# ALBANIAN COMPETITION POLICY VERSUS IMPLEMENATION OF THE COMPETION LAW

Raimonda Duka and
Erinda Bllaca*

**Abstract**

*Changes in the economic system have led to a number of sectoral reforms in Albania, including those in the market and regulatory environments. Given that foreign investors are mainly attracted by an open market, competition reform, in must include not only the adoption of competition legislation, but also the elaboration of a well defined competition policy, the creation and maintenance of a competitive environment and, in parallel with such reform, the establishment of a modern legal and institutional framework capable of supporting these developments. This article seeks to analyse the new Albanian competition framework and its approximation with EU law.*

**Keywords**: *Competition policy, competion law, concentration, agreemen, dominant positiont.*

**JEL:** *D41, D42, D43*

## 1. Introduction

Competition law comprises a set of rules that affect all aspects of the economy. Its context varies from one country to another, depending on the particular need of a given country, and its regional and international aspirations and obligations. In this context, all of the latest wave of EU accession countries[1], which elonged in the twentieth century to the so-called "soviet bloc", have adopted modern EU compliant competition laws and established attendant institutions as part of the harmonisation of their legal framework with the acquis communautaire The legal basis of this harmonization is grounded in the European Association Agreement, subsequently enhanced and reinforced by the EU Commission's White Paper on the "Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union".

* Raimonda Duka is at the University of Tirana, Faculty of Economy
Phone: +355 +355 4 345 789; Email: rajmondaduka@unitir.edu.al
Erinda Bllaca is at the Albanian Center for Human Rights
Phone ++ 355 4 230630, Fax ++ 355 4 239121, Email: ebllaca@yahoo.com

[1] Albania did, however, sign the Trade and Co-operation Agreement on October 26, 1992 [1992] O.J. L343/1 (of a different nature to the European Association Agreements). Since 1999 the relationship between Albania and the EU has been governed by the Stabilisation and Association process. In January 2001, the President of the European Commission, Romano Prodi, officially launched the negotiations for a Stabilisation and Association Agreement between the EU and Albania. These negotiations are presently ongoing. For more information see http://europa.eu.int/comm/external_relations/see/albania/index.htm).

Given the fact that Albania was, in previous decades, pointed to as one of the worst examples of the communist economic system, recent legislative and framework revisions represent a significant improvement and appear to be a direct consequence of the Albanian Government's efforts to introduce a market economy.

**2. What is the situation currentely in Albania in the competition reform field?**

In 2002, the EU Stabilisation and Association Report for Albania concluded that "the development of competition policy in Albania remains at an early stage, despite the existence of basic legislation since 1995. Implementation is weak, due in particular to the clearly insufficient resources devoted to this area. Although the law provides for establishment of an independent Competition Office, this structure does not yet exist and competition issues are dealt by the Department of Economic Competition within the Albanian Ministry of Economy. This department remains poorly staffed and, as a result, enforcement of the law is extremely limited."

A similar conclusion was drawn by the European Bank for Reconstruction and Development (EBRD). As part of its transition assessments, 2 the Bank scored Albanian competition policy "2−" (i.e. 2 minus) in 2003, a mark which could be understood as indicating a grossly deficient law. Although the legal framework (i.e. "the law on the books") is just one of the components in the scope of the EBRD survey, it should be noted that the survey, organised in the course of 2003, did not consider the more recent legislative changes, i.e. adoption of the 2003 competition law. These findings have also been, indirectly, supported by the Albanian Competition Department itself, which noted the following major weaknesses of the competition structure in Albania:

- lack of an appropriate legal framework;
- lack of an independent institution;
- lack of sufficient and qualified staff;
- lack of financial resources in conducting surveys for market data collection.(OECD)[3]

While some of these deficiencies appear to be resolved by the recent legislative changes, others will depend on the general growth of the Albanian economy and the practical implementation of the formal changes made to the competition framework over the medium to long term.

