

## Review of Ten Years of Albanian Competition Law Developments

by

Ermal Nazifi\*, Petrina Broka\*\*

### CONTENTS

- I. Introduction
- II. Towards the first law on competition
- III. The Law on the Protection of Competition of 2003
  1. Introduction
  2. The Albanian Competition Authority
  3. Market supervision
  4. The activity of the ACA
  5. Private Enforcement
  6. Anticompetitive practices
    - 6.1. Agreements
    - 6.2. Abuse of a dominant position
    - 6.3. Merger control
- IV. Conclusions

### *Abstract*

Albania was one of the last countries in Europe to adopt a free market economy after suffering from one of the worst dictatorial communist regimes in the world. In order to succeed in its efforts to establish a free market economy, Albania needed to undertake a set of reforms to modernize its economy in order to cope with the new reality of global markets and Euro-Atlantic integration. An important aspect of these reforms is also the implementation of a competition law in line with the *acquis* and its effective implementation. A lot has been achieved in the last ten years but there is a lot to be done still in order to facilitate a competitive economy able

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\* Ermal Nazifi, LL.M., Ph.D. Candidate, University of Tirana; [enazifi@gmail.com](mailto:enazifi@gmail.com).

\*\* Petrina Broka, LL.M., Ph.D, Lecturer Law Faculty, University of Tirana; [petrinabr@gmail.com](mailto:petrinabr@gmail.com).

to cope with Albania's EU integration. The work of the ACA is only one aspect of this process, but it is of utmost importance for the development of the national economy and successful EU membership.

### *Résumé*

L'Albanie est l'un des derniers pays de l'Europe à adopter l'économie de marché libre après avoir souffert d'un des pires régimes communistes dictatoriaux dans le monde. Afin de réussir dans ses efforts pour établir une économie de marché libre, l'Albanie devait entreprendre une série de réformes pour moderniser son économie et faire face à la nouvelle réalité des marchés globaux et l'intégration euro-atlantique. Un aspect important de ces réformes est aussi l'introduction des règles du droit de la concurrence en conformité avec l'acquis communautaire et sa mise en œuvre efficace. Beaucoup a été accompli au cours des dix dernières années, mais il y a encore beaucoup à faire afin de faciliter une économie compétitive, capable de faire face à l'intégration européenne de l'Albanie. Le travail de l'ACA ne est qu'un aspect de ce processus, mais il est crucial pour le développement de l'économie nationale et la réussite du processus d'intégration à l'UE.

**Classifications and key words:** abuse of dominance; Albania; Albanian competition authority; anticompetitive agreements; competition law and policy; merger review, private enforcement.

## I. Introduction

Albania was one of the last countries in Europe to adopt a free market economy after millennia of tumultuous history. In the beginning of the 1990s, Albania finally emerged from one of the worst dictatorial communist regimes in the world with a centrally-planned economy at the core of its superstructure. According to the World Bank, Albania's GDP per capita was less than 330 US dollars in 1992<sup>1</sup>, making it one of the poorest countries in the world.

In order to succeed in its efforts to establish a free market economy, Albania needed to undertake a set of reforms to modernize its economy in order to cope with the new reality of global markets and Euro-Atlantic integration. An important aspect of these reforms was the approval of its first Law on Competition (hereafter, LoC) in 1995<sup>2</sup>. The LoC contained provisions against unfair competition, anti-competitive agreements, abuse of dominance, merger

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<sup>1</sup> Available at: [<http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?page=4>].

<sup>2</sup> This is not the first law on competition in Albania, if ancient and medieval history is taken into account. Legal acts such as *Lex Iulia de Annona* (year 18 A.D.?) Diocletian's, (301 A.D.),

control, etc. It included public enforcement as well as private enforcement rules and criminal penalties in cases of severe damages caused to health and/or property. Unfortunately, its implementation was not successful in practice. This, in part, was also due to the severe economic crisis and civil unrests that Albania had to face after the fall of pyramid schemes in 1997<sup>3</sup>.

In order to cope with the new economic reality as well as the EU integration process, a new law was approved by the Albanian Parliament (*Kuvendi*) in 2003. The Law on the Protection of Competition<sup>4</sup> (hereafter, LPC) was mostly in line with latest EU standards and practices. In March 2004, the Albanian Competition Authority (hereafter, ACA) issued its first decision starting a new and exciting era in the field of competition law developments in Albania. A lot has been achieved in the last ten years but there is a lot to be done still in order to facilitate a competitive economy able to cope with Albania's EU integration. The work of the ACA is only one aspect of this process, but it is of utmost importance for the development of the national economy and successful EU membership.

## II. Towards the first law on competition

Competition law should be considered as one of the cornerstones for building a free market economy from the ashes of a communist regime. Most of the countries of Central and Eastern Europe, as well as of the former Soviet Union, adopted competition laws in the period between 1990-1996<sup>5</sup>. Albania joined the 'club' in 1995 when risks related to anti-competitive practices started to become evident on the national market<sup>6</sup>.

Albania's first Law No. 8044 on Competition was approved in December 1995. The LoC included provisions on monopoly, dominance, cartel agreements, mergers and unfair competition. The enforcement of the LoC was assigned to the Directorate on Economic Competition, part of the Ministry of

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*Edictum De Pretiis Rerum Venalium, etc.*, can be seen as precursors of modern competition law and they were also implemented in the Albanian territories.

