Competition Law Framework in Kosovo and the Role of the EU in Promoting Competition Policies in Other Countries and Regions Wishing to Join the Block

by

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CONTENTS

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Abstract

The aim of this article is, on the one hand, to provide an overview of the competition law framework in Kosovo *vis-á-vis* the establishment of the Kosovo Competition Authority (hereinafter; the Authority), its institutional design as well as the criteria for becoming a member of the Commission within the Authority, which is the most important decision-making body in the field of competition law in Kosovo. On the other hand, it discusses some of the challenges the Authority as well as the courts are facing as regards the effective enforcement of competition law provisions in Kosovo, be it procedural or substantive. In addition, the only three cases decided by the Authority, since its establishment in 2008, are briefly discussed. Last but not least, it tries to contextualise the role of the EU concerning enacting as well as enforcing competition law in some of the South East Europe (hereinafter; SEE) countries, with the main focus placed on Kosovo. Without the European perspective, it is convincing to say that the picture that would result from a competitiveness viewpoint would change dramatically, although the EU's efforts alone are not sufficient in the absence of serious efforts by the states themselves.

Résumé

L'objectif de cet article est, d'une part, de fournir un aperçu du cadre du droit de la concurrence au Kosovo en ce qui concerne la constitution de l'Autorité de la concurrence du Kosovo («l'Autorité»), sa conception institutionnelle ainsi que les critères de sélection des membres de la Commission au sein de l'Autorité, qui constitue l'organe décisionnel le plus important dans le domaine du droit de la concurrence au Kosovo. D'autre part, il présente certaines des défis auxquels l'Autorité ainsi que les tribunaux sont confrontés en ce qui concerne l'application effective des dispositions du droit de la concurrence au Kosovo. En outre, les trois seules affaires décidées par l'Autorité, depuis sa création en 2008, sont brièvement abordées. Enfin, l'article tente de contextualiser le rôle de l'UE dans la promulgation et l'application du droit de la concurrence dans les pays de l'Europe du Sud-Est, avec un accent particulier sur le Kosovo. En l'absence d'une perspective européenne sur ces pays, l'auteur pense que le contexte qui en résulterait du point de vue de la compétitivité changerait radicalement en l'absence d'efforts sérieux de la part des États.

Key words: Competition Law; Institutional Design; Enforcement; Challenges; Kosovo.

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I. Introduction

The EU competition foundations have played a major role in the new jurisdictions in the SEE countries, including Kosovo. Its impact has been twofold. On the one hand, a normativity of competition law in these jurisdictions, new to competition rules, has been derived from EU competition foundations. On the other hand, the institutional framework in terms of enforcing competition legislation has been administrative in nature, similar to that of the EU and its Member States. The EU had a crucial role in promoting competition in the region during the accession process, by promoting a market economy and competition, instead of a state-controlled economy model as in the former Yugoslavia. The competition authorities are on the frontlines of the enforcement of competition law provisions, through investigations and fining, if it is proven that competition has been distorted or restricted by undertakings in the relevant market. In addition, the courts are a part of the enforcement chain as well, which review competition cases following complaints and, in some SEE countries, also as stand-alone actions. Currently, the competition law framework in Kosovo does not foresee stand-alone actions, but changes are under way with the amendment of the existing Law on Protection of Competition.

The EU accession mechanism allows the latter to impose its policies on the candidate, or potential candidate countries, during the accession journey. This has been the case in former Yugoslavian countries that have already joined the EU, such as Slovenia and Croatia, as well as in other candidate or potential candidate countries, such as Kosovo, North Macedonia, Bosnia and Herzegovina, Serbia, Montenegro, and Albania, although the latter was not part of Yugoslavia.

However, putting competition law in place, albeit crucial, is not enough in itself. Once the competition law is enacted, building blocks with regard to both the administrative and judiciary pillars are indispensable to the effective enforcement of competition law and policy. Building a competition authority with adequate human resources in transition economies is often not an easy task. This is, among other things, because of political influence and the lack of experts in this field. If the start-up agency is ill-equipped, effective enforcement of competition law may be a desirable, but hardly achievable reality. In addition, the judiciary has a great role to play in achieving effective or inefficient enforcement, since almost all the decisions issued by the competition authorities undergo a court review. Thus, if courts take a wrong trajectory, as has proven to be the case in Kosovo, where the courts misunderstood competition law goals, the enforcement may easily find itself in a deadlock. In most of the SEE countries, judges coming from socialist

governance tend to play a significant role in the procedural side, thus negating the merits of the cases. In all cases where the courts in Kosovo overturned the Kosovo Competition Authority's rulings, reference was made solely to the Law on Administrative Procedure, rather than to the Law on Competition of 2004, based on which the Authority's decision were made.

Therefore, this paper aims to contextualise the role of the EU, as a promoter of competition in the region, as well as reflect on some of the challenges these new jurisdictions face towards effective enforcement of competition law and policy, with the case of Kosovo at the centre. It concludes that, even the most advanced piece of legislation, such as EU competition law, cannot produce automatic results in the absence of an independent and professionally competent institutional framework.

II. The Establishment of the Kosovo Competition Authority

The Authority was established by the Assembly of Kosovo in 2008, with the responsibility to promote competition among undertakings and consumer welfare (See Çeku, 2015, p. 110). Currently, the Authority continues to function under the Law on Protection of Competition. The Law on Protection of Competition defines the Authority as a public institution, independent in performing its duties as specified by the law, for which it is accountable to the Assembly of Kosovo. In the work of the Authority, every form of influence which might affect its independence and impartiality is prohibited, at least formally (See Fatur, Podobnik, Vlahek, 2016, p. 91).

In Kosovo, however, a significant number of independent agencies have been established, be it under the supervision of the Kosovo Assembly or a particular Ministry, depending on the agency's scope. The establishment of these agencies with specific mandates, such as in the case of the Authority, is not proven to have resulted from the will and vision of Kosovo's institutions (See: Muris, 2005, p. 167). The European Commission, however, has reported incessantly as regards competition policy developments in Kosovo, including the need to establish the Authority, prior to its establishment in 2008 (EU Progress Report on Kosovo, 2008, p. 37).

