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Functionality of the Kosovo Competition Authority on the basis of European Union standards a guarantee for loyal economy in Kosovo

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Abstract

Legal regulation of market mechanisms and the implementation of economic policies for a fair competition in TEs is a challenging issue. The competition is a complex economic phenomenon that is manifested and characterized by the strength and content that gives to the market economy. In Kosovo specific economic entities, in one way or another, are tempted to gain as much buyers or markets and create much more profits. The problem is that this is not done in regular way. Such behavior and unfair actions are not only damaging the image of the country but is a serious threat the harmonious development of the national economy and the country's accession process to the EU. The parliament of Kosovo year ago established the Kosovo Competition Authority as an independent institution with special competences to control and fight this negative phenomenon. Based to official data it turns out that the effectiveness of this institution not only is incomplete but also non-functional. This is because of the “ignorance” and non-adequate treatment that is reserved for this authority by the parliamentary and governmental institutions. All this because the members are not elected based to regular procedures and not allocating the necessary financial means to operate. At least so far, to Kosovo Competition Authority was not allowed to hire professionals with clear competences to act and investigate the negative phenomenon of unfair competition. Certainly, this situation does not guarantee effective implementation of laws and quality protection of competition. Therefore, mobilization of parliamentary and governmental levels is to enhance professional capacities and increase their competence in scope of the investigation including cooperation with prosecutors and courts. These actions should be reconsidered with the aim of creating a competitive safe environment for all operators. To conclude, the loyal competition policies and legislative framework should be harmonized in forms and content with the policies and rules of the EU.

Key words: competition, competences, legislation, the regulatory authority, EU

1. Introduction

The Republic of Kosovo is a country with an economy open toward the international trade that was supposed to be characterized by dynamism and growth. During recent years the country has a macroeconomic stability with small economic growth. Despite this, these positive parameters are not sufficient for a dynamic economic development. A particular attention has been paid to the institutional changes including the establishment of regulatory mechanisms, adoption of a legal framework for competition, the establishment of institutions and development of policies that support markets. The institutional changes regarding the enterprises and businesses, in the legal, financial and social framework that support the market process and enterprises constitute the essence of the transition.

In this regard, the main challenges for today and in the future is the consolidation of a fully functioning market economy, able to withstand the competitive coercion and market forces by powerful commercial operators, both at the regional and global level. Soon the relevant state institutions will sign the Stabilization and Association Agreement with EU. These are proofs that in one hand reflect the progress that the country has made in the EU structures toward the consolidation of political and democratic institutions and toward and consolidated market economy and in other hand the willingness to making their respective obligations arising from this process. To enable a sustainable growth and faster integration into EU structures, the country needs a more advanced climate for businesses and strong and efficient governance. However, the situation may worsen if state intervention is not effective. Practice shows that solutions stand not only between imperfect markets and state intervention, but in many cases between imperfect markets and imperfect or incomplete interventions of the state. One of the mechanisms to be strengthened is the competition authority of the Republic of Kosovo¹. To the Governing Body of the Kosovo Competition Authority since November 2011 some members some members are missing. On the other hand the Commission for Protection of Competition, the body that runs the ACA, has received only a few decisions about the market from the time it was left with only three commissioners as part of the institution. The current members do not recognize the authority of each other and also almost all the members have secondary commitments out of the institution. Such institution not only is alarming but it puts into the risk that an institution like the Competition Authority of Kosovo became the institution for distorting the competition. This condition should be treated with urgency the made by the Assembly of Kosovo.

2. The competition and the economy in the Republic of Kosovo

After 1999, and especially after the declaration of independence in early 2007, the economy of our country, as never before, is facing with an extremely low dynamic development and integration of its markets. In addition, a disturbing situation is considered the appearance of various forms of unfair competition. These forms and the high level of uncertainty of doing business increasingly many are unclear reflect a state of economic hopelessness which urgently requires professional preventive treatment but also much more serious institutional commitment. With the unfair competition, which was no investigated, the markets more and more have been battered leaving different spaces for manipulations and abuses, damaging not only the operators and consumers but also country's economy. According to the publication of the Kosovo Businesses Alliance certain forms of "valorized" unfair competition with also the effects of the informal economy, which now has become "the principal employer" in the country, perhaps risk becoming problematic areas. There is no doubt that trade liberalization and the creation of opportunities for breakthroughs; increase productivity, protection of competition and its growth are just some of the important objectives for sustainable economic development of the state of Kosovo. The realization of these objectives imposes the need that the decision making institutions to create such economy policies adapted to an adequate legislation, that influence in

