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Editorial foreword

Dear readers,

We are pleased to present the 22nd issue of the Yearbook of Antitrust and Regulatory Studies (YARS 2020, Vol. 13(22)). This issue is focused on competition law and policy developments in Central and Eastern Europe, as well as South-Eastern Europe. In addition, the developments in EU law are discussed. Several of the articles are based on research which was originally presented at a conference held in December 2019 at the University of Zagreb under the auspices of the Academic Society for Competition Law (ASCOLA). The underlying goal of this issue is to discuss experiences with the enforcement of competition law and challenges faced by countries from Central and Eastern as well as South-Eastern Europe. In this context, the institutional setting of competition authorities and the review of their actions by the courts is of particular relevance.

The articles section begins with the article written by Dubravka Akšamović who presents her analysis of the winning and losing arguments before the High Administrative Court of the Republic of Croatia and, by doing so, tells the story of the practice of judicial review in Croatia. The next article, by Dijana Marković-B jalović, focuses on the competition enforcement model chosen by the candidate countries of the Western Balkans. It shows the weaknesses of judicial review in competition law cases in those jurisdictions. Veljko Smiljanić and Kevin Rihtar compare the institutional designs and historic legacy of the Slovenian and Serbian competition enforcement framework, and discuss the advantages and drawbacks of each model. Avdylkader Mucaj provides an analysis of the competition law system in Kosovo focusing on its institutional aspects, and the practice of its enforcement. He also explains the role of the EU in promoting competition law in the region. The next three articles move away from South-East Europe. Analyzing the Slovak jurisdiction as a case study, Ondrej Blažo discusses the ECN+ Directive and the prioritization policy as a challenge for national competition authorities. Next, Jorge Condezo, Annabel Kingma and Miroslava Scholten analyze judicial review of inspections conducted by competition authorities. They argue that identified limitations of judicial review could be addressed by extending the types of controls over inspections, that is, ex ante legislative guidance and internal managerial
accountability. Finally, Mirna Romić offers an overview of the evidentiary rules for proving a single and continuous infringement of competition rules through the case law of the Court of Justice of the EU, while also providing a brief overview of the challenges encountered by the courts and the NCA in Croatia in applying this standard.

In the legislation and case-law reviews section, Alexandr Svetlicinii writes about state-controlled entities in EU merger control, discussing the high-profile case of PKN Orlen and Lotos Group, while Robert Kordić, Marija Žrno and Raško Radovanović focus on gun-jumping cases in the SEE region. Mislav Bradvica and Kristina Rudic give an overview of the abuse of dominance cases in the electronic communications market in Croatia. Finally, Kamil Dobosz comments on the CJEU judgement in the Escalators and Elevators case, chronicling the arguments back to the national context.

In the book reviews section, three books are presented. First, Monika Wozniak reviews the book on the harmonisation of EU competition law enforcement written by Jurgita Malinauskaite, which analyses the interplay between national and EU competition law in the post-socialist Member States from 2004 onwards. In the next review, Marco Botta reviews the book ‘Competition law in Croatia’ (written by Jasminka Pecotić Kaufman, Vlatka Butorac Malnar, Dubravka Akšamović) as a detailed account of the relevant competition rules in Croatia and the major enforcement cases of the past two decades. Finally, Mario Krka reviews the book ‘Competition Authorities in South Eastern Europe – Building Institutions in Emerging Markets’, edited by Boris Begović and Dušan V. Popović, containing a series of papers devoted to analysing various aspects of competition law and policy in South-East Europe.

Finally, this issue contains also a report written by Vlatka Butorac Malnar and Jasminka Pecotić Kaufman on the 6th Competition Law and Policy Conference in Memory of Dr. Vedran Šoljan – ‘Challenges to the Enforcement of Competition Rules in Central and Eastern Europe’ & ‘Competition Policy Enforcement in Digital Economy: Recent Developments’, that was organized at the University of Zagreb, Croatia, on 12–13 December 2019. The event notably hosted Professor Bill Kovacic and Professor Kati Cseres as keynote speakers, but also provided an opportunity for Central and Eastern European competition law scholars to present their latest research.

We hope you find this issue informative and engaging.

Warsaw and Zagreb, November 2020

Maciej Bernatt, University of Warsaw
Jasminka Pecotić Kaufman, University of Zagreb
Judicial review in competition cases in Croatia: Winning and losing arguments before the High Administrative Court of the Republic of Croatia

by

Dubravka Akšamović

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An earlier version of this paper was presented at the 6th Zagreb Competition Law and Policy Conference in Memory of Dr. Vedran Soljan, Challenges to the Enforcement of Competition Rules in Central and Eastern Europe, 12–13 December 2019, Zagreb, Croatia.

Article received: 29 May 2020, accepted: 27 July 2020.
2. Number of successful and unsuccessful claims before the HACRC
3. The most common types of CCA decisions that were subject to an appeal
4. The most successful and the most unsuccessful claims before the HACRC

V. Conclusion

Abstract

The paper provides a systematic insight into judicial control of Croatian Competition Agency (CCA) decisions in Croatia. Its first part will explain how the applicable model of judicial control and CCA powers were changed over the years. The central part of the paper will be dedicated to the current model of judicial control of CCA decisions, to the powers of the High Administrative Court of Republic of Croatia (HACRC) and to the scope of judicial review in competition cases. In the last part of the paper, the author will present the results of a survey on the most successful and unsuccessful appeal arguments in competition cases before the HACRC in the five year period from 2015 until 2020. In its conclusion, the author will give a critical review of the quality and adequacy of the current model of judicial control in competition cases in Croatia, and will suggest changes that would, in the authors view, result in significant improvements.

Résumé

L’article donne un aperçu systématique du contrôle judiciaire des décisions de l’Agence croate de la concurrence en Croatie. En particulier, la première partie expose la manière dont le modèle applicable de contrôle judiciaire et les pouvoirs de l’Agence croate de la concurrence ont été modifiés au fil des ans. La partie centrale du document est dédiée au modèle actuel de contrôle judiciaire des décisions de l’Agence croate de la concurrence, aux pouvoirs de la Haute Cour administrative de la République de Croatie et à la portée du contrôle judiciaire dans les affaires de concurrence. Dans la dernière partie de l’article, l’auteur présente les résultats d’une analyse des motifs de recours les plus et les moins efficaces dans les affaires de concurrence devant la Haute Cour administrative de la République de Croatie au cours de la période de cinq ans (de 2015 à 2020). Dans la conclusion, l’auteur propose un examen critique de la qualité et de l’adéquation du modèle actuel de contrôle judiciaire dans les affaires de concurrence en Croatie, et suggère des changements qui pourraient entraîner des améliorations considérables.

Key words: competition law; standard and intensity of judicial review; procedure; High Administrative Court of the Republic of Croatia; Croatia.

JEL: K21, K23, K49, L41, L42
I. Introduction

Judicial review is the barometer of the health of governance in a particular jurisdiction (Forsyth, 2010, p. 3). In competition cases, judicial review seeks to place the competition authority and the undertakings on relatively equal footing, giving both parties a reasonable opportunity to present their case under conditions which do not place them at a substantial disadvantages vis-a-vis their opponent\(^1\).

Only such balanced approach ensures that the goals of competition law are achieved. In that sense, balanced, timely and effective judicial control is a key to efficient competition law enforcement.

While in some countries there are substantial bodies of scholarly work and/or other type of studies on different aspects of judicial review in competition cases, judicial review of the decisions issued by the Croatia Competition Authority (hereinafter; CCA) is in a way a disregarded (neglected) topic. Since that part of the puzzle is missing, it is hard to provide any relevant information or conclusions on the intensity, complexity and quality of judicial review.

The purpose of this paper is to fill that gap and, based on the conducted research, to provide closer insight into the judicial activity in competition cases in Croatia. In that sense, in the first part of the paper, the author will explain how the model of judicial control and CCA powers have changed over the years. The central part of the paper will be dedicated to the current model of judicial control of CCA decisions, powers of the HACRC and the scope of judicial review in competition cases. In the last part of the paper, the author will present the results of a survey of the most successful and unsuccessful appeal arguments in competition cases before the HACRC in the latest five-year period. Based on the findings, the author will express personal views and reflections on the adequacy and efficiency of judicial review in competition cases in Croatia.

II. Looking back: 25 years of Competition Law in Croatia with special emphasis on competent Courts and the main features of judicial review in competition cases in Croatia

Competition law in Croatia, as it is the case for many other east European countries, is a relatively recent phenomena. The first Competition Act (hereinafter; CA) was enacted in 1995\(^2\). The Croatian Competition Agency\(^3\)

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\(^2\) Competition Act was published in OJ No. 48/95 from 14 July 1996. It entered into force on 22 July 1995.
\(^3\) CCA was established by the Decision of the Parliament of the Republic of Croatia from 20 September 1995 (Published in OJ No. 73/95 and 79/95).
(CCA) was established in the same year; however, it only started working two years later, in 1997. Therefore, competition law enforcement in Croatia officially started in 1997.

The first CA was rather modest and simple. It only had 45 articles. However, having in mind the fact that it was brought about in post-war times, in very specific political and economic conditions, it doesn’t seem wrong to conclude that, on a general level, this first CA created a solid foundation for the future implementation of competition law in Croatia. Nonetheless, this Act also had numerous imperfections, including particularly problematic rules on judicial control of CCA decisions.

With this first CA, Croatia started to implement a model of judicial review of CCA decisions that was in force for more than 10 years and which made the role of the CCA largely marginal and irrelevant. According to that Act, the CCA had powers to decide on infringements but not on fines. It was the Misdemeanour Court⁴ who was deciding on fines, while the Administrative Court of Republic of Croatia was deciding on appeals against CCA decisions.

According to that model, two courts were involved in competition law enforcement: the Misdemeanour Court, which was deciding on the amount of fine when the CCA brought a decision on infringement, and the Administrative Court of Republic of Croatia which was deciding on the legality of CCA decisions.

With regard to the Misdemeanour Court’s powers to set up fines, the Court had broad discretion to decide on the amount of the fines. However, fines for infringements of competition rules set by Misdemeanour Court were quite low, so that the deterrent effect of the fining policy was not achieved. When it comes to the procedure before the Administrative Court of Republic of Croatia on the control of the legality of CCA decisions, it was ineffective. Proceedings lasted too long and there was no oral hearing. In general, this was a new legal discipline and the Administrative Court of Republic of Croatia was not adequately prepared to deal with this type of very specific and complex cases.

In its annual reports, the CCA was regularly expressing dissatisfaction with that aspect of competition law enforcement. For example, in the Annual report prepared for the Croatian Parliament for years 1998–1999⁵,

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⁴ The Misdemeanour Court is a specialized court which decides in accordance with the Misdemeanour Act. According to Article 5 of the Misdemeanour Act, the Misdemeanour Court is entitled to prescribe one of the following sanctions: 1. penalty (financial and prison penalties), 2. protective measures, in accordance with Article 50, Paragraph 2, of the Act. (2) Misdemeanour legal sanctions that are prescribed by the Act are: 1. warning measures (reprimand and conditional conviction), 2. protective measures (Article 50, Paragraph 1), 3. educational measures. See: http://pak.hr/cke/propisi,%20zakoni/en/MisdemeanourAct/EN.pdf (2.7.2020).

⁵ Agencija za zaštitu tržišnog natjecanja. (1999). Izvješće o radu u Agenciji za zaštitu tržišnog natjecanja za 1998 i 1999, Zagreb; Agencija za zaštitu tržišnog natjecanja, p. 12–13,
the CCA said in this regard that it had not been satisfied with the way or the speed of resolving competition cases before the Administrative Court, nor was it satisfied with the Misdemeanour Court’s decisions on fines. The reasons for those dissatisfactions were more than justified. For example, in the aforementioned Annual report, in the two year period from 1997 until February 1999, the CCA filed a claim before the Misdemeanour Court against a total of 18 undertakings, requesting from the Misdemeanour Court to fine those 18 undertakings for their infringements of competition law rules. However, none of those 18 undertakings got fines.

In 2003, the Croatian Parliament formulated a new Competition Act (hereinafter; 2003 CA). That Act brought forward numerous improvements, but the judicial review model established by the first CA unfortunately remained the same. As it was the case according to the first CA, the CCA was deciding on infringements, while the Misdemeanour Court was deciding on fines against the offenders of competition law rules. The Administrative Court of Republic of Croatia continued to be a judicial body, whose task was to decide on claims against CCA decisions regarding the legality of such decisions.

Such model of judicial control of CCA decisions was in force until 2009 when the Croatian Parliament enacted its third CA, which is still in force today. This CA (hereinafter; 2009 CA) came into force on 1 October 2009, however, it started to apply from 1 October 2010. With that Act, Croatia conducted a comprehensive competition law reform. Powers of the CCA were significantly increased and, among other things, the CCA was finally given the right to decide on fines. So the power to set up a fine for an infringement of competition law rules was taken away from Misdemeanour Court and given to the CCA. Moreover, the 2009 CA also introduced a set of novelties with regard to the procedure before the CCA, and the control of the legality of CCA decisions by (now) High Administrative Court of Republic of Croatia. With regard to that, it should be emphasized that Croatia also conducted in 2010 a comprehensive reform of its judicial system. An important aspect available at http://www.aztn.hr/uploads/documents/tn/godisnja_izvjesca/godisnje_izvjesce_AZTN_3.1998-4.1999.pdf (14.5.2020).

Ibidem, p. 12 (table 5).

6 Ibidem, p. 12 (table 5).

7 Competition Act was published in OJ No. 122 /03 from 30 July 2003.

8 See the explanations and comments on the main aspects of the 2003 CA reform provided by the Head of the CCA Cerovac M., available at http://www.aztn.hr/uploads/documents/o_nama/strucni_clanci/mladen_cerovac/10_mc.pdf (17.5.2020).

9 This most recent CA was published in OJ 79/09 from 8 June 2009 but it started to apply from 1 October 2010. It has been ammended in 2013 after Croatia bacame full member state of the EU and when new rules on the application of EU law came into the force.

of that reform was a new model of an administrative justice system. After
the adoption of the new Administrative Dispute Act\textsuperscript{11} in 2010, a two-tier
administrative courts system was introduced; administrative courts became
courts of full jurisdiction and the Administrative Court of Republic of Croatia,
which was previously the only administrative court in the Republic of Croatia,
became the second instance court and, at the same time, the highest judicial
instance in administrative matters in Croatia.

Although the HACRC is a second instance court, and is typically deciding
on appeals (claims) against the decisions of the first instance administrative
courts, by virtue of Article 67 of the 2009 CA, the HACRC became competent
to decide in the first instance on claims against CCA decisions.

Since such regulatory model is obviously unusual, one can raise the
question why the legislator decided that the HACRC, as a supreme judicial
administrative body, should take the role of a first instance court and decide
in the first instance? Is such political decision justified?

Although there are surely arguments which speak against such a regulatory
model, there are at least two reasons why such political decision can be
considered wise.

Firstly, by assigning competition law cases to the highest judicial
administrative body in Croatia, the legislator is sending a message about the
importance of competition law.

Secondly, competition law cases require certain (higher) level of judicial
skills, expertise and experiences. Therefore, it was the legislator’s presumption
that the judges of the HACRC would be up to the task.

Even though judges of the HACRC are the most experienced and the most
skilled administrative law judges in the country, it turned out that even for
them, competition law enforcement and judicial review of competition law
decision have represented a real challenge.

Starting from 2012, Croatia has begun with an implementation of a new
model of judicial review and a new era of competition law enforcement started
in Croatia. In 2012, the CCA started to impose fines and in 2013, when Croatia
became a full member of the EU, it started to apply EU law, whilst solely the
HACRC decided on fines and on the legality of CCA decision.

Regardless the potential criticism that one may have on the judicial review
of CCA decisions, there is no doubt that judicial review in competition
cases after 2012 became more profound and stringent. Unlike the previous
period during which competent courts, including the Administrative Court

\footnotesize{\textsuperscript{11} Administrative Dispute Act was published in OJ No. 20/10 and was ammended on several
occasions 143/12, 152/14, 94/16 – OiRUSRH i 29/17.}
of Republic of Croatia, were only conducting the so-called ‘control of the legality’ of CCA decisions, which was in most cases a rather general judicial control, the HACRC started to conduct more intensive judicial review of CCA decisions.

III. Main features of judicial review in competition cases before the High Administrative Court of Republic of Croatia

Regarding the judicial review before the HACRC, there are numerous relevant issues that are worthy of a more detailed analysis. However, an analysis of all procedural and substantive aspects of judicial control of competition cases before the HACRC, is beyond the scope of this article.

In the following part, the article will focus solely on those rules of judicial review that are contained in the 2009 CA, which determine the main aspects of judicial control of CCA decisions before the HACRC. In that sense, three issues will be analysed: first, the appeal procedure before the HACRC; second, the scope of judicial review; and third, the legal remedies against HACRC decisions.

1. Appealing CCA decisions: reasons, procedure and parties to the proceedings

The appeal procedure and the parties’ rights with regard to the appeal procedure before the HACRC in competition cases are regulated by two acts: the Law on Administrative Disputes and the 2009 CA. Although the Law on Administrative Disputes is the principal law applicable in the procedure before the HACRC, in competition cases the rules of the 2009 CA prevail. In competition cases, the Law on Administrative Disputes applies as a lex generalis only if a particular legal issue is not regulated by the 2009 CA.

Although the 2009 CA regulates the judicial control of CCA decisions with only two articles: Article 67 and Article 68 of the 2009 CA, those two provisions regulate most issues that relate to judicial review of CCA decisions before the HACRC. Therefore, there isn’t much space for the application of the Law on Administrative Disputes. In that sense, Article 67 of the 2009 CA regulates: the type of legal remedy against CCA decisions, the deadlines for lodging a claim, the reasons for the claim, the composition of a judicial panel, the legal effects of submitted a claim, etc.; Article 68 of the 2009 Act regulates most issues regarding the review of the facts before the HACRC and the standard of judicial review.
Regarding the legal remedy against CCA decisions, Article 67(1) of the 2009 CA prescribes that against the decision of the CCA, no appeal is allowed. In order to challenge a CCA decision, the unsatisfied party must file a claim (lawsuit) for an administrative dispute at the HACRC.

Moreover, according to the same Article 67(1), not all types of CCA decisions can be contested.

A lawsuit can be lodged only against the final decision; a lawsuit (claim) is not allowed against procedural orders (conclusions) (Pecotic Kaufman, Butorac Malnar and Aksamovic, 2019, p. 212) as the CCA usually decides on the parties’ procedural rights.

To clarify, during administrative proceedings, the CCA adopts one of two possible types of decisions, namely procedural orders (conclusions) and a (final) decision. A lawsuit can be lodged only against a (final) decision, while a party to the proceedings cannot file a lawsuit (claim) against procedural orders. Since the CCA decides by way of a procedural order on numerous rights, such as standing,12 initiation of the proceedings13, interim reliefs14, etc., the question is how can one challenge procedural orders?

An answer to this question is given in Article 67(4) where it says that a procedural order may be challenged by filing a complaint for an administrative dispute at the HACRC against the decision resolving the administrative matter in question15. This means that, when the CCA reaches a final decision on the merits of a claim, an injured party can bring a claim against that decision, challenging the part of the decision related to the contested procedural order.

Filing a claim to the HACRC does not suspend the decision, except the part of the decision regarding the fine. Therefore, when a party to proceedings files a lawsuit, and is contesting the part of the decision related to the fine, filing the lawsuit will suspend the enforcement of the decision on that fine until the HACRC reaches a final decision.

The 2009 CA in its Article 67 precisely specifies the reasons for a lawsuit. A lawsuit can be lodged on the following points:

(a) misapplication or erroneous application of substantive provisions of competition law;
(b) manifest errors in the application of procedural provisions;
(c) incorrect or incomplete facts of the case;
(d) inappropriate fine and other issues contained in the decision of the Agency16.

12 Article 36 of the 2009 CA.
13 Article 39 of the 2009 CA.
14 Article 51(4) of the 2009 CA.
15 Article 67(3) of the CA.
16 Article 67(1) of the 2009 CA.
An issue that also arises in relation to a claim before the HACRC is who has standing before the HACRC. In other words, who is entitled to challenge a CCA decision?

A claim against a CCA decision establishing an infringement can be filed only by an injured party, whereas a claim against a decision that no infringement of competition rules has been committed can be submitted by a person who filed the initiative and a person who has been granted the same procedural rights (Pecotic Kaufman, Butorac Malnar and Aksamovic, 2019, p. 213).

All claims are decided by a panel of three judges. The deadline for filing a claim is 30 days from the receipt of the decision. When deciding on a claim, the HACRC can bring one of the following decisions: it can dismiss the claim, reject it or accept it. The HACRC will dismiss the claim when it finds the claim to be incomplete. If the HACRC establishes that the claim is unfounded, it will reject the claim. When the HACRC finds that the claim is well-founded it will accept the claim.

When the HACRC concludes that a claim is well-founded, it has a few options: it can either nullify the decision of the CCA, it can remand it to the CCA ordering an action, or it can resolve the matter itself.

Although the HACRC is entitled to decide on the merits of a case and to replace the CCA decision, according to available data, the HACRC has never used this power. In all cases in which the HACRC has accepted a plaintiff’s allegations in the lawsuit and annulled the CCA decision, it so far always remanded the cases back to the CCA for reconsideration.

2. The scope of judicial review: review of legality or full review

One frequent issue arising during the judicial control of competition law decisions concerns the question of the scope or intensity of judicial review (Vesterdorf, 2005; Schwarze, 2004; de la Torre, Fournier, 2017). Should a competent court conduct a full review of the contested decision, including an extensive evaluation of all the facts and evidence of the case, new evidence and economic evidence, or should the scope of judicial review be limited to the control of the legality of the contested decision only?

Different European countries have adopted different models of judicial review of competition authorities’ decisions. For example, in Germany, competent courts conduct full review of all facts and evidence (Wise, 2005; 17 Article 67(1) of the 2009 CA.

18 Ibidem.

19 Articles 57 and 58 of the Administrative Disputes Act.
in a large number of other European countries, particularly in those countries where administrative courts decide on appeals against competition agency’s decisions, courts are obliged to conduct the so-called ‘control of legality’ of competition authorities’ decision (Gajin, 2019; Galewska, 2014; Fatur, Podobnik, Vlahek, 2016; Pecotic Kaufman, Butorac Malnar, Aksamovic, 2019; Rea, 2020; Svetlicinii, 2019). This means that in the review procedure courts will only check whether a competition authority violated parties’ procedural rights or whether there was a manifest violation of any other legal rule. The court will not conduct ‘de novo’ proceeding and it will not re-examine all the facts and evidence from the beginning.

With regard to the scope of judicial review in competition cases in Croatia, until 2012 courts were only conducting a ‘control of legality’ without going into a deeper evaluation of the facts and evidence. This type of control was rather superficial and definitely insufficient.

Following the 2012 administrative justice reform, the powers of the administrative courts in the Republic of Croatia, including the powers of the HACRC, have been significantly broadened.

After 2012, the HACRC became entitled to conduct a full review (or unlimited review) of administrative decisions including, but not limited to, decisions brought by the CCA.

Moreover, administrative courts and the HACRC became obliged to conduct an oral hearing with the possibility to decide on the merits of the case.

However, those general powers of the HACRC, with regard to the scope of judicial review in competition cases, are subject to limitations prescribed by the 2009 CA. According to Article 68 of the 2009 CA, in the proceedings before the HACRC, judges were supposed to debate and decide on the basis of the facts presented in evidence during the proceedings\(^{20}\). Moreover, plaintiffs could not present new facts before the HACRC. He/she could only propose new evidence relating to the facts that had been presented as evidence during the proceedings\(^{21}\). A plaintiff was entitled to present new facts before the HACRC under the condition that the plaintiff could prove that s/he had not had or could not have had knowledge of these facts during the proceedings before the CCA\(^{22}\).

This regulatory solution significantly narrowed the scope and the intensity of judicial review before the HACRC. Consequently, instead of conducting an extensive appraisal of all the facts and evidence before the HACRC, including the examination of new evidence which could be crucial for the final outcome of the court proceedings, the 2009 CA introduced a hybrid model of judicial

\(^{20}\) Article 68(1) of the 2009 CA.

\(^{21}\) Article 68(2) of the 2009 CA.

\(^{22}\) Article 68(3) of the 2009 CA.
review which is still very much resembling the abandoned model of the ‘control of legality’ of CCA decisions. This choice was interesting since the ‘control of legality’ model had been changed mostly due to it being considered ineffective.

The weakness of this legal solutions should be further considered because a party dissatisfied with a HACRC judgment has only a limited right to a further recourse (Pecotic Kaufman, Butorac Malnar and Aksamovic, 2019, p. 215). The only legal remedy against a HACRC judgment is to request an extraordinary examination of the final judgment, which is an extraordinary legal remedy regulated by the Law on Administrative Disputes (Pecotic Kaufman, Butorac Malnar and Aksamovic, 2019, p. 215).

3. Legal remedies against HACRC decisions

As mentioned earlier, the parties to the proceedings initiated before the HACRC cannot appeal a judgment brought by the HACRC. However, parties to the proceedings brought before the HACRC may, due to a violation of the law, propose to the State Attorney’s Office of the Republic of Croatia to file a request with the Supreme Court of the Republic of Croatia for an extraordinary examination of the legality of the final decisions made by the High Administrative Court23. So, only the State Attorney’s Office, which has a broad discretionary power to decide on such request, can on behalf of the parties to the proceedings request a review of a HACRC judgment. If the State Attorney’s Office finds that the request is well grounded, it will forward the request to the Supreme Court of Republic of Croatia. Likewise, the State Attorney’s Office of the Republic of Croatia can, without the obligation to explain its decision, reject the parties’ request. If the Supreme Court of the Republic of Croatia adopts the request, it may annul the judgment and remand the case for a new decision, or reverse the judgment24.

Since 2012, when the new model of judicial review of competition law decisions was introduced, the State Attorney’s Office of the Republic of Croatia has received only one request for an extraordinary examination of the legality of a final decision of the HACRC25. This request was sent to the Supreme Court; however, 8 years thereafter, the Supreme Court has still not decided on that case. The decision of the Supreme Court is being awaited with interest. Once the decision is rendered, it will be the first Supreme Court’s decision in relation to competition matters in Croatia.

23 Article 78(1) of the Law on Administrative Disputes.
24 Article 78(4) of the Law on Administrative Disputes.
25 The request was made by the CCA against the HACRC judgment in the so-called Orthodontists cartel case (Judgment of the HACRC of 5 March 2015, UsII-70/14-6).
However, in the last five or six years, the HACRC has delivered numerous judgments against CCA decisions. These judgments represent valuable material for academic research and to draw conclusions about general trends and the efficiency of judicial control of CCA decisions.

IV. Judicial activity before the HACRC in competition cases with special emphasis upon successful and unsuccessful claims before the High Administrative Court

Since 1995 and the enactment of the first CA, decisions of the CCA and of the Administrative Court are published in the National Gazette. Since 2003 and the enactment of the 2003 CA, decisions of the HACRC are also published on the website of the CCA. This commendable practice ensured transparency of the work of the CCA as well as transparency of judicial control of CCA decisions. It has also significantly facilitated the research of past and current trends with regard to judicial activity in competition cases in Croatia. Based on the data published on the CCA website, in the following chapters, the author presents the results of research aimed at answering the following questions:

1. What is the average appeal ratio of CCA decisions?
2. What is the average number of successful and unsuccessful appeals?
3. Which are the most common types of CCA decisions that are subject to an appeal?
4. Which are the most successful and the most unsuccessful appeal arguments brought before the HACRC?

This is subject to the analysis of all CCA decisions appealed in the five-year period from 2014 until 1.1.2020.

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26 See: http://www.aztn.hr/ (11.5.2020).
27 Subject to analysis are only cases which relate to cartels, prohibited agreements, abuse of a dominant position and concentrations. To clarify, besides the decisions which relate to these types of infringements, the CCA also gives expert opinions at the request of the Croatian Parliament or the Government of the Republic of Croatia or other central administration authorities. Moreover, since 2017, based on the Act on the prohibition of unfair trading practices in the business-to-business food supply chain (OG 117/17), it also decides on unfair trading practices. Those opinions and decisions are also published on the CCA website, but they are not included in this research and presented data.
1. Number of decisions brought by the CCA and the average appeal ratio (2014–2020)

In the five-year period of time from 2014 until January 2020, the CCA brought a total of 322 decisions related to competition law enforcement; out of them, plaintiffs brought a total of 82 claims before the HACRC. This leads to the conclusion that approximately 25% of all CCA decisions are subject to an appeal.

Table 1 shows the number of decisions brought by the CCA and the total number of claims against those decisions on an annual basis.

Table 1.

<table>
<thead>
<tr>
<th>Year</th>
<th>CCA decisions per year</th>
<th>Number of claims per year</th>
<th>Number of appealed decisions in %</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>52</td>
<td>13</td>
<td>25</td>
</tr>
<tr>
<td>2015</td>
<td>86</td>
<td>39</td>
<td>45.3</td>
</tr>
<tr>
<td>2016</td>
<td>67</td>
<td>15</td>
<td>22.3</td>
</tr>
<tr>
<td>2017</td>
<td>41</td>
<td>6</td>
<td>14.6</td>
</tr>
<tr>
<td>2018</td>
<td>32</td>
<td>4</td>
<td>12.5</td>
</tr>
<tr>
<td>2019 (until 1 January 2020)</td>
<td>44</td>
<td>5</td>
<td>11.4</td>
</tr>
<tr>
<td><strong>TOTAL NUMBER</strong></td>
<td><strong>322</strong></td>
<td><strong>82</strong></td>
<td><strong>25.46</strong></td>
</tr>
</tbody>
</table>

2. Number of successful and unsuccessful claims before the HACRC

Table 2 shows the number of successful and unsuccessful claims brought before the HACRC. Note that out of the aforementioned 82 claims, 14 claims were successful, while 63 claims were dismissed. There were 5 (other) decisions where the HACRC dismissed the action (lawsuit) as incomplete or as lacking in jurisdiction. A little more than 17% of the successful claims, compared to almost 77% of unsuccessful claims, shows that the chance to win a case before the HACRC against the CCA is pretty low. The reasons for the low success rate are difficult to detect, but we can assume that they include unfounded claims, poor or insufficient evidence and others.

28 In this case, the HACRC delivered its decision based on the rules prescribed by Article 29 and 30 of the Law on Administrative disputes.
Table 2.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of claims per year</th>
<th>Number of successful claims per year</th>
<th>Number of unsuccessful claim per year</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>13</td>
<td>4</td>
<td>9</td>
<td>0</td>
</tr>
<tr>
<td>2015</td>
<td>39</td>
<td>4</td>
<td>31</td>
<td>4</td>
</tr>
<tr>
<td>2016</td>
<td>15</td>
<td>3</td>
<td>12</td>
<td>0</td>
</tr>
<tr>
<td>2017</td>
<td>6</td>
<td>0</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>2018</td>
<td>4</td>
<td>3</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>2019</td>
<td>5</td>
<td>0</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>82</td>
<td>14</td>
<td>63</td>
<td>5</td>
</tr>
</tbody>
</table>

Total % of successful and unsuccessful claims from 2014 – 1 January 2020: 17.07% successful claims, 76.82% unsuccessful claims.

3. Types of CCA decisions that were most frequently subject to appeals

Table 3 and 4 show the most frequently appealed decisions and the success ratio regarding those claims.

Table 3 shows that there are six types of CCA decisions that were most frequently challenged. These include decisions dismissing an initiative, terminating proceedings, prohibiting an agreement or a cartel, abusing a dominant position, fining for failing to notify a merger and rejecting a request for the reinstitution of the proceedings.

Out of the 82 decisions (see table 1 and 2), 29 claims concerned a decision of the CAA to dismiss an initiative. Most of these cases related to a situation where a claimant was requesting from the CCA to open an ex officio investigation of an alleged abuse of a dominant position against a certain undertaking, where CCA rejected such a request.

The second most challenged decision of the CCA concerned cases related to the existence of a prohibited agreement or a cartel agreement. Out of the 82 decisions, 17 claims were brought against CCA decisions dealing with infringements of competitions rules related to the existence of a prohibited agreement (cartel agreement) and the level of the fine.

The third most challenged type of CCA decisions is the decision to reject a request for reinstituting the proceedings. However, it is noticeable that 12 claims were brought in 2015, whilst there was only one such claim in 2017.
All the twelve claims mentioned above were submitted by the same claimant, which makes the analysed data almost irrelevant.

However, with regard to the data in table 3, it is worth mentioning that only two claims are related to CCA decisions regarding abuse of a dominant position. If we translate this number into a real life situation, it means that the CCA conducted only two proceedings for abuse of a dominant position in a five-year period, which seems an absolutely unrealistic scenario and leads to one of two following possibilities: either in Croatia abuse of a dominant position is not a widespread practice or the CCA has not been researching and thus detecting this conduct. Since it is hard to believe that Croatian undertakings are restraining themselves from abusing their dominance, it appears that it is more likely that the CCA has been insufficiently researching the abusive behaviours of dominant undertakings.

Furthermore, it should be emphasized that only two decisions relate to mergers, and both are in connection to a CCA decision to impose a fine for failing to notify a merger. The significant point in this matter is that both claims were brought in 2014 when Croatian undertakings were still largely unaware of the possibility of being fined for failing to notify mergers. Since no infringement for the same offence was registered after 2014, we may assume that the CCA’s fining policy regarding the failure to notify mergers has achieved the desired deterrent effect.

**Table 3.**

<table>
<thead>
<tr>
<th>Year</th>
<th>Decision to dismiss initiative</th>
<th>Decision on the termination of the proceedings</th>
<th>Decision on the prohibited agreement – cartel</th>
<th>Decision on the abuse of dominant position</th>
<th>Decision on fine for failing to notify merger</th>
<th>Decision on rejection of the request for reinstitution of the proceedings</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>7</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>2015</td>
<td>11</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>12</td>
</tr>
<tr>
<td>2016</td>
<td>3</td>
<td>0</td>
<td>10</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2017</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>2018</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2019</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>82 appealed decision</strong></td>
<td><strong>29</strong></td>
<td><strong>3</strong></td>
<td><strong>17</strong></td>
<td><strong>2</strong></td>
<td><strong>2</strong></td>
<td><strong>13</strong></td>
</tr>
</tbody>
</table>
4. The most successful and unsuccessful claims before the HACRC

Although every competition case is fact specific, the analysis of the case-law provides useful information on the likelihood of success of the arguments on appeal and it may reduce the risks associated with the decision of whether to engage into competition law litigation or not. Having this in mind, the data provided in table 4 below intended to show the general success ratio with regard to particular claims raised before the HACRC. In other words, table 4 will show whether an appeal is more likely to succeed with some claims in comparison to others.

Table 4 also suggests that all parties who were contesting CCA decisions on the termination of proceedings succeeded with their claims. There were three such claims and all of them proved successful.

Moreover, a quite high success ratio is noticeable with regard to the two decisions on an abuse of a dominant position and in a merger. In both cases, the general success ratio is 50%. However, we cannot consider this information too relevant since the statistical sample was too small for definite conclusions.

Probably the most relevant information of the entire research concerns claims regarding prohibited agreements (cartels). Out of the 17 claims against CCA decisions on prohibited agreements (cartels), the HACRC upheld the claimants in six of these cases, which makes the success ratio in cartel cases around 35%. This is quite a high ratio, comparable to the success rate of cases brought before EU courts. According to the study by Paemen and Blondeel, the success ratio in cartel cases before the GC is around 40% (Paemen and Blondeel, 2017, p. 173–174).

This information should also be considered from different stand points. Firstly, it signals that there is a chance to win a cartel case before the HACRC. Secondly, it shows that the CCA’s estimations and evaluations are not irrefutable. Lastly, regardless of the criticism that may exist on particular decisions, and generally on the judicial control of CCA decisions by the HACRC, these figures show that the HACRC is investing time and effort in resolving these issues and is making progress.
Table 4.

<table>
<thead>
<tr>
<th>Type of appealed decision</th>
<th>Decision to dismiss initiative</th>
<th>Decision on the termination of the proceedings</th>
<th>Decision on the prohibited agreement – cartel</th>
<th>Decision on the abuse of dominant position</th>
<th>Decision on fine for failing to notify merger</th>
<th>Decision on rejection of the request for reinstitution of the proceedings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total (number of claims)</td>
<td>29</td>
<td>3</td>
<td>17</td>
<td>2</td>
<td>2</td>
<td>13</td>
</tr>
<tr>
<td>Successful claims</td>
<td>2</td>
<td>3</td>
<td>6</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Unsuccessful claims</td>
<td>27</td>
<td>0</td>
<td>11</td>
<td>1</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>Successful claims in (%)</td>
<td>8%</td>
<td>100%</td>
<td>35.3%</td>
<td>50%</td>
<td>50%</td>
<td>0</td>
</tr>
</tbody>
</table>

V. Conclusion

Twenty-five years seems the right time to evaluate the achievements and failures during the time of the creation of a complex system of competition law rules in Croatia. Meanwhile, a predictable legal framework of competition law rules has been established. In that sense, legal experiments associated with finding the right model of administrative procedure and judicial control of competition law decisions is behind us. Therefore, regardless of criticism with regard to some existing legal solutions, the current model of judicial review ensures at least a minimum standard of legal protection guarantees and due process.

However, in order to improve the quality of judicial review in competition law, changes would be welcome with regard to some aspects of judicial review. Firstly, rules on the scope of judicial review and the evaluation of evidence should be re-examined. The HACRC should conduct a full review of all the evidence and facts, and its review should not be limited solely to the facts established in the administrative procedure before the CCA.

Moreover, the current model of judicial review of the HACRC judgments by the Supreme Court should be improved further. The existing model of judicial control of HACRC judgments is too rigid and seriously limits potential claimants’ rights to access the second instance court.

With regard to research data on the scope and intensity of judicial review before the HACRC, this data may be used only for some rather general
conclusions. It is noticeable that the average success rate in competition cases is rather low. Overall success rate below 20% may signal that some aspects of judicial review are inefficient. Therefore, a more detailed analysis of every single decision should be made in order to detect the causes of the problem, if any exist.

Furthermore, some of the data presented are, due to a too small number of cases (samples), insufficient for drawing any relevant conclusions. This relates particularly to CCA decisions on abuse of a dominant position and mergers.

Lastly, as it has already been mentioned in this article, probably the most relevant information of the whole research concerns the success rate in cartel cases (or prohibited agreements). Although this data should be taken with a certain amount of scepticism, but it should not be fully disregarded. A success rate above 35% gives plaintiffs a cause for satisfaction. It sends the message that the HACRC is willing to hear their arguments, to analyse them and that the HACRC is not taking CCA’s findings for granted.

Literature


Competition Enforcement Models in the Western Balkans Countries – The Rule of Law Still Terra Incognita?

by

Dijana Marković-Bajalović*

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Abstract

The administrative model of competition law enforcement is the prevailing model in the EU Member States. Although Member States are free to choose between the administrative and the judicial model or their combination, many of them opted for the administrative model taking the EU model as an example. The same is valid for the candidate and potential candidate states of Western Balkans. The new Directive 2019/1 deals with the issue of safeguarding the fundamental rights in competition proceedings in general terms only, while stabilisation and association agreements lay down the rule of law as a fundamental principle, but do not say much regarding the features of the competition enforcement model. Candidate countries did not consider the rule of law requirements when designing their competition enforcement models. Competition authorities combine investigative and decision-making powers, preventing them from impartial decision-making. Rules on the appointment, that is, election of members of decision-making bodies, and the limited term of office, made competition authorities susceptible to political influence. Administrative courts are in charge of disputes initiated against decisions of competition authorities in the second instance. Limitations on applying full jurisdiction proceedings, and the modest expertise of administrative law judges in competition law, prevent courts from dealing with the merits of competition cases. Hence, effective judicial control of decisions of competition authorities is missing. The European Commission should monitor the observance of fundamental legal principles in competition law enforcement when assessing the readiness of candidate states to join the EU.

Résumé

Le modèle administratif d’application du droit de la concurrence est le modèle qui prévaut dans les États membres de l’UE. Bien que les États membres puissent choisir entre le modèle administratif et le modèle judiciaire ou leur combinaison, nombreux sont ceux qui ont opté pour le modèle administratif en prenant le modèle de l’UE comme modèle. La même remarque vaut pour les pays candidats des Balkans occidentaux. La directive 2019/1 traite la question de la sauvegarde des droits fondamentaux dans les procédures de concurrence en termes généraux seulement, tandis que les accords de stabilisation et d’association posent l’État de droit comme principe fondamental, sans toutefois en préciser les caractéristiques du modèle d’application des règles de concurrence. Les pays candidats n’ont pas tenu compte des exigences de l’État de droit lors de la conception de leurs modèles d’application des règles de concurrence. Les autorités de concurrence combinent des pouvoirs d’enquête et de décision, les empêchant ainsi de prendre des décisions impartiales. Les règles de nomination, c’est-à-dire de l’élection des membres des organes de décision, et la durée limitée du mandat, ont rendu les autorités de la concurrence sensibles à l’influence politique. Les tribunaux administratifs sont en charge des procédures engagées contre les décisions des autorités de
The fundamental principle of the rule of law is embedded in the EU founding treaties.\(^1\) The Charter of Fundamental Rights reiterates its significance for the EU and its member states.\(^2\) The observance of the Charter is obligatory for EU institutions and member states in line with Article 6 of the Treaty on European Union.\(^3\) Adherence to the rule of law is among the essential criteria when assessing the ability of a candidate country to join the EU (European Council, 1993, p. 13).

Several countries of the Western Balkans (hereinafter; WB) aspire to join the EU. Albania, North Macedonia, Montenegro, and Serbia have obtained the candidate status already,\(^4\) while Bosnia and Herzegovina and Kosovo\(^5\) are

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\(^1\) Article 2 of the Treaty on the European Union.


\(^3\) The explicit reference to the Charter on Fundamental Rights in the Lisbon Treaty was regarded as the most important normative intervention since it provided the Charter with legal force equal to that of the Treaties. See Jordanova (2011), 107. Legal theory regarded the observance of the Charter obligatory even before the conclusion of the Lisbon Treaty: ‘In practice, however, the legal effect of the solemn proclamation of the Charter of Fundamental Rights of the European Union will tend to be similar to that of insertion into the Treaties on which the Union is founded.’ (Lenaerts and De Smitjer, 2001, p. 298–299).

\(^4\) North Macedonia was granted candidate status as early as in December 2005. Other countries were awarded candidate status during this decade: Montenegro in December 2011, Serbia and Albania in June 2014.

\(^5\) This designation is without prejudice to positions on status and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.
still potential candidates. As of 2016, stabilisation and association agreements (hereinafter; SAA) between all these countries and the EU have entered in force. The SAAs lay down the rule of law as one of the general principles. The European Commission (hereinafter; EC) monitors the advancement in fulfilling the criteria for each candidate country, and it gives the highest priority to the assessment of the criteria in the monitoring process. In 2018 the EC reiterated: “For the prospect of enlargement to become a reality, a firm commitment to the principle ‘fundamentals first’ remains essential. Structural shortcomings persist, notably in the key areas of the rule of law and the economy. Accession countries must deliver on the rule of law, justice reforms.... Embracing core European values such as the rule of law is central to the generational choice of aspiring to EU membership.” (EC, 2018b, p. 2).

The accession process fostered the adoption of competition laws harmonised with EU law in the WB countries. The negotiation chapter on competition policy (Chapter 8) represents by far one of the toughest parts of the negotiation process between the candidate countries and the EC. One of the reasons for the complexity of accession negotiations in this field is the power given by Regulation 1/2003 to national competition authorities and courts of member states to implement the EU competition rules hand in hand with the EC. There is no break time for a competition authority and courts.

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6 Bosnia and Herzegovina submitted its application to join the EU on 15.02.2016. The SAA between the EU and Kosovo entered into force in April 2016.
7 SAA agreements between the EU and countries of the Western Balkans:
- SAA between the European Communities and their Member States and Bosnia and Herzegovina, OJ L 164, 30.06.2015.
- SAA between the European Communities and their Member States and the FRY Macedonia. OJ L 84, 20.3.2004.
8 Article 2 SAA EU-Albania, Article 2 SAA EU-Bosnia and Herzegovina, Article 3 SAA EU-Kosovo, Article 2 SAA EU-Montenegro and Article 2 SAA EU-Serbia.
9 See Article 71 SAA EU-Albania, Article 71 SAA EU-Bosnia and Herzegovina, Article 75 SAA EU-Kosovo, Article 73 SAA EU-Montenegro and Article 73 SAA EU-Serbia.
10 The chapter on competition policy was among the last closed in the negotiation process between the EC and its youngest member state – Croatia. See EC (2012).
of a new member state after joining the EU to improve their capacities for competition law enforcement. They must be prepared to apply EU competition law from the very beginning of their EU membership.12

Compliance with the rule of law should be assessed by the EC, also when monitoring the implementation of competition law during the accession process. However, it seems that the EC takes a little notice of the rule of law when it comes to assessing the competition investigation and decision-making procedures in candidate countries. It seems that unresolved issues concerning models of competition law enforcement on the EU level have brought about the EC’s apathy for the same issues when it comes to candidate countries (Forrester, 2009; Slater, Thomas and Waelbroeck, 2008, p. 28). The EU has so far not dealt more profoundly with the models of competition law enforcement in the Member States (Editorial Comments, 2015). Directive 2019/1 is addressing the issue of providing competition authorities with more powers, albeit devoting only one article to the safeguards of fundamental rights.13 The SAAs oblige accession countries to gradually approximate national legislation with the EU acquis, and to ensure its effective implementation, meaning that accession countries will need to transpose Directive 2019/1 as well.

In this article, we explain firstly the requirements stemming from Directive 2019/1 concerning the rule of law and the SAA obligations of candidate countries in the field of competition. We proceed by assessing competition enforcement models existent in the WB countries from the perspective of their compatibility with the rule of law. We analyze the status, structure, and investigative and decision-making powers of first instance competition bodies, as well as the ability of second instance courts to make a substantive review of competition decisions. In the end, we provide concluding remarks and our suggestions for improving the EC monitoring process regarding the SAA’s Chapter 8.

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12 By comparison, in areas regulated by directives, a new member state can negotiate a delayed application for a time period defined in the accession agreement or submit a request to the Council or the Commission for a temporary derogation from acts of the EU institutions adopted shortly before the accession. See, for example, Article 47 and 49 of the Accession Treaty between Croatia and the EU member states, O.J. L 112, 24.4.2012.

13 Article 3 of the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019.
II. The EU Directive 2019/1

Recently, the EU has taken steps to strengthen the status of national competition authorities (hereinafter; NCA) by adopting Directive 2019/1. The Directive aims to empower the NCA to be able to enforce EU competition law effectively. The Directive’s Preamble states that many NCA lack necessary guarantees of independence, resources, and enforcement and fining powers. Directive 2019/1 does not interfere with the rights of Member States (hereinafter; MS) to select the most appropriate model of competition law enforcement. MS can entrust the enforcement of Articles 101 and 102 TFEU exclusively to an administrative authority, as is the case in most jurisdictions, or they can assign this task to both judicial and administrative authorities. However, the exercise of powers conferred by the Directive to a NCA “should be subject to appropriate safeguards which at least comply with general principles of Union law and the Charter of Fundamental Rights of the European Union, in particular in the context of proceedings which could give rise to the imposition of penalties. These safeguards include the right to good administration and the respect of undertakings’ right of defense, an essential component of which is the right to be heard.” When specifying MS obligation to comply with general principles of Union law and the EU Charter, the Directive explicitly refers to safeguards in respect of the undertakings’ right of defense, including the right to be heard and the right to an effective remedy before a tribunal.

The Directive does not elaborate on these obligations in detail. MS need to interpret Article 3 and figure out what they should do precisely to comply with the obligations deriving from it (Temple Lang, 2017, p. 48). The diversity of competition enforcement models in the EU prevented the Directive’s drafters from specifying which guarantees of fundamental rights MS should provide in first instance and second instance proceedings. Since administrative authorities enforce competition law in the first instance in most MS, these MS need to assess the compatibility of their enforcement procedure with fundamental rights by analysing the quality of the first instance administrative proceedings and the second instance judicial review, taken in combination.

Regarding the judicial review requirements, the Directive merely asks for “an effective remedy before a tribunal,” avoiding even to specify a requirement for “an independent and impartial tribunal established by law,” existing in

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14 Par. 5.
15 Par. 13.
16 Par. 14.
17 Article 3.
Article 6(1) ECHR and Article 47(2) EU Charter. One could argue that these notions have already been explained in the case-law of the European Court for Human Rights (hereinafter; ECtHR) and the Court of Justice of the EU (hereinafter; CJEU), so that there was no need to lay down more detailed rules in Directive 2019/1. In the ECtHR interpretation of ECHR Article 6(1), the notion of ‘tribunal’ comprises not only courts of law integrated within the standard judicial machinery of the concerned country,\textsuperscript{18} but also other bodies, provided that they comply with substantive and procedural guarantees laid down in Article 6(1).\textsuperscript{19} A tribunal needs to perform a judicial function, that is to say, to determine matters within its competence based on rules of law and after proceedings conducted in a prescribed manner.\textsuperscript{20} A tribunal must have the power to decide cases,\textsuperscript{21} namely to issue a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party.\textsuperscript{22} This power must be executed in full jurisdiction.\textsuperscript{23} It means that the tribunal must examine all questions of fact and law relevant to the dispute before it.\textsuperscript{24} However, a tribunal is not precluded from performing other functions, such as administrative, regulatory, adjudicative, advisory, and disciplinary.\textsuperscript{25} A tribunal must also satisfy a series of other requirements,\textsuperscript{26} namely: independence from other branches of state power, in particular from the executive, but also vis-à-vis the parties;\textsuperscript{27} the manner of appointment of the members of the tribunal, the duration of their term of office, the existence of sufficient safeguards against the risk of outside pressures\textsuperscript{28} and the appearance of independence;\textsuperscript{29} impartiality of the tribunal, both in subjective (non-existence of personal prejudice or bias of a particular judge) and objective terms (the tribunal itself and its composition offer sufficient guarantees to exclude any legitimate doubt in respect of its impartiality);\textsuperscript{30} procedural guarantees, several of which appear in the text of Article 6(1) ECHR itself.

\textsuperscript{18} Mutu and Pechstein v. Switzerland, 40575/10 and 67474/10, 2.10.2018, par. 139.
\textsuperscript{19} Rolf Gustafson v. Sweden, 23196/94, 1.07.1997, par. 45.
\textsuperscript{20} Sramek v. Austria, 8790/79, 22.10.1984, par. 36; Belilos v. Switzerland, 10328/83, 29.04.1988, par. 64.
\textsuperscript{21} Bentham v. The Netherlands, 8848/80, 23.10.1985, par. 40.
\textsuperscript{22} Van de Hurk v. The Netherlands, 16034/90, 19.04.1994, par. 45.
\textsuperscript{23} Mutu and Pechstein v. Switzerland, par. 139.
\textsuperscript{24} Ramos Nunes de Carvalho e Sá v. Portugal, 55391/13, 55728/13 and 74041/13, 21.06.2016, par. 176–177.
\textsuperscript{25} H. v. Belgium, 8950/80, 30.11.1987, par. 50.
\textsuperscript{26} Coëme and Others v. Belgium, 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, par. 99.
\textsuperscript{27} Beaumartin v. France, 15287/89, 24.11.1994, par. 38; Sramek v. Austria, par. 42.
\textsuperscript{28} Ramos Nunes de Carvalho e Sá v. Portugal, par. 153–156.
\textsuperscript{29} Sramek v. Austria.
\textsuperscript{30} Micallef v. Malta, 17056/06, 15.10.2010, par. 93.
The ECtHR confirmed several times that it is in line with Article 6(1) ECHR to confer to administrative authorities prosecution and punishment of ‘minor’ criminal offenses, provided that a defendant is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6.\textsuperscript{31} Administrative authorities, which do not themselves satisfy Article 6(1) requirements, must be subject to a subsequent review by a judicial body that has full jurisdiction. The ECtHR equalled full jurisdiction with the power to quash in all respects, on questions of fact and law, the decisions of the body below.\textsuperscript{32} It did not require the second instance court to have the power to substitute its own decision for the decision of the lower level body, which is the regular understanding of full jurisdiction. However, in cases where the second instance court does not have the power to examine facts by itself, the issue of the intensity of the court’s review becomes essential.\textsuperscript{33} This view became critical in competition cases where an administrative body is deciding in the first instance, while an administrative court in the second instance controls the legality of the lower body’s decision.

In the \textit{Menarini} case, the ECtHR analyzed the Italian model of judicial review in competition cases. The ECtHR classified competition law cases as criminal cases, based upon criteria defined in \textit{Engel}.\textsuperscript{34} However, relying upon its judgment in \textit{Jusilla},\textsuperscript{35} the ECtHR considered competition cases different from hard-core criminal cases, with the consequence that the criminal-limb ECHR guarantees do not necessarily apply with full stringency.\textsuperscript{36} The Court found that appellate courts, deciding upon the legality of the decision of the Italian Competition Authority, met standards of independence and impartiality required by Article 6 ECHR, and that they examined various defendant’s allegations, both in facts and law. The Court did not have the power to substitute itself for an independent administrative authority. However, it was


\textsuperscript{32} Schmautzer v. Austria, 15523/89, 23.10.1995, par. 36; Gradinger v. Austria, 15963/90, 23.10.1995, par. 44; Grande Stevens and Others v. Italy, 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, 4.03.2014, par. 139.

\textsuperscript{33} Ramos Nunes de Carvalho e Sá v. Portugal, par. 183.

\textsuperscript{34} These criteria are: defining the offence as a criminal one in the national legal system, the nature of the offence and the severity of the penalty. \textit{Engel and others v. The Netherlands}, 5100/71, 8.06.1976.

\textsuperscript{35} A criminal case must be decided by an independent and impartial tribunal in the first instance and a defendant must be given an opportunity, \textit{inter alia}, to give evidence in his own defence, hear the evidence against him and cross examine the witnesses. \textit{Jusilla v Finland}, 73053/01, 23.11.2006.

\textsuperscript{36} However, in \textit{Jusilla}, several judges dissented stating that Article 6 ECHR does not provide a basis to make a distinction between hard-core and beyond hard-core cases. See: Medzmariashvili (2012).
able to verify that the Authority had made proper use of its discretionary powers. Appellate courts were able to examine whether the authority’s decision was substantiated and proportionate and even to check its technical findings.

Moreover, the courts executed full jurisdiction regarding the fine imposed. They were able to verify if the fine fit the offense, and they could have changed it, if necessary. The ECtHR found that Italian courts in the particular case had gone beyond the formal review of the logical coherency of the Authority’s decision concerning the penalty imposed. They made a detailed analysis of the appropriateness of the penalty, having regard to relevant parameters, including proportionality.37 The court decided by majority vote that the Italian judicial bodies had exercised full jurisdiction and, therefore, that there was no violation of Article 6 ECHR.38

In its later decision, the ECtHR explained that a pure legality review does not amount to full jurisdiction.39 A review limited to the question of whether an administrative body exceeded its discrentional powers is not consistent with the requirement to decide in full jurisdiction.40 The ECtHR also dealt with the issue of compatibility of the first-level administrative proceedings with the ECHR. It found a severe breach of the impartiality requirement in a case concerning the French banking authority, who lacked a clear distinction of powers of investigation and imposition of a fine. The ECtHR did not accept the justification of the French Government that a structural separation of functions within the authority existed.41 This case shows that a subsequent review of an administrative decision by a tribunal cannot always remedy infringements of Article 6(1) ECHR made during the first instance proceedings.

The CJEU made relevant the intensity of the second instance court’s review in competition cases in cases decided post-Menarini. In KME Germany, the CJEU stated that “…the Courts cannot use the Commission’s margin of discretion – either as regards the choice of factors taken into account in the application of criteria mentioned in the Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of in-depth review of the law and the facts.”42 The CJEU found that the review of legality provided for in Article 263 TFEU, supplemented by unlimited jurisdiction regarding a penalty imposed, under Article 261 TFEU and Article 31 Regulation 1/2003, was not contrary to the requirements of the principle of effective judicial

37 Menarini, paras. 65–66.
38 Menarini, par. 67.
40 Obermeyer v. Austria, 11761/85, 28.06.1990, par. 70.
41 Dubus S.A v. France, 5242/04, 11.06.2009.
protection in Article 47 of the EU Charter. This view was confirmed in Chalkor, as well as in Schindler, where the CJEU explicitly referred to the Menarini qualification of competition cases as criminal cases.