In this regard, some appear to be the result of demands coming directly from the EU (See EU Progress Report on Kosovo, 2008, p. 37). Hence, agencies are often neglected and lack necessary support from central institutions, specifically the Government and the Assembly. This is also evidenced by the fact that for nearly three years (2013–2016) the Authority was inactive. 'After almost three years, in which the [Authority] had not been able to fulfil its

mandate due to the lack of a quorum, its five board members were finally appointed by the assembly in June 2016. Regarding implementation, due to the failure to nominate its members from 2013–2016, the [Authority] was not able to take any decisions and its activities were very limited, focusing mainly on judicial representation of previous cases' (EU Progress Report on Kosovo, 2016, p. 47). As a result, the work of the Authority was paralyzed for years. Apart from the non-enforcement of competition law provisions for a long period of time, this delay also negatively affected the credibility of the Authority as an institution. (See: ICN Working Group on Capacity Building and Competition Policy Implementation, 2003, p. 42 and Gal, 2004, p. 12).

III. The Authority's Legal Mandate

In addition to detecting and fining undertakings proven to be/have been involved in prohibited agreements and abuse of a dominant position, reviewing notifications of mergers as well as providing professional opinions in the field of competition to both the Assembly and the Government of the Republic of Kosovo, if so requested, the Law on Competition gave the Authority specific tasks and responsibilities to fulfil, such as:

> to provide information and advice on the requirements of the law to persons, undertakings and public authorities; to hold seminars and training courses for the purpose of informing people generally and especially legal and economic professionals and undertakings on the rights, obligations and subject matter established and/or covered by the law (Article 24(1) (a) and (b)).

Since competition law and policy was a new field in Kosovo for both public authorities and business undertakings, apart from using its investigatory powers, the abovementioned tasks and responsibilities should have been also considered and used as a public advocacy enforcement tool by the Authority (See: Evenet, 2006, p. 495; Stucke, 2012, p. 951; Cooper, Pautler, Zywicki, 2005, p. 1091).

The Authority has shown no evidence of providing any seminars, training courses or information campaigns in order to inform and educate undertakings, public bodies or individuals, for the period 2010–2018, despite the fact that the law and the EU required such efforts. The European Commission in 2011 stated that the Authority should make additional efforts in competition advocacy eg awareness/information campaigns on competition policy for the business community in Kosovo (See Kosovo Progress Reports 2013, p. 32 and 2016, p. 47).

Informing and educating the general public may assist the Authority by making the public aware of anti-competitive conduct of undertakings. A central contribution of new competition agencies is to educate consumers, business leaders, and government officials about the competition policy system and help them understand the rationale for relying on market rivalry as the organizing principle for economic activity (Kovacic, 1997, p. 438). This may reduce the cost to the Authority of detecting anti-competitive behaviours and facilitating competition law enforcement (See Ehlermann & Laudati (eds), 1998, p. 77). In addition, promotion is a regulatory function (See: Waller, 1998, 1384). In this regard, a public advocacy programme may serve to persuade undertakings unintentionally involved in various practices that restrict or distort competition to discontinue such practices.

Informing the public should include an explanation of the cost of monopolies, abuse of a dominant position, cartels and other behaviours restricting or distorting competition. Another important aspect which should be included in public advocacy is the effect on the promotion of consumer welfare of competitive markets in Kosovo (See: Orbach, 2013, p. 2151). The Authority has the responsibility to promote competition among undertakings and thus advance consumer welfare. Richard Whish and David Bailey note that competition law consists of rules that are intended to protect the process of competition in order to maximize consumer welfare (Whish & Bailey, 2012, p. 1). In the same vein, Renato Nazzini suggests that an appropriate objective of competition law is the maximization of social welfare in the long term (Nazzini, 2011, p. 45; see also: Gormsen, 2010, p. 20).

Such public education should have taken place via multiple channels, including seminars and training courses with public authorities, trade associations and undertakings, and should have included explanations of rights, obligations and consequences regarding breaches of competition law, thus representing competition law enforcement in a win-win light (See Kovacic, 2011, p. 41). For the purposes of information for the general public, useful methods would have included the organization of conferences or roundtable meetings, media campaigns, publication of articles in daily newspapers, and the selection of first cases based on direct links to consumer welfare, which would resound strongly with the general public.

The organization of various seminars and media campaigns may serve to educate consumers and to promote basic rules in the field of competition law (See: Zhang, 2018, p. 473; Gentzkow & Shapiro, 2008, p. 133). It may also encourage natural persons and undertakings to lodge complaints if they believe that competition law provisions are being breached as a result of anti-competitive conducts by undertakings. This way, apart from becoming better known to the public, the societal acceptance level of the Authority

would improve, at the same time, as an important institution in the field of competition law and policy.

The Law on Protection of Competition mandates the Authority to provide its professional opinion to almost all state bodies, including the highest, such as the Assembly of Kosovo and the Government, regarding any piece of legislation that may negatively affect competition, and to promote awareness of competition policies. Article 23 of the Law on Protection of Competition reads:

> The Authority, on the request of the Kosovo Parliament, Government of the Republic of Kosovo, central organs of public administration, legal persons with public authority and local organs, provides professional opinions for the laws and regulations and other bylaws that significantly affect market competition. The Authority may provide its opinion about compatibility of existing laws and other regulations with this law, it may provide opinions which encourage knowledge about market competition, improve the level of awareness and information relating to the role of law and the market competition policy respectively, and provide professional opinions on resolutions and comparative developments of practices in the field of legislation and market competition policies.