<sup>3</sup> For a historic account of the Albanian economy after the fall of communism, see generally: T. Redek, F. Memaj, J. Prašnikar, D. Trobec, *Albania: The Role of Intangible Capital in Future Growth*, Ljubljana, 2012.

<sup>4</sup> Law on the Protection of Competition no. 9121 of 28 July 2003, Official Gazzette: Viti 2003, No. 71, p. 3189.

<sup>5</sup> Available at: <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/39990968.pdf>.

<sup>6</sup> Albanian Competition Authority, *National competition policy*, Tirana 2006, p. 13.

Trade and Tourism<sup>7</sup>. The object of the LoC was to define the rules of market players, as well as rights and obligations under the conditions of fair and just competition<sup>8</sup>.

The LoC regulated the rights and duties of both undertakings and consumers. However, several important industry sectors such as telecommunications, insurance, agriculture, etc. were excluded from the scope of its application<sup>9</sup>. The LoC was a very positive step towards the establishment of a free and competitive economy in Albania. Unfortunately, it did not prove effective in practice and remained mostly on paper<sup>10</sup>.

### III. The Law on the Protection of Competition of 2003

#### 1. Introduction

The stagnation in the implementation of Albania's competition law was criticized by the European Commission in its EU integration progress report of 2003<sup>11</sup>. What the Commission said in this important summary of Albania's developments so far was that new legislation was needed as well as an independent institution in charge of its implementation.

A deep reform of Albanian competition law and policy was increasingly necessary so that it could be used to further the economic development of the country. Having a competition regime similar to European *acquis* as well as effective enforcement mechanisms is certainly of utmost importance for Albania's EU accession. Against this backdrop, the new Law no. 9121 on the Protection of Competition was approved in 2003 (hereafter, LPC). The protection of free and effective competition is thus the main object of the LPC. For that purpose, the LPC established a competition authority, the ACA, responsible for its enforcement as an independent public body with broad powers concerning the implementation of the law.

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<sup>7</sup> Decision of Albanian Council of Ministers no. 248, of 14 June 1997, on the functioning and organization of the Directorate on Economic Competition.

<sup>8</sup> Art. 1 LoC.

<sup>9</sup> Albanian Competition Authority (hereafter, ACA), *National competition policy*, Tirana 2006, p. 13.

<sup>10</sup> See e.g.: T. Baleta, N. Kallfa et. al., *Dominimi i tregut bankar shqiptar* (Dominance of the Albanian banking market), Bank of Albania, Tirana 2000.

<sup>11</sup> Commission of the European Communities, Albania Stabilization and Association Report 2003, page 23; available at: [http://eeas.europa.eu/delegations/albania/documents/eu\\_albania/2003\\_progress\\_report\\_en.pdf](http://eeas.europa.eu/delegations/albania/documents/eu_albania/2003_progress_report_en.pdf) (4 May 2014).

One of the major differences between the LPC and the LoC is the fact that unfair competition clauses are no longer included in the LPC – their regulation is left to other institutions in their respective fields of work, such as consumer protection<sup>12</sup>, intellectual property<sup>13</sup>, metrology and calibration<sup>14</sup>, etc. Parties that have suffered from an unfair competition practice can also address the courts directly<sup>15</sup>.

There are no longer any exemptions from the applicability of the LPC – it covers all sectors of the economy, private and public undertakings, as well as undertakings that operate in sectors of general economic interest (SGEI's)<sup>16</sup>.

Furthermore, the LPC is applicable to undertakings that operate outside the territory of Albania, provided their behaviour affects the domestic market. An important feature of the LPC is that the protection of free and effective competition is considered an important aspect of constitutional economic principles enshrined in Article 11 of the Albanian Constitution<sup>17</sup> – in fact, Article 11 of the Albanian Constitution is specifically mentioned in the LPC's Preamble. This kind of legal drafting, that is, mentioning constitutional principles in the preamble of another legal act, is very rare; preambles usually only mention procedural articles of the constitution, or articles that are directly relevant to the given legislation (such as laws that regulate the activity of constitutional institutions etc.).

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<sup>12</sup> Law no. 9902 of 17 April 2008 on Consumer Protection (Official Journal no.61); available at: <http://www.kmk.al/pdf/Ligji%20per%20Mbrojtjen%20e%20Konsumatoreve%20Nr%20%209902.doc>.

<sup>13</sup> Law no. 9947 of 7 July 2008 on Industrial Property” (Official Journal no. 121), available at: <http://www.alpto.gov.al>, as well as the Law no. 9380 of 28 April 2005 on the Copyrights and Other Related Rights (Official Journal no. 42, pages 1493); available at: <http://zshda.gov.al/wp-content/uploads/2014/05/LIGJI-NR-9380-DATE-28-04-2005-PER-TE-DREJTEN-E-AUTORIT-DHE-TE-DREJTAT-E-TJERA-TE-LIDHURA-ME-TE.pdf>.

<sup>14</sup> Law no. 9875 of 14 February 2008 on metrology (Official Journal no. 27); available at: [http://dpm.gov.al/images/stories/DPM/legjislacioni/Ligji\\_per\\_metrologjine.pdf](http://dpm.gov.al/images/stories/DPM/legjislacioni/Ligji_per_metrologjine.pdf).

<sup>15</sup> Provisions on unfair competition are foreseen in the Albanian Civil Code.

<sup>16</sup> Article 2 LPC.

