

COMPETITION AND STATE AID IN ALBANIA

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COMPETITION AND STATE AID IN ALBANIA

I. Executive summary

Competition and State aid are essential aspects of the market mechanism because, the availability of choice between goods and services establishes a link between the success of an undertaking and its ability to satisfy consumer's wish. Competition law/policy and State aid are among the main development areas in European Union (EU). They try to adjust the demand and supply structure to technological development. Through interplay of decentralized decision making machinery, competition enables enterprises continuously to improve their efficiency, which is a *sine qua non* for a steady improvement of living standards and employment prospect within the countries. State aid schemes are also prohibited in the EU, because the support to one sector in the market could impede the competition among other sectors. In the EU context the core legal basis for competition law/policy and State aid are laid down in the Treaty of Rome (Articles 81 and 82 and 87) and they are completed by a great number of regulations, jurisprudences of the European Court of Justices and other community acts.

Competition and State aid are not that much developed in Albania. However the picture has changed a lot during the last years, due to rapid economic reforms and integration process that Albania has pursued. Among the most determinant factors for the establishment of pro-market legislation in Albania, is the opening of the Stabilization and Association Process (SAP) with EU. During this process to Albania has been given an Agreement to negotiate, the Stabilization and Association Agreement (SAA) that will allow Albania and the Community to further strength and extend their relation. The SAA establishes a broad legal basis for future cooperation and reforms in the area of economic, political and social development of the country¹. Albanian economic cooperation with EU is one of the main pillars of the SAA. Albania seeks to sign a free trade area with EU, as well as adopting the European *acquis* in the area of internal market, more specifically: four freedoms, competition, State aid, public procurement, intellectual property etc.

Fair competition and preservation of fair competition in Albanian market, has been recently sanctioned by the law No. dated 9121 28/07/2003 "On Protection of Competition" (law on competition), which annulled the exiting law of 1995 and which conformed European requirements and standards in this area. Implementation of this law has marked a positive step as compared to the previous law, reflecting more comprehensive rules on competition protection, implementation of the proper structure,

¹ Albania has opened officially the negotiation for the Stabilization and Association Agreement on 31 January 2003 with European Union.

the imposition of the structure and sanctions, in order to provide rigorous execution of the former. The new law is modern in the terminology used, and in evaluation of specific situation, regarding the performance of enterprises in the condition of market competition. This law applies not only to those enterprises that are directly related to the domestic market, but also to those indirectly related to this market, consequently reflecting a supplementary element as compared to the previous law.

Establishment of the Competition Authority (CA), an institution monitoring the activity of domestic and foreign enterprises, as well as, that of other subjects operating in the domestic market, is a significant achievement in the context of this law. In contrast with the Directorate on Competition, established according to the previous law within the Ministry of Economy (MoE), the CA is an independent entity composed of qualified members chosen by the Parliament. The CA can launch investigations on various sectors of the economy through its Secretariat. It takes decision on issuing permission regarding exclusion for abolition of agreements, respecting the requirement of the law. The CA is currently issuing recommendations to the regulatory entities, on competition aspects of the privatization process in Albania.

The implementation of the new law will be accompanied by drafting some other acts necessary to implement the procedures of law. Part of the EU-CARDS project will address this issue. Moreover article 82 of the existing law stipulates the duty of the CA, to carry out within two years from the date on entering into force of this law, a legislative assessment of all normative acts in force, which in particular restrain or distort competition. The CA recommendations shall be presented to the Council of Ministers and to the Albanian Parliament. This assessment is important for fulfilling the obligations stated in article 72 of SA-Draft Agreement.

Competition culture and competition advocacy will be strengthened and developed through the work of CA. The latter will take the necessary measures for the implementation of competition law, and will build institutional cooperation with other administrative bodies and entities for the competition issues. In this framework will be also the training with new concepts of the law on competition for administrative employees and judges of the courts.

The situation on State aid is some how different, since the new law is still in drafting process and the new Directorate for State Aid (DSA) is recently established. State aid control in Albania is foreseen to be implemented in short and medium term actions. First of all the draft of SAA requires that a comprehensive inventory scheme should be instituted before the establishment of the State aid Authority. The State aid scheme should be aligned and assessed in accordance with European criteria. In order to fulfill such obligation, the DSA within the MoE, in collaboration with the line ministries has anticipated the work, trying to have a general picture of State aid schemes operational in Albania. It should be emphasized that State aid schemes are mainly applied in agriculture, energy, and transport in form of tax relief, exemption from taxes, grants, and lower input prices.

Preparing the legislations in this field and harmonizing them with the EU standards, is part of the medium term action. The law “On State Aids” shall be completed by the end of 2004 and some assistances will be given under the CARDS 2002 project. Establishment of the State aid Unit, as an independent authority entrusted with power to authorize and control the State aid schemes in Albania is a requirement under the SA-draft Agreement. Raising public awareness will be part of the actions taken by the government in this field, because it is important to change the old scheme and notion of state aids, to the new one, based on EU principles in this field. In order to accomplish all these tasks, the MoE has required the transformation of the existing state aid sectors into a new DSA. DSA will be an intermediate structure in charge of preparation of harmonized legal framework, inventories of all aids measures in force.

Albeit all the progress in the field of competition and State aid, more reforms need to be done. The completion of legal framework on competition and State aid is a necessary short term measure. From one side, it is important that the new acts issued for the protection of competition and state aid be compatible with the European standards but from the other side they must reflect the Albania economic interests and prerogatives. Along with the completion of the legal framework, is the establishment of competition culture in Albania.

Strengthening the institution capacities is a *sine qua non* for the proper implementation of laws. Thus for, the CA and DSA need to be completed with training staffs, capable to work with competition and State aid issues. Meanwhile the establishment of the independent Authority for State aid will further assesses the state aid schemes in Albania and will further implement the measures taken by the actual DSA.