In our view, the omission of the detailed rule of law requirements in Directive 2019/1 is a deficiency, which could provide a ground for some MS and candidate countries to avoid compliance with the ECHR and the EU Charter. During the process of accession, pieces of national legislation of a candidate country are mostly checked mechanically against provisions of EU regulations and directives. This way of checking the compatibility of a national law with the EU acquis is possible even in the framework of Chapter 8 negotiations. Although CJEU landmark decisions represent ‘instruments of interpretation’ within the meaning of TFEU articles on competition policy and respective SAA provisions, CJEU case-law is often marginalised when assessing the preparedness of candidate countries for full membership. The possible reason why this is happening is the inclination of EU and candidate countries’ administrations to rely upon formal and codified sources of law, rather than to dig through the bewildering and continually changing body of CJEU case-law when assessing the fulfilment of accession criteria. Therefore, if an EU regulation or directive does not list specific obligations, there are higher chances that the issue of compliance with fundamental rights requirements will be neglected. The ECHR membership of candidate countries is not a sufficient guarantee itself, since derogations from the ECHR in national legislation and practice may come under the scrutiny of the ECtHR years or even decades after the adoption of a particular piece of legislation and the establishment of a competition enforcement model.

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43 Par. 133. Views expressed by the ECtHR and CJEU with regard to the scope and intensity of the second instance court’s review of decisions of administrative competition authorities have been seriously criticised in legal writings, as well as the EU model of competition enforcement. The scope of this article does not allow us to present and discuss these critics more deeply. Let us agree with Forrester pointing out the severity of fines imposed by the EC when arguing that EU competition cases cannot be equated with ‘light’ criminal cases in the sense of Jusilla. He indicated to the inconsistency of the ECtHR regarding the issue of the qualification of hardcore and other criminal cases and consequent ECHR requirements (Forrester, 2011). Similarly, Nazzini made a remark that the categorization of criminal offences as hardcore and non-hardcore had no basis in the ECHR (Nazzini, 2012). Van Bael also questioned the compatibility of the EU enforcement model with the ECHR, Van Bael (2011). Baudenbacher forecasted that the criticism of the European enforcement model would not end (Baudenbacher, 2015).


III. The competition enforcement model in stabilisation and association agreements

SAAs between the EU and its MS and the WB countries encompass identical provisions concerning competition. They declare as incompatible with the proper functioning of SAAs, insofar as it may affect trade between the EU and the respective country: i) all agreements between undertakings, decisions of associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition; ii) abuse by one or more undertakings of a dominant position in the territories of the EU and the respective country as a whole or in a substantial part thereof; iii) any state aid which distorts or threaten to distort competition by favouring certain undertakings or certain products.46

The legality of the named practices must be assessed based on the criteria arising from the application of the competition rules applicable in the EU, in particular from Articles, 101, 102, 106 and 107 TFEU, and interpretative instruments adopted by the EU institutions.47

Concerning institutions in charge of competition enforcement, SAAs oblige candidate countries to entrust the operationally independent authority with powers necessary for the full application of the specified provisions.48

The notion of ‘operationally independent authority’ has not been defined in SAAs, thus making the obligations of candidate states in that respect obscure (Popović, 2018). In our view, the said term should be interpreted in line with Article 4 Directive 2019/1, laying down minimum guarantees of the independence of national administrative competition authorities. EU MS need to ensure that staff and persons who take decisions in national administrative competition authorities:

a) are able to perform their duties and exercise their powers for the application of Articles 101 and 102 TFEU independently from political and other external influence;

b) neither seek nor take any instructions from government or any other political or private entity when carrying out their duties and exercising

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46 Article 71(1) SAA EU-Albania; Article 71(1) SAA EU-BH; Article 75(1) SAA EU-Kosovo; Article 73(1) SAA EU-Montenegro; Article 69(1) SAA EU-North Macedonia; Article 71(1) SAA EU-Serbia.

47 Article 71(2) SAA EU-Albania; Article 71(2) SAA EU-BH; Article 75(2) SAA EU-Kosovo; Article 73(2) SAA EU-Montenegro; Article 69(2) SAA EU-North Macedonia; Article 71(2) SAA EU-Serbia.

48 Article 71(3) SAA EU-Albania; Article 71(3) SAA EU-BH; Article 75(3) SAA EU-Kosovo; Article 73(3) SAA EU-Montenegro; Article 69(3) SAA EU-North Macedonia; Article 73(3) SAA EU-Serbia.
their powers in the application of Articles 101 and 102 TFEU, except for the right of a government to issue general policy rules that are not related to sector inquiries or specific enforcement proceedings; and c) refrain from taking any action which is incompatible with the performance of their duties and/or with the exercise of their powers for the application of Articles 101 and 102 TFEU and are subject to a procedure that ensures that for a reasonable time after leaving their office, they refrain from dealing with enforcement proceedings that could give rise to a conflict of interests.49

Within the framework of Directive 2019/1, independence is understood as freedom to act and take decisions without political and other external interference and pressure, as well as forbearance from any conflict of interest. The CJEU provided a similar definition of independence in Commission v. Germany: “In relation to a public body, the term independence normally means a status which ensures that the body concerned can act completely freely, without taking instructions or being put under any pressure.”50 However, independence does not preclude some form of accountability or judicial control (Wills, 2019, p. 158).

Specific guarantees of independence must be provided for members of the decision-making bodies of national administrative competition authorities. They must be selected, recruited, or appointed according to clear and transparent procedures laid down in advance in national law.51 They may be dismissed from their duties only if they no longer fulfill the conditions required for the performance of their duties or if they have been found guilty of serious misconduct under national law. The conditions required for the performance of their duties, and what constitutes serious misconduct, must be laid down in advance in national law, taking into account the need to ensure effective enforcement.52

Two dilemmas arise regarding the interpretation of SAAs in the light of Article 4 Directive 2019/1. The first one concerns the SAAs requiring ‘operational independence’, while Directive 2019/1 is merely speaking about ‘independence’. Is there a material distinction between these two terms, concerning that the Directive defines independence in the context of the performance of duties and execution of powers by staff and decision-making persons? In our understanding, this is what ‘operational independence’ should mean. It should not be understood as a kind of ‘lower level’ independence.

50 Commission v. Germany, C-518/07, 9.03.2010, par. 18.
The second dilemma results from identifying impartiality in Article 4 of the Directive as a constitutive element of independence: “To guarantee the independence of national administrative competition authorities when applying Articles 101 and 102 TFEU Member States shall ensure that such authorities perform their duties and execute their powers impartially and in the interest of the effective and uniform application of those provisions…”\(^{53}\) This wording differs from the language of Article 6(1) ECHR and 47(2) EU Charter, which both consider impartiality as a distinct and equally important attribute as independence, albeit these two concepts are closely linked and regularly assessed together.\(^{54}\) The conceptual disagreement between Directive 2019/1 and the ECHR and EU Charter might lead to a wrong interpretation of SAAs’ competition provisions in a way that the ‘impartiality’ of competition authorities is ensured if they are guaranteed independence. The possibility of such interpretation seems realistic if one takes into account the above-mentioned minimum guarantees of independence. Only one of them establishes a guarantee of impartiality – the requirement for the avoidance of conflict of interests. Surprisingly, the Directive requires the avoidance of conflict of interests only after leaving the office. The possibility of a conflict of interests that arises from the execution of dual functions in the proceedings is not even mentioned. The same is true regarding different kinds of links between parties and staff and/or members of decision-making bodies, which prevent impartial investigation and decision-making.

These deficiencies can be eliminated by relying on the principle of the rule of law.\(^{55}\) It provides the basis for invoking ECtHR and CJEU case-law when assessing the fulfillment of SAAs’ obligations. However, as we have already explained, there are great chances that this will not happen, especially recalling the controversial attitude of the CJEU regarding the compatibility of the EU competition enforcement model with the ECHR and EU Charter.

\(^{54}\) See, for example, the explanation of the CJEU in the case Krajowa Rada Sądownictwa, C-585/18, C-624/18 and C-625/18, par. 121–122: ‘According to settled case-law, the requirement that courts be independent has two aspects to it. The first aspect, which is external in nature, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions... The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.’
\(^{55}\) Article 2 SAA EU-Albania; Article 2 SAA EU-BH; Article 3 SAA EU-Kosovo; Article 2 SAA EU-North Macedonia; Article 2 SAA EU-Montenegro; Article 2 SAA EU-Serbia.
Securing the candidate countries’ compliance with SAAs’ obligations represents yet another problem. The EU approach in the context of the stabilisation and association process of the WB countries is characterised by the conditionality principle. The fulfilment of SAAs’ obligations is an essential condition for the accession of the candidate country to the EU. The WB countries will only be able to join the EU once the criteria of Article 49 TEU and the Copenhagen criteria are met (EC, 2018a, p. 3). However, full membership in the EU is not guaranteed by SAAs (Vukadinović, 2015, p. 96). They only provide a perspective of joining the EU once the candidate country fulfils the required obligations. During the accession process, the EU sets requirements for opening and closing of negotiation chapters. The progress is being monitored by setting interim benchmarks and controlling actual enforcement of legislation. The EU cannot force candidate countries to fulfil SAAs’ obligations since it is candidate countries that mainly determine the pace.\textsuperscript{56} The new EU methodology for enlargement introduced a possibility for accelerated integration for candidates advancing in reforms. However, it is also possible to sanction stagnation or backsliding in meeting the requirements of the accession process by putting negotiations on hold or even suspending them, re-opening closed chapters, etc. (EC, 2020).

It is essential within this context to point out the role of the Association Council, a body established by SAAs to monitor their implementation. The Association Council has the power to take binding decisions within the scope of SAAs in cases provided therein.\textsuperscript{57} This power has not been provided in competition matters. The Association Council may also make appropriate recommendations. Besides, contracting parties may consult each other to discuss any matter concerning the interpretation or implementation of the SAA.\textsuperscript{58} These mechanisms can be used to define more precisely the obligations of the candidate countries.

\textsuperscript{56} EC monitoring reports have assessed WB countries’ ability to assume obligations concerning competition below moderate. The state of progress in the area of the rule of law is marked 2 (some level of preparation) on the scale between 1 and 5 (Sanfey and Milatović, 2018).

\textsuperscript{57} Article 118 SAA EU-Albania; Article 117 SAA EU-BH; Article 128 SAA EU-Kosovo; Article 121 SAA EU-Montenegro; Article 110(1) SAA EU-North Macedonia; Article 121 SAA EU-Serbia.

\textsuperscript{58} Article 129(2) SAA EU-Montenegro.
IV. General features of the competition enforcement model in WB countries

WB countries have followed the majority of EU MS, opting for the administrative model of competition law enforcement. Administrative bodies decide in first instance competition proceedings. Competition laws of WB countries declare the independent status of competition authorities. However, strong political influence in the formation and operation of competition bodies is palpable in practice, putting doubt on whether competition cases are always decided objectively and upon robust evidence. Competition authorities conduct investigations and decide cases under rules on general administrative proceedings, supplemented with specific procedural provisions laid down in competition laws. The proceedings have an inquisitorial character, since the same authority and, sometimes, even the same officials within the authority, conduct investigations and take decisions. Inquisitorial proceedings, albeit more efficient, prevent impartial investigation and decision-making. The majority of competition laws of WB countries do not classify fines imposed in competition cases, that is, whether they are of criminal or administrative nature. For these reasons, it is not clear to what an extent the right to a fair trial should be observed in competition cases.

Administrative courts are dealing with competition cases in the second instance. Administrative law judges are not experts in competition law and economics, since they decide different matters in administrative disputes. In the majority of WB countries, full jurisdiction of courts in administrative cases is only exceptionally allowed. Hence, an in-depth review of decisions of competition bodies is lacking. As a rule, courts do not have the power to amend the disputed act of a competition authority, not even concerning the level of fine imposed.

V. Particular WB countries’ models

1. Albania

The Law on Competition Protection from 2003 (hereinafter; LCP) established the Albanian Competition Authority (hereinafter; ACA).\(^\text{59}\) It defined the ACA as a public entity, independent in the performance of its tasks.\(^\text{60}\) The ACA is composed of the Competition Commission, the governing

\(^{59}\) Law No 9121, 28.07.2003, amended by the Law No 10317, 16.09.2010.

\(^{60}\) Article 18 LCP.
and decision-making body, and the Secretariat. The Commission consists of five members elected by the Parliament upon a proposal of the President (1 member), the Council of Ministers (2 members), and the Assembly (2 members). The LCP defined requirements for the election and the premature term of Commission members. A public debate related to the procedure of the election of the Commission members took place in the past. It was suggested that the independence of the ACA would be strengthened if proposals of candidates would not come from governmental institutions, and if the requirements regarding the educational and professional experience of the candidates would be more stringent (Penev et al., 2013, p. 55).

The Secretariat is declared by law as functionally independent from the Commission. However, the functional separation is not complete since the Commission supervises the Secretariat’s work, and it elects the Secretary-General, who manages the Secretariat. The Secretariat is in charge of conducting investigations. After the completion of an investigation, the Secretary-General submits a report to the Commission, who decides on a case.

The ACA starts investigations *ex officio*, based upon a decision taken by the Commission, or upon a complaint of third parties. The ACA’s investigative powers are similar to those of the EC. However, the ACA needs the court’s authorisation to carry out an unannounced inspection of private premises. After the completion of an investigation, the Commission regularly holds a hearing to allow parties to be heard. Before taking a final decision, the Commission discusses a case together with the Secretary-General, department heads, and members of the investigation group.

The Commission can take infringement decisions, commitment decisions, and decisions on interim measures in antitrust cases. It can impose fines, periodic penalty payments, and single procedural fines. The number of investigations and finalized cases has constantly been rising since the establishment of the ACA. The maximum amount of fines is in line with EU law. The ACA tended to impose high fines in practice. It imposed a fine at the rate of 5.69% of the total turnover in the case *SGS Automotive Albania*,

61 Article 22(3) LCP.
62 Article 24(q) LCP.
63 Article 27(1) LCP.
64 Article 29.1 LCP. See also: UNCTAD (2015), p. 38.
65 Ibid., 47.
66 In 2018 and 2019, the ACA adopted 87 and 93 decisions respectively. It significantly increased the number of decisions compared to the period 2011–2017 when the average yearly number of decisions was below 50. However, these numbers reflect decisions taken in every activity. The ACA finalised 10 antitrust cases in 2019 (Competition Authority of Albania, 2019, p. 6–7).

For more detailed analysis of cases in the period before 2015 see Nazifi and Broka (2015).
concerning the abuse of a dominant position in the market for mandatory technical control of road vehicles. 67 According to one research, more than half of the fines are severe fines (Penev et al., 2013, p. 59). Besides, the ACA can impose structural and behavioral remedies. Albeit the LCP laid down provisions on leniency, undertakings in Albania rarely use the possibility to apply for it (EC, 2018c, p. 61). 68

The Council of Europe project implemented to assess the ACA anti-corruption risk indicated several issues of concern, namely the overwhelming influence of the Government on the appointment of the Commission members, vague legal terms/conditions for evaluating concentrations and restrictive agreements, discretion in setting fines, and the extent to which the courts controlling ACA decisions are affected by corruption. 69 It is worth noting that the project recommended, among other things, to ensure a higher representation of lawyers in the Commission and to require an educational background in European competition law (Council of Europe, 2010, p. 18–19). Another proposal was to establish an ad-hoc expert commission to screen candidates for the ACA Commission (Penev et al., 2013, p. 70).

Albania underwent a judicial reform in 2012, which had a significant impact on competition cases. The law from 2012 established administrative courts. 70 These courts became in charge of disputes initiated by defendant undertakings against ACA decisions. In the view of independent researchers, the reform represented a step forward, making it possible that more experienced judges deal with complex cases involving public interest concerns (Hoxha, 2019), and to increase the efficiency of courts dealing with competition cases (Penev et al., 2013, p. 72). Administrative courts in Albania can conduct full jurisdiction proceedings. An injured party may bring a lawsuit to repeal or amend an administrative act wholly or in part, or for the obligation of the public organ to amend an administrative act, or for the absolute annulment of an act. The court should determine the facts of the dispute accurately without being tied to parties’ claims. 71 The first instance administrative court must hold a hearing. However, parties at the hearing present their views in writing, except when they ask the court to present their explanations orally. The court may instruct parties when presenting their explanations orally to concentrate on issues

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68 According to the EC, there has been no application for leniency since 2016.
69 Widespread corruption and weak rule of law manifested by incompetent, ineffective and non-independent judiciary are seen as the main institutional weaknesses of competition law enforcement in the Western Balkans. See: Buccirossi and Ciari (2018); Begović and Popović (2018).
70 Article 7, Law No 49/12 on Organisation and Functioning of Administrative Courts and the Adjudication of Administrative Disputes.
71 Law 49/12, Article 17.
that it deems crucial for solving the case.\textsuperscript{72} The burden of proof lies with the ACA. It needs to prove the facts of the case and to provide legal arguments to the court.\textsuperscript{73} Judgments of the first instance Administrative Court can be appealed to the Administrative Court of Appeal. The Court of Appeal can hold a hearing if it finds it necessary to verify new facts and evidence submitted with the appeal, or if the first instance court based its decision on severe procedural breaches or false facts.\textsuperscript{74} Concerning the effectiveness of judicial control, Albanian courts can apply the ECHR as a formal source of law, as well as SAA provisions (Pogače, 2008, p. 34–35), which opens the possibility of invoking ECtHR and CJEU case-law in proceedings before Albanian courts. The need for in-depth expertise, and more precise rules of the judicial review, has been indicated as the main obstacle for more effective judicial review (Penev et al., 2013, p. 72).

2. Bosnia and Herzegovina

The Law on Competition of Bosnia and Herzegovina (hereinafter; LC BH)\textsuperscript{75} established the Competition Council as an independent body exclusively in charge of implementing competition law.\textsuperscript{76} A decision-making body within the authority is also named the Competition Council (hereinafter; the Council). The structure of the Council reflects the complicated constitutional setup of Bosnia and Herzegovina.\textsuperscript{77} The Council consists of six members, which should be of different ethnicity, thus representing the ethnic BH constitution.

The combination of investigation and decision-making functions is evident in the inner structure of the Competition Council, and in the rules on investigation and decision-making procedures. The Council decides upon starting an investigation and nominates one of its members to conduct the investigation – a rapporteur.\textsuperscript{78} The rapporteur also holds a hearing, which is obligatory in cases involving parties with confronting interests.\textsuperscript{79} At the end

\textsuperscript{72} Law 49/12, Article 34.
\textsuperscript{73} Law 49/12, Article 35(1).
\textsuperscript{74} Law 49/12, Article 51.
\textsuperscript{75} Official Herald BH, No 48/05, 76/08, 80/09.
\textsuperscript{76} Article 21.
\textsuperscript{77} Bosnia and Herzegovina is composed of two entities, Federation of Bosnia and Herzegovina and Republika Srpska. The former entity is populated dominantly with Bosnian and Croatian ethnicity, while in the latter Serbian ethnicity represents most of the population.
\textsuperscript{78} Article 31 and 34 LC BH.
\textsuperscript{79} E.g. cases initiated by a complainant. The complainant has a party status by law and the Council is obliged to start a proceeding upon every complaint. Article 32 LC BH.
of the investigation, the rapporteur prepares a draft decision and submits it to the Council.

The Council decides by a majority of its present members, under the condition that at least one member from each constituent BH ethnicity votes for a decision.\textsuperscript{80} To our knowledge, a similar stipulation does not exist in comparative competition law.\textsuperscript{81} In practice, it repeatedly caused a blockade in decision-making, preventing the Council from adopting decisions against undertakings with the political support of a particular constitutive ethnicity. A merger case involving the two largest BH retail chains in 2013 – Croatian Agrokor and Slovenian Mercator – is the best example of adverse effects caused by the blockade. The Council could not adopt the draft decision to conditionally approve the concentration (proposed by parties to the concentration) within the mandatory time limit since two members of the Council of the same ethnicity did not vote for the decision.\textsuperscript{82} The parties to the concentration benefited from the blockade since, in the end, the concentration was \textit{ex lege} approved unconditionally.\textsuperscript{83}

The same scenario is visible in antitrust cases. The LC BH laid down mandatory time limits for completing an investigation and deciding a case. When the Council cannot decide since two of its members of the same ethnicity are absent or vote against a draft decision, a legal presumption arises that a competition infringement has not been committed.\textsuperscript{84} BH legal writers criticised this solution, indicating the possibility of its misuse (Grbo and Imamović-Čizmić, 2015, p. 287). The Court of Bosnia and Herzegovina condemned several times the Council’s practice of postponing decision-making beyond the mandatory time limits.\textsuperscript{85} In the case of alleged abuse of a dominant position initiated against the leading mobile operator BH Telekom, the BH Court found that the proceedings before the Competition Council lasted too long without objective justification and the Council avoided to decide on the merits. The Court noted that five months elapsed between the submission of a complaint and the issuance of a conclusion to start an investigation, and that

\begin{itemize}
\item \textsuperscript{80} Article 24(2) CC BH.
\item \textsuperscript{81} By comparison, the Competition College of the Belgian Competition Authority consists of a president and two assessors coming from different language groups (Article IV.22, Book IV of the Code of Economic Law). However, representatives of both language groups need not to participate in the Competition College in each case. Members of the College do not have a veto power when making decisions.
\item \textsuperscript{82} Article 41.
\item \textsuperscript{83} Decision No 05-26-I-014-374/II/13, 10.06.2014. The LC BH laid down in Article 18(6) and (7) a legal presumption that a concentration is deemed approved if the Council does not issue a decision within the time limit established by the law.
\item \textsuperscript{84} Article 5(2) and 11(2) LC BH.
\item \textsuperscript{85} Decision S1 3 U 023347 16 U.
\end{itemize}
it took another eight months to issue a decision rejecting a complaint because of procedural reasons.\textsuperscript{86} However, the Court’s condemnation of the practice produced little effect. The Council stopped the practice, but it turned instead to more sophisticated methods of escaping having to decide on the merits. In a new case of abuse of a dominant position started against BH Telekom, the Council simply informed the complainant that the expert witness was not able to produce a report due to the unavailability of economic data. Since the Council considered that there exists no other evidence that it could take, it informed the complainant that it would cease the case.\textsuperscript{87}

The issues of the ethnic composition of the Council and the ethnic veto right of the Council members were raised at the Constitutional Court of Bosnia and Herzegovina. (Un)surprisingly, the Court found no infringement of the BH Constitution, concluding that LC BH does not prohibit BH citizens of other ethnicities to become Council members and that the issue of decision-making majority belongs to the discretionary powers of the BH legislator.\textsuperscript{88} EC noted in its 2019 Opinion on BH’s application for EU membership that the composition and decision-making of administrative bodies that are based on ethnic criteria risk affecting the implementation of the EU \textit{acquis} (EC, 2019d, p. 7).

Complaints exist also regarding other severe infringements of Article 6 ECHR in proceedings before the Competition Council. Allegedly, the Competition Council infringed the principle \textit{non bis in idem} by sanctioning the same undertaking twice for an identical anticompetitive practice based on identical facts. \textit{Prima facie}, it seems that the Council was wrong for doing this since the description of facts and legal qualification of the case are almost the same in the decisions issued in 2015 and 2017.\textsuperscript{89} The Council failed to define in the decision the exact period during which the defendant practiced the condemned behaviour. It seems possible that the defendant continued to behave in the same way after the 2015 decision, which made the Council issue a new decision. However, the Court of BH ignored the \textit{non bis in idem} objection of the defendant, thus infringing his right to get a reasoned judgment.\textsuperscript{90} The Court also declared that the Competition Council is not obliged to inform the defendant about elements upon which it would base its decision (to provide

\textsuperscript{86} Decision S1 3 U 003765 10 U.
\textsuperscript{88} U 25/14, 9.07.2015, Official Herald BH No 72, 14.09.2015. Two foreign members of the Constitutional Court, judges Greewe and Caca-Nikolovska, submitted a separated opinion, finding the disputed provisions of the LC BH discriminatory.
\textsuperscript{90} S1 3U 027851 18 U and S1 3 U 027851 19 Uvp. The case is still pending before the Constitutional Court, which is competent to decide upon appellations against BH courts in cases of ECHR infringements.
a statement of objections). In the view of the Court, it has been left in the discretion of the Council to do this. This view is entirely in contravention of EU acquis, as well as of the general rules on administrative proceedings in BH.

The Court of BH decides upon lawsuits brought against the Council’s decisions under the Law on Administrative Disputes. The Court of BH decides merely upon the legality of a decision. It explicitly stated that in administrative disputes, a court decides upon facts determined in the first instance administrative proceedings. As a rule, it cannot substitute its decision for that of the Council. If it finds the appellants’ claims justified, it will declare the disputed decision null and void. However, the Court can issue a decision substituting a disputed act in the following cases: 1) where the annulment would cause irreparable damage to the appellant, 2) where case facts are manifestly different from the facts established in the disputed act, or 3) the Court had previously annulled the act in the same dispute and the administrative organ did not follow the Court’s instructions. The Court will then find the facts alone and adopt a decision to solve the merits of the case. The Court has not used these powers in competition cases yet.

The LC BH has not classified fines for competition infringements, even though BH law distinguishes between criminal and misdemeanour offenses. Criminal chambers of ordinary courts are in charge of criminal offenses, while special misdemeanor courts deal with the latter type of offenses. Notwithstanding the constitutional principle of separation of powers, legal writers confirmed that independent administrative bodies could act like tribunals within the meaning of Article 6 ECHR (ademović, Marko and Marković, 2019, p. 162). It seems that the LC BH takes the view that infringements of its provisions do not amount to criminal offenses, since it stipulated that decisions of the Council do not affect criminal or civil responsibility of the offender, which remains within the court’s competences. However, the BH Code of Administrative Proceedings and the LC BH lack provisions specifying rights of defendants in cases where the Council intends to impose the fine. Article 52 LC BH makes the only exception, obliging the Council to consider ‘intent and duration of the infringement’ when determining a fine. Since legal

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91 U 027851 19 Uvp, 7.
92 Article 27 Regulation 1/2003.
93 Article 134(3) Code of Administrative Proceedings BH.
95 Article 11.
96 U 027851 19 Uvp, 7.
97 Article 34(3).
98 Article 48–51.
99 Article 46(6) LC BH.
persons are competition violators in most of cases, it remained unclear whose intent the legislator had in mind.

The Competition Council may refer to CJEU and EC case-law when deciding cases. This power has been explicitly stipulated in Article 43(7) LC BH, albeit as a discretionary power and not an obligation. This is contrary to SAA competition provisions obliging BH to apply EU competition rules and interpretative instruments adopted by EU institutions. The Council referred to EU case-law in the case ASA Auto. The Court of BH and the Constitutional Court confirmed the Council’s decision in this case.

3. Kosovo

The Parliament of Kosovo adopted the new Law on Protection of Competition (hereinafter; LPC) in 2010. The EC assessed Kosovo antitrust rules as being broadly aligned with Article 101, and 102 TFEU (EC, 2018b, p. 55).

The Kosovo Competition Authority (hereinafter; KCA) is a public institution, independent in executing its duties specified by the LPC. It is accountable to the Parliament. The KCA principal decision-making body is the Commission for Protection of Competition (hereinafter; Commission), a collegial organ consisting of five members, one of which is the President. The Kosovo Government selects candidates for the President and other members of the Commission through an open competition procedure, and it submits its proposal to the Assembly of Kosovo for a nomination of the Commission president and members. The Secretariat, headed by the General Director, performs the investigative function. Since the Secretariat is subordinated to the Commission, the investigation and decision-making powers are de facto merged.

The operation of the KCA was prevented by the Kosovo Assembly’s delay to elect members of the Commission. In the period between 2011–13, the Commission had three members only, and in the period 2013–16, it was inactive since it had only one member (until 2015) or no member at all (2015–16). An opinion prevailed in the Kosovo public that the members of the Commission elected in 2016 were politically affiliated and/or incompetent (Group for Legal and Political Studies, 2017, p. 5).

100 Article 71(2) SAA EU-BH.
101 Decision S1 3 U 005412 10 Uv.
102 Decision 8.12.2015.
103 Law No 03/L-229. It was amended by the Law on Amending and Supplementing the Law 03/L-229 on Protection of Competition, approved on 13.02.2014.
The LPC regulated investigative and decision-making powers of the KCA, as well as rights of parties mainly in line with the EU Regulation 1/2003. The KCA is authorized to collect information from parties and third persons and to carry out unannounced inspections. The KCA must provide parties access to files, protect parties’ and third persons’ business secrets, notify a party with a statement of objections, and hold a hearing before making a decision. A defendant may propose remedies and obligations to eliminate the negative consequences of its behaviour (a commitments offer). If the KCA accepts the proposed offer, proceedings will be suspended. Besides, the KCA may adopt interim measures against the defendant undertaking, before taking a final decision. The National Programme for Adoption of the Acquis specified several activities that should promote the independence and accountability of the KCA, namely: giving the KCA freedom from ministerial and political control; getting clear professional criteria for appointing Commission members; appointing highly professional officials for relevant fields within the KCA; providing clear and substantive annual reports on KCA activities (Nezaj, 2015, p. 22).

The KCA can impose punitive measures (i.e., fines) when it finds the existence of a competition infringement or for minor violations of competition law. The maximum amount of fines equals the level set out in EU law. The Commission should consider alleviating and aggravating circumstances when setting the fine amount. The KCA can also impose penalties on third parties not complying with KCA requests to provide information. However, the KCA cannot impose periodic penalty payments to compel undertakings to comply with its decisions. Similar to other WB competition laws, a legal characterization of the punitive measures in the LPC is missing. The KCA’s sanctioning policy has been very mild. In the period between 2009–2013, the KCA imposed fines totaling 1,2 mil. EUR. Information on the sanctioning policy after 2016 is not available since KCA decisions and reports are not published on the agency website. According to a study from 2017, the KCA did not impose any fines in the period 2016–2017 (Nezaj, 2015, p. 22). The EC 2019 Report on Kosovo does not provide information on the enforcement record except for professional opinions. The Commission issued ten professional opinions in 2018. EC assessed that Kosovo is at an early stage as regards competition (European Commission, 2019a, p. 62).

Ordinary courts decide upon lawsuits against KCA decisions since administrative courts were not formed in Kosovo in the 2009 courts’ reform. A chamber for administrative disputes exists in the Prishtina Basic Court, which is the first instance court in charge of all administrative disputes. A single professional judge adjudicates in administrative disputes (Pepaj, 2015, p. 165). Administrative judges in Kosovo consider that they can only declare a disputed act null and void and resend it to the administrative body to issue
a new act. In their interpretation of the Law on Administrative Disputes,\(^\text{104}\) full jurisdiction proceedings are not allowed in administrative disputes (Kosovo Law Institute, 2017, p. 15). This interpretation is in contradiction to the actual meaning of Article 43(3) of the Law on Administrative Disputes, which specifies that the court may establish facts by itself and issue a judgment on merits if requirements similar to those existing in BH law are fulfilled. The Administrative Chamber of the Basic Court has never used powers to decide a case in full jurisdiction proceedings (Kosovo Law Institute, 2017, p. 15).

4. Montenegro

The current competition protection regime in Montenegro was created in 2012 by the Law on Protection of Competition (hereinafter; LPC 2012).\(^\text{105}\) The LPC 2012 established the Agency for Protection of Competition (hereinafter; APC) as an independent body in charge of the application of competition law. The APC has necessary investigative powers, compatible with those stipulated in the EU Regulation 1/2003. However, the APC remained the only WB competition authority without the power to impose fines for competition violations. The LPC 2012 defined competition infringements as misdemeanour offenses. Since Montenegrin administrative authorities do not have the power to impose sanctions for misdemeanours, if the APC finds an infringement of competition law, it needs to submit a motion to a misdemeanour court to impose a fine.\(^\text{106}\) The range of fines for competition offenses stands in line with fines in EU competition law – between 1\% and 10\% of the total income of an undertaking.\(^\text{107}\) The APC has got special powers to implement the leniency programme. Based on Article 69 LPC, the APC can decide not to submit a motion, or to withdraw a motion, or to ask the court to alleviate the fine in case of a perpetrator who first notifies to the APC the existence of an anticompetitive agreement, or submits sufficient evidence to prove its existence.\(^\text{108}\)

The 2018 amendments to the Law on Protection of Competition (hereinafter; LPC 2018)\(^\text{109}\) established a collegial body – the Council – as the APC decision-making body. The Council consists of the Chairperson and two

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\(^{104}\) Law No 3/L-202 on Administrative Disputes.

\(^{105}\) Official Journal of Montenegro, No 44/2012.


\(^{107}\) Article 67 LPC 2012.

\(^{108}\) Article 69 LPC.

members. The Council adopts final decisions in proceedings taking part before the APC on a proposal of the Director. The investigative function rests with the APC Director. The Director issues a decision to start an *ex officio* investigation and a conclusion to perform specific investigative actions (e.g., an unannounced inspection).

The functional separation of investigative and decision-making powers within the APC represents a significant improvement in terms of the observance of fundamental rights. However, the LPC 2018 provisions on the appointment of the Council members and the Director contradict the functional separation. The Government appoints the Chairperson and members of the Council, as well as the Director. The ministry in charge of competition proposes candidates for the Chairperson, one member of the Council, and the Director, while the authority in charge of state aid proposes the other Council member. Since the same ministry proposes two out of the three Council members and the Director, the LPC 2018 declaration of the APC’s independence is not persuasive. Secondly, the Council’s governing powers compromise the functional independence of the Director and its staff. The Council adopts internal acts of the APC – the Statute and the Rulebook on the internal organization. It proposes to the Government the financial plan of the APC, and it adopts the annual report on the APC operation.

The facultative character of an oral hearing represents the main shortcoming of APC proceedings. A party can submit a reasoned motion to the APC to hold a hearing, but the APC is free to decide whether to hold it or not. The APC can also decide to hold a hearing on its own motion. The LPC 2018 does not state clearly which APC organ should hold a hearing. Since the provision on an oral hearing existed in the LPC 2012, and the 2018 amendments did not make any express provision regarding the removal of this function from the Director, it seems that the Director has remained in charge of conducting the hearing. This stipulation is contrary to the immediacy principle since the decision-making body does not hear parties.

Although the misdemeanour courts’ competence to impose fines seems appropriate from the rule of law perspective, the six years of experiences in the LPC 2012 implementation has revealed the reduced effectiveness of the Montenegrin model. The EC noted in its 2019 Report that misdemeanour courts imposed only one fine in 2014 and two fines in 2017 (EC, 2019b, p. 63). The drop in the number of fines was also due to the deteriorated APC operation. The number of decisions adopted by the APC has gradually declined since 2014. In 2018, the APC decided one case dealing with fixing of

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110 Article 20f and Article 22(1)(4) LPC 2018.
111 Article 36 LPC.
prices in the market of drivers schools services (Autoškole).\textsuperscript{112} In 2019, there were no new antitrust cases. The APC issued a decision prohibiting the abuse of a dominant position of the port authority in Kotor (Luka Kotor A.D.).\textsuperscript{113} However, the APC was repeating proceedings in the case already decided in 2015,\textsuperscript{114} acting in line with the instructions given by the court’s judgment partially annulling the earlier APC decision. The modest capacity of misdemeanour judges to deal with competition cases, and the low level of fines imposed, are principal reasons explaining the poor enforcement record. For example, in the case Autoškole, the court imposed 1.000 EUR fines upon each of the two defendant driver schools and 500 EUR fines to each of the responsible natural persons (managing directors). In the case of Luka Kotor A.D. the court imposed 27.245,54 EUR fine to the company and 1.000,00 EUR fine to a responsible natural person (Agencija za zaštitu konkurencije Crne Gore, 2019, p. 41–42).

The bifurcation of legal remedies represents another, yet a neglected problem in Montenegrin competition law. When the APC issues a decision finding a competition infringement, the first instance misdemeanour court will decide a case \textit{ab initio}, meaning that it needs to find the existence of a competition violation by itself. A party can submit a lawsuit against the APC administrative decision and an appeal against a decision of the first instance misdemeanour court. Decisions of the first or the second instance misdemeanour court and the court deciding in the administrative dispute might differ as to the critical element – the existence of a competition violation. This legal anomaly needs a correction. A single court should be entrusted with the power to decide on competition violations and fines.

5. North Macedonia

North Macedonia established the Commission for Protection of Competition (hereinafter; CPC) in 2005, as an independent administrative body, headed by the President and four commissioners. The Competition Act of 2005 (hereinafter; CA) did not provide the CPC with powers to impose fines and periodic penalty payments (Karova and Botta, 2010, p. 64–65). It defined competition infringements as misdemeanour offenses. Therefore, only misdemeanour courts could impose fines upon infringers. By amendments to

\textsuperscript{112} No. 02-UPI-8/65-18.
\textsuperscript{113} http://www.azzk.me/jml/images/docs/Savjet_Agencije_za_zatitu_konkurencije_na_osnovu_1.pdf
\textsuperscript{114} No. 02-UPI-81/67-15.
the CA made in 2007 (hereinafter; CA 2007),\textsuperscript{115} the CPC received the power to impose fines. The CA 2007 created separate proceedings for imposing fines and laid down provisions on judicial review of the Commission’s decisions by administrative courts.\textsuperscript{116} The enforcement model laid down by the CA 2007 has remained mainly unchanged, even though the new Law on Protection of Competition (hereinafter; LPC) came into force in 2010.\textsuperscript{117}

The decision-making body – the Commission for Protection of Competition – sitting in its full composition decides in administrative proceedings upon concentration cases, interim measures, and imposes remedies.\textsuperscript{118} Besides the Commission, an internal organ exists named the Misdemeanour Commission. It consists of the CPC President, and two CPC employees. It decides in cases where the CPC intends to impose fines.\textsuperscript{119} The Misdemeanour Commission was set up by the CA 2007 to eliminate the deficiency of the CPC, which at that time did not have qualified lawyers as members of the decision-making body. Article 59(2) of the Misdemeanor Act stipulates that a qualified lawyer must preside the first instance misdemeanour body.\textsuperscript{120} The LPC of 2010 also stipulated that the President or at least one member of the CPC must be a qualified lawyer,\textsuperscript{121} which made the existence of the separate Misdemeanour Commission obsolete. However, it remained part of the new institutional setup. This model is rather strange since the full composition collegial body, elected by the Parliament, is deprived of taking decisions in cases where the CPC imposes fines (mostly antitrust cases). The participation of two CPC employees in the Misdemeanour Commission is only mimicking the collegial decision-making process since employees are dependant on the President.

Misdemeanour proceedings are initiated \textit{ex officio} by the Secretary-General of the CPC or by a party having a legal interest. Misdemeanour proceedings combine inquisitorial and controversial elements. Although the Secretary-General has the power to initiate proceedings, he/she is not independent of

\textsuperscript{115} Law 22/07.
\textsuperscript{116} Article 13(3) of the Constitution of North Macedonia sets forth that administrative authorities can impose misdemeanour sanctions in cases provided by the law.
\textsuperscript{118} Article 51 and 52 LPC 2010.
\textsuperscript{119} Article 27(8) LPC 2010.
\textsuperscript{120} Article 55 od the Misdemeanor Law sets out down the following: ‘(1) The procedure before the misdemeanor authority shall be conducted by a Commission deciding on misdemeanors, specified by law or by other regulation. (2) The members of the Commission stipulated in paragraph 1 of this article shall be authorised officers with an appropriate level of professional background and necessary work experience required by law, among which at least one of the members shall be a graduated lawyer who has passed the bar exam.’
\textsuperscript{121} Article 27(8) LPC 2010.
the Commission, since the CPC President appoints the Secretary-General.\textsuperscript{122} The Secretary-General issues requests for information\textsuperscript{123} and conclusions to conduct unannounced inspections.\textsuperscript{124}

The Secretary-General and the relevant third party have the party status in misdemeanour proceedings initiated by them.\textsuperscript{125} In this way, controversial elements are introduced into the proceedings. In proceedings before the CPC, the rules of the Misdemeanour Law\textsuperscript{126} and the Law on General Administrative Procedure are applied as subsidiary rules to the LPC.\textsuperscript{127} The application of the Misdemeanour Law ensures better protection of parties’ rights, since this law defines rules on the defendant’s rights in more detail. However, the combined application of three laws in the same proceedings can lead to problems in their interpretation, and it increases legal uncertainty.

The LPC does not specify who bears the burden of proof in cases initiated \textit{ex officio}, by the Secretary-General and by a third party? The third party needs to identify in its motion to initiate proceedings the necessary facts and to submit evidence together with the motion. If it does not comply with the request of the CPC to supplement the motion, the CPC will reject it.\textsuperscript{128} Hence, we argue that in cases initiated by third parties, the burden of proof lies with them.

The CPC is not obliged to hold a hearing. The Misdemeanour Commission can hold a hearing if it finds that it is necessary to establish facts of the case. The Secretary-General and persons who initiated the proceedings have a right to participate in the hearing.

A party can submit a lawsuit against a decision of the Misdemeanour Commission to the Administrative Court. The Macedonian Administrative Court is empowered to conduct full jurisdiction proceedings. Full jurisdiction proceedings are mandatory in cases where an administrative body decided in misdemeanour proceedings. The court will issue a new decision substituting the decision of the first instance administrative body (Pelivanova and Ristovska, 2014).

The Administrative Court operates in chambers. Depending on the subject-matter of the case, judges sitting in different chambers deal with competition

\textsuperscript{122} Article 29(1) LPC 2010.
\textsuperscript{123} Article 49 LPC 2010.
\textsuperscript{124} Article 50 LPC 2010.
\textsuperscript{125} Article 38 LPC 2010.
\textsuperscript{126} New Macedonian Misdemeanour Law was adopted on May 17, 2019. The Law in Macedonian language is available at https://www.pravdiko.mk/zakon-za-prekrshotsite/
\textsuperscript{127} Article 31 LPC 2010.
\textsuperscript{128} Article 34 and 35 LPC 2010.
cases. According to legal writers, the establishment of administrative courts in North Macedonia improved the procedure in competition cases (Karova and Botta, 2010, p. 71). The scope of this article did not allow us to verify whether the Administrative Court used its powers fully in practice. It seems that courts rely mainly on facts and evidence established by the CPC. For example, in a case dealing with an agreement to fix prices, the Court oddly decided by cumulatively applying LPC articles on prohibited agreements and provisions on the abuse of a dominant position. The Court stated that the CPC did not need to find written evidence to prove the existence of the agreement, but it failed to explain which other facts and evidence support the finding that the defendant participated in the prohibited agreement.

The EC expressed concerns regarding the lack of trained staff and the lack of independence and capacity of courts to deal with antitrust cases as a significant obstacle to effective implementation of competition law in North Macedonia (EC, 2019c, p. 64). This statement is confirmed by the non-existence of antitrust cases in 2018 and 2019. The last antitrust case was decided at the beginning of 2018, when the CPC imposed a fine to the brewery ‘Prilepska pivarnica’ A.D. for price-fixing. Although the case dealt with resale price-maintenance clauses in agreements between the brewery and its distributors, the CPC inexplicably failed to initiate proceedings against distributors. The amount of a fine is not publicly available. According to some reports, the CPC imposed a fine to ‘Prilepska pivarnica’ amounting to 2,7 mil EUR. In 2017, the CPC finalized the investigation against another brewery, ‘Pivara Skopje’ A.D., imposing a 5,8 mil. EUR fine (Dokleštić, Repić and Gajin, 2017).

6. Serbia

The Commission for Protection of Competition (hereinafter; CPC) was established in 2005 as an independent administrative body with legal capacity, accountable to the National Assembly. Since the Law on Protection of Competition 2005 defined competition violations as misdemeanour offenses, the CPC could not impose fines. Misdemeanour courts did not impose even a single fine under the 2005 Law. The Administrative Chamber of the Supreme Court decided on lawsuits against CPC decisions in antitrust and

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131 No. 09-9/2, 7.02.2018.
concentration cases. The Court was inclined to annul CPC decisions without a profound reasoning on the merits of cases. It dealt mainly with minor issues of procedure.133

The new Law on Protection of Competition was adopted in 2009134 (hereinafter; LPC 2009) to provide the CPC with more robust enforcement powers. The CPC has got powers by the new law to request information from undertakings, to interview directors and employees of undertakings, to seize evidence, and to perform unannounced inspections. Besides, the CPC has got the power to adopt interim measures, accept commitments, accept remedies, and impose fines. To circumvent a conflict with the constitutional principle of the separation of powers, the law drafters defined fines as ‘measures for the protection of competition’. The measure consists of a cash payment of up to 10% of the total income of an undertaking or associations of undertakings. The Serbian legal community criticized the ingenuity of the legislator (Begović and Pavić, 2009; Marković-Bajalović, 2013). Several initiatives have questioned the constitutionality of the LPC and its compatibility with the ECHR before the Constitutional Court of Serbia.135 The Court has delayed deciding upon this initiatives up to now. Therefore, the issue of the legality of the CPC’s sanctioning powers in Serbia has yet to be resolved.

The LPC 2009 established the Council and the CPC President as separate organs. The President initiates ex officio investigations, decides upon taking investigative actions, and submits draft decisions to the Council. Third parties have a right to submit a complaint to the CPC concerning an alleged competition violation, but it is the President who decides whether to start an investigation. The President has a decisive role during the whole investigation process and upon the outcome of the investigation. At the same time, the President presides over the Council and takes part in decision-making. Although the idea of the legislator was to make the competition investigation more efficient, the blend of investigative and decision-making powers created a ground for their misappropriation. For example, in the first years after the LPC 2009 had entered into force, the CPC started imposing fines for competition violations committed before 2009. The CPC had already finalized proceedings against violators and issued decisions on case merits before the adoption of the LPC 2009. However, after the LPC had entered into force, the CPC re-opened proceedings only to impose fines. These CPC acts have

133 See on that point the report prepared by a judge of the Administrative Court (Đurić, 2012; Penev et al., 2013).
135 The last one was submitted in 2017 by the Bar Association of Serbia. The full text of the initiative is available at https://www.geciclak.com/wp-content/uploads/2017/09/INICIATIVA-USTAVNOM-SUDU-ZA-OCENU-USTAVNOSTI-ZAKONA-O-ZA%5C%25A0TITI-.pdf
been qualified as manifest violations of the constitutional principle of non-retroactivity of law (Marković-Bajalović, 2012; Vasiljević and Popović, 2012). The Administrative Court annulled these CPC decisions.136 In the more recent period, the CPC has delayed with starting investigations upon complaints of third parties. Although the CPC should respond to a complainant in 15 days, the CPC extended this period substantially, thus de facto denying third parties the right to initiate proceedings.

Decisions of the CPC are final. The Administrative Court decides upon lawsuits submitted against CPC decisions. The Law on Administrative Disputes of Serbia from 2009137 allowed for full jurisdiction disputes, although under limited conditions. If the Administrative Court finds that the disputed administrative act is illegal, it will solve the case by its judgment, under the conditions that the matter allows it, and the facts of the case make a reliable basis for the court to do so. The judgment of the Court substitutes the annulled act fully.138 A full jurisdiction dispute is not allowed in cases where the first instance administrative body decides using discretionary powers.139 The Administrative Court has not expressed a view yet whether the CPC possesses discretionary authorities in competition cases, while legal writers take the view that full jurisdiction proceedings are not possible because of the CPC discretionary powers (Golubović, 2017, p. 326–327). Even if the Court could decide in full jurisdiction in competition cases, it would not determine facts by itself. If the CPC did not establish facts correctly in the first instance proceedings, the Court should annul the administrative act and re-send the case to the CPC to determine the facts and to adopt a new act based on them.

The LPC laid down the power of the Administrative Court to alter the amount of a fine determined by the CPC, if it finds that a CPC decision is contravening the law in that respect.140 The Court has not availed itself of this possibility yet. In the early years of the Administrative Court’s control over CPC decisions, its judgments often lacked detailed statements of reasons and proper legal and economic analysis of the cases. Its decisions seemed arbitrary and ill-considered both to the CPC and to the infringing party (Penev et al., 2013, p. 140). In the meantime, the Administrative Court improved the reasoning of its decisions. However, the Court keeps relying mainly upon facts

136 See, for example, judgment of the Administrative Court 1 U 1154-12, 4.04.2012. Available at http://www.up.sud.rs/latinica/news/article/presuda-1-u-1154-12-od-04.04.2012.-zastita-konkurencije
138 Article 43(1) of the Law on Administrative Disputes.
139 Article 43(2) of the Law on Administrative Disputes.
140 Article 72(3) LPC.
established in the first instance proceedings and decides based upon legal arguments submitted by parties.

In recent years, the CPC has completed the majority of cases by accepting commitments or ceasing the case after finding the non-existence of a competition violation. In the period 2016–2019, the CPC issued eight decisions in antitrust cases, adopted commitments in seven cases, and terminated nine cases. The major recent antitrust case against the state-owned undertaking ‘Elektrodistribucija’ ended in 2018 by an informal settlement. The CPC accepted commitments proposed by the defendant after the Administrative Court had annulled earlier CPC decisions two times.141 In two cases finalized by decisions imposing fines upon undertakings, the defendant submitted appeals to the Constitutional Court alleging the infringement of the constitutional right to a fair trial. In the case decided upon the appeal of ‘Frikom’ A.D., the Constitutional Court rejected the appellant’s assertion that the fine imposed on him was of a criminal law nature. The fine imposed in this case amounted 3 mil. EUR. The Court referred to the ECtHR case Nestle St. Petersburg and Others v. Russia142 decided in 2004, to justify its assertion that competition law cases are of an administrative-misdemeanour character. However, referring to this case was not appropriate, since the ECtHR dealt with the powers of the Russian Antimonopoly Office to impose remedies rather than fines. The ECtHR, applying the Engel criteria, decided that the third criterion on the severity of fine was not fulfilled in this case. The Constitutional Court disregarded the Menarini case, albeit the applicant referred to it.

In a case decided in 2019,143 the appellant disputed the Administrative Court’s decision on the grounds that the Court had decided the case without holding a hearing, and it had not provide sufficient reasoning for its judgment. The Constitutional Court rejected the appeal by invoking the administrative dispute principle of the administrative court’s reliance on facts determined in the first instance administrative proceedings. The Constitutional Court explained that the Administrative Court did not need to provide reasoning for all claims of the claimant, when these claims had been already submitted and assessed in the first instance proceedings. The Constitutional Court referred to two ECtHR decisions, Chaudet v. France144 and Sigma Radio Television Ltd. v. Cyprus.145 It is doubtful whether referring to these cases was appropriate since the first case did not deal with the imposition of fine at all, while in the

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141 Decisions of CPC are available at https://www.kzk.gov.rs/odluke/tipovi/povreda-konkurencije
142 No. 69042/01, 3.06.2004.
143 Už 5371/2017.
144 No. 49037/06, 29.10.2009.
145 No. 31281/04 and 35122/05, 21.10.2011.
second case, the fine was imposed, but the amount was not mentioned in the ECtHR decision. Besides, in both of these cases, the ECtHR underlined the court’s obligation to examine all submissions made by the applicant, on factual and legal grounds,\(^{146}\) that is, to assess the central issues of the case.\(^{147}\)

The CPC could not develop a coherent case-law since the composition of the Council had changed completely several times in the last 14 years. Although the procedure for the election of the President and the members of the Council may seem more transparent comparing to other WB countries, ruling political parties jeopardized the independent operation of the CPC through the election process.\(^{148}\) The National Assembly elects the President and the members of the Council in an open competition procedure. The LPC laid down rather strict requirements for candidates for these positions. However, the National Assembly disregarded the requirements when selecting candidates in 2010, 2014, and 2019 elections.

Notwithstanding the manifest shortcomings of the present model, the EC assessment of the CPC enforcement record is somewhat positive. The main remark concerns the mild attitude of the CPC towards concentrations. Although the CPC decides over a hundred concentration cases each year, it has not forbidden a single concentration since 2006. In 2018, the CPC imposed remedies in one case only, out of its 158 concentration cases (Commission for the Protection of the Republic of Serbia, 2019, p. 49).

VI. Conclusion

Albeit the majority of the WB competition authorities possess necessary investigative and decision-making powers for enforcing competition law, severe deficiencies exist in terms of the compatibility of competition enforcement models with fundamental legal principles. WB countries opted

\(^{146}\) *Chaudet v. France*, par. 37.

\(^{147}\) *Sigma Radio Television Ltd. v. Cyprus*, par. 156.

\(^{148}\) See, on this point, recommendations coming from the European Movement for Serbia, that the practice of changing the full composition of the Council should be avoided, to ensure the continuity and accumulation of expertise in the operation of the CPC (Evropski pokret Srbija 2013, p. 22).

The results of voting for candidates in the 2019 election process showed clearly that the ruling coalition SNS-SPS-PUP fully supported the proposed candidates, while members of opposition parties sustained from voting or were absent from voting. Out of the 250 members of the Assembly, 132 voted for the proposed candidates, 1 member sustained from voting and 117 members were absent. Results of the voting can be viewed at the Open Parliament website: https://otvoreniparlament.rs/glasanje/4108
for the administrative model of enforcement, with a collegial body governing an administrative authority and deciding in the first instance on competition violations, and administrative courts deciding in the second instance. Without exception, administrative competition authorities combine investigative and decision-making powers. In some of the WB countries, like Albania, North Macedonia and Montenegro, investigative functions have been entrusted to separate, supposedly independent organs within the same authority. However, in reality, their independence is compromised with rules on the nomination of head officers and the supervisory power of decision-making bodies.

An oral hearing is not mandatory in all WB jurisdictions. What is more, the oral hearing takes place before the decision-making body only in rare cases (Albania). All WB administrative competition authorities, except for the Montenegrin APC, have powers to impose fines. The legal character of fines for competition infringements has not been defined in the competition laws of the majority of the WB countries, which has caused legal uncertainty regarding the necessary minimum of procedural rights of competition infringers. Only in Montenegro and North Macedonia, competition infringements have been defined as misdemeanour offenses. However, this qualification has resulted in a complicated enforcement model with separate bodies deciding upon fines and, in case of Montenegro, dual appellate judicial proceedings examining the legality of an administrative decision on the merits of a case, on one side, and a judgment of a misdemeanour court imposing a fine, on another.

Rules on the election or appointment of members of decision-making bodies differ from country to country. In some countries (Albania, BH, Kosovo, Montenegro), their governments play a crucial role in proposing candidates or appointing members of decision-making bodies. In North Macedonia and Serbia, competition laws stipulated transparent rules on the election of members of decision-making bodies by parliaments. However, in practice, legal requirements for the election are often ignored, and political criteria remain the decisive factor. This practice, combined with the limited duration of the office term of members of decision-making bodies, makes competition authorities susceptible to political influences. The continuously decreasing number of finalised antitrust cases, recorded in the vast majority of the WB countries (Albania being the only positive exception) in the last decade, represents the most convincing proof for this finding.

Powers of administrative courts differ in the WB countries. A full jurisdiction procedure is possible in most of the countries, albeit under limited circumstances. Administrative courts have not availed themselves yet of the opportunity to decide upon the merits of a case in competition law disputes. Courts regularly base their decisions on facts determined in the first instance proceedings. An oral hearing can take place in proceedings
before administrative courts, and in some jurisdictions (e.g., Serbia), it is even obligatory. However, in practice, courts tend to avoid holding a hearing and taking new evidence. As a consequence of such practice, competition cases are decided without defendant parties having an opportunity to present their arguments orally, and to cross-examine witnesses and experts in front of a decision-making body at any stage of the proceedings. First instance decision-making bodies decide upon facts investigated by investigating officials and presented to them in writing. A second-instance court decides upon files of a case submitted by a first-instance authority. The members of the first-instance decision-making bodies and the courts cannot build an autonomous opinion on a case in this way. Fundamental elements for impartial decision-making are lacking both in the first and the second instance proceedings. The modest expertise of administrative law judges in competition law, and the overload of different types of cases, represent additional obstacles for a competent and efficient adjudication of competition cases.

In our view, it is necessary to make improvements both in the first and the second stage of competition enforcement. Regarding the first level of enforcement, it is necessary to follow the requirements of ECtHR case-law relating to the notion of ‘independent and impartial tribunal’. It is not required to transform administrative competition authorities into courts. However, it is essential to provide them with guarantees of impartial and independent investigation and decision-making. Two critical improvements on the first level of competition enforcement should be the institutional separation of investigation and decision-making functions, and the elimination of political influences in the election or appointment of members of decision-making bodies.