The recent legislative changes relate to the adoption of a new Law "On Protection of Competition" of July 28, 2003, No.9121, which entered into force on December 1, 2003 (the "2003 Law" or "new law"). This law fully replaced the previous Law "On Competition" of December 7, 1995, No.8044, (the "1995 Law"), generally considered as insufficiently applied given its ambiguity and apparent

[2] See EBRD Transition Report 2003

[3] "Discussion paper—Contribution from Albania", OECD Forum February 2004 (www.oecd.org/dataoecd/49/48/24742637.pdf ).

contradictions. The initiative for the revisions to the competition legislation came from the Competition Department of the Albanian Ministry of Economy and the drafting work largely involved the assistance of the Deutsche Gesellschaft fur Technische Zusammenarbeit (GTZ).

The new law, mainly based on EU competition rules, aims to improve the legal and institutional framework for competition in Albania and permits improved implementation of competition policy. As in a number of other eastern European countries, the 2003 Law deals solely with economic competition, leaving unfair competition to the competency of Albanian Civil Code. Such division of competence is a significant departure from the former 1995 Law.

The general strategic aim of the competition policy in Albania is the protection of fair and effective market competition, defining the rules of conduct by undertakings, as well as the institutions responsible for protection of competition and their competencies[4] .

As an obvious improvement, compared with the 1995 Law, the 2003 Law provides for a range of comprehensive definitions. Moreover, unlike its predecessor, the 2003 Law applies to any entity, public or private, engaged in commercial activity, as well as to any associations thereof. Similar to the old framework, in addition to entities established in Albania, the law is applicable to foreign entities whose activities have an effect on the Albanian market ("effect doctrine").

While, like its predecessor, the 2003 Law applies to agreements and concentrations between entities engaged in commercial activity, the significant novelty attaches to the introduction of the concept of abuse of dominant position and the provision of a legal basis for an independent competition authority. These changes, on the face of it, appear to reflect current thinking that the dynamic and constantly changing nature of the modern marketplace requires a continuously evolving competition policy and legal framework.

### 2.1. Agreements

More then a decade ago the level of detail required for the alignment of an accession country's competition legal framework to that of the European Union led to heated discussions throughout central and eastern Europe. One of the most pressing questions was: should the drafters "transfer" every single detail of acquis communautaire without deeply examining the competition- related issues which could arise in a particular country, and which—in the majority of cases—arose because of specific legal frameworks applying in eastern Europe prior to the demise of the Soviet Union?

More particularly, in a specific area such as competition law, the question was whether legislative drafters should, in the process of harmonisation, refer solely to the EU Treaty and attendant regulations or also include reference to the European

[4] Law No. 9121, date 28.07. 2003 "On Competition Protection", article 1

Commission's guidelines and the European Court of Justice's jurisprudence? More to the point, what character should competition law have: strict or lax?

While these questions have been largely dealt with, in one way or another, in the context of the greater accession process, these issues are currently still animating discussion in a number of countries, both within and without the accession grouping; Albania is a recent such example.

Following the model of EU competition law, the 2003 Law is relevant to any type of agreement: formal or informal, tacit or explicit, horizontal (i.e. agreements between entities operating on the same level of production) or vertical (i.e. agreements between entities operating on different levels of production) which may prevent, restrict or distort competition in the market. Unlike the 1995 Law, the application of the law is no longer restricted to particular sectors, such as the agriculture, forestry or food sectors.[5] Furthermore, the new legislation also extends to entities in public services, including electricity, gas and water.[6]

A particular novelty of the law is the introduction of a black list (agreements falling under the black list are prohibited and are void) and a grey list (agreements falling under the grey list are invalid unless the competition authorities issue an exception list). To obtain an exception, entities must notify their agreements to the competition authority. While the law provides for specific treatment of agreements on intellectual and industrial property rights, for which the exception is granted automatically if the competition authority does not reply within three months of notification,[7] all other agreements falling under the grey list must be explicitly exempted by the competition authority in order not to contravene the law. It is notable that the new law does not provide for a white list (agreements not restrictive of competition, per se). Given the relative infancy of the new law and its application it remains to be seen how the new competition authority will deal with agreements that do not fall under the black or grey lists.