<sup>17</sup> Article 11 of the Albanian Constitution, which states that:

1. The economic system of the Republic of Albania is based on private and public property, as well as on a market economy and on freedom of economic activity.
2. Private and public property is equally protected by law.
3. Limitations on the freedom of economic activity may be established only by law and for important public reasons.

## 2. The Albanian Competition Authority

The absence of a stable and independent institution in charge of the enforcement of the LoC in practice was seen as one of the reasons for the failure in its overall implementation process.

The LPC created a new institutional framework for an efficient enforcement of its provisions – an independent public entity, the Albanian Competition Authority (in Albanian: *Komisioni i Konkurrencës*). The ACA encompasses the Competition Commission, its decision-making body, and the Secretariat of the ACA, the body in charge of market supervision and investigations.

The Parliament elects the members of the Competition Commission while the employees of the Secretariat are elected based on civil service procedures. The Chair of the Commission is voted separately by the Parliament after being elected as a member of the Commission.

One member of the Competition Commission is proposed by the President of Albania, two by the Council of Ministers and the remaining two are proposed by the Parliament. This rule aims to ensure a politically independent and balanced institution. Candidates for the Competition Commission must fulfil a set of criteria including: at least 15 years work experience and academic experience either as a lecture or holding at least a doctorate degree in economics or law (private or administrative law). Finding suitable candidates to fulfil these requirements has not been easy, and so the Competition Commission has for a long time been functioning with only 4 members. The work experience criteria may be an unnecessarily heavy burden here, which keeps away young professionals and academics that might specialize in competition law or industrial economics seeing as this is a very new subject in Albanian Universities. This also explains the lack of research, articles and publications on Albanian competition law and policy.

The authority's two-tier structure, separating investigative and decision-making functions, assures fair process for the parties. The Competition Commission can make a decision only after providing the investigated parties with the possibility to be heard. This is yet another major guarantee of fair process. This way, the Commission acts as a quasi-court, judging on the arguments and evidence provided by the Secretariat, on the one hand, and the parties, on the other. ACA decisions can be reviewed by the Administrative Court of First Instance of Tirana, which decides both on the merits and on procedural aspects of the cases. Furthermore, the work of the ACA is monitored by the Albanian Parliament together with other independent bodies. Its monitoring is carried out by the Monitoring of Independent Institutions Unit and the Parliamentary Commission of Economy and Finance when the Authority reports on a yearly basis. The Parliament issues a yearly Resolution

on the Activities of the ACA, which is subject to plenary discussions. No other body, be it the government or specific ministries, has any power over the decisions of the ACA.

Anyone can submit a complaint concerning any issues related to competition law. However, investigations can also be launched *ex officio* assuring a proactive role of the ACA. Recently, most of the ACA's work is based on addressing complaints about anti-competitive practices coming from businesses or individuals. This shows that Albanian competition culture is improving, as is the trust of the public and of the business community in the competition law enforcement mechanism.

The number of complaints submitted to the ACA in 2012 was almost twice as high as in 2011<sup>18</sup>. A positive trend continued in 2013 but the number has decreased compared to 2012<sup>19</sup>.

The Parliament's resolution on the activities of the ACA, as well as other concerns identified by the MP's during plenary discussion on its yearly report, are important tools for starting investigations or monitoring markets also. For example, in the Resolution on the evaluation of the ACA's activity for 2013, the Parliament specifically asked the authority to strengthen its enforcement activities in sectors such as: mobile telecommunications, insurance, energy and government concessions that have granted monopoly or exclusive rights<sup>20</sup>.

However, there are also many complaints received from ACA that do not fall under the scope of the LPC. This shows that the authority is perceived as a trusted institution on one hand, but more efforts should still be devoted to increasing Albanian competition culture.

### 3. Market supervision

The ACA is empowered to supervise the market behaviour of undertakings looking for anti-competitive practices (*ex-post*). Within its merger control activities, it aims to prevent the creation of market structures that may cause abuse of dominance or facilitate collusion.

Advocacy is another statutory duty of the ACA. It cooperates with other State institutions and provides a 'regulatory impact assessment' of other

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<sup>18</sup> ACA, *2012 Annual report and main goals for 2013*, Tirana 2013, p. 6-7 (available at: [http://www.caa.gov.al/uploads/publications/Annual\\_Report\\_2012-2013.pdf](http://www.caa.gov.al/uploads/publications/Annual_Report_2012-2013.pdf); last visited on 9 September 2013).

<sup>19</sup> ACA, *2013 Annual report and main goals for 2014*, Tirana 2014, p. 5 (available at: [http://caa.gov.al/uploads/publications/Raporti\\_Vjetor\\_2014\\_-\\_Autoriteti\\_i\\_Konkurrences.pdf](http://caa.gov.al/uploads/publications/Raporti_Vjetor_2014_-_Autoriteti_i_Konkurrences.pdf)).

<sup>20</sup> Albanian Parliament, Resolution for the evaluation of the activity of the Competition Authority for 2013, p. 3.

laws and/or normative acts from the point of view of competition law. The Competition Commission has approved a guideline for the evaluation (within their drafting process) of draft-acts that might impede market competition<sup>21</sup>. It is aimed to avoid anti-competitive measures such as granting of exclusive and special rights to certain undertakings, raising barriers of entry, limiting consumer choice, etc.

The ACA has several tools for market supervision.