Concerning the first improvement, we will rephrase the EFTA Court ex-judge Baudenbacher: ‘Chinese walls’ are necessary between the investigation and decision-making bodies, to ensure impartiality of the first-instance proceedings. In this scenario, decision-making bodies would hear the case at an oral hearing where investigators and defendant parties would have the opportunity to present confronting arguments and evidence (adversarial principle). Regarding the second improvement, guarantees of independence of members of decision-making bodies similar to those stipulated for judges should be introduced, including, but not limited to, more transparent and detailed rules on required qualifications, experience, and integrity, methods of selection of candidates and perpetuity of function (Venice Commission, 2016, p. 20).

Regarding the second level of enforcement, the most appropriate improvement to ensure merit-based and efficient solving of cases would be the setting up of a specialised court to deal with competition cases, similar to
that existing in the United Kingdom. However, we doubt this is attainable in WB countries, having in mind their scarce financial resources. The second-best solution would be the designation of competition law chambers within commercial or civil courts, like it has been done in Austria, France, and Germany. In both cases, special rules on the procedure, before the first-instance administrative authorities and the second-instance courts, should be adopted to ensure the respect of parties’ rights at a level appropriate to the severity of fines stipulated by the EU and national competition laws.

The scope of monitoring of the SAA implementation in the WB countries concerning competition needs modification. The EC should assess the observance of the rule of law in this field too. The EC must use Directive 2019/1 as a legal basis to set up benchmarks for the institutional and procedural arrangements regarding the competition law enforcement in candidate countries. However, it is not realistic that the EC would ask for the fulfillment of standards higher than those achieved on the EU level. For this reason, we do not expect that WB countries will soon start redesigning their competition enforcement models to comply fully with the rule of law.

Literature


Institutional Design, Efficiency and Due Process in Competition Enforcement:
Lessons from Slovenia and Serbia

by
Veljko Smiljanić* and Kevin Rihtar**

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Abstract

The article compares the institutional designs and historic legacy of the Slovenian and Serbian competition enforcement framework, and discusses the advantages and drawbacks of each model. Slovenia implemented a mixed model, where the competition enforcement procedure is divided into functionally separate investigation and misdemeanour administrative procedures for the imposition of sanctions.

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The Slovenian model has generally been perceived as inefficient, with specific difficulties arising from the unclear relationship between the administrative and the misdemeanour procedures. On the other hand, Serbia significantly changed its institutional design in 2009 from its Austrian-inspired roots to a single administrative procedure. The new system appears to have been more effective, but strong judicial safeguards are necessary. The Authors further review the matter from a national and international point of view, considering the ECN+ Directive and the case-law of the Court of Justice of the European Union and European Court of Human Rights.

Résumé

L’article compare les conceptions institutionnelles et l’héritage historique du cadre slovène et serbe d’application des règles de concurrence, et examine les avantages et les inconvénients de chaque modèle. La Slovénie a mis en œuvre un modèle mixte, dans lequel la procédure d’application des règles de concurrence est répartie entre des procédures administratives d’enquête et de sanction fonctionnellement distinctes. Le modèle slovène a été généralement perçu comme peu efficace, avec des difficultés spécifiques dues au manque de clarté des relations entre les procédures administratives et les procédures pénales. D’autre part, la Serbie a considérablement modifié sa conception institutionnelle en 2009, passant de ses traditions d’inspiration autrichienne à une procédure administrative unique. Le nouveau système semble avoir été plus efficace, mais de solides sauvegardes juridictionnelles sont nécessaires. Les auteurs examinent la question d’un point de vue national et international, en tenant compte de la directive ECN+ et de la jurisprudence de la Cour de justice de l’Union européenne et de la Cour européenne des droits de l’homme.

Key words: antitrust; competition law; Central and Eastern Europe; efficiency; competition enforcement systems; judicial review; Slovenia; Serbia.

JEL: K21, K23, K49, L49

I. Introduction

The Former Director-General for Competition at the European Commission, Johannes Laitenberger (2017), once stated that the robust, independent and even-handed enforcement of competition rules is one of the public policies that contribute to making our society more sustainable, more inclusive and more future-proof. The need for enforcement which is both effective and procedurally even-handed in antitrust is repeatedly hammered home by competition authorities, undertakings and academics, almost without distinction. As is often
the case, difficulties arise when these two lofty principles clash; when efficiency can be gained at the expense of legal certainty, or when procedural fairness leads to protracted proceedings that ultimately serve little purpose to effectively curtail infringements, but might benefit the parties to the proceedings.

Different lawmakers have tried to approach the tension between these principles in institutional design by different means. Most national systems in Europe have copied the European Commission’s institutional setup, where an administrative authority simultaneously has the roles of the investigator, the prosecutor and the adjudicator, while a minority have tried to separate the investigatory function from the decision-making role by granting their competition authorities the right to investigate whether an infringement had been committed, but leaving the final decision either on substantive matters or only on the sanctions to the judiciary. Some, like Slovenia, opted for a mixed approach, by trying to functionally separate investigation from deliberations within the same authority. In each instance, the underlying choice involved a similar trade-off between the level of discretion and power granted to an administrative authority in exchange for faster resolution of cases.

Indeed, efficiency has long been the driving principle behind antitrust regulation and enforcement, and this imperative has only intensified with the rise of digital markets. Market changes and disruptions are now faster than ever and, if enforcement lags behind, decisions run the risk of being rendered irrelevant by subsequent developments. Inefficiency in enforcement was one of the guiding principles behind the European Commission’s Directive 2019/1 (hereinafter; ECN+ Directive).¹ As noted in Recital 5 of the ECN+ Directive, national law prevents many national competition authorities from having the necessary enforcement and fining powers to be able to enforce Union competition rules effectively, which undermines their ability to effectively apply national competition law in parallel to Articles 101 and 102 of the Treaty on the Functioning of the European Union² (hereinafter; TFEU). However, simultaneously, the right to a fair trial and the necessity for firm procedural guarantees have expanded alongside the scope of enforcement of competition rules worldwide, with concerns related to the severity of potential consequences caused by infringement decisions³ and fundamental rights being underlined repeatedly by parties to the proceedings.

¹ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (2019) OJ L 11.
³ Not only with respect to the ever-increasing administrative fines and/or behavioural remedies, but increasingly with respect to follow-on damage claims and criminal liability.
Even though it has been a member state of the European Union for fifteen years now, Slovenia has a system of competition rules enforcement which is often perceived as inefficient. Its national competition authority, the Slovenian Competition Protection Agency (hereinafter; the Slovenian NCA) is empowered not only to establish the infringement of competition rules, but also to impose fines. It does so, however, in two formally separate procedures (an administrative procedure and a misdemeanour procedure). Even though high-profile investigations against major local companies have been both initiated and concluded, the final outcome of subsequent misdemeanour procedures was generally perceived as unsatisfactory from a regulatory point of view. Conversely, Serbia, itself still only a candidate country for EU accession, adopted a single administrative procedure already in 2009, where the competition authority both investigates and imposes fines on companies suspected of wrongdoings within the same proceeding. Since 2011, the Serbian Commission for Protection of Competition (hereinafter; the Serbian NCA) initiated many high-profile investigations against major market players across numerous industries – from dairy to tobacco, telecoms to electricity, baby care products to motor vehicles – and imposed total fines in tens of millions of euros over the period. Compared to the overall development level of the country, the Serbian NCA is widely considered as an active and relatively competent enforcer. This article intends to examine the

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4 According to publicly available information, less than EUR 1 million fines have been imposed by final decision and paid since the formation of the Slovenian national competition authority in 1993 (Krašek, 2019, p. 6). Other indicative examples include the Slovenian NCA's own Annual Report for the Year 2014, June 2015, as well as numerous media claims (e.g. Finance, newspaper article dated 22 May 2008: Intervju: Za kaznovanje tajkunov ni prepozno! and Ius-Info, article dated 12 July 2012: Novela zakona o preprečevanju omejevanja konkurence čez matični odbor). Problems in relation to duplication of procedures, which are generally aimed at a single goal, were also raised by judges of the Constitutional Court of the Republic of Slovenia (e.g. Partly Dissenting Opinion of Judge Mag. Miroslav Mozetič of 22 April 2013, No. U-I-40/12).

5 The Slovenian NCA was given the role of the misdemeanour authority on 1 January 2005. Prior to that, only judges were allowed to render decisions in misdemeanour procedures, whereby the Slovenian NCA was allowed to file a motion for the initiation of the misdemeanour procedure. The objectives pursued by extending the competence of the Slovenian NCA included a more appropriate placement of misdemeanours in the system of criminal law and resolving court backlogs (Repas, 2010, p. 99).

6 For example, investigations in relation to construction cartels, pharmaceutical companies and media companies.

7 “In a short timespan since its establishment and start of operations in 2006, the Commission for Protection of Competition has grown into a respectable national competition authority. At the moment, the Commission has significant expert, organizational, technical and financial capacity. During the study, stakeholders have noted that the Commission has through its practice and professionalism of its expert service gained respect not only on the Serbian market, but that it represents a model for institutions in the region” (Lazarević and Protić, 2015, p. 62). Per the European Commission’s 2019 Progress Report on Serbia, Serbia
institutional design of the Serbian and Slovenian competition framework and see how divergences in the original approach may have contributed to the evolution of their enforcement practice. We will look at whether a conscious choice has been made between efficiency and procedural fairness, what the advantages and disadvantages of each model may have been, and what lessons can be learned for the institutional design in other jurisdictions in Central and Eastern Europe, most of which faced similar economic, socio-political and cultural challenges in their development, which naturally reflect on the wider competition landscape.

II. Global Overview of Public Competition Enforcement Systems

In relation to how the tasks of investigation, prosecution and decision-making are allocated, public competition enforcement systems can be divided into two broad groups: administrative and judicial systems. In judicial enforcement systems, the competition authority is authorized only to investigate cases and identify competition concerns, but then has to bring the case before a court, which then renders the decision. In this framework, the authority essentially acts as a prosecutor, which has to convince the court on the merits of its claim. In a pure judicial model, the court renders the decision on both substance and fines. In a mixed judicial model, the competition authority adopts the decision on substance, and the court is only responsible for determining and imposing an appropriate sanction.

On the other hand, in an administrative enforcement system, the competition authority is empowered to investigate cases and issue binding and final decisions, usually subject to judicial review, which is supposed to provide additional legal certainty and allow the parties to appeal the decision. In practice, within the administrative model, further distinction can be made between the monist and the dualist model. In the monist administrative model, the competition authority is empowered to investigate cases and render decisions directly within a single procedure, where the authority simultaneously investigates the facts of the case, considers the arguments of the parties to the proceedings and relevant stakeholders, applies the rules to the determined facts and ultimately discontinues the proceedings or imposes fines should it consider that

is considered to be moderately prepared in the area of competition policy, with the European Commission noting that: “The CPC’s investigations of large private and public companies further contributed to improving its credibility and public image.” EU principles are applied as a matter of course: “National competition law significantly overlaps with EU rules. Within EU accession, not only legal harmonization, but interpretation of domestic rules based on the criteria of EU competition law is necessary” (Danković-Stepanović, 2014, p. 90).
a competition infringement had been committed. In a dualist administrative model, the tasks of investigation and decision-making are divided between two administrative bodies, which may or may not be placed within the same authority (one body is in charge of the investigation of the case, which is later referred to the other body responsible for deciding the case). In practice, there can be significant differences in how a case is handled even within nominally similar administrative models: as an example, Bosnia and Herzegovina has a significantly more adversarial approach in contrast to most of the Western Balkans, with the competition authority’s role being more akin to a *de facto* arbiter between competing claims of the complainant and defendant than to the more conventional inquisitorial approach prevalent in most other jurisdictions.8

**III. Institutional Design: Looking at Slovenia and Serbia**

Under the applicable legislation, the Slovenian NCA conducts two types of procedures: an administrative procedure for the investigation of infringements of the Prevention of Restriction of Competition Law (hereinafter; Slovenian Competition Law)9 and Articles 101 or 102 of TFEU, and a misdemeanour procedure where the Slovenian NCA imposes sanctions. Accordingly, the Slovenian system is trying to have it both ways to a certain extent: there is functional separation, but set under the umbrella of the same administrative institution,10 so it is not structural. The Slovenian NCA does not have jurisdiction to impose a fine within the same procedure where it establishes that a competition infringement had been committed. It should be borne in mind that the imposition of a fine is generally considered as one of the most important tools in the repertoire of NCAs, with mere administrative decisions not having a preventive effect on market participants (Grilc et al., 2009). The Slovenian system has several other specific features, which have been subject to avid debate and not a small amount of criticism over the years.11

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8 Law on Competition, Official Gazette of BiH, no. 48/05, 76/07 and 80/09.
10 Slovenia is not the only jurisdiction in the former Yugoslavia where this setup has been put in place: North Macedonia operates a similar scheme (Law on Protection of Competition, Official Gazette of Macedonia, no. 145/2010, 136/11, 41/14, 53/16 and 83/18).
11 One of the major criticisms of the Slovenian competition procedure in the past concerned its independence. “At the beginning, the [Slovenian NCA’s] powers were limited as it lacked independence being an office within the ministry. It was also severely understaffed (consisted of the Director, a couple of assistants and a secretary) and notoriously lacking professionals. These negative factors, which prevented it to be more than a passive observer, were amplified
The administrative procedure is normally carried out by a panel, which consists of all members of the Council of the Slovenian NCA and the chair of the panel, whereas the decision on fines is adopted by a (three member) misdemeanour panel, chosen for each individual case among the council members and officials employed by the Slovenian NCA. Consequently, while the persons actually deciding in both procedures are not necessarily the same, they will usually work together. Moreover, the mentioned proceedings are governed by different rules – whereas the administrative procedure is governed by the Slovenian Competition Law and, subsidiary, by the General Administrative Procedure Law, the misdemeanour procedure is governed by the Minor Offences Law. Each of these rulesets stipulate that in both the administrative and the misdemeanour procedure, the Slovenian NCA has to examine the facts of the case and determine the infringement of substantive law. It is clear that these two proceedings are formally separated and independent from one another.

The Slovenian Competition Law does not include detailed guidelines regarding the relation between the two aforementioned proceedings, nor does it strictly determine whether they shall run simultaneously or successively, or which one of them is superior to the other. Therefore, many questions are unanswered and left to the discretion of the Slovenian NCA (Valter, 2015). However, according to the Slovenian Competition Law and the Minor Offences Law, the Slovenian NCA has to exercise relevant procedural guarantees and safeguards in both proceedings and must, separately and independently, examine the facts of the case and establish the infringement of the competition rules. As is logical and confirmed by the Slovenian NCA’s interpretation and established case-law, only the final decision, in which an infringement of the competition rules is established, represents the legal basis for the initiation of the misdemeanour procedure. In such way, a problematic scenario in which an administrative decision is repealed only after the fine was imposed can be avoided (Grilc et al., 2009). Since competition investigations are often complex by the absence of specialized procedural rules for actions entrusted to the [Slovenian NCA,] preventing it to tackle competition law cases efficiently.” (Fatur, Podobnik, Vlahek, 2016, p. 77) This nevertheless significantly changed in 2012/13 when it was reorganized into an agency. (Fatur, Podobnik, Vlahek, 2016, p. 77).

14 The formal distinction of an administrative and a misdemeanour decision, while in practice these two procedures are necessarily interconnected, has been subject to criticism by constitutional judges as well. See Partly Dissenting Opinion of Judge Mag. Miroslav Mozetič of 22 April 2013, No. U-I-40/12.
and time-consuming, in practice that means that the Slovenian NCA will initiate the misdemeanour procedure several years after the administrative procedure was originally initiated and the alleged offence committed. In order to increase efficiency, the Slovenian NCA relies on evidence used in the administrative procedure in the misdemeanour procedure as well.\textsuperscript{15} Such approach has been given the green light by the Constitutional Court of the Republic of Slovenia.\textsuperscript{16}

Following an investigation procedure, which is very much in line with the usual scope of authority of competition enforcers,\textsuperscript{17} the Slovenian NCA is only entitled to render a decision by which it establishes an infringement of competition rules (a declaratory administrative decision). As a follow-up to this administrative decision becoming final, the Slovenian NCA can then initiate a misdemeanour procedure. The procedure is carried out in accordance with the rules for expedited proceedings in the Minor Offences Law by sending an information letter on the offence to the offender. The purpose of the information letter is to inform the offender on the offence and to enable him to respond to the allegations. This is a very peculiar approach, as the offender should have already been informed about the offence twice: firstly, on a preliminary basis via the Statement of Objections (which it would have already responded to), and hopefully, via a clear statement of reasons incorporated in the administrative decision. In line with the Minor Offences Law, the Slovenian NCA must \textit{ex officio} and without delay, promptly and briefly establish the facts and collect evidence necessary to decide on the offence. Problems inevitably occur in determining the intent or negligence involved as a fundamental element of a misdemeanour, which is not necessarily relevant in the context of an administrative proceeding. Ultimately, the Slovenian NCA would impose a fine within the misdemeanour decision. Judicial protection against the administrative decisions is provided by the administrative court and the Supreme Court,\textsuperscript{18} whereas judicial protection against the decisions adopted by the Slovenian

\textsuperscript{15} The decision of Slovenian Competition Protection Agency of 21 July 2014, No. 3063-3/2014-35, pt. 60.
\textsuperscript{16} The decision of the Constitutional Court of the Republic of Slovenia of 11 April 2013, No. U-I-40/12-31, pt. 35 and 37.
\textsuperscript{17} The scope of the powers conferred on the Slovenian NCA in the investigation procedure (which is part of the administrative procedure), has been subject of criticism and even constitutional review. Since the majority of the evidence obtained in the administrative procedure are used in the misdemeanour procedure as well, the Constitutional Court in its judgment established that the powers of the Slovenian NCA shall be assessed as powers conferred on a public authority for the conduct of criminal proceedings, given the high possibility that the evidence obtained within the administrative procedure can be used also in the following criminal procedure. See: The decision of the Constitutional Court of the Republic of Slovenia of 11 April 2013, No. U-I-40/12-31, pt 37.
\textsuperscript{18} In cases where violations of different human rights are claimed, the Slovenian Constitutional Court also confers a certain degree of legal revision.
NCA in misdemeanour procedures is provided by the local court and then by the higher court specializing in misdemeanour matters. With regard to judicial review of the administrative procedure, the choice of the administrative court as the reviewing body has been subject to some criticism.\(^{19}\)

It is important to mention that Slovenian Competition Law includes several special provisions that deviate from general (administrative law) rules, with the stated aim to improve the efficiency of the Slovenian competition procedure.\(^{20}\) However, they seem to have resulted in additional inconsistencies in the Slovenian legal system. Administrative judicial review proceedings in competition law cases are partially regulated in the Slovenian Competition Law, which encompasses only a limited number of specific provisions; meanwhile, Administrative Dispute Law\(^{21}\) applies *mutatis mutandis* with regard to all other procedural aspects. In line with the Slovenian Competition Law, a judicial review of the administrative procedure without a hearing is enacted as a general rule. This rule clearly intervenes with the general rule of the Administrative Dispute Law whereby the hearing is the default manner of deciding administrative disputes, unless specifically listed exceptions apply (see Fatur, Podobnik, Vlahek, 2016, p. 217). Since the wording of the Slovenian Competition Law “is extremely vague as it does not provide the reasons for the explicit exclusion of the hearing in competition matters, […] is thus to be

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\(^{19}\) In 1999, in the process of adoption of the previous Slovenian Competition Law, several recommendations were submitted for judicial review to be performed by a specialized panel (e.g. senate of Supreme Court which would consist of judges from both the commercial and administrative unit). The purpose of such recommendations was that competition law deals with many economic and commercial issues, regarding which the judges from the commercial unit have more knowledge and experience. Regardless of these recommendations, the judicial review of administrative procedure is, until today, in hands of the administrative court (see Galič, 2000). Between 1993 and 1999, judicial review was ensured by filing a civil claim. In the period from 1999 and 2008, judicial review was regulated in the same manner as it is today. This was amended in 2008, when the initiation of an administrative dispute before the Supreme Court of the Republic of Slovenia was enacted as the only available legal remedy against the decision issued in the administrative procedure (see Fatur, Podobnik, Vlahek, 2016, pp. 208–209). This rule remained in force until 2013. Even though different approaches were tested, judicial review has never been assigned to commercial law judges in Slovenia.

\(^{20}\) “The [Slovenian Competition Law] provides for the following competition law-specific rules on the court review proceedings: as a rule, the review court is to decide without a hearing, cases subject to judicial review procedure are to be considered urgent and are to be handled by the court as priority; the plaintiff may not introduce new facts or present new evidence; the court is to test a decision of the [Slovenian NCA] (in some cases also its orders) within the limit of the claim and within the limits of the grounds stated in the action, and is to pay attention ex officio to essential infringements of procedure; access to case file documents before the court is allowed under the same ground as before the [Slovenian NCA], as of 2019, the [Slovenian NCA] must publish all review judgements on its webpage.” (Fatur, Podobnik, Vlahek, 2016, p. 209).

\(^{21}\) Official Gazette of the Republic of Slovenia, No. 105/06, as amended.
interpreted as directing the review court to, first and foremost, always analyse whether the general conditions to omit the hearing [...] are met.” (Fatur, Podobnik, Vlahek, 2016, p. 217).

Under the legal framework originally put in place in 2005, and considered as the first modern national competition law, Serbia instituted a mixed judicial system for competition infringements, with the Serbian NCA investigating and determining that an infringement had been committed, and the misdemeanour courts liable for the subsequent imposition of fines. This was originally inspired by the Austrian legal framework, and is still operated as an exception in a few other EU member states. In theory, the system is supposed to maintain both the rights of defence and efficiency through a form of structural separation: an administrative enforcer would determine the factual questions and apply specialized rules in a streamlined procedure, while imposing sanctions in a distinct judicial procedure, supposed to safeguard the procedural rights of defendants, which face severe consequences for their actions. As in Slovenia, the Serbian NCA would determine that an infringement had been committed within an administrative procedure and issue a declaratory administrative decision. When the decision became final, the Serbian NCA would file a misdemeanour complaint to the competent misdemeanour court, which would decide on fines. Also akin to Slovenia, the appeal route was separate: against the infringement decision, one would appeal to the Administrative Court, and then the Supreme Court of Cassation (potentially the Constitutional Court), while the misdemeanour decision would be appealed before the higher misdemeanour courts.

However, as preparation for a more vigorous enforcement of competition rules, the new Serbian Law on Protection of Competition (hereinafter; Serbian Competition Law) was adopted in 2009, drastically changing the earlier institutional framework by empowering the Serbian NCA to both investigate infringements and directly impose fines. Nowadays, misdemeanour courts have long been eliminated from the game – the Serbian NCA identifies an infringement and imposes sanctions within a single administrative proceeding,

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22 “If we disregard the regulations which were intended to protect the permitted tinges of a market economy, the first law which tried to regulate this field was adopted by the Federal Republic of Yugoslavia in 1998. After years of unsuccessful and ad hoc enforcement, it was replaced by the Competition Law of 2005, and Serbia got its latest law regulating this field in 2009. ... The Laws from 2005 and 2009 follow the European framework and regulate restrictive agreements, dominance abuse and merger control” (Begović, Pavić, Popović, 2019).

23 At times, Sweden, Finland and Ireland operated similar systems. In the former Yugoslavia, this approach is still in force in Montenegro, while Croatia switched over to a monist administrative system in 2009.

where it allows the parties to make their case (especially through responding to the Statement of Objections). Following the Serbian NCA's decision, the parties can appeal it directly to the Administrative Court in a regular administrative dispute and appeal upwards to the Supreme Court of Cassation and/or the Constitutional Court.

Unlike Slovenia, the only specific procedural rules in Serbia involve instructive (and relatively short) deadlines for both the Administrative and the Supreme Court of Cassation to decide in competition law-related cases, which are commonly not adhered to in practice. Additionally, if the court decides that the appeal had merit only with respect to the amount of the fine imposed, it is principally obliged to amend the decision itself. An appeal does not suspend the execution of the decision, but the party to the proceedings is allowed to request the Serbian NCA to suspend execution, if it would cause irreparable damages, and if it is not contrary to the public interest (per the general legal framework, this competence is reserved for the court). Therefore, the framework of the Law on Administrative Disputes is mostly applicable to competition law-related cases.

IV. Putting Theory into Practice

If the mixed judicial system was supposed to offer the best of both worlds, it might seem odd that the Serbian Competition Law would have so drastically departed from the previous institutional setup, let alone in the early stages when the country is developing a competition compliance culture. After all,

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25 As in Slovenia, in the local legal community, occasionally disputes arise on whether the Commercial Court would have been a more appropriate forum for appeal, irrespective of the procedure used, as this court is perceived as more versed in dealing with commercial entities in general: “Although the Administrative Court has slowly built up practice over the years in competition cases (which is still insufficiently reliable), there is an impression of a missed opportunity for a more comprehensive solution and a higher degree of judicial protection which might have been provided by a court with more expert capacity in commercial cases and with respect to the market. There are still criticisms concerning the court’s positions or lack of specialization, as well as deadlines for deliberations, since this is the most burdened court in the country” (Lazarević and Protić, 2015, p. 7).

26 “The vast majority of competition authorities of the EU Member States as well as the EU Commission itself combine investigative, prosecutorial and decision-making powers in one institution. The risk of prosecutorial bias is an obvious corollary of this institutional design. … With its institutional separation of powers between an investigating authority and a decision-making court, Austria’s system of public competition law enforcement is very much the exception within the EU, and is sometimes regarded as a gold standard in terms of institutional design. From the point of view of undertakings concerned by an investigation, the Austrian system indeed has significant advantages over the EU model” (Böhler-Grimm and Kühnert 2017, p. 69).
in just a few short years since the start of the economic transition and the introduction of credible competition law, with practical enforcement in its infancy, the country would radically pivot and reshape a significant part of the institutional framework, by excluding an important part of the setup in the misdemeanour courts.

In practice, to a large extent, the system as such was seen as problematic, and a deterrent to the development of effective enforcement practice, with literature being overwhelmingly against the institutional setup. Procedural missteps in the early days of the Serbian NCA’s practice led to the judiciary annulling most of its’ decisions; reopening proceedings and repeated appeals were the rule rather than an exception. By the time the case ended up with the misdemeanour courts (themselves notoriously overburdened), the statute of limitations would have often expired, and no decision on sanctions would have been made. Furthermore, misdemeanour courts had proven to be ill-prepared to handle complex economic assessments and analysis that competition law presupposes: a judge might decide on traffic penalties in the morning, while considering multi-million euro fines for a corporate conglomerate in the afternoon. The sheer novelty of competition rules, and lack of direct agency in defining a broader compliance policy, meant that judges were eager not to misstep and impose any fines which might significantly rock the boat. The results were predictable: from 2005 to 2009, effective competition enforcement in Serbia was prima facie

27 “Specifically, during the application of the 2005 Law, there have been no sanctions collected against competition infringers, and no acts of the Commission were confirmed in judicial review. Bearing this in mind, the 2009 Law improved the Commission’s procedural tools with respect to gathering the relevant data and evidence in investigations. The discontinuation of the previous duality in competition investigations, which included successive administrative and judicial-misdemeanour proceedings, and then parallel judicial review over both kinds of acts (administrative dispute and appellate misdemeanour proceedings) is especially important. This flaw was removed by introducing a single and comprehensive administrative proceeding before the Commission, which is then judicially reviewed before the Administrative Court” (Lazarević and Protić, 2015, p. 37). Also: “The 2009 Law made a drastic shift towards improving the efficiency of competition proceedings. In order to overcome the constitutional problem of entrusting sanctioning to an authority which is neither a court, nor a classical administrative body, the sanctions have under the 2009 Law been garbed in the guise of administrative measures. … The second important novelty in regulating the investigation procedure in the 2009 Law is reflected in the fact that both the determination that a competition infringement had been committed and the imposition of corresponding sanctions, including the administrative, i.e. monetary fine, are decided in in a single proceeding, with a single resolution. Thus, the unnecessary duality of proceedings, seen in the 2005 Law, is now eliminated. … Efficiency in competition protection is achieved with a quick response to competition infringements observed by the authority in charge, through the identification and simultaneous imposition of corresponding remedies and sanctions”. (Marković-Bajalović, 2012, p. 70). Furthermore: “A significant advantage of the new model concerns the comprehensiveness and uniformity of acting within the single competition protection process by the same authority. Judicial review is separate.” (Danković-Stepanović, 2014, p. 284).
non-functional. The Serbian NCA pursued investigations and decided that infringements had been committed, even in high-profile cases, but consequences failed to materialize, and the business community remained relatively unaware of the importance of competition rules. However, this markedly changed following the adoption of the Serbian Competition Law.

One of the guiding principles of the new legal framework was efficiency: if the courts have proven not to be up to the task, the lawmakers would do away with them and transfer their power to the Serbian NCA, which would be the sole responsible entity for advocacy and enforcement of competition rules. The system would be simplified: there would no longer be two separate tracks of appeal, but a single authority applying the rules to a set of facts determined only once. There were vocal critiques of the potential ramifications on legal certainty and due process at the time of the amendments, undermining the right of the courts to decide on such severe sanctions, but legal purism gave way to expediency.

The results had much to do with other factors as well, but were undeniable: within a few short years, the Serbian NCA had built-up a relatively impressive track record, to a large extent attributed to the change in the institutional framework.28 Another key reason behind this was that the authority was not afraid to utilize its newfound power and experiment – unlike elsewhere, the Serbian NCA did not kick off its practice with gentle rebukes or cautionary fines, but immediately initiated proceedings against some of the most prominent market players and imposed hefty multi-million euro fines.29 There were a number of missteps along the way, and the Serbian NCA was forced to admit defeat in more than a few cases. However, over time and with increased experience, successes also started piling up, and the competition awareness of the business community on one side, and the sophistication of the cases pursued on the other, evidently improved. The Serbian NCA now boasts a developed track record and represents a clear example of the benefits in terms of efficiency of an administrative system in contrast to the judicial enforcement system.

What are the disadvantages? The costs of the Serbian NCA’s education have had to be borne by someone – often enough, these have been either the parties to the proceedings or the harmed complainants, especially in cases where market awareness may justifiably not have necessarily followed the authority’s eagerness

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28 “Probably the successful transition to the procedural and institutional model of the 2009 Law was crucial for facilitating development of competition protection, formation of the Commission’s relevant practice, building the credibility of the authority among undertakings, as well as preventive effects, all related to a successful model connecting investigation and sanctioning.” (Lazarević and Protić, 2015, pp. 83–84).

29 Over the years, the Serbian NCA conducted proceedings against the largest dairy in Serbia, major retail chains, the leading ice cream producer, the national electricity company, the Bar Association, a number of major pharma companies, both major telecom operators (SBB and Telekom Srbija), the entire local tobacco industry, the largest brewery in Serbia etc.
to strictly apply the law. A prosecutorial administrative authority working under the imperative of efficiency has a natural tendency of bias against suspected infringers, which can lead to a willingness to more easily disregard their procedural rights or inconvenient arguments. Again, the key is judicial oversight, which needs to be effective in order to prevent overreach by the administrative authority – this requires expert judges, who are unafraid to go an into in-depth review of the authority’s argumentation and insist on the strict following of procedural guarantees, bearing in mind the nature of the proceedings. The importance of judicial review has been clearly highlighted by the practice of the European Court of Human Rights (hereinafter; ECtHR) in *A. Menarini Diagnostics S.R.L. v. Italy* (hereinafter; *Menarini Diagnostics*), a court having full jurisdiction to examine the decision. Sadly, this has still been lacklustre in Serbia, with the judiciary still lacking sufficient expertise for proper case review and hesitant to robustly challenge the NCA, especially with respect to the substance of the cases. This is dangerous, as it allows the authority to wield disproportionate power and grants it a substantial advantage in the proceedings.

Simultaneously, in Slovenia, the unclear relationship between the administrative and misdemeanour procedure results in certain crucial discrepancies, including the very definition of persons covered by the rulesets governing each of the procedures. According to the Slovenian Competition Law, the concept of an undertaking is defined very broadly, exceeding the definition of a legal entity as defined under the Minor Offences Law. Consequently, in practice, the Slovenian NCA can establish an infringement of competition law in administrative procedure towards a given undertaking, but it might not be able to impose a fine upon such undertaking, if it does not fall within the definition of a ‘legal entity’ under the Minor Offences Law. More importantly, the ambiguous relationship between the procedures themselves leads to confusion concerning the scope and content of the misdemeanour decision and its conformity with the administrative decision. Not only does this creates concerns in relation to the prohibition of double jeopardy, but also considerably hampers the efficiency of the Slovenian NCA and its ability to fully enforce competition rules. Additional elements of misdemeanours, not necessarily integral to the

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31 “Examination of the decisions of the Commission in meritum, concerning legality of the reasons for application of substantive rules, did not find its place in the judicial practice thus far” (Lazarević and Protić, 2015, p. 7).

32 In practice, it is not uncommon for the misdemeanour procedures to be time-barred. See: Judgement of the Supreme Court of the Republic of Slovenia of 21 September 2010, No. IV Ips 129/2010.
original proceedings (e.g. the establishment of intent or negligence), further frustrate proceedings. The separation of the two procedures has proven to be especially time consuming due to procedural safeguards and fundamental guarantees concerning fair trial.

According to the ECN+ Directive, the exercise of the powers should be subject to appropriate safeguards, in particular in the context of proceedings which could give rise to the imposition of penalties. These safeguards include the right to good administration and the respect of the undertakings’ rights of defence, an essential component of which is the right to be heard. This means that both the Slovenian Competition Law and the Minor Offences Law have to provide for the right to be heard, which then would not corelate to efficient enforcement. The fact that the Slovenian NCA must examine facts and establish an infringement of competition rules separately and (formally) independently in both procedures, and exercise all procedural guarantees and safeguards twice, while the facts and evidence are identical, has proven to be unreasonable and inefficient. There are also practical problems in relation to such duplication, especially considering the potential time-barring of misdemeanour procedures (which was a common procedural strategy pursued by defendants in Serbia under the previous regime). In relation to the judicial review of the misdemeanour decision, judges of the Slovene local courts have interpreted their tasks and powers in different ways. Some are of the opinion that the facts are adequately determined in the Slovenian NCA’s administrative decision, and that it is not their place to question them, while more commonly, judges examine and assess all the evidence once again and independently from the interpretation of the Slovenian NCA in the administrative procedure. As an example, the higher court in Ljubljana explicitly ruled that the courts are independent when deciding and therefore must deliberate autonomously in each case and are not bound by decisions made in other administrative proceedings.

There is a comprehensive case-law by the ECtHR on judicial review and standards of review of competition decisions issued by national competition authorities, which questions the above described confusion of Slovenian courts, since it appears that the ECtHR has already settled the opinion that full judicial review of competition decision as determined under Article 6 of the European Convention on Human Rights (hereinafter; ECHR) has to be granted. Article 6 of ECHR stipulates: “In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to fair and public hearing

33 See the judgement of the Supreme Court of the Republic of Slovenia of 23 November 2010, No. IV Ips 148/2010.
34 The judgement of the Higher Court of Ljubljana of 12 December 2016, No. PRp 142/2016, par. 6.
within a reasonable time by an independent and impartial tribunal established by law.” Per Menarini Diagnostics, as the characteristics of a judicial body with full jurisdiction, the ECtHR referred to the power to quash in all respect, in fact or in law, the decision rendered by the lower body. It must, in particular, have jurisdiction to consider all questions of fact and law relevant to the dispute which was before it (Murg-Perlmutter, 2012). The impact of Menarini Diagnostics stretches beyond EU courts and, therefore, when national courts review fining decisions of their national competition law authorities, they should make sure to exercise full jurisdiction as well.35

In line with the above, since the main purpose of misdemeanour procedure is to impose (usually relatively high) fines, it is very probable that the ECtHR would consider such a procedure as a type of a criminal procedure and require full judicial review. Therefore, the position of the Slovenian courts in relation to judicial review of the misdemeanour decisions would not be contrary to international law and practice, but it does additionally procrastinate the procedure.

In Slovenia as in Serbia, the trickle-down of criminal elements into the administrative procedure and its specific rules has been subject to criticism. In this regard, regardless of the related constitutional issues, the legal solution by

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35 Contrary to the ECtHR, the view of the Court of Justice of the EU on whether the competition procedures in which fines are imposed are to be qualified as ‘criminal’, and whether the Commission’s decision on antitrust shall be the subject of full judicial review by CJ EU has not been clear. The CJEU recognizes the broad definition of the Commission’s margin of discretion in assessing technical economic matters and does not review its assessments and conclusions if they were based on sufficient evidence and followed due process. However, it seems the CJEU has restricted the implication of the margin of discretion when it ruled in case Commission v. Tetra Laval that “Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it” (Case Commission vs Tetra Laval BV, C-12/03 P, EU:C:2005:87, par. 39). According to OECD’s Directorate for Financial and Enterprise Affairs Competition Committee (2019): “…effective review by courts is a necessary complement to the internal checks and balances that competition authorities put in place to ensure due process” (p. 4). Moreover, “In any competition enforcement system, whether judicial or administrative, and independently of that system’s characteristics, the effectiveness and credibility of enforcement requires that there is, in addition to the ex ante internal checks and balances and procedural guarantees for parties that competition authorities put in place, access to ex post review of competition cases by an independent generalist or specialised court or tribunal” (OECD, Directorate for Financial and Enterprise Affairs Competition Committee, 2019, p. 19).

36 The Slovenian Competition Law was adopted on 1 April 2008 and has already been subject to constitutional review. The disputed provision conferred power to the Slovenian NCA to issue decisions on the initiation of an investigation of legal entities’ premises, even when
which the investigation department of the District Court of Ljubljana (and not the Administrative Court) was entitled to assess whether there are reasonable grounds to suspect that the party has committed an infringement has been considered as unreasonable as well. According to the ECN+ Directive, such judicial review is allowed. However, judges of the District Court of Ljubljana are usually not familiar with the specific features of competition law, and per the Slovenian NCA's experiences, tended to apply the stricter procedural and material standards of criminal law, further slowing down the efficiency of the investigation proceedings. According to the Slovenian NCA's opinion, this role should have better been left to the judges of the Administrative Court (Krašek, 2019, p. 3).

The results in Slovenia have not been encouraging either. Arguably, no cases have been completed in less than a year and a half, whereas some last longer than five years. Since court proceedings can (and usually do) last a few years, and the Slovenian NCA has no legal power to initiate the misdemeanour procedure before the decision in the administrative procedure is final, it is quite common that decisions on fines are not rendered at all for several years. In 2016 and 2017 no fines were imposed at all, even though several administrative procedures were initiated. And while this does not necessarily speak of the robustness of the institutional design, it is indicative that the total fines in Slovenia have been several times smaller than in Serbia over a longer period of time.37

V. Repainting the Shed: Legal Amendments in the Observed Jurisdictions

Coincidentally, changes to the institutional design are simultaneously considered in both Slovenia and Serbia. On some level, the two systems seem to be converging: on another, variance in experience seem to indicate different concerns by the relevant stakeholders and branching paths of further development.

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such investigation was conducted against its will. The Constitutional Court of the Republic of Slovenia repelled the disputed provision due to violation of the second paragraph of Article 36 (Inviolability of Dwellings) and Article 37 (Protection of the Privacy of Correspondence and Other Means of Communication) of the Constitution of the Republic of Slovenia.

37 Of course, that determination of the level of the penalty is not a simple task and has several important effects on the overall lawfulness of the decision (Whish and Bailey, 2012). However, the determination of the fine might be conducted more appropriately, if it would be ascertained at the onset, when the information and evidence is relatively fresh and arguably more relevant.
In February 2019, the Slovenian Ministry of Economic Development and Technology issued proposals for amendments to the Slovenian Competition Law, introducing one version of an ‘ideal’ single administrative procedure. Although the new solutions are welcome from the standpoint of simplifying the current procedural minefield, some of the changes appear to be ill-advised. Regrettably, it would appear that the Slovenian NCA was not significantly involved in the drafting, leading to justified concerns about future implementation and the fitness for purpose of the rules. Furthermore, the proposal is contrary to some of the main tendencies of the new ECN+ Directive, which clearly advocates that efficient and effective competition systems shall include as little criminal elements as possible. Recital 40 of the preamble to the ECN+ Directive stipulates: To ensure the effective and uniform enforcement of Articles 101 and 102 TFEU, national administrative competition authorities should have the power to impose effective, proportionate and dissuasive fines on undertakings and associations of undertakings for infringements of Article 101 or 102 TFEU, either directly themselves in their own proceedings, in particular in administrative proceedings, provided that such proceedings enable the direct imposition of effective, proportionate and dissuasive fines, or by seeking the imposition of fines in non-criminal judicial proceedings.

Accordingly, despite the broader practice of the CJEU and ECHR, it is reasonable to note an EU-wide institutional preference for efficiency and an attempt to move away, where possible, from criminal guarantees in competition enforcement. This of course does not mean that even though wide investigative powers would be given to the NCAs, any procedural and material rights of the market participants, and especially undertakings under investigation, should not be duly respected (Jones and Sufrin, 2004). However, the proposed amendments to the Slovenian Competition Law introduce many criminal elements into the single administrative procedure, such as elimination of evidence, rules on sentencing and the prohibition of double jeopardy. Since criminal elements in the competition procedure have tended to hinder its efficiency, it remains to be seen whether they would actually offer a tangible benefit with respect to the rights of the parties, without unduly burdening the expediency of the proceedings. However, it is evident that Slovenia finally recognized that separate procedures do not represent an optimal approach to effective enforcement.

Serbia offers a marked contrast with the legislative process: the Serbian Ministry of Trade, Tourism and Telecommunications has pursued legislative changes for some time now, working closely in order to engage the wider competition community. Not only has the Serbian NCA spearheaded the efforts, but a number of relevant stakeholders have actively been engaged (e.g. other competent ministries, representatives of business associations etc.).
Originally, there was a vocal minority within the corporate sector which extolled the virtues of a judicial enforcement system and demanded that it is reinstated, which was not accepted thus far in the drafting process, with the relevant authorities signalling that efficiency concerns and past experience should preclude this\textsuperscript{38}. The current draft, however, makes an attempted concession to the necessity for stricter separation between prosecution and decision-making, by making the Council of the Serbian NCA responsible for ultimate deliberations and independent from the conduct of the investigation (as quasi-judges within the administrative authority), while prosecution is handled by the authority’s expert service.\textsuperscript{39} Therefore, following the development of practice and greater wisdom, Serbia seems willing to revise its institutional framework to somewhat mitigate the concerns about the concentration of functions within the national competition authority, but without entirely moving away from the single administrative procedure.

VI. Conclusion

Ironically enough, one of the important figures involved in setting up Serbia’s current institutional framework was a former head of the Slovenian NCA. The key factors which impact market competition are not substantially different in Slovenia and Serbia. However, design choices have unquestionably

\textsuperscript{38} “In practice, certain questions have been raised concerning the Commission’s position related to protecting the fundamental rights of undertakings, and proposals have been made to introduce a system for protection of competition which would, allegedly, contribute to better protection of rights of the undertakings in the proceedings before the Commission. … However, we are of the opinion that the role of the Commission as the national competition authority does not need to be changed, as its scope of authorities and role are in line with best comparative practice and the principles of protection of the fundamental rights of parties to the proceedings. … The question of choice between institutional models for the Commission should not be reopened after a decade of practice in enforcement of competition protection legislation in Serbia, especially since it is widely known that the entire expert and academic public acknowledged that the one of the main deficiencies in the 2005 Competition Law concerned the fact that the Commission was not authorised to issue sanctions against competition infringements, which was entrusted to the misdemeanour courts at the time. … In order to ensure the right to a fair trial in Serbia, the Administrative Court should effectively exercise its authority to rule in disputes of full jurisdiction in practice, and in that sense it would certainly be desirable that judges continue with training and specialization in competition law, since the relevant cases are often complex and specific, requiring applying economic know-how.” (Obрадовић, 2017, p. 5)

\textsuperscript{39} The current draft even includes a public hearing before the Competition Council, where the expert service (as the prosecutor) and the defendant would each present their case.
contributed to a difference in the results between the authorities. Institutional
design which discourages efficiency significantly hampers the build-up of
a competition law-compliant culture, and efficiency has substantial value of
its own for the rule of law. This is not the only factor in the equation: the
deterrent effect of high-profile cases, courage to experiment (even if mistakes
will be made) and fortitude to impose substantial fines has proven to be
a powerful tool for advocacy. It is much easier to convince a CEO to prioritise
competition compliance if his peers have suffered significant consequences
for failure to do so.\textsuperscript{40} From a regional practitioners’ perspective, it seems
self-evident that high fines and effective proceedings fostered \textit{know-how}
and compliance and that a more cautious and gradual approach tended to
encourage negligence among the business community. In both Serbia and
Slovenia, a conscious choice has been made towards the institutional design,
with significant and evolving consideration being given to both efficiency and
procedural fairness.

The ECN+ Directive clearly specifies that the design of procedural
safeguards should strike a balance between the respect of the fundamental
rights of undertakings and the duty to ensure that Articles 101 and 102 TFEU
are effectively enforced.\textsuperscript{41} Putting up opportunities for deadlocks and stalling
does not, on its own, contribute to better protection of due process: only
robust and careful judicial oversight can do this. Focusing on judicial review
might be a boring response, but it is an unavoidable and integral part of proper
deliberations and safeguarding rights of defence, and need to be significantly
bolstered in tandem with any push towards procedural efficiency.

That being said, one shouldn’t set aside efficiency for the sake of legal
purism. The cocktail of enforcement systems across the Western Balkans seems
to demonstrate that in most instances, a single administrative procedure has the
best chance to foster effective competition enforcement. Checks and balances
and due process must be studiously observed, which means that an overhaul of
an institutional design has to be followed by a significant investment in judicial
capacity, involvement and control. While the rights enshrined in the European
Convention of Human Rights are ultimately too important to sacrifice at the
altar of efficiency, they are best served by continuous and comprehensive
effort, and not by obstructive procedures. In building a credible and fair public
enforcement system, institutional design is only the first step on the way, with
the more difficult path still ahead in much of Central and Eastern Europe.

\textsuperscript{40} Of course, as recent experiences in the United Kingdom show, criminal liability also tends
to have a significant deterrent effect – generally speaking, although a number of jurisdictions in
the region criminalize competition infringements, there haven’t been many high-profile cases
personally involving corporate management.

\textsuperscript{41} Recital 14 of the preamble of the ECN+ Directive.
**Literature**


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

Avdylkader Mucaj*

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The paper builds on the author’s presentation at the 6th Zagreb Competition Law and Policy Conference in Memory of Dr. Vedran Šoljan, Challenges to the Enforcement of Competition Rules in Central and Eastern Europe, 12–13 December 2019, Zagreb, Croatia.

Abstract

The aim of this article is, on the one hand, to provide an overview of the competition law framework in Kosovo vis-à-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.

JEL: K21
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/P/AIDS/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 Dardania¹; 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.
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. 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,
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 competition5 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

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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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Proper, transparent and just prioritization policy
as a challenge for national competition authorities
and prioritization of the Slovak NCA

by

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Abstract

The paper tries to establish some limits of the framework for prioritization policy in order to show that the NCAs are still bound by certain principles for setting their prioritization policies and are not completely independent or autonomous. In this context, priority setting by the Slovak NCA, surveillance of this process and evaluation of its credibility is analysed. The power to prioritize cases became a part of the ‘independence toolkit’ of the ECN+ Directive and is linked to effective use of limited resources. Despite including prioritization into the elements of independence of NCAs, the ECN+ Directive gives no further requirements for the prioritisation of the performance of enforcement powers of NCAs. Decisions regarding prioritization of enforcement can allow a NCA to focus on the most serious infringements of competition law. On the other hand, they can be challenged due to lack of transparency, arbitrariness, disproportionality and because of unequal treatment. Hence the prioritization policy, as well as individual decisions, shall be embedded into the framework safeguarding proper enforcement and due process of law. The legal framework of the European Commission for the system of rejection of cases as well as limited judicial review can serve as an inspiration for NCAs. Although NCAs are not restricted in the selection of their priorities, some competition infringements shall be inevitably included in their priorities, such as cartels and bid rigging. The case of Slovakia and its NCA shows a relatively low level of accountability of the Antimonopoly Office of the Slovak Republic (AMO) to the parliament, and judicial as well as parliamentary control of the prioritization and case selection of the AMO is limited. The paper concludes that within the reform of the Slovak NCA, it will be insufficient to only grant the AMO guarantees of independence, including independence of priority setting, and that mechanisms of accountability and review shall be evolved.

Résumé

L'article cherche à définir certaines limites du cadre de la politique de priorisation afin de montrer que les ANC sont liées par certains principes pour établir leurs politiques de priorisation et ne sont pas complètement indépendantes ou autonomes. Dans ce contexte, la définition des priorités par l’ANC slovaque, la surveillance de ce processus et l’évaluation de sa crédibilité sont analysées. Le pouvoir de hiérarchiser les affaires fait partie de la stratégie d’indépendance fixée par la directive ECN+ et est lié à l’utilisation efficace de ressources. Bien que la hiérarchisation fasse partie des éléments de l’indépendance des ANC, la directive ECN+ ne prévoit pas d’autres conditions pour la politique de prioritisation des ANC. Les décisions concernant la hiérarchisation des mesures d’application peuvent permettre à une ANC de se concentrer sur les infractions les plus graves au droit de la concurrence. D’autre part, elles peuvent être critiquées en raison de leur manque de transparence, de leur caractère arbitraire, de leur disproportionnalité et de l’inégalité de traitement. Par conséquent, la politique de hiérarchisation des
priorités doit être intégrée dans le cadre garantissant une application correcte et une procédure régulière de la loi. Le cadre juridique de la Commission européenne concernant le rejet des affaires ainsi que le contrôle judiciaire limité peut inspirer les ANC. Bien que les ANC ne soient pas limitées dans le choix de leurs priorités, certaines infractions à la concurrence doivent inévitablement être incluses dans leurs priorités, comme les ententes et les truquages d’offres. Le cas de la Slovaquie montre un niveau relativement faible de responsabilité de l’Office antimonopole de la République slovaque devant le Parlement, et le contrôle judiciaire et parlementaire de la définition des priorités et de la sélection des affaires de l’Office est limité. L’article conclut que dans le cadre de la réforme de l’ANC slovaque, il ne suffira pas de garantir l’indépendance de l’AMO, y compris la fixation des priorités, mais qu’il faudra faire progresser les mécanismes de responsabilité et de contrôle.

Key words: Competition law; EU law; Slovakia; prioritization; parliamentary surveillance; rejection of complaints; credibility of NCA; accountability of NCA.

JEL: K22, K23, K42

I. Prioritization policy – introduction

The prioritization policy can be either a systematic strategy of a competition agency or a safeguard against overburdening the agency by a myriad of insignificant cases (Power, 2018, p. 87). A proper prioritization policy can increase the deterrent effect of sanctions and competition law itself, due to raising the probability of detection of a serious violation of competition rules (Ost, 2014, p. 176). Kovacic noted, that “despite their significance prioritization and project selection too often lack needed attention and structure” (2018, p. 10). Prioritization policy is not an aim in itself and is a vehicle for the achievement of socio-economic purposes of competition law (Jennings, 2015, p. 38), which can be themselves influenced by other policies than ‘pure competition’ law (Ezrachi, 2017). Moreover, a political context can be also determined for a prioritization policy (Malinauskaite, 2016; Martyniszyn & Bernatt, 2019).

Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market¹ (hereinafter; ECN+ Directive) brought a new impulse for designing and re-designing national competition authorities, including

their priority setting. This directive answered the call for a harmonization of enforcement tools (e.g. Bernatt et al., 2018) in the system of shared administration and enforcement of EU law (Scholten, 2019).

The ECN+ Directive defined several measures in order to improve the operability and effectiveness of national competition authorities (hereinafter; NCAs) outlining a basic institutional design of a national competition authority (Ferro, 2019). However, it does not prevent the establishment or creation of an integrated agency (for integration of agencies, see e.g. Cseres, 2013). The autonomy of the prioritization policy set by a NCA is one of them. The ECN+ Directive requires two-fold prioritization autonomy (Art. 4 par. 5):

First, ‘strategic prioritization’, that is, setting priorities for carrying out tasks for the application of Articles 101 and 102 TFEU.

Second, ‘procedural prioritization’, that is, the right to reject complaints on the grounds that the case is not an ‘enforcement priority’.

‘Strategic prioritization’ overlaps with the power to set ‘positive priorities’, that is, the power to launch proceedings without any formal notification or complaint; ‘procedural prioritization’ corresponds to the power to set ‘negative priorities’, that is, the power not to launch proceedings even in the case of a formal complaint (Wils, 2017, p. 38).

The power to prioritize cases became part of the ‘independence toolkit’ specified in the ECN+ Directive and is linked to effective use of limited resources. According to the Impact Assessment attached to the Draft ECN+ Directive, 15 NCAs had powers to set priorities in full and choose which cases to dedicate their scarce resources to (8 NCAs are obliged to investigate cases which are not a priority, and 15 NCAs cannot reject complaints which are not a priority without doing a detailed investigation on their substance) (European Commission, 2017, pt. 2.2.1).

Furthermore, the European Commission in its Impact Assessment found that “Stakeholders, notably businesses, report that the lack of the power of NCAs to set their priorities in full prevents them from focusing on infringements that cause the most harm to competition” (European Commission, 2017, pt. 2.2.1).

In fact, prioritization is not a new topic within the European Competition Network (hereinafter; ECN), in 2013 the ‘ECN Recommendation on the Power to set Priorities’ was introduced within the ECN.

Despite including prioritization into the elements of the independence of a NCA, the ECN+ Directive gives no further requirements for the prioritisation of the performance of enforcement powers of NCAs.

Decisions regarding prioritization of enforcement can, indeed, allow a NCA to focus on the most serious infringements of competition law. On the other hand, they can be challenged due to lack of transparency, arbitrariness, disproportionality and because of unequal treatment. Hence the prioritization
policy, as well as individual decisions, shall be embedded into the framework safeguarding the proper enforcement and due process of law.

The paper will aim to establish some limits or a framework for the prioritization policy in order to show that NCAs are still bound by certain principles for setting their prioritization policies and are not completely independent or autonomous. In this context, priority setting by the Slovak NCA, surveillance of this process and evaluation of its credibility will be analysed.

II. Independence of priority setting and supervision

It is apparent from the rationale of the ECN+ Directive that NCAs shall enjoy independence from other national authorities in order to enforce EU competition rules properly (Ferro, 2019, pp. 122–123). EU law itself provides two possible limits of the independence or autonomy of NCAs.

The first one is directly enshrined in the ECN+ Directive (Art. 4(2 (b)) which allows “a government of a Member State, where applicable, to issue general policy rules that are not related to sector inquiries or specific enforcement proceedings”. Such link to the prioritisation policy is also confirmed in Rec. 23 of the ECN+ Directive. However, Wils discussed the link between independence and the power to reject complaints; the possibility to reject complaints on priority grounds actually presents an independence risk and depends substantially on the presence or absence of other independence guarantees (2019).

The second one is stemming from judicial and democratic control of every public body.

The independence of competition authorities may raise questions of their democratic legitimacy. So called input legitimacy of ‘unelected’ independent authorities shall connect political decisions with the preferences of the people. Scholten suggest ‘safeguards’ and ‘accountability’ as two of the triad of elements that can confirm the democratic legitimacy of independent regulatory agencies (2015, p. 66). Bringing ‘independent’ to account before parliament, that is, the representatives of the people, can establish a ‘delegation-accountability chain’ (Scholten, 2012, p. 31).

It was confirmed by the Court of Justice of the EU (hereinafter; CJEU) that even authorities that shall be independent form political influence of a government, shall be still subject to judicial control and parliamentary control, since “the absence of any parliamentary influence over those authorities is inconceivable” (C-518/07 Commission/Germany2, par. 43). Hence a parliament

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can, at least indirectly, influence the prioritisation policy of a NCA by assessing the effectiveness of the performance of the activities of a NCA (e.g. it can challenge some policy approaches of a NCA as inappropriate or insufficient).

The judicial review of decisions rejecting complaints can reduce risks of political influence (Wils, 2019); however, the courts have deterred themselves not to replace powers of the competition authority (Bernatt, 2016).

From the aim and wording of the ECN+ Directive and the ECN Recommendation on the Power to set Priorities, it is clear that they follow the same goal regarding prioritization – filter the workload in order to save resources for ‘priority’ cases. Although the ECN Recommendation gives more details for setting rules for prioritization policies, they are still too loose. For example, in comparison to the ECN+ Directive, the ENC Recommendation refers to the limited framework for judicial control over a rejection of complaints: “the framework of judicial review of decisions by the Authorities to reject non-priority complaints should, to the greatest extent possible, be designed in a way that preserves the prerogative of the Authorities to set and pursue enforcement priorities.” (European Competition Network, 2013, pp. 4, 6). Hence, the highest level of conformity with this recommendation is the complete exclusion of judicial control. However, ‘meaningful judicial oversight’ (Jennings, 2015, p. 38) cannot be excluded as a safeguard against abuse of power.