II. Albanian legal framework on protection of competition

II.1 The evolution of competition law/policy in Albania

The law No. 8044 dated 07/12/1995 “On Competition” was the first step towards the creation and implementation of a competition policy and environment in Albania. Although that the law was not sufficient in covering all issues related with competition practices in Albania, such as monopoly and dominant position, it was still a progress in this field. The law prohibited monopoly position, by defining as a dominant position any situation in which an undertaking or a group of undertakings hold 40% of the share of the market². These provisions turned to be not in conformity with European criteria on this field. The application of this law has been encountered with lots of problems in resolving cases of the privatization and liberalization of strategic sectors. The law has exempted public sectors, including utilities, banks and some other institutions from its application. There was no specific provision in the law when Competition Department could open a case under its own initiative. The latter was also not empowered to enter into premises during investigative procedures; could not seize documents to be accepted as evidence for the case; could not compel witness to testify, or to require the production of documents, or written responses to question; or could not impose sanctions either for the timely and complete provisions of documents. Finally there were very significantly fines for antitrust infringement.

Albeit the problems mentioned above, the previous law on competition provided the basis for the creation of the first competition authority. Although it was not an independent body, it was the first administrative institution that dealt with competition issues. For a long period of time it was structured as a sector within the Ministry of Economic Cooperation and Trade and afterward, it was part of the department of Consumer and Competition Protection, and only after the Council of Minister Decision No. 135 2002, the Competition Sector was transformed into a Department. Result of this separation was the strength of the work in the field of competition. The Department carried out, the government program for the year 2002-2005, and the whole work for the preparation of the SAP.

It is obvious that the level of competition culture and advocacy in Albania went along with the economic development of the country during the last years. The progress was slow on this field, due to the high percentage of informal economy and long ongoing privatization process.

² See Article 4 of the Law on Competition 8044, dated 7/12.1995

II.2 Competition provisions of draft SAA

The adoption of European principles and standards in the area of internal market is one of prerogatives under the SAP. Competition policy/law remains one of the important areas that need to be regulated, once the trade is liberalized not only within the country, but also among the partners in this agreement (SAA).

Articles 70, 71 and 72³ of the draft SAA contain the requirements for competition protection in Albania. One the requirement deriving from these articles is the approximation of Albanian legislations with European *acquis* on competition⁴. Moreover Albania will ensure proper implementation of these legislations. The adoption of *acquis* will start on the date of signing of Agreement and will be gradually extended to all elements of *acquis* on competition by the end of a given transition period⁵. The first part of the implementation of the agreement will require the approximation of Albanian legislations in the fields like internal market, intellectual property, competition etc, and during the second phase, Albania will be focused on other part of *acquis*. The approximation of legislation will be realized on the basis of the programs agreed between Albania and the European Community.

The first step is already committed by Albania with the introduction of the new law on competition, which is modern one, and in full compliance with EU standards in this area. However the new law needs further acts, in order to be fully operative and appropriate for the protection of competition in Albania.

Article 71 of the draft SAA covers the rules on prohibition of certain types of agreements that impede competition between the community and Albania. The conditions contained in this article are based on the rules foreseen in articles 81 and 82 of the EC Treaty and they are transposed on the new law on competition.

Regarding the practices contrary to the above mentioned articles the draft SAA requires that parties behave on the bases of the criteria that are included in articles 81, 82, 86 and 87 of EC Treaty. The implementation of such instruments of protection will be realized upon the introduction of other legislative actions based on the language of new law on competition.

³ See Annex 1 for the full text of the articles

⁴ See the text of the articles of the Albanian law on competition attached to Annex 1

⁵ Article 6 paragraph I of draft SAA stipulates that: "The Association shall be implemented progressively and shall be fully realized over a transitional period of a maximum ten years divided into two successive stages. Moreover in paragraph III it is stated that: In the field of legal approximation and law enforcement, the aim will be for Albania to concentrate during this phase on the fundamental elements, with specific benchmarks of the *acquis* as described under Title VI of this Agreement.

II.3 The new Law on Protection of Competition

The new Albanian law on competition⁶ is divided in seven parts dealing with definitions and concepts of competition, unfair practices, as well as, the establishment of the independent Authority, responsible for such practices.

In the first part called “General Provisions”; the law covers the aim, field of implementation and some important definitions related to competition. The law seeks to protect fair competition in Albanian territory and it will be applicable for all types of undertakings and their joint ventures, which have impact on the market, distort and impede competition, even in the cases when such actions take place outside Albania. In contrary to the previous law, the actual one is applicable for all sectors without any exceptions. The definition of undertaking is given in article 3 of the law and it defines that “*any juridical or natural person that is involved in economic activities shall be considered as an undertaking for the purposes of the law*”, meaning that state authorities, central and local ones, NGOs, will be subject of this law when they are involved in economic operations.

The second part of the law deals with prohibition of competition. As in European Competition legislations, the pillars of this part of law are agreements with heavy consequences in the market (cartel agreement), abuse of dominant position and concentration. Article 4 of the law emphasizes that shall be prohibited those horizontal and vertical agreements which prevent, restrict and distort competition.

Articles 5 and 6 lay down the cases when the provisions of article 4 are inapplicable. The only exception is made for agreements that fix price or limit the territory. These are considering as Cartel agreements with very negative impact on competition (Hard Core Cartels). The language of articles 4, 5 and 6 is word by word similar with article 81 of the EC Treaty and respective EC regulations⁷. (Annex 1)

The license agreements usually have less restrictive effect than the vertical and horizontal agreements thus for, the exceptions from their prohibitions are formulated differently. The agreements under articles 5 and 6 can be qualified under the exceptions only with the decision issued by the Competition Authority⁸, while the exceptions for the licenses agreements can have effect automatically, unless the Authority decides differently within a period of three months. The Guideline for the implementation of

⁶ The Law No 9121 dated 28/07/2003 “On the protection of competition”

⁷ See for example Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted parties.