### 2.2. Concentration

A very important innovation in the new law concerns concentration of undertakings. A number of clear provisions have been incorporated in the new Albanian competition framework enabling such concentrations to take place effectively. In this respect the new law appears to have, essentially, replicated the provisions of EU Council Regulation 4064/89.26 That Regulation and its subsequent amendments defines an operation of concentration as: **(i)** the merger of two or more undertakings or parts of undertakings hitherto independent of each other; **(ii)** any transaction when one or more undertakings acquires, directly or indirectly, a controlling interest in all or parts of one or more undertakings; or, **(iii)** joint ventures exercising all the functions of an autonomous economic entity. The EU definition of

[5] 1995 Law, Art.51
[6] Ibid, 1995 Law, Art.51.
[7] 2003 Law, Arts 7 and 50

control has also been introduced in the new law. Such inclusion of EU provisions in this respect has not been the norm in certain other eastern European laws, where interaction with the relevant commercial code did not permit the introduction of the EU "control of undertaking" definition.

The new law replaces the previous merger notification threshold and establishes a new one requiring approximately €500 million (Lek 70 billion) annual worldwide turnover for all entities involved in the concentration (or €5.8 million (Lek 800 million) annual turnover in Albania for all entities involved in the transactions) and approximately €3.6 million (Lek 500 million) annual turnover in Albania for one of the entities involved in the transaction.[8] In the new law legislators have duly decided to specify a methodology for calculation of turnover, including situations when participating undertakings (which are also defined)[9] are part of a group, as well as for the turnover of credit institutions, other financial institutions and insurance undertakings. The new law provides for a pre-merger notification procedure. The competition authority must decide on a concentration within a two-month period from the notification. At the end of such period the competition authority is required to take a decision on the proposed merger: either to continue its investigation for another three months or to issue an authorisation.[10] If the authority fails to take any decision within two months of the notification, the proposed concentration becomes effective and operational.[11]

### 2.3. Abuse of dominant position

This is also an area where core changes to the legislation have been made. Most notably, a dominant position is no longer prohibited per se. Unlike its predecessor law, the new legislation prohibits only the abuse of a dominant position and provides for a non-exhaustive list of examples of such abuse.[12] It can be further noted that provisions implementing the concept of "essential facilities" have been included in the body of the new law.[13]

The decision whether or not to incorporate this provision in the main competition law, given its jurisprudential origin in the European Union itself and its sensitive anti-monopolistic character, has been debated in a number of eastern

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[8] 2003 Law, Art.12.

[9] The definition of participating undertaking, provided by 2003 Law, Art.12(3) includes: (i) the undertakings merged, in the case of a merger; (ii) the undertakings which acquire control and those subject to the control, in the case of control of acquisition; (iii) part of the undertaking, if the transaction has influence on it.

[10] 2003 Law, Art.56.1.

[11] ibid., Art.56.3.

[12] 2003 Law, Art.9.

[13] 2003 Law, Art.9(2): "Such abuse may, in particular, consist in: . . . refusal to allow another undertaking access to its own networks or other infrastructure facilities of undertakings with a dominant position, against adequate remuneration, provided that without such concurrent use the other undertaking is unable
to operate as a competitor of the undertaking with a dominant position".

European countries. For example, a similar provision was removed from the draft Czech Competition Law after heated debate in the Parliament. [14]

Currently, it continues to be discussed by legislators and may be added as a future amendment to the Czech law.

### 2.4. A new competition authority and its increased powers

Much has already been written on the importance of institutional building in eastern European counties and this article does not seek to repeat it. However, it is worth emphasising that successful market openness should be accompanied by full regulatory reform, including an adequate legal framework and strong, independent and democratic implementing institutions, specifically sector-specific regulators and competition authorities. It would appear that the legislature has followed western models with respect to the new competition authority.

As previously mentioned in the Law, since its establishment the activity of Competition Authority has been concentrated on the implementation of the law "On protection of competition" relying on three main pillars which determine the protection of competition: abuse with the dominant position; prohibited agreements in the form of cartels, merging or concentration of enterprises.

The mission of the Competition Authority is the protection of free and effective competition in the market through the implementation of the legislation on competition. Such legislation defines the rules of conduct to ensure the juridical protection of competition. These rules are defined for both undertakers and the State bodies. In relation to the latter, these rules concern the promotion of horizontal policies that motivate competition through liberalization, improvement of practices for public procurement, the ensuring of a pro-competition approach in privatization processes and an overall enforcement of legitimacy.