III. Inspiration by the European Commission

The institutional design as well as procedural rules of the European Commission and those of the NCAs represent different legal spheres and, in general, procedural rules of the European Commission as well as judicial review assessing Commission procedures are not directly applicable within the ambit of the NCAs. However, they can serve as certain inspiration. Hence, if the legal framework of a NCA aligns with the rules applicable for the European Commission, then practice and case-law can per analogiam serve as a guidance in the argumentation in judicial review.

The European Commission can, in fact, prioritize its cases under Article 7 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty since, if “on the basis of the information in its possession there are insufficient grounds for acting on a complaint”, it can reject a complaint (the regulation

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provides rules for informal and formal rejection). This power of the European Commission was confirmed by the case-law of the CJEU. The Commission, entrusted by Article 105(1) TFEU with the task of ensuring the application of the principles laid down in Articles 101 and 102 TFEU, is responsible for defining and implementing the orientation of EU competition policy. In order to perform that task effectively, it is entitled to attach differing degrees of priority to the complaints brought before it and has a broad discretion in that respect. When, in the exercise of that broad discretion, the European Commission decides to assign differing degrees of priority to the examination of complaints submitted to it, it may not only decide on the order in which the complaints are to be examined but also reject a complaint on the ground that there is an insufficient EU interest in further investigating this case. In order to assess the EU interest in the further investigation of a case, the European Commission must take account of the circumstances of the case, and especially of the matters of fact and of law set out in the complaint referring to it. In particular, the Commission is required, after evaluating with all due care the matters of fact and of law put forward by the complainant, to weigh the significance of the alleged infringement as regards the functioning of the internal market against the probability of its being able to establish the existence of the infringement and the extent of the investigative measures required in order to fulfil, under the best possible conditions, its task of ensuring that Articles 101 and 102 TFEU are complied with.

This discretion of the European Commission entails two consequences. First, EU law does not give a complainant the right to insist that the Commission take a final decision as to the existence or non-existence of the alleged infringement, and does not oblige the Commission to continue the proceedings, whatever the circumstances, right up to the stage of a final decision. Second, the judicial review of decisions rejecting complaints is limited and courts cannot substitute the European Commission’s assessment of the EU interest.

However, discretion of the European Commission cannot lead to unfounded decisions and the European Commission has to assess properly and impartially matters of fact and legal arguments brought by the complainant, and the decision of the Commission has to rely on facts and arguments described therein. Such consistency and reasons of the decision of the European Commission are subject to judicial review.9

The abovementioned case-law of the CJEU can serve as an inspiration for national approaches towards the level of discretion of a competition authority as well as the limits of judicial review.

However, more precisely, the case-law of the CJEU allows the European Commission to reject a case if there is a lack of Union interest. In the light of judgment C-17/10 Toshiba10, it must be noted that a distinction remained between EU competition rules and national competition rules. The scope of EU competition law is limited by the TFEU, because it covers only infringements that have impact on the functioning of the internal market. On the other hand, national law as well as NCAs bear responsibility for the proper functioning of their respective national economies. Thus, while the European Commission can reject a case due to lack of Union interest, the possibilities of NCAs in this context are limited, because they still have to protect their national economy, notwithstanding an impediment of trade between the Member States. Moreover, the European Commission can reject a case due to lack of EU interest on the basis of an investigation by a NCA (Rusu, 2018, pp. 35–38). Notwithstanding Union interest, the ‘Automec test’11 is operational for both the European Commission and NCAs: when deciding whether or not to start an investigation, the competition authority must weigh up the significance of the alleged infringement regarding the functioning of the Internal Market/national market, against the probability of establishing the existence of the infringement, and the extent of the necessary investigative measures.

IV. Prioritization and rule of law

Prioritization and rejection of complains can be challenged from the point of view of equality of treatment, transparency, fair and impartial treatment, that is, elements of the rule of law linked to the right for good administration (Lanza, 2008). It can be suggested that a sufficient mechanism must be

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10 Judgment of 14 February 2012, Toshiba Corporation e.a., C-17/10, EU:C:2012:72.
established in order not to frustrate these requirements of the rule of law. External control of a prioritization policy can, on the other hand, undermine the independence of a NCA. The effectiveness of judicial control can be doubtful in this context, because the courts are usually empowered to formally review legal aspects of the decision, and not subject-matter questions related to the expertise of the respective authority itself.

Again, strategic prioritization and procedural prioritization shall be distinguished. Strategic prioritization can easily fall under public surveillance, since it is usually published or included in annual reports. Furthermore, strategic prioritization is based on a professional assessment of the current conditions of the national and international economy. The competition authority and its representatives can be called to be accountable for their decisions regarding strategic prioritization, and the general setting of a prioritization policy cannot undermine requirements of the rule of law.

On the other hand, “procedural prioritization”, i.e. decisions in individual cases, if unpublished, cannot be identified and verified, particularly in jurisdictions where a complaint is not rejected by a decision but merely by a letter or when the authority is not obliged to inform the complainant at all.

Thus, in order to follow standards of the rule of law, a NCA shall establish a transparent and formalized procedure of accepting and rejecting complaints (statutory or soft law), including transparent statistic data on rejected complaints and reasons for the rejections in its annual reports. The rationale is the same as for a prioritization policy – taxpayer’s demand for ‘best value for money’: the competition authority as a public agency is financed by taxpayers who can claim both – proper enforcement of competition law as well as fair treatment of their own individual matters.

V. Mandatory priorities?

Although formally the NCAs shall have full autonomy in priority setting, there are some limits for such discretion stemming from economic theory of competition law itself. Cartels can be hardly excluded from ‘top priorities’ of a NCA. Second, prioritisation must inevitably follow the focus of the European Commission’s priorities in application of Articles 101 and 102 TFEU. Although the NCAs can be formally independent from the European Commission, they still have responsibility for the proper application of Articles 101 and 102 TFEU and any deviation or lenient approach to enforcement of EU law can be seen as the under-enforcement of EU law. The European Commission has, moreover, several measures how to compel a NCA to deal with a case:
the discussion within notification procedure under Regulation No 1/2003, peer pressure within the ECN as well as infringement procedure against the Member State.

There can be an argument that since the prioritization policy covers merely public enforcement, minor and non-priority cases can be still subject to private enforcement. However, the European system of private enforcement seems to be more favourable to follow-on actions and so a decision of a competition authority can be crucial for private enforcement itself. Although public enforcement of competition rules can foster private enforcement, in the Agria Polska case, the CJEU absolved competition authorities from the mandatory launch of an investigation in cases where private claims for damages were submitted: “As provided for by the second subparagraph of Article 19(1) TEU, it is for the Member States to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law (see, to that effect, judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, paragraph 34), and not for the Commission to make up for any shortcomings in judicial protection at national level by opening an investigation requiring considerable resources where the likelihood of finding an infringement of Articles 101 and 102 TFEU is low.”12

Bid rigging cases are another candidate for being a quasi-mandatory priority of NCAs. Bid rigging is a specific case of anticompetitive behaviour which can cause, along with anti-trust sanctions, negative effects under public procurement law. In detail, an economic operator can be excluded from the process of the given public procurement, if the contracting authority can prove the existence of anti-competitive agreements. Moreover, such economic operator can be excluded from public procurement procedures in the future. In this context, the ability of the contracting authority to prove bid rigging is crucial. It is obvious that a decision of a competition authority is an effective proof of a violation of competition rules. Moreover, bid rigging can cause serious damage to public funds as well as financial interests of the European Union.

The importance of the investigation of bid rigging cases was also underlined by the CJEU in the Vossloh Laeis case. The CJEU viewed that “the existence of conduct restrictive of competition may be regarded as proved only after the adoption of such a decision, which legally classifies the facts to that effect.”13

“As a consequence, the period of exclusion must be calculated not as from the participation in the cartel, but from the date on which the conduct was

the subject of a finding of infringement by the competent authority.” It is, thus, indispensable for a NCA to pay special attention to bid rigging cases. The link to double interests of the Union – competition law for the proper functioning of internal market and financial interests (Kováčiková, 2018b) may lead to the conclusion that the fight against bid rigging shall be included into the priorities of a NCA.

VI. Case of Slovakia

1. General legislative framework for discretion

The Slovak legal order and practice of the Slovak NCA (Protimonopolný úrad Slovenskej republiky/Antimonopoly Office of the Slovak Republic) (hereinafter; AMO) will serve as a case-study of the abovementioned aspects of prioritization policies, including its coherence with the rest of the Slovak legal order and powers of similar national authorities (e.g. independent enforcement agencies, PPO).

The AMO is constituted as a body of central government and administrative body (central body of state administration) [§ 14(1) of the Act on Protection of Competition (hereinafter; APC)15]. The laws providing the operational framework for the AMO do not currently regulate its prioritisation policy. The APC does not provide exact policy-setting rules other than those that are stipulated in § 1 APC: “The purpose of this Act is to protect competition from any restriction and to create conditions for its further development to the benefit of consumers and regulating the powers and scope of activities of the Antimonopoly Office of the Slovak Republic (hereinafter referred to as “the Office”) in supervising compliance with the provisions of this Act.” Nevertheless, the objective of the action of the AMO is visible and every action of the AMO shall follow this objective stipulated in § 1 APC.

The AMO is obliged to provide an annual report on its activities to the Government of the Slovak Republic, the latter can also request the AMO to do so [§ 14(5) ATC]. The law does not specify any mandatory content of the report. However, the position of the AMO as a ‘central body of

state administration’ can determine its reporting policy as well as ‘strategic prioritization’. Under § 39(1) of Act No 575/2001 Coll. on the Organization of Activities of the Government and the Organization of Central State Administration (hereinafter; AOG), the activities of central bodies of state administration are governed, coordinated and supervised by the Government through the heads of these bodies. Thus, the AOG can serve as a legal basis for shaping the ‘strategic’ prioritization policy of the AMO and the Government is allowed to assign duties to the AMO within the mission of the AMO. Such decisions of the Government are not subject to judicial review (§ 1aa AOG), and internal discussions during governmental meetings need not be published (more precisely, meetings are not public) (§ 1a AOG).

‘Procedural’ prioritization is also shaped by general administrative law since the proceedings and decision-making of the AMO is governed by both, special provision of the ATC and general provisions of the Administrative Code\textsuperscript{16}. Under the Administrative Code, administrative bodies shall protect the interests of the state and the society [§ 3(1)] and “must deal with any matter subject to the proceedings in a diligent and responsible manner, to settle the matter in a timely manner and without undue delay and use the most suitable means which lead to the accurate settlement of the matter” [§ 3(4)]. Furthermore, administrative bodies shall ensure that decision-making on matters based on the same or similar facts is not unduly divergent [§ 3(5)].

The legislative framework on administrative proceedings in competition matters separated investigation (as a preliminary phase) and administrative proceeding (as a decision-making phase). In case of an agreement restricting competition, abuse of a dominant position and other forms of unlawful restrictions of competition, the proceedings shall always be initiated \textit{ex officio} [§ 25(1) ATC] and the law failed to provide a procedural position to possible complainant. Alleged infringers are the only parties of administrative proceedings before the AMO. The rights of the person who submitted a written complaint regarding a possible infringement are quite limited. The only procedural right of such a person is the right to be informed in writing of further procedures regarding the matter within two months following the date of the receipt of the request of such person [§ 25(2) ATC].

Since the complainants are not parties to the proceeding, they cannot challenge the decision of the AMO, neither by appeal nor by action within the judicial review.

\textsuperscript{16} Act no 71/1967 Coll. on Administrative Proceeding (Administrative Code) as amended (zákon č. 71/1967 Zb. o správnom konaní (správny poriadok)).
2. Rejection of individual complaints – procedural safeguards

Neither the APC nor the Administrative Code provide rules on the formal rejection of complaints. As it was mentioned above, a complainant is merely informed within two months of the request on the course of the proceedings. The AMO does not issue any decision on the rejection of a complaint and, therefore, the complainant cannot appeal against such rejection. Furthermore, the AMO is not obliged to provide any reasons for the rejection of a complaint.

In the Slovak legal framework, three measures can be involved in case of an undue activity of an administrative body: a formal administrative complaint, a notice and protest of the prosecutor, and judicial review.

Although Slovak courts generally consider formal administrative complaints under the Act on Complaints\(^{17}\) as a effective remedies against a wrongful or unfair behaviour of administrative bodies, such a character cannot be attributed to the formal administrative complaint in every case. It was confirmed by the Constitutional Court of the Slovak Republic that ‘practical effectiveness of the remedy’ is relevant as well\(^{18}\). A formal administrative complaint can serve as a remedy against an unlawful encroachment into rights of the complainant or can point to certain failures, particularly violation of law (§ 3 of Act on Complaints). However, complaints are handled by the administrative body which is legally responsible for the given area of administration (§ 11 of the Act on Complaints). In the context of enforcement of competition law, the AMO is empowered to handle all complaints regarding enforcement or non-enforcement of competition rules. Therefore, a formal administrative complaint against a rejection of a complaint referring to an infringement of competition law is more theoretical than an effective safeguard against the arbitrariness of procedural prioritization and rejection of complaints. The only exemption from this ‘internal’ handling of formal administrative complaints can be invoked by the complaint directly against the chairperson of the AMO if he or she is directly involved in the measure at stake. Such a formal administrative compliant shall be handled by the Office of the Government [§ 11(2) Act on Complaints].

The prosecutor is, inter alia, empowered by § 22 of the Act on Public Prosecution\(^{19}\) to protest against administrative acts and issue a notice (warning). The prosecutor can, however, protest against decisions and measures of administrative bodies in cases of violations of law only [§ 23(1) of the Act on Public Prosecution]. Therefore, the prosecutor cannot challenge the margin

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\(^{19}\) Act No 152/2001 Coll. on Public Prosecution as amended.
of discretion of an administrative body if that margin is not misused contrary to the law. Similarly, a prosecutor’s notice (warning) can be issued against an activity or the failure to act contrary to the law [§ 28(1) of the Act on Public Prosecution]. Thus, a prosecutor can in theory effectively employ the notice (warning) procedure only in cases when a rejection of a complaint is manifestly contrary to the mission of the AMO to protect competition. This situation is quite hypothetical because an individual can hardly provide enough evidence, data and assessment of the market situation to show that there is a manifest and undeniable violation of competition rules.

Within the judicial review, the Code of Administrative Court Procedure (hereinafter; CACP) provides three basic types of actions: a general administrative action (§ 177 et seq. CACP), an action against the inactivity of the public administrative body (§ 242 et seq. CACP), an action against an intervention of the public administrative body (§ 252 et seq. CACP).

A party to administrative proceedings (or a person who should have been a party of administrative proceedings) can challenge a decision or measure of an administrative body via a general administrative action (§ 177 CACP). However, a complaint is not rejected by way of a decision, and any letter informing a complainant on the course of proceeding cannot be considered a ‘measure of an administrative body’ under § 3(1)(c) CACP because it is not issued within an administrative proceeding under § 3(1)(a) CAPC (proceedings of an administrative body aimed to issue an individually addressed decision or normative act). Therefore, a complainant cannot use the general administrative action in order to challenge ‘procedural’ prioritization. Similarly, an action against an intervention of a public administrative body (§ 252 CACP) is not applicable because the rejection of a complaint is not a direct or factual encroachment onto an individual’s right granted by law.

The scope of the action against an inactivity (§ 242 CACP) is limited only to failure to act within already commenced administrative proceeding. However, the public prosecutor is empowered to file an action against the failure to launch administrative proceedings ex officio [§ 242 (2) CACP]. An action against an inactivity can be successful only in case where there is a clear duty of the administrative body to act. “The inactivity of an administrative body must be contrary to exact legal provision that contains and order for the administrative body to act. “The inactivity of an administrative body must be contrary to exact legal provision that contains and order for the administrative body to proceed, act, employ certain procedural measures and to decide”.

The legal relevance of a ‘complaint’ in competition matters was explained by the Supreme Court of the Slovak Republic: “A notice provided by natural

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person or juridical person [§ 25(2) APC] is not a motion for commencement of administrative proceeding. The court considers that such notice provides certain information regarding competition that need not be known to the Office in its ex officio investigation. [...] The court is not empowered [...] to decide that an administrative body shall initiate administrative proceeding in cases when the law explicitly provides such competence (commence an administrative proceeding) solely to an administrative body (principle of officiality)."\(^{22}\)

3. Prioritization policy of the AMO

A prioritization policy was outlined by the AMO in its strategy paper in 2012. The priorities were outlined in broad terms: (a) revealing and sanctioning of anticompetitive conducts with impact on large groups of consumers, (b) revealing and sanctioning of the most serious anticompetitive conducts (for example, price-fixing cartels), and (c) competition advocacy (Protimonopolný úrad Slovenskej republiky, 2012a, pp. 3–4). The rationale for prioritization was clearly focusing on “handling meaningful competition” and not to “spend its resources and taxpayers’ financials on sanctioning of conduct which constitute only ‘formal’ infringement of the Act without the real impact on consumers” (Protimonopolný úrad Slovenskej republiky, 2012b).

The AMO published its itemised prioritization policy in January 2015, in which it defined the areas of prioritisation: decision-making activity, market research and competition advocacy (Protimonopolný úrad Slovenskej republiky, 2015a, p. 3). The establishment of priorities determining whether the AMO will deal with an issue, or will proceed to solve a case, results from the following principal criteria: gravity (type gravity and factual gravity), importance of investigation, probability of success and strategic nature (Protimonopolný úrad Slovenskej republiky, 2015a, pp. 4–6).

‘Type gravity’ scales from very serious offences (horizontal agreements on prices, market allocation, actual restriction of production, bid rigging, exclusionary abuse of a dominant position, not notified mergers, failure to comply with a decision of the AMO), through serious offences to less serious offences (vertical agreements of minor importance, competition restrictions by public authorities of minor importance and other less serious competition law infringements). This scale is not very instructive because almost all offences are defined either as very serious or serious; what falls into the group of ‘less serious offences’ are offences tautologically described of a violation of minor

importance. Furthermore, under the AMO’s prioritization policy, priority will be given to very serious and serious offences (Protimonopolný úrad Slovenskej republiky, 2015a, p. 4).

Gravity of a violation of competition rules, together with the probability of success of the investigation, can form part of ‘procedural prioritization’. Although it is not clear how the AMO will handle the ‘probability of success’ criterion within its prioritisation policy, it declares that it will take into account availability of relevant information and evidence and the possibility to obtain them, existence of precedence and assessment whether there is another authority able to effectively deal with the matter (Protimonopolný úrad Slovenskej republiky, 2015a, pp. 5–6).

‘Strategic’ prioritization can be linked to the following criteria of prioritization: importance of an investigation and strategic nature. Importance of an investigation includes nature of the industry, damage and existence of an action of private enforcement. Although there are currently no private enforcement cases closed after the introduction of private enforcement rules23, public enforcement seems to be still important for private enforcement. Slovak courts appeared to be very cautious in dealing with stand-alone actions, and rejected claims on the basis of the lack of a prior decision of a competition authority24.

The ‘strategic nature’ of the case can, nevertheless, override the prioritization assessment under the previous criteria and can lead to an investigation also of non-priority cases. The strategic importance of a case can stem from current goals and vision of the AMO, aim to build the credibility of the AMO, and the creation of a legal precedent as an interpretative rule (Protimonopolný úrad Slovenskej republiky, 2015a, p. 6).

The abovementioned factors appear to be criteria for the case-by-case assessment of competition issues, nevertheless, the AMO labels them as


“prioritization form a long-term perspective” (Protimonopolný úrad Slovenskej republiky, 2015a, p. 3). Along these ‘long-term’ priorities, the AMO defined also short-term priorities linked to (a) anti-competitive practices (cartels, bid rigging and not notified mergers) and (b) priority sectors (public passenger transport, the motor vehicle sectors, the food industry) (Protimonopolný úrad Slovenskej republiky, 2015a, pp. 7–9). Such a division of ‘long-term’ and ‘short-term’ priorities appears to be confusing. If fight against cartels is a mere ‘short-term’ priority, what is the ‘long-term’ priority. On the other hand, form the ‘long-term’ point of view, the AMO included price and segmentation horizontal agreements as very serious offences.

There has been no explicit update of AMO’s prioritization policy till 2020, however, in its later documents, the authority defines another set of priority sectors: e-Commerce, agriculture, food industry, information systems, information technologies, sectors affected by state regulations (utility companies, financial and insurance services, etc.) (Protimonopolný úrad Slovenskej republiky, 2018c, p. 46, 2018a, p. 2). The new prioritization policy of the AMO was published in April 2020 (Protimonopolný úrad Slovenskej republiky, 2020a) and apparently it reacted to the coronavirus pandemic by describing the abuse of the extraordinary situation (caused by the spread of COVID-19) as an aggravating factor as well as adding the health sector into sectoral priorities. The AMO envisaged establishing a ‘prioritization commission’ in order to prevent employees of the AMO from abusing the prioritization policy in favour of a given investigated undertaking (Protimonopolný úrad Slovenskej republiky, 2020a, p. 9). However, further details on this ‘commission’, its composition and position within the AMO’s structure were not given either in the prioritization policy or in the Organizational Order of the AMO.

4. Independence and credibility of the prioritization policy of the AMO
– legal framework

The procedure for establishing and review of a prioritization policy cannot be fund in either statutory and by-law rules or in the prioritization document themselves. In its ‘strategic prioritization’, the AMO does not refer to governmental decisions, and tasks ordered by the Government are not apparent form annual reports of the AMO submitted to the government (Protimonopolný úrad Slovenskej republiky, 2017a, 2018b, 2019a). Although indirect political influence cannot be excluded (Patakyová, 2019a, pp. 136, 138, 140), there is no current evidence of such actions. Nevertheless, lack of transparency, lack of any public hearings or precise rules for the selection of candidates during the appointment process of the chairperson of the AMO,
vice-chairperson of the AMO as well as members of the Council of the AMO (Patakyová, 2019a), do not contribute to the credibility of assertions on the absence of political influence. The fact that the chairperson of the AMO is appointed by the president on a proposal of the Government (Balog & Trellová, 2010, p. 806) can contribute to a certain level of independence and legitimacy of the chairperson of the AMO, due to the direct election of the President of the Republic (Patakyová, 2019a, p. 137). However, in history, there has never been any discord between the President of the Republic and the Government regarding the appointment of the chairperson of the AMO.

Responsibility for establishing, review and surveillance of the prioritization policy is not directly enshrined in the Organizational Order of the AMO (Protimonopolný úrad Slovenskej republiky, 2020). The only reference can be found within the powers and responsibilities of the vice-chairperson of the AMO, who is “…responsible for setting priority aims of the Office within the protection of economic competition and defining of the duties arising from such aims for subordinate employees…”25. The powers of the chairperson of the AMO regarding the prioritization policy can be included in its power to approve a plan of the main tasks of the AMO and programme documents.26 Together with their power to sign first-instance decisions [§ 15(3) APC], the vice-chairperson of the AMO is dominus vitae necisque of cases dealt with by the AMO. In this context, the vice-chairperson is not accountable to any person other than the chairperson of the AMO who appoints and dismisses him/her at his/her discretion.

Apart from regular and extraordinary reports to the Government [§ 15(4) APC] and execution of statutory powers of the Government [§ 39(1) AOG], there is no other tool for public accountability of the AMO for its activities. In this context, Cséres sees a link between the accountability of a NCA to the parliament and proper enforcement of competition law and the rule of law (2019, pp. 82–82). In Slovakia, indeed, there is both indirect and direct political surveillance by the parliament (the National Council of the Slovak Republic). Indirect surveillance of the AMO by the parliament relies on the overall control power of the parliament over the Government and the power of vote of non-confidence. The direct form of control has its constitutional basis in the right of the members of the parliament to interpellate members of the Government and heads of central bodies of state administration [Art. 80(1) of the Constitution of the Slovak Republic]. However, throughout history, there was only a single interpellation of the chairperson of the AMO in 2011 related to the age of retirement of the employees of the AMO (Národná rada Slovenskej republiky, 2011). Furthermore, the National Council of the Slovak Republic as well as its

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25 Art. 6(2)(b)(1) of the Organizational Order of the AMO.
26 Art. 4(2)(c)(2) of the Organizational Order of the AMO.
committees can request any governmental body to submit a report (§ 128 of the Rules of Procedure of the National Council of the Slovak Republic\textsuperscript{27}), however, this power was not employed towards the AMO.

From the comparative point of view, the supervision of the AMO and its chairperson is quite weak, comparing to other ‘market’ regulators. For example, criteria for the appointment and dismissal of the chairperson of the Regulatory Authority for Electronic Communication and Postal Services (hereinafter; RA) is stipulated in law in detail, including his/her qualifications, as are incompatibility and conflict of interests rules (§ 3–6 of the Act on of the Regulatory Authority for Electronic Communication and Postal Services and Transport Authority, hereinafter; ARATA)\textsuperscript{28}. The chairperson of the RA is elected by the parliament [§ 3(1) ARATA). The issue of conflict of interests of the chairperson and vice-chairperson of the RA is under the supervision of a special parliamentary committee (§ 6 ARATA). On the other hand, the parliamentary committee is not empowered to challenge the decisions of the chairperson of the RA. Similarly, the chairperson of the Office for Public Procurement is elected by the parliament after public hearings\textsuperscript{29}, a fact that can contribute to the independence of this official (Patakyová, 2019b, p. 212).

The National Council of the Slovak Republic also directly surveys the activities of some governmental bodies, such as the Slovak Information Service (civil intelligence service), the Military Intelligence Service and the National Security Authority (authority for the protection of classified information, cryptographic services and cyber security) (§ 60 of the Rules of Procedure of the National Council of the Slovak Republic).

Summing up, the AMO and its chairperson is closely linked to the Government, as compared to other market regulators, and there is no mandatory measure of democratic control by the parliament (the level of parliamentary supervision depends on activities of the members of the parliament themselves). If more independence is granted to the AMO after the transposition of the ECN+ Directive, more requirements for accountability and democratic control shall be introduced.

\textsuperscript{27} Act of the National Council of the Slovak Republic No 350/1996 Coll. on the Rules of Procedure of the National Council of the Slovak Republic (zákon Národnej rady Slovenskej republiky č. 350/1996 Z.z. o rokovacom poriadku Národnej rady Slovenskej republiky)

\textsuperscript{28} Act No 402/2013 Coll. Act on of the Regulatory Authority for Electronic Communication and Postal Services and Transport Authority and on amendment certain laws (zákon č. 402/2013 Z.z. o Úrade pre reguláciu elektronických komunikácií a poštových služieb a Dopravnom úrade a o zmene a doplnení niektorých zákonov).

\textsuperscript{29} Act No. 343/2015 Coll. on public procurement, as amended (zákon č. 343/2015 Z.z. o verejnom obstarávaní).
5. Reasonability of prioritisation and accountability to the general public

Promulgating a prioritization policy is not sufficient to ensure the reasonability and credibility of that prioritisation policy. First, if the AMO shows that it is really overburdened by non-significant cases, a prioritization policy appears reasonable. Second, the competition authority shall follow its own policy and confront its activities vis-à-vis the prioritization policy. Table 1 shows limited personal and financial sources of the AMO. In 2015, the number of its employees was raised by 15 former employees of the Ministry of Finance in charge of state aid. In 2016–2018, the budget of the AMO was raised due to investments supported by European structural funds. Hence, although the budget of the AMO is slightly increasing, the number of employees is decreasing. Table 2 shows the gap between investigation and enforcement activities depending on the types of offences – while in the case of cartels there is a substantial number of complaints as well as investigations and subsequent administrative procedures, in the case of abuse of a dominant position, the number of proceedings is relatively minimal. In such situation, more precise explanation of the ratio of rejected complaints would contribute to the credibility of the prioritization policy. Moreover, it is apparent neither from annual reports addressed to the general public nor from the reports addressed to the Government, what was the reason behind the rejection of complaints – prima facie lack of violation of competition law or the non-priority character of the case.

Following the prioritization policy can also contribute to its credibility. The AMO follows its aim to suppress bid rigging and the majority of cartel cases cover violations of competition rules within public procurement. In the period 2011–2019, the AMO closed 17 cartel cases imposing total fines of approximately 22 million EURO, while 12 of them were bid rigging cases (total fine approximately 8 million EURO) (Kováčiková, 2018a; Protimonopolný úrad Slovenskej republiky, 2012c, 2013, 2014, 2015b, 2016, 2017b, 2019b).

Regarding sectorial priorities, the AMO is performing a market analysis of the e-commerce sector (Protimonopolný úrad Slovenskej republiky, 2018c), and has analysed the food retail sector in the past.
### Table 1

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6. Draft of a ‘new’ competition legislation

Due to the duty to transpose the ECN+ Directive, on 19 October 2020, the draft of a new Act on Protection of Competition was submitted (hereinafter; Draft APC 2020)\(^{32}\). In general, the Draft APC 2020 follows the outline of its predecessor and, at the same time, it introduces changes of substantive law required by the ECN+ Directive, in particular a broader definition of the notion of undertaking in order to better attribute parental liability. Regarding the prioritization policy, the Draft APC 2020 establishes the power of the AMO to “publish and update its prioritization policy on the webpage of the Office” [§ 16(1)(k) Draft APC 2020] and the right of the AMO to decline a complaint that does not represent a priority of law enforcement under § 1 and § 16(1)(k) of the act [§ 16(2) Draft APC 2020]. The Draft APC 2020 remains silent still on the adoption of prioritization policy and, in general, follows the legal framework of the APC. Hence, the Draft APC 2020 neither strengthens the independence of the AMO, its chairperson and members of the Council of the AMO, nor involves the Council of the AMO in the revision of policies of the AMO, nor does it establish a statutory link between the AMO and the parliament. It can be concluded that the Draft APC 2020 brings nothing significantly new regarding independence and credibility of the prioritization policy and its reasonability and accountability to the general public.

VII. Conclusions

The issue of prioritization policies was discussed by competition authorities and scholar even prior to the adoption of the ECN+ Directive. However, the ECN+ Directive gave a new impulse to such discussions since it opened the way for considerations on institutional redesigning of some of the NCAs. Independence of priority setting can be seen as one of the tokens of the independence of a NCA itself. Due to the necessity to safeguard the rule of law, an independent prioritization policy shall be accompanied by public accountability and proper democratic and judicial supervision in order to prevent the possibility of abuse of power.

Although the NCAs are not restricted in the selection of their priorities, some competition infringements shall be inevitably included in their priorities, such as cartels and bid rigging.

\(^{32}\) Proposal for the Act on Protection of Competition (Návrh zákona o ochrane hospodárskej), No of legislative procedure LP/2020/284.
The case of Slovakia shows a relatively low level of accountability of the AMO to the parliament; moreover, judicial as well as parliamentary control of the prioritization and case selection of the AMO is limited. The credibility of the prioritization policy and case selection is also undermined by the lack of transparency in the creation of the prioritization policy. Indeed, there cannot be an objection against priorities chosen by the AMO. However, setting of ‘non-priorities’ and the rejection of cases can be challenged due to the impossibility to rely on the political independence of the chairperson and vice-chairperson of the AMO, because of their non-transparent nomination procedure.

The AMO confirmed its goals and priorities in the area of cartels by prosecuting bid rigging cases. Moreover, it also referred to market analyses in priority sectors. On the other hand, a proper explanation of substantial rejections of complaints in abuse of dominance cases vis-à-vis the minimal amount of cases handled in this area requires a more profound explanation in annual reports in order to save the credibility of the prioritization policy.

Within then reform of the Slovak NCA, it will be insufficient to grant the AMO guarantees of independence, including independence of priority setting; mechanisms of accountability and review shall also be evolved. However, the Draft APC 2020 submitted in October 2020 gives little reason for optimism for a change in the near future.

Literature


Slovenskej republiky č. 350/1996 Z.z. o rokovacom poriadku Národnej rady Slovenskej republiky


Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ L 11, 14.1.2019, p. 3–33)


Finding of the Constitutional Court of the Slovak Republic of 2 June 2009, No. III ÚS 70/09.


Judgment of 14 February 2012, Toshiba Corporation e.a., C-17/10, EU:C:2012:72.


Putting Dawn Raids under Control

by

Jorge G. Contreras Condezo*,
Annabel Kingma** and Miroslava Scholten***

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II. Dawn raids: what, why and how
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III. Controlling dawn raids: ex ante warrants vs ex post judicial review
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The views and opinions expressed in this article are those of the authors and do not necessarily reflect the position of the institutions they work with. This article is a collective product of all authors based on research on the EU and national (case)laws of Ms Kingma and Mr Contreras Condezo and the idea and research on connecting the concepts of controls by Dr Scholten, the latter supported by the Dutch Scientific Council (NWO) within the veni project of M. Scholten.

Article received: 11 June 2019, accepted: 3 November 2020.
IV. Shortcomings in controls and how to overcome them
   1. ‘Theory’ on connecting concepts
   2. The judicial control of dawn raids
   3. Enhancing the public control over dawn raids
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V. Conclusion

Abstract

Dawn raids have become an effective tool to enforce EU and national competition laws. Judicial review is an essential mechanism of control over the executive branch against possible misuse of this power. However, this judicial review has shown to have limits; it cannot always guarantee an adequate redress for the affected parties. How to address the limited judicial review to ensure control over dawn raids? This article argues that the limits of judicial review could be addressed by extending the types of controls over this action, i.e. ex ante legislative guidance and internal managerial accountability. The more conceptual argument that this paper puts forward is thus that it is essential to seek connections between different concepts and types of controls to ensure a comprehensive/water-tight system of controls over the actions of the executive branch.

Resumé

« Dawn raids » sont devenus un moyen efficace de faire respecter le droit européen et national de la concurrence. Le contrôle judiciaire est un mécanisme essentiel de contrôle du pouvoir exécutif contre d’éventuels abus de ce pouvoir. Toutefois, ce contrôle judiciaire a montré ses limites ; il ne garantit pas toujours une réparation adéquate pour les parties concernées. Comment résoudre le problème du contrôle judiciaire limité pour assurer le contrôle des « dawn raids » ? Cet article avance que les limites du contrôle judiciaire pourraient être résolues en étendant les types de contrôle sur cette action, c’est-à-dire les orientations législatives ex ante et la responsabilité interne des administrateurs. Ainsi, la thèse plus conceptuelle de l’article est qu’il est essentiel de chercher des liens entre les différents concepts et types de contrôles pour garantir un système complet et efficace de contrôle des actions du pouvoir exécutif.

Key words: dawn raids; competition law; control; judicial review.

JEL: K21, K41, K49, L41, L49
I. Introduction

During the period 2015 through 2019, 27 cartel cases were decided by the European Commission (“Commission”), and fines of more than eight billion euros were imposed (European Commission, 2019a). Andersson came to a similar conclusion in the timeframe 2010–2014 (Andersson, 2017). Even more cases have been decided at the Member States (“MSs”) level by their national competition authorities (“NCAs”). Dawn raids play an important role in enforcing EU and national competition laws and policies (European Commission, 2019b; European Commission, 2018). They namely allow Commission/NCA officials to search through company premises and/or private homes with or without prior notice (Andersson, 2017). The element of surprise allows the Commission/NCA to gather evidence that would otherwise be destroyed or withheld (Andersson, 2017), which enhances the effectiveness of enforcement.

At the same time, dawn raids imply interfering with the rights, obligations and freedoms of private actors. For example, back in 2014 Deutsche Bahn’s rights of defence were affected when the Commission carried out multiple dawn raids on their premises on the basis a suspicion on infringement ‘A’, but then seized documents, opened an investigation and sanctioned this company for infringement ‘B’1. This led to the following research question: How to balance the effectiveness of dawn raids as an enforcement instrument with the respect of the rule of law values?

The recent case-law2 and literature (Di Federico, 2014; Deselaers & Venot, 2015; Steene, 2016; Pinotti, 2018) seems to have been focusing on the question of to what extent ex ante and/or ex post judicial control of dawn raids has been effective. We took this question as a starting point and drew a comparison between the legal orders of certain MSs and the Commission and, as our analysis in this paper will show, there are different solutions in this respect. Some countries establish an obligation upon a competition authority to obtain a judicial authorisation prior to the search while others do not and rely upon ex post judicial control only. But even if both types of control could be used,

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to what extent are dawn raids under control and how can we enhance the controls to ensure the rule of law?

Comparative analysis considered recent cases in some MSs and the dawn raid legislation therein, based on which we argue that the classical approach of controlling dawn raids by means of judicial review, either ex-ante and/or ex-post, has limitations. Such limitations concern a partial redress to private parties affected by an illegal dawn raid and an efficient instrument to prevent abuses in the execution of dawn raids and to guide – to some extent – officials in that regard. Enforcing competition law within the rule of law is an obligation of any competition authority and it particularly has been on the public agenda of the Commission in the last couple of years (Vestager, 2017; Vestager, 2019). Therefore, we believe that in order to achieve this goal, it is necessary to take multiple perspectives and seek connections between different concepts and types of controls to ensure a comprehensive/watertight system of controls over the actions of the executive branch like dawn raids.

More specifically, we propose a possibility of extending the types of controls over this action, through measures such as ex ante legislative guidance and internal managerial accountability, in order to overcome the limitations of judicial review.

We will address this issue through a practical and comparative approach by analysing how the dawn raids are controlled in practice throughout 9 jurisdictions and showing that it is necessary to align such controls through the aforementioned additional measures. These 9 jurisdictions are Austria, Belgium, Germany, Italy, Ireland, the Netherlands, Portugal, Spain and the United Kingdom. The choice for these countries was mainly based on language-proficiency of the researchers, the different legal traditions (i.e. civil and common law approaches) (Cooper, 1950) and level of convergence with the EU framework (ECN Working Group, 2008).

In section 2, dawn raids and their legislative frameworks will be defined and explained. In section 3, we will explain why dawn raids need to be under control from the rule of law perspective. The necessity to extend the view to include other types of controls is argued in section 4, whereafter a conclusion will be given. This article invites further (policy) debate and research on how the limits of judicial review of dawn raids could be addressed. This article aims at promoting research and debate on a more conceptual level concerning the issue of connecting various concepts and types of controls over the executive to ensure watertight systems of controls.
II. Dawn raids: what, why and how

1. Definition of dawn raids

A dawn raid is considered to be one of the most powerful and effective investigatory tools available to competition authorities to gather evidence on suspected antitrust infringements (OECD, 2013). It is an investigation conducted by NCAs or the European competition authority (the Directorate-General for Competition “DG COMP”) based on a reasonable suspicion, meaning that the authority already ‘possesses certain information constituting reasonable grounds for suspecting an infringement of the competition rules’ which would be later confirmed or dismissed with the information gathered after the raid. This investigation is, most of the time, unannounced to the investigated firm. The most common ground for launching inspections is generally the existence of elements pointing towards reasonable grounds for suspecting an infringement (ECN Working Group, 2012).

The objective of a dawn raid is to find evidence of a competition law infringement. Refusal of access to a property when ordered may be construed as a breach of the duty of cooperation and may result in a fine. The success of having this type of tool is twofold.

Firstly, because dawn raids are almost always unannounced, they have a deterrent effect (Scordamaglia-Tousis, 2013). Market participants worry that if they do not comply with competition law, eventually they will get in trouble with the competition authority. This has been classified as the authority being a ‘gorilla in the closet’ that comes out at any time (Verbruggen, 2013; Rees, 1997). Secondly, inherent to the participation in a cartel is the silence of market parties, otherwise the competition authority will discover that the cartelists are acting contrary to the law. Evidence of a cartel infringement is therefore hard to find and safe-locked in companies’ premises. Thus, the only way for an authority to obtain crucial information for its investigation is through a dawn raid (Harding and Joshua, 2010). It is the intrusive character of the dawn raid that makes it so powerful, but this intrusiveness also entails an inherent risk that fundamental rights are not properly safeguarded (Andersson, 2017; Wils, 2006).

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2. Legislative frameworks

2.1. EU framework (European Commission – DG COMP)

DG COMP and NCAs are the main enforcers of competition law. Council Regulation (EC) No. 1/2003 (“Regulation 1/2003”) creates a system of parallel competences where NCAs and the Commission apply Articles 101 and 102 TFEU, forming a network of public authorities which cooperate closely to protect competition. However, this does not imply that the enforcement is harmonised and coordinated between all MSs.

Regulation 1/2003 provides DG COMP with direct enforcement powers and grants powers to conduct all necessary inspections in order to determine the existence of an infringement of competition law. Even though DG COMP is empowered to decide on whether to conduct a dawn raid or not, it may need a judicial warrant in certain situations. Article 20(6) of Regulation 1/2003 does not allow the DG COMP to obtain access to premises by force. Thus, if a company opposes an inspection, Commission officials cannot enter the premises without the assistance of relevant national authorities. The Commission may request assistance as a precautionary measure in order to overcome any opposition from the undertaking, but only insofar as there are grounds for apprehending opposition to the inspection and/or attempts at concealing or disposing of evidence (Andersson, 2017). It must, however, also comply with national legislation and requirements.

2.2. National frameworks (NCAs)

The Commission shares its enforcement task with the NCAs in a system of parallel competences. Each MS has its own legal framework surrounding the enforcement of EU competition law and associated dawn raids. Comparative research in 9 Member States led to the following table:

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<tr>
<th>Member State</th>
<th>Law</th>
<th>Specifications</th>
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<td>Netherlands</td>
<td>Art. 5:15 GALA</td>
<td>No warrant needed, only a written description of the objective and subject of the investigation.</td>
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<tr>
<td>Italy</td>
<td>Art. 12 Law No. 287/90 and Decree No. 217/98</td>
<td>No warrant needed, only if it wants to use the ‘strong arm’</td>
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<tr>
<td>Member State</td>
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<td>Specifications</td>
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<tr>
<td>United Kingdom</td>
<td>Section 27 Competition Act</td>
<td>No warrant but two working days’ written notice unless there is reasonable suspicion, or the competition authority is unable to give notice besides all reasonable steps. The competition authority does not need two working days’ notice if it has a warrant from the High Court.</td>
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<tr>
<td>Germany</td>
<td>Section 59(4) GWB</td>
<td>A search warrant issued by the local court at the authority’s principal place of business is generally required. Only where a prior court application would cause a delay that could jeopardise the investigation, can a judicial search warrant be dispensed with.</td>
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<tr>
<td>Ireland</td>
<td>Section 45 Competition Act</td>
<td>Prior warrant of judge of the District Court</td>
</tr>
<tr>
<td>Spain</td>
<td>Art. 27 Law No. 3/2013</td>
<td>Prior consent of the party or judicial warrant</td>
</tr>
<tr>
<td>Portugal</td>
<td>Art. 18 Law No. 19/2012</td>
<td>Prior warrant competent of the judicial authority</td>
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<tr>
<td>Austria</td>
<td>Section 12 WettbG</td>
<td>Prior order of the Cartel Court</td>
</tr>
<tr>
<td>Belgium</td>
<td>Art. IV.41(3) Competition Act</td>
<td>Specific instructions issued by a competition prosecutor and prior authorization of the president of the Competition Council</td>
</tr>
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</table>

Discrepancies in the enforcement of the Regulation 1/2003 framework across MSs are highlighted by problems with regard to safeguards and judicial review in some countries more than others (Błachucki and Jóźwiak, 2012; Townley, 2018). There is a tension between the need for a well-functioning and effective competition law system and the necessity of safeguarding fundamental rights (Aslam and Ramsden, 2008). For example, investigations and dawn raids conducted by the Commission entail some intricacies regarding certain procedural rights of an undertaking such as the right against self-incrimination⁴, the right to remain silent⁵ and the duty to state reasons⁶ which are much more limited under EU law.

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⁶ *Deutsche Bahn AG v Commission*, 2015, supra note 1 above.
Most recently, Directive 2019/1 was issued with the objective of empowering NCAs by introducing guarantees of independence, resources, and enforcement and fining powers in order to be more effective enforcers of competition law and to ensure the proper functioning of the internal market. Thus, Directive 2019/1 ensures that NCAs are provided with broader investigatory powers than those foreseen by Regulation 1/2003. For example, MSs are required to grant NCAs powers to inspect private homes and, overall, to enable NCAs to access the premises of undertakings where there are reasonable grounds for suspecting an infringement. Nevertheless, this instrument recognizes that MSs are not prevented from requiring prior authorisation by a national judicial authority for conducting inspections.

In this regard, we have grouped the frameworks in terms of the courts’ intervention when it comes to executing a dawn raid. No judicial or administrative warrant prior to a dawn raid is needed in the Netherlands, Italy, and in the UK (although the Competition and Markets Authority needs to give a two days notice). When the law in MSs does not prescribe a warrant, DG COMP will also not need a warrant.

In the Netherlands, Article 5:15 of the General Administrative Law Act states that a supervisor (NCA) shall be authorised to enter any place, including the necessary equipment, with the exception of a domicile. The safeguard here is Article 5:13 of the same Act which establishes that a supervisor may make use of these powers to the extent that this is reasonably necessary for the fulfilment of the defendant’s supervisory task.

The Italian Competition Authority is an independent administrative agency established by Law no. 287/90. The procedural rules and the investigative powers of the Authority are set out in the Law and in Decree No. 217/98. A dawn raid is carried out when the Italian Competition Authority has sufficient evidence of the existence of an infringement.

In the United Kingdom, the Competition and Markets Authority (“CMA”) has the power to enter premises either with or without warrants. When conducting an inspection without a warrant, Section 27 of the Competition Act 1998 stipulates that CMA officials entering a business premise must give the occupiers of the premise at least two working days’ written notice of the intended entry. Under Section 28, the CMA can be authorised by the court to enter the premises in question, gather any documents and use any force that is reasonably necessary. Then, the CMA does not need a two working days’ written notice. It is interesting to note in this regard, that the CMA usually seeks a warrant in cases where there is a suspicion ‘that the information relevant to the investigation may be destroyed or interfered with’ if the CMA gives such prior notice or sends a written request (e.g. in cartel cases) (CMA, 2019).
In these jurisdictions, no warrant is needed to enter business’ premises. The rationale for not needing a warrant to conduct a dawn raid differs. At the EU level, the European Court of Justice (“ECJ”) held in the Deutsche Bahn case that prior judicial authorisation for a raid is only necessary if there are no meaningful safeguards to restrict the powers of the Commission. Regulation 1/2003 provides for five types of safeguards which make prior authorization unnecessary (Steene, 2016):

1. The decision must include a statement of reasons;
2. Limits on the Commission’s conduct in the course of inspections;
3. The absence of coercive measures by the Commission itself to prevent the possibility of opposing an inspection;
4. The requirement that the Commission receives the assistance of national authorities if the search is opposed and the requirement that a national body consider the appropriateness of any contemplated coercive measures; and
5. The availability of ex post facto review by the ECJ, which may include the granting of interim relief, and the availability of non-contractual damages.

On the other hand, in the UK the CMA relies on warrants given the nature of the case at hand. If the CMA wants to assure the ‘gorilla in the closet’ effect, it will require the warrant; if not, giving prior notice will suffice the authority’s needs.

In Austria, Belgium, Germany, Ireland, Portugal and Spain (6 out of 10 investigated legal orders), designated agencies require a court warrant preceding a dawn raid (it should be noted that in Spain the warrant can be obviated if the investigated party grants consent for the execution of the dawn raid). This means the competition authorities in these countries need to submit a dawn raid decision to the court. Thereafter, the court will, hopefully, give them a court warrant stating that they may conduct this dawn raid. Thus, in these jurisdictions the legislative option has been to provide an additional safeguard to the undertakings under inspection.

These differences in jurisdictions have implications for the parallel and, as shown, not aligned systems of controls.

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7 Deutsche Bahn AG v Commission, 2013 and 2015, supra notes 1 and 2 above.
8 Deutsche Bahn AG v Commission, 2015, supra note 1 above.
III. Controlling dawn raids: ex ante warrants vs ex post judicial review

There are two types of controls on dawn raids: ex ante judicial warrants and ex post judicial review. In this section, these two will be elaborated on. Afterwards, it will be shown how these controls work out in practice and which are the implications therein.

1. Ex ante controls

First, ex ante controls consist of a judicial warrant prior to the dawn raid. The contents of the court warrant can vary considerably. Nevertheless, the main elements that are present, to a certain extent, are (i) a identification of the investigating authority; (ii) the legal basis; (iii) the addressee and (iv) the object of the investigation and the suspected infringement (ECN Working Group, 2012). Differences arise in the level of detail provided in such documents and in the aspects of the infringement included. In some cases, the suspected infringement or facts of the case are described. Reference may also be made to the subject matter and purpose of the inspection. In some jurisdictions, the market affected or the economic sector or products concerned is mentioned (ECN Working Group, 2012).

Judicial warrants thus provide an extra safeguard to the process. The objective of the dawn raid is assessed before this is carried out: the judge will assess the non-arbitrariness and non-excessiveness of the coercive measures envisaged in the decision ordering the inspection (Messina, 2007). The judge cannot question the necessity of a dawn raid or other substantive parameters. It merely checks whether there indeed is a reasonable suspicion and thus whether the (European) competition authority may conduct a dawn raid. The requirement of a judicial authorization cannot, however, compensate for the lack of ex post review9.

The European Court of Human Rights (“ECHR”) has been one of the advocates in favour of an ex-ante judicial review of the dawn raid. Through its case-law the ECHR has held that, in order to have a dawn raid conducted in accordance of the ECHR, ‘(i) legal persons are entitled to the protection of their premises; (ii) searches must be well founded and the parties must be assisted by adequate guarantees; (iii) prior judicial authorisation can avoid arbitrary measures, but in any event decisions must be reviewable, in fact and in law, by a court’ (Di Federico, 2013).

9 Deutsche Bahn AG v. Commission, 2015, supra note 1 above.
Furthermore, scholars have analyzed and argued that the inspection powers as outlined in Regulation No. 1/2003 (with no judicial warrant) and the protection provided by the ECJ falls short of the protection provided by the ECHR (Aslam & Ramsdem, 2008; Steene, 2016).

2. Ex post controls

Ex post controls are the second category of controls on dawn raids. Competition authorities, whether European or national, that conduct a dawn raid often (if not always) use the evidence gathered in such an investigation for their final decision on a competition law infringement.

Regardless of whether there is a requirement of an ex ante judicial warrant or not, unlawful conduct from competition authority officials during a dawn raid is namely not always challengeable on a standalone basis (Andersson, 2017).

For example, at EU level, the affected company may appeal only after DG COMP has made an official decision with evidence they found during the dawn raid. Otherwise, the raided firm must take the step to go to court and argue that the authority has not acted proportionally or violated procedural provisions. This must be done without knowing if the documents copied/seized are actually used in the conviction decision. This is a step which the firm must undertake and the presence of high litigation costs may act as a deterrent for such firms to fully utilize all tools available to protect their legal rights.

Companies can challenge a dawn raid decision of the Commission under Article 263 TFEU. Dawn raids can therefore be challenged when they have produced binding legal effects capable of affecting the applicant’s interests by bringing about a distinct change in his legal position10. As for measures taken during the course of an inspection (which are not considered to produce binding legal effects) the raided company will instead have to await the final decision in the underlying competition case before being able to take action (Andersson, 2017).

Now, this situation slightly differs in certain jurisdictions. For example, in the UK and Spain, where the competition procedure has a certain administrative gist, the inspection decision may not be challenged before the competition authority directly, but before the specialized administrative courts. Although challenging on a standalone basis is possible, one could say the solution is not completely effective.

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During the time between a dawn raid and a competition law infringement decision, harm could have already been done (Andersson, 2017). When an NCA or the Commission conducts a dawn raid and goes beyond its powers, there is no immediate way for a firm to appeal. It could go to court, but the court will not know, for instance, whether the NCA has actually utilised evidence illegally obtained. In some cases, the firm in question will have to wait until the formal infringement decision is taken before it can go to court for judicial review. A firm will have to wait around two to four years (the time cartel investigations normally take (Hüscherach, Laitenberger and Smuda, 2013)), depending on the jurisdiction, before it can lodge an appeal (e.g. in the UK the CMA takes an average of two and a half years; in Portugal, an average of four to five years; in Spain, an average of two years; at the EU level, the Commission takes four years). This problem is worsened by the fact that, in some jurisdictions, the firm will have to wait without even knowing if a challenge will ever be possible (Andersson, 2017).

Furthermore, even if the judiciary determines that (parts of) the dawn raids were conducted illegally, there is no effective remedy for the affected party because there is no power to order the Commission to return or destroy collected material (Steene, 2016). The same principle applies to national dawn raid proceedings as the remedies will depend on whether the applicant asks for such measure and whether the courts uphold such claim.

These different circumstances across the multiple jurisdictions may collide with the right to an effective remedy. In this regard, it is worth mentioning the criteria of the ECHR\textsuperscript{11} regarding the conditions to satisfy the right to an effective remedy (Citron, 2020):

- The existence of an effective judicial review of the facts and of points of law (requirement of effectiveness);
- The possibility for an individual to obtain an appropriate remedy when an unlawful act has taken place (requirement of efficiency);
- The certainty of access to proceedings (requirement of certainty);
- Judicial review within a reasonable time (requirement of a reasonable time).

While judicial review of a competition authority’s dawn raid decision, whether its DG COMP or an NCA, is possible, the key of the matter is to assess the requirements of the right to an effective remedy, as this mechanism of control may be limited due to, for instance, tight standing requirements at a court and negative implications from the differences between laws governing legal protection in different jurisdictions.

IV. Shortcomings in controls and how to overcome them

1. ‘Theory’ on connecting concepts

The rule of law presupposes the necessity to control actions of the executive branch. In the case of dawn raids, it means that companies should have the right to question this action and decision by a competition authority, which normally goes through courts. At the same time, judicial control shows limits, which prompts the question of how to address those limits. Scholten proposes to focus on connections of various concepts, of types of control and of different legal orders to seek for possibilities to close gaps in individual types of control (Scholten, 2019). In this light, we here focus on how different types of controls could indeed be connected to mitigate the challenges that judicial control may have in relation to dawn raids.

2. The judicial control of dawn raids

How does the judicial control in relation to dawn raids work at this moment? In this section, we show a few examples of how it works and what limits it may have. Also, we note that the requirement for a prior judicial warrant does not necessarily guarantee an extra safeguard for the undertaking(s) involved. This conclusion can be drawn as a consequence of some recent cases in the European Union.

(a) Belgium

The Belgian competition authority conducted several dawn raids in 2006. They concerned companies in the travel sector. As stated earlier, the Belgian competition authority needs a judicial warrant before conducting dawn raids as is stated in their Competition Act. In this case, however, the competition authority did not have this judicial warrant authorising the dawn raids.
Therefore, the Court of Appeal decided that the competition authority was prohibited from using any information that was gathered during those dawn raids\textsuperscript{12}. The Belgian Supreme Court affirmed that the dawn raids had been conducted illegally. Accordingly, the Court of Appeal was right to conclude that the evidence had to be dismissed from the case file\textsuperscript{13}.

In this case, note that the time elapsed from the execution of the dawn raid to the remedy given by the Court is approximately nine years. In terms of the criteria of the ECHR, this case lacks the requirement of reasonable time, affecting the right to an effective remedy.

(b) The Netherlands

The Dutch competition authority conducted dawn raids in the period of 2012–2016. As aforementioned, it does not need a judicial warrant prior to entering business premises. The court ruled that the competition authority collected data from persons that were not listed on the dawn raid decision by that same authority. It therefore went beyond the powers it intended to use during the dawn raid. The court prohibited the use of the data collected from the not mentioned persons\textsuperscript{14}.

(c) Spain

The Spaniard competition authority conducted dawn raids in the year 2012 to several waste management companies for a suspicion of an alleged infringement of Article 101 TFEU. As detailed in section 2.2.2, the authority needs a warrant if the undertaking does not grant its consent for the execution of the dawn raid; however, in the cases described herein the undertakings abided by the order of inspection issued by the NCA, so no judicial warrant was needed.

The Spaniard Supreme Court determined in 2019 and 2020\textsuperscript{15} that the dawn raids were illegal since the competition authority issued an order of inspection with a vague scope: the subject matter of the inspection was ‘possible collusive agreements in the markets of transport, collection and management of sanitary

\textsuperscript{12} Judgment of 18 February 2015, Court of Appeal of Brussels in joined Cases 2013/MR/19, 20, 21, 22, 24, 25.
or other type of waste’, conducted the raid and later opened an investigation and sanctioned several undertakings for colluding in the market of ‘recycling and commercialization of recycled paper and cardboard’. Thus, the Court considered that the inclusion of ‘other types of waste’ in the decision ordering the inspection was too broad and not specific enough, invalidating the procedure which was based on the collection of documents which were not referred to sanitary waste (i.e. paper and cardboard).