⁸ The exceptions are based on the criteria determined by the EC legislations such as economic efficiency, fair share to consumers, less restrictive effects on competition.

Articles 5 and 6 (vertical and horizontal agreements) will be drafted in the upcoming months⁹.

An important issue regulated by this law is the dominant position of an undertaking. By contrast of the previous law, articles 8 and 9 of the existing law do not prohibit the dominant position of an undertaking, but only the abuse of dominant position. According to these articles, the undertaking that have already gain the dominate position can not be punished, until it has a negative impact on other firms and on consumers¹⁰. The law established also the criteria for the evaluation of dominant position and the criteria for the abuse of dominant position. The criteria for the identification of the abuse of dominant position are identical with the criteria laid down in article 82 of the Treaty of Rome. (see Annex 1)

Chapter three of the second part the law (Articles 10-17) deals with the concentrated practices. The provisions include the rule on prohibition of this anti competition practice in the market and they prohibit the concentration of undertakings that strength their dominant position in the market, or prohibit the competition for a long period of time. There exist another way of declaring turn over and, when they overcome the normal value; the undertakings can ask the Authority for merger. As it was promised by the Albanian document in their progress report to the European Commission, the concentration practice is now better regulated by a new Regulation “For applying concentration procedures of undertakings” and Guideline “On the notification form of concentration and for the opportunity of a simplified notification”¹¹.

Civil proceeding is included in the fourth part of the law. Under these provisions undertakings and other interested parties can go directly to the court and bring a claim for the prohibition, abuse and restriction of competition under articles 4 or 9 of the law on competition, and they can ask for restitution of the damages, or for unlawful compensation. Civil proceeding in the court can start regardless the proceeding under the CA authority¹². Civil procedures need to be distinguished from the right of appeal for a decision taken by CA. The decisions taken by the CA can be appealed in the Tirana District Court¹³.

⁹ The draft guidelines will be drafted and approved by the end of this year under the CARDS program 2002

¹⁰ The definition of dominant position is given in Article 3 of the law on competition and it reads the same as the definition given by the European Court of Justice in *United Brands versus EC Commission*, Case 27/76, E.C.R. 207. According to the article the dominant position is the position of one or more undertakings which enables them to behave on the market to an appreciable extent independently of its competitor's costumers and consumers.

¹¹ See Regulation of the Commission of Competition Authority “For applying concentration procedures of undertakings” based on articles 24 dh and 84, letter c of law on competition and Guideline “On the notification form of a concentration and for the opportunity of simplified notification”, based on articles 24 letter dh and 53 point 3 of the law on competition.

¹² See articles 65 to 68 of the law on competition.

¹³ See article 40 of the law on competition

The fifth part of the law discusses the formal cooperation between the CA on one side and public administration, courts, and other responsible institutions on the other side, in order to fulfill the proper implementation of the law.

The sixth part of the law covers fines and the procedures that need to be followed by the CA when it conducts such sanctions. This part of the law is completed by the new regulation of Commission of the CA “On Fines and Leniency” based on Article 24, letter dh, and 84 letter ç, of the law on competition. In contrary to the previous law the existing one together with new regulation stipulates a different formula for the calculation of fines explained more specifically in the new regulation. The sanctions are categorized in two main groups; the first one deals with fines for procedural infringements, and the second one deals with more heavy infringements; like abuse of dominate position, cartel agreements etc. The new law allows the entire or partial exemption from the fines, in cases when an undertaking cooperates with the CA for finding out the cartel agreement. The law embraces these new concepts from the European Community practices.

The last part (part seven) covers the final provisions and gives to the old Directory of Competition the duty to deal with concentrations that will take place within one month from the date of entering into force of the new law.

II.4 Institutional Framework

The Competition Authority is an independent structure that is made up by the *Competition Commission* and as a decision making body and *Secretariat* as an executive body¹⁴. In order to reassure the independence of the Authority, the Commission is composed by five members elected by the Parliament for a period of 5 years. In compliance with the third part of the law on competition, by February 2004 the Albanian Parliament concluded the procedures for the election of Commissioners. Moreover in order to complete and implement the new law, a regulation “On the organization and functioning of the Authority” is approved by the Competition Commission with the Decision No.2 dated 17.03.2004¹⁵.

To the Commission of the CA has been given very important tasks and responsibilities, necessary for a proper implementation of the law and for the

¹⁴ Part three of the law on competition deals with the organization of Competition Authority and the Administrative Procedures.

¹⁵ The regulation aims to define the function rules of Competition Authority, duties, responsibilities and procedures for their implementation. It establishes the cooperation between the two structures within the Authority. It serves as an organization charter for the Authority.

establishment of the competition culture in Albania. Among the most specific duties we can mention¹⁶:

- Drafting of national competition policy
- Issuing regulations and guidelines for the implementation of the law
- Giving opinion for the issues relating with the competition upon the request of commissions in the parliament
- Taking decisions based on the Competition law
- Giving authorization for the depth investigation of anti competition practices

The Secretariat is another unit within the Authority framework. The Secretariat is composed of four departments:

- Department of Risk and Market Analysis
- Department of Juridical issues
- Department of Investigations
- Department of Administration and Human Resources

Under article 28 of the law on competition, the Secretariat is responsible for monitoring, analyzing market conditions and for the creation of competition environment. The Secretariat conducts investigations based on the procedures of Administrative Code and represents its finding to the Commission. It monitors the implementation of Commission decisions and makes them public. The Secretariat can start an investigation on its initiative and upon the request of interested parties¹⁷.