### 3. Increased enforcement measures

Unlike its predecessor law, which did not provide for appropriate powers of investigating and imposing sanctions, the new law provides such increased enforcement powers. An investigation can now be opened by the competition authority not only on the basis of a formal complaint but also by the authority ex officio.[15] Further, the new law empowers the competition authority to enter into premises during an investigative procedure,[16] seize documents to be accepted as evidence in proceedings, compel witnesses to testify or require sanctions to be imposed for a delayed or incomplete provision of relevant documents by the entity being investigated.

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[14] Czech Competition Law entered into effect in July 2001. For more details see JUDr. Jindˇriˇska Munkov´a, "Czech Republic: Competition rules in transition", Law in Transition, Spring 2004.

[15] 1995 Law, Art.60.

[16] 2003 Law, Arts 36 and 37.

Generally, the sanctions provided for in cases where entities contravene the legislation, range from fines (which have been increased by the new law), obligations to act or refrain from acting in a particular manner, interruption of contractual relationships, to ordering concerned entities to take the necessary steps to restore the status quo ante, in particular to conduct the separation of merged entities or rescind from participations or acquired assets. Criminal responsibility can no longer be imposed in the case of violation of Albanian competition law.

Following a strategy of seeking to reinforce overall enforcement of competition legislation, the new law provides for a significant element of judicial remedy. Parties who have suffered loss through anti-competitive behaviour of a particular entity can seek compensation against that entity from the civil chamber of the First Instance Court of Tirana District. This entitlement to seek a judicial remedy is in addition to the traditional administrative procedure before the competition authority and such procedure can run independently of the administrative procedure(s) undertaken by the competition authority.

However, the requests for exemption from prohibition of an agreement and the procedures on control of concentrations are not within the jurisdiction of the courts. The effectiveness of this new mechanism is yet to be observed. Establishment of an independent competition authority an additional core change to the legislation is the revision of the institutional structure responsible for application of the competition law.

Unlike the pre-existing structure, where the Directorate of Economic Competition was part of the Ministry of Economy, the new law provides for an independent competition authority, directly appointed by and accountable to the Albanian Parliament.

The new competition authority is to be comprised of two bodies, the Commission and the Secretariat.[17] The Commission will be the decision-making body of the authority (elected by the Parliament), whereas the Secretariat is the administrative and investigative body (i.e. having market monitoring and investigative powers). The duties and responsibilities of each body are regulated by the new law. Based on the investigation results provided by the Secretariat, the Commission can adopt appropriate decisions, which can be appealed within 30 days of the notification of the decision at the administrative chamber of the First Instance Court of Tirana District.

The new law also provides all due procedures that allow the effective investigation of cases, fines categorised according to seriousness of infringements, and provisions related to leniency.

Another area of the new law which is also worthy of note relates to specific provisions on co-operation between the competition authority and other institutions. This co-operation includes exchange of information with corresponding authorities, suspension or termination of proceedings in co-operation with other authorities, the

[17] 2003 Law, Art.18.

nature of the relationship with other regulatory authorities, and provision for other bodies to seek the competition authority's opinion on any relevant issues. The latter provision is of particular importance in the light of international competition advocacy developments.[18]

Relations with other national regulatory bodies are also a crucial point supporting an effective and unambiguous application of the legal framework.

## 4. Institutional developments in the competition national policy of Albania

By virtue of Article 24, point a, Competition Commission approved, by decision no 43, dated 28.12.2006, the document of the Competition National Policy. This is the first document of the competition policy in Albania and it has been compiled based on the similar experience of the regional countries which are a couple phases advanced in the process of European integration (such as Croatia, Bulgaria, Rumania etc), as well as the specific features of the developments in the competition culture and legal infrastructure in Albania. With reference to these special features, the Competition Authority tried for this Competition National Policy to be all-inclusive. To his effect, this document was subject to a discussion and exchange of opinions with all the interested parties (potential stakeholders in the market), such as: ministries and regulatory entities, business community, consumers' associations, legal firms, etc, reflecting their opinions in this document. Competition policy represents the short and medium term vision of protection of competition in Albania. There are reflected the main directions of the activity of Competition Authority in order to explain to the enterprises of the private and public sector, the possibility to carry out their economic activity on the basis of a free, effective and fair competition. The competition policy aims at preventing the market stakeholders from abusing with their dominant position, to enter into agreements which have as a consequence the setting of prices or establishing a market structure where the competitors join each other (through concentration), thus distorting the competition in the market.