- Bringing an anticompetitive practice to an end.
- Issuing temporary injunctions in order to stop an undertaking from continuing an allegedly anti-competitive practice.
- Recommending public bodies to improve their legal framework and/or practice in order to avoid anti-competitive behaviours or promote a more competitive environment.
- Imposing fines on companies and individuals that are involved in anti-competitive practices.
- Ordering structural and/or behavioural remedies, etc.

#### 4. The activity of the ACA

In the 10 years of its functioning, the ACA has issued more than 300 decisions.

**Table 1. Number of decisions issued by the ACA (2003–2013)**

Number of decisions of the ACA	
Cartels	14
Abuse of Dominance	10
Mergers	72
Other*	205
<b>TOTAL</b>	<b>301</b>

\* This includes decisions on recommendations to public bodies, several procedural issues, approval of laws and bylaws, etc.

Source: 2013 Annual Report<sup>22</sup>.

<sup>21</sup> Decision of the ACA, no. 68 of 24 December 2007, on the approval of the guideline on the evaluation of the effects of the legislation on competition, Official Bulletin 2007, no. 2, p. 72.

<sup>22</sup> ACA, *2013 Report and Main Goals for 2014*, Tirana 2014, p. 52 (available at: [http://caa.gov.al/uploads/publications/Raporti\\_Vjetor\\_2014\\_-\\_Autoriteti\\_i\\_Konkurrences.pdf](http://caa.gov.al/uploads/publications/Raporti_Vjetor_2014_-_Autoriteti_i_Konkurrences.pdf)).

These decisions have been issued in sectors very important for both the economy and consumer including: finance, telecommunications, energy, access to infrastructure, public transportation, bread, wheat, etc.

Considering these statistics, it can be argued that the ACA has managed to do much to safeguard free and effective competition. The authority has indeed received a lot of positive feedback from EU institutions, the Albanian Parliament, Consumer associations, etc. However, it can also be argued that the ACA has not issued many decisions on key competition issues, that is, cartels and the abuse of dominance.

This situation can be attributed to different factors such as: lack of competition culture, general lack of trust toward public institutions in Albania, problems with the enforcement of decisions, an inefficient judicial review process, general economic and political situation, etc. This area needs serious research, through questionnaires and interviews with both the business community and the general public, which is currently lacking.

In total, the ACA has imposed around 8 million Euros of fines on companies found in breach of the LPC. This is a considerable amount considering the size of both the Albanian economy and of the fined undertakings. However, only 25% of this sum has in fact been collected by judicial enforcing services<sup>23</sup> since collection can only take place after a final ruling of the court is delivered.

Judicial review is one of the biggest challenges faced by the ACA. Competition law is a novel legal field in Albania and its study is only just begging. There are no specialised courts or judges in the field of competition law. In practice, while many important ACA decisions have found judicial confirmation, several other cases were quashed.

In many of the quashed decisions, the reasoning of the court was not very clear about why it believed that a given practice had not constituted an anti-competitive behaviour, or what would be the necessary evidence to prove the infringement.

The ACA has stated in its 2012 report that: 'It is vital to the good functioning of the markets – which, in simpler words means increased consumer wellbeing – that the justice system absorbs and conveys the philosophy of competition protection in the fairest manner possible. Not only is the reasoning of decisions in the light of the protection of public interest a legal obligation under the law, but also, and above all, it is a moral duty since it affects the wellbeing of the citizens'<sup>24</sup>.

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<sup>23</sup> ACA, *2013 Report and Main Goals for 2014*, Tirana 2014, p. 57.

<sup>24</sup> ACA, *2012 Report and Main Goals for 2013*, Tirana 2013, p. 4.

## 5. Private enforcement

Private enforcement of competition law in Albania was first introduced in the LoC of 1995<sup>25</sup>. Despite the fact that the possibility to claim damages based on an anti-competitive practice has existed in for 19 years already, private enforcement is still totally undeveloped in Albania.

Private enforcement of competition law was included in the LPC<sup>26</sup> of 2003. Article 65 LPC gives a person impeded in his/her activity by way of a prohibited agreement or an abusive practice the right to lodge an action before the court. He/she can request a) the removal or prevention of a competition restricting practices which might be/is carried out in contradiction to these articles. He/she can also request b) reparations or compensations of damages caused, in accordance with relevant provisions of the Civil Code. Such persons can address the court even if the ACA has started its own investigation procedure concerning the same practice.

Compared with its predecessor, the LPC regulates better the question of jurisdiction – Tirana Court of the First Instance is now the court competent to hear all private damages claims related to anti-competitive practices in Albania. This new rule avoids problems in choosing a competent court for those that have suffered damages from an anti-competitive practice<sup>27</sup>. The new solution ensures also better judicial performance, since it is easier to train a limited number of judges (single court) in competition law and European jurisprudence in this area.

Interestingly, the LoC provided that professional associations of competitors, suppliers, consumers and other purchasers can claim damages. This possibility is no longer available under the current legal framework. This is a major obstacle for the effectiveness of private enforcement of competition law in Albania.

According to the provisions of Albanian Code of Civil Procedure: ‘a person may start a lawsuit on its behalf for the protection of a right of a third party only if it is allowed by the law’<sup>28</sup>. The LPC provides this possibility only for persons that have suffered damages from an anti-competitive practice.

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<sup>25</sup> Private litigation was first regulated by part VII of the LoC, specifically the articles 62, 63 and 64.