CA has the duty to make an assessment of the existing laws on the field of competition starting from the date of entering into force of the SAA¹⁸. This assessment will be particular importance, in order to comply with obligations, stated in article 72 of draft SAA. Moreover the law specifies that CA with his initiative, or with the requirement by the parliament, can conduct investigation in main economic sectors in Albania¹⁹

The transparency on the information provided for CA remains one of the most important requirements of the law. The lack of cooperation can be punished with progressive fines. The public authorities are subjects to such requirements too.

¹⁶ See article 24 of the competition law

¹⁷ See article 42 of the law on competition.

¹⁸ See article 82 of law on competition that gives the power to the CA to evaluate the existing law on competition from the date of entering into force of this law. The assessment will take place in two years, and afterwards, the CA will prepare a report for the problems faced on the implementation of this acts that distort competition, accompanied with proposals for amendments.

¹⁹ Article 41 of the law on competition stipulates that the CA with its initiative or with the request of Parliament and other institutions can conduct investigations for all the sectors of the economy if the price fixing or other circumstances restrict the competition in the market.

In order to secure the transparency for public opinion, the CA should publish the starting of the investigation on his official gazette as well as, publishing its decisions for exemption cases upon the request of undertakings. The CA can also take precautionary measures in order to protect public interests and not the interests of particular undertaking in the market.

II.5 Competition Advocacy and Competition Culture in Albania

The competent authority responsible for competition advocacy in Albania is the CA, which has a major role in the process of designing public policies, or giving recommendations with the purpose of developing reforms and opening market in Albania. In order to successfully fulfill the mission of implementing competition policy in all economic sectors, it is very important that CA has an active attitude with different participants, including business community, state and private institutions, which directly or indirectly influence the normal function of the market. Moreover CA must be involved in dialogue with different actors which have big influence on the market economy. Based also on the importance that the strategic sectors play in the economic development of the country, the CA should seek to enter in formal agreement with regulatory entities for competition aspects of privatization process. The normative acts which are under the CA estimation includes inter alia:

- Quantitative restrictions concerning trading and market access
- Establishment of exclusive rights or special rights in certain zones, for certain undertaking or products
- Imposing inform practices in prices and selling conditions.

The CA has the obligation to estimate the level of restriction, or prevention of competition which such draft normative acts might create. The role of CA is not sufficient for the promotion of competition in Albania. It is particularly identified that general public, business community and policy makers would likely support the work of CA and help to advocate pro competition refinements to regulatory regime. Further more there would be effective pro competitive reform and policy makers would regularly and seriously consult with CA on how to further such reforms. Business instead of asking for protection from competition, they should compete more vigorously, should take risks and innovate more and should comply more with the competition rule.

Judicial review is another indispensable element for competition protection. It is important that such requirement is already sanctioned by the new law on competition, but this requires training for the proper implementation of this law.

II.6 Obstacles for the establishment of a competition policy in Albania

An effective competition policy is an indispensable element for the efficient activity of the market economy and in the now days reforms under the SAP. Being aware of the importance of this policy, the Albanian government has committed itself in many reforms necessary to protect free market economy and to be in line with the European standards.

During these years, starting from 1995 and up to now, there have been identified a number of reasons that justify the vague practice of competition in Albania. The very specific weakness included:

1. lack of appropriate legal framework
2. lack of an independent institution
3. lack of sufficient and qualified staff
4. lack of financial resources in conducting survey for market data collection
5. high percentage of informal economic sectors
6. political implication
7. lack of competition culture

It is obvious that some of these problems still remain, although the legal and institutional frameworks have been tremendously improved. The advantages of the new law and new Authority are described in details above.

The lack of sufficient and qualified staff still remains a problem. Although the 5 commissioners of CA are elected the executive staff is not completed yet. The European projects under CARDS are still in process of implementation for increasing the capacity building in this area.

According to the statistics, the informal sector in Albania is about 30% of the economy. Many debates raise the concern that the figure is higher as such, and its repercussion in competition enforcement is worthy to be considered. Informal economy raises serious competition problems such as unfair competitive advantages; distrust in the operation of the market and market institutions; limitation of the efficiency of the competition office's work (e.g. by making market definition difficult or impossible because market data are completely unreliable). Further, the informal economy can foster corruption hamper innovation distorts market and reduces growth and development. The informal market has manifested its negative impacts also to the formal sector. The old competition department has got limited access to the information of this market. Several unfair competitions, related complaints due to the activities in the informal sector, had been submitted to the old Competition Department. Thus for; it will be to a certain importance that the new Authority takes necessary investigations for this sector of the economy.

As a small country in transition, one of the main challenges for the CA is also related to small population. There are few main businesses and so the explicit collusion is easier to hide and the tacit collusion is easier to occur. Furthermore, the links between political and business classes may favor such unfair practices.

Another challenge for the competition structure has been and continued to be other institutions' awareness and their adjustment with the competition rules. When the new law was adopted it took a long time for all the institutions to be aware of and to comply with the competition rules. The government institutions or non government based institutions sometimes had taken actions that undermine competition, in particular with regard to regulatory procurement, strategic sectors of privatization policies. There has been not a legal-based cooperation among regulatory entities and the old competition department.