A very important objective of the competition policy is the increase of the economic wellbeing of the society, developing the increase of competitiveness, ensuring equitable rules of game in the market, promoting the technological evolution, increasing the possibility for the selection and quality of the products and services and achieving potentially market equilibriums which are a prerequisite to setting as real prices as possible. In this context the competition policy consists an important factor in the economic development of the country. At the same time, aiming at steady boosting of competitiveness in the economy of the country, the

[18] "Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanism, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition", definition provided by International Competition Network, Questionnaire on Competition Advocacy (www.internationalcompetitionnetwork.org/advocacyquestionnairem.pdf).

competition policy can make a very important contribution in improving the macro-economic indicators such as that of the total level of prices, level of employment and economic increase.

The competition policy, along with the monetary, fiscal and commercial policies, has been considered as the fourth stone of the foundation of the public policies. This makes it necessary that its main principles should be taken into consideration from the various public institutions to draft and implement other economy related policies, to the effect of harmonising their objectives to those of the competition policy, achieving in this way the final aim of governmental performance which is the increase of the sustainable wellbeing.

The Policy of Competition is closely connected to the policy of state aid and for this reason, while dealing with the policy of state aid, there should be taken into accounts the importance of establishing equal conditions for the enterprises to the effect of promoting competition. The competition policy should be taken into account in drafting the strategies of regulatory entities in different sectors of the economy and in this context the cooperation of Regulatory Entities is of special importance.

**5.Conclusions**

The new basis for the implementation of competition policy in Albania has now been established. Going forward, it is crucial that these foundations continue to be built upon without neglecting the experience of other eastern European counties[19]. The new legal framework for competition in Albania appears to be an admirable effort at addressing a major part of the legal bottlenecks experienced previously. Representing a significant improvement over the 1995 Law, its successful implementation will determine the overall success of competition structure/policy in Albania. The responsibility for successful enforcement lies not solely with the competition authority, but also with government, the courts and other regulatory institutions and, in certain countries, privatisation agencies[20] whose willingness to co-operate in implementation is crucial. While a competition culture is developing, the introduction of explicit "legal provisions on co-operation" in the body of competition laws themselves can be seen as a current general trend in eastern European countries. In that sense, it is recommended that the Albanian competition authority should not only co-operate regarding cross-border transactions but also seek assistance from international organisations, the European Commission and foreign competition authorities regarding the practicalities of implementation and related problems that can arise.

[19] http://www.ebrd.com/country/sector/law/articles/dajkovic.pdf last accessed march 2008

[20] The competition authority had played a role in privatization process and liberalisation in a number of cases by providing its comments for reforms in strategic sectors of the economy, which could be accompanied by non-competitive effects (e.g. in the case of the privatisation of the Savings Bank, Albtelecom, in Albania)

In the light of international developments in the field, the organisation of international roundtables and seminars in eastern European countries appears to have produced positive results on the general development of the competition culture. These should be continued, replicated on a south-eastern European basis and also organised at national level, in addition to dissemination of information on the internet and through the specialised press.

In conclusion, if a large-scale assessment of Albanian competition law vis-à-vis EU competition law were carried out today, Albania would likely achieve a relatively high position compared with other eastern European countries. However, as discussed earlier, an entire competition policy evaluation, such as the one conducted by the EBRD, is not founded solely upon extensiveness (i.e. the "law on the books") but looks also to effectiveness. It has, therefore, yet to be seen whether the implementation of this new framework and any progress in the general introduction of competition to the Albanian market measures up. In that respect, the responsibility lies with the Albanian Government, to demonstrate the political will and commitment to implement fully the framework contained in the law. This it can do in a tangible meaningful form, particularly by dedicating sufficient financial and human resources to support the appropriate implementing institutions.

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