¹Kosovo Competition Commission was established by the Assembly of Kosovo date: 07 November, 2008, and based on the Competition Law no. 2004/36. Kosovo Competition Commission is an independent body and has responsibility and authority for law enforcement and promoting of competition among undertakers and protection of consumers in Kosovo. KCC is composed from five members, president of commission and four commissioners which are appointed from Assembly of Republic of Kosovo. For more see: <https://ak.rks-gov.net/?cid=1,1>

economy growth through a competition market in one side and on the other side eliminate the behaviors that damage the free market. Such policies will have multiple positive effects for the country's economy, businesses and especially to the consumers. According to Osmani (2005) the competition and its protection take a significant place in the economic policies of developed countries and for their importance they have a special treatment². Such importance is increased today in the global economic crisis time and its recession. To us the protection of competition from various abusive actions and the establishment of genuine market are state - institutions obligations that we have to ward ourselves and EU. The Kosovo's economy in consolidation and the transition process are creating spaces for such activities that damage the free competition. The Kosovo market is relatively small. Concentrations of commercial activities in the hands of a few actors occur more easily than in major markets and even these have a major impact on the final consumer. This imposes the need for proper functioning of the regulatory mechanisms of the market by the state. The significant areas where the violation of competition is present in: communication technology sector, transportation, insurance sector, energy, pharmaceuticals, media, procurement, import of oil, banking sector and other financial services and for this reason feels the need of inter-institutional cooperation, especially economic cooperation with regulators is more than necessary. Because of the need to adhere in EU, the Parliament of Kosovo has approved the Law on Competition since 2004, in 2009 have established the Kosovo Competition Commission in the quality of the regulatory agency that is independent and responsible for the execution of this law³. With these actions has been created a mechanism of institutionalization of competition policies in our country. The aim of this law is to insure a sustainable development of the market in the Republic of Kosovo, by preventing the actions that damage the market, distort and abuse with this law. Such disturbing actions can be caused by, cartels and other secret agreements, concentration of enterprises and abuse their dominant position. Free and fair competition in our market, can be implemented when every participant in the market "plays" a fair game by not damaging the other. The competition must not be misunderstood by doing what we want in the market, but it must contribute in increasing the quality of the services in favor of the costumers and in favor of our country in general. From the abovementioned we can conclude that the establishment of free competition, combating deviant phenomena in the market that is a major challenge that arises before the Kosovo Competition Commission and enforcement of the laws of the Republic of Kosovo, that the market economy and its laws are implemented and operating properly to generate investment, employment and prosperity for the citizens of Kosovo

³ Law on Protection of Competition 03/L-229 This law defines the rules and measures for protection of free and effective competition on the market, competencies, organization of the Authority for Protection of Competition as well as the procedures concerning implementation of this law. This law applies for all forms of prevention, limitation or abuse of the competition by the enterprises on the territory of the Republic of Kosovo, or outside the territory of Kosovo, if those actions have impacts in Kosovo. The Law on Protection of Competition provides a free competition supported by three pillars that determine the protection of the competition: the prohibited agreements in the form of cartels: the abuse with the dominant position and the Unions or concentrations of enterprises.

3. Development trends of competition policy in the European Union

The current characteristic of competition policy in the European Union, in the broad sense, deal with also the inclusion of other sectorial policies that are related to the competition (or rules that prevent the limitation of the competition) through the combination with the final aim to regulate and adapt efficiently the common market structure. This group of rules includes: assigning the control on the grants' right and special and exclusive prevention of state support. The European Commission, in close cooperation with national competition authorities of the Member States have established a European network of authorities responsible for protection of competition (European Competition Network), that insure the effective execution of the competition law of EU. The Regulation 1/2003 has been executed in full sense in the context of legal reform of the competition in European Union. This reform has been reflected in the approval of new rules for the execution of the article 81 and 82 of EC treaty, and the rules on controls and concentrations. This Regulation also provides the creation of parallel system competences where the national authorities for competition protection, in active collaboration with the European Commission will be responsible for the execution of European competition policies (http://ec.europa.eu/index_en.htm). The introduction of such rule that acts in the general interests of the Union has created conditions to effectively execute the disposition of the Regulation nr. 1/2003. The previous legal system (created with the Regulation 17/62), despite its deficiencies, has realized its mission, by reflecting an increased awareness of the culture and respect toward the EU competition rules. However, in the late stage of its development, the trend of this culture is treated and regulated in the actual right of the EU competition. In this point of view the tendencies are established for gradual transition process through the decentralization based to the article 81 and 82 of the Agreement of EU. The current reforms of the competition law of EU have reflected the enforcement of an economic approach on the basis of analysis that deal with the behavior of the enterprises in the market. Despite the transfer of responsibilities to national competition authorities responsible for protection of competition is combined with the role of national courts. In this point of view the function of European Commission has reserved the right to control and execute the article 81 and 82 of the Agreement (http://europa.eu/legislation_summaries/competition/firms/l26109_en.htm). In practice these cases can be divided in three manners:

1. Only a national body, usually only national competition authority has the mandate to receive complaints and to initiate a review procedure on regarding. This happens when the offense is committed within the territory of a certain state in the EU or the Member States. In this case, national authorities should implement national competition laws. However, the redistribution of jurisdiction is likely to be considered only in circumstances where a national competition authority of each Member State is competent to resolve the observed cases.

2. Parallel operations when more state bodies that operate at the same time, respectively when two or three national competition authorities are allowed to operate in certain cases where cartel agreements restrict the competition in their territories.
This phenomenon is known as cross-border effects (border effect). In such circumstances, the national authorities directly apply Article 81 and 82 of the EC Treaty. Separation of competencies with the increasing number of national authorities is allowed when it is estimated that a body can not prosecute the case until the end.
3. The European Commission – as a body is obligated to investigate the prohibited agreements that damage the competition of three or more members of EU. In its competences are also all cases which can positively affect the development of competition policy
(http://europa.eu/legislation_summaries/competition/firms/l26109_en.htm).

Another revolutionary step in EU is reflected this supranational organization has direct interests in supporting the certain companies. This policy is institutionalized with a special program in 2006 with a facilitating purpose which it refers only to those companies that are willing to cooperate in the investigation of illegal cartel agreement. These companies under this program gain a privileged position and therefore have the opportunity to take partial or full immunity (in case where is seen y that are part of the cartel or have been reported depending on the level of cooperation). Implementation of this program has not yet been harmonized across the EU. The program is a result of the reforms of the European competition law also influenced by the need for changes and priorities in EU competition policy. Today, the fight against cartels considered the most important goal of common policies (**Competition Policy in the European Union - http://ec.europa.eu/dgs/competition/index_en.htm**). The 2008 will be remembered as the year of the fight against cartels and consumer protection year. Due to unfavorable financial and economic situation and global crisis that has affected the operations of European companies, the annual report on competition policy for 2008 pays a special attention to rescue the companies and restructuring measures. In 2008, there were significant effects of increasing preventive penalties toward those companies that have entered repeatedly in cartel. The Commission has condemned the 34 companies since it has found that they have been a member of seven cartels and the penalties paid was 2,271 million euros. The Commission has been active in the area of state subsidies with the implementation of the Action Plan of the State Aid (State Aid Action Plan – SAAP), (http://europa.eu/legislation_summaries/competition/state_aid/l26115_en.htm) as well as the adoption of the correct field, which until recently has been legalized by judicial practices and positioned on top of competition policy. The undertaken reforms imposes the inclusion of precise and more stringent requirements for union members.

Commission for a relatively short period, made three Communications (called communications protocols) to regulate the role of state aid connected with the global crisis and the need for a process of recovery. The communication for state support rules and the measures related with the function of the financial institutions deal with the redefinition of the process to permit the

member states to implement the recapitalization of the bank in crisis time with the aim to stabilize the financial market.

1. Temporary Framework to ensure that members additional opportunities in order to overcome the crisis in the lending industry sector. In 2009 it was the EU and the rest of the world that were hit by severe financial crisis and economic. Therefore, the European Commission focus its efforts towards the stabilization of the financial system of the EU and took measures to prevent the occurrence of a possible crisis. Since continuation of the crisis the Commission has set two important objectives in the field of competition policy in the EU:
 - a) support and adopting emergency measures for financial and legal stability of the Member States in a shorter time frame
 - b) maintaining the stability and security of other member states of the EU by measures taken by some countries.