III. Liberalization and privatization of utilities and undertakings in Albania

The Albanian Government policy on privatization was first launched with the law "On the Privatization on the Sector of Particular Importance"²⁰. According to this law, are defined as strategic, sectors such as: energy, petrol, insurance, telecommunication, water, banking etc. The privatization of the abovementioned sectors is an ongoing process and the Albanian Government is responsible for drafting and implementing the annual strategy for privatization. During these years the Albanian government has been concerned for the following main issues:

- Further liberalization of the economy in the strategic sectors that are still state monopolies
- Implementation of privatization program
- Improvement of institutional activities and the role of regulatory market entities
- Implementation of transparent and competitive privatization process

The implications from the competitive perspective, during the privatization were left aside till the introduction of the new law. Below together with a summary of the privatization stages of the main economic sectors are also some of the last CA recommendations and decisions given to regulatory entities for competition implication arising from this process.

III.1 Electro-energetic sector

The Albanian Government has prepared a gradual privatization of the electro-energetic sector, in which electric distribution would be privatized first, followed by generation facilities and finally transmission. The initial privatization would begin with

²⁰ Law no 8306 date, 14 march 1998 " On the Privatization of the Sectors of Particular Importance

the sale of the electricity distribution division (KESH) (Albania Energy Cooperation) and this was foreseen for the year 2003. The date is postponed for the following years. The Albanian Government will implement such strategy by the reconstruction of the company (KESH) by creating so special companies that will carry out the KESH activities. This measure together with other measures such as: organization of Transmission Company and starting up of the privatization of distribution sector of energy will be implemented in the upcoming years. The scheme of KESH reconstruction is already approved. Moreover during this year will continue the organization of Company of Transmission of Energy in the framework of regional project for the organization and operational reconstruction of the independent operator of energy transmission.

III.2 Telecommunication sector

In the telecommunication sector the only state-owned operators is Alb Telecom which has a commercialized form and its privatization was first scheduled to be completed by the end of 2001. The process is postponed and right now the respective institutions are preparing the legal framework for the privatization process. To this operator has been given by the Government the exclusive right to provide till the end of 2002 fixed telephony calls in urban areas, as well as, national and international call services. Consequently until now Alb telecom exercises a legal monopoly in the fixed telephony market.

In the year 2001 the Albanian government drafted the document “Government Policy document for Telecommunications Development in the Republic of Albania, which was delivered for comments to various Ministries. The document provided inter alia that the Alb Telecom by the end of privatization will hold a license to provide GSM cellular mobile radio services. The proposal of the government turned to be not in compliance with competition law and with article 49 of law No.8618 dated 14.06.2002 “On telecommunication in the Republic of Albania. The article provides that the individual license shall be awarded only to the winners of an open international tender and the body entitled to issue these licenses is the Albanian Telecommunications Regulatory Entity (TRE). Awarding a GSM license without a tender was an open violation of the above mentioned law and a violation of competition rules. A deformation of competition in the mobile market due to enormous advantage of Alb Telecom mobile as third operator can be considered because of its dominant position in the fixed telephony market even after the privatization process. However the new law establishes new requirement for the dominant position which remains to be evaluated when the third mobile operator will start working.

The new CA was involved for the first time on giving opinion for measures taken by TRE. As mentioned above the actual law on competition gives to the CA the tasks to protect competition from the market behavior prospective. As regard to other functions related to sectors of public interests and the creation of competition environment, the

Albanian legislation gives this duty to regulatory entities. In most of the cases their duties interweave, in particular in the cases of entering into the market of an undertaking, price fixing, the promotion of a competition environment, etc.

However recently the CA was involved on giving an opinion for a draft agreement on interconnection tariffs issued by the TRE, based on Article 70/2 of the law on competition. Article 70 gives to the CA the possibility to give recommendations for barriers on economic and administrative regulation. The draft Agreement proposed by the (TRE) establishes tariffs for intercession that will give access to the existing and potential operators to the net. The CA appreciates the initiative of TRE regarding the draft agreement on Interconnection Tariffs as a positive step towards competition and the possibility for access to the market of existing and potential operators.

The criteria to be followed for the establishment of such tariffs are laid down in articles 42 and 60 of law On the Telecommunication in the Republic of Albania²¹. TRE is using the benchmarking methods for the establishment of the tariffs by making references to other countries experience. In this context, the CA is concerned first of all, on the methodology that needs to be drafted by TRE. The methodology needs to be based on the Albanian data gathered by TRE, which is responsible for justification of every change in the interconnection tariffs. According to the Authority benchmarking is not the proper method to be followed in such situation. Moreover the Authority recommended also that the prohibition of exclusive right on transition of international calls through Alb telecom will have a better impact on competition of telecommunication services.

III.3. Financial sectors

Bank system

The Bank of Albania has prepared a document for the promotion and protection of competition in banking system in Albania. According to that, the pro competition policies are main elements to promote the efforts for reform in financial system in Albania. Pro-competition policy is a broad concept which includes aspect of regulatory reforms, reduction or abolition of monopoly and privatization, requiring interruption of harmful practices which are as a consequence pro non-competitive actions, defending financial subject's rights and their client's rights. As regard to this sector the CA is going to work with Bank of Albania for implementing a detailed plan on introducing competition in this sector and more concretely in: privatization process, privatization of State Institute, promotion of the saving credit schemes, expansion of the country banking

²¹ The criteria determine that, in particular, for the operators with potential influence in the market the tariffs shall be established towards appropriate costs that allow proper incomes; non containing reductions that impede the possibilities of competitive operators in the market; not being discriminatory and guarantee equal treatment

network, strengthening the supervision systems and rules of the banking system, establishment of Agency for Deposit Guarantees, the general improvement and completion of the legal and institution framework for the development of capital market etc²².

The privatization of Saving Bank of Albanian was considered an important step toward the liberalization of this sector. The privatization of Saving Bank was completed by the year 2003 and its shares were transferred to an Austrian Bank, Raiffeisen Zentral Bank.