<sup>26</sup> Law no. 9121 of 28 July 2003 on Competition Protection (Official Journal no. 71).

<sup>27</sup> For problems arising for the competent court see: M. Carpagnano, ‘Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-289/04 Manfredi’ (2006) 3(1) *The Competition Law Review* 47–72.

<sup>28</sup> Article 95 of the Albanian Code of Civil Procedure (unofficial translation from the authors).

According to Article 54 of the Law on the Protection of Consumers<sup>29</sup>, consumer association may address the court if consumer rights were breached. It should be noted, however, that consumer organizations that may address the court, by a representative action for the protection of consumer rights, are only entitled to request the ceasing of the violation of the infringed rights by the company. They cannot request compensation of damages. So even in this case, there is no mechanism that enables collective redress for damages. This possibility should be granted to consumer protection associations as soon as possible to enable them to seek compensation for damages suffered from consumers, including damages caused by anti-competitive practices. In so doing, the impact of these actions for consumer rights protection will be greater – assuring better protection as well as greater deterrence.

In the above context, the lack of legal mechanisms for collective redress for damages suffered from anti-competitive behaviors is an important factor that has influenced the failure of private enforcement in Albania. This is because most of the victims of anti-competitive practices are consumers, which have neither the interest nor the ability to individually sue the infringers (which profit from this state of affairs).

In order to improve the current situation, there is an urgent need to amend Albanian legislation by drafting it in accordance with EU *acquis* and to implement it properly. Several changes in material and procedural aspects of Albanian competition law need to be made that will facilitate actions for damages in line with the Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the EU and related initiatives<sup>30</sup>. It is also important to inform and raise awareness of all stakeholders, including businesses, consumers and public institutions that might have been or can suffer damages from an anti-competitive practice. This is not only a matter of law, but also of mentality. Enhancing private enforcement will be one of the most important challenges that Albania has to face to further improve the implementation of its competition law.

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<sup>29</sup> Law no. 9902 of 17 April 2008 on Consumer Protection (Official Journal no. 61).

<sup>30</sup> See the text of the directive but also Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, and the Commission's Communication on quantifying harm in antitrust damages actions; available at: <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>.

## 6. Anticompetitive practices

### 6.1. Agreements

#### 6.1.1. General remarks

The LPC focuses on: anti-competitive agreements, abuse of a dominant position, and merger control.

The fight against anti-competitive agreements is one of the key priorities of the ACA. According to the authority, such behaviour harms social well-being, can cause inefficiencies, and transfer benefits from consumers to the parties of the agreement<sup>31</sup>. The material provisions of the LPC are in line with European *acquis* and give a non-exhaustive list of examples of anti-competitive agreements<sup>32</sup>, that is, behaviours which are considered illegal<sup>33</sup>. When discovered, the ACA may stop such practices<sup>34</sup> and impose high fines on the undertakings involved<sup>35</sup>. The LPC allows also for individual<sup>36</sup> and block<sup>37</sup> exemptions and contains a *de minimis* rule<sup>38</sup>, albeit these exemptions do not apply to hard-core cartels.

The Albanian Competition Authority has approved a leniency program as well, but there have not been any applications yet. There was only one application for leniency but the ACA receive a leniency application, yet the after looking at the issue, decided that there was no room for starting an investigation. Albania does not yet have any provisions on settlements such as those used in the EU<sup>39</sup>. However, such rules can be easily introduced into

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<sup>31</sup> E.g.: ACA, *2012 Annual report and main goals for 2013*, Tirana 2013, p. 17, available at: [http://caa.gov.al/uploads/publications/Raporti\\_Vjetor\\_2012-2013.pdf](http://caa.gov.al/uploads/publications/Raporti_Vjetor_2012-2013.pdf).

<sup>32</sup> Article 4 LPC.

<sup>33</sup> *Ibidem*. It should be noted that the Albanian law is in line with the relevant *acquis* (Article 101 of the Treaty on the Functioning of the European Union). The nullity can be raised by the interested parties or *ex officio* from the Authority and/or the courts. The effects are *ex tunc* (from the outset).

<sup>34</sup> Article 45 LPC.

<sup>35</sup> Part VI of the LPC on sanctions as well as the regulation on fines and leniency; available at: <http://caa.gov.al/uploads/laws/Regulation%20On%20Fines%20and%20Leniency.pdf>.

<sup>36</sup> Article 5 LPC, as well as Guideline on the form of the notification of the agreements; available at: <http://caa.gov.al/uploads/laws/guideline%20for%20notification.pdf>.

<sup>37</sup> Article 6 LPC. The Commission has also approved several block exemptions (specialisation agreements, Research and Development, Technology transfer block exemptions, etc.). For more information see the website of the Competition Authority ([www.caa.gov.al](http://www.caa.gov.al)).

<sup>38</sup> Article 7 LPC and decision of ACA no. 203 of 8 November 2011, Regulation on Agreements of Minor Importance, Official Bulletin 2011 no. 7, p. 176; available at: <http://caa.gov.al/uploads/laws/Regulation%20on%20agreements%20of%20minor%20importance.pdf>.

<sup>39</sup> See in general about this topic: F. Laina, E. Laurinen, 'The EU Cartel Settlement Procedure: Current Status and Challenges' (2013) *Journal of European Competition Law & Practice*.

the national legal system since the ACA has the power to issue secondary legislation.