This is a substantial power of the Authority, authorizing the use of legal opinions to monitor and promote competition in Kosovo (See: Fox, 1981, p. 1191). It may make it possible to avoid conflicts between laws or by-laws within the territory of Kosovo in the field of competition. In Kosovo, not only in the competition field but also in other areas, there are certain cases where the same issues are regulated differently by laws or by-laws. The Authority has issued such opinions regarding the decision of the Ministry of Economy and Finance selecting undertakings to sell, install, and maintain Fiscal Electronic Devices (Notice for Restriction and Distortion of Competition by the Ministry of Economy and Finance, 2010), and the decision of the Ministry of Trade and Industry placing safeguard measures on cement imports (Request for the Ministry of Trade and Industry to Review its Decision, 2012). However, the Authority should be more proactive in this regard, and act on its own initiative and not only upon complaints and requests. The European Commission emphasised in its policy that 'a pro-active competition policy is characterised by: – improvement of the regulatory framework for competition which facilitates vibrant business activity, wide dissemination of knowledge, a better deal for consumers, and efficient economic restructuring throughout the internal market; and – enforcement practice which actively removes barriers to entry and impediments to effective competition that most seriously harm competition in the internal market and imperil the competitiveness of European enterprises' (European Commission, A Pro-active Competition Policy for a Competitive

Europe, 2004, p. 1; see also: Fox, 2010). The Authority should *ex officio* carry out studies and analyses to ascertain whether certain laws or regulations in force within the territory of Kosovo are contrary to the Law on Protection of Competition and thus restrict or distort competition in any sector.

IV. The Authority's Internal Structure

The Authority's structure includes: (i) the Commission; (ii) the Secretariat; (iii) the Legal and Administrative Department; and (iv) the Market Supervision Department. The Secretariat is an administrative body that manages the daily work of the Authority. The Legal and Administrative Department develops the Authority's personnel policies and staff management plans. It also coordinates the process of drafting primary and secondary legislation in close cooperation with the Commission, and endeavours to ensure the compliance of draft legislation prepared by the Authority with EU legislation and other applicable laws in Kosovo. The Market Supervisory Department carries out investigations upon request of the Commission, in order to ensure fair and effective competition in the market. It aims, through the investigative proceedings provided by law, to supervise the market, and proposes appropriate measures to restore competition in cases of its restriction or distortion. Upon completion of an investigation, the Department prepares an investigative report for the Commission. Most Commission decisions are taken based on the recommendations of such reports. The core supervisory and investigative role of this Department is uncovering anti-competitive agreements and abuses of a dominant position (Annual Report, 2017).

V. The Decision-Making Bodies Within the Authority

1. The Commission

Within the Authority, the so-called Commission is the most important entity and the main decision-making body. The Commission is a collegial body comprised of five members (commissioners), with one of them acting as chairperson. The Commission is responsible for deciding all cases under investigation, either fining the parties for an infringement of competition law provisions or concluding that no breach of competition law has occurred. The quorum for meetings of the Commission is three members. The Chairperson

chairs the Commission meetings. All decisions require the affirmative vote of the majority of the members present and voting (Law on Protection of Competition, Art 26).

2. Criteria for Becoming a Member of the Commission

The Law on Protection of Competition stipulates that any citizen of Kosovo, having acquired a university degree and having seven years work experience, can become a member of the Commission. Article 26(1) reads: 'Commission members should be citizens of the Republic of Kosovo who have advanced qualifications in the fields of law or economics, or an equivalent field, and at least seven (7) years of professional experience'. The criteria for appointing members of the Commission tend to be too general and are thus deficient. However, in order for the Authority to improve its performance and advance its professional work in effective enforcement of competition policy, only experience in the field of competition should be relevant.

The criteria for selecting members of the Commission within the Authority should also be more rigorous, to ensure that the Authority is professionally competent and that it successfully accomplishes its mandate to enforce competition law. William E Kovacic notes that nominal legal commands, such as antitrust statutes, count for little without effective means for their enforcement. To a large degree, a country reveals the intensity of its commitment to enforce the law through its choice of officials to head its public enforcement institutions. The more capable the appointees, the more serious the nation's intent to implement its laws effectively (Kovacic, 2012, p. 364). Daniel D Sokol notes that an antitrust agency is only as good as the quality its staff (Sokol, 2010, p. 579). Staff is the most precious resource of any organization and this is certainly true in the case of competition agencies (Martyniszyn & Bernatt, 2016, p. 178).

Members of the Commission must fulfil at least one of the two most important conditions: they must have either education or work experience in the field of competition. The best scenario, however, would be if both conditions were fulfilled, although this is not an easy situation to achieve, since economies in transition generally have a small number of individuals with knowledge of the economics of competition law or experience in market-oriented economies (See Kovacic, 2001, p. 269). The best of laws cannot be applied without adequate human resources, that is staff of sufficient size with adequate technical competence. The last condition is especially important in the area of competition law, which often involves a high-level economic analysis that complements a legal one in order to detect and to analyze the

effects of business conduct. Lack of such human resources may lead to under-enforcement of the laws. It may also undermine the standing and reputation of the competition authority, especially where it results in failed enforcement efforts such as when the authority looses many of its cases before the courts (Gal, 2004, p. 13).

3. Appointment of Commission Members

Under the Law on Competition, members of the Commission were appointed by the Assembly of Kosovo. However, since the entry in force of the Law on Protection of Competition in 2010, the President and other members of the Commission shall be selected by the Government through a public announcement and their names submitted to the Assembly of Kosovo for appointment.

Having considered the fact that the Authority is responsible to the Assembly, the best scenario would be for the selection process for commissioners to be organized and managed by the Assembly. This would ensure greater independence for the commissioners and the Authority itself, (See: Guidi, 2016, p. 93) and, at the same time, limit government interference in the work of the Authority. Although the Law on Protection of Competition states that: '[the] Authority is independent in performing its duties specified by this law', it is hard to be convinced that this is demonstrated by the activities of the Authority, since the selection and proposal of commissioners comes directly from the Government. As a result, influence from the Government is more likely than if the selection process was made by the Assembly, it being the body to whom the Authority is responsible and to whom it reports. In the 2008 Assembly vote on two members of the Commission, it was said that despite political interference, the nominees had to be approved (Kosovo Assembly, Transcript of the Plenary Session, 2008).

In the last selection of Commission members, the Government, in its decision proposing members for the Assembly to select, did not give any reasons or explanations regarding the basis on which these commissioners were proposed (Decision No 07/83, 2016). Although the Authority remained without commissioners or a decision-making body from 2013 to 2016, and was thus paralyzed in its functioning, the Assembly has not proven willing to remedy this situation by the appointment of staff members that were experts in the field of competition. The Assembly Committee on Economic Development, Infrastructure, Trade and Industry, in its meeting held on 26 April 2016, after reviewing the list of candidates for the Competition Commission proposed by the Government, estimated that most of the proposed candidates did *not*

meet the condition of professional competence (Procès-verbal of the meeting, 2016). After evaluating the proposed candidates and after discussions, the Committee recommended to the Assembly:

> Not to approve the Government's proposal to appoint candidates for membership of the Competition Commission.