The CA has analyzed the notification of the Saving Bank acquisition by the Raiffeisen Zentral Bank. The CA has made a proper investigation on the data provided by the concerned parties in the concentration, in order to define the effect of this concentration in the Albanian banking market. Under the Order no 11 date 07.2004 the CA authorized the concentration, because it argued that the acquisition which transfers the ownership from the Saving Bank to Raiffeisen Zentral Bank does constitute a concentration that is not anticompetitive. Raiffeisen Bank has not economic operation in Albania, thus for the concentration can not be anticompetitive by creating or strengthening the dominant position in the market in the light of article 13 of the law on competition.

Insurance Sector

Insurance sector is one the important sectors subject of rapid reforms on its privatization. The Albanian Government has drafted two important laws necessary for the reforms in insurance market: “For the insurance, re-insurance and interconnection action”, and “For the functioning of insurance monitoring Authority”. The state insurance company INSIG is one of the biggest companies in the market and it is now going under the privatization process. The first phase of its privatization was completed by the end July 2004, when the 39% of stock was transferred to IFC and EBRD. The rest of the stocks will be given to the strategic investor and the full privatization of the company will finished by the year 2006.

Upon the request of the Council of Ministers, the CA has recently carried out an economic and legal assessment on the level of restriction of competition, arising from a Council of Minister draft decision, authorizing State Entities to insure vehicles nearby the state owned company INSIG. The Authority after taking the proper investigation concluded that there is no concern from the competition view point, since it does not result in a distortion of the insurance market. It should be stressed that the CA had a very good collaboration with Insurance Supervisory Commission, Department of Road Administration and INSTAT for finding the necessary data on the development of the insurance market for the years 2002-2003.

²² See for a detailed list of Albania government plan for financial sector : “Competition law and policy in SEE”, in SEE Compact for reform, investment, integrity and growth, Stability Pact/OECD , April 2003

III. 4. Other sectors

The petrol companies are under the process of privatization as well. For Armo Company, Albpetrol and Servcom the Memorandum of Information will be adopted. The legal framework of their privatizations and sales will be issued within the year 2004.

The Competition Authority was recently involved in the evaluation of price petrol in Albania. Based on article 24, point f²³ of the law on competition the Commission of CA is obliged to give recommendations and evaluations to juridical and natural persons related to competition. Thus for the CA delivered its opinion for price increasing of petrol in Albania. The Authority found out that Armo Company, which is state owned company calculates the oil price on periodic basis²⁴, according to the situation both in international and domestic market, thus playing a kind of regulatory role in the domestic market. Moreover taking into consideration the data published by media, a clear tendency is observed between oil importing companies for reaching agreement for price fixing and division of markets. This kind of practice constitutes a violation of Article 4 points a and b of the law on competition, which prohibits the cartel agreements. The CA considers the undertaking of such illegal practices as a very serious violation of competition, bringing other negative effects, not only in the oil market, but also on fiscal evasion, unfair increasing of the consumer living cost etc. Among different recommendations given to the MoE and other responsible institutional bodies, the CA, in order to protect competition and consumer interests, advised for review and further completion of the legal framework regarding importing and trading of oil, gas and their sub products, towards introduction of economic and fiscal incentives for the use of the alternative energy sources, by domestic consumers and the industry in general.

²³ Paragraph f of Article 24 of the law on competition defines that the Commission of the Competition Authority is responsible for giving recommendations and opinions to local and central governmental bodies, other public institutions, companies, and industrial sectors for issues related to competition

²⁴ Based on the information of different public institutions it results that the reference price for oil products is calculated daily, by taking into accounts the prices in international stock exchange market.

V. State Aid

State aid is another important issue that remains on the priorities of draft SAA. Together with competition policy, the establishment of fair trade in Albania in the context of market economy will be realized also after the approval of a proper legal framework on State aid and the creation of the institutional capacity, for the implementation of the law. In the article 71 of the draft SAA, are foreseen the legal obligations of Albania in the field of State aid. According to the paragraph I (3) of this article, any State aid that distort or threaten to distort the competition by favoring certain undertakings or certain products, will be incompatibility with the draft agreement. The second paragraph envisages that every practice in contrary with the first paragraph, will be dealt based on Community legislations in this area and especially based on article 81, 82, 86, and 87 of the Treaty of Rome.

V.1 State Aids Practices in Albania

The short period of Albanian transition from a central to a market economy has changed some how the role of the state in this process. The state is playing the role of facilitator and harmonizer of the economic activities, contrary to its practice of ownership position.

During this period the public sector has the priority of the state interventions and protection where the State aid is more focused on the problem solving of the society.

The number of the cases when the private sector is favored by the state is limited. The typical aid situation for private sector is the giving for rent of land and other objects with prices lower than those in the market. This relationship is based on some by laws that try to give priority to the development of the companies in Albania, in order to increase the economic data of the country.

The Decision No. 315, dated 24.04.2003 of the Council of Ministers, “For renting of state enterprises, institution” gives the procedures for renting state properties. This decision has some elements of State aid. For example, the price of the rent is lower than this one on the market, or it is fixed, based on the level of the development of a certain area, or it can be reduced in the cases when the company increases the number of employment. The same criteria are used when the value of investment is increased from a given company. It should be emphasized that the state has its own benefits by conducting this kind of policy. It raises its revenues from the rents of unused areas, but also it fulfils its goals such as the development of investment, employment etc.

The actual legal framework in Albania has created the proper climate for the support of certain economic zones. Thus for the law No. 7665, dated 21.01.1993 “For the

development of tourism zones”, in paragraph 6 foresees supports from the state in terms of exemption from the axis taxis, or custom taxis, for persons involved in economic activities in this areas. Moreover the law No 8987 dated 24.12.2002 “For facilitating condition for the building other sources of supply power”, excludes the companies involved in this activity from different taxes.