4. What should be the role and function of the Kosovo Competition Authority

The focus on what must be concentrated the work of Kosovo Competition Authority, as an independent public institution, is the effective implementation of the competition legal framework and advocacy in way to influence to the government and the public sector to execute pro-competition policies. Until now the Commission has started only some investigation procedures in sectors like: telephony sector, bank system and insurance companies. Of course, this is not even close to the market needs of the country in the sphere of regulation of competition. Therefore, the obligation of competition legislation implementation should be related with decision that must be basen in detailed and general studies of the market. Providing information compose the fundamental element for a healthy gudge and based decision making. By reviweing the relations with the courts (increasing the culture of the courts for the implementation of the competition legal framework). From the analysis for the activity of the Competition Authority we can conclude that the creation of contemporary legislation for the Competition, respectively the function of an Authority of Competition, as an independent body, there are not created necessary conditions to effectively implement of the law and competition policies. This makes it necessary to strengthen the institutional and professional capacities of the Competition Authority in order to play a more proactive role to implement strictly, strictly and effectively the law on protection of competition and to be an advocate of the development of economic reforms according to the principles of competition. This makes it necessary to strengthen the institutional and professional capacities of the Competition Authority in order to play a more proactive role to implement strictly and effectively the law on protection of competition and to be an advocate of the development of economic reforms according to the principles of competition. Assembly of the country should focus on the completion of the Authority with the necessary human and financial resources to review and increase the budget in this segment. The Competition Authority in quality of the competent institution for the implementation of competition policies must adjust and meet its goals in order to be an independent public institution with the necessary power and capacity to undertake active actions against anti-competitive attitudes and create a pro-competitive environment.

It is essential that in exercising the function the arbitres must be fair and provide a free and effective competition in the market between operators, where all are satisfied.

Competition policies and their implementation must ensure that all market players compete and win only on merit. As a specific mechanism must become an important segment in the process of creating a competitive economy in the regional and European market. Kosovo Assembly as the founder of authority and also other governmental and nongovernmental segments systematically must take care for the further completion of the legal framework under the legal acts in the form of regulations, directives, each time according to MSA standards and their implementation. Specific task should be the development and effective implementation of national competition policy. This can only be achieved through ensuring of a process of monitoring and analysis of market conditions for the development of free and effective competition. It is legal but also ethical that the Competition Authority must be a really advocate for the competition. This action should be ensured by giving the evaluations and recommendations to the parliamentary commission, to the body of central administration and to other public institutions, trade associations, trade unions, consumer associations, chambers of commerce and industry, for the development of sectoral policies, as well as other strategies and policies associated with competition and legislation in this area. The cooperation with other central and local administration, regulatory institutions, other public and private institutions, domestic and foreign, on matters related to competition are not only necessary but also essential and will bring bilateral and multilateral international and national collaboration that will guarantee the realization and the implementation of the law and of the competition policies. This it should be regulated through the establishment of mutual contacts with counterpart authorities in the region and wider, to ensure the exchange of information on matters of competition policy enforcement. These events and activities to be effective and bring results are conditioned by an active process of training within and outside the country, in way to strengthen the administrative capacity, as well as all other activities (seminars, conferences etc.), which have to do with the competition in the region and beyond.

The guiding principles on the basis of which the law, the national policies and other related policies are: Equality, Application of Principles of competition in such a way that does not allow discrimination of economic enterprises in the same circumstances; Comprehensiveness, which means a wide application of regulatory principles and competition in economic activity, which includes goods, services, private and public business, recognition of the scale of competition in development policies and reforms that affect the efficient functioning of markets, protecting the process of competition and creating an environment for maintaining open and effective competition. Also, competitive markets require a good comprehensive legal framework, clear property rights and a non-discriminatory environment that is efficient and effective: the transparency in conducting the activities of the Competition Authority should be open, indicating the reasons for the decisions taken, as well as informing on the activities and results achieved.

The Competition Authority is responsible to the public through the annual report to the Parliament, statements and press releases on the website, press conferences, etc. This makes clear the responsibility on the implementation of the rules and efficiency of competition in the policies development and their implementation. The Competition Authority will act in accordance and in harmony with national strategies, social sector and economic development, in order to increase the welfare of citizens. The activity of the institution will establish credibility for the authenticity of the declarations and decisions, based on ongoing studies and in consideration of the opinions of market actors.