However, despite the recommendation of the Committee, the Plenary Assembly appointed the stated candidates. This fact was, however, emphasised in the 2016 EU Progress Report for Kosovo, in a negative connotation (Kosovo Progress Report, 2016, p. 47) since, in its 2015 Progress Report, the EU urged both the Assembly and the Government that the appointments need to be made on the basis of professional qualifications and merit, not political patronage (Kosovo Progress Report, 2015, p. 4).

VI. The significance of the administrative pillar to the effective enforcement of competition law

Since its establishment in 2008, the Authority in Kosovo has ruled on the breach of the Competition Law of 2004 in three cases, which include fines. The first case was an insurance companies' case, which took place in 2010. This case involved a price-fixing agreement between all the ten active insurance companies in the relevant market. In this particular case, the Authority managed to obtain a copy of the agreement, showing how the insurance companies agreed not to offer any discounts in relation to insurance policies for compulsory third-party liability motor insurance. The insurance tariffs which were approved by the Central Bank of Kosovo, allowed price differences of up to 8% among different insurance companies. However, in order to avoid this difference and to maximise their profit, insurance companies agreed to fix prices.

After conducting the administrative investigative procedure, the Authority fined all ten insurance companies 100,000.00 EURO rach (Decisions No. 05/1-10/2010, 27.12.2010). This was the maximum amount, according to the Law on Competition of 2004, that one undertaking could be fined, if proven to have breached competition rules. Although this case was supported by direct evidence, since the copy of the price fixing agreement was obtained by the Authority, the latter lost the case before the court. One reason for such a false start was the *reasoning gap* in the Authority's decision-making process. The reasoning gap applies to a great extent in Kosovo, since competition

policies are not well-known, even among institutions directly involved in the enforcement process, such as the courts. Thus, the Authority, apart from bearing its own responsibility to act, carries the burden of 'educating' others to properly understand and apply competition policies. A prerequisite for this standard to be achieved is that the work of the Authority during the investigation and decision-making process, should be properly based on the law, and that the reasoning should be clear and consistent, in tying allegations to facts and the law, beyond a reasonable doubt. In this way, in addition to fulfilling its core role of enforcing competition law, the Authority would at the same time assist the courts, and to some extent prevent them from establishing an inadequate practice in the field of competition law enforcement.

The second case involved two undertakings, Dukagjini and Gekos, which were the only ones licensed by the Ministry of Economy and Finance in 2009 to sell, install and maintain Fiscal Electronic Devices (hereinafter; FEDs) for all businesses operating within the territory of Kosovo. Although these were the only two undertakings licensed for FEDs, they agreed not to compete, but to transfer all their rights to a third unlicensed undertaking called Enternet, to operate in their joint interest. This anti-competitive practice had a wide negative impact on all businesses in Kosovo, since they had only one supplier, and as a result the FEDs equipment was sold at a very high cost. In addition, yearly mandatory maintenance of the FEDs, from the same undertaking only, posed a real concern from a competition viewpoint. These two undertakings were fined by the Authority in 2010. Dukagjini was fined for concerted practices, whereas Gekos for abuse of a dominant position, although both cases were heard together (Decision No. 03, PA/III/08/2010 and Decision No. 04/PA/IV/08/2010). Again, the sum of the fine was 100,000.00 EURO on each undertaking (see Çeku, 2015). However, Enternet was neither investigated nor fined, even though it was directly involved in the anti-competitive practices. Both cases will be discussed more thoroughly as part of the judiciary's role in the effective enforcement of competition law.

The third case, which involves oil companies, has recently been decided. This case involved fourteen undertakings and the total amount of the fine for all of them is over 4,000,000.00 EURO. The Law on Protection of Competition which is currently in force allows up to 10% of the undertaking's turnover for the duration of the breach. The Authority's main allegations were that the fined undertakings had been involved in tacit collusion as well as concerted practices, due to the fact that in November and December 2018 their pricelist did not reflect the price fall on the international market. At first glance it seems, however, that the Authority's *reasoning gap* is not successfully met in this recent case either, although some progress has been made. In its ruling, although the Authority has stated that the investigations were initiated due to

tacit collusion, it has ultimately imposed a fine also for concerted practices. Using different legal bases in court for the same allegation, especially in cases such as Kosovo where courts lack deep knowledge of competition law, may pose a challenge when arguing that tacit collusion and concerted practice are the same thing. In addition, the alleged duration of the breach of Law on Protection of Competition, which is only two months, may be viewed sceptically from the standpoint of the merits of the case.

However, despite the Authority's willingness to enforce competition law and punish undertakings that are found to be involved in activities that restrict or disrupt competition, its work was characterized by significant defects. The most visible shortcomings related to the insufficient and contradictory reasoning as well as lack of explicit legal provisions which were said to have been infringed. Most of the Authority's decisions were set aside by the courts for that reason.

An authoritative statement of reasons is a requirement not only in Kosovo but also in EU competition law enforcement (See Case T-169/08 *Dimosia Epicheirisi Ilektrismou (DEI) v Commission* ECLI:EU:T:2016:733, para 200). In addition, the obligation to provide an adequate statement of reasons in administrative procedures is considered of fundamental importance in EU law (Case C-405/07 P *Netherlands v Commission* ECLI:EU:C:2008:613, para 56). According to settled EU case law, the Commission is obliged to state the reasons on which its decisions are based. Yet, the Union courts have consistently held that the statement of reasons must state those reasons in a clear and unequivocal fashion, so as to inform the persons concerned of the reasons for the measure and, thus, to enable them to defend their rights and for the court to exercise its supervisory jurisdiction (Case C-56/93 *Belgium v Commission* ECLI:EU:C:1996:64, para 86).

Another challenge that the Authority has faced in its work has been the lack of express indication in its decisions of the legal provisions alleged to have been violated. According to EU jurisprudence on the enforcement of EU competition rules, adopting an act without expressly indicating the relevant provision of EU law infringes the principle of legal certainty (Case C-370/07 *Commission v Council* ECLI:EU:C:2009:590, para 38). This requirement appears to be an important prerequisite for the Authority's rulings to survive court scrutiny.