V.2 State Aid provisions under draft SAA

The above mentioned cases are only few examples of State aid practices in Albania. The lack of legislation and administrative capacity in this area makes it difficult the development of this concept in Albania.

As the first priority of the Albanian Government in the light of SAA is the drafting of a new law for State aid in Albania. The legal framework designed for this purpose will reflect the European principles in this field; it will institutionalize the relationship between governmental structures and other interested parties in every stage of State aid providing. In this context the legislation on State aid will describe also in details the procedures for notifications, approvals, and controls of state aids as well as the methodology of their classification upon the European criteria. In meanwhile the legal framework for the establishment of competent authority for the evaluation of State aid scheme will be drafted by giving though the tasks and responsibilities of this authority.

In order to make the proper assessment for the draft law on State aid, the DSA is carrying out different investigation for finding the state aid schemes already in force in Albania and the categorization of the schemes upon the European standards. Such a draft scheme needs to be done in a period of one year. Meanwhile the work has already started with line Ministries like; Ministry of Agriculture, Energy, Transport because the State aid schemes are used on the above mentioned sectors in the form of grants, tax exemption, lower prices etc.

Moreover the agreement defines that within a period of time which needs to be agreed between the parties, every public aid given by the Albania Government will be evaluated based on a facts that Albania will consider as a same as those contained in article 87 paragraph 3 (a) of EC Treaty. The Albanian Government will represent to the European Commission the PPB indicators calculated based on NUTS II level.

An independent Authority will be established for monitoring and implementing the state aid law in Albania. Right now within the MoE, DSA is involved in fulfilling all the obligations deriving from the SAP. The Directorate is established under the Order of the Prime Minister No.79 dated 26.03.2004. The Directorate is made up by two important sectors:

1. The economic –financial assessment sector
2. The legislative assessment sector.

The Directorate will function during the transition period till the establishment of the independent Authority.

VI. Recommendations for the future

Both competition and state aid remain quite new fields that need to be developed and improved in Albania. The snapshot of the current situation shows some progresses done in the light of the establishment of a market economy and within the SAP.

As a main short recommendation remains the establishment of the legal framework for state aid. In order to facilitate the implementation of the new law on competition, the CA needs to adopt a number of regulations, and to adopt guidelines for different parts of the existing law. Above all the CA must give the priority to the drafting of the National Plan on Competition, which is supposed to be delivered by the year 2006. The drafting of the national scheme for State aid and the evaluation of the existing one should be considered as one of the top priorities of the DSA in Albania.

The identification of aquis in the field of competition and State aid, with translation and explanation in Albanian language, would be a very helpful element for the future work of the Authorities and for the obligation of compliance with European legislations in the area. Such a document is already done from the Department of State Aid.

The CA needs to be strengthened, by recruiting qualified people. The training process will help the CA's staff members to better work with the new law. The same holds true for the DSA, which will carry out the reforms for this area until an independent Authority will be created in a period of 4 years suggested by Albania to the EU negotiators. Moreover it is important to ensure that CA and DSA are able to carry out and implement their duties without the influence of government and other stakeholders.

One of the important elements is the establishment of a competition advocacy and competition culture in Albania. As a short and long term prerogative is the interrelation of effective measures taken by the CA with other administrative bodies and the courts. It is necessary also the development of strategies and studies for enhanced understanding of

the benefits of competition among main stakeholders, including here, business community, general public and politicians. The business community and general public would better embrace the long term benefits of competition even if this involves short term sacrifices.

In order to have a fair competition environment the intervention of CA in informal economic sectors and in the privatization of important sectors is needed. The role of CA is determinant in designing the privatization schemes in order to find out solutions that minimize the restraints of competition and facilitate new entry after a limited period of time.

As a prerogative of the future remains the responsibility of CA to periodically and systematically analyse the distortion of competition in main economic sectors in Albania and to propose concrete steps for elimination of effects deriving from the distortion of competition.

The creation of a pro-market legislation that include a large number of legislative areas e.g. commercial law, standardizations, intellectual property law, contract law, property law is determinant among other factors for the proper implementation of competition law and for the establishment of competition environment. Competition and State aid should be seen as constructive components of the market mechanism provided by such regulations.

Round tables and debates concerning the anticompetitive practices and state aid schemes should be held by both authorities and a special attention should be given to business opinions and participations of other stake holders in these areas.

A bilateral cooperation with other regional and international organisms in these fields must be considered as an important element for the further improvement of Authority's work.

Annex 1

Article 70 of draft SAA

Approximation of the laws, law enforcement and competition rules

1. The parties recognize the importance of the approximation of the Albanian's existing legislation to that of the Community and of its effective implementation. Albania shall endeavor to ensure that its existing laws and future legislation will be gradually made compatible with community acquis. Albania will ensure that the existing and future legislation will be properly implemented and enforced.
2. This approximation will start on the date of signing of the Agreement, and will gradually extended to all elements of the Community acquis, referred to in this Agreement by the end of the transition period defined in Article 6 of this Agreement.
3. During the first stage defined in the Article 6 of this Agreement, approximation will focus on fundamental elements of internal Market acquis, as well as on the other important areas such as competition, intellectual property, and commercial property rights, public procurement, standards and certification financial services, land and maritime transport-with special emphasis on safety, and environmental standards as well as social aspects- company law, accounting, consumer protection, data protection, health and safety at work and equal opportunities. During the second stage, Albania will focus of the remaining parts of the acquis.

Approximation will be carried out on the basis of a program to be agreed between the Commission of the European Communities and Albania.

4. Albania shall also define, in agreement with the Commission of the European Communities, the modalities for the monitoring of the implementation of the approximation of legislation and law enforcement actions to be taken.