### 6.1.2. 'Naïve' cartels

An interesting feature of Albania's experiences in the fight against anti-competitive agreements are so-called 'naïve' cartels, where multiple companies proved unaware of the existence of competition law. In those cases, not only did the participants get together fixing prices and other sales conditions, they did so publicly or even announced it in the media. These types of phenomena were observed in different regional bread production markets as well as in the ready-mixed concrete market in Tirana<sup>40</sup>.

It was observed during the ACA's investigations, that most of the undertakings operating in the investigated markets, usually regional ones, got together to fix their prices, in some cases under the umbrella of a non-formal business organisation<sup>41</sup>.

### 6.1.3. Concerted practices

The ACA has also investigated several cases of concerted practices<sup>42</sup>. The *Atlas/Bloja* case concerned two companies operating in the market for the import of wheat and the production of flour destined for bread production. The authority discovered that the two investigated undertakings were sharing information about joint imports, prices, quantities, taxes, customs duties, etc.<sup>43</sup>. While the concerted practice was in operation, the two companies applied also the same prices, or changed them by the same level. This behaviour was considered a concerted practice and both companies were fined<sup>44</sup>.

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<sup>40</sup> In the case of the concrete practice case, the companies were fined for failing to comply with the ACA's request for information.

<sup>41</sup> See the decisions of ACA in the bread market in Fier, Korce and Vlora, as well as in the ready-mixed concrete market in Tirana. See E. Nazifi, P. Broka, 'Fighting Cartels 'Albanian Style': The Practice of the Albanian Competition Authority against Anticompetitive Agreements', International Masaryk Conference for Ph.D. Students and Young Researchers 2013 Proceedings.

<sup>42</sup> Article 3 LPC defines agreements as 'agreements and/or concerted practices of two or more undertakings, and the decisions or the recommendations of associations of undertakings, regardless their form, in written or not, or their binding force'.

<sup>43</sup> Decision of ACA, no. 125 of 8 October 2009 on imposition of fines into the enterprises 'Atlas' Sh.a and 'Bloja' Sh.a for restriction of competition in the wheat import and flour production and sales market', Official Bulletin 2009, no. 5, p. 115; available at: <http://caa.gov.al/uploads/decisions/Decision%20125.pdf>.

<sup>44</sup> Both undertakings have appealed this decision to the Tirana Circuit Court, which has decided in both cases to quash the decision of the ACA. It seems that the court has not been

### 6.1.4. Bid rigging

It has been calculated that the in cases of bid rigging prices are about 5–10% higher than the competitive price<sup>45</sup>.

The ACA investigated several bid rigging cases concerning procurement of new vehicles and guarding and security services<sup>46</sup>. The ACA has discovered that there were clear signs of cooperation in the rigged tenders starting with similar typos in the tender documents; the use of joint staff and shared offices/other premises; supporting documents such as insurance or court clearances being obtained at the same time. This cooperation in the phase of the preparation of the tender documents was followed with offers very close to the maximum available funds in cases where only the riggers participating in the bid; prices were lower when other undertakings were taking part in the tender as well. The ACA found also cases of subcontracting or purchasing from a direct competitor in the tender.

## 6.2. Abuse of a dominant position

### 6.2.1. General remarks

Smaller economies like Albania usually have high concentration levels in many of their industry sectors – they are more prone to experience monopolies, oligopolies and dominant undertakings in sectors such as energy, telecommunications, postal services, transportation, etc. Dominance has often been inherited from privatized state monopolies of the communism era. On occasions, such problems arise because of the granting, by the government, of exclusive rights to undertakings in order to develop or improve certain services (for example: port services or technical control of vehicles).

The provisions of the LPC are in line with the European *acquis*. As such, holding a dominant position or monopoly is not forbidden in Albania but the abuse of such position is. The LPC sets out a list of anti-competitive

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very clear in in analysing evidence submitted by the ACA and why it was not sufficient to uphold its decision. See in general: P. Broka, 'The Court of Appeals of Tirana upholds the District Court's judgment quashing the NCA decision concerning a concerted practice case in the markets for wheat import and production of flour (Atlas/Bloja)' (20 April 2012) N° 49031 *e-Competitions Bulletin*.

<sup>45</sup> OECD, *Collusion and Corruption in Public Procurement*, Paris 2010, p. 57.

<sup>46</sup> OECD, *Guidelines for Fighting Bid Rigging in Public Procurement*, Paris, 2009, p. 1. The OECD has defined bid rigging as: 'Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process'.

exploitative and exclusionary abuses. It also contains provisions on joint dominance.

In order to determine the dominant position of an undertaking, elements such as: market share, barriers to entry, potential competition or countervailing power of buyers/customers are taken in consideration<sup>47</sup>. Therefore, the ACA should firstly analyze if the company has a dominant position, and then if that position was/is in fact abused.

### 6.2.2. Mobile telephony

The ACA has investigated several abuse of dominance cases. One of the most important investigations in this field concerned the mobile telecommunications market. The authority imposed a fine of around 5 million USD on AMC and Vodafone Albania, both mobile carriers operating in Albania at that time. The authority found that these two companies held, between 2004-2005, a joint dominant position. The ACA also established that they charged unfair prices – prices much higher than the prices of the same product in similar market conditions, and much higher than the costs incurred by the two operators. The decision of the ACA was upheld by both the District Court of Tirana and the Court of Appeals. It is, however, still under judicial review waiting for a hearing before the Supreme Court of Albania.