The Authority must be capable when tying facts to the law, because the mere allegation of a breach of competition law does not suffice. Investigations and the decision-making process must always be conducted in accordance with the legal provisions in force, not only the provisions of competition law but also of the Law on Administrative Procedure too. This is particularly the case since the Authority's decisions in Kosovo are judicially reviewed before the

administrative court, and consequently the first aspects to be considered are procedural facets. Given that judges lack knowledge in the field of competition law, inevitably the courts tend to avoid issues of material law and judge on the basis of the provisions of the Law on Administrative Procedure. Therefore, legal provisions regulating the procedural aspect of decision-making by administrative bodies, including the Authority, must be respected thoroughly, thus avoiding procedural flaws which may cause annulment of the Authority's decisions by courts, without assessing the merits of the case at all.

VII. The prominence of the judiciary pillar in the effective enforcement of competition law

The key role of the judiciary in the enforcement of competition law is widely recognised, since most of the administrative pillar rulings undergo court scrutiny, especially those involving fines. Therefore, the role of the judiciary for the effective enforcement of competition law is indispensable. Richard A. Posner notes that the real problem of antitrust in the new economy lies on the institutional side: the enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough, to cope effectively with a very complex business sector that changes very rapidly (Posner, 2001). In addition, Maciej Bernatt argues that the independence of the judiciary is a prerequisite for effective judicial protection (Bernatt, 2019, p. 347).

Apart from the challenges faced by the Authority, the judiciary has proven to be a bottleneck when it comes to the effective enforcement of competition law in Kosovo. Even cases where the Authority has persuasive evidence in support of its allegations against undertakings, the courts have jeopardised the work of the Authority by judging contrary to competition law goals. The most astonishing example is found in the insurance companies' case. Here, since the Authority possessed a copy of the price-fixing agreement, the courts asked the Authority, *inter alia*, to confirm: who had signed the agreement on behalf of Dardania[1]; the identification of the person by name and surname; whether the person was employed and what kind of position the person had in the insurance company; on behalf of whom the person acted; whether the person was authorized or was a representative of the Gjakova branch; whether the agreement intended to inflict harm on other companies or certain people; whether the agreement was enforced in practice, and what were the consequences of it, or whether it was just an agreement on paper

[1] Dardania was one of 10 insurance companies fined in this case. This ruling served as a precedent for all other undertakings in this particular case.

(Mucaj, 2019).[2] Any competition authority, including those in European countries with long experiences and expertise, if challenged by such a burden of proof, will most likely find it impossible to win the case before a court. All court requests are irrelevant in terms of competition law, because the law prohibits any agreement that has as the *object* or *effect* breaching or restricting competition. According to EU jurisprudence, the document as such is not important at all, but rather the conclusion drawn from it. Courts need to be able to understand that the basis of competition law is not based on formality. As such, competition law differs fundamentally from contract law, for instance and so it must not be judged based on similar grounds.

Whereas, in the second case, the FEDs case has gone down a different path, the Kosovo Supreme Court reached an unfounded conclusion too. Albeit some cases are identical, as in the case of the insurance companies or similar cases like the FEDs, courts in Kosovo do not join them, but they judge them separately. On the one hand, Gekos has won in all court instances in Kosovo, starting with the court of first instance, moving to the court of appeal and finally in the Supreme Court. Although the Authority's ruling was deficient with regard to its reasoning as well as the alleged legal provisions to have been breached, the courts based their judgments almost entirely on the expert report, which was ordered by the court, and which had virtually nothing to do with competition issues. The entire expert report was focused on whether Gekos paid its taxes and who imported FEDs. The merits of this particular case from the point of view of competition had nothing to do with the fact of who imported FEDs into Kosovo, but who sold them in the relevant market to the end users.

On the other hand, although Dukagjini lost its case in the first and second instance, the Supreme Court approved the plaintiff's request for extraordinary review and referred the case back to the first instance for adjudication. In principle, and legally speaking, the Supreme Court can overturn, as in the present case, judgments rendered in lower instances. However, what makes this judgment uncertain and unfounded is its contradictory reasoning.

According to the Supreme Court:

> It cannot accept as legally sustainable the rulings of the lower courts, which were made in violation of applicable provisions of the Law on the Contested Procedure. The courts of lower instance have violated fundamental provisions of Article 182.2(n) of the Law on Contested Procedure.[3] The violation of essential provisions

[2] These were mixed findings of both the court of first instance and the appellate court.

[3] Law on Contested Procedure, Art 182.2(n) provides as follows: 'If the decision has leaks due to which it' can't be examined, especially if the disposition of the decision is not understandable or contradictory in itself with the reasoning of the verdict, or when the verdict

> during the contested procedure lies in the fact that the courts of lower instance did not point out in their decisions the crucial facts upon which the ultimate decisions were based. Facts that are presented are vague and contradictory. In addition, there are contradictions between the reasoning and the content of the reviewed judgments. Also, it was not clear whether the plaintiff's appeal was unfounded or whether it was rejected because it was submitted beyond the legal deadline (Judgment, no AA97, 2015).

Furthermore, the Supreme Court stated that:

> The final judgment of the Court of First Instance accepted as grounded the claim of Gekos for annulment of the decision of the Authority. This judgment was confirmed by the Court of Appeal, and the Supreme Court. In this regard, the Supreme Court asks the Court of First Instance to have regard to the facts of the Gekos case in the case of Dukagjini during restoration. Both cases, Dukagjini and Gekos, are directly related to each other. So, if there is no legal violation of the Law on Competition by Gekos, which was confirmed by the court by a final decision, there is no violation of the Law on Competition by Dukagjini either. The Supreme Court finds that it is legally untenable for the same court in two cases with the same legal basis and with a similar factual situation to arrive at two completely opposite decisions. The Court of First Instance is obliged during the retrial to eliminate these flaws and to establish the facts and evidence related to the claims at the plaintiff's request. During the retrial, the Court of First Instance should refer to the findings and expert opinion given in court in the Gekos case.