It is important to note that these actions were brought by the affected parties after a fining decision was issued in the proceedings before the NCA (although the regulatory framework allows the parties to question the decisions of the authority by means of judicial review).

Again, it is worth noting that the time elapsed between the execution of the inspection and the remedy given by the court was approximately seven years. This certainly conflicts with the requirement of reasonable time considered by the ECHR.

(d) EU

In 2016, the DG COMP conducted a dawn raid into a Czech rail company premise based on the suspicion of an infringement of Article 102 TFEU for allegedly incurring in ‘predatory pricing and other forms of infringement of Article 102 TFEU’. The General Court later determined in 2018\(^\text{16}\) that the Commission had only reasonable grounds for the specific conduct referred to in the decision ordering the inspection, which is predatory pricing in the Prague-Ostrava route. Consequently, the General Court declared invalid the inspection for any evidence collected which was not referred to predatory pricing in the Prague-Ostrava route.

In similar fashion, in another case in 2017, DG COMP conducted a dawn raid into certain companies of the food and non-food distribution sector in France. The information uncovered in the raids led to a formal EC investigation into alleged collusion between retailers through purchasing alliances (Citron, 2020). In 2020, the General Court held\(^\text{17}\) that the Commission did not have sufficiently strong evidence to launch dawn raids in respect of some of the suspected behaviour (Citron, 2020), annulling partially the order of inspection in that regard.

In these cases the time lapse between the inspection and the decision of the General Court is between two and three years, which could be considered as reasonable. Notwithstanding, both decisions only circumscribed to the order

\(^{16}\) České dráhy a.s. v. Commission (2018), supra note 2 above.

\(^{17}\) Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC), formerly EMC Distribution v. Commission, 2020, supra note 2 above.
of inspection, not addressing the evidence itself, or the procedure on which the evidence is based. This could be considered as an inefficient remedy in terms of the criteria of the ECHR.

(e) Corollary

As it can be noted, both the MSs and the Commission had exceeded their powers when executing dawn raids. These cases might not be wholly representative of the actual practice of the Commission or NCAs. It does, however, give insights in some shortcomings in the relation between judicial control and dawn raids. A common issue in these cases is the fact that the authority went beyond what was reasonably expected from the decision which ordered a dawn raid (except for the Belgium case in which the raid was illegal for not being supported by a warrant). Furthermore, the judicial review of such cases was not necessarily respectful of the right to an effective remedy, as in some cases the judiciary took too long to issue a final decision, or the remedy did not completely address the effects of the illegal inspection.

An interesting fact, and surprising to some extent, is the DG COMP case against České dráhy, in which the infringement was similar to the Deutsche Bahn case from three years before. In both cases the Commission conducted a dawn raid for a certain infringement but then opened a proceeding for a different or additional conduct.

This brief snapshot on the recent cases involving the dawn raids shows that judicial control over this action of the executive works and allows the affected parties to seek judicial redress against unlawful behavior. At the same time, these cases illustrate that ex ante and/or ex post controls face limits. Ex ante judicial warrants provide not enough control on the afterwards conducted dawn raid because the judicial warrant is not constituted under ‘full review’ but only comments on the non-arbitrariness.

As can be illustrated from these cases, it does not matter whether a judicial warrant is required or it is not. In Belgium, a warrant is prescribed and the competition authority neglected this requirement. In the Netherlands, no warrant is required and the competition authority overstepped its boundaries.

In turn, ex post judicial review cannot restore the original situation. In all the aforementioned cases, evidence was excluded from the investigation. This in turn meant that the relevant competition authority could not base itself on these documents anymore. That, however, does not mean that the situation is restored to before the disproportionate behaviour happened. This depends also on whether the affected parties were able to ask for a particular remedy, as the judiciary usually only assesses the legality of the act.
There are no immediate controls on dawn raids that can be enforced during the investigations of the competition authority. It thus seems that existing controls are not sufficient to ensure the rule of law. Finally, the judicial procedure may be time – and resource consuming for both public authorities and private parties.

3. Enhancing the public control over dawn raids

The problems arising from the execution of the dawn raids claim for a solution taking a different approach. We suggest seeking connections with different concepts and types of controls. The proposed improvements are threefold: (i) full ex ante reviews of dawn raids decisions; (ii) accountability measures for officials; and (iii) legislative guidance. The benefits and drawbacks of these options follow below.

3.1. Full ex ante reviews

In theory, ex ante judicial review of dawn raid decisions has the potential to solve a lot of problems, a trend of thought that is not new (Messina, 2007). This would entail an EU-wide requirement of a judicial review of an NCA dawn raid decision, after which the competent court can or cannot distribute a warrant. It does thus not only encompass the awarding of a warrant, but also an extensive ex ante review by the court. The competition authority would then have to prove the necessity and the proportionality of the inspections before the court.

The underlying dawn raid decision should then be based on reasonable suspicion (as is already the case in the 6 warrant-needing MSs presented above). Moreover, as an additional safeguard, the decision should encompass the intentions of the NCA as to what evidence they want to confiscate and how they want to do that. This basis is then more extensive than is the practice today. The review could be left to a judge to establish which evidence of which persons or cases can be gathered. With a review of the dawn raid decision and a subsequent judicial warrant, a judge can ex ante comment on the lawfulness and necessity of such a dawn raid. This has as a result that these components of the dawn raid are legitimate. It would therefore also be clearer afterwards, whether the competition authority has exceeded its powers in evidence-gathering. This ex ante review will hold the NCA with dawn raid competences judicially accountable for its conduct.

In the EU context, however, additional means are required to align the different procedures in MSs. MSs will need guidance on how to design and
implement full ex ante reviews. To achieve the right amount of harmonisation, legislative guidance is needed from the EU institutions. It will be difficult to establish to what extent MSs will need guidance and how intrusive this guidance should be. ‘Just’ implementing these measures will thus not work: there is always extra work involved to obtain a sophisticated and aligned system of controls. Moreover, guidance still leaves a significant scope for divergence.

This more extensive, full prior judicial review, however, completely undermines the efficacy of dawn raids, limiting their utility as an investigative tool (Verbruggen, 2013; Andersson, 2017; Australian Securities and Investments Commission, 2017) (the ‘gorilla in the closet’ approach). Moreover, this would be extremely burdensome for the judiciary (although it is the system established for the competition law enforcement in the US (OECD, 2013)) and does not assure that the dawn raid will be duly executed by the NCAs (Messina, 2007). Furthermore, it can be argued that standardizing the warrant requirements for all MSs would also undermine the national procedural autonomy of the NCAs (Arnull, 2011). Most importantly, this full ex ante judicial review does not guarantee that there will be no competition authorities still overstepping their boundaries. Therefore, imposing this profound ex ante judicial review does not appear to be an efficient and desirable alternative.

3.2. Accountability measures for officials

Another alternative that might be effective in terms of shaping the officials’ behaviour with regards to dawn raids is implementing judicial and political accountability measures. These could hold the authority’s officials responsible for an illegal exercise of their inspection powers, declared as such by the judiciary. For instance, measures such as bad performance reports or economic fines could be imposed to the officials responsible. In order to ensure the objectivity and transparency throughout the procedure, an independent entity should implement such accountability measures. This can be achieved by enhancing the powers of the hearing officer.

Currently, during investigations conducted by the European Commission, hearing officers have the role as independent arbiters ‘who seek to resolve issues affecting the effective exercise of the procedural rights of the parties concerned’ (European Commission, 2011). Likewise, in the UK the figure of the hearing officer is carried by the ‘Procedural Officer’ (Article 8 of the Competition and Markets Authority’s Competition Act 1998 Rules).

Subsequently, the hearing officer has a vital role in the investigation phase. He or she can issue reasoned opinions when alleged violations of the principle of self-incrimination, legal-professional privilege and confidentiality took place (European Commission, 2011), or any procedural complaint brought
by the parties of the investigation (Article 8 of the Competition and Markets Authority’s Competition Act 1998 Rules). Since the proposed measures fall perfectly within the existing powers of the hearing officer, these accountability measures such as issuing bad performance reports could easily be added to the competences of the hearing officer. Because the concept of hearing officers is currently only applicable to procedures conducted by DG COMP and the CMA, this concept should be utilized by the other NCAs as well.

While this alternative may provide more safeguards for the undertakings, it will be highly unlikely that competition authorities would create their own national variant of hearing officers. This is because this will undermine the officials’ willingness to act and would also affect the efficacy of the authorities, since the threat of sanctions would avoid them from taking appropriate actions for the detection of illegal activities. Furthermore, if all actions conducted by the competition authorities must be examined by the hearing officers, the entire investigation will be more burdensome and prolonged.

Moreover, and perhaps most importantly, this option may hamper the independence of the authorities and officials, as it could be used as a tool to exert pressure to such officials (one could say that the hearing officer will gain power over the officials, affecting their independence). In this regard, Directive 2019/1 seeks to increase the independence of NCAs and free them from political influence, so the type of accountability measures discussed in this section may run contrary to EU law.

3.3. Guidance by means of legal instruments

Taking into consideration that the principle of procedural autonomy leads to a lack of uniformity in the administrative procedure throughout MSs, there could be an argument in favour of the uniform application of EU law. This will be beneficial in terms of equality of treatment, predictability and legal certainty and would be normatively justified in the achievement of a common market (Leczykiewicz, 2010). Guidance by means of legal instruments thus seems like the most desirable improvement.

This could be achieved through an EU Directive, a legislative measure that would not undermine the autonomy of the MSs. There are no real indicators that legal tradition plays a role in the regulation of dawn raids, but there may be policy choices that flow from these traditions. These traditions should be preserved and a directive is the best alternative in that regard.

In this way, uniformity could be used to implement some rules or principles oriented to the protection of the undertakings rights; for example, by integrating procedural rules and criteria for issuing a dawn raid order or for conducting the inspection. Furthermore, this alternative could be used for
'lowering’ the criteria required for admitting judicial review actions (e.g. the legally binding effects required under Article 263 TFEU); or even include the possibility to return or destroy documents after a raid is declared illegal by the courts. Hence, this option is seen as the most effective and less intrusive for achieving a desirable outcome. This solution does need political will to be effectively implemented.

Coincidently, in 2013 the European Competition Network recommended that the NCAs should enhance and standardize their investigative powers (ECN Working Group, 2013). This recommendation gave later place to the Directive 2019/1 which has the purpose to ‘ensure that NCAs have the guarantees of independence, resources, and enforcement and fining powers necessary to apply Articles 101 and 102 TFEU effectively’, considering also that ‘the application of NCAs of national competition law [...] should not lead to a different outcome to the one reached by the NCAs under Union law’.

In this regard, recital 7 of the Directive literally provides that ‘[g]aps and limitations in the tools and guarantees of NCAs undermine the system of parallel powers for the enforcement of Articles 101 and 102 TFEU, which is designed to work as a cohesive whole’.

Now, Directive 2019/1 also addresses the fact that the exercise of the investigative powers conferred ‘should be subject to appropriate safeguards which at least comply with the general principles of Union law and the Charter of Fundamental Rights of the European Union’. Such safeguards include the right to good administration and the respect of rights of defence. The former comprising the assurance to conduct a proceeding within a reasonable timeframe and the latter including the right to be heard, access the file, and the right to an effective remedy.

Since Directive 2019/1 however ensures that NCAs are granted even more far reaching powers than Directive 1/2003, the need for adequate procedural safeguards will be even more urgent post-transposition. However, given its objectives, this legislation only focused on enhancing the enforcement of Article 101 and 102 TFEU, giving a minimum set of investigative, decision-making and sanctioning powers (i.e. how to impose fines); as well as structural measures that would ensure the independence of the NCAs.

As for the power to conduct inspections on business premises, no greater regard was given to the protection of rights besides declarations of compliance with the principles of EU law and the Charter. Notwithstanding, it is worth mentioning that the competent authority has the power to continue the dawn raid searches at the authority’s premises, as long as it will respect the undertaking’s right of defence. In this regard, the Court of Justice recently found that it can be inferred from Regulation 1/2003 that Commission officials may copy data encountered during the dawn raid and assess the relevance to
the investigation at its own premises in Brussels. This all while safeguarding the companies’ rights of defence by having a companies’ counsel present in Brussels during the assessment\textsuperscript{18}.

It therefore seems that the awareness of disproportionate needs to be raised, before the implementation of any of these possible improvements could be introduced. Ideally, a section on procedural safeguards or an effective judicial review could have been included in the directive. For this purpose, the criteria of the ECHR on assessing the right to an effective remedy could be considered.

Thus, for instance, provisions on which decisions may be subject to appeal before the NCA may be included. Ideally, the decisions ordering inspections could be considered (enhancing the effectiveness requirement of the ECHR). Moreover, the section could lay the grounds on the procedure which an affected party may have to walk in order to apply for the review of the decision – either by competition authorities or by courts – enhancing the certainty requirement.

Furthermore, provisions regarding the remedies that the authority may issue if an infringement is found could be included as well (enhancing the efficiency requirement of the ECHR). Finally, as with interim measures, provisions could be considered requiring that the revision of inspection decisions may be executed in an expedited manner (enhancing the reasonable time requirement).

\vspace{2em}

V. Conclusion

Dawn raids have been an effective tool in (competition) law enforcement. At the same time, dawn raids imply interfering with the rights and freedoms of private actors, which leads to the necessity of establishing controls over this action of the executive. The traditional controlling mechanism has been judicial control. The debate in the recent case-law and literature have been focusing on which type of it should be established: ex ante and/or ex post judicial check. In this article, we have proposed to look beyond one type of control (judicial) and seek for connections between types of controls to address the limits that judicial control faces (e.g. limited scope of review). We have outlined three possibilities to address the existing challenges: full review of ex ante decisions on dawn raids, internal accountability checks for the relevant officials and legislative guidance. We invite further debate with academics and practitioners concerning the benefits of these possibilities for

dawn raids as well as more broadly on what (other) connections can be sought to address the limits of individual types of controls and how to make such connections to ensure the rule of law.

**Literature**


Particularities of Proving a Single and Continuous Infringement of EU Competition Rules

by

Mirna Romić*

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Abstract

A single and continuous infringement of EU competition rules is a qualified form of infringement of EU Competition Law characterized by the existence of a global plan having a single objective between undertakings. Given the specificity of this form of infringement, proving it is somewhat different from the standard evidentiary

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process for proving infringements of competition rules before EU courts. This article aims to give an overview of the evidentiary rules through the case law of the Court of Justice of the EU and analyze their application in practice.

Resumé

Une infraction unique et continue aux règles de concurrence de l’UE est une forme qualifiée d’infraction au droit de la concurrence de l’UE caractérisée par l’existence d’un projet commun aux entreprises ayant un objectif unique. Compte tenu de la spécificité de cette forme d’infraction, la preuve est différente de la procédure de preuve standard pour prouver les infractions aux règles de concurrence devant les tribunaux de l’UE. Cet article vise à donner un aperçu des règles de preuve à travers la jurisprudence de la Cour de justice de l’UE et à en analyser l’application dans la pratique.

Key words: competition law; antitrust; infringement; cartels; single and continuous infringement; evidence; CJEU; European Union; Croatia.

JEL: K21, K23, K40

I. Introduction

A single and continuous infringement of competition rules, sometimes referred to as ‘single and complex’ or ‘single and persistent’ infringement, appeared as a legal notion for the first time in the Commission decision of 23 April 1986 – Polypropylene. This concept can be defined as a participation of undertakings in different actions that form part of an overall plan “because their identical object distorts competition within the EU market”1. The particularity of this form of infringement is precisely in the identical or single objective2 shared by the behavior of the undertakings participating in the infringement, which is not a typical characteristic of simplified forms of infringements of competition rules. Whereas it suffices, for the criteria set in Articles 101 or 102 TFEU to be fulfilled, for a simple infringement of competition rules to be established; in the case of a single and continuous infringement, it is necessary for the behavior that would in and of itself represent an infringement of

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competition rules, to also share the single objective of a global anticompetitive plan.

This article aims to, firstly, highlight the specificity of the concept of a single and continuous infringement and the scope of responsibility of the inculpated undertakings. Secondly, it seeks to clarify the evidentiary rules applicable to single and continuous infringements developed in the case law of the Court of Justice of the EU. Thirdly, using the example of the Areva decision and the Samsung judgment, the article provides examples of those rules as applied in the practice of the Commission and EU Courts. Finally, the article addresses the use of the notion of a single and continuous infringement in national systems, using the example of the Croatian legal system. It examines if, despite the absence of the exact notion, the relevant authorities and courts apply the underlying logic of the notion of a ‘single and continuous infringement’ to the cases before them.

II. Particularities of a single and continuous infringement of EU competition rules

A single and continuous infringement of competition rules is a notion introduced by the Commission in order to avoid artificially dividing an infringement of competition rules into each individual infraction in cases where these infractions are connected to such an extent that they function as parts of a global plan sharing a single objective. EU courts accepted this legal construct while considering that it would be “artificial to split up such continuous conduct, characterized by a single purpose, by treating it as consisting of several separate infringements”\(^3\). Although it cannot be seriously asserted that such a definition does not make it easier for the Commission to prove an infringement of the competition rules (in pursuit of a specific policy, Riley, 2014, p. 294), it should be stressed that it is the complex and secretive operation of cartels that justifies this approach of EU Courts to the evidentiary rules (Idot, 2015). In any event, a possibility for the Commission to simply incriminate unrelated anticompetitive behaviors as a single and continuous infringement is effectively prevented by the criterion of a ‘single objective’ that always has to be fulfilled in cases of single and continuous infringements (Alexiadis, Swanson and Guerrero, 2016, p. 5).

A single objective that characterizes a single and continuous infringement is normally one of the classical anticompetitive objectives such as price

\(^3\) Judgment of 8 July 1999, Case C-49/92 P Commission v Anic Partecipazioni, EU:C:1999:356, para. 82.
control\(^4\) or market partitioning\(^5\). For the purposes of correctly classifying an infringement, it is extremely important to determine if certain activities share an identical objective, because it is possible that the same undertakings, acting within the auspices of two or more separate cartels, simultaneously commit two or more single and continuous infringements of competition rules\(^6\). For example, it is possible for five undertakings to engage in two single and continuous infringements that still do not form a unique infraction, because the objective of the first one is the partitioning of the market for a certain product, whereas the second infraction has as its objective the control of prices of different products produced by those same undertakings (for difference between a continuous and a repeated infringement see Themaat and Reude, 2018, pt. 13.19). In order for the different activities to be classified as a single and continuous infringement, it has to be ascertained whether there are “any elements characterizing the various instances of conduct forming part of the infringement which are capable of indicating that the instances of conduct in fact implemented by other participating undertakings do not have an identical object or identical anticompetitive effect and, consequently, do not form part of an ‘overall plan’ (Studt, 2017, p. 645) as a result of their identical object distorting the normal pattern of competition within the internal market”\(^7\). An important consequence of establishing this form of infringement of competition rules is a wider scope of responsibility of undertakings that engaged in the infringement. However, such a qualification also provides an opportunity to those undertakings to defend themselves, by alleging that their behavior does not share an object identical to that of the activities of other undertakings and, therefore, does not constitute a part of an overall plan underlying a single and continuous infringement. One practical consequence of successfully refuting an incrimination of a single and continuous infringement could be the amount of fine, because fines are normally higher for complex infringements due to taking into account of a higher percentage of the basic amount as a starting point for the calculation of the fine\(^8\).


\(^7\) Judgment of 26 January 2017, Case C-609/13 P Duravit and Others v Commission, EU:C:2017:46, para. 121.

III. Scope of responsibility

It is settled case law of the Court of Justice that “an undertaking which has participated in a single and complex infringement, by its own conduct, which meets the definition of an agreement or concerted practice having an anticompetitive object within the meaning of Article 101, paragraph 1, TFEU and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement”9. In order to establish the responsibility for the behavior of other participants (Alexiadis et al., 2016, p. 6), it is necessary to establish that “the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk”10. Contrary to that, it is likewise possible that an undertaking has directly taken part in one or more of the forms of anticompetitive conduct making up a single and continuous infringement, but it has not been proven that the undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel. In this case, if the undertaking “was aware of all the other offending conduct planned or put into effect by those other participants in pursuit of the same objectives, or if it could reasonably have foreseen all that conduct and was prepared to take the risk, the Commission is entitled to attribute to that undertaking liability for the conduct in which it had participated directly and also for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself”11. However, this is conditional upon proof that “the undertaking was aware of the conduct of others or was able reasonably to foresee it and prepared to take the risk”12.

Already in its early case law, the Court of Justice concluded that such a definition of responsibility is not contrary to the principle according to which the responsibility for such infringements is personal in nature. It found that the definition actually “fits in with widespread conception in the legal

orders of the Member State concerning the attribution of responsibility for infringements committed by several perpetrators”\textsuperscript{13}. This is a good example of a situation where the Court complements its reasoning by referring directly to comparable instruments in national legal systems, thus strengthening its argument.

This peculiar definition of the scope of responsibility has influenced the evidentiary rules for proving a single and continuous infringement of EU competition rules.

\section*{IV. Proving a single and continuous infringement}

It is undisputed that EU Competition Law does not exist only to ensure fair market competition, but it is also a mechanism of market integration\textsuperscript{14}. This approach to competition policy resulted in a specific approach to the evidentiary rules in competition cases (de la Torre and Fournier, 2017). Given that it is normal for anticompetitive activities to take place in a clandestine fashion, for the meetings to be held in secret, and for the associated documentation to be reduced to a minimum\textsuperscript{15}, the Court developed a rule very early on according to which “the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules”\textsuperscript{16}. In practice, this notion encompasses any type of evidence, for example, the tables containing the fixed prices for a certain period, the minutes of meetings when the anticompetitive agreements were entered into or an exchange of emails fixing the time of these anticompetitive meetings.

Statements provided in leniency proceedings have significant value when it comes to shedding light on anticompetitive behaviors. Formally, these do not have an added value compared to other evidence, but they often facilitate the Commission’s understanding of an infringement, mechanisms of its implementation and its duration (Balasingham, 2016). Although having uncritical trust in statements given in leniency proceedings is not justified,

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\textsuperscript{13} Judgment of 8 July 1999, Case C-49/92 P Commission v Anic Partecipazioni, EU:C:1999:356, para. 84.
\textsuperscript{15} Judgment of 7 January 2004, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission, EU:C:2004:6, para. 55.
\textsuperscript{16} Judgment of 7 January 2004, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission, EU:C:2004:6, para. 57.
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because it can often happen that several of them are partially or totally contradictory, the parts in which they coincide, especially if supported by other evidence (Burhart and Maulin, 2011), can often become a key to putting an end to the anticompetitive activities.

One of the most interesting evidentiary problems, that directly influences the admissibility of evidence before EU courts, concerns the legality of the evidence gathered by national authorities and the transmission of such evidence to the Commission under Article 12 of Regulation 1/2003\(^\text{17}\). This problem arose in the case *FSL*, where the plaintiff alleged that the General Court failed to rule that the use of evidence transmitted to the Commission by the Italian customs and finance police was unlawful\(^\text{18}\), on the grounds that these were gathered in a national procedure the purpose of which was different from the procedure before the Commission. The Court held that the General Court was correct in stating that “the lawfulness of the transmission to the Commission, by a prosecutor or the national competition authorities, of information obtained in application of national criminal law is a question governed by national law” over which EU Courts have no jurisdiction\(^\text{19}\). It concluded that prohibiting the Commission from using evidence transmitted by national authorities which are not competition authorities, solely because these were gathered in procedures with a different aim from the one of a competition law infringement proceedings, would “excessively hamper the role of the Commission in its task of supervising the proper application of EU competition law”\(^\text{20}\). It follows that one of the important mechanisms of cartel detection and prosecution is the cooperation between national authorities which do not necessarily have to be competition agencies, such as national tax or customs authorities. Establishing a line of communication should not be limited just to the Commission, but should also include the respective national competition watchdogs.

4.1. The *Areva* decision

The mechanisms of cartel functioning are at times so sophisticated that it is hard to imagine any institution being able to uncover a cartel by using ordinary methods of market surveillance or mere inquiries. A good example of methods


\(^{19}\) *Ibidem*, para. 32.

\(^{20}\) *Ibidem*, paras. 35–36.
used to cover up cartel activities is the Areva case, where the cartel participants used encryption software when exchanging messages in which they discussed their anticompetitive activities\textsuperscript{21}. An additional hurdle in this specific case was the fact that some of the cartel participants were simultaneously manufacturing the telecommunication devices used to engage in the clandestine communication\textsuperscript{22}. In this case, had the Commission not procured the leniency statements\textsuperscript{23}, it would have been highly likely that the cartel’s existence would not have been established (Riley, 2010). However, leniency statements are often criticized as unreliable evidence and even the Court held that an admission by one cartel participant, the accuracy of which is contested by several others, “cannot be regarded as constituting adequate proof of an infringement committed by the latter undertakings unless it is supported by other evidence”\textsuperscript{24}. Despite taking this cautious view, the Court is well aware that leniency statements have a certain value because the impulse to provide incorrect information about a cartel is somewhat deterred by the fact that providing inaccurate information can be sanctioned, amongst other measures, also by the loss of immunity granted in the leniency procedure\textsuperscript{25}. As a rule, the credibility of a leniency statement depends on other evidence that can be used to support the statement, such as usual written evidence namely the tables that contain prices or witness statements.

The Areva decision provides a particularly clear example of the evidentiary process for proving a single and continuous infringement because the Commission structured its reasoning into three parts, which alleviates the comprehension of each phase. In the first part, the Commission focused on proving the coherence of measures undertaken by the cartel participants and their focus towards a single purpose of restricting competition for gas insulated switchgear projects at the global and the European level. The specific evidence that the Commission cited were market partitioning arrangements and various mechanisms aiming to implement such arrangements\textsuperscript{26}. For the purposes of

\textsuperscript{21} Commission decision of 24 January 2007, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/38.899 – Gas Insulated Switchgear, paras. 170–176.

\textsuperscript{22} Commission decision of 24 January 2007, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/38.899 – Gas Insulated Switchgear, para. 176.

\textsuperscript{23} Commission decision of 24 January 2007, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/38.899 – Gas Insulated Switchgear, paras. 88–104 and 263–264.

\textsuperscript{24} Judgment of 26 January 2017, Case C-613/13 P Commission v Keramag Keramische Werke and Others, EU:C:2017:49, para. 28.


\textsuperscript{26} Commission decision of 24 January 2007, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/38.899 – Gas Insulated Switchgear, paras. 88–104 and 263–264.
proving a single objective, the Commission put forward the following claims: i) the market partitioning agreements for the European and the global markets were contemporaneous; ii) the market partitioning agreement for the European market was subordinated to the one concerning the global market; iii) the European members were also members to the market partitioning agreement for the global market; and iv) the content and the implementation mechanisms for the two agreements were interlinked. In the second part, the Commission focused on proving the continuity of the single objective and of the crucial elements of the infringement. It is important to bear in mind that, once the Commission proves the single objective, the undertakings wishing to challenge the qualification of a single and continuous infringement then have to prove that their anticompetitive behavior is independent of a single objective pursued by the single and continuous infringement. This is a logical consequence of a more general evidentiary rule according to which, once the Commission lays out the evidence establishing the existence of an infringement, it is for the undertaking raising its defense to demonstrate that its defense is founded, so that the Commission will then have to resort to other evidence.

More specifically, in Areva, the undertakings alleged that in their case, the identity of the cartel participants changed, the mechanisms of cartel maintenance became rarer and that some of the participants no longer knew about all of the cartel activities, which is why the qualification of the infraction as ‘single and continuous’ was erroneous and should be re-qualified to two separate infringements. The Commission dismissed their arguments considering that “a) the object of the infringement remained the same; b) projects were notified, discussed, allocated; c) contacts and meetings took place at both management and working level; d) tenders were manipulated by organising bids and supporting tenders; e) price competition was avoided for projects not suitable for allocation; f) licensing of ‘uncontrolled’ outsiders was avoided; g) confidential information was regularly exchanged; h) compensation mechanisms were applied and retaliation mechanisms were put in place; i) measures to conceal the cartel were used; j) Japan and the European home countries were reserved, while projects won outside home countries were counted in the relevant quotas; and k) the individuals and Switchgear, paras. 271–272.

27 Commission decision of 24 January 2007, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/38.899 – Gas Insulated Switchgear, para. 274.


29 Commission decision of 24 January 2007, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/38.899 – Gas Insulated Switchgear, para. 279.
companies participating in the cartel showed a high degree of continuity”\(^{30}\). One of the indicia pointing to the cartel’s continuity was a review provision in the agreements providing that these continue to apply during any negotiations aimed at modifying those agreements; the challenge to the qualification of this infringement was not helped by the fact that several participants gave contradictory statements about the duration of the cartel activities, as well as about the participation time of certain undertakings\(^{31}\). It is important to stress that certain cartels, especially if they last for a long time period, begin to operate almost automatically and their anticompetitive practices begin to encompass the part of their business that was not originally covered by anticompetitive agreements. One additionally negative consequence of global cartels is that smaller undertakings, despite the fact that they do not necessarily participate directly in the cartel, can end up being forced to do business with a cartel on imposed terms because their market survival depends on it.

Finally, the third part of the Commission’s analysis concerns the interruption of the participation in the cartel of certain undertakings. This analysis is important because of the determination of responsibility. More specifically, if an undertaking has participated in a single and continuous infringement, then leaves the cartel and subsequently comes back, this constitutes a repeated participation in the same infringement\(^{32}\) and not two different infringements. It is questionable if these qualifications have a significant influence on the final amount of fines set in these cases because, although the duration of the participation is shortened, the fact that an undertaking repeated the infringement will normally lead to an increase in its fine due to recidivism\(^{33}\).

### 4.2. The Siemens judgment

The Areva decision was appealed before the General Court and the judgment of that Court was likewise appealed before the Court of Justice. The Siemens judgment, which is a judgment relative to the Areva decision, brought to light an always-interesting question of the distortion of facts and evidence, which is often invoked by the parties in order to demonstrate their absence from the cartel or a shorter period of participation than the one suggested by

\(^{30}\) Commission decision of 24 January 2007, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/38.899 – Gas Insulated Switchgear, para. 281.

\(^{31}\) Ibidem, paras. 282–294.

\(^{32}\) Ibidem, para. 297.

\(^{33}\) Judgment of 5 March 2015, Joined cases C-93/13 P and C-123/13 P Commission and Others v Versalis and Others, EU:C:2015:150, para. 87.
the Commission. A distortion is, according to the case law of the Court, rather
difficult to prove because the standard dictates that such a distortion must
be “obvious from the documents in the Court’s file, without there being any
need to carry out a new assessment of the facts and the evidence”34. This high
standard is, however, understandable because it facilitates the application of
the classical criteria of admissibility according to which the Court, in principle,
has no jurisdiction to establish the facts or examine the evidence which the
General Court accepted in support of those facts35. In practice, a distortion
will normally be established if the paragraphs of the General Court’s judgment
are contradictory, whereas, absent such contradiction, distortion pleas are
usually viewed as an attempt to obtain a reexamination of facts and evidence,
which the Court of Justice does not have jurisdiction to undertake36.

In Siemens, the Court also reiterated its case law according to which, for the
purposes of proving a single and continuous infringement, it is necessary to take
into account “any circumstance capable of establishing or casting doubt on the
existence of a the link between the anticompetitive behaviors and the single
objective of the infringement, such as, the period of application, the content,
including the methods used, and, correlative, the objective of the various
instances of conduct concerned”37. It is interesting to note that the parties
in this case tried to demonstrate that the qualification of the infringement
as ‘single and continuous’ is not correct because there were periods in which
the activities of the cartel were interrupted. The Court did not accept this
thesis and, instead, held that the absence of evidence for certain specific
periods “does not preclude the infringement from being regarded as having
been established during a more extensive overall period, provided that such
a finding is based on objective and consistent indicia”38. It is therefore clear
that cartel activities do not have to manifest continuously and it is irrelevant in
that regard if there had been a period of inactivity between the anticompetitive
behaviors, as long as those behaviors continue to pursue the same objective.

The Siemens judgment is a good example of the Court’s strict approach
to the issue of admissibility of parties’ arguments and the scope of their
review. More specifically, in the Siemens judgment, the Court examined only
Toshiba’s, but not Mitsubishi’s, argument alleging the incorrect qualification of

38 Ibidem, para. 264.
the infringement, because Mitsubishi failed to raise that argument during the procedure before the General Court. Had Toshiba successfully demonstrated that the infringement was incorrectly qualified, it would have escaped the single and continuous infringement qualification, whereas Mitsubishi would remain responsible for that qualification regardless of Toshiba’s success. Although it appears illogical, this rule is based on the case law of the Court according to which “an obligation for the General Court to state the reasons for its judgments does not in principle extend to requiring it to justify the approach taken in one case as against that taken in another case, even if the latter concerns the same decision.” The underlying logic is that the parties are not necessarily represented in the same way, which is why it would not be justified to treat their cases identically. One exception to this rule is a situation where the General Court itself raises an argument, in which case the parties can invoke or criticize such an argument on appeal, although they themselves did not raise it before the General Court. Given that this exception was not applicable in the Siemens judgment, Mitsubishi’s argument alleging an erroneous qualification was rejected as inadmissible. The Court is surely aware of the possibility that this approach might result in some problematic outcomes in cases when a Commission’s decision establishing a single and continuous infringement would be annulled with regard to one participant and upheld with regard to other participants in the same cartel; still, the Court did not abandon this line of case law despite having many occasions to do so.


V. Practical consequences of the evidentiary rules pertaining to a single and continuous infringement of EU competition rules

Specific characteristics of a ‘single and continuous infringement’ reflect also on the methods of defense used to challenge the qualification that are usually geared towards proving that the anticompetitive activities of undertakings were independent of the single objective. This type of defense actually presupposes admitting to a simplified infringement because, to challenge the qualification, an undertaking has to prove that its anticompetitive behavior does not share the single objective characteristic for the single and continuous infringement.

Legally intriguing situations usually arise when one of the inculpated undertakings participating in the single and continuous infringement is a small company. One of the defense strategies used in these cases is to allege that the small undertaking was in a position of dependence towards the bigger undertakings participating in the cartel, which made it impossible for such a small undertaking to refuse doing business with the cartel. This line of arguments is not always unfounded because, in cases of global cartels, it is possible that an entire sector operates under the rules dictated by a cartel and the small undertakings, if they are even aware of the cartel’s existence, have no other option than to do business with the undertakings joined in a cartel. Even in these cases, undertakings often offer a second line of defense with consists in admitting to a simple infringement while arguing that such an infringement is, however, independent of a single objective shared by the undertakings participating in the cartel. If the Commission’s thesis about a single objective is successfully challenged, this qualification will be proven to be erroneous, which could even result, under certain conditions, in a complete exoneration.

This strategy was used successfully by a company called Soliver, which was one of the undertakings charged with a single and continuous infringement in the Saint Gobain case. This company admitted to having an ‘inappropriate contact’ with certain undertakings participating in a cartel, but it denied participating in any market partitioning arrangements of the said cartel. The General Court found that the Commission proved that Soliver entered into bilateral contacts of an anticompetitive nature with two undertakings participating in the cartel.

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44 Commission decision of 12 November 2008, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/39.125 – Carglass.
participating in the cartel. However, since the Commission failed to prove that Soliver was aware or should have been aware of the cartel’s existence and its mechanisms, and, especially, of its single objective, the company managed to successfully topple the qualification of a ‘single and continuous’ infringement. In this specific case, the consequence was complete exoneration regardless of the fact that a simple infringement was established by the Commission and confirmed by the General Court. This outcome is due to the fact that the task of qualifying a reproached anticompetitive behavior belongs to the Commission and not EU Courts. Had the Commission alleged a subsidiary, simple violation of Article 101 TFEU, based on the findings of the General Court, Soliver would have been responsible for it. However, since the Commission failed to allege a subsidiary claim, such an additional incrimination could not have been added at the stage of the General Court’s proceedings, neither by the Commission nor by the General Court.

The practical consequence of a successful challenge to the qualification of an infringement as a single and continuous one, is a possibility of a lower fine for an undertaking that managed to topple the qualification. When an infringement is found to be ‘single and continuous’, the coefficient reflecting the gravity of the infringement, which is usually set between 0–30%, will usually be set at the top end of that scale. In case of a simple infringement of competition law, especially if the charged undertaking is small and maybe even have been forced to do business with the cartel, the coefficient will probably be set at the lower end of that scale. Nevertheless, these general tendencies do not have to hold true in every case because the determination of fines depends on so many factors that it is sometimes jokingly referred to as alchemy (Forrester, 2009, p. 832). This procedure could more accurately be compared to the phenomenon of Schrödinger’s cat (Schrödinger, 1935) because, although the criteria for fine determination are fixed in advance in EU legislation and clarified by the Court’s case law, nobody can predict with certainty what the outcome will be until the moment when the Commission renders its decision. Taking into account that EU Courts have unlimited jurisdiction which allows them not just to control the legality of the fine, but also to substitute their own

46 Ibidem, paras. 80–81.
47 Ibidem, paras. 90–103.
48 Ibidem, paras. 113.
appraisal for that of the Commission and, consequently, to cancel, reduce or increase the fine or penalty payment imposed, it becomes clear that any and all guesses as to the final amount of a fine are pure speculations51.

VI. A single and continuous infringement in national practice: Croatian examples

At the outset, it should be noted that competent Croatian authorities do not use the notion of a ‘single and continuous infringement’ in their decisions. Even the most complex infringements are treated under the classical notion of infringement, which is covered by Article 8 of the Market Competition Protection Act52. The absence of evidence of the exact terminology should not, however, be interpreted as evidence of the absence of such types of infringements in the Croatian market.

A good example of what could have been qualified as a single and continuous infringement is the bus transporters cartel case where the Croatian Competition Agency53 established, and the High Administrative Court confirmed54, that bus transporters engaged in a series of anticompetitive behaviors in the territory of the entire county. These included an agreement on price fixing and market partitioning, as well as co-ordination with regards to the registration procedure for new buses and the joint participation in future public tenders for the school transportation services. Although the Agency and, subsequently, the High Administrative Court, correctly categorized the infringement as a restriction by object, in so far as the very agreement has a clear anticompetitive object, the notion of a ‘single and continuous infringement’ was not used. However, at the outset, it appears that all of the anticompetitive behaviors in this case shared a single objective: restriction of competition for public bus line transport on a defined territory. Moreover, it does not seem as if the behaviors of certain transporters had an objective distinct to the one shared by the cartel members, or that any of their behaviors deviated from what was agreed upon within the cartel.

It can only be speculated as to the reason why the Croatian Competition Agency does not engage in the qualification of infringements as ‘single and continuous’, but part of the problem might be the approach of the Croatian

52 Zakon o zaštiti tržišnog natjecanja, Official Gazette n° 79/09, 80/13.
courts to the domain of competition law in general, and the applicable evidentiary rules even in cases of simple infringements. In that regard, it should be stressed that the Croatian Constitutional Court annulled the above mentioned judgment of the High Administrative Court of 20 February 2014\textsuperscript{55}, on the grounds that the High Administrative Court failed to provide reasons as to why a specific legislation regulating road transport was not taken into account. As correctly observed by certain authors (Petrović, 2018, p. 9), in a series of cases related to the bus transporters cartel, the Croatian Constitutional Court did not dispute the factual findings of the Agency. However, the approach adopted by the Croatian Constitutional Court raises serious doubts as to its compatibility with EU Competition Law. EU Law requires national courts to apply EU and national competition law in parallel\textsuperscript{56}. Article 101(3) TFEU provides a list of exceptions to the applicability of Article 101(1). The approach of the Croatian Constitutional Court seems to imply that national special laws constitute exceptions to the applicability of competition rules. This approach would seriously undermine the effective application of EU Competition Law when applied by the national courts, because it would effectively allow for unilateral adding of additional exceptions to Article 101 TFEU by virtue of national legislation. Another problem that might influence the decision of the Competition Agency not to qualify infringements as ‘single and continuous’ might reside in the fact that the judiciary seems to struggle with evidentiary rules set in the established case law of the Court of Justice even in the cases of simple infringements (Petrović, 2018, pp. 14–16).

Setting the possible deficiencies aside, it seems that the Croatian Competition Agency operates with the relevant notions and applies the case law of the Court of Justice in the field of competition law even if it does not always use the exact terminology used in the Court’s case law. The practice of qualifying a series of anticompetitive agreements as a single agreement\textsuperscript{57}, a correct identification of hard-core restrictions of competition\textsuperscript{58} or a correct application of evidentiary rules (Pecotić Kaufman, Butorac Malnar and Akšamović, 2019, p. 126), are some of the many examples demonstrating that the Agency follows the developments in EU Competition Law closely and applies the relevant notions in practice. Despite some hiccups along the road, courts have been slowly catching up with this trend. A positive development

\textsuperscript{55} Judgment of the Constitutional Court of 21 April 2016, U-III-1678/2014.

\textsuperscript{56} Judgment of 13 July 2006, Joined cases C-295/04 to C-298/04 Manfredi and Others, EU:C:2006:461, para. 38.


\textsuperscript{58} Decision of the Croatian Competition Agency of 19 July 2019, Sewage Disposal Cartel, UP/I-034-03/2017-01/019.
in that regard is a recent decision of the Croatian Constitutional Court in a case concerning Directive 98/5\textsuperscript{59}. The Constitutional Court annulled a judgment of the Supreme Court of Croatia on the grounds that the latter omitted to provide reasons explaining why it refused to initiate a preliminary rulings procedure in a case concerning EU legislation\textsuperscript{60}. Although the case at hand was not specifically related to EU Competition Law, this decision is a landmark judgment making it clear that EU Law has to be applied in Croatia and, in case of ambiguity as to its meaning, a preliminary rulings procedure has to be initiated. The same conclusion remains valid for the domain of competition law.

VII. Conclusion

A single and continuous infringement of EU Competition Law is a qualified form of a competition law infringement, introduced by the Commission and confirmed by the case law of EU Courts in order to facilitate the sanctioning of complex forms of EU Competition Law infringements. Taking into consideration the specific aim that competition law pursues in the European Union, namely, its aim of facilitating the integration of the Member States’ markets, it becomes obvious why EU institutions have a vested interest in alleviating the difficult endeavor of proving complex infringements, in order to allow for an effective sanctioning thereof. Nevertheless, efficient application of EU Competition Law cannot be pursued at the expense of the rights of defense of the inculpated undertakings which, when faced with a qualification of a ‘single and continuous’ infringement, usually follow a similar pattern of defense before the Commission and EU Courts. The first attempt of every undertaking will most likely be to deny any involvement in the anticompetitive activities, in order to attain complete exoneration. In the case of a single and continuous infringement, it is highly unlikely that this strategy will prove to be very successful. More specifically, if the Commission inculpates an undertaking for a single and continuous infringement, this, in and of itself, usually means that the institution has very strong evidence of a simple infringement. Although a successful challenge to the qualification of an infringement as a single and continuous one can lead to a reduced fine, taking into account the methodology of determining fines, nobody can guarantee that such a reduction will in effect

\textsuperscript{59} Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, (OJ 77 L, 14 March 1998), pp. 36–43.

\textsuperscript{60} U-III-2089/2017, 3 December 2019, paras. 9–10.
be granted at the end of the proceedings. Despite the fact that some of the coefficients might be set at a lower end of the scale, such a reduction could well be balanced out by the other relevant factors, that is, it could happen that an undertaking that successfully challenged the said qualification is actually a recidivist, which would then allow for an increase in fine.

A concept of a single and continuous infringement of competition law, like most of the instruments in this domain, has its proponents and its critics, but it is clear that, given the ever increasing complexity of modern cartels and their mechanisms, this form of infringement is becoming the most frequently established form of EU Competition Law infringement before the Commission and EU Courts.

Literature


State-Controlled Entities in the EU Merger Control: 
the Case of PKN Orlen and Lotos Group 

by 

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Abstract 

The economic downturn caused by the coronavirus pandemics is expected to result 
in the increased participation of the state in the functioning of markets. One of 
the forms of this participation is the recapitalization and state shareholding in 
commercial enterprises, which could lead to anti-competitive effects to the 
detriment of competitors and consumers. In this regard, the effective enforcement 
of merger control rules at the EU and national levels gains in importance. The 
present paper questions the adequacy of the available merger control standards and 
assessment tools for taking into account potential anti-competitive effects stemming 
from ownership and non-ownership forms of state control over undertakings. The

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analysis is focused on the experiences of Polish state owned enterprises under the EU and national merger control assessment. It was prompted by the notification of the *PKN Orlen/Lotos* merger that received conditional clearance from the EU Commission.

**Résumé**

Le ralentissement économique provoqué par la pandémie de coronavirus est supposé se traduire par une participation accrue de l’État au fonctionnement des marchés. L’une des formes de cette participation est la recapitalisation et la participation de l’État dans les entreprises commerciales, ce qui pourrait produire des effets anticoncurrentiels au détriment des concurrents et des consommateurs. À cet égard, l’application effective des règles de contrôle des concentrations au niveau de l’UE et national gagne en importance. Le présent article s’interroge sur l’adéquation des normes de contrôle des concentrations et des moyens d’évaluation disponibles pour tenir en compte les effets anticoncurrentiels potentiels découplant des formes de contrôle public sur les entreprises. L’analyse se concentre sur les expériences des entreprises publiques polonaises dans le cadre de l’évaluation du contrôle des concentrations au niveau de l’UE et national. Cette analyse est le résultat de la notification de la fusion PKN Orlen/Lotos qui a reçu l’autorisation conditionnelle de la Commission européenne.

**Key words:** state owned enterprise; merger control; single economic unit; competitive neutrality; Poland; national competition authority.

**JEL:** K21

**I. Introduction: state owned enterprises in EU merger control before COVID-19**

Following the principle of non-discrimination between private and public forms of property ownership, embedded in Article 345 TFEU, the EU Merger Regulation (hereinafter: EUMR) also adheres to the principle of competitive neutrality and stipulates that the “arrangements to be introduced for the control of concentrations should…respect the principle of non-discrimination between the public and the private sectors”.¹ According to the EU Commission’s explanation, “if it was allowed to treat state-owned undertakings more favourably than other enterprises, removing the level playing field that

should be the characteristic of free competition, the competitive process and
the long-term goal of one European integrated market could be considerably
damaged” (OECD, 2009, p. 243). The Court of Justice of the European
Union (hereinafter: CJEU) developed a functional approach to the concept
of undertaking, which “encompasses every entity engaged in an economic
activity regardless of the legal status of the entity and the way in which it
is financed”.2 As a result, state owned enterprises (hereinafter: SOEs) are
regarded as ‘undertakings’ and have to pass through the same procedural
steps and substantive assessments of the EU merger control regime along with
other types of companies.

At the same time, the determination of the ‘undertakings concerned’ or
‘persons concerned’ in merger cases has encountered several application
challenges in relation to the economic concentrations involving SOEs. These
challenges can be presented as two broader groups of questions: (1) procedural
questions related to the qualification of a transaction as a concentration
under the EUMR and determination whether a given transaction reaches
the threshold of the ‘Community dimension’, and has to be notified to the
EU Commission under the EUMR; and (2) substantive questions related to
the competitive assessment of SOE-related mergers and acquisitions such as
whether one SOE will be subject to coordination of its conduct on the market
with other SOEs controlled by the same state.

A ‘concentration’ under the EUMR can result from a merger of two or
more previously independent undertakings or parts of undertakings or from
an acquisition, by one or more persons, of direct or indirect control of the
whole or parts of one or more other undertakings.3 A ‘concentration’ should
be distinguished from an ‘internal restructuring’ within a group of companies,
which may take the form of increases in shareholdings not accompanied by
changes of control or restructuring operations, such as “a merger of a dual
listed company into a single legal entity or a merger of subsidiaries”.4 Will
a merger of two SOEs owned by the same state qualify as a concentration
under the EUMR? According to the Commission’s Jurisdictional Notice,
if two SOEs “were formerly part of different economic units having an
independent power of decision, the operation will be deemed to constitute
a concentration and not an internal restructuring”.5 For example, “several
SOEs will be considered to be the same independent centre of commercial

3 EUMR, Article 3(1). Commission Consolidated Jurisdictional Notice under Council
Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95,
16 April 2008, para 7.
4 Jurisdictional Notice, para 51.
5 Jurisdictional Notice, para 52.
decision-making where they are part of the same holding company owned by the State” (Fountoukakos and Puech-Baron, 2012, p. 48).

The early merger control practice of the EU Commission has evolved around cases involving SOEs from EU Member States, or those controlled by the countries within the European Economic Area. As a result, the ‘European inquisitor’ (Bernatt, Botta and Svetlicinii, 2018a; Bernatt, Botta and Svetlicinii, 2018b) was dealing with the companies that were largely subjected to EU competition law and placed within the regulatory framework of competitive neutrality. The Commission has developed the concept of a ‘single economic unit’, which encompassed all undertakings under the control of the same decision-making center. Hence, if two SOEs are owned by the same state but controlled by different entities or persons, they would belong to distinct ‘single economic units’ and the merger of such SOEs would qualify as economic concentration under the EUMR.6 Similarly, for determining whether the concentration achieves ‘Community dimension’, the Commission calculated the aggregate turnover of all SOEs included into such ‘single economic unit’.7 The competitive assessment of the possible coordination of the market behavior of SOEs owned by the same state was carried out on the basis of: previous evidence of such coordination, presence of interlocking directorships, exchange of sensitive information between the undertakings concerned, and other factors considered by the Commission on case-by-case basis.8 The universal applicability of these concepts has been put to the test in 2011, when the Commission has conducted its first substantive assessment of an acquisition notified by a Chinese SOE (Depoortere, 2011).9 The subsequent string of acquisitions of Chinese SOEs in Europe challenged the application of the traditional competition law concepts such as ‘concentration’, ‘single economic unit’, ‘control’ and ‘decisive influence’ to the Chinese ‘national champions’, which operate within a system of state capitalism that does not embrace the principle of competitive neutrality (Svetlicinii, 2017; Svetlicinii, 2020).

The clearance of Chinese SOEs’ acquisitions and the Commission’s blocking of the Siemens/Alstom merger10 prompted various calls for reform of the EU merger control regime coming from individual Member States and other stakeholders (Heim, 2019). For example, France, Germany and Poland

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6 See e.g. Case No. IV/M.511 Texaco/Norsk Hydro, decision of 9 January 1995; Case No. IV/M.1573 Norsk Hydro/Saga, decision of 5 July 1999; Case No IV/M.931 Neste/IVO, decision of 2 June 1998.

7 See e.g. Case No. COMP/M.4934 Kazmunaigaz/Rompetrol, decision of 19 November 2007; Case No. COMP/M.8319 CEFCI/JSC KazmunaiGaz/Rompetrol France, decision of 23 December 2016; Case No. COMP/M.8361 Qatar Airways/Alisarda/Meridiana, decision of 22 March 2017.

8 See e.g. Case No. COMP/M.5549 EDF/Segebel, decision of 12 November 2009.

9 Case No. COMP/M.6082 China National Bluestar/Elkem, decision of 31 March 2011.

10 Case No. COMP/M.8677 Siemens/Alstom, decision of 6 February 2019.
in their position paper entitled ‘Modernising EU Competition Policy’ urged the EU Commission to ‘stringently take into account’ state control and state support of undertakings coming from third countries in calculating turnover and conducting the competitive assessment of the notified concentrations.11 In relation to mergers of those European companies that should be able to compete on the global markets, the three Member States suggested to take into account the competitiveness of the EU industry and the European value chains by using more flexibility in adopting merger remedies that should take the form of behavioral conditions rather than structural divestitures.12 Their concerns were heard by Ursula von der Leyen, the newly elected President of the EU Commission, who called upon Margrethe Vestager, now ‘the Executive Vice-President for a Europe fit for the Digital Age’ to “develop tools and policies to better tackle the distortive effects of foreign state ownership and subsidies in the internal market” (von der Leyen, 2019, p. 6). The Commission’s response to the competition challenges posed by SOEs and other state-initiated market distortions was subsequently formulated in the White Paper on levelling the playing field as regards foreign subsidies.13

The COVID-19 pandemic, which caused large scale economic disruptions in the EU starting from March 2020, has diverted the Commission’s attention towards emergency economic support measures and the planning of economic recovery policies. In order to allow Member States to grant state aid to its struggling enterprises, the Commission has adopted the Temporary Framework for state aid measures during the COVID-19 outbreak, which identified temporary state aid measures that the Commission considers compatible under Article 107 TFEU.14 Among the woes brought about by the COVID-19 was the volatility of the stock markets and fear of foreign acquisitions. Commissioner Vestager pointed out that one of the ways to prevent a takeover by a foreign state is to replace it by the takeover by the EU Member State: “We don’t have any issues of states acting as market participants if need be – if they provide shares in a company, if they want to prevent a takeover of this kind” (McCaffrey, 2020). The German Economy Minister Peter Altmaier concurred: “We will avoid a sell-out of German economic and industrial concerns. There cannot be

12 Ibid., p. 3.
14 Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 91 I/01; Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 112 I/01.
any taboos. Temporary and limited state support as well as participations and takeovers need to be possible” (Escritt and Steitz, 2020).

The Commission responded by amending the Temporary Framework on 8 May 2020 to allow “well-targeted public interventions providing equity and/or hybrid capital instruments to undertakings could reduce the risk for the EU economy of a significant number of insolvencies”. At the same time, since such state interventions are especially distortive for competition, the Commission specified that these measures should “be subject to clear conditions as regards the State’s entry, remuneration and exit from the undertakings concerned, governance provisions and appropriate measures to limit distortions of competition”. The Commission acknowledged that some Member States are considering the acquisition of strategic companies. If such acquisition is done to avoid a foreign takeover, the Commission urged Member States to consider other means such as strengthening the FDI screening mechanism (Svetlicinii, 2019). The Temporary Framework provided for incentive schemes that would ensure the eventual exit of the state from those undertakings that have been assisted by recapitalization. At the same time, if the beneficiary has significant market power and receives a recapitalization measure above EUR 250 million, then the Member State concerned must propose additional measures to preserve effective competition in the affected markets. Such measures may include structural or behavioral commitments.

The Temporary Framework has laid down the ground rules for recapitalization of the European companies and, if pursued by the national government, it will lead to the increase of the number of companies (albeit temporary) with state shareholdings as well as those where the state will be able to exercise control over them. Is the EU merger control regime well equipped to address the potential anti-competitive effects of state-supported acquisitions and mergers? Are the previously developed concepts and assessment tools effective in assessing the potential anti-competitive effects of state control over SOEs and other state-invested entities? While the preceding research of the author has been focused primarily on cases involving Chinese SOEs, the growth of economic nationalism

16 Ibid., para 7.
18 Temporary Framework, para 72.
and protectionism within the EU itself calls for the reversal of attention towards SOEs controlled by the Member States. The present paper attempts to provide the answers to these questions by addressing the recent notification of the acquisition of the Lotos Group (controlled by the Polish State)\(^{19}\) by PKN Orlen\(^{20}\) (significant shareholding owned by the Polish State).\(^{21}\)

### II. PKN Orlen and Lotos Group: state owned or state controlled?

The establishment of PKN Orlen and the Lotos Group dates back to the early 2000s, which saw a privatization of the Polish petroleum industry. The two largest state owned oil refineries, the one in Płock (around 60% of domestic production) and the one in Gdańsk (around 20% of domestic production), were up for sale. The Polish government was hesitant to consolidate the refining capacities under one single corporate group due to fears of geopolitical Russian takeovers in the strategic energy sector (Orban, 2008, pp. 85–87). However, the attempts to privatize the Gdańsk refinery attracted consortia of bidders including Russian oil giants Yukos and Lukoil. As a result, the public tenders were called off and after the revision of the petroleum industry strategy in 2003, the Gdańsk refinery and three refineries in the south of Poland were consolidated into the Lotos Group under state control.

In 2005, in order to keep the strategic industry under state control, Poland adopted its ‘golden share’ legislation allowing the government to block key decisions in companies of special importance for the public order or public security.\(^{22}\) In 2008, the Council of Ministers has included PKN Orlen, along with the Lotos Group, Polish Oil and Gas Extraction (PGNiG),\(^{23}\) the energy holding Tauron Group,\(^{24}\) electricity transmission system PSE,\(^{25}\) and others, on the list of companies of special importance for public order and security.\(^{26}\) However, after the EU Commission’s infringement proceedings against

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19. [Grupa Lotos](http://www.lotos.pl/); traded on Warsaw Stock Exchange as LTS.
20. [Polski Koncern Naftowy Orlen](https://www.orlen.pl/); traded on Warsaw Stock Exchange as PKN.
23. [Polskie Górnictwo Naftowe i Gazownictwo](http://pgnig.pl/); traded on Warsaw Stock Exchange as PGN.
24. [Tauron Polska Energia](https://en.tauron.pl/); traded on Warsaw Stock Exchange as TPE.
25. [Polskie Sieci Elektroenergetyczne](https://www.pse.pl/)
26. Council of Ministers, Regulation of 30 September 2008 concerning the list of companies of special importance for public order or public security, Official Gazette No. 192, item 1184.
Member States applying ‘golden share’ regimes, the Polish government had to withdraw the above-mentioned legislation (Adamczyk and Barański, 2010).