Since then, the ACA had started another investigation of the mobile telephony market for an alleged abuse by one of the current operators, Vodafone Albania. The investigation focused on the fact that Vodafone Albania offered very cheap calls to a group of its clients called Vodafone Club (on-net tariffs) offering, at the same time, expensive calls to non-Club clients and clients of other carriers (off-net tariffs). Vodafone offered also bonus packages to customers of other operators if they transfer their numbers to Vodafone; such packages were not available to new customers nor to existing customers of the same tariff plan. Ultimately however, this case was closed without the ACA finding that an infringement occurred. The case was later appealed by the complainant Plus SHA, the 4<sup>th</sup> and smallest operator in the Albanian telephony market.

In the 2014 Resolution concerning the ACA's activities in 2013, the Albanian Parliament asked the authority for more intervention into the mobile communications market in cooperation with the Electronic and Postal Services Authority.

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<sup>47</sup> Article 8 LPC.

### 6.2.3. The *ARMO* Case

Another important case concerned the market for the production and sale of D2 petroleum. The ACA has found that the sole producer of this type of fuel in Albania, ARMO, held a dominant position in this market after an import ban had been imposed by the Albanian government. During this period, ARMO charged different prices to different undertakings for similar quantities of the same fuel. By doing so, it favored their own vertically integrated company that was active in the retail market of D2 petroleum. This behavior was considered an abuse of its dominant position because of the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

### 6.2.4. *Romano Port* Case

In another abuse decision, the ACA fined Romano Port, the operator of port facilities for the loading and unloading of LPG. Romano Port is one of the two operators allowed to offer such services in the territory of Albania. In the case at hand, Romano port had not allowed the unloading of LPG by two specific undertakings. The company justified its refusal by saying that these two companies did not have all the permits necessary to use their depots, which were connected to the port facilities. However, according to the rules of the operation of the port, those permits were not part of the set of documents that the port operator was required to review. Furthermore, Romano Port had allowed other undertakings to unload their products without asking for such permits. The reason behind Romano Port's behavior was vertical integration in the market of LPG import by its subsidiaries. Again, this behavior was considered by the ACA as an abuse of dominance because of the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The ACA has looked into this market once again in 2013 but found no infringements.

## 7. Merger control

Almost 1/3 of all ACA's decisions<sup>48</sup> are in the field of merger control. This is a very important aspect of its activities since the makeup of Albanian markets is often oligopolistic. Considering this market structure, an anti-

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<sup>48</sup> According to the ACA, *2013 Annual report and main goals for 2014*, Tirana 2014, there are 72 merger decisions out of 301 decisions in total.

competitive merger, if carried out, would be very detrimental for consumers and competition in general.

The LPC's merger control provisions are generally in line with European *acquis*. A further approximation took place with the amendments of 2010 which, most importantly, introduced a change in the Albanian merger test, aligning it with EU rules. As a result, the ACA is now using the Significant Impediment of Effective Competition (SIEC) test in merger analysis. The dominance test used in Albania before the 2010 amendments was more absolute than that under the first EU Merger Regulation<sup>49</sup>. According to this regulation 'A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market'. By contrast, Article 13 of the LPC, before the amendments of 2010, would not allow a merger solely if it created or strengthened a dominant position, without analyzing whether effective competition would have been significantly impeded as a result of the merger or not.

The amendments of 2010 extended also, from 7 to 30 days, the deadline for submitting a merger notification. Another important change concerned the lowering of penalties for a late notification. Considering late notifications a minor infringement of the law, the fine is now limited to a maximum 1% of the turnover achieved in the previous accounting year, provided however that the merger is ultimately authorized by the ACA. By contrast, if a non-notified merger is implemented and has anti-competitive effects, this would be considered a serious infringement of the LPC and the fine could go up to 10% of the turnover. In practice, the ACA has imposed several fines for late notifications already; it has, however, never imposed a fine for a serious infringement of its merger rules.

Despite the considerable number of mergers supervised, the ACA has never prohibited a merger. It has not issued a conditional clearance<sup>50</sup>, or even conducted an in-depth investigation (phase 2 investigation) as well. There are also very few examples of notification withdrawals, none of which was caused by the risk of a merger ban or the imposition of a fine.

The activity of the ACA in the field of merger control has touched upon different sectors of the Albanian economy including: insurance, banking, energy, trade, constructions, etc. Several mergers included the privatization

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<sup>49</sup> Article 2.2 of the Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, (OJ L 395, 30.12.1989, p. 1).

<sup>50</sup> Decision of ACA no. 150 of 20 July 2010 on the abuse of dominant position of 'ARMO' SHA in the market of D2 diesel, Official Bulletin no. 6, 2010, p. 88; available at: <http://caa.gov.al/uploads/decisions/vendimi%20150-ARMO.pdf>.

of State-owned companies, operating in industries such as energy transition or refining of oil, etc.

An interesting feature of the ACA's activities is the review of foreign to foreign mergers. Like many other jurisdictions, the LPC has extraterritorial jurisdiction that covers all transactions that might influence the Albanian market, even in cases where the participants remain active outside the Albanian territory.