The reasoning given by the Supreme Court in the Dukagjini case is neither legally justified nor grounded in reason, and as a result not in conformity with the principle of effective judicial protection. It is contended that the Supreme Court's reference to Article 182.2(n) of the Law on Contested Procedure in issuing its ruling is erroneous. None of the requirements set forth in this provision were present, nor were they even specifically argued as the basis for the Supreme Court's decision when it gave its reasons for annulling the lower instances' judgments. This provision in the Law on Contested Procedure requires that court decisions should be annulled if no justification is given, when the crucial facts are unclear and contradictory to each other, or when there are contradictions between the disposition and the reasoning.

By reviewing the previous decisions of the lower courts in this case, it is apparent that none of the aforementioned legal criteria were met. Initially,

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has no reason or which gives no justification for the final facts, or which reasoning are unclear, contradictory, or if in the final facts there are contradictions between what is said in the verdict, the main document or the procedural records and of the document or the minutes of the proceedings'.

the Court of First Instance issued a decision to reject the lawsuit of Dukagjini as ungrounded. In its ruling, the court elaborated and justified the facts, which makes this one of the rare court judgments in Kosovo that took into account the provisions of the Law on Competition. Afterwards, the same court rejected the appeal of the plaintiff as having exceeded the time limitations. Moreover, the court did not allow a return to the previous situation, finding that there were no legal grounds to justify such a decision. Among the crucial facts for that refusal was that the representative of Dukagjini had indeed received the Court of First Instance's judgment on time, based on the post office notification signed by Dukagjini's legal representative. All these legal grounds and circumstances found by the Court of First Instance were accepted and upheld by the Court of Appeal.

In principle, the Supreme Court's conclusion that similar cases must be decided in a similar way with consistent judicial reasoning is sustainable (See: Ginsburg, 2010, p. 217). According to EU case law, however, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way (See Case C-174/89 *Hoche v Bundesanstalt für Landwirtschaftliche Marktordnung* ECLI:EU:C:1990:270, para 25). However, the argument does not stand in the Dukagjini and Gekos cases. It is not accurate to state that these two companies were fined by the Authority for the same breach of the Law on Competition. Gekos was fined for abuse of a dominant position while Dukagjini was fined for being involved in concerted practices. It must be recalled that, contrary to the court's contention, competition cases must be subject of a case-by-case examination and not be decided in a 'copy-paste' fashion, without taking proper account of the merits of each individual case, unless they are joined. At least that is the impression in this case. The courts must examine carefully all the relevant aspects of each individual case.

It may be observed that the main reason for the Supreme Court's annulment of the lower courts' judgments was not because Dukagjini's claims had been verified or because the court had confirmed procedural violations. On the contrary, the main reason appears to have been the Supreme Court's desire for unification of the Dukagjini and Gekos cases. The Supreme Court concluded that as there was no violation of the Law on Competition in the Gekos case, for the sake of consistency, there should also be no such violation in the Dukagjini case. Unification of the judicial rulings would have been useful if the alleged violations were proven and the provisions of the Law on Competition were accurately applied. Thus the Gekos case should have been decided in accordance with the findings established in the Dukagjini judgment of the Court of First Instance, and not vice versa.

The negative impacts of the approach of the Supreme Court will reverberate for a significant period of time. This is because they are the first cases in the field of competition law in Kosovo, and as such, they will have a direct impact on the establishment of judicial practice in this field. William E Kovacic notes that because the outcome of the first litigated cases can have lasting effects on an agency's reputation and effectiveness, it is vital that the agency be ready to address and prevail on these issues from the very start (Kovacic, 1997, p. 431). Rather than setting forth a system of clear and coherent enforcement of the law, the court's approach is found to have suffered from a variety of defects in legal understanding of competition law goals. This does not bode well for the future of competition law in Kosovo.

Current trends in enforcement, within the Authority itself as a guardian of competition and within the courts, suggest that major improvements are required as regards *human capital,* within the Authority and at all levels of the court system, in order for a better understanding, interpretation and enforcement of competition policies in Kosovo to be achieved. It is essential, however, that the Authority improve its work, from both a procedural and a substantive point of view, in order to effectively enforce competition law. This improvement is required in all stages of the Authority's work, from investigation to the imposition of fines and court litigation. This is so due to the fact that the work of the Authority has in the past been characterized by significant deficiencies at all stages. The same applies to the courts involved in reviewing competition cases to date (See Çeku, 2015, pp. 125–126).

Among the most important mechanisms for the effective enforcement of competition law, apart from the Authority, is a well-functioning judicial system. At this stage, Kosovo's courts are not primed to effectively enforce competition law. Judges tend to take seriously their role of safeguarding procedures but not the substantive aspects of competition law, and so they avoid examining the merits of cases. Courts should review competition cases more comprehensively, and not limit their examination to formalistic aspects only. Nevertheless, this seems to have also been the experience of other countries with a socialist background, such as Poland for instance. Maciej Bernatt argues that before 2004, the Court of Competition and Consumer Protection in Warsaw embraced a formalistic approach to competition law cases too. However, in its rulings on the subject matter, the Supreme Court ordered for this approach to be changed, thus instructing the lower courts to verify and assess facts of the cases and not focusing on formalities only (Bernatt, 2016, pp. 103–104).

VIII. The role of the EU as a promoter of the effective enforcement of competition law and policies to some of the SEE countries during the EU accession process

Some SEE countries, which are now part of the EU, such as Slovenia and Croatia, encountered similar challenges only a few years before joining the EU. That was so especially on the institutional side as regards the effective enforcement of competition rules and ensuring the conditions for a competitive economy at the national level. Similar challenges faced by these countries included, in particular, human capital within their competition authorities and the courts, as well as legislative deficiencies.[4]