Article 71 of draft SAA

Competition and other economic provision

1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Albania:

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

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

(iii) any State aid which distorts or threatens to distort competition by favoring certain undertakings or certain products.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community and interpretative instruments adopted by the Community institutions.

3. The Parties shall ensure that an operationally independent public body is entrusted with the powers necessary for full application of paragraph 1(i) and (ii) of this Article, regarding private, public undertakings and undertakings to which special rights have been granted.

4. Albania shall establish an operationally independent Authority which is requested with the power necessary for the full application of paragraph 1 (iii) of this Article within (...years) from the date of entering into force of this Agreement. This Authority shall have, inter alia, the powers to authorize State aid schemes and individual aid granted in conformity with paragraph 2 of this Article, as well as the powers to order the recovery of State aid that has been unlawfully granted.

5. Each party shall ensure transparency in the areas of State aid, inter alia, by providing to the other Party a regular annual report, or equivalent, following the methodology and the presentation of the Community survey on State aid. Upon the request by one Party, the other Party shall provide information on particular individual cases of public aid.

6. Albania shall establish a comprehensive inventory of State aid schemes instituted before the establishment of the authority referred to in paragraph 4 and shall align such aid scheme with the criteria referred to in paragraph 2 of this Article within the period of no more than (...years) from the entry into force of this agreement.

7. (a) For the purposes of applying the provisions of paragraph 1(iii) Parties recognize that during the (first ...year) after the entry into force of this Agreement, any public aid granted by Albania shall be assessed taking into account the fact that Albania shall be regarded as an area identical to those areas of the Community described in Article 87 (3) (a) of the Treaty establishing the European Community.

(b) Within (...years) from the entry into force of this Agreement, Albania shall submitted to the Commission of the European Community its GDP per capita figures harmonized at NUTSII level. The authority refereed to in paragraph 4 and the Commission of the European Communities shall than jointly evaluate the eligibility of the region of Albania as well as the maximum aid intensities in relation thereto in order to draw up the regional aid map on the basis of the relevant Community guidelines

8. With regard to products refereed to in Chapter II of Title IV;

paragraph 1(iii) shall not apply;

any practices contrary to paragraph 1(i) shall be assessed according to the criteria established by the Community on the basis of Article 36 and 37 of Treaty establishing the European Community and specific Community instruments adopted on this basis.

9. If one of the Parties considers that a particular practice is incompatible with the terms of paragraph 1 of this Article, it may take appropriate measures after consultation within the Stabilization and Association Council or after thirty working days following referral for such consultation

Nothing in this Agreement shall prejudice or affect in any way the taking, by either party, of antidumping or countervailing measures in accordance with the relevant Articles of GATT 1994 and WTO Agreement on Subsidies and Countervailing Measures.

Article 4 of Law on Protection of Competition (No.9121, dated 28.07.2003)

1. The following shall be prohibited as incompatible with this law: all the agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition, in particular those which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to paragraph 1 of this Article and not prohibited under article 5 and 6 shall be automatically void.

Article 5 of Law on Protection of Competition (No.9121, dated 28.07.2003)

The prohibition of horizontal agreement

1. Horizontal agreement, in particular those which have as their object or effect the rationalization and specialization of economic activities, research and development of production and processing of production, distribution of goods from and to one single source, shall be avoid from the prohibition of Article 4 for the economic efficiency.
2. The agreements qualified under the efficiency test must fulfill the below motioned conditions:
- a) The reduction of production and distribution costs, improving the production efficiency, improving the production and distribution of production, promoting technical and economic progress, promoting the development of SME s, the result that can not be achieved otherwise:
 - b) Afford to consumer fair share of the resulting the benefit
 - c) Afford to undertakings the possibility of eliminating competition in respect of substantial part of the products in question

Article 6 of Law on Protection of Competition (No.9121, dated 28.07.2003)

Prohibition of vertical agreements

1. The vertical agreement can be void from the prohibition of article 4 of this law for their economic efficiency, in particular when their have their object or as effect:
- a) the restriction of active sales into exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such restriction does not limit sales by the customer of the buyer,
 - b) the restriction of sales to end users by a buyer operating at wholesale level of trade
 - c) the restriction of sale to unauthorized distributions by the members of selective distribution system, and

ç) the restriction of the buyer's ability to sell components supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by supplier;

The conditions laid down in Article 5 paragraph 2 are applicable also for the paragraph 1 of this article.

Article 9 of Law on Protection of Competition (No.9121, dated 28.07.2003)

The abuse of dominant position

Any abuse by one or more undertaking of a dominant position within the common market shall be prohibited:

Such abuse may in particular consist:

a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions:

b) limiting productions, markets or technical development to the prejudice of consumers

c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantages;

d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with subject of such contracts

dh) refusing to give licenses and trade permissions

e) refusing of the other undertaking to enter or to use in the infrastructure of the other undertaking, if this refusal impede the other undertaking to behave as competitive of the undertaking with dominant position.

Article 10 of Law on Protection of Competition (No.9121, dated 28.07.2003)

Contraction

1. A concentration shall be deemed to arise where:

a) two or more previously independent undertakings merge, or one or more persons already controlling at least one undertaking, or one or more undertakings

b) acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

c) the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity

2. The control under paragraph 1. letter “b” shall be constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

a) ownership or the right to use all or part of the assets of an undertaking;

b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

4. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned, or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving there from.

LIST OF ABBREVIATIONS

CA	Competition Authority
DSA	Directorate of State Aid
ERA	Energy Regulatory Agency
KESH	Albanian Energy Corporate
MoE	Ministry of Economy
SAA	Stabilization and Association Agreement
SAP	Stabilization and Association Process
TRE	Telecommunication Regulatory Entity

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