The 2010 reform has narrowed the extraterritorial jurisdiction of the LPC. In order for the ACA to review a merger, the companies involved should now meet a turnover threshold of at least 7 billion lek (approximately 50 million EUR) in the international market, and at least one of them should meet the domestic threshold of 200 million lek (approximately 1.4 million EU). However, future amendments are needed and should consider the introduction of clearer and stricter criteria for the establishment of the 'local nexus'<sup>51</sup>.

Examples of foreign to foreign merger cases analysed by the ACA include several transactions notified by Japan Tobacco Inc. (JTI) in different parts of the world (the UK, Netherlands, Belgium, Egypt, Sudan, Southern Sudan, etc). In these cases, the LPC's international threshold was met by Japan Tobacco Inc. while its local threshold was met by its Albanian subsidiary<sup>52</sup>. However, many notorious mergers that have triggered multi-jurisdictional merger notifications, for example Pfizer/Wyeth, Google/Motorola, Microsoft/Skype, Face book/Whatspp, were not notified in Albania.

The 2010 reform has in fact lowered earlier turnover thresholds, making them more in line with those found in the Western Balkans region. The fees to be paid for a merger authorisation were also amended in light of the lowering of the notification thresholds; different fees now apply based on different turnover levels<sup>53</sup>.

Interestingly, lowering turnover thresholds was expected to increase the number of merger notifications in Albania, yet only a small increase occurred

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<sup>51</sup> E.g. the ICN recommended practices for Merger notification procedures; available at: [www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf).

<sup>52</sup> Decisions of the ACA no. 271 of 26 February 2013 on the authorization of the concentration realized through the acquiring of the control from Japan Tobacco International Netherlands B.V of Nefftekx World II B.V through the transfer of 100% of the quotes from Batata S.A; available at: <http://caa.gov.al/decisions/read/id/455>. Decisions of the Albanian Competition Commission no. 238 of 26 July 2012 on the authorization of the concentration realized through the acquiring of the full control of V.D.M Invest Comm. VA, through the acquiring of 99.99% of shares from Japan Tobacco International Holding B.V, Official Bulletin 2012, no. 8, p. 97; available at: <http://caa.gov.al/decisions/read/id/419>; etc.

<sup>53</sup> Decision of ACA no. 242 of 3 September 2012 on some amendments on the regulation on expenditures on following the procedures in front of ACA, Official Bulletin 2012, no. 8, p. 117; available at: [http://caa.gov.al/uploads/decisions/vendimi\\_242-shpenzimet.pdf](http://caa.gov.al/uploads/decisions/vendimi_242-shpenzimet.pdf).

in practice when comparing the total number of notifications before and after the 2010 reform<sup>54</sup>. This may have been caused by a global decrease in merger activity<sup>55</sup>. The first quarter of 2014 shows signs of improvements<sup>56</sup>, which are likely to affect Albania over the next year also. For instance, the Albanian Association of Banks foresees such trend at least in the banking sector having dedicated to this topic the front page of its publication 'Bankieri'<sup>57</sup>.

Other competition-related issues, such as liberalization and state aid, are not discussed in this paper. Liberalization, modeled after Article 106 TFEU, was included in the LPC following the 2010 reform, but the ACA has not dealt with any such cases yet. According to the changes introduced in 2010, Article 2 LPC, Albanian is applicable also to 'public undertakings and undertakings which have been granted by the state exclusive or special rights and undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly insofar that in law or in fact their activity is not obstructed'. This will be one of the major challenges facing the ACA in 2014-2015. In the Resolution on the ACA's work in 2013, the Parliament specifically asked the authority to deal with some concessions that have granted monopoly and/or exclusive rights to private undertakings. On the other hand, state aid is regulated in Law no. 9374 of 21 April 2005 on State Aid<sup>58</sup> and enforced by other institutions<sup>59</sup>.

#### IV. Conclusions

Free and effective competition is a *conditio sine qua non* for the market economy in Albania. Both the LPC and the institution in charge of its enforcement are becoming an important part of the Albanian legal framework and legal institutions. Its successful application in practice is very important

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<sup>54</sup> From 2004 until 2010 there was an average of 5.6 mergers per year. From 2010 until 2014 the average was 9.5 mergers per year. Considering the initial difficulties in the setting up of the institution, low awareness of companies about their duty to notify and the capacities of the ACA to screen the market for mergers that fall under its jurisdiction, this increase is not that big.

<sup>55</sup> There is a global and regional decrease in M&As since a recovery in 2011. See: 'M&A Index, H1 2013, Allen & Overy, London 2013; available at: <http://www.allenoverly.com/publications/en-gb/Pages/M-A-Index-H1-2013.aspx>, last visited on 13 December 2014.

<sup>56</sup> M&A Index Q1 2014, Allen & Overy, London 2014; available at: <http://www.allenoverly.com/publications/en-gb/mainindex/Pages/default.aspx>.

<sup>57</sup> 'Mergers and Acquisitions Ante Portas' (2013) 7 *Bankieri*.

<sup>58</sup> Official Journal no. 36.

<sup>59</sup> For more information on the amendments to the LPC introduced in 2010, see: P. Broka, E. Nazifi, 'Risitë në të drejtën shqiptare të konkurrencës' (2011) 1 *Revista Juridike*.

for an efficient market. It is a pre-condition of Albania's EU accession as well as an important tool to fight poverty by bringing competition to product and service markets that influence the daily life of many Albanians. The existing legal and institutional framework is a good start for a flexible yet efficient application of competition law and policy in Albania. However, constant improvements are needed to ensure its success.

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