The unwillingness of the Polish State to part with the previously fully state-owned companies, labeled ‘reluctant privatization’, led to the current situation of “the preservation of numerous enterprises that are still controlled by the state, although formally the state does not possess any shares in them or has only small packages, which carry insignificant voting rights” (Bałtowski and Kozarzewski, 2016, p. 409). As a result, one would observe the emergence of the two broader groups of companies: (1) SOEs where the state holds a dominant shareholder position (PGNiG, PGE,27 Lotos Group, Enea,28 Energa,29 etc.); and (2) companies where the state maintains a certain degree of control through statute provisions of voting caps strengthening the position of the state shareholder (PKN Orlen, Tauron Group, CIEH,30 etc.). The second group of companies has been labeled as ‘state-controlled enterprises’ or SCEs encompassing those companies that are controlled by the state using non-ownership instruments (Bałtowski and Kozarzewski, 2016, p. 406).

At the time of writing, the state shareholding in PKN Orlen was 27.52%31 held by the Ministry of State Assets (hereinafter: State Treasury).32 At the same time, the articles of association provide that no shareholder can exercise more than 10% of the total voting rights at the General Meeting.33 This restriction, however, does not apply to the State Treasury. This results in a situation where the State Treasury appears as the largest voting rights holder while the voting powers of all other shareholders is curbed at the 10% cap. For example, at the General Meeting held on 5 March 2020, the State Treasury exercised 43.01% of voting rights, while the total voting rights of all other participating shareholders that had at least 5% of voting rights amounted to 34.97%.34 Furthermore, the position of the state shareholder is also strengthened by the special right of the State Treasury to appoint one member of the

28 Enea SA, https://www.enea.pl/; traded on Warsaw Stock Exchange as ENA.
29 Energa SA, https://www.energa.pl/; traded on Warsaw Stock Exchange as ENG.
30 CIEH SA, https://ciechgroup.com/; traded on Warsaw Stock Exchange as CIE.
32 The Ministry of State Treasury (Ministerstwo Skarbu Państwa) was liquidated in 2017, while the current Ministry of State Assets (Ministerstwo Aktywów Państwowych) was established at the end of 2019.
33 PKN Orlen, Articles of Association, Article 7(11).
Supervisory Board directly, in addition to the members it can vote in through the General Meeting. These corporate arrangements led the commentators to conclude that the “Polish state currently controls PKN Orlen via a 27.5% stake” (IntelliNews, 2018a) and that the “Polish state is able to control listed companies even without a majority stake” (Bretan, 2018). The control over the SOEs and other enterprises made the Ministry of State Treasury so powerful that the “political weight of this body apparently was one of the main reasons of its liquidation after the Law and Justice coalition came to power in 2015 and started to concentrate economic power in the hands of the Prime Minister and branch ministries” (Kozarzewski and Bałtowski, 2019a, p. 20).

The observation of the functioning of Polish SCEs such as PKN Orlen revealed their similarities with the SOEs: “the boards of these companies are subject to politically motivated personnel decisions; the state de facto determines their development strategies, it is also the state that decides every year on the amount of the dividend these companies will pay out” (Kozarzewski and Bałtowski, 2019b, p. 26). For example, Wojciech Jasiński assumed his duties as the President of the Board of Directors in PKN Orlen at the end of 2015 (and served until 2018) while maintaing his appointment in the supervisory board of the state owned PKO Bank Polski (commercial bank), which he held from February 2016. On 5 February 2017, Mr Jasiński was dismissed as PKN Orlen’s CEO and replaced with Daniel Obajtek, who previously headed Energa SA, another Polish SOE. It was reported that “his refusal to fire colleagues associated with Civic Platform had played a role, as had his reluctance to join a project to build a nuclear power plant” (Koper, 2019). PKN Orlen’s Vice-President, Mirosław Kochalski, held various political appointments with the Law and Justice party and the presidency of CIEH Group (chemical industry). Mateusz Bochacik served on the supervisory boards of PKN Orlen and one of the companies within the Polish Armaments Group (PGZ). Arkadiusz Siwko, who served on the supervisory board of PKN Orlen, also held the position of the President of PGZ. Robert Pietrzsyn occupied board positions in PZU and the Lotos Group. Remigiusz Nowakowski held board positions in PKN Orlen and the state owned Tauron Group (Mikołajewska, 2017; Mikołajewska, 2019).

Centralized government control and participation in a number of SOEs and SCEs, which until recently was concentrated in the hands of the State Treasury, the rotation of the same individuals through the corporate boards of these undertakings, the steering of the strategic decisions of the SOEs and SCEs in line with the government’s economic development strategies and policies (for example, in the energy and petroleum sectors) serve as evidence of both the capacity and the actual exercise of state control over major commercial

35 PKN Orlen, Articles of Association, Article 8(2).
decisions of those companies through ownership and non-ownership means. The ensuing section will discuss whether and how these factors have been considered in the assessment of mergers involving Polish SOEs at the EU and national levels.

III. Polish state owned enterprises under EU merger control

After its ‘partial privatization’, PKN Orlen was involved in a number of concentrations, which due to the size of its economic group and its presence in several Member States, have reached ‘Community dimension’ and were notified to the EU Commission under the EUMR. In 2005, PKN Orlen set to acquire 62.99% in Unipetrol a.s., a Czech SOE in the process of privatization, controlled by the National Property Fund of the Czech Republic.37 In its clearance decision, the Commission did not label the acquiring undertaking as a SOE: “PKN Orlen used to be a state-owned company, which prior to Poland’s opening up to an open market economy, was the only company able to produce and sell petroleum products and its derivates”.38 Since the transaction had no significant effect on the non-retail sales markets of fuel oil and liquefied petroleum gas, the Commission focused its assessment on the non-retail sales markets of gasoline and diesel. The analysis concluded that the geographic scope for non-retail markets was national (Czech Republic and Poland) and neither of the merging parties was particularly strong in the border region between the two countries.39 Furthermore, it was noted that PKN Orlen faced strong competition from the Lotos Group on the Polish market for gasoline, diesel, and bitumen.40 In 2003, the Lotos Group owned 349 gas stations and three petroleum refineries in Southern Poland.41 PKN Orlen, on the other hand, controlled the refinery in Plock and two smaller refineries in the south of the country.42 Thus, the Commission considered PKN Orlen and the Lotos Group as competitors without demonstrating whether and how it considered the effects of state participation in both undertakings.

In 2006, PKN Orlen expanded its presence in Lithuania by acquiring control over AB Mažeikiu Nafta, a company active in the refining of crude oil and the

37 Case No. COMP/M.3543 PKN Orlen/Unipetrol, decision of 20 April 2005.
38 Ibid., para 7.
39 Ibid., para 19.
40 Ibid., paras 34, 50.
41 Ibid., para 35.
42 Ibid., paras 43–44.
wholesale and retail of petroleum products in the Baltic States and Poland.\(^{43}\) The competitive assessment was focused on ex-refinery/cargo sales, non-retail sales, and retails sales of refined oil products\(^{44}\) in North Eastern Poland where both parties were present, but since none of them were exclusive suppliers, the concentration did not raise anti-competitive concerns.\(^{45}\) Here again, the Lotos Group was considered as a main competitor of PKN Orlen on the market for non-retail sales of diesel and gasoline in Poland.\(^{46}\) The Commission cleared the merger by concluding that the “additional market shares are relatively small, customers are able to source supplies from neighboring EU countries, supplies from CIS are likely to increase their sales as refineries in these countries are being upgraded, storage facilities are available and there is considerable buyer power”.\(^{47}\)

In 2012, the EU Commission has received PKN Orlen’s merger notification concerning the acquisition of the fuel supplier Petrolot (from 2017 – Orlen Aviation), which was previously under the joint control of PKN Orlen and the state owned LOT Polish Airlines.\(^{48}\) The merging parties have requested the Commission under Article 4(4) EUMR to refer the case for investigation to the Polish NCA – the Office of Competition and Consumer Protection (hereinafter: UOKiK).\(^{49}\) After considering that the affected geographic markets (individual airports) were all in Poland, the Commission referred the case to UOKiK. According to the submission from the Lotos Group, the supply of jet fuel required the possession of adequate storage facilities at each airport. In this respect, Petrolot had such facilities at 12 airports, while the presence of its competitors was very low. This raised vertical anti-competitive concerns as PKN Orlen was active on the market for the supply of jet fuel, while Petrolot was acting as a downstream distributor delivering the fuel to airplanes. The Polish NCA confirmed the existing dominance of Petrolot on the jet fuel markets in several airports in Poland but concluded that the concentration will not lead to a strengthening of this dominant position.\(^{50}\) Furthermore, according to UOKiK, the departure of LOT, as a shareholder of Petrolot, ensures that there will be no discrimination in fuel supply between LOT and other airlines refueling their jets in Polish airports.

\(^{43}\) Case No. COMP/M.4348 PKN/Mazeikiu, decision of 7 November 2006.

\(^{44}\) Ibid., para 8.

\(^{45}\) Ibid., para 27.

\(^{46}\) Ibid., paras 42–43.

\(^{47}\) Ibid., para 50.

\(^{48}\) Case No. COMP/M.6683 PKN Orlen/Petrolot, decision of 5 September 2012.

\(^{49}\) Urząd Ochrony Konkurencji i Konsumentów, https://www.uokik.gov.pl/

\(^{50}\) UOKiK, Decision No. DKK-131/2012 of 5 December 2012.
In terms of referrals of merger cases from the Commission to the NCA, UOKiK’s experience is mixed. In 2018, the Commission rejected UOKiK’s request under Article 9 EUMR to refer to the Polish NCA an acquisition in the media sector. The Commission reasoned that “given its extensive experience in assessing cases in the media sector, and the need to ensure consistency in the application of merger control rules in this sector across the EEA, it was better placed to deal with this case” (European Commission, 2018).51 In another case, which concerned two companies active on the pork meat market, the Commission approved UOKiK’s request for referral under Article 9 EUMR (European Commission, 2017).52 As a result, until recently,53 PKN Orlen/Petrolot was the only merger case concerning a Polish SCE that was referred to the UOKiK under the EUMR.54

Most recently, the Commission cleared PKN Orlen’s acquisition of Energa, a Polish renewable energy operator.55 Prior to the acquisition, Energa was a SOE with 52% of the shares (as of 29 November 2019), which provided the Polish State with a 64% share of the voting power at the General Meeting. In its press release, the EU Commission referred to Energa as “an energy company active in the generation and wholesale supply, distribution, and retail supply of electricity and other energy-related activities in Poland” (European Commission, 2020a). While the merger clearance decision has not been yet released at the time of writing, the Commission’s press release does not contain any mentioning of the state participation in PKN Orlen. As a result, the Commission’s merger assessment of the concentrations involving PKN Orlen do not consider this undertaking to be part of the same ‘single economic unit’ with other Polish SOEs.

51 Case No. COMP/M.8665 Discovery/Scripps, decision of 6 February 2018.
52 Case No. COMP/M.8611 Smithfield/Pini Polonia, decision of 23 January 2018.
53 See Case No. COMP/M.9561 PKN Orlen/Ruch, decision of 12 February 2020. The Commission under Article 4(4) EUMR has referred to the UOKiK an acquisition of Ruch (a Polish operator of kiosks and newsagent stores) by PKN Orlen.
54 Under Article 4 EUMR, the Commission has referred to UOKiK the following cases: Case No. COMP/M.6476 Canal+/ITI/TVN/FTA/ITI Neovision, decision of 16 March 2012; Case No. COMP/M.6822 Groupe Auchan/Real/Real Hypermarket Romania, decision of 7 March 2013. Under Article 9(3) EUMR, the Commission has referred to UOKiK the Case No. COMP/M.4522 Carrefour/Ahold Polska, decision of 10 April 2007.
55 Case No. COMP/M.9626 PKN Orlen/Energa, decision of 31 March 2020.
IV. Polish state owned enterprises under national competition law

While the EU Commission may have had limited experience in assessing the effects of corporate governance in Polish SOEs and SCEs on the commercial conduct of such companies, the Polish NCA has accumulated a more varied practice in this domain. Polish competition law authorizes the President of UOKiK to exceptionally clear anti-competitive mergers on the basis of public interest provided that “(1) the concentration will contribute to economic development or technical progress; (2) it may have a positive effect on the national economy.” UOKiK’s merger review practice contains examples where public interest was taken into account in merger cases involving SOEs: Dalkia International/Zespół Elektrocieplowni Poznanskich (2004), PGE (2006), Tauron (2007), Enea (2007), PGE/Energa (2011) (Blachucki, 2014; Bernatt and Mleczko, 2018).

In 2011, UOKiK prohibited the acquisition of Energa by PGE, the two SOEs active in the generation, trading and distribution of electricity. One of the anti-competitive concerns noted by the Polish NCA was the elimination of PGE’s biggest competitor on the retail market, where PGE’s market share was 25% and Energa’s 15% (Gago and Tabor, 2011). The President of UOKiK also refused to clear the merger on the basis of public interest. Although several prior merger clearances in the energy sector were issued on the basis of energy security, in the present case the Polish NCA feared that the merger would cause an increase in electricity prices as PGE will attempt to recoup its costs of acquiring Energa. The bulk of the energy sector was already controlled by SOEs (PGE, Tauron, Energa and Enea) with little incentive to engage in price competition. On appeal, PGE has offered a commitment to sell 15% of the electricity on the regulated market of the energy exchange platforms until the end of 2020. The court has rejected this proposal, stating that it does not go beyond the existing obligations under energy regulations. The court also did not accept PGE’s public interest arguments, stating that the reliance on the government’s energy policy cannot qualify as proof of the public interest (Sroczynski, 2012). This decision has allegedly caused the dismissal of the UOKiK President Krasnodębska-Tomkiel, who was appointed by the Prime Minister Donald Tusk in 2014, as it was expected that UOKiK may create further obstacles for the consolidation of the state-owned energy sector (Martyniszyn and Bernatt, 2020, pp. 176–177). This dismissal also suggested that “the government has attempted to influence

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57 UOKiK, Decision DKK 1/2011 of 13 January 2011.
the work of the agency, especially, but not only, when it comes to mergers involving state-owned firms” (Martyniszyn and Bernatt, 2020, pp. 177–178).

In 2017, the UOKiK investigated a ‘reverse privatization’ whereby the state owned PGE would acquire control over the electricity generation capacities of EDF Polska, which included a number of coal and gas fired generation plants and heat distribution networks.\textsuperscript{59} The Polish NCA opened an in-depth investigation due to anti-competitive concerns affecting the electricity production market and the electricity wholesale supply market. PGE was expected to gain a dominant position on the electricity generation market and leverage it into the electricity wholesale supply market. UOKiK was concerned about customer foreclosure as the electric energy produced by EDF Polska could become unavailable for firms outside the PGE Group. In the end, the NCA accepted commitments in the form of a 3-year-long obligation to sell electricity generated by EDF Polska outside the PGE group. While UOKiK’s decision was hailed as a significant breakthrough in terms of acceptance of behavioral remedies (Gołąbiowski, 2019; Svetlicinii and Lugenberg, 2013), it was also argued that this clearance exhibited the signs of favoritism in its treatment of SOEs: (1) the proposed commitments were examined and accepted without modification within a short period of time (one week); (2) the proposed commitments did not address the anti-competitive concerns of the energy regulator related to the electricity production market, which is now dominated by SOEs; (3) the merger eliminated EDF Polska, the fourth-largest and the only competitor, which is not owned by the Polish State (Bernatt, 2019, pp. 42–46).

The above review of UOKiK’s merger control practice reveals the absence of the ‘single economic unit’ even in relation to mergers between two SOEs controlled by the Ministry of State Treasury. This approach allows the Polish NCA to block SOE consolidations as demonstrated by the PGE/Energa case. At the same time, the President of UOKiK retains discretion of clearing mergers on the basis of public interest, which has been considered in a number of SOE-related mergers. The balancing between competition concerns and public interest, in the light of the independence concerns about the Polish NCA, could lead to further consolidation of the market power by SOEs and SCEs.

At the same, the treatment of SOEs and SCEs as autonomous undertakings has made them the target of antitrust enforcement. For example, in 2005, UOKiK initiated an investigation into an alleged anti-competitive agreement between the largest petroleum producers, PKN Orlen and the Lotos Group, concerning the joint termination of the production of U-95 gasoline, which was used in the older generation of automobiles. The two companies colluded to withdraw from the market simultaneously in order to eliminate the possibility

\textsuperscript{59} UOKiK, Decision DKK-156/2017 of 4 October 2017.
that one of them would remain on the market and acquire dominance after the exit of the competitor (Gago and Borowiec, 2007; Paliszewski, 2007). The case ended in 2007 with an infringement decision and a fine of PLN 5.5 million (PKN Orlen – 4.5 million; Lotos – 1 million) (UOKiK, 2008).

PKN Orlen was also prosecuted for various abuses of its dominant position. In 2006, it was sanctioned by UOKiK for charging excessively low prices for radiator liquids, which were close to the costs of their production. In the long run, this pricing strategy led to the elimination of PKN Orlen’s competitors, who were often dependent on PKN Orlen for the supply of monoethylene glycol (hereinafter: MEG), a key component of radiator liquids. By raising the prices for MEG faster than its own prices for the radiator liquids, PKN Orlen created a margin squeeze situation for its competitors (Najbauer, 2006). UOKiK ordered PKN Orlen to pay a fine of PLN 14 million (Dec, 2006). In 2012, PKN Orlen’s subsidiary Orlen Oil was prosecuted for resale price maintenance agreements concluded with the distributors of automotive lubricants. Notably, PKN Orlen was maintaining these RPM arrangements since 2003, although the respective contract clauses were not enforced when breached by the distributors (Igras, 2012).

UOKiK’s antitrust enforcement, especially in the field of abuse of dominance, has resulted in Poland’s top antitrust fines being imposed on major SOEs: Telekomunikacja Polska (telecommunications), PKP Cargo (logistics), PGNiG (oil and gas), PZU (insurance) (Martyniszyn and Bernatt, 2020, p. 195). The enforcement preference for abuse of dominance cases by the Polish NCA, follows the general trend of antitrust enforcement in Central and Eastern European jurisdictions, where the competition authorities, especially in the early years of their establishment, have found such cases easy to investigate and prosecute (Svetlicinii and Botta, 2012). As a result, the abuse of dominance investigations against individual SOEs or SCEs could be also employed for addressing potential anti-competitive conduct of these undertakings.

V. PKN Orlen/Lotos merger: quo vadis EU merger control?

The government of the Law and Justice (Prawo i Sprawiedliwość) party (ruling after the 2015 parliamentary elections), has contemplated the merger between the two state-controlled petroleum companies PKN Orlen and the Lotos Group already in 2007. At that time, the government’s plan provided that the Lotos Group will acquire a much larger PKN Orlen, which would result in

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61 UOKiK, Decision DOK-410/1/12/PW of 31 December 2012.
the state’s holding of 75% in the new company (Petroleum Economist, 2007). However, “all proposals have been rejected until now, partly from anxiety that it would have effects on market competition that would be detrimental to the Polish consumer” (Conroy, 2018). In 2018, the Polish government decided to consolidate the two biggest petroleum refiners by selling to PKN Orlen a 53% stake in the Lotos Group (Shotter, 2018). The high political stakes of this decision were reflected in the media reports claiming that the state supervision over PKN Orlen and the Lotos Group has been assumed by the Prime Minister Mateusz Morawiecki from the energy minister Krzysztof Tchorzewski, which reflected an internal disagreement over the planned PKN Orlen/Lotos takeover and PKN Orlen’s role in the nuclear power plant project (IntelliNews, 2018b). In 2014, the Polish government has already engaged its energy sector’s SOEs (PGE, Tauron, and Enea) in the construction of the first domestic nuclear power plant (Polish Competition Authority, 2014).

The PKN Orlen/Lotos merger was notified to the EU Commission, which decided to open an in-depth investigation. Commissioner Vestager explained that the “Commission will investigate whether the proposed acquisition would reduce competition and lead to higher prices for or less choice of fuels and related products for business customers and end consumers in Poland and other Member States” (European Commission, 2019). In May 2020, the parties have offered commitments, which included the divestiture of a certain number of petrol stations operated by the Lotos Group in Poland. Avia International has already indicated its willingness to purchase petrol stations from PKN Orlen/Lotos (Cleaner Energy, 2019b) while the UOKiK President Marek Niechciał announced the readiness of the Polish NCA to supervise the implementation of the commitments (Cleaner Energy, 2019a). As a result, on 14 July 2020, the Commission announced the conditional clearance of the proposed merger subject to certain divestitures to ensure the preservation of competition on wholesale and retail markets for petroleum products (European Commission, 2020b). According to the media reports, senior Commission officials admitted that “the acquisition was set to be blocked, after initial antitrust assessments suggested it would harm competition in Polish fuel services like gas stations and the refueling of airliners” but Commissioner Vestager subjected to “political pressure from Poland” has “made a top-level intervention to ensure the deal was approved, just as Warsaw wanted” (Larger, 2020). Encouraged by the Commission’s conditional clearance, PKN Orlen has announced its intention to acquire another Polish energy SOE – PGNiG, which would keep PKN Orlen “at the helm of the process aimed at creating a single, all-Polish group with well diversified revenue sources and significant market standing in Europe” (PKN Orlen, 2020).

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62 Case No. COMP/M.9014 PKN Orlen/Grupa Lotos.
VI. Conclusion

As the Member States contemplate their long term national policies for a rebound from the economic downturn caused by the COVID-19 outbreak, the recapitalization of enterprises will remain in the arsenal of the available tools to inject much needed liquidity into companies of strategic importance. This could lead, even temporarily, to the increase of the state shareholding in companies looking for strategic opportunities to succeed over their competitors, and implement an exit strategy for the state participations as mandated by the Temporary Framework. Another catalyst that could encourage state-sponsored acquisitions is the fear of foreign takeovers in strategic industries. In times like this, the ability of merger control systems both at the EU and at the national level to address the anti-competitive effects of concentrations involving SOEs and SCEs grows in importance.

The review of the EU merger control practice in relation to Polish SOEs and SCEs demonstrates that the exercise of state control, especially through non-ownership means, has not been adequately addressed in merger clearance decisions. The enforcement practice of the Polish NCA, an authority that is more familiar with the specifics of Polish SOEs’ corporate governance, also did not ascertain the potential anti-competitive effects stemming from state control over numerous SOEs and SCEs in highly concentrated industries, and the possibility to influence strategic decisions by these enterprises when it comes to the implementation of sectorial development policies. Without clarifying the existence of ‘single economic units’ comprising SOEs and SCEs in particular sectors, the Polish NCA has treated them as independent undertakings for the purposes of enforcing competition law provisions prohibiting anti-competitive agreements and abuses of a dominant position. However, antitrust enforcement cannot be viewed as an alternative to effective merger control, especially in the light of the recurrent concerns over the independence of the NCA.

Following the recent clearance of a Chinese SOE’s acquisition of a German company in the railway sector, the German NCA was praised by antitrust observers for its solid grounding on competitive assessment as opposed to industrial policy considerations because “even where state ownership translates into significant economic power, this does not necessarily pose a threat to effective competition when a non-EU player enters a European market” (Siragusa and Rizza, 2020, para. 9). This case is another reminder for the EU Commission and the NCAs to develop a more detailed and consistent assessment methodology for determining the existence of a ‘single economic unit’ in SOE-related concentrations, and conducting a substantive assessment of the potential anti-competitive effects stemming from the exercise of state
control and coordination of the commercial conduct of SOEs and SCEs (Svetlicinii, 2018). Without such methodology, the application of EU and national merger control rules following the principle of competitive neutrality can hardly be achieved.

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Gun Jumping in Selected SEE Countries – an Obvious Risk in M&A Transactions

by

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Abstract

Gun jumping is a term which describes the premature realization of a merger before obtaining a merger clearance from the relevant competition authorities. In the last years, the European Commission and national competition authorities have demonstrated an increased interest in investigating and punishing gun jumping cases. Recognizing this interest and the need for practical guidance, the article first gives an overview of gun-jumping evolution through case law. It then points to different merger filing thresholds in the region, and implications they could have for gun-jumping issues, to show that despite the commercial and historical common ground in the region, merger filing thresholds do differ significantly between the countries, in a way which requires a cautious and sometimes challenging structuring of M&A activities with regional reach. Based upon an overview of individual gun-jumping cases in the region, but taking into account the EU precedents, the article provides recommendations how to avoid gun-jumping risks.

Résumé

« Gun jumping » est un terme qui décrit la réalisation prématurée d’une fusion avant d’obtenir l’autorisation des autorités de la concurrence compétentes. Au cours des dernières années, la Commission européenne et les autorités nationales de la concurrence ont montré un intérêt accru pour les affaires de « gun jumping ». Reconnaissant cet intérêt et le nécessité d’une guidance pratique, l’article donne d’abord un aperçu de l’évolution du « gun-jumping » à travers la jurisprudence. Il souligne ensuite les différents seuils de notification des fusions dans la région, et les implications qu’ils pourraient avoir pour les questions de « gun jumping », pour montrer que malgré les points de convergence dans la région, les seuils de notification des fusions diffèrent sensiblement d’un pays à l’autre, d’une manière qui exige une organisation prudente et parfois difficile des activités de fusion et d’acquisition à portée régionale. Sur la base d’une vue d’ensemble des cas particuliers de « gun jumping » dans la région et en tenant compte des précédents de l’UE, l’article fournit des recommandations sur la manière d’éviter les risques de « gun jumping ».

Key words: competition law; antitrust; gun-jumping; mergers & acquisitions; administration; Central and Eastern Europe; Croatia; Serbia; Slovenia.

JEL: K21, K22, K42, L40, L44
I. Introduction

Gun-jumping\(^1\) as a competition law issue continues to attract interest among practitioners and scholars for more than 20 years in the EU and 30 years in the US. Hence, one could say that this topic is anything but new. Yet, the lack of sufficiently detailed case law and guidance from the authorities was a characteristic of the discourse. In recent years however, a line of EU precedents clearly address some of the most important issues associated with the gun-jumping topic, such as the actual meaning and scope of the standstill obligation, and the relation between the merger control regime and the cartel prohibition when it comes to cases of premature coordination.

Nevertheless, the gun-jumping issue remains relatively invisible in the Balkan region. In spite of the national regulations mirroring EC Regulation 139/2004\(^2\) (hereinafter; EUMR), there seem to be only few cases and no clear guidance from the authorities. Considering the regional dimension of many transactions happening in the Balkans, we found it interesting to shed some light on this topic from a regional perspective. This article will therefore give a brief background of gun-jumping and the most recent EU precedents, explain common risks and consequences gun-jumping cases raise, and provide an overview of local practice and recommendations what to do to avoid gun-jumping risks.

II. Definition of Gun-Jumping

1. (Historical) Background

Gun-jumping is a practitioners’ term, stemming from US practice. It is commonly used to describe a breach of the standstill obligation that represents a cornerstone of the merger control regime in the EU and of a great majority of other merger control regimes in the world. This term adequately describes

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\(^1\) The use of the term ‘gun-jumping’ first came up in the scope of a number of debates in the years 1989 and 1991, which focused on the question if information exchange in the context of a due-diligence would represent a violation of antitrust rules „[…] where information about future business plans, obtained during pre-merger talks, allows companies to ‘jump the gun’ and cease acting as competitors before they have consummated the deal”. Steptoe, Mary Lou, Deputy Director, Bureau of Competition, Federal Trade Commission, Remarks before the National Health Lawyers Association, 14.02.1991 (Blumenthal, 1994, p. 9).

the tension that exists between the *ex ante* merger control, on one hand, and merging companies’ desire to implement the merger as soon as possible, on the other hand\(^3\).

From this perspective, gun-jumping is typically defined as a premature implementation of a notifiable concentration, that is, its implementation before or without a merger clearance (Linsmeier/Balssen, 2008, p. 742; Raysen/Jaspers, 2006, p. 603; Gottschalk, 2005, p. 905; Modrall/Ciullo, 2003, p. 424; Bosch/Marquirer, 2010 113). This definition typically covers cases of premature acquisition and/or exercise of control. A somewhat wider definition of gun-jumping includes also a breach of notification requirements (for example the one under Article 4 EUMR). Actually, some of the first European gun-jumping cases were cases centered on the lack of a merger notification.\(^4\)

Until recently, there were not that many gun-jumping cases in Europe. The few European cases typically referred to as gun-jumping cases in a more distant past were *Samsung/AST*\(^5\), *Bertelsmann/Kirch/Premiere* (European Commission, 1997), *A.P. Møller*\(^6\) and *Electrabel*\(^7\), on the EU level and *Mars/Nutro Products* (Klauss/Germany, 2009, 63; Gromotke, 2008; Immenga, 2009, 57; Bischke/Brack, 2009, 298; Bundeskartellamt, 2009, p. 69) and *Druck- und Verlagshaus Frankfurt a.M. (DuV)* (Bundeskartellamt, 2011, p. 96) on German soil. Although these cases offered some guidance, they were not particularly useful in understanding what types of pre-merger integration and coordination are exactly allowed.

Obviously, the most important question when it comes to gun-jumping is what exactly ‘premature implementation’ means, since Article 7(1) EUMR and its counterparts in EU national merger control regimes have not explained that. Another question is whether gun-jumping includes also cases of premature coordination, where all sorts of competition-sensitive coordination between the merging parties is considered, including most importantly exchange of sensitive business information (Reysen/Jaspers, 2006, 603; Linsmeier/Balssen, 2008, 742; Gottschalk, 2005, 905; Modrall/Ciullo, 2003, 424).

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\(^3\) There are of course variations in the use of the term ‘gun-jumping’ (Rudowicz, 2016, p. 35 et seq.).


\(^5\) European Commission, decision from 18.2.1998, IV/M.920, OJ. 1999 EG No. L 225/12, Para. 7 – *Samsung-AST*.

\(^6\) European Commission, decision from 10.2.1999, IV/M.969, OJ. 1999 EG No. L 183/29, Para. 1, 7, 12, 19 – *A.P. Møller*.

\(^7\) ECJ, Decision from 03.07.2014, C-84/13 P, *Electrabel/Kommission*. 
2. Current Situation

Thanks to three important recent cases we now have a much clearer picture as to the scope and meaning of the standstill obligation. The *Ernst & Young* judgment clarifies how the concept of a standstill obligation, that represents the core of the gun-jumping issue, should be interpreted. First of all, according to the CJEU, the implementation of Article 7(1) EUMR is limited to the boundaries of the concept of concentration as defined in Article 3 EUMR. Article 7(1) EUMR, which prohibits the implementation of a concentration, limits that prohibition only to concentrations (as defined in Article 3 EUMR) and thus excludes the prohibition of any other transaction which cannot be regarded as contributing to the implementation of a concentration.10

Secondly, an important clarification offered by the *Ernst & Young* judgment is that any partial implementation of a concentration is also covered by Article 7(1) and may therefore amount to gun-jumping. Otherwise, the system of preventative merger control would be undermined because the merging parties could have effectively implemented the transaction by successive partial operations.11 Building upon that, the Commission concluded in *Canon/Toshiba Medical Systems Corporation* that, in line with paragraph 35 of the European Commission’s Consolidated Jurisdictional Notice, interim transactions, which even in themselves do not entail an acquisition of control on a lasting basis, do constitute a breach of Article 7 EUMR when they form a first step of a single concentration. Thus, genuine warehousing schemes, typically considered for the purpose of avoiding waiting periods (in some or all countries where the notification duty is triggered), are therefore considered as breaching the standstill obligation under EUMR.

Thirdly, whether ancillary or preparatory transactions between merging parties before a merger clearance can produce certain effects on the market is irrelevant for the existence of an Article 7(1) breach.13 This is a practically very

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8 The CJEU judgment in case C-633/16 of 31.05.2018 – Ernst & Young, the European Commission decision in case M.7993 of 24.04.2018 – Altice/PT Portugal and the European Commission decision in case M.8179 of 27.06.2019 – Canon/Toshiba Medical Systems Corporation. Decisions in Altice/PT Portugal and Canon/Toshiba Medical Systems Corporation are under appeal before the General Court.

9 C-633/16 of 31.05.2018 – Ernst & Young, para. 43.

10 C-633/16 of 31.05.2018 – Ernst & Young, para. 46.

11 C-633/16 of 31.05.2018 – Ernst & Young, para. 47.


13 C-633/16 of 31.05.2018 – Ernst & Young, para. 50.
important message, considering the number of different activities that happen between signing and closing and the urge to make things run as smoothly as possible from day one after closing.

Since the key concept underlying the definition of concentration in Article 3 EUMR is the ‘change of control on a lasting basis’, a concentration arises as soon as the merging parties implement operations contributing to a lasting change in the control of the target undertaking.

Hence, according to Ernst & Young, a transaction that represents a direct functional link with the implementation of a concentration, that is, which contributes, in whole or in part, in fact or in law, to a change of control over the target undertaking, constitutes a gun-jumping.14 Contrastingly, a transaction that despite having been carried out in the context of a contemplated concentration, that is, despite being ancillary or preparatory to the concentration, does not represent a direct functional link with the implementation of a concentration, that is, which does not contribute, in whole or in part, in fact or in law, to a change of control over the target undertaking, does not constitute an implementation of a concentration, that is, a breach of Article 7(1) EUMR.

In this respect, the termination of the contract by the target company (as in Ernst & Young that of KPMG DK and KMPG International) in view of the contemplated merger between the target company (KPMG DK) and the acquirer (EY), was not in breach of the standstill obligation since, by such termination of the contract, the acquirer (EY) has not acquired the possibility of exercising any control over the target company (KPMG DK).

Another important message of the Ernst & Young judgment is that it delineates cases of premature coordination between the merging parties from cases of premature implementation of the concentration. Coordination cases, which have been, especially in the US doctrine, regarded as gun-jumping cases, are not covered by Article 7(1) EUMR and cannot be regarded as breaches of the suspensory obligation. Such cases can only be assessed under Article 101 TFEU.15

Contrary to KPMG’s termination of the contract with KPMG International in Ernst & Young, Altice/PT Portugal could serve as an example of a classical gun-jumping case and the European Commission’s decision in this case offers an extensive guidance for many of the typically used interim covenants and practices between signing and closing. In short, the most important takeaways from this case are as follows:

14 C-633/16 of 31.05.2018 – Ernst & Young, paras. 49, 50 and 59.
15 Ibidem, para. 57. Although this stance is derived from CJEU judgment in case C-248/16 of 7.9.2017 – Austria Asphalt, para. 33, it seems to be used (for the first time) in the context of the interpretation of a standstill obligation.
First, the interim covenants agreed between the buyer and the seller, such as the ones requiring the seller to run the target business in the ordinary course, and ask for the buyer’s consent for any out-of-the-ordinary measures, are appropriate and do not breach the standstill obligation as long as they are strictly limited to what is necessary to ensure that the value of the target business is maintained. However, if the buyer is by virtue of the transactional agreement afforded the possibility to exercise decisive influence over the target on matters that are not necessary for the preservation of the value of the target, this is not justified and represents a breach of the standstill obligation.

Secondly, de facto involvement of the buyer in the decision-making process of the target pre-closing can very easily amount to a gun-jumping situation. This was the case in Altice/PT Portugal with Altice influencing a number of PT Portugal’s day-to-day business decisions (e.g. giving consents to the conclusion of commercial contracts and giving instructions how to negotiate contracts).

Thirdly, and perhaps most interestingly, is the issue of exchange of business sensitive information between the merging parties before the clearance. Two things seem important in this respect. First, the Commission seemingly looked at exchange of granular and business sensitive information between Altice and PT Portugal as an evidence of Altice effectively exercising decisive influence over PT Portugal, and did not qualify this as a breach of Article 101 TFEU. Second, the Commission explicitly referred to lack of any safeguards, such as Non-Disclosure Agreements and Clean Team Arrangements, which makes the Altice/PT Portugal decision a very good guidance on such arrangements.

III. The Threshold Question

The most obvious case of gun-jumping arises if parties implement a notifiable concentration without filing a merger notification at all. Although this risk seems to be manageable to avoid, mistakes do occur. One reason is that parties to the transaction are often not aware of their obligation to file for a merger clearance in various countries. Another reason is that there are

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17 For example, this can be the case if the materiality thresholds, above which the consent of the buyer has to be sought, are set too low to effectively cover also contracts and other activities typically falling within the ordinary course of business.
18 European Commission decision M.7993 of 24.04.2018 – Altice/PT Portugal, see section 4.2.
19 Ibidem, see for example paras. 423 and 473.
20 Ibidem, see for example paras. 423 and 471.
situations susceptible to mistakes involving, for example, filing thresholds that are relatively subjective (e.g. when it comes to market share based thresholds). A third possible scenario involves thresholds that are difficult to comply with, for example due to very low financial turnover thresholds requiring multinational companies with activities, subsidiaries and assets all over the world to file each and every foreign-to-foreign transaction.

In this respect, the gun-jumping issue becomes relevant in transactions triggering merger filing and waiting periods in Serbia, Montenegro and North Macedonia. Because of very low jurisdictional thresholds, many foreign-to-foreign transactions with no ties to these jurisdictions have to be notified and postponed until after the merger clearance has been granted. For example, all three sets of jurisdictional thresholds can very often be triggered by only one merging party. A particularly burdensome situation arises in Montenegro where no typical Phase I proceedings exist and where the waiting period, which lasts up to 105 working days (depending on how fast the Montenegrin NCA issues clearance), applies.

All of these three competition law systems formally recognize the domestic effects doctrine, according to which acts undertaken abroad fall within the scope of local competition law provided they have domestic effects. Yet, the practice of all three local competition authorities seems to deny domestic effects in merger control cases. Namely, all three NCAs accept notifications, decide upon them on merits and issue merger clearances relating to transactions that although fulfilling jurisdictional thresholds have neither actual nor foreseeable effects in either country.

For the obvious reasons one of the practical questions in such foreign-to-foreign deals is whether the closing of the transaction elsewhere, potentially with some sort of formal carve-out arrangement concerning Serbian, Montenegrin and/or Macedonian operations of one merging party, would amount to a gun-jumping in Serbia, Montenegro and North Macedonia. With the view to the above mentioned territorial scope of all three competition law systems, the answer to that question would be negative, assuming no effects are caused in either of these three country. Such effects would, indeed, be practically very unlikely, considering that the transactions we are referring to are often concerning targets active in other continents and non-related markets.

Yet, considering the apparent approach of the local NCAs to disregard the absence of domestic effects when it comes to accepting jurisdiction to decide on foreign-to-foreign transactions, absence of domestic effects could also be very likely disregarded by the local NCAs when it comes to interpreting whether or not the closing of the foreign-to-foreign transaction (even with

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21 In case of North Macedonia, even without any turnover being generated there.
carve-out arrangement in place) represents a gun-jumping case. From this reason, caution is highly advisable.

Unlike in other countries in the region, generally applicable jurisdictional thresholds in Croatia are quite high. As a result, it is logical that the number of transactions constituting a notifiable operation in Croatia is not big either.

There are also specific rules applicable to the media sector, triggering the notification obligation in all cases where media publishers act as parties to the concentration, regardless of their turnovers (i.e. the aforementioned turnover thresholds do not apply to such concentrations). As it will be presented further below, the majority of gun-jumping case in Croatia is related to the specifics that govern the media sector.

In addition to the ‘clear’ matter of the turnover threshold, some countries consider the relevant market share of the companies participating in a concentration as relevant. This is initially in itself a problem, as it requires an in depth knowledge and assessment of the relevant market. Companies in a merger proceeding have therefore to allocate a certain amount of time and money in order to adequately assess their own market share as well as that of their competitors in order to identify if a merger has to be notified. In the case of Slovenia, the matter becomes even further complicated. While reaching the turnover threshold automatically triggers the notification duty, the undertakings involved in a merger must inform the Slovenian

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22 The combined aggregate annual worldwide turnover of all parties to the concentration of at least HRK 1bn (approx. EUR 132m), and the combined aggregate annual turnover of each of at least two parties to the concentration generated on the Croatian market of at least HRK 100m (approx. EUR 13m). The thresholds are prescribed by Article 17 (1) of the Competition Act (Zakon o zaštiti tržišnog natjecanja; Official Gazette No. 79/09, 80/13).

23 Even though the number of notifiable concentrations might be bigger than the number of notified concentrations, the statistics help get a general picture. Just for an example, according to the Annual Report of the Croatian Competition Agency for 2018, overall 29 concentrations have been notified in 2018 (Agencija za zaštitu tržišnog natjecanja, 2019).

24 Article 36 (2) of the Croatian Media Act (Zakon o medijima; Official Gazette No. 59/04, 84/11, 81/13). It should be noted that the relevant provision refers to the ‘wrong’ number of the article of the Competition Act, which was applicable at the time the Media Act was adopted (i.e. the number of the relevant article of the Competition Act changed in the meantime, which has not been reflected in the Media Act).

25 According to Article 42 (1) of the Slovenian Competition Act (Zakon o preprečevanju omejevanja konkurence, Official gazette No. 36/08, 40/09, 26/11, 87/11, 57/12, 39/13, 33/14, 76/15, 23/17), a concentration must be notified if:
- The combined turnover of the undertakings concerned (including undertakings belonging to the same group) exceeded EUR 35 million in Slovenia; and
- Either the turnover of the undertaking acquired (i.e. the target), including undertakings belonging to the same group, exceeded EUR 1 million in Slovenia, or in the case of the creation of a full-function joint venture, the turnover of at least two undertakings concerned (including undertakings belonging to the same group) exceeded EUR 1 million in Slovenia.
NCA\textsuperscript{26} if their combined market share exceeds 60\% in Slovenia. This means that (i) a potentially too broadly defined market would increase the risk of exceeding the market share value and therefore the information obligations and that (ii), due to the wording of the law, the Slovenian NCA will consider if a notification is necessary based on the information on the transaction and the market share. Such uncertainties aggregate the risk of companies implementing a merger too soon and exposing themselves to potential fines.

IV. Gun-Jumping Cases in the Balkan Region

1. Serbia

So far the only gun-jumping case in Serbia concerned the non-notified change of control from joint to sole by the company Prointer IT Solutions and Services d.o.o. over the company Alti d.o.o. The Serbian NCA learned about it only after this change was registered with the commercial registry. Hence, in this case, breached was not only the standstill obligation but also the notification duty. As a consequence, the NCA fined Prointer 2.5\% of its 2015 turnover (approximately EUR 60,000)\textsuperscript{27}.

Apart from this case, the Serbian NCA has been also investigating the acquisition by a Russian company of the Serbian newspaper Politika a.d. (Komisija za zaštitu konkurencije, 2015). Most recently, the NCA opened an investigation against the Croatian company Fortenova for apparently acquiring control over some very prominent companies active in Serbia, that is Frikom, IDEA and Mg Mivela, that were previously part of Agrokor Group (Komisija za zaštitu konkurencije, 2019).

There are a couple of important messages from the Serbian case law concerning gun-jumping. First, the Serbian NCA does read newspapers and pay attention to the commercial registry, probably with somewhat higher scrutiny in case of companies already in the loop or whose transactions have been previously cleared by the NCA.\textsuperscript{28} Second, gun-jumping cases will no longer be tolerated in Serbia. Third, the NCA is also investigating foreign companies.

\textsuperscript{26} Similarly North Macedonia as well as Bosnia and Herzegovina include provisions which stipulate that a merger notification is triggered once market thresholds are met.

\textsuperscript{27} Considering the typical duration of infringement proceedings, this case was closed rather quickly – in less than seven months.

\textsuperscript{28} In case of Prointer/Alti, the preceding acquisition of joint control over Alti in 2015 was notified to and cleared by the Serbian NCA. In case of the Fortenova investigation, Frikom and IDEA have been already investigated and fined for different antitrust infringements.
Fourth, Serbian gun-jumping experience does not provide any guidelines as to what constitutes an implementation of a concentration, since the available precedents concerned clear-cut implementations of concentrations without the requisite merger notifications and clearances.

2. North Macedonia

The gun-jumping experience in North Macedonia consists of three cases in which the Macedonian NCA issued fines, including in a case of a foreign-to-foreign transaction.

The first gun-jumping case in North Macedonia dates back to 2007, where the Macedonian NCA fined the company Top Investment Group B.V. for acquiring joint control over the company Zegin d.o.o. without notifying it and obtaining a merger clearance. Although this was a clear-cut case, it is interesting because the NCA nevertheless examined in detail how and when the control was actually acquired and, consequently, found that control was acquired only at the moment when the acquisition of 7.76% of the shares, in addition to the already owned 20% of the shares, enabled Top Investment Group to block strategic decisions of Zegin d.o.o.29

The other two cases involve Slovenia Broadband S.a.r.l. and United Media Ltd.30 that notified the Macedonian NCA in October 2013 of their past non-notified but implemented acquisitions of Solford Trading Limited and IKO Balkan S.r.l, respectively. Slovenia Broadband S.a.r.l. and United Media Ltd. were at the time of the relevant acquisitions and merger notifications controlled by Mid Europa Partners LLP, which also controlled another company registered in North Macedonia (Total TV doo). IKO Balkan generated a relatively low turnover in North Macedonia in the relevant financial year, whereas Solford Trading Limited was not active in North Macedonia at all.

Following the late merger notifications from October 2013, the NCA issued fines in May 2014 to Slovenia Broadband S.a.r.l. and United Media Ltd. for failing to notify the above mentioned transactions and for implementing them before a merger clearance. The NCA considered the following circumstances as mitigating: the concentration did not give rise to any competition concerns and the parties voluntarily reported the non-notified concentrations and cooperated with the NCA during the proceedings. The exact coefficients used on account of mitigating circumstances are not publicly available. From the reasoning of the NCA’s decisions it is evident that the NCA concluded

29 Macedonian NCA decision no. 09-195/17.
30 The authors are aware of the cases because they were actively involved at that time. Unfortunately, a public version is no longer available at the web site of the Macedonian NCA.
that both transactions were reportable in North Macedonia because the jurisdictional thresholds were exceeded.

Hence, based on the decision in the case of the transaction involving Solford Trading Limited, it may be reasonably concluded that the Macedonian NCA in practice does not recognize the domestic effects doctrine in merger control cases. All three cases in general serve as evidence of a very strict approach of the Macedonian NCA, which poses an increased risk of its enforcement actions against companies that do not notify transactions (even involving targets with no business presence in Macedonia).

3. Croatia

The vast majority of gun-jumping cases in Croatia concern the failure to notify a concentration in the media sector (as explained under Section 3 above, this is because the notification obligation is triggered whenever media publishers act as parties to the concentration, regardless of their turnovers). The fines imposed in those cases were quite low – mostly in the range of HRK 10,000–30,000 (approx. EUR 1,320–3,960).

Generally speaking, the amount of the fine depends on two main elements: (i) if the concentration in question is deemed prohibited or not, and (ii) the aggregate turnover of the undertaking in question generated in the last year for which financial statements have been completed. For example, in two recent cases – case Maca LM d.o.o./Radio Trsat d.o.o./Vanga za radijsku djelatnost d.o.o./Miroslav Kraljević d.o.o./Radio Brod-informiranje i marketing

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The Croatian Competition Agency (Agencija za zaštitu tržišnog natjecanja; hereinafter; AZTN) imposed a fine of 0.71% of the aggregate turnover of the concerned undertakings, on the ground that both (un-notified) concentrations were assessed as permissible, and that there were other mitigating circumstances (e.g. recognition of the breach, cooperation with the AZTN). Ultimately, the specific amounts of the fines imposed on each undertaking differed due to differences in their respective aggregate turnovers. Concretely, the undertaking Maca ML d.o.o. was obliged to pay an amount of HRK 24,000 (approx. EUR 3,200), while the fine for the undertaking Extra FM d.o.o. amounted to HRK 1,000 (approx. EUR 130). If a concentration was not notified / was implemented before obtaining a clearance, but it would not have been deemed as prohibited, the fine can reach up to 1% of the aggregate turnover (generated in the last year for which financial statements have been completed)\(^\text{34}\). If, on the other hand, a concentration which has been implemented would have been considered prohibited, the fine can reach up to 10% of the aggregate turnover (generated in the last year for which financial statements have been completed)\(^\text{35}\). In establishing the exact amount of the fine, the Agency takes into consideration other (aggravating and mitigating) circumstances.

In the media sector cases, the turnovers which form the basis for the fine calculation were not that big and the AZTN took into consideration that the concentrations have not created any negative effects on the market, the relatively short duration of the breach (i.e. the time period between the implementation of the transaction and the notification, which was less than 1 year in many cases), that the individuals / undertakings in question cooperated with AZTN, etc. Such low fines should not be expected in all gun-jumping cases, especially in those where the generally applicable jurisdictional thresholds apply, that is, where the undertakings in question usually generate higher turnovers. The same applies to the cases where the concentration would be considered prohibited, for which the law envisions a much higher maximum fine (10% of the aggregate turnover).

\(^{32}\) Case Maca LM d.o.o./Radio Trsat d.o.o./Vanga za radijsku djelatnost d.o.o./Miroslav Kraljević d.o.o./Radio Brod-informiranje i marketing d.o.o. from June 2019 (Class (Klasa): UP/I 034-03/18-02/015, Admin.No. (Urbroj): 580-11/107-2019-017).


\(^{34}\) Article 62(1) and (5) of the Competition Act (Zakon o zaštiti tržišnog natjecanja; Official Gazette No. 79/09, 80/13).

\(^{35}\) Article 61(3) of the Competition Act (Zakon o zaštiti tržišnog natjecanja; Official Gazette No. 79/09, 80/13).
One should also bear in mind that the AZTN may impose measures aimed at restoring efficient competition, such as (i) order the sale or transfer of the acquired shares, (ii) prohibit or restrict the exercise of voting rights related to the shares or interest in the undertakings parties to the concentration, (iii) order to terminate the joint venture or any other form of control by which a prohibited concentration has been put into effect, etc. (Pecotić Kaufman, Butorac Malnar and Akšamović 2019, para. 556) As these are just examples of the measures, the AZTN could also impose other measures they find appropriate to address the competition concerns they identify.

As explained, the vast majority of gun-jumping cases in Croatia concern the failure to notify a concentration in the media sector, due to which the fines were imposed against the undertakings concerned. Nevertheless, some older cases, such as the case Globus grupa d.d.-Diona d.d./Dalma-Maloprodaja d.o.o./Jadrantestil d.d./Koteks d.d. from 1998 show that the AZTN also imposes measures they find appropriate to address the identified competition concerns, when applicable. For example, in Globus grupa d.d.-Diona d.d./Dalma-Maloprodaja d.o.o./Jadrantestil d.d./Koteks d.d., the AZTN established that the concentration should be prohibited because of the strong dominant position of the Globus group which was created thereby. As the concentration had already been implemented, the AZTN adopted certain structural measures, based on which the Globus group had to decrease the number of its sale stores by 1/3 and enter into exclusivity arrangement in regard to another 1/3 of the stores as well as enable the relevant counterparties to have at least 20% of its distribution channels with other customers. Also, certain behavioural measures had been imposed, which obligated the Globus group to notify the AZTN of any planned arrangement regarding the new business premises (i.e. purchase, lease, etc.). Although this case was decided under (different) law applicable at that time, it may serves as an example of different measures which may be expected in the case of a breach of the gun-jumping rules.

Finally, it is important to bear in mind that the AZTN has not had the same powers in the past as it has nowadays. Namely, it was not until 2009 that the AZTN has the power to impose fines directly. For example, in the case Gavrilović d.o.o./
Istracommerce d.d. from 2008\textsuperscript{39}, the AZTN established that the concentration in question (which was implemented before it was notified to the AZTN) should be cleared. Although the notification about the case says nothing about fines for breaching the gun-jumping rules, the AZTN clarified in its subsequent public announcement that the initiation of misdemeanour proceedings against both the undertaking and its responsible person was to follow (Agencija za zaštitu tržišnog natjecanja, 2012). This was in accordance with the law applicable at that time, which envisaged that, following an established breach of competition law, the AZTN files a request to initiate misdemeanour proceedings to the competent court\textsuperscript{40}. Because of this, we are not familiar with the details of possible fines imposed for the breaches of gun-jumping rules at that time. In other words, the number of cases where the undertakings were fined for breaching the gun-jumping rules is probably higher than it seems if one takes a look only at the period from 2009 (when the AZTN gained the power to impose fines directly).

4. Slovenia

With the adoption of the Slovenian Competition Act in 2008, the approach of the Slovenian NCA to go after transactions which have not been notified became increasingly stricter and sometimes involving even higher fines\textsuperscript{41}. One of the biggest cases came in 2019 when the Slovenian NCA fined United Media Ltd., due to the late notification of their acquisition of United Media Distribution SRL\textsuperscript{42}. The case in itself was a novum for the Slovenian competition law sphere as the NCA took a hard stance at the already conducted acquisition of the sport channel provider\textsuperscript{43}. It ruled that the United Group must sell 13 programmes within six months and that it may not launch sports TV programmes for the next three years. Following this, the NCA opened

\textsuperscript{39} Based on the notification about this case, which is publicly available (Class (Klasa): UP/I 030-02/2008-02/28, Admin. No. (Urbroj): 580-02-08-64-13).

\textsuperscript{40} Article 60 of the Competition Act from 2003 (Zakon o zaštitii tržišnog natjecanja, Official Gazette No. 122/2003).

\textsuperscript{41} Although the Slovenian NCA has issued in the past the maximum amount of possible fines under the then valid legislation, they can be considered low in regards to the value (i.e. EUR 25,000.00) in comparison with the effect they could have on a market. See e.g. decision no.: 306-112/2007-9 dated 12.10.2007 (Viator & Vektor); no. 306-166 (2017-17) dated 13.8.2008 (Cestno podjetje Ljubljana d.d.).

\textsuperscript{42} Adria Media Ltd./ Iko Balkan S.R.L, case no.: 3061-8/2013, decision dated 4.9.2018.

\textsuperscript{43} It was reported that the NCA took the case under the microscope when subscribers of competing service providers temporarily lost the channels (Sports Klub) because Adria Media, which exclusively broadcasts these programmes and is part of the United Group, demanded better financial conditions from them (RTV SLO, 2018; Delo, 2019).
separate misdemeanour proceeding\textsuperscript{44} and issued a then record fine of EUR 3.7m (Javna agencija Republike Slovenije za varstvo konkurence, 2019).

The NCA took especially into account the time between the conclusion of the acquisition and the notification, the form of guilt, the behaviour of the legal entity and other aspects. Under other aspects, it should be noted that the NCA wanted to raise general awareness and prevent future gun-jumping attempts. In other word, it wanted to set up an example that such violations will not be tolerated. However, the administrative court has annulled the order that United Media must sell its Sport Klub TV channels and returned the whole matter to the NCA to decide once again, since it established ‘substantial procedural violations’ (Dnevnik, 2020a).

What can only be described as an ‘Agrokor-Shock’, is the decision of the NCA to fine Agrokor d.d., a Croatian retail conglomerate, and its responsible person for their failure to notify the merger with Ardeya Global Ltd\textsuperscript{45}. No one would have thought that when the NCA introduced ex officio concentration control proceedings, that they would lead to one of the biggest fines\textsuperscript{46} on the local and regional market. By concluding a Forward Share Purchase Agreement, between Agrokor AG (which is 100\% owned by Agrokor d.d.) and Alsafi Partners td., Agrokor d.d. became obliged to notify the merger to the NCA as Ardeya Global owned a 100\% interest in Costella d.o.o., a Slovenian bottle company. Since Agrokor d.d. despite the Agency’s request, did not notify the merger, the NCA opened the proceedings.