According to the EU Commission Opinion of 1997, Slovenia faced legislative as well as institutional challenges when it came to public enforcement of competition rules. The Commission took the view that in order for Slovenia to effectively enforce competition policies its existing competition legislation should be further aligned with EU competition law. Furthermore, the administrative capacities within the Competition Protection Office needed to be strengthened, since the staffing and technical qualifications were inadequate to ensure effective implementation of *acquis.* In particular, at this time, the banking sector in Slovenia was criticized for its lack of competition[5] and high operational cost levels. Also, banks had an interest rate arrangement (cartel) setting the maximum rates on deposits, which was approved by the Antimonopoly Office. Among other things, the European Commission stated that in order for Slovenia to demonstrate credible enforcement of competition rules, both administrative and judicial staff involved in that enforcement must have a sufficient understanding of competition law and policy. In its assessment of 1998, the EU Commission repeated that the financial sector is still far from being competitive. Apart from the lack of privatization of two state-owned banks, the insurance sector needed major efforts in order to become competitive. Although it was recognized that Slovenia can be regarded as a functioning market economy, it was stressed, however, that there is room for additional progress in that the state remains heavily involved in the running of the economy. In addition, the EU concluded that Slovenian competition legislation still has major shortcomings and that the very low staff levels and

[4] Many scholars argue that, in the early years of the enforcement of competition rules, even the EU itself faced challenges (Geradin, 2006). To overcome these difficulties in the 1960s, the EU benefited from best practice in relation to the enforcement of competition rules on the other side of the Atlantic, in the US.

[5] Other sectors, such as insurance, energy, telecommunications and transport, also faced lack of competition.

administrative deficiencies within the Competition Protection Office pose a challenge when it comes to effective enforcement of competition law.

In 2000, the EU measured the lack of competition in financial markets in Slovenia, assessing this as a gap in efficiency as regards monetary policy instruments. At the same time, it required the improvement of competitiveness in all parts of the financial markets. According to the EU assessment, the Slovenian insurance sector at that time faced little foreign competition exerting pressure to improve efficiency. In addition, the EU told Slovenia that, in order for the country to cope with competitive pressure and market forces within the EU, it must increase competition in the economy, and that one way to do this would be to reduce the role of the state in the economy. In its progress report of 2002, the EU recognized the significance of the judiciary as an important component of effective enforcement of competition law in Slovenia. As such, it suggested that in order for the courts to play their role in an effective way, training should be developed for the judiciary. According to the last assessment of the EU before Slovenia became an EU Member State, effective enforcement of competition rules had not been achieved even at this stage. As a result, the EU requested Slovenia to prioritize strengthening the administrative capacity of the competition authority and ensuring its independence. In addition, special training for judges was mandatory, according to the EU assessment (See EU progress reports on Slovenia, 1997–2002).

In the same vein, in 2007 Croatia had different shortcomings hindering the effective enforcement of competition legislation, according to the EU assessment. These shortcomings lay in legislation, deficient administrative capacities within the competition authority, and low budgetary allocation. In particular, the Law on Administrative Procedure in Croatia was considered to be an obstacle, because it allowed the Government to overturn antitrust decisions. In 2008, the EU assessed that Croatia had made no progress as regards aligning its legislation with *acquis* in the field of antitrust. The need to increase the Agency's administrative capacity was also repeated. In 2009, the gas and electricity markets were said to lack effective competition, since both markets were dominated by single suppliers. In addition, state intervention in the enterprise sector was considered high, in particular due to anti-recession measures. Only in 2009 did Croatia enact a Competition Act in line with *acquis*; this entered into force in October 2010. At this stage, the EU considered that significant progress had been made by Croatia because, according to this legal act, the competition authority was empowered to impose fines and to use a leniency programme. This strengthened the rights of defence, since the law introduced the obligation of the Agency to submit statements of objection to the parties under investigation, and made the Agency's decisions subject to judicial review before the High Administrative Court. In 2011,

with a total of 55 employees, the competition agency was assessed as having good administrative capacity, even though the EU suggested that in order for it to be further strengthened and to effectively enforce competition rules, staff needed training in the field of cartels and abuse of a dominant position. In its last assessment, the EU concluded that Croatia had largely aligned its legislation in the field of antitrust with *acquis* and achieved a positive enforcement record, and that the competition agency was fulfilling its duties and responsibilities in line with the legislation in force (See EU progress reports in Croatia, 2007–2011).

Other SEE countries, such as Northern Macedonia and Albania, in their mission to enforce competition law, did not find it easy either and also faced similar challenges. Albania, like other countries in the region such as Montenegro, Macedonia, and Kosovo, is a small economy according to GDP measures, which means that it can support only a small number of competitors in most of its industries. At the same time, however, all these countries are at different stages of the European integration process, and will face similar challenges in the process of ensuring free and effective competition in the market (Gruda and Melani, 2010). Effective enforcement of competition law is far more challenging than adopting the legislation. For better protection of free and effective competition, it is not sufficient to have well-crafted legislation in line with the developments of *acquis communautaire* – the most important issue here is the correct and efficient application of that law in practice (Nazifi and Broka, 2016, p. 63). According to Karova and Botta, in some of its first cases, the North Macedonian Competition Authority did not clearly indicate the length of the duration of the infringement, making such decisions close to arbitrary. Similarly to Kosovo, in North Macedonia, the first competition cases were lost before the courts too. In spite of its limited human resources, the North Macedonian Competition Authority also faced many challenges as regards effective enforcement. This was evident especially concerning anti-competitive agreements, which require deeper knowledge in the field of competition law (Karova and Botta, 2010).

However, the EU has financed different projects in SEE countries in support of effective enforcement of competition law before joining the Union. This was the case in the past in Slovenia and Croatia, and is still present in Albania and Kosovo (See Vlahek, 2016; EU Assistance Programme 2007, Implementing Croatian Competition and State Aid policies; and EuropeAid/128368/C/SER/AL, 2011). In most of these countries, the beneficiaries were the respective competition authorities and the courts. Most of these projects, such as those in Croatia and Albania, had 'ensuring a competitive environment' as their focal objective. This was to be achieved by: ensuring further alignment of legislation with *acquis communautaire*; screening legislation that may have

an adverse effect on competition; clarifying and advancing the procedures of the competition authorities, in order to safeguard full respect for the parties' rights to a fair process; enhancing enforcement effectiveness; raising awareness of the benefits that citizens may obtain as a result of fair competition; public advocacy as a mode of strengthening competition culture; training of target groups such as the staff of the authorities, officials, judges and others stakeholders. The competition agencies of both countries are asserted to have greatly benefited from such EU support as regards advancing and achieving competition law objectives.