Kosovo Competition Authority should operate on the principle of honesty, drawing and publishing accurate decisions about its activity. To be an institution with integrity the Competition Authority should not establish itself in financial liabilities or other similar activities, which may adversely affect or hinder him in the performance of its major activities. Kosovo Competition Authority should explain each year to the Parliament the financial resources allocated from the state budget, and keep accurate financial reports, which are controlled by the country's General Auditor. The work of the institution is based on the principle of cooperation with all stakeholders and market factors, constitutional institutions, government, regulatory bodies, consumer representatives, regional counterpart institutions, and the institutions of the General Competition of the European Commission.

5. Conclusion

The economic system in the Republic of Kosovo is a constitutional category that is based on market economy principles and the freedom of economic activity. The guarantee of this constitution principle is realized through Law on Protection of Competition and through responsible institution known as the Kosovo Competition Authority. This public institution function not only in the implementation of the law and the policy of the competition but also in the implementation of the norms and best practices of the public administration and of the European right of the competition.

The competition is a social phenomenon that it refers to a such situation of a free economy of the market, where the enterprises and other business operators, independently, try to gain more consumers in way to achieve their objectives that are: maximization of profits, sales, market share etc ., Competition constitutes the main promoter of competitiveness between enterprises and leads to a country's economic growth. The competition obligate inefficient operators to leave the market and realises the redistribution of the production resources from the failed companies to the most powerful competitors.

In our country the competition field is regulated by the law for Competition Protection Nr. 03/L - 229 and with four (4) legal acts that regulates the form and the content of legitimacy; the requirements and the conditions of the agreement with smaller value; The manner of application and criteria for determining the concentration of enterprises; and the criteria for releasing or reducing the administrative measures.

The Kosovo Competition Authority is the responsible institution in charge to implement the Law "On Protection of Competition", but is not the only one for its implementation. Implementation of the law, the behavior of enterprises and other stakeholders, in accordance with the competition rules of a functioning market economy depends very much on the attitude of central and local institutions, judges, the media, regulators, business and its associations, customers' associations and the general public. The authority is and will be open to fruitful cooperation and interaction with all stakeholders for the realization of a free effective and fair competition.

Competition Commission acts as a permanent structure and has all necessary powers for the decision on its own initiative on issues that restrict, impede or distort competition in the market, for both private and the public enterprises, and to propose necessary measures for the protection of free and effective competition.

Competition Commission presents an annual report to the Parliament. To properly exercise its legal powers, the Authority has requested to have enough staff and expertise, and has

intended to enable their effective engagement. However, the practice of recent years has shown that, in terms of institutional capacity building, administrative and professional, it is not enough that they be designated as a primary task, but it is necessary that they be applied in daily practice work. The European Commission has drawn attention to the growth and strengthening of the institutional capacity of the Competition Authority, as well as strengthening of real independence in exercising legal functions.

Continuous legal support and encouragement by the Parliament of the Republic of Kosovo and European Commission assistance to the Kosovo Competition Authority should be an important factor for the growth of the institution's performance and for a more competitive economy. The Competition institution although new is in difficulties and is not realizing its mission as a supervisor of the markets competition and this because of the political influences and its negligence of relevant institution to strengthen this vital segment. Therefore, urgently measures should be taken to increase and strength the law through the use of all legal instruments, aiming at the proper functioning of markets as one of the basic conditions of efficient use of economic resources of the country and increase consumer welfare. The improvement and the perfection of the intervention instruments in the market and the increasing their effectiveness is a continuous challenge of the Authority, considering our economy with a lower experience comparing to the long history of the developed countries with a free economy. The optimal combination of the instrument of sanctions against enterprises for the anti competition practices, in the form of the prohibited agreements or the abuse with the dominant position, with the instruments of advocacy and the culture to encourage the competition has been the main characteristic of the competition institution activity. During this period, the Competition Commission has taken very few important decisions. The work to supplement and update the legal framework, in order to harmonize with EU standards - is necessary. Collaboration with various public institutions is also an important factor that affects the activity of the Kosovo Competition Agency. In this way the cooperation with the Central, Local and especially with Regulatory institutions have a special significance. The creation of a culture to protect the competition in the country should be accompanied also with the awareness of the Ministry of Finances and the Ministry of Economy, specialized agency like Tax Administration, Custom Administration, municipality institutions, Chamber of Commerce and NGOs.

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