo Competition Authority as institution who implements the law on protection of competition,
the protection and development of competition must be oriented in two main directions:

1. Permanent correction of forbidden agreements, control of concentrations and market analyse and
   competition in the market.
2. Reading of the laws and other by-laws documents who may create favours and certain monopoles
   and their improvement.

Particularly, it is very important to have more advocacies regarding to the importance of competition
and introduction to law on protection of competition. There is a need that the authority should have
regular cooperation with economic regulatory bodies with a view to create fair competition (energy
regulatory office, telecommunication regulatory office, media, procurement, etc). The market
liberalization must take place with a view to increase the number of business operators, particularly
those who have relevant influence in the market. More political support must be given to the Kosovo

²¹⁰ http://ak.rks.gov.net , Kosovo Competition Authority of the Republic of Kosovo
Competition Commission who implements the Law on Protection of Competition. This institution must be independent body and should not be under the influence of the politics. Penalties and other sanctions must be lowest and these sanctions to be taken as the last measure. There is a need to be implemented the law on state assistances and these assistances to be monitored by Competition Authority with a view to not disorganize the market and different favours harming the market economy.

All these acts shall create sustainable environment for further development of free competition and its protection, as one the fundamental condition for sustainable economic development and protection of consumer health.

8. Literature:

1. Competition policy implementation in transition economies: an empirical, by Mark A. Dutz and Maria Vagliasindi;
8. OECD- Competition Law and Policy;
10. Regulation No. 1/2003, European Competition Commission;
11. Regulation 1392004, European Competition Commission;
12. Regulation 7732004, European Competition Commision;
13. Regulation (EEC) no 4064/89 “Merger Procedure”;
14. Regulation 139/24 for Joined in European Union;
15. Law for Competition 2004/36, Kosovo Assembly;
16. Law on Protection of Competition no. 03/1-229, 7 october 2010;
17. http://ak.rks-gov.net, Kosovo Competition Commision – Republic of Kosovo;
Enforcement of Competition and Consumer Law in the Mediterranean Countries

AGENDA

Thursday 22 March 2012

9.00-9.15 - Opening remarks by the WS 7-11 directors.

Panel I (9.15 – 13.00): Competition policy similarities, differences and the influence of the EU model

Moderator: Rainer Bierwagen

Competition Policy Response to Mediterranean Challenges. Juan Antonio Rivière
Réforme du Conseil de la Concurrence du Maroc: Principes et fondements
Abdelali Benamour and Mohamed Abouelaziz
Developing competition Policy in Morocco a model for the MENA region?
Jaros Krzysytof
Evolution of Competition Law in South East European Countries on the Way Towards EU Membership.
Veronika Efremova
How Foreign Investment and Multinational Enterprises May Help out in Competition Law Adoption and Enforcement in Developing Countries?
Francisco Marcos
The Influence of the EU Competition Law on the Design and Implementation of the Egyptian Competition Law.
Heba Shahein

The Transplant of Article 102 of the TFEU: Conditions for a Successful Transplant. Michal Gal

Afternoon (15.00 – 18.00)

Panel II, Enforcement of the competition law: cartel investigations and private enforcement

Moderator: Natalie Harsdorf Enderndorf

Future Prospects of Private Competition Law Enforcement in Egypt.
Mohamed El-Far
The Effectiveness of the Enforcement Activity of the Egyptian Competition Law.
Mourad Greiss
Level of enforcement of competition regulations in candidate countries for EU Membership
Srdjana Petronijević
Penalties and Procedural Safeguards under Serbia's New Competition Law Two Years on.
Veljko Milutinovic
Market economy and its protection in Kosovo. Gani Asslani
Friday 23 March 2012

**Morning (9.00 – 13.00)**

Panel III, Enforcement of the competition law: market structure and Government failures
Moderators: Giorgio Monti

Abuse of Dominance in South Eastern Europe: Enforcement Priorities and Practices of the national competition authorities.  
*Alexandr Svetlicinii*

Turkey’s Merger Review: Assessment and Lessons from an Emerging Economy.  
*Jeronimo Maillo*

Retail Therapy: Problems and Suggestions. Meltem  
*Begis Akkaya and Tarkan Erdogan.*

Advocacy Issues in a Young Competition Agency: Market Failure v. Government Failure (Turkish Experience). *Yanik Mehmet*

State aid control in South-East Europe: endless transition?  
*Marco Botta*

Palestinian Authority Competition Case.  
*Jamal Abu Farha*

**Afternoon (15.00 – 18.00)**

Panel VI, Consumer law protection
Moderator: Hans Micklitz

Europeanisation of private law in the CEECs and SEECs. The Case of Consumer Protection.  
*Hans Micklitz*

The Limits of Informal International Law: Enforcement, Norm-generation and Learning in the ICN.  
*Yane Svetiev*

Enforcement of Consumer Protection Regulation in Serbia. *Andrea Fejős*

The New Serbian Law on Consumer Protection and the Position of the Serbian Consumer  
*Mateja Djurovic and Nebojsa Lazarevic*

*Marija Karanikić Mirkic*

Enforcement Activity in Consumer Protection Regulation in Croatia.  
*Tatjana Josipović*

Investor Protection and Supervisory Architecture: an Inquiry about the EU and Four South-East Members. *Antonio Marcacci*
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25. Antonio Marcacci

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Participants excused

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