The ‘hard-line’ position of the NCA was further proven by the fact that the NCA confiscated 70\% of the shares in Mercator d.d., a Slovenian multinational retail company owned by Agrokor. The NCA argued that “…there is a fear and high probability that the fine imposed will not be enforced…” when reasoning why such measures are being used (Javna agencija Republike Slovenije za varstvo konkurence, 2020a). It should be noted that at that time, Agrokor was undergoing a special insolvency procedure in Croatia and its business activities were being transferred to Fortenova grupa. Agrokor filed a request for judicial protection before the District Court in Ljubljana and also complained to the EU Commission about the decision, as it is considered that it has crossed the boundaries of legality and constitutionality with each of its decisions in the Agrokor’s cases (Agrokor, 2020). While, the district court in Ljubljana upheld the decision of the NCA in regards to the confiscated shares (SiolNet, 2020), it nevertheless considered the

\textsuperscript{44} Slovenia has a two-phase proceeding system for competition law infringements. The NCA must first establish an infringement in an administrative proceeding and a fine can later only be imposed in a misdemeanour proceeding.


\textsuperscript{46} The fine imposed on Agrokor d.d. amounted to EUR 53.9m and the fine imposed on the responsible person amounted to EUR 5,000.
amount of the fine, to be vastly too high and reduced it to EUR one million (RTV SLO, 2020). Furthermore, the Supreme court took the stance that the confiscation of shares was against the law (Dnevnik, 2020b). According to the Supreme court’s position, the NCA had no legal basis for issuing a decision on the confiscation of Mercator’s shares. Namely, the NCA could have decided on the confiscation of property if “there was a fear that the perpetrator would hide or go to an unknown place or abroad during the misdemeanour proceedings or until the execution of the decision”, but this was in the Supreme court’s view conceptually impossible, due to the fact that it was dealing with a legal entity. It also follows from the ruling that the NCA misapplied the provision of the Minor Offences Act, whose aim and purpose refers exclusively to natural persons for whom there is a possibility to “hide or go to an unknown place”. Therefore, it was ordered that Mercator’s shares should be returned to Agrokor immediately. The NCA’s official statement showed concerns that in accordance with the applicable legislation it had no other instruments to enforce its decision, as the one taken (Javna agencija Republike Slovenije za varstvo konkurence, 2020b). It is therefore only a matter of time that legislative changes will be introduced, to provide the NCA with a proper set of enforcement mechanisms.

V. Avoiding gun-jumping risks in M&A transactions

As it has been presented in Section 4 above, the gun-jumping cases in the region mostly deal with rather simple situations where the acquisition of an undertaking constituting a notifiable concentration has not been notified to the competition authorities before its implementation. The awareness of the notification obligations in different countries should be increased, but it is equally important to become familiar with and keep track of the practice at EU level dealing with more subtle breaches of the gun-jumping rules (as it may be expected that national competition authorities pay more attention to such matters as well). The cases so far show the importance of the following main elements in M&A47 transactions.

First, structuring of the transaction, which may include several interim transactions before the final implementation of the transaction. In Canon/Toshiba Medical Systems Corporation, the transaction was structured in a way that Canon acquires 5% of the target company’s share options (which were to be exercised after obtaining the merger clearance), while using an interim buyer to acquire the other 95% before the merger approval. The Commission found

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47 M&A stands for mergers and acquisitions.
this conduct to be a single notifiable merger and contributed to a change of control over the target company. Although the undertakings may have different reasons for structuring their transactions in different levels (i.e. avoiding the waiting period for a merger clearance is not necessarily their concern), it should be duly considered if the planned structure is compliant with the merger filing rules and at which stage the notification requirement is triggered.

Second, contractual rights in the interim period (between the agreement is signed and the transaction is implemented). The interim period depends on the circumstances of each transaction and it is quite usual that it lasts for several months to ensure that various conditions precedent to the implementation of the transaction agreed on between the parties are satisfied. The overall timing of a typical M&A transaction is even longer, as the signing of the agreement is usually preceded by a due diligence process over the target carried out by the buyer and lengthy negotiations of transaction documents. Bearing in mind that the status of the target’s assets and business may significantly change in this period, it is logical that buyers want to ensure that the status established before the agreement has been signed is not significantly changed. As presented in Section 2.b, such concerns are taken into consideration by the competition authorities and as the findings in Altice/PT Portugal show, a proper balance in controlling arrangements is necessary to ensure compliance with the gun-jumping rules. The key takeaways for drafting interim covenants in share purchase agreements would be setting monetary thresholds high enough to not capture a broad array of influence over the target company, avoiding a veto power over management personnel, and generally, avoiding clauses that can be interpreted to allow the exercise of decisive influence over the target company.

Third, behaviour of competitors during transaction process, especially the exchange of information between them. Although certain flow of business information is necessary between the seller and the buyer, the parties to a transaction should never forget that the fact they are negotiating and implementing a transaction does not mean that they are free to do whatever they find necessary. Again, as in the case of interim covenants, a proper balance is necessary. The case Altice/PT Portugal is especially helpful in this regard as it mentions examples of appropriate safeguards (such as Non-Disclosure Agreements and Clean Team Arrangements) and provides further guidance on how to implement them. The definition of a clean team as “a restricted group of individuals from the business that are not involved in the day-to-day commercial operation of the business who receive confidential information from the counter party to the transaction and are bound by strict confidentiality protocols with regard to that information”\textsuperscript{48} shows that the arrangements should especially focus on

\textsuperscript{48} European Commission decision M.7993 of 24.04.2018 – Altice/PT Portugal, see footnote 221.
identifying the proper members of a clean team (i.e. employees and advisers of the buyer receiving sensitive information) and ensuring that additional safeguards such as strict confidentiality obligations apply to them as well.

VI. Conclusions

From the mentioned cases it has become obvious that the local competition authorities have taken a strict stance against gun-jumping in most cases.

Partially this is for good reason, since such transactions can have severely adverse effects on the local markets and the competition within if not properly evaluated by the authorities. Moreover, the awareness of the notification obligations in different countries should be increased. In addition, and considering the cooperation developed between the individual regional authorities, it can also be assumed that we will see an increase in such cases, since the information exchange between the offices is already in place. It will therefore be of crucial importance for companies active in the region to shift their focus even more on the competition assessment of their transactions. Companies will need to have proper policies and mechanisms in place to tackle potential breaches of gun-jumping rules at an early stage of their transaction planning. By doing so, they will avoid the risks associated therefore and secure, at least from the merger clearance part, a smooth transaction.

However, such highly publicized cases with their draconian penalties can have also an additional adverse effect. While it cannot be denied that authorities should conduct investigations of potential violations of competition rules, this still has to be done with a legally and economically traceable approach. When imposing penalties, the authorities should develop or implement guidelines\(^\text{49}\) more thoroughly and in a structured way. The existing examples show significant differences in the amounts of fines imposed by the authorities in the region. Such an arbitrary approach could lead to even more uncertainties in an already sensitive legal sphere. It cannot be denied that the requirements of predictability and acceptability are the cornerstone of legal certainty. This means that parties who violated any rule, even competition rules, should be able to properly assess what kind of penalties they will face.

\(^{49}\) Similar to the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, Official Journal C 210/2, 1.09.2006. Certain countries, such as Croatia, have adopted relevant local provisions (In Croatia, the Regulation on the method of setting fines (Uredba o kriterijima za izricanje upravno-kaznene mjere; Official Gazette No. 129/2010, 23/2015) applies).
**Literature**


Abuse of dominance in the electronic communications markets: overview of Croatian efforts with a report on recent developments

by

Mislav Bradvica* and Kristina Rudec**

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Abstract

On 6 November 2019, the Croatian Competition Agency brought one of its latest decisions concerning dominance abuse on Croatian electronic communication market. When asked to assess the behaviour of the dominant incumbent, Agency had to deal not only with incumbent’s position in the electronic communications markets, but also with spillover of its power to electronic media market. In its ruling, the Agency concluded that exclusivity licencing terms regarding premium football content do not qualify as the abuse of dominant position. While the decision in itself might represent only an interesting read, if considered in the context of Agency’s previous practice, powers and influence of other Croatian regulatory authorities, it might also represent the long-awaited evidence of the need to shift perspective and invoke improved rules for antitrust cases concerning electronic communication operators in Croatia.

Résumé

Le 6 novembre 2019, l’Agence croate de la concurrence a rendu une de ses dernières décisions concernant l’abus de position dominante sur le marché croate des communications électroniques. L’Agence a dû se prononcer non seulement sur la position de l’opérateur dominant sur les marchés des communications électroniques, mais aussi sur les répercussions de son pouvoir sur le marché des médias électroniques. Dans sa décision, l’agence a conclu que les conditions des licences d’exclusivité concernant les contenus premium de football ne constituent pas un abus de position dominante. Bien que la décision en elle-même ne représente qu’une lecture intéressante, si elle est considérée dans le contexte de la pratique antérieure de l’Agence, des pouvoirs et de l’influence d’autres autorités de régulation croates, elle pourrait également représenter la preuve tant attendue de la nécessité de changer de perspective et d’invoquer des règles renforcées pour les affaires d’antitrust concernant les opérateurs de communications électroniques en Croatie.

Key words: The Croatian Competition Agency; electronic communication operator; abuse of dominance; broadcasting rights; premium TV content; pay-TV.

JEL: K21
I. Introduction

‘Regulation and competition policy are very close relatives. As you probably all know relationships between close relatives can be quite complicated.’

(Kroes, 2009, p. 2)

Barely any economic sector is as affected by modern competition law as electronic communications. We can compare electronic communications to the paved road which digitalization and online markets walk on, or an invisible hand which still rocks the cradle from which the laughter of innovation is always heard, albeit with a few screams. As electronic communications operators constantly interact with millions of consumers, practically each citizen, they are naturally in a position where regulators give them special attention.

The long-awaited liberalization of electronic communications in the Republic of Croatia started in 1999, with the entrance of a new mobile communications provider. However, first major shifts did not occur for several years, as the foundations for the introduction of the first alternative fixed electronic communications providers were established only in 2004. Liberalization immediately brought more active operators and a diverse offer, which induced an overall rise of the market’s value. By the end of 2005, Croatia already had three mobile operators spread between 3 million users, while 14 undertakings\(^1\) had been granted licenses for the provision of services in the fixed network and were to begin competing for 1.7 million users. Higher number of competitors and users expected swift benefits from the dynamic developments in the times to come.

New competitors immediately tried to gain as much manoeuvring space as possible – seeking the strict regulation and supervision of the incumbent\(^2\) – and thus it was logical that the Croatian Competition Agency\(^3\), along with HAKOM\(^4\), the electronic communications sector regulator, became prominent stakeholders in the developing market.

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\(^2\) Term ‘incumbent’ is used throughout the text with the same meaning, describing the undertaking Hrvatski Telekom d.d., a subsidiary of Deutsche Telekom AG, that was the monopolist before the liberalisation of the electronic communications services, and which remained the biggest operator on the Croatian market. In the text for the undertaking we also use widely accepted abbreviation ‘HT’.

\(^3\) In Croatian: Agencija za zaštitu tržišnog natjecanja.

\(^4\) Abbreviated name of the Croatian sector regulator ‘Hrvatska regulatorna agencija za mrežne djelatnosti’, in English the ‘Croatian Regulatory Authority for Network Industries’.
II. Early steps of the Croatian Competition Agency in the electronic communications sector

Shortly after the appearance of the first alternative operators on the market, the Croatian Competition Agency started receiving its first complaints on the behaviour of the incumbent.

Unsurprisingly, during the next two years, in the period from 2005 to 2007, all of the complaints received related to abuse of a dominant position, more precisely to possible pricing abuses. In principle, a dominant undertaking on one of the relevant markets in the electronic communications sector can abuse its market power in various ways. Firstly, the operator’s action may restrict the activities of its competitors by, for example, denying competitor access to critical infrastructure (Bellamy and Child, 2009, p. 1511). Secondly, the operator can extend its dominant position to areas in which it is not yet dominant by, for example, tying products or services (tying, bundling) or by means of using its dominant position in one market to squeeze competitors from a neighbouring market (margin squeeze) (Pecotić Kaufman, 2011). Thirdly, the operator may impose prices which customers would not accept in conditions of effective competition and, fourthly, the operator may impose the conditions which suppliers would not have approved had it not been for the customer-operator in a dominant position (Pecotić Kaufman, 2011).

Taking a closer look at these published cases, it seems that – pursuant to the complainants – different offers of the incumbent, related to fixed and mobile retail voice services, put competitors at a disadvantage and prevented them from effectively competing. However, the Croatian Competition Agency rejected all these applications, declaring its lack of competence. As a rule, it was concluded that ex-ante involvement of the HAKOM led to the exclusion of competition law rules. Thus, all cases were referred to the HAKOM for further resolution.

On the other hand, in the mentioned period, the Croatian Competition Agency did not initiate any procedure ex-officio. So, although the number of competition cases in this period is not large, it is stable in terms of relevant markets involved and case outcomes.

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5 Relating to the regulation of the incumbent’s offer to consumers i.e. prices.
However, as early as 2007, the Croatian Competition Agency took the first major step forward by issuing a decision⁶ where it established an abuse of a dominant position in the electronic communications markets. It found that linking different electronic communications services in the offers directed at business users (tying), as a package, led to the abuse of a dominant position by the incumbent in the fixed and mobile retail voice services markets. The Croatian Competition Agency determined that no undertaking other than the incumbent is active in (all) relevant markets and cannot offer a similar (full) package of services to its key customers. On the other side of the same coin, key customers cannot switch their demand to any other provider by taking such packaged services. Therefore, it was concluded that the incumbent exploited its market power and benefited from comparative advantages achieved on those markets. *Obiter dictum*, the Croatian Competition Agency noted that it shares competences with the HAKOM in electronic communications markets; however, it did not delineate the task of each authority and the goals of these neighbouring, yet separate, regulations and legal fields. Therefore, in order to avoid a possible positive conflict of jurisdictions, in the first abuse of dominance case relating to electronic communications, the Croatian Competition Agency did not assess relevant discounts and other price-related elements from the perspective of competition law, as the HAKOM already passed an *ex-ante* decision on these matters. The Croatian Competition Agency believed, in our view erroneously, that any *ex-ante* intervention prevents the application of *ex-post* competition law rules irrespective of the established effects.

Shortly after, in 2008, the Croatian Competition Agency established another infringement. However, this time, it was not relating to the abuse of a dominant position, but to dubious vertical agreements that the rival of the incumbent⁷ had concluded with its distributors in relation to the mobile market. By way of the decision⁸, the Croatian Competition Agency annulled illicit provisions in parts where they established minimum rebates for further resale and imposed qualitative criteria on the distributor’s retail locations (Svetlicinii, 2008). Via these prohibited (vertical) agreements, the supplier imposed additional obligations on the distributors, which are not related to the subject matter of those agreements, within the meaning of Article 9 of the

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⁷ Term ‘rival of the incumbent’ or ‘incumbent’s biggest rival’ is used throughout the text with the same meaning, describing the undertaking A1 Hrvatska d.o.o., a subsidiary of A1 Telekom Austria Group AG, which, after the liberalisation of electronic communications services, represents the biggest rival of the incumbent on the relevant market.
Croatian Competition Act. These obligations relate to criteria or conditions which must be fulfilled by the store (point of sale) and the obligations with respect to the marketing activity of the distributor. The Croatian Competition Agency determined that such obligations are characteristic for selective distribution systems, which did not exist in this case.

III. Series of ‘missed opportunities’

Even though the number of processed cases increased, the years that followed were not so fruitful in terms of adjudicated matters. By 2019, the Croatian Competition Agency dealt with fifteen antitrust cases related to the electronic communications markets. These cases were predominantly the result of initiatives filed against the incumbent alleging its abuse of a dominant position.

More precisely, nine of the respective initiatives concerned the market behaviour of the incumbent, while the remaining four concerned the market behaviour of the incumbent’s biggest rival. In short, the initiatives contained the following allegations:

- abuse of a dominant position by way of excessive pricing for infrastructure access services and by way of predatory pricing practices in the IPTV (paytv) services market (incumbent);
• abuse of dominance by way of manipulating the termination and amendment conditions of agreements (incumbent)\textsuperscript{12};
• abuse of dominance by way of unlawful price reductions and possible predatory pricing during several promotional campaigns (incumbent)\textsuperscript{13};
• abuse of dominance by way of refusal to supply and refusal to conclude infrastructure agreement practices, which precluded the competing undertaking from entering the relevant market (incumbent’s biggest rival)\textsuperscript{14};
• abuse of dominance by way of margin squeeze in the downstream market (incumbent)\textsuperscript{15};
• applications of different conditions for the service ‘Hrvatski memo’, which is provided via short codes – numbers (incumbent’s biggest rival)\textsuperscript{16};
• abuse of a dominant position by way of a manipulation of the user database pertaining to a smaller rival on the market – made available to the incumbent for the purpose of upstream services which incumbent provides to its rival – and by way of deficient services provision on the upstream market (incumbent)\textsuperscript{17};
• abuse of dominance due to non-compliance with compensation terms of an agreement concluded with incumbent (incumbent)\textsuperscript{18};
• abuse of a dominant position by way of tying practices, that is, the price for internet or mobile services combined with fixed telephone services is lower than the price for either internet or mobile services without fixed telephone services – also, the quality of either service is better when purchased together with fixed telephone services (incumbent)\textsuperscript{19};
• abuse of a dominant position by way of predatory pricing practices aimed at the exclusion of competition – initiator states that such practices concerned the territory of the City of Varaždin and Varaždin county and aimed directly at a small local telecom operator (incumbent’s biggest rival)\textsuperscript{20};
• abuse of a dominant position by way of discriminatory pricing practices whereby the incumbent’s related company Iskon had received better pricing conditions than its competitors – alternative operators (incumbent)\textsuperscript{21};

\textsuperscript{12} Decision of 3 November 2011, No. UP/I 030-02/11-01/33.
\textsuperscript{13} Decision of 15 November 2011, No. UP/I 030-02/2009-01/034.
\textsuperscript{14} Decision of 17 November 2011, No. UP/I 030-02/2010-01/002.
\textsuperscript{15} Decision of 9 February 2012, No. UP/I 030-02/10-01/007.
\textsuperscript{16} Decision of 19 September 2013, No. UP/I 034-03/2013-01/023.
\textsuperscript{17} Decision of 8 May 2014, No. UP/I 034-03/2013-01/007.
\textsuperscript{18} Decision of 2 December 2015, No. UP/I 034-03/15-01/027.
\textsuperscript{19} Decision of 15 September 2016, No. UP/I 034-03/16-01/006.
\textsuperscript{20} Decision of 7 May 2018, No. UP/I 034-03/17-01/024.
\textsuperscript{21} Decision of 14 November 2018, No. UP/I 034-03/2013-01/007.
• abuse of a dominant position on the premium football TV content distribution market due to exclusivity terms for the territory of the Republic of Croatia, that is, exclusive distribution rights for premium content which the incumbent had acquired by means of the agreement concluded with HD-WIN d.o.o. and HD-WIN Arena sport d.o.o. (incumbent)\textsuperscript{22};

• abuse of a joint dominant position on the part of the incumbent’s biggest rival by way of non-pricing practices on the upstream market (refusal to supply and vexatious litigation) which are intended to exclude its competitor – Totalna televizija d.o.o. – from the relevant downstream market (incumbent’s biggest rival)\textsuperscript{23}.

Interestingly, the Croatian Competition Agency was predominantly dismissing the respective initiatives claiming the lack of requirements for initiating a procedure. By doing so the Agency – intentionally or not – missed the opportunity to dig deeper into every case, analyse all the evidences the situation might have had to offer (apart from initial ones) and confront parties to the procedure during oral hearings.

It must be noted that the bar for initiating a procedure from the statutory provisions’ angle – that is, procedural requirements – is set fairly low. Namely, a dominance abuse procedure should be initiated if the received initiative contains the following: (1) name and seat of the legal entity, that is, the name and surname and the residence of the natural person filing the initiative, (2) information by means of which it can be unequivocally and clearly determined against whom the initiative is filed, (3) description of the facts; practices or circumstances qualifying as the reason for submitting the initiative, and (4) documents and other evidence available to the applicant which support its (his/her) allegations\textsuperscript{24}.

In that respect, one could justifiably form the following questions: was it really the case that nine out of the thirteen initiatives qualified for a dismissal, or did the Agency make a mistake in at least some of them by not taking the procedure further? Were at least some of these cases missed opportunities for the creation of a more transparent electronic communications market or, from the competition law perspective: could the body of case law have been more robust? There is no question that this approach of the Croatian Competition Agency is lawful; after all, it has been confirmed by the courts.

Namely, the Croatian Competition Agency has created a two-tiered system, in a procedural sense, where administrative proceedings are initiated only when it is (almost) certain that a violation of the law has occurred and that it

\textsuperscript{22} Decision of 6 November 2019, No. UP/I 034-03/12-01/023.
\textsuperscript{23} Decision of 11 December 2019, No. UP/I 034-03/19-01/010.
\textsuperscript{24} Article 37 paragraph 2 of the Croatian Competition Act.
can be determined. Otherwise, the Croatian Competition Agency conducts an investigation and analysis – which is the metonymy for not only gathering of facts and evidences, but also for making legal judgments – but still does not initiate the procedure.

This is, from our point of view, a problematic practice, especially in the cases concerning abuses of a dominant position. The party that has been investigated has a very narrow window to invoke its ‘rights of defence’. Further, abuse of a dominant position usually encompasses practices with undertakings that have confronted (economic and legal) interests. Also, more often than not, the authority should rely on complex economic analyses in such cases and carry significant data collection activities, while it does not benefit from any self-restraint in this regard. It is logical for the authority to take a procedural path that allows greater power, that is, in the Croatian case, to formally open a procedure. However, the Croatian Competition Agency was not keen to engage itself in formal proceedings – whereby it gave away delicate process tools – and this resulted in the end of proceedings at an early stage.

Interestingly, two cases were also handled to examine potential cartel collusion between electronic communications operators, but both were dismissed for lack of evidence. In the same period, the market went through consolidation, which was evidenced by a total of eight merger cases.

IV. Cooperation with the Croatian Regulatory Authority for Network Industries (HAKOM)

HAKOM promotes competition in the sector of electronic communications networks and services, as well as electronic communications infrastructure and related equipment. While electronic communications regulations are mainly meant to safeguarding recently achieved levels of competition in the post-liberalization period by ex-ante infringement prevention – where HAKOM is authorized to interpret and implement sector specific rules – competition rules are tailored to safeguard competition via ex-post control.

Electronic communications regulations implement competition law standards in the phase of the identification of markets susceptible to ex-ante regulation (e.g. the three criteria test includes the understanding of the potential applicability

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of competition law rules), starting with market definition and analysis, which may result in the designation of operators with significant market power and the imposition of regulatory obligations onto such operators. In the context of the electronic communications regulations term “significant market power” (SMP) is used, which is equated in a meaning with the concept of a dominant position under the competition law (Pecotić Kaufman, 2011). There is no effective competition in electronic communications markets where there are one or more undertakings with significant market power in specific market. In essence, effective competition and the lack of significant market power are two sides of the same coin (Koenig, Bartosch, Braun and Romes, 2009).

In all phases, HAKOM, where necessary, cooperates with the Croatian Competition Agency, either by seeking its opinions or proposing the initiation of competition infringement proceedings in cases where HAKOM has identified a potential infringement of competition law rules.

Also, in abuse of dominance and cartel cases relating to electronic communication services or networks, the Croatian Competition Agency cooperates closely with HAKOM. In practically all cases which reached the assessment phase between 2005 and 2019 and involving electronic communications, the Croatian Competition Agency contacted HAKOM and relied on its findings and expert standpoints. This cooperation is voluntary and typically encompasses technical assistance during (i) the process of defining relevant markets and delineations between related relevant products, (ii) gathering of relevant data, for example: revenues, number of customers, (iii) assessing market shares and, (iv) evidencing effects of certain behaviours or agreements.

Cooperation is also significant during the merger review process. Like its EU counterpart, the Croatian merger control regime catches three types of transactions (i) the merger of independent undertakings or parts thereof, (ii) the acquisition of control and (iii) the creation of a full-function joint venture. Besides the merger control rules laid down in the Croatian Competition Act, merger rules for particular sectors also exist. In cases of mergers affecting the electronic communications sector, the Croatian Competition Agency is obliged to request an expert opinion from HAKOM regarding the possible effects of the merger on the relevant market.26 In that regard, when the Croatian Competition Agency in 2014 adopted a landmark merger decision27 whereby it conditionally cleared HT’s acquisition of control over OT – Optima Telekom d.d. – a close rival in fixed network services – HAKOM delivered more than a dozen opinions to the Croatian Competition Agency.

26 This obligation is stemming from Article 68. para. 3 of the Electronic Communications Act (Official Gazette, nos. 73/08, 90/11, 133/12, 80/13, 71/14 and 72/17).
Agency and provided professional assistance in accessing and testing the proposed commitments.

Electronic communications operators with significant market power and operators granted a licence for the use of the radio frequency spectrum at state level, who would not be subject to merger control rules under the Croatian Competition Act, must notify HAKOM of each intention to merge as well as any intention of any other form of joint or concerted practice, irrespective of the conditions determined under the Croatian Competition Act.

HAKOM was granted with such authority in 2008 to safeguard competition on the still nascent telecommunications market. Namely, turnover thresholds prescribed by the Croatian Competition Act are quite high – at least in relation to neighbouring countries – which allowed large telecommunications operators to acquire smaller telecommunications operators without merger control. Such ‘legal gap’ enabled, in 2006, HT to acquire Iskon, the then largest alternative internet provider, thereby gaining almost 100% of the broadband market. The Director of the Croatian Agency for Telecommunications (Hrvatska agencija za telekomunikacije) publicly voiced his concerns about the concentration because of the strengthening of HT’s monopoly status. We may assume that the acquisition of Iskon by HT would not have been approved, and that the telecommunications market would have been much less concentrated, if the regulator had the authority to review concentrations on the telecommunications market at the time, irrespective of the turnover thresholds.

HAKOM’s competence to review mergers falling outside the competence of the Croatian Competition Agency was not regulated to a sufficiently detailed level. For instance, it was not precisely regulated which regime should be used for a merger review conducted by HAKOM – competition law or sector specific rules. If the competition law regime is used, is it then opportune for HAKOM to conduct a merger review, as it misses the procedural framework for assessing such cases and is possibly not well equipped to do so? By contrast, if sector specific rules are used, are those rules sufficient to process merger cases? These questions have finally been resolved in 2019 during a merger case before HAKOM between HT and its competitor providing pay-TV services, HP Produkcija d.o.o. In this context, HAKOM bravely declared that it has full competence to review all merger cases between electronic communications operators with significant market power and operators with the licence for the use of the radio frequency spectrum at state level, who are not subject to

\[28\] In our view, in practice this means that all telecommunications operators in the market are included, due to their significant market position in the market for traffic termination in their own networks.

\[29\] If, e.g., they do not meet the prescribed turnover thresholds.

\[30\] Case No. UP/I-344-01/18-08/02.
merger control under the Croatian Competition Act. In HAKOM’s view, this included not only the power to clear such mergers but also to block them or to impose measures under which a conditional clearance may be issued. In the review process, HAKOM relied on domestic competition law rules and on the EC Merger Regulation, at least, in their essential meaning.

By virtue of this precedent, which was not challenged before the courts, we may arrive to the conclusion that Croatia has a two-tier merger control system with respect to electronic communications, i.e. the system where HAKOM is a competent merger review authority if the merger falls below the threshold radar of the Croatian Competition Agency.

V. Cooperation with the Electronic Media Agency

So far, the cooperation between the Croatian Competition Agency and the Electronic Media Agency was not as extensive as with HAKOM, however, a change in this trend can be expected. The entire electronic communications industry has adopted a broader strategy. After a long and peaceful period when electronic communication operators were offering traditional services and were not under pressure from new business models, the smartphone revolution started and caused the consequent explosion of data traffic in mobile and fixed networks, spurred with the appearance of OTT (Over The Top) players in the voice and messaging world (Skype, Viber, WhatsApp, etc.) (Jurjević, 2018).

It is long since it became typical for electronic communications operators to include pay-TV services into its offer towards customers, but they also became ready for the new move: premium content (e.g. sports) or even acquiring broadcasters themselves and different electronic publications, which became targets in the new landscape. The fight amongst electronic communications operators has therefore partly shifted to the area of content, the business area previously largely reserved for broadcasters and media companies.

Croatia in this respect tends to catch all media mergers, as mergers in the media sector must be notified to the Croatian Competition Agency, irrespective of the turnover thresholds, provided that – as recent case-law suggests – at least two of the undertakings concerned are considered ‘publishers’ under the Croatian Media Act. This is a rather new practice since the 2019

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31 In Croatian: Agencija za elektroničke medije.
decision\textsuperscript{33} concerning gun-jumping in relation to the acquisition of a 100% share in a TV publisher.

Before that, the Croatian Competition Agency’s interpretation of the Croatian Media Act was that any merger including at least one publisher is a notifiable concentration, and the watchdog regularly issued fines for gun-jumping when such mergers were not notified. However, in the respective case, the Croatian Competition Agency accepted the argumentation that Articles 36 and 37 of the Croatian Media Act, respectively Articles 52–62 of the Croatian Electronic Media Act\textsuperscript{34}, relate to the protection of plurality and diversity of (electronic) media, and only limit capital and personal connections between publishers, media service providers and their affiliated persons, but do not impose restrictions outside that circle. Namely, if any other person (outside that circle) acquires a share in the ownership structure of a publisher, such acquisition could not produce effects on competition within the meaning of media regulations. Therefore, the Croatian Competition Agency concluded that a notification obligation arises only where at least two publishers are parties to the concentration, because the purpose of media-sector specific rules on concentrations is the limitation of market shares enjoyed by publishers on the relevant media market.

However, any change of control arising out of the concentration of TV, radio broadcasters and media services providers must be notified to the Electronic Media Agency. The decision of the Electronic Media Agency on the permissibility of such concentration forms a mandatory document to be supplied to the Croatian Competition Agency when filing the merger notification.

In its separate stream, the Electronic Media Agency assesses whether the acquired share exceeds the share capital thresholds prescribed by the media-sector specific rules. If the respective thresholds are exceeded or certain inadmissible (type of) ownership is involved, the Electronic Media Agency will declare the concentration inadmissible.

\textsuperscript{33} Decision of 22 March 2018, No. UP/I 034-03/17-02/012.

\textsuperscript{34} Croatian Electronic Media Act (Zakon o elektroničkim medijima; Official Gazette, nos. 153/2009, 84/2011, 94/2013 and 136/2013).
VI. Premium content as a new battlefield

It was to be expected that the electronic communications operators’ shift of focus (competition) to new markets, will test the functionality of competition law against new market dynamics. It appears that Croatian case-law is not lagging with market developments. What stands out from previous cases, but fits this technological progress pattern, is one of the most recent decisions concerning premium football content distribution via pay-TV platforms in Croatia.\(^{35}\)

In the present case, the Croatian Competition Agency revoked, for the first time, an already issued statement of objections due to insufficiently established facts on which the statement was based. It is particularly interesting that the statement of objections was revoked for this reason, even though the procedural rules under the Croatian Competition Act allow – at least if further facts are undisputed\(^{36}\) – to rectify this omission before rendering a final decision. This only points to the complexity of the case and the possible procedural drama that took place behind the scenes. Although the outcome of these proceedings was that the Croatian Competition Agency did not find evidence of an abuse of a dominant position, we find the conclusions on the matter of relevant markets – as well as the analysis of exclusivity clauses’ effects on the downstream market – to be interesting for further discussion.

The case considered the vertical agreement between HT and the company that has rights over premium sports content\(^{37}\) – the Serbian company HD-WIN d.o.o. and its Croatian affiliate HD-WIN Arena sport d.o.o. (hereinafter; jointly ‘HD-WIN’). In short, via a series of agreements, HT acquired from HD-WIN the right to exclusively distribute premium sport content in Croatia, such as the direct transmission of UEFA Champions League, UEFA Europa League and Croatian national football league\(^{38}\) through its pay-tv service MAXtv.

The Croatian Competition Agency had, on 14 December 2012, initiated proceedings to investigate whether HT had abused its dominant position with regard to premium football content (distribution market) in the territory of Croatia. The first trigger for this proceeding was the sports TV channel distribution agreement concluded between HT and HD-WIN on 24 October 2012, and its exclusivity terms by which HT had contractually obliged HD-WIN to allow distribution of premium football content only via MAXtv.

\(^{35}\) Decision of 6 November 2019, No. UP/I 034-03/12-01/023.

\(^{36}\) In this context it appears that new facts have been presented by the procedural parties and not challenged later on by the authority.

\(^{37}\) ‘HD-WIN’.

\(^{38}\) In Croatian: Hrvatska nogometna liga.
1. Why testing the exclusivity terms?

In order to understand why HT had insisted on any form of exclusivity regarding the distribution rights on MAXtv, we must primarily define ‘the path’ taken by the media rights over UEFA Champions League, UEFA Europa League and Croatian national football league from their initial rights holders to pay-TV’s and final customers.

Namely, HT had acquired media rights to football matches within the UEFA Champions League, UEFA Super Cup and UEFA Europa League from the 2012/2013 up to the 2017/2018 season. In the context of national football content, HT had acquired media rights to football matches for from the 2013/2014 up to the 2018/2019 season. Additionally, HT had also acquired media rights for football matches within the UEFA Europa League for the competition season 2018/2019 up to 2020/2021.39

At that point, HT was ‘inclined’ to find the appropriate means to monetize the acquired media rights. Namely, the Croatian Electronic Media Act prohibits an electronic communications operator (such as HT) to simultaneously act as a TV broadcaster.40 To simplify, the intention of this prohibition is to prevent electronic communications operators – whose purpose is, inter alia, to retransmit audio-visual content – from influencing the content being transmitted.

This is where the cooperation with HD-WIN comes in place. Since HD-WIN acts as the broadcaster of the respective sports TV channels, HT concluded the agreements to ensure that these sports TV channels will present the UEFA and the national football league media content.41 HT also tried to ensure the maximisation of its profit from the monetization of the said media rights and had agreed – in several different forms – that HD-WIN will not deliver this content to any HT’s competitor on the pay-TV service market.

2. What the exclusivity terms covered?

Although HT and HD-WIN concluded the total of four Retransmission Agreements, only the first three were the subject of review before the Croatian Competition Agency.

The first Retransmission Agreement did not include the possibility that the sport TV channel is broadcasted on other pay-TV platforms in ‘full UEFA and national football league capacity’, that is, UEFA Champions League, UEFA

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39 All agreements listed in this paragraph are further hereinafter referred to as: ‘Media Rights Agreements’.
40 Article 61 of the Croatian Electronic Media Act.
41 ‘Retransmission agreement’.
Europa League and national football league content were to be broadcasted only on MAXtv. Unlike the first Retransmission Agreement, pursuant to the second Retransmission Agreement, HD-WIN could request to sub-license rights for the retransmission of the UEFA Champions League, UEFA Europa League and the national football league in the competition seasons 2013/2014 and 2014/2015, in accordance with detailed financial conditions envisaged for two possible sub-license options. Regardless of the difference among the three Retransmission Agreements, HT evidently made no or very little room for HD-WIN to dispose of UEFA and national football league premium content and did not allow the monetization of its investment to a wider range of pay-TV operators in Croatia.

The Croatian Competition Agency pointed out that the media rights for the UEFA Champions League season 2018/2019 and onwards were granted to the incumbent’s biggest rival, which dispersed the premium football content between several electronic communications operators on the relevant market. As a consequence, and for efficiency and procedural economy reasons, the Croatian Competition Agency limited its investigation to seasons starting in 2012 and ending in 2018. The questions that naturally followed were: (i) what were the relevant upstream and downstream markets, (ii) was the HT a dominant undertaking on the relevant upstream market, and (iii) how did its position on the upstream market reflect on the downstream market regarding the exclusivity terms in all three Retransmission Agreements?

3. The relevant markets

Regarding the relevant upstream and downstream markets, it has to be noted that the Croatian Competition Agency did not establish its own particular case law relevant to the matter of premium football content. Therefore, this case follows the findings of the European Commission and the Court of Justice of the EU regarding the content distribution market, TV channel distribution market and pay-TV channel retransmission market, that is, the three-tier vertical distribution channel.

i. The premium football content market

The Croatian Competition Agency primarily referred to the Group Canal+ case. It concluded that different types of content vary depending on their demand from both end consumers and broadcasters, distinguishing between the so-called premium and regular football content. Premium content usually

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has lower and limited degree of substitutability and can thus be regarded as a separate market.

In essence, the Croatian Competition Agency further continued with the conclusion that UEFA matches fit such premium content profile since (i) viewers are not attracted to separate matches within the UEFA leagues, (ii) UEFA content is able to ensure higher TV channel ratings during longer periods of time, and thus creates viewer loyalty, (iii) UEFA matches are played during work days while other regular competing matches are usually not played during Monday-Friday schedule and, finally, (iv) UEFA matches are in general played throughout the entire year, which enables creation of a brand valuable for broadcasters.

Regarding the national football league content, the Croatian Competition Agency analysed the relevant facts presented within the case file and determined that HT paid almost the same amount to media content providers for UEFA and for national football league content, concluding that HT values these two contents equally.

Also, ratings data have shown that national football league and UEFA content have much higher numbers than the rest of the content on sport TV channels.

In any event, the Croatian Competition Agency’s relatively detailed analysis of all market levels led to the conclusion that this case concerned an example of an upstream premium football content market, territorially limited to the Republic of Croatia, whereby the conditions on such upstream market essentially influence conditions, and produce effects, on the relevant downstream pay-TV channel (retransmission) market in Croatia. In light of the above, the Croatian Competition Agency went on to conclude that UEFA and national football league contents are to be regarded as a separate premium football content market – in the relevant upstream market.

ii. TV channel distribution market

Next, the Croatian Competition Agency considered the middle market level, the TV channel distribution level. EU case-law on this matter usually differentiates between two types of TV channels – so called *pay-TV* vs. *free-TV* – which in principle creates two separate markets.\(^{43}\)

What was important for the present case, and what in fact differentiated the two types of channels and markets, was the value of the content. Namely, free-TV broadcasters accumulate their revenue by means of paid advertisements and are thus aiming at reaching out to the maximum possible number of viewers. However, free-TV broadcasters usually do not emphasize

the quality and value of the content since their revenue does not come from end viewers and their interest choices.

On the other side, pay-TV broadcasters usually take special care of the quality of their content and the viewers’ demand in order to capture viewers’ interest and their willingness to pay for the ability to access their TV channels.

iii. Pay-TV channel retransmission market

The last level of review dealt with the market level concerning distribution towards final consumers (end viewers). Once again, the Croatian Competition Agency referred to EU Commission examples such as BSkyB and Telepiu, when differentiating between pay-TV and free-TV service as two separate markets.

The biggest difference of the pay-TV service from the free-TV service is its component of reduced interchangeability in the short period of time. Besides that, the differentiating factors include: (i) consumers’ willingness to use pay-TV services in order to access a wider set of TV channels and richer content offer, and (ii) the fact that users of pay-TV service are usually motivated by the fact that their interest for, say, wider sports or film content cannot be satisfied with the offer of free-TV services, and are thus prepared to pay additional price for accessing that content via pay-TV platforms.

The Croatian Competition Agency dismissed HT’s argument that UEFA and national football league content are also still accessible to all viewers via HT’s special pay-TV mobile service platform and its online pay-per-view TV platform, which enables access regardless of whether the person is a MAXtv subscriber or not, and regardless of whether the person uses any other of HT’s service. The Croatian Competition Agency’s counterargument was that those services are only accessible via additional electronic devices (tablet, smartphone etc.) which are not as simple to use as regular pay-TV devices (TV sets and accompanying devices which depend on the pay-TV mode). Also, the Croatian Competition Agency argued that usage of these services requires broadband internet access. Interestingly, the Croatian Competition Agency also argued that MAXtv as the ‘regular’ pay-TV service provides for much wider content access (in terms of a content type) than that of special HT’s pay TV services ‘MAXtv to Go’ and ‘PPV Match servis’ which – albeit available to all consumers – can only provide paid access to a specific football match or several chosen matches. This, combined with the price of broadband internet access and the price of an additional electronic device, according to the Croatian Competition Agency, amounts to a more expensive version of accessing the respective content, which cannot be regarded as a substitute to MAXtv.

The Croatian Competition Agency based this conclusion mostly on the advisory opinion submitted by HAKOM. Once more, when accessing possible
infringements in the electronic communications sector, the expert opinion of the regulator was used as a pillar for the competition law assessment.

Moreover, in addition to the above, when analysing the retail market for broadband Internet access, HAKOM concluded that there is effective competition in the market for overall pay-TV services. HAKOM stated that the pay-TV services market is not subject to *ex-ante* regulation and was of the opinion that, even without such regulation, the market would achieve a level of effective competition. Although HAKOM did not analyse the type of content offered by the operators, the Croatian Competition Agency basically accepted this position as its own in the decision.

In our opinion, this entire assessment is lacking the test of interchangeability from the viewpoint of end viewers opting for the basic set of a particular pay-TV service with the addition of sports channels, that is, consumers particularly interested in additional sports content. Although these consumers probably do present a minority, the Croatian Competition Agency, in our view, conducted insufficient analysis regarding the question of whether HT’s special pay-TV services (mobile and online pay-per-view) could provide for an adequate alternative. This particularly since the Croatian Competition Agency also stated that these consumers opt for more specific content – namely the UEFA Championships League or national football league matches – than those simply aiming for more choice in various different content groups.

Further, if the upstream market is narrowed down only to premium sports content, is it possible that it should have been seen as such (narrow) also in the downstream market? In other words, the Croatian Competition Agency considers premium sports content so distinct and special that there is no substitute on the upstream market. However, on the downstream market this content is placed in the same basket with all other content.

4. HT’s market share on the relevant upstream market

Regarding the question of HT’s position on the relevant upstream market, and the ability to influence the relevant downstream market, the answer in this case was simply straightforward.

Since the Media Rights Agreements have granted HT the exclusive media rights for the referenced UEFA and national football league content, starting with the season of 2012/2013 and ending with competition season of 2017/2018, HT has been acting as the dominant undertaking on the upstream market. For the purpose of completeness, the Croatian Competition Agency has also considered HT’s affiliation with its parent company, which, not surprisingly, led to the conclusion that alongside its contractual advantage, HT also supersedes
its competitors regarding access to financial, technological and infrastructural means. These factors have only strengthened the claim of HT’s dominance and its prevailing influence on the market.

5. Exclusivity clauses – HT abusing its dominant position on the upstream market?

Finally, once the Croatian Competition Agency established the relevant market(s) and the fact that HT was in a (dominant) position [upstream] which enabled it to influence the downstream market, the final question to be answered was whether the exclusivity clauses and/or their effects amounted to an abuse of HT’s dominant position.

Although one might expect extensive argumentation and analysis when answering this question, the Croatian Competition Agency has instead provided a ‘two-criteria’ analysis, whereby it concluded that there was no abuse since the first condition for refusal to supply was not met, and that further assessment of the remaining two conditions is therefore not required.

More precisely, the Croatian Competition Agency concluded that HT was facing efficient competition on the downstream market despite having exclusivity over premium football content for the territory of the Republic of Croatia.

The Croatian Competition Agency analysed the criteria of income and number of subscribers to pay-TV services on the Croatian market – that of HT and its competitors – during the period between 2010 and 2017. In essence, findings indicated the decrease of HT’s market share on the basis of both criteria – despite the fact that HT’s income and number of subscribers have continuously grown during the relevant period of time (in relative terms, HT was not a winner).

Thus, two metrics were taken into account for measuring the market share: revenues and the number of users. The Croatian Competition Agency equated them to benchmarks, which in our opinion is one of the possible ways forward, but at the same time has to be sufficiently elaborated. However, the Croatian Competition Agency paid little attention to this. Namely, it is possible that with respect to premium content, revenues are a better proxy than the number of users (as users, in terms of willingness to pay for additional content, may vary substantially across different types of content).

However, we are left under the impression that the analysis could have been narrower in its general setup. As already indicated earlier, the Croatian Competition Agency had never taken into account the relevant group of end viewers who are very particular in their content choice, that is, the group seeking only or mainly sports and/or (premium) football content. Needless to say, any such analysis of – probably only minority – group tendencies
would outweigh or change the statistics that were presented in the Croatian Competition Agency’s decision. However, such review would probably put a different light on the part of the market directly affected by the conditions of exclusivity – the UEFA and national football league content.

It is also interesting to note that the analysis refers to the absence of effects, and pivots around the fact that HT’s market share is failing or declining slightly. This is a significant conclusion, but it would gain special weight if it were brought into the – counterfactual – relationship with the effects of a possible situation ‘without that exclusivity’, where it could, for example, be possible that the market share of HT would fall rapidly without such exclusivity.

VII. Concluding remarks

Finally, if one would wish to draw a single conclusion from the current decisional practice which the Croatian Competition Agency established – for electronic communications markets – the result would probably be, at the outset, the following: a hefty set of experience in dominance abuse cases, mixed with several complicated merger cases, and a notable lack of prohibited agreements and concerted practices cases. If one would wish to dig deeper, more precisely into the results and statistics of the respective cases, one might find him/herself surprised that most of the dominance abuse cases have been dismissed due to supposed lack of procedural requirements. This, however, does not alter the fact that the relevant decisional practice addressing electronic communications markets is still overrepresented, a fact that could certainly benefit both the Croatian Competition Agency and market players in the upcoming period.

Namely, the conclusions of the most recent decision, that is, the one concerning premium football content distribution via pay-TV platforms in Croatia, should not only be read as an interesting mix and match case in terms of how electronic communication operators manage to enter and connect different markets, but also as a turning point. Namely, this could be a beacon case showing that dominance abuse assessment in electronic communications markets would necessarily also involve an assessment of other markets, i.e. markets which are not traditionally perceived as part of electronic communications. Not only would such cases force the Croatian Competition Agency to require additional procedural help from a wider scope of regulatory agencies, but it would most probably ask for closer attention vis-à-vis leveraging abuses and thereby provoking new definitions in terms of relevant markets and what should consequently be considered as an abuse and against whom.
At this point in time, the emerging need for global distancing in physical terms is increasing the need for global connectivity and internet access services. As the demand increases, oligopolistic market structures may see new challengers. Each operator has the incentive to offer better, more diverse and cheapest possible option. In terms of diversity, providers are evidently particularly keen to offer not only useful but also content-wise and entertainment-wise robust services. The winner in this competition is – as always – uncertain, but those with control over infrastructure and capital are heaving a head start. In Croatian terms, it seems right to claim that only some electronic communication operators have the means to maintain their current market power and even improve it, with a look to entering other relevant markets. If these activities cause for some future allegations regarding the abuse of a dominant position, the Croatian Competition Agency has started to pave the road how to address such cases. On the other hand, it will be interesting to monitor how the case law will develop in terms of distancing from current, fairly ‘set in stone’, market definitions and typology of abuses.

Literature


The Escalators’ Series.
Season: Private Enforcement. Episode: About the One that was not an Undertaking on the Relevant Market.
Case Comment to Judgment of the Court of Justice of 12 December 2019, Case C-435/18*

by

Kamil Dobosz**

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Abstract

This case-note offers comments to the judgement of the Court of Justice in another escalators’ case and its potential implications. Given that the preliminary questions rather entail obvious response, the ruling goes beyond expectations. Its reasoning is not based on the necessity to cope with specific national obstacles that was predominantly utilized in face of private enforcement cases. Instead the Court of Justice held that genuinely Article 101 TFEU implies that, probably, any injured party will be entitled to act as a claimant in damages litigation. No room for national legal specificities was left then. Furthermore, the case comment argues that its side back is more economic approach return to the mainstream debate. Aside these and other insights, some misgivings are presented in a context of a certain noticeable tendency in terms of the fashion in which the Court of Justice in genere handles with the cases.

Résumé

Ce commentaire analyse l’arrêt de la Cour de justice dans la « Escalators’ Series » et ses implications potentielles. Comme les questions préjudicielles comportent plutôt des réponses claires, l’arrêt va au-delà des attentes. Son raisonnement n’est pas basé sur la nécessité de faire face à des obstacles nationaux spécifiques qui ont été principalement utilisés dans des affaires privée. Au contraire, la Cour de justice a estimé que l’article 101 du TFUE implique véritablement que toute partie endommagée sera en droit d’agir en tant que demandeur dans un litige de dommages et intérêts. Il n’y avait pas de place pour les spécificités juridiques nationales. En outre, le commentaire de l’affaire fait valoir que cette décision implique un retour à une approche plus économique dans le débat général. Certaines réserves sont présentées dans le contexte d’une certaine tendance perceptible en ce qui concerne la manière dont la Cour de justice traite généralement les affaires. En outre, le commentaire de l’affaire fait valoir qu’il implique un retour au débat général avec une approche plus économique. Par ailleurs, certaines réserves sont présentées dans le cadre d’une certaine tendance perceptible en ce qui concerne la manière dont la Cour de justice traite en général les affaires.

Key words: damages; private enforcement; Article 101 TFEU; preliminary ruling; competition law; national civil law; principle of effectiveness; more economic approach.

JEL: K15, K21, K29, K33, K37
I. Introduction

So far EU competition law encountered not that many bunches of cases tied with a subject of the same infringer(s) and hence coined as “sagas” or “series”. Some time ago the Microsoft Saga reached a peak interest from antitrust lawyers and economists (see e.g. Montagnani, 2007). Contemporarily it is feasible to discern new sagas, tailored to the current state of competition regime development, including how law and economics are mingled, and what competition authorities have appetite for. Undoubtedly two may be readily posed – so-called Interchange Fee cases (see e.g. Lista, 2013, p, 145 et seq.) and so-called Escalators cases (compare Sousa Ferro and Oliveira e Costa, 2020). These both sagas have one in common; their pedigree is public as competition authorities (and courts) rendered multiple decisions (and judgements) which just preceded even more rulings in civil proceedings. Unlike the first ones that will apparently still give rise to a range of civil suits across Europe\(^1\), Escalators saga has seemed to steadily stall. Nothing could be more wrong as case C-435/18 evidences.

II. National proceedings

The case at issue pertains to the legal dispute that emerged in Austria between companies operating in escalators\(^2\) industry, namely Otis GmbH, Schindler Liegenschaftsverwaltung GmbH, Schindler Aufzüge und Fahnreppen GmbH, Kone AG, ThyssenKrupp Aufzüge GmbH and Land Oberösterreich (i.e. the Province of Upper Austria) and Others. A concise explanatory introduction exceeding a mere domestic perspective is needed here though.

In 2007 the European Commission found various undertakings complicit of anticompetitive delict and imposed relatively severe pecuniary sanctions thereon. The decision embraces (merely) the territory of the Benelux countries together with Germany. What is more, intra group entities associated to Kone, Otis, Schindler and ThyssenKrupp were among those undertakings. Slightly later, in 2008, the Oberster Gerichtshof, i.e. the Austrian Supreme Court, upheld the order of the Kartellgericht, i.e. the Austrian Competition Court, stating existence of the escalators cartel. Thereby fines were imposed on – inter alia – Kone, Otis

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\(^2\) The collateral issue of potential differences of escalators, lifts and elevators will not elaborated.
and Schindler. Nevertheless the order’s ambit was limited to their misconduct perpetrated exclusively in Austria. As concerns ThyssenKrupp, it benefitted fully from the domestic leniency program. Within this public enforcement case, it was ascertained that the distortion of competition was caused by higher prices and the price development was affected thereof.

In a follow-on civil case, the Province of Upper Austria (i.e. Land Oberösterreich) and 14 other entities, demanded in 2010 to be awarded an indemnity for their loss from Kone, ThyssenKrupp, Otis and Schindler. It should be accentuated that the Province of Upper Austria’s right for damages was not based on a link between a (direct or indirect) customer of the affected products and a cartelist. The public entity explained instead that it has granted subsidies to promote the building of homes and proceeded promotional loans for the financing of building projects. Alike, it claimed that the expenses for the installation of lifts were lower, but for the cartel at issue. Consequently the loans would have been lower and Land Oberösterreich could have invested the difference at the average interest rate of federal loans. The claim at hand was rejected in 2016 by the Handelsgericht Wien, i.e. the Commercial Court in Vienna, since the public entity is not an operator active on the market for escalators. Taking it into account and a mere indirect claimant’s loss, the Handelsgericht Wien denied to award compensation. This judgement was in turn annulled nearly a year later by the Oberlandesgericht Wien, i.e. the Higher Regional Court in Vienna. In addition to referring the case back to the court of first instance for a new ruling, the Oberlandesgericht Wien maintained that the competition law is also aimed at protecting the financial interests of those, inclusive of public bodies, who bore additional costs caused by the distortion of competition. Furthermore the court noticed their role as “the source of a substantial part of the demand in the market for lifts and escalators, on which the five companies concerned were able to sell their services at higher prices as a result of the cartel at issue” (paragraph 12 in fine). The proceedings before the Oberster Gerichtshof were initiated as result of an action brought by the cartelists against that judgement.

III. The referring courts’ considerations

The Austrian Supreme court admitted that the suffered loss does not satisfy the conditions laid down in the domestic civil law. In this vein, it was stated that “under Austrian law, pure material losses, which consist in damage to the assets of the injured party without infringement of an absolutely protected legal interest, do not enjoy, outside of a contractual relationship, absolute protection” (paragraph 15). The court added that it can be considered otherwise providing
that, in particular, there is an abstract prohibition constructed in the law in order to prevent violations against the seminal legal interests.\(^3\) Relatedly, a perpetrator may be obliged to compensate the loss, only if it occurred in consequence of the risk presence against which the law envisages a requirement or a proscription.\(^4\)

As per paragraph 16, the court was, on the other hand, aware of the EU case-law according to which the protection against cartels enshrined in 101 TFEU\(^5\) covers all suppliers and customers active on the relevant product and geographic markets that were affected by the anticompetitive agreement. Nonetheless, in the Oberster Gerichtshof’s view, public bodies merely grant loans and thus are not market’s participants, despite their vital role in fostering thereof, what cannot remain unnoted. Thereby the referring court raised the very issue concerning a causal connection between the loss and the anti-competitive behaviour that is a subject of rules prescribed by the Member States on their own discretion. The principles of equivalence and effectiveness have to be fulfilled though.

Taking it all as a whole, the Austrian Supreme Court, through preliminary question, inquired whether the full effectiveness of Article 101 TFEU\(^6\) requires conferring on entities, that are not active as suppliers or customers on the relevant market, rights to seek compensation from cartelists, if their role is limited to grant preferential loans to purchasers of the products affected by the illicit agreement as funding bodies within the scope of statutory provisions, and if their loss consists in an inability to invest amounts that would have been saved, but for the cartel did not come into existence so that the purchasers’ expenses were lower then.

**IV. The assessment of the Court of Justice**

The Court of Justice recalled (paragraph 21) its well-known, classical, judgment from *Courage* case\(^7\), so as the very recent seminal *Skanska* case\(^8\). In light of the case-law, the specificity of Article 101(1) TFEU was stressed, namely

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3 In this regard, discrepancies in translations between certain language versions of the judgement have been noticed.

4 In the Opinion, it is even more clearly explained – the causal link occurs in light of the domestic law only if the infringed provision is also aimed at protecting the injured party (point 51 of the Opinion).


7 Judgment of the Court of Justice of 14.03.19, C-724/17, *Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204.
its direct applicability in horizontal relationships and mandatory protection of the harmed parties that national courts are to ensure. While clarifying the concept of the full effectiveness of Article 101 TFEU, the Court noted that, either by a contract or by conduct, any individual may suffer and lodge an action for damages for that reason. To this end, a well-established, since Manfredi case\(^9\), causal relationship between that harm and an anticompetitive conduct has to be proved. Invoking chiefly Kone case\(^10\), the Court observed that this wide scope of the right to claim damages as it “strengthens the working of the European Union competition rules” (paragraph 24) and serves as a deterring factor. Therefore, under no condition, shall pertinent national rules jeopardise objectives that Article 101 TFEU sets out. Stating so, the Court agilely and convincingly moved to an explanation by means of which effective and undistorted competition in the internal market was put to the forefront in an implied opposition to a mere relevant market perspective, which, in turn, was emphasised in the stance presented by Oberster Gerichtshof in the discernible fashion. Having held that, the duty rested on the Member States to ensure the right to claim compensation for any party what did not require further arguments.

Besides, the Court of Justice cogently observed\(^11\) that the effective protection against the adverse effects of a breach of competition rules cannot be limited to suppliers and customers of the relevant market since it would be, otherwise, seriously undermined. Consequently a range of suffered entities would be from the outset and unconditionally doomed to be devoid of redress. Accordingly the Province of Upper Austria did not claim to be a customer but a public body granting subsidies instead (paragraph 28). In spite of that, the applicants questioned that Land Oberösterreich has a right for compensation in the first place (paragraph 29). Their position was basically justified on the remoteness between objective pursued by Article 101 TFEU and produced loss. The Court of Justice took an opposite view reminding that any loss which has a causal connection with a violation of Article 101 TFEU “must be capable of giving rise to compensation” (paragraph 30) lest pursing a scenario in which the effectiveness thereof was put at stake.