Notwithstanding criticism of the work of the Authority and the courts in Kosovo, hope emerges. With support and funding from the EU, a new project has begun to support the work of the Authority (See EuropeAid/139447/DH/SER/XK, 2019–2022). It is currently at an early phase and is due to last for at least three years. This project, in addition to training and advising the Authority, also includes the participation in the work of the Authority by experts from EU countries. In this way, the Authority will be assisted and advised by EU experts on its tasks, for at least three years to come. This is expected to be a great help to the Authority not only in investigating and fining undertakings that are proven to have breached competition rules, but it is also likely to enhance the credibility of the Authority in the eyes of the public and institutions such as the Government. As planned, this project will be expanded at a later stage to the courts involved in the judicial review of competition cases.

Effective enforcement of competition rules by both the administrative and judicial pillars – to create the necessary conditions for effective competition among rival undertakings – is a pre-condition for national economies to successfully cope with the competitive pressure they will encounter upon their EU membership. The competitive pressure for all EU Member States is twofold. The first comes from foreign enterprises that compete with local businesses as a result of the unification of national economies within a single market, and the second is the ability of domestic enterprises to successfully compete with foreign companies active in the EU single market.

As can be understood from the experiences of other countries that have commenced the EU accession process, there are generally three main challenges in the field of competition that need to be overcome. The first is legislative in nature – meaning that national competition laws need to be harmonized with those of the EU as a prerequisite for membership. The second challenge lies in creating sufficient administrative capacity within the enforcement agencies to prioritize and successfully combat cases concerning the most serious distortions of competition. The third challenge is lack of

knowledge among the judiciary as regards competition law objectives, and the lack of enforcement of competition law in accordance with its intrinsic goals.

On the journey to EU accession and the achievement of efficient enforcement of competition policies, almost all countries have faced similar challenges to those faced by Kosovo. The most common hurdles for all countries lay in legislative shortfalls, deficient administrative capacity within enforcement agencies, and the courts' lack of understanding of competition law goals. Kosovo should therefore learn lessons from other countries that have managed to successfully overcome similar challenges as regards the enforcement of competition legislation and the creation of the necessary conditions for a competitive economy. Kosovo's long-term goal should be to advance and improve the enforcement of competition rules with reference to the EU's already consolidated practice in this area. In so doing, Kosovo does not have the luxury to wait decades for slow progress towards efficient enforcement of competition rules both at the administrative and judicial levels. Kosovo needs immediate substantive steps toward the enforcement of competition law in accordance with its goals and best practices established elsewhere, such as within the EU. In this respect, and among other things, Kosovo needs 'new blood' as regards *human capital* in key positions related to competition policies and their enforcement in both the administrative and judicial arenas, together with a substantial increase in their remunerations. It is necessary, however, that both the administrative and judicial pillars advance in parallel – as one alone cannot support the process of change – nor achieve the goals of competition legislation in force.

However, recently, the Ministry of Justice has stated its commitment to establish a separate commercial court, with specific jurisdiction in commercial matters. This initiative, if implemented in practice, seems a good opportunity for advocates of efficient enforcement of competition rules in Kosovo. Stakeholders should advocate for a specialized, mandated and competent panel on competition policy within the new court for reviewing all competition cases. Thus, only judges with previous education in the competition field should be considered. Practice so far has presented sufficient evidence as to why competition cases must *not* be reviewed by generalist judges. One of the most important tasks of such panel, apart from deciding new competition cases correctly, both procedurally and substantively, and in accordance with competition law objectives, is to change current judicial practice established by the administrative court in competition matters. This is because the administrative court has misinterpreted competition law objectives and established harmful precedents, which might pose an obstacle to the efficient enforcement of competition policies in the near future if it remains unaltered.

IX. Conclusion

Immediate effective implementation of competition law is an almost impossible assignment, as evidenced by the experience of most states of SEE. Nonetheless, inefficiency lasting for decades cannot, and should not, be entertained either. Competition legislation, with a few exceptions, has the same origin. In normative terms, the role of the EU has been tremendous in its spread, especially through its accession mechanism that has enabled the EU to extend competition policy to all countries aiming for membership. This was the case with the EU accession wave of 2004, with 10 countries coming from different political and economic systems; the following EU membership of Bulgaria and Rumania in 2007 as well as Croatia in 2013 support the same conclusion. The same trend is observed in some of the SEE countries, which are already candidate or potential candidate countries for EU accession.

However, the fulfilment of the formal condition by these states, upon the request of the EU to enact competition law, has proven to be more easily attainable. This has been the case in Kosovo too, which had its first competition law in place since 2004, but which has not seen even the slightest of its enforcement, in the absence of a competent authority, until 2009. What turns out to be the Achilles' heel, and a common denominator of almost all of these states, is the challenge of effectively enforcing competition law *vis-à-vis* establishing a competitive market economy. The reasons can be multidimensional and vary from state to state. However, one common obstacle experienced by most of these countries appears to be political interference at the time of staff selection, especially the decision-making staff, in the relevant agencies. If this happens during the recruitment process, political interference in certain cases, which these authorities investigate, is almost inevitable, and as such poses a direct threat to the efficient enforcement of competition law. The essential precondition for an authority to effectively enforce the law, and ensure a competitive market, is for human capital to be truly the best the country has to offer. Indeed, the work of these agencies and their track record cannot be better than their own staff.

Another essential condition for efficiency in the implementation of competition rules, in addition to selecting professionally competent staff and its independence from political interventions, especially in transition countries where the rule of law has not yet been established, is, first, having an independent judiciary and, second, for that judiciary to have at least a minimal level of competence in the field of competition. Otherwise, even if the basic condition is met, that the administrative pillar is professional and independent, its work is in danger of being crippled by the judiciary, in the absence of basic knowledge in the field of competition law. Given the

fact that at least most, if not all, of the judges lack formal qualifications in the field of competition, training programmes in this area are necessary and indispensable. The European Union has played a key role in financing various projects in SEE countries for both the administrative and judicial pillars. A similar EU-funded project is currently underway in Kosovo. However, what SEE countries, including Kosovo, must understand, is that the effective enforcement of competition law *vis-á-vis* ensuring a competitive economy, is first and foremost in the primary interest of these very countries, and not, therefore, of the EU itself, which is often misunderstood.

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