Heeding all these issues, the Court of Justice ruled that entities not acting as suppliers or customers on the relevant market must be vested with the right to claim damages also if their loss had a form of inability to use more profitably the difference between the higher granted subsidies and lower subsidies granted

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\(^10\) Judgment of the Court of Justice of 5.06.14, Case C-557/12, Kone AG and Others v. ÖBB-Infrastruktur AG, ECLIEU:C:2014:1317.

\(^11\) Invoking also the Opinion of the Advocate General in this regard.
under circumstance of undistorted competition. In compliance with the rules governing judgements delivered in preliminary proceedings, the Court of Justice passed to the national court a duty to adjudicate in concreto, verifying whether the Austrian public authority actually suffered such loss, had the possibility of making more profitable investments and, lastly, the evidence supported the existence of a causal link between that loss and the cartel at issue.

V. Opinion of Advocate General

Before the judgement has been passed, Advocate General, Juliane Kokott, prepared her opinion\textsuperscript{12}. Essentially, the Court of Justice invoked it merely twice – in relation to her rejection for any limits regarding Article 101 TFEU to suppliers and customers of the market affected by the cartel (paragraph 27 of the judgement and point 78 of the Opinion), as well as to her denial in respect of a thesis that the loss has to be necessarily linked with the objective of protection pursued by Article 101 TFEU (paragraph 27 of the judgement and point 78 of the Opinion). Aside these two remarks, the AG pointed out other worth mentioning observations among which are some that should be encapsulated at least in a few sentences below.

In general, the Opinion is complex and released from vagueness that could be instead alleged to the commented ruling (Sousa Ferro and Oliveira e Costa, 2020). It lies in line with former opinions from Juliane Kokot who almost “monopolised” private enforcement of the EU competition law from the position of Advocate General, just to mention the following cases: Kone, Cogeco\textsuperscript{13} and Gasorba\textsuperscript{14}, although in Skanska\textsuperscript{15} it was Nils Wahl whose opinion was presented.

Turning to details, AG Kokott rightly noticed that the case referred to the Court of Justice regarded infringements that were present before and after Austria acceded to the European Union (point 22 et seq.). The Court of Justice seamlessly shifted its attention on the interpretation of Article 101 TFEU. Hence the possible interpretation of a domestic equivalent before 1994 was not taken into account. As the conditions, under which the Court of

\textsuperscript{12} Opinion of Advocate General J. Kokott presented on 29.07.2019, Case C-435/18, Otis Gesellschaft m.b.H. and Others v Land Oberösterreich and Others, ECLI:EU:C:2019:651.

\textsuperscript{13} Judgment of the Court of Justice of 28.03.14, Case C-637/17, Cogeco Communications Inc v Sport TV Portugal SA and Others, ECLI:EU:C:2019:263.

\textsuperscript{14} Judgment of the Court of Justice of 23.11.17, Case C-547/16, Gasorba SL and Others v Repsol Comercial de Productos Petrolíferos SA, ECLI:EU:C:2017:891.

\textsuperscript{15} Judgment of the Court of Justice of 14.03.19, Case C-724/17, Vantaan kaupunki v Skanska Industrial Solutions Oy and Others, ECLI:EU:C:2019:204.
Justice is authorised to rule with regard to purely domestic cases, spur doubts (see Dobosz, 2017), the maneuver, to take a chance to skip it, is entirely understood. Since misconduct took place also after 31/12/1993, it comprised a convenient opportunity to adjudicate without prejudice to merits regarding the earlier period.

Another facet of the case, that is not readily noticeable whilst reading through the judgement, concerns the uniform application of the EU competition law. AG marked it in points 54 and 55 of her Opinion holding that the level playing field constitutes the goal which would be put in danger if legal criteria differed in respect of cartelists’ civil liability for certain losses and with regard to certain entities. I have already comprehensively discussed the paramount role that uniformity plays elsewhere (see Dobosz, 2018). This ruling solely affirmed that an adjudication process through the lens of uniformity is unavoidable, so as enhances delineating of what can be left to national regimes and what has to be dealt on the EU level. Alike goals can be visible in Directive 2019/1/EU16.

In terms of establishing whether the loss in question was capable to be a foreseeable effect of the cartel, AG Kokott went further than the Court of Justice (points 145–150 of the Opinion). Unlike applicants and the Commission, Advocate General determined that the loss caused by higher prices would be passed on entities which provide funding for the investors. Moreover, infringers were aware of the preferential loans used to finance building projects. Doubtlessly, the lost opportunity to gain from interests on the financial market is thus a solid and unnecessarily atypical reason for which redress can be claimed.

VI. Observations

1. Comment on usefulness of the case for the EU (competition) law

Having encountered the content of the preliminary question, the following objections may be in the first blush born in mind – did this question have to be necessarily dealt via preliminary ruling in the first place or was it actually intended to obtain a prior quasi “approval” from the Court of Justice? Given a current stage of knowledge and development when it comes to the EU competition law, nothing intricate can be found in the preliminary question

16 Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3–33.
so that pushing it to Luxembourg might not have been deemed indispensable. Needless to say that objectively none of the preliminary questions can be *ex ante* assessed to deserve the attention of the Court of Justice, but for some, responses come up virtually at a glance. Some doubt may emerge due to still quite a new wave from Directive 2014/104/UE. It is not a case here because of its inapplicability (see points 7 and 8 of the Opinion). Since it is never so simple as it appears to be, also this time some reading through the judgement brings discoveries. It is why even *prima facie* uninteresting preliminary questions (and rulings) ought to be commented. The response – particularly from the Court of Justice – may surpass the expectations. It may work *vice versa* as well. Potentially ground-breaking questions could have prompted demotivating rulings – just to mention the Polish case\(^\text{18}\) *PZU* and hopes that case spurred (Szmigielski, 2018; Dobosz, 2018a).

Time will show whether the commented case will join other milestones for developing the EU competition law. Just after vast efforts have been undertaken for the implementation of Directive 2014/104/UE (in this respect see Rodger, Sousa Ferro, Marcos, 2018), as well as innumerous publications\(^\text{19}\) devoted to private enforcement, the state of knowledge was not supposed to be extended in course of judgement passed in this another escalators’ case. The request from the Austrian court looked rather like a “backup” for the national court’s ruling given some conflicting touchpoints with the domestic incumbent civil rules.\(^\text{20}\) This critical insight may be espoused by previous judgements – in the aforementioned *Kone* case as well as in *Tibor-Trans* case\(^\text{21}\). They are legitimate sources to guide national courts in terms of the ambit of loss to be compensated and non-contractual grounds for redress actions.

Hardly could no one have foreseen that, technically speaking, the Court of Justice may take chance to enact the broad scope of Article 101 TFUE along with a concurrent denial for another interplay between the EU and Member States’ legal orders. No objections inasmuch as a reasoning behind it stems from *more economic approach* but it is arguably a side effect instead. There is a thin distinction between the perception of the Court of Justice as a *spiritus movens*...
for changes and an impression of unpredictability (or inconsistency at least) in terms of its adjudications. This is important not only through the lens of the EU competition law but generally European Union law. As concerns solely the former one – just to juxtapose the judgement at hand with above mentioned PZU case which has been identified as “a lost opportunity” (Libertini, 2019). As regards the latter one – just to recall a very latest judgement of the Federal Constitutional Court which adopted essentially different stance than the Court of Justice, thereby triggering a certain tension in dialogue between those two courts, or – sensu largo – between the EU court and Member States courts. Even the competition law is not released from the rule of law issues (see Bernatt, 2019), hence either way compromised position of the Court of Justice may not be inconsequential in face of adjudication challenges whilst utmost values are at stake. For that reason, the Court of Justice should, at once, be extremely cautious and capable to forsake its comfort zone.

2. Nifty more economic approach embodiment

What can be found truly outstanding in the commented ruling is the pass-through from presenting the objectives of the EU competition law to manifesting the priority that effective and undistorted competition takes, what prevails over “the technicalities” regarding the relevant market. Although the Court of Justice did not state it literally, the point has been well delivered. Similarly, the Court of Justice put forward an argument aptly that the effectiveness of the EU competition law system would be questioned if it would have been limited – in terms of the guaranteed protection for harmed ones – to suppliers and customers of the relevant market. In other words, the European Union competition rules were not designed to protect only the chosen ones – competition law is not simply about end users (Foer, Durst, 2018, p. 499). It is indeed contrary – the subjects’ catalogue in this context is possibly non-exhaustive as it ought to be congruent with more economic approach. Seemingly more economic approach has become passé, just after it figured as a cliché for many years. Notwithstanding its current recognition, more economic approach is embedded in the competition law veins and no matter it is explicitly expressed or not, it still plays a vital role. Therefore it

22 BVerfG, Judgement of the Second Senate of 05 May 2020 – 2 BvR 859/15, paras. (1–237) available in English at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html;jsessionid=133C175B562B23E5FE926C576713CC51.2_cid3383 (22.05.20).

has to be recalled that not only effectiveness of Article 101 TFEU is pertinent here but this very approach alike. Besides, as this approach is an invitation for complicated econometric magic, which many lawyers are afraid of, *a contrario* it requires to embrace economically suffered victims in deliveries of antitrust redress measures. Not to mention, *more economic approach* and effectiveness are, cumulatively, mutually harmonious and adequate to narrate future cases, especially as issues with damages cases in Europe have not been averted (see e.g. Ritz, Marx, Bogenreuther, 2019).

Unlike the Court of Justice, the Austrian Supreme Court underscored the essential role of the claimant for the functioning of the relevant market as if it were a crucial factor in considerations about admissibility of the right for indemnity. However, as in line with *more economic approach*, more sophisticated analysis techniques may be necessary to capture the impact that a conduct may have on the structure of competition in a given market (Cruz Vilaca, 2018, p. 176), it is not applicable to the commented case, so as it should be yet borne in mind that the impact exerted on the relevant market cannot be ever deemed necessary to award compensation. If an entity is able to prove that the infringement affected its economic situation, its particular standing on the market does not matter. It can be readily apprehended from paragraph 20 of the judgement that the Court of Justice rephrased the referring question to capture the sheer legal problem of the case. In consequence, no trace concerning the essential impact on the functioning of the relevant market can be found onwards.24

In addition, two features in respect of the commented case should be observed. Firstly, it was the public entity that sued the cartelists – but *nota bene* not the Member States’ first public entity in the EU (see Walle, 2018, p. 7). Secondly, it could be only a public entity to sue on such grounds. It appears to be a never-ending drawback that many SMEs (and consumers) may not manage, in particular financially, to engage in a several years long suitcase. Likewise beneficiaries of the Austrian programme fostering the housing may not be in a sound position to execute their rights. It should be recalled then that they had to incur higher costs for their financial participation in overall building expenses, including the lifts’ installation. Not to mention, they might have had larger loans, mortgages, to pay back owing to higher prices for the lifts. The final judgement of the national court may thereby pave the way for them to claim for indemnity. But take note of the Oberster Gerichtshof observation from paragraph 18 in which the Austrian Supreme Court seemed to have clearly stated that the loss of Land Oberösterreich is only the result of the loss suffered by third parties who were directly affected, namely the beneficiaries of...

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24 This example perfectly shows how it is important in the Court’s judgement to put in order the question’s aspects at this stage of adjudication.
the programme. It ironically shows that although the anticompetitive practices have been profoundly examined in course of public and private enforcement, some harmed entities might have been compensated, nonetheless the weakest ones may remain at the end of the day without fair share.

3. The sins of the European Commission and the Austrian Supreme Court

Adjudicating in favour of “the economic side” appears to be the ultimate goal expected from the competition law. Therefore, prisms adopted by the Austrian Supreme Court and the European Commission may be found perplexing. As regards the former one, it might have, to some degree erroneously, paid too much attention to the domestic and civil layers of the case.25 Likewise, the national court apparently strived to stress that the claimant had a massive impact on the relevant market by means of loans proceeding, as if it were a point at all. As concerns the latter one, its standpoint may be understood in one of, at least, two ways. First, the EC attempted to pretend that the private pillar of the EU competition law has artificial boundaries and they can be as remote as the EU competition authority allows, if it does. Second, the EC endeavoured to shift a burden of the issue to national courts for the sake of principles of effectiveness and equivalence (point 37 of the Opinion). No matter which one is closer to the truth, it can be acknowledged that a provisional impression that the Commission is in charge of competition law boundaries, can be no longer retained. More importantly, the civil paradigm was from the very beginning doomed to be equally undiscovered and limitless. How otherwise awarding compensation to certain harmed parties and leaving the others with no redress could be reconciled in practice? It’s a big ask. An unconditional acceptance for any damages cannot be respected though – it has been already recognised that liability ought to be individual in lieu of general one and possible to be calculated (Jurkowska-Gomułka, 2015, p. 74–75).

4. Damages actions (not) under control

Notwithstanding the harsh reception above of the European Commission’s view, a question pertaining to an extent to which the compensation stemming from anticompetitive delict can be awarded is not that rejectible. Hypothetically, could a harmed party sue employees of the infringer if the latter were bankrupt and if their salaries were higher due to the employer’s unfairly high income

25 This remark is built upon a content of paragraph 15 of the judgement.
resulting from anticompetitive practice?26 I hope it could not. Passing-on scenarios appeared to be altogether captured (see how in: Moisejevas, 2017, see p. 137–138) but frankly speaking no one is able to envision directions in which damage claims may go.

Yet it is Article 1 of Directive 2014/104/UE that straightforwardly provides that “anyone who has suffered harm caused by an infringement of competition law” is covered by the EU compensation rules. Similarly, another provision therein defines “injured party” as a person that has suffered harm caused by an infringement of competition law – without any additional prerequisites expressed. The Polish law27 that implemented Directive has not incorporated the EU definition of a harmed party in its own glossary. However Article 3 of the Polish law states that an injured party can be anyone. Nevertheless it is intriguing that the Polish lawmaker introduced a culpability premise therein. It corresponds to a culpability concept existing in the national tort law. Given the recent EU case-law, this domestic condition may be of relative significance from now on, at least when interstate trade criterion has been fulfilled. In pure domestic cases it may be theoretically taken into account as so far – despite differing both categories of cases is not preferable any more.

What is more, it can be even boldly presumed that the EU autonomous comprehension of injured parties left no space for diverse specific Member States rules that could hamper the pace in which private enforcement is flourishing. The approach taken in the case at issue is a step forward overreaching limitations characteristic for Article 4 of Directive. There is a huge difference when the essence of the Treaty’s norm dictates interpretation in comparison to a mere principle of effectiveness indirect impact which then rests mainly on national courts. Thus, in future, national courts will need to think twice before they proceed upon such issues as imputability, adequacy and culpability since they have been apparently reduced to minimal factor affecting damages actions. Instead economic side seemingly takes priority in such litigations.

5. The European Commission undermines amicus curiae option?

It can be argued that there are other available options whilst seeking support in interpretation’s conundrums with regard to Article 101 TFEU (and 102 TFEU). Aside the preliminary reference, the European Commission may serve as amicus curiae yet during the national proceedings (Vallindas,

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26 Regardless of probable evidence multiple related issues.

For various reasons this legal institution is more abstract and ideal than concrete and expedient given solely handful of cases in which the Commission stepped in to the proceeding, no matter on its own motion (Article 15(3) of Regulation 1/2003)\(^{28}\) or invited (Article 15(1) of Regulation 1/2003). Regardless of pros and cons for both concepts, the Commission, acting as the agent in the proceedings before the Court of Justice either way has to employ its resources, both in terms of people and time. Hence if the Commission does not engage before a national court, its involvement may be shifted in time to the ECJ’s proceedings at any rate.

As per information provided in the judgment (and the opinion), the Commission was reluctant to follow the path that the Court of Justice has trodden. Paradoxically, if the EC had acted as *amicus curia* in the case at issue before a national court, it would have produced more harm than good. National courts are not restrained and can ask the Court of Justice even if the EC has delivered its opinion. However potential conflicting assessments from the most important antitrust institutions is not a desirable course of events. Irrespective of which of them is called upon to assist, their involvement brings the case on the European forum whilst for instance majority of dismissed actions is not widely known.\(^{29}\) In light of uniform application of the EU competition law, this is the pivotal window through which the Member States’ authorities and courts may learn how the Treaties’ provisions should be construed.

**VII. Conclusions**

The commented case can be called a spin-off in the European series of lifts. It opens the avenue for broader scope of instances that may give rise to civil suits in line with the less and less heard concept these days – *more economic approach*. Direct and indirect customers together with parties suffered by umbrella pricing were already deemed legitimate to claim damages in respect of breach of Article 101 TFEU, but they brought attention from the national procedural side. The judgement at issue had to align with this consistent course what ensued by a clear assertion that the lost opportunity to gain from interests on the financial market shall be compensated to a public entity granting subsidies in compliance with Article 101 TFEU. Nevertheless the purport of the ruling is much broader and should be applied universally.


\(^{29}\) As recent research demonstrated there has been a number of dismissals across Europe – see Laborde, 2019, p. 5 *et seq.*
The judgement elucidates rather substantial premises in interpreting Article 101 TFUE than the requirements for the legal system of the Member States which were occasionally pondered so far (compare Caro De Sousa, 2018, *passim*). Despite that, the European Commission suggested leaving this issue for national legal regimes (compare: point 53 of the Opinion). The ruling is not flawless though. The preliminary question could have entailed obvious response. Instead the Court of Justice decided to come up with highly surprising motifs laying behind anticipated general findings. Contemporarily, this *modus operandi* raise doubts that fall outside a sole antitrust regime.

**Literature**


Jurgita Malinauskaite,

The purpose of the publication is to present the process and the level of harmonisation of European competition law in Central and Eastern European Countries (hereinafter; CEE Countries). The author describes comparative legal studies in detail, analyses EU conceptual framework of harmonisation (also from the historical perspective) and compares the institutional framework of the National Competition Authorities in CEE Countries. Finally, the author verifies the level of harmonisation of public and private enforcement of EU competition law.

The book is cross-sectional and provides a broad look at harmonisation of EU competition law enforcement. It is also a well laid out paper, starting with a brief theoretical background of comparative law, inter alia, the description of Watson’s positivism or Legrand’s pessimism. The author analyses different approaches to comparative law based on specific subject areas (that is comparative competition law); or in the context of specific jurisdiction/s, or regions (that is comparative law in CEE Countries). A variety of approaches to the comparative law discourse, for instance comparative law and legal philosophy or comparative law and legal history, are also described.

Although the above analyses could seem a bit theoretical, such an introduction is understandable due to the subject of the book. The author’s research is based on the assumption that a thorough comparative study of national legal measures plays an essential role for the purpose of harmonisation, in order to bring the various national approaches closer to each other. Research on EU harmonisation demands, in particular, an understanding of the economic analysis of law, which presumes that legal rules should be designed to promote efficiency.

The book presents the comparative nature of EU law. The author explains that EU law is influenced by the legal traditions of its Member States. However, the substantive competition law provisions in the Treaty of Rome were mainly designed by the two founding countries – Germany and France. CEE countries implemented *acquis communautaire* rather than creating it. Further on, the author adds that while EU law is regarded as a laboratory of different flavours deriving from the legal systems of the Member States, especially German and French, the influence from US antitrust law should not be overlooked. Some obvious examples of legal constructs which inspired certain aspects of EU competition law are, inter alia, the adoption of a leniency policy.
for cartel ‘whistle-blowers’, the drastic increase in fines imposed on cartels, merger-specific efficiencies, and the ‘effect’ doctrine.

Although the EU has employed harmonisation as a tool to achieve the intended result – that is integration, the book places an emphasis on harmonisation as a process (as a learning process) at both European and national levels, instead of a means to achieve an intended result. While for the internal market with a level playing field to work, harmonisation is employed to achieve intended results, the correct application may not necessary occur any time soon, as this new measure acts as an ‘irritant’ which triggers the whole process. Therefore, the author argues that it is more rewarding to address harmonisation not as a tool for the intended result, but rather as a process. Perceiving harmonisation as a process, an aim in itself, makes it difficult to assess its progress. Without setting a specific point of reference, for instance, better consumer protection in the e-commerce sector, the success of harmonisation is hard to measure.

The book contextualizes harmonisation as a process, which in the EU happens through the dialogue and cooperation between two levels – national and supranational. Responsibility for the success of harmonisation depends on the proper transposition and application not only on the national, but also the supranational (EU) level.

Different means of vertical and horizontal harmonisation are analysed. Not only EU Regulations and Directives, but also Recommendations, Opinions, Guidelines, and other soft law instruments can have a factual harmonizing effect. However, while the European Commission is bound by its own Notices, Guidelines and any deviations must be clearly justified, no such obligation exists for the NCAs. This, according to the author, can lead to legal uncertainty for individuals, as well as a lack of effectiveness and consistency of EU competition law. It is worth emphasizing here that while in theory such a non-binding effect can be harmful to harmonisation, usually the NCAs follow the customary habit of obedience anyway.

On the horizontal level, the book describes a variety of transposition methods. There is a choice between the ‘copying method of transposition’, also known as literal transposition, and the ‘elaboration method of transposition’. Secondly, there is an option between a minimalistic and a non-minimalistic method of transposition, such as ‘gold-plating’. According to the author, the duty of sincere cooperation is the most important rule in the relations between the EU and national institutions, which can be seen as a panacea for problems with the transposition of EU measures into national legal orders. The procedure of preliminary rulings (Art. 267 TFEU) also plays a significant role for harmonisation.

One of the observations provided in the book is that once CEE countries joined the EU, their national courts did not shy away from using EU law and referring cases to the CJEU for clarification based on the preliminary reference procedure. This thesis seems to be true when it comes to EU competition law provisions, the establishment of which is the exclusive competence of the EU. However, it does not seem to be appropriate to make this observation cover the rest of the legal sphere. For instance, German courts are the leader in the number of questions referred for a preliminary ruling, while Germany’s neighbour – Poland, one of the CEE countries, ranks only
10th (2018). Polish judges admit that they still have too little knowledge of how to use this instrument.

In light of the principle of subsidiarity, the book provides an assessment of the comparative efficiency between a European and national intervention in pursuing a certain objective. Even though Member States can challenge any EU measure, including Directives, before European Courts, as practice shows, judicial review under the Article 263 TFEU procedure on the principle of subsidiarity is virtually absent. The author provides interesting observations that the comparative efficiency calculus is not a technical assessment but rather a political evaluation made by EU institutions in pursuing a certain policy with different objectives and interests to be taken into account. In light of the Commission v Germany case, the CJEU has been criticised for acting with ‘double standards’ when reviewing EU law based on the principle of proportionality. The legislation of a Member State is the subject to greater scrutiny.

Importantly, the author emphasizes the need for harmonized procedural rules, which may ensure ‘uniform’ application of EU competition law where harmonized substantive rules are enforced by the NCAs and/or national courts across the EU pursuant to the same procedural rules, therefore, increasing transparency and legal certainty. Harmonisation may also be necessary to internalize external effects. However, the book argues that it is almost a ‘mission impossible’ to achieve sameness of procedural rules, which are rooted in legal traditions and characteristics of the different legal systems of the Member States. Furthermore, it is highly difficult to establish one single instrument that suits all, for instance due to the differences between big undertakings and SMEs.

The author points out that differences between procedural rules may still remain in the Member States even after the transposition of binding EU law. This is because of the minimum harmonisation standard provided by, for example, the Antitrust Damages and the ECN+ Directives.

A thorough historical background of the harmonisation of EU competition law enforcement is provided. The book analyses the harmonisation processes in the newer post-socialist Member States, namely from the 2004 accession onwards. The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Bulgaria, Romania and Croatia have been selected. The economic background of CEE countries is described historically. The author argues that life behind the ‘iron curtain’ had left these countries far behind ‘western’ EU Member States with modern economies. During their transition to market economies, CEE countries had to set up capital

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3 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.
markets and create banking, financial and monetary systems; they needed to re-draft their laws to allow for new forms of economic organizations, new sorts of transactions and obviously new patterns of ownership (by including private ownership). Although in comparative legal studies a division into CEE countries and Western-European countries is justified, a thorough description of economic changes makes it necessary to distinguish the transformation models of the individual CEE countries, which were very different from each other.

Four development stages of EU harmonisation of competition law enforcement and procedural issues are distinguished: the first enforcement Regulation 17/62, the modernisation Regulation 1/2003, and the two recent directives (namely the Antitrust Damages Directive and the ECN+ Directive). The author describes those stages in detail from a historical perspective. Apart from formalised harmonisation, the book also discusses the so-called ‘soft’ harmonisation via tools, such as the European Competition Network (ECN), the Association of European Competition Authorities (ECA) and the Commission’s support to national courts. The internal market objective is playing a key role in EU harmonisation initiatives, which is visible for instance in the justification for the Antitrust Damages Directive.

The author points out the lack of harmonisation on the procedural level. Initially, there was no call for harmonisation in the context of procedural and enforcement rules in competition law at all. However, national procedural autonomy is subject to the twin principles of equivalence and effectiveness. The book offers interesting observations by emphasising effectiveness in recent legal acts intended to empower Member States’ competition authorities to be more effective enforcers. The author notices that the Antitrust Damages Directive and the ECN+ Directive introduced a new dimension of harmonisation in EU competition law, which is minimum harmonisation. Moreover, the current development of EU competition law enforcement turns back to public enforcement and aims to enhance the powers of the NCAs. Other aspects of cooperation such as mutual assistance or limitation periods are also covered by the ECN+ Directive.

Harmonization is also hindered by differences in the fines imposed by NCAs for the infringement of EU competition rules. Penalty systems notably vary across Member States due to different national proceedings (that is, administrative, criminal, or quasi-criminal). Differences occur also in the methodologies for calculating fines applied and, finally, in the entities that can be held liable. For instance, several NCAs cannot hold parent companies liable for infringements committed by subsidiaries under their control.

Next, the author discussed in detail the institutional frameworks of the NCAs in CEE countries. The layout of the book is coherent and consistent, as such a review of the institutions in Member States allows to verify how recently implemented harmonisation instruments (directives) function in practice. For instance, Germany (which is not a CEE country, however, is a good example), went beyond the requirement of the Antitrust Damages Directive by acknowledging as an irrefutable fact of an infringement the decisions issued by the NCAs of other Member States, thus, placing ‘trust’ in the decisions of other Member States.
It is strongly emphasised that the NCAs of CEE countries faced difficult tasks unparalleled in the West, as they had to facilitate a competition process during the transition from a socialist to a market economy. Many of these countries, including Poland, established current NCAs as part of market economy reforms. All Member States, but in particular CEE countries, are struggling with the problem of their NCAs’ structural, operational, functional, and financial independence from the state authorities. According to the author, it is doubtful whether NCAs can attain full independence and impartiality, as they must be constrained in some ways by the markets and by the state. In light of the above, institutions of particular Member States are examined. Due to the fact that the book covers the subject of harmonisation of EU competition law enforcement in a cross-sectional manner, the discussed problems are sometimes presented a bit briefly. In my view, all of the NCAs in the EU, not only in CEE countries, struggle with the same problem of independence.

Independence and impartiality are not the only issue. Independence cannot survive without a requisite level of accountability, as accountability mechanisms make it possible to assess whether the competition authority has reached the general objectives set for it, and if it used public resources accordingly. The author argues that the ECN+ Directive places an emphasis mostly on the independence of NCAs while not acknowledging their accountability. Another challenge for the Member States is to ensure that their NCAs have the human, financial and technical resources that are necessary for the effective performance of their duties and exercise of their powers when applying Articles 101 and 102 TFEU.

Further on, the author describes other dilemmas related to the functioning of NCAs. For instance, there is a question what policies should be prioritised (consumer or competition protection), which is of relevance, among others, for the Polish Competition Authority (UOKiK). The UOKiK has been criticised for its evident focus on consumer protection, in particular in the banking and telecommunications sectors, with insufficient attention being placed on antitrust enforcement4. Furthermore, there are also different views on single-functional or multi-functional NCAs. This is interesting, for example, in light of the recent ideas in Poland to delegate the powers of the Polish Financial Ombudsman to the UOKiK.

After covering the institutional background, the book provides an overview of the competition law enforcement systems in CEE countries. All of the NCAs have a wide range of investigative powers similar to those of the Commission and can adopt (substantive) decisions in line with Article 5 Regulation 1/2003 themselves. All of them also introduced national leniency regimes following a voluntary harmonisation inspired by the earlier EU Leniency notice and the ECN leniency model, and have the legal basis for granting full or partial immunity to an undertaking that participated in a secret cartel. Differences in the adaptation of particular solutions by CEE countries

are also marked in the book. Fining policies and issues related to mutual assistance are described in detail.

Private enforcement to this date has been one of the most debated and researched field in competition law. The author does not overlook this area and provides broad analyses of the transposition of the Antitrust Damages Directive in CEE countries, including issues related to disclosure of evidence, limitation periods, joint and several liability, passing-on defence, presumption of harm, consensual dispute resolution or collective redress.

In summary, the book is certainly worth reading. The layout is well thought out. The author’s analyses based on her own data sets are highly valuable.

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The book ‘Competition Law in Croatia’\(^1\) represents the last volume of the ‘International Encyclopedia of Competition Law’\(^2\) books collection published by Wolters Kluwer, which covers over 30 competition law jurisdictions across the world. The authors of this volume are 3 distinguished Croatian academics, who have great interest in competition law: while Prof. Pecotić Kaufman is Professor at the University of Zagreb,\(^3\) Prof. Butorac Malnar teaches competition and commercial law at the University of Rijeka,\(^4\) while Prof. Akšamović is Head of the Department of Business Law at the University of Osijek.\(^5\) During the last two decades, the 3 authors have published extensively in the field of competition law in Croatia and presented their work at international conferences. Finally, it is worth noticing that the authors are also actively involved in the Croatian Association of Competition Law and Policy, which represents the main discussion forum in the country among practitioners, enforcers and academics.

Similarly to the other books included in the same collection, this volume is divided in 3 main sections: Part I discusses the sources of competition law in Croatia, as well as a number of general concepts, such as the concept of undertaking and relevant market definition. In addition, chapter 5 provides a detailed analysis of the system of public and private enforcement of competition law in Croatia. Part II, on the other hand, discusses the application of the rules concerning anti-competitive agreements, abuse of dominance and merger control in Croatia, analysing how the Agencija za zaštitu tržišnog natjecanja (that is, the Croatian competition agency, AZTN)\(^6\) and the courts have enforced these rules in the last twenty years. Finally, Part III offers


\(^{6}\) http://www.aztn.hr/
a detailed analysis of the procedural rules applied by the Croatian NCA in the context of antitrust investigations and in the field of merger control.

Croatia adopted its first Competition Act in 1995, a few years after having declared its independence from Yugoslavia, and started the process of transition from socialism to a market economy. It is worth noticing the gradual development of competition policy in the country, achieved via a series of amendments to the Competition Act. The original legislation was first amended in 2003, allowing Croatia to comply with the EU competition law acquis in the context of EU accession negotiations, and then later on in 2009, in order to change the enforcement structure of competition law in Croatia. In the original version of the legislation, in fact, the AZTN did not have the power to directly impose sanctions for violations of the Competition Act. Instead, the agency had to bring an action to the ‘misdemeanor’ court, which would decide on the case. As the name of the tribunal suggests, this court could impose only ‘minor’ fines on undertakings breaching competition rules. By granting to the AZTN the power to directly fine undertakings, Croatia showed the intention to increase deterrence vis-a-vis competition law violations and by so doing, contribute to the development of a competition culture in the country. Further amendments to the Competition Act were adopted in 2013, in the aftermath of the accession of Croatia to the EU, and most recently in 2017, in order to transpose the Damages Directive at the internal level. Besides the Competition Act, the AZTN has adopted a number of guidelines that fully comply with the EU competition law acquis.

Two aspects of the Croatian Competition Act diverge from the relevant EU acquis: first of all, Article 12 provides a rebuttable presumption of dominance for undertakings that hold a 40% market share. Though such threshold has been followed de facto by the European Commission and by the Court of Justice EU, it has never been legally codified at the EU level – that is, Article 102 TFEU keeps an open definition of the concept of dominance. A rebuttable presumption of dominance usually leads a competition agency to place excessive emphasis on the undertaking’s market share in the context of abuse of dominance cases. It is doubtful whether such presumption still makes sense in the context of the digital economy, which is characterized by contestable markets, where the market share is rather unstable and thus it plays a minor role in an antitrust analysis.

7 Supra, Pecotić Kaufman, V. Butorac Malmar, D. Akšamović, p. 21.
8 Ibidem, p. 22.
From a procedural point of view, Article 58(13) of the Croatian Competition Act allows the AZTN to adopt non-infringement decisions to close investigations concerning a breach of Articles 101–102 TFEU. While justified by reasons of legal certainty for the complainant, such provision is incompatible with Tele 2 Polska, where the Court of Justice EU ruled that under Article 5(2) Regulation 1/2003, NCAs of the EU Member States may ‘close investigations’ under Article 101–102 TFEU rather than adopting a ‘non-infringement decisions’. As noted by the authors in this book, in 2015, Article 58 led to a conflict between the AZTN and the Croatian High Administrative Court in Hrvatski Telekom: while the agency claimed that Article 58 was inapplicable, since it contradicted the Tele 2 Polska case-law, the High Court considered the CJEU case-law inapplicable in the case. Convinced that the wrong interpretation by the High Court was due to the incorrect translation into the Croatian language of Article 5(2) Regulation 1/2003, in 2016, the AZTN successfully asked the European Commission to modify the Croatian version of Article 5(2) Regulation 1/2003. Following the modification of the translation, the High Court has re-considered its previous ruling: in spite of the language of Article 58, the AZTN now routinely closes its investigations due to the lack of evidence without adopting any non-infringement decision.

**Hrvatski Telekom** is one of the several court cases discussed in the book. In this regard, it is worth noticing the role played by the Croatian Constitutional Court in competition law enforcement. Unlike other EU Member States, the Croatian Constitutional Court has heard several complaints in the field of competition law. In its 2008 landmark ruling in **PZ Auto**, the court recognized the duty of the AZTN to interpret the national competition act in light of the case-law of the Court of Justice EU. It is worth mentioning that at that time Croatia was still a EU candidate country; the Constitutional Court recognized such obligation as stemming from the Article 70(2) of the Stability and Association Agreement (hereinafter; SAA) concluded by Croatia and the EU in 2001. More recently, the Constitutional Court has annulled previous rulings of the High Administrative Court on the basis of their

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15 Supra, Pecotić Kaufman, V. Butorac Malmar, D. Akšamović, p. 81.
18 Supra, Pecotić Kaufman, V. Butorac Malmar, D. Akšamović, p. 81.
20 Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part. OJ L 26/3, 28.01.2005.
lack of constitutionality. As argued by the authors of the book, such a unusual and pro-active role of the Constitutional Court might be explained by the fact the Croatian Competition Act does not provide for a second instance of appeal: the AZTN decisions, in fact, may be first appealed to the High Administrative Court and only in exceptional circumstances to the Supreme Court.

The section concerning private enforcement of competition law in Croatia represents the most interesting part of the book. This section of the volume analyzes in great details how Croatia has transposed the Damages Directive and how the new procedural rules interact with the pre-existing code of civil procedure. Similarly to other EU Member States, Croatia transposed the Damages Directive by adopting a new Act on Antitrust Damages – that is, new legislation providing procedural rules applicable to antitrust damage claims. While the new Act reflects the provisions of the Directive, it also tries to ‘fill in’ the gaps left by the Directive and find a ‘compromise’ with existing procedural rules. The rules on disclosure of evidence represent a good example in this regard. On the one hand, Article 5 Damages Directive grants to the national civil judge the power to order the disclosure of ‘relevant categories of evidence’. On the other hand, similarly to other civil law jurisdictions, Croatian general rules on civil procedure only allow the disclosure of specific/individual documents. In transposing Article 5, the Act on Antitrust Damages allows the parties to obtain the court-assisted disclosure of ‘specified or specifiable evidence’, depending on the circumstances of the case. As noted by the authors of the book, the Act on Antitrust Damages follows a ‘stricter’ approach than Article 5 Damages Directive in relation to the disclosure of evidence, in order to find a ‘workable compromise’ with the general rules of civil procedure.

The book is very informative: it includes a detailed account of the relevant competition rules in Croatia and the major enforcement cases of the past two decades. Unfortunately, the manuscript of the book was finalized before the adoption of the ECN+ Directive, which is expected to be transposed by February 2021. Therefore,
the book does not include any discussion of the impact of the ECN+ Directive in Croatia.

The book is relevant for academics, practitioners and enforcers interested in competition law enforcement in Croatia. More generally, the book may be of interest for competition law experts interested in the enforcement of EU competition rules in Central and Eastern Europe.

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The book *Competition Authorities in South Eastern Europe – Building Institutions in Emerging Markets*, published in 2018, is a follow-up of the Conference on Institution Building of the Competition Authorities in South-East Europe, held in Belgrade, Serbia on 2–3 June 2016, organized jointly by the European Bank for Reconstruction and Development and the Commission for the Protection of Competition of Republic of Serbia. The book delivers 11 papers authored by scholars and practitioners as well as the very useful introduction written by the editors, Mr. Boris Begović and Mr. Dušan V. Popović, both of the School of Law of the University of Belgrade, covering various topics concerning the current status as well as proposals for further development of competition regimes across the region. However, the book is not only about local experiences, but provides also a very good blend of national, regional as well as general topics and issues.

South-East Europe (which, for the purposes of the conference and the book, consist of Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Greece, Kosovo, Moldova, Montenegro, North Macedonia, Romania, and Serbia; hereinafter: SEE) is a rather small, but quite a diverse region, both from political as well as cultural perspective. Such diversity clearly reflects onto the status of competition policy and competition law enforcement. Whilst some of the jurisdictions have been part of the European Union for decades and have a longer-standing competition law practice (Greece), some have joined the EU rather recently (Croatia). Most are still at different stages of an ongoing EU-accession process, and at rather early stages of their competition law development. In that context, although benchmarking against well-developed economies and jurisdictions is a logical approach in developing competition regimes across the region, those regimes can also largely benefit from each others’ experiences, in substantive as well as procedural terms. It therefore comes with little surprise that the conference, and also the book, deal not only with one aspect of competition enforcement, but provide a very-welcome, multi-sided approach to both assessing the competition regimes in the region and proposing tools and approaches in dealing with specific policy, legal and economic challenges.

Several authors deal with topics covering certain national or regional matters, which, however, can also prove useful elsewhere, as the underlying issues are or may become relevant across the globe.
In that respect, the paper of Paolo Buccirossi and Lorenzo Ciari provides a comprehensive overview and comparison of the role of the economic, institutional and cultural characteristics of the competition law design in the so-called Western Balkans. However, the entire first half of the paper is dedicated to a generally applicable introduction to those characteristics, which can indeed prove very useful for practitioners in emerging economies worldwide.

Boris Begović analyzes the dangers of the middle income (or non-convergence) trap for SEE countries and the role of competition policy in avoiding that trap, which Mr. Begović argues is crucial. As one of his key conclusions, the Author proposes the increase of merger notification thresholds and allocating sufficient resources of competition enforcers to competition advocacy, which he believes should remain the priority of the competition policies in the region.

Dušan V. Popović discusses institutional design of state aid authorities in the countries that are candidates or potential candidates for membership of the European Union, arguing that they all have unsatisfactory enforcement records and show an overly lenient approach overall. The paper does not stop at detecting what the issues are, but also delivers the Author’s understanding of the reasons for the inefficiencies, which, as we understood it, mostly derive from the lack of sincere governmental support to an efficient, objective and independent state aid control system.

Dimitris Loukas gives an interesting insight into the way in which competition advocacy priorities shifted and even expanded in relation to the economic adjustment programmes in Greece. The Author discusses each of the four advocacy initiatives, which we would argue reflect the issue of advocacy in a broad sense, as some of them actually related to the Greek competition authority dealing with hard law initiatives and proposals. Although the Author is careful in drawing any final conclusions, it seems that the experience did reveal several important shortfalls of the entire system, going even beyond competition issues, such as a poorly structured legislation formation process, unnecessary regulatory barriers etc.

Ivana Rakić presents the Serbian experience in competition advocacy and its role, both in terms of its nature and tools as well as its result and lessons learnt. The Author argues, and we can certainly agree, that the Serbian experience can serve as a valuable lesson to other developing and transition countries in tailoring their own competition advocacy activities. In that light, Ms. Rakić presents her own set of advice to such competition authorities, which indeed need to consider many different aspects of their work and how to appropriately contribute to the positioning of the authority as well as to competition policy overall.

Finally, Radu A. Păun and Danusia Vamvu provide a Romanian case study of using the difference-in-differences approach in the ex-post analysis of a merger, which was cleared by the Romanian Competition Council.

The remaining papers deal with general topics and issues that are universally applicable, and are not strictly related to the regional competition law landscape.

Andrej Plahutnik analyses the pros and cons of combining antitrust, merger control, state aid and consumer protection competences under one authority, strongly arguing against cost-saving being an argument in favour of such an approach. Although, given
the nature of the conference, the purpose of the paper was to present the Author’s standpoint and pieces of advice to SEE countries, it is not tailor-made to SEE, so can easily be applied in any jurisdiction dealing with its institutional structure of the four areas.

Yannis Katsoulacos discusses the still (or always) ongoing topic of determining the extent of economic analysis and legal standards in competition law enforcement, applicable not only to the SEE region, but universally. The paper presents an interesting view on the object vs. effect-based approach, in arguing that welfare-related considerations would overall be in favour of an effects-based approach, however that there are other non-welfare related matters that often surpass the consumer, or even total welfare, when it comes to their place in the spotlight.

Russell Pittman provides a very useful introduction into the three economic tools that become widespread in competition law enforcement in general, and in the analysis of proposed mergers in particular: critical loss analysis, upward pricing pressure, and the vertical arithmetic. The aim of the paper is to be non-technical, and to serve as a solid starting point for any enforcement agency analyst in using those tools. We would certainly argue that this would be a very welcome approach in emerging economies, where competition issues may often slip into a very vague and subject-to-interpretation legal-technical environment, even where there are solid economic tools to be applied.

Siniša Milošević, Jelena Popović Markopoulos, Jelena Grahovac and Aleksandra Ravić analyze the pricing benchmark in market definition, both from the theoretical as well as practical perspective. The Authors used an example of three products (two different brands of edible sunflower oil – belonging to the same market – and one brand of diesel fuel) in demonstrating the practical implementation of price-based tests in determining the relevant market.

Finally, Bojan Ristić discusses the rationale for using the classic Cournot mechanism in merger control. The Author argues that the model is important and useful in the context of a merger simulation, applied to both homogeneous as well as differentiated product markets. However, Mr. Ristić emphasizes the importance of judges and lawyers to actually understand the underlying economic theories of a simulation method. Nevertheless, the author is clear in detecting the need for a more significant inflow of economic theory into the merger control assessment, in particular in the clarification or questioning of evidence.

As one can take from the above brief outline of each of the papers, the book succeeds at what seems to be its goal – indeed to provide an insight into the current state of play in SEE competition regimes, but put even more emphasis on topics that are generally applicable and are not regionally-bound, from a policy, legal and economic perspective. For that reason, this book should clearly be an interesting read to all dealing with one or more of the SEE competition regimes in whatever capacity, but should also raise the attention of professionals far from the borders of the region.

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The 6th Competition Law and Policy Conference in Memory of Dr. Vedran Šoljan, co-organised by the University of Zagreb – Faculty of Economics and Business (EFZG), the Croatian Competition Agency (AZTN), the Croatian Competition Law and Policy Association (HDPPTN) and the European Documentation Centre EFZG, was held in Zagreb on 12–13 December 2019. A conference devoted to competition law and policy developments in Croatia, the wider CEE region and the EU as a whole, started off in 2009 as a small scale event aimed at presenting the results of an EU merger control reform project, led initially by Professor Vedran Šoljan (University of Zagreb), and continued on by Professor Jasmina Pecotić Kaufman (University of Zagreb) after his untimely death in 2008. Eventually, the Conference evolved into a large-scale event, and a tribute to the late Professor Šoljan, gathering around 150 participants from Croatia and abroad.

The 2019 conference was supported by ASCOLA (Academic Society for Competition Law) and sponsored by three leading Zagreb law firms that deal with competition issues (Bradvica Marić Wahl Cesarec; Divjak Topić & Bahtijarević; Liszt & Partners) as well as the biggest bank in Croatia (Zagrebačka banka d.d.).

The two-day conference was devoted to two major topics. The first day focused on competition law developments in post-socialist economies in Central and Eastern Europe, while the second day looked at challenges to competition law enforcement posed by the digital economy from the policy perspective.

The conference was opened by the main organizer, Professor Pecotić Kaufman, who emphasised the importance of reflection and discussion, especially for countries where the freedom of speech and critical thinking was limited and discouraged just a few decades ago. This conference, she said, provided a forum for a much-needed reflection on various competition law issues, especially in the context of post-socialist economies, where competition rules still do not feel interwoven with the fabric of the society.
The participants were also greeted by Professor Siniša Petrović, Vice-Dean of the University of Zagreb, Faculty of Law and President of the HDPPTN; Ms Mirta Kapural, Member of the Croatian Competition Council, and Professor Oliver Kesar, Vice-Dean of the University of Zagreb, Faculty of Economics and Business. Finally, opening speeches were given by H.E. W. Robert Kohorst, the US Ambassador to Croatia and by Ms Nataša Mikuš Žigman, State Secretary in the Ministry of Economy, Entrepreneurship and Crafts of the Republic of Croatia, who spoke on behalf of the Prime Minister of the Republic of Croatia. Ambassador Kohorst placed antitrust rules in the context of preserving economic liberty, but also noted that lobbying government for protection was sometimes easier for firms than innovating. Ms Mikuš Žigman placed the conference in the context of the then current Croatian EU Presidency with its four priorities (a Europe that is developing, a Europe that connects, a Europe that protects, and an influential Europe) and emphasised that opportunities for consumers must be protected, and that this is possible only if competition works well.

An inspiring introductory lecture, contextualizing the topics to come in day one, was given by the first keynote speaker, Professor William Kovacic (George Washington University, USA). Noting that it takes 20 to 30 years to be able to take a look behind you, Professor Kovacic gave a historical overview of the development of competition systems in Central and Eastern Europe during the 30 years following the fall of the Berlin wall, which marked the beginning of the transition process from a socialist to a market economy in this part of Europe. Major milestones of the competition law systems were presented, and the developed systems were evaluated against identified determinants of: good performance such as human capital, expenditures, project selection methodology, political stability, rate of learning and other. In this regard, Professor Kovacic noted that a strong academic hub was an extremely important component of an adaptable and resilient competition system. He also said that the question was not whether institutions will be affected by political turmoil, but rather, the question was if it will be able to persevere. He noted that the Central and Eastern Europe experiment did not fail but that it was incomplete. He mentioned Poland as a great success in terms of transitioning to a market economy, with the government’s role in the economy changing from being a player to being a referee. When talking about institutional capacity and resilience, Professor Kovacic emphasised the importance of leadership and human capital, in particular of assessing the quality of the team with an annual staff evaluation. As regards challenges for less experienced competition authorities, Professor Kovacic noted that “you have to play the right matches”. Remembering his role as the FTC head, when “politicians called me all the time”, he emphasised “autonomy, accountability and effectiveness” as three cornerstones and a combination of “ambition and realism” as a good mix; “Moon, not Mars”.

The second keynote speech was given by Kati Cseres (University of Amsterdam), who addressed the most important common denominator of competition law systems in Central and Eastern Europe, their journey from Europeisation to Harmonisation, with a view on institutions, their powers and priorities. Most of those countries’ legal frameworks related to competition were the result of their accession process to
the EU. Institution building is the major part of this process, and Professor Cseres analysed the institutional capacity and efficiency in the pre- and post-accession stage, identifying common challenges and possible solutions for further development in the era of decentralisation. Noting that 2004 was an exercise in ‘copy pasting’, with implementation being neglected as a conditionality criterion, Professor Cseres called for more ‘centralisation’, for example, more involvement by the Commission in the new countries. Her message was that ‘institutions do matter’. She warned that Regulation 1/2003, which gave more power to local enforcers and created the challenge of ‘multilevel governance’, did not fulfil its aim for a more effective system when it comes to CEECs, and that a much more complex approach is required. Also, she emphasised that vertical legal transplants (‘if it worked for the Commission, it will work for us’) are not working (for instance, almost no leniency applications or private enforcement cases despite the 10% overcharge presumption). In fact, she called for a more centralised approach, criticizing the Commission’s hands-off approach.

Panel 1, moderated by Professor Siniša Petrović (University of Zagreb), was dedicated to the development of competition law systems from the perspective of different jurisdictions. Marek Martyniszyn (Queen’s University Belfast), presented the results of the empirical study performed in Poland on the development of its competition law system, which he found to be deeply influenced and related to the political, legal and economic development of the country. A similar empirical study was performed in Croatia by Jasminka Pecotić Kaufman (University of Zagreb), who presented her results showing the immaturity of the Croatian competition system and an insufficient competition culture. Opposite results came from Chile in relation to competition culture and cartel enforcement; they were presented by Umut Aydin (Pontificia Universidad Catholic de Chile).

Panel 2 was moderated by Marco Botta (Max Planck Institute for Competition and Innovation, Munich). The first presentation in this panel was devoted to the topic of antitrust enforcement against SOEs in the CEE Member States, prepared by Alexandr Svetlicinii (University of Macau). Dubravka Akšamović (University of Osijek) followed, with the results of a study related to judicial review in competition cases. Her research focused on winning and losing arguments before the High Administrative Court of the Republic of Croatia, compared to winning and losing arguments before the CJEU, showing a remarkable similarity of results. Vlatka Butorac Malnar and Ivana Kunda (both University of Rijeka) analysed the timely issue of damages claims for infringements of Article 101 TFEU that occurred prior to the Croatian accession to the EU, with a view of bypassing the limitations imposed by EU law with tools originating in private international law rules.

The first conference day was finalised with a sequence of short presentations of selected papers moderated by Tea Jagić (DG CONNECT/HAKOM). The first to introduce his topic was Ondrej Blažo (Comenius University Bratislava). He addressed the issue of the prioritization policy of national competition authorities and its impact on the overall enforcement of competition law, particularly with a view on the new ECN+ Directive and the overall EU impact in creating a proper, transparent and just competition policy and enforcement. Ákos Réger (Allegro Consulting) and András
Horváth (Hegymegi-Barakonyi and Partner Baker & McKenzie) discussed the abuse of dominance in the case Law of the Hungarian Competition Authority from the historical perspective. Dijana Marković-Bajalović (University of East Sarajevo), on the other hand, gave a competition law perspective of candidate countries to EU accession, the choice of the most suitable EU competition enforcement model to follow and lesson to lean. Avdylkader Mucaj (PhD candidate at University of Ljubljana) presented an overview of the competition law framework and institutional design in Kosovo. Veljko Smiljanić (Karanović & Partners, Belgrade) and Kevin Rihtar (Karanović & Nikolić, Ljubljana) gave a comparative analysis of the institutional design in Slovenia and Serbia, addressing the key problem of effectiveness vs. procedural fairness. The first conference day ended with the presentation of Dino Gliha (PhD candidate at University of Zagreb), who analysed the development of the refusal to license copyright under Article 102 TFEU. He focused his presentation on the methods of evaluation and enforcement in the Croatian legal system.

A short book presentation was held on the first conference day, with Professor Cseres introducing the book Competition Law in Croatia by Kluwer Law International, published in 2019, and written by Jasminka Pecotić Kaufman, Vlatka Butorac Malnar and Dubravka Akšamović. By providing a comprehensive review of most important competition cases dealt with by Croatian authorities, detailed information on the normative framework and the enforcement system including private enforcement, the book will hopefully be valuable for business and legal professionals alike, as well as for academics and researchers studying international and comparative competition law.

On the second day of the Conference, a special policy event titled ‘Competition Policy Enforcement in the Digital Economy: Recent Developments’ took place, bringing together prominent academics with their cutting-edge research on various challenges and threats that digitalisation and related technological developments pose to competition policy enforcement. Here again, the topics were given an introductory context by keynote speakers, Professor Bill Kovacic and Mirta Kapural (AZTN). While Professor Kovacic problematised the general adequacy of competition law institutions to address digital economy issues, Ms Kapural addressed these issues from the perspective of the Croatian Competition Agency, particularly with a view on digital policy demands of the EU.

While the focus nowadays is on the digital revolution and its implications, Professor Kovacic noted that a revolution happened before – at the end of 19th century. Quoting the later Kodak case, he said that the consequences of competition can be drastic, with consumers loving it, but not necessarily the workers. As regards digital markets, he noted that intervention needs to be prompt but precise, suggesting that we will not get good results unless we use competition, privacy and data protection together. Professor Kovacic commented that the German Facebook case was ‘a stretch’, but that it was a result of other (privacy) regulators not being engaged. He noted that in some instances, past cases create space for new firms to emerge, and how as a consequence of Microsoft abuse cases Bing was not included in the bundle, which allowed Google to emerge as a strong competitor. Finally, he suggested that smaller, newer agencies
tackle the issue of digital markets by using the analysis made by larger institutions, by cooperating with other domestic agencies, foreign colleagues and by forming academic partnerships.

Ms Kapural presented the main conclusions from the Crèmer et al. Report, summarising them conveniently for the audience. As a local NCA *fonctionnaire*, she did not speak in favour of a lower standard of proof for digital markets, and noted that underenforcement was a problem both as regards traditional markets and digital markets. She noted that while smaller agencies have limited resources and, absent legislation on EU level, she sees at least a part of the solution in cooperating with a data protection regulator as well as designating a person at the NCA level to follow developments on digital markets.

Panel 1 of the event, moderated by Marijana Liszt (Liszt & Partners Law Firm, Zagreb), started with the presentation by Nikola Popović (HAKOM) on the topic of governance of digital ecosystems and the possible future developments influenced and driven by AI, internet of things and other digital breakthroughs. Pedro Gonzaga (OECD) discussed the main challenges for competition authorities and presented recent OECD findings related to competition policy in digital markets, while Álvaro Garcia Delgado (DG COMP) analysed the interactions between competition and regulation in the digital field, by presenting the findings of the EU Report on competition policy for the digital era and possible future developments.

Mr Gonzaga said that while we should not be afraid of change, we should care about market power and abuse. Speaking in favour of a ‘careful approach’, he noted that competition law has its limits and cannot address all the problems. As regards merger control in digital markets, where we need to look at very complicated markets, Mr Gonzaga emphasised that the evolution of market shares over time was more important than static market shares because of the pronounced market dynamism. Also, he noted the importance of dynamic efficiencies in digital markets, as well as that dynamic markets require more flexible remedies.

Mr Garcia Delgado noted that over the five years Commissioner Vestager and her team gathered a lot of expertise in assessing competition issues in digital markets, emphasising that competition law is flexible enough and that what was needed was not revolution, but evolution.

Panel 2 was moderated by Mario Krka (Divjak Topić & Bahtijarević Law Firm, Zagreb). The first speaker was Viktoria H.S.E. Robertson (University of Graz) who discussed the problems of defining relevant digital markets. She questioned the appropriateness of the existent legal framework and economic tools of relevant market definition, presented possible problems and proposed a roadmap for the challenges ahead. Ramsi Woodcock (University of Kentucky) addressed the intricate issue of driven pricing and, what he referred to as the second dimension of market power, differentiating between the effects of personalised and dynamic pricing and the threat to competition they both pose. Thibault Schrepel (University of Utrecht) focused on a special digital technology, blockchains, and possible dynamic collusion it may lead to with far-reaching implications and serious challenges to competition policy.
response. Panel 2 was closed with the presentation of Stefan Thomas (Eberhard Karls University, Tübingen) who gave an engaging presentation on the application of oligopoly theory in the age of machine learning.

Panel 3, moderated by Mislav Bradvica (Bradvica Marić Wahl Cesarec Law Firm, Zagreb), gathered presentations of different national perspectives and responses to the existent digital economy challenges. Marko Brgić (AZTN) discussed the new role that the NCA’s experts should take in response to digitalization, particularly by rethinking forensic IT and data analytics. AI. Stefan Ruech (Austrian Competition Authority) brought the Austrian perspective, questioning its dealing with the challenges in the digital economy. Marco Botta (Max Planck Institute for Competition and Innovation, Munich) analysed the German Facebook Case and the complex interaction between competition policy, consumer protection and data protection shaping the decision in question. The final presentation was given by Mario Denni (Italian Competition Authority) on the ICA’s investigation against Amazon and its use of a mixture of old and new theories of harm.

More details on the conference, including presentations and videos, are available at https://pptn.net.efzg.hr.

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