

## **Application of Competition Policy and Law in Small and transition Economies- Albanian Case<sup>1</sup>**

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**Abstract:** Albania is one of the first countries in the region of Southeast Europe that has applied an antitrust law according to the standards of the European legislation. Even though the small size of the economy, where the GDP is 979 milliard lek, (round 10 milliard American dollars), the objectives of the competition law and policy are identical with those that are applied in big and developed economies. From this point of view the Competition Commission has uphold its decision-making in the principles of the protection of free and effective competition in the market, in function of the prosperity of the economy and increasing welfare of the society. But in small economies the application of the anti-trust law has to be seen with attention for the combination of the competition policy with other policies like: industrial policy, monetary and fiscal policy, and also for the size of the enterprises with dominant position or the effect of a cartel (prohibited agreement) in the relevant market or in the economy. The first complications of the application of the law, relates to the differences in the objectives of the competition policy with other policies for example industrial policies.

### **1. A short history of the Competition Law and Policy in Albania**

After 1990, the entry of Albania in the way of a free market economy, carried out the necessity for making a legal framework that would have created the opportunity, for private and national enterprises, to enjoy all market freedom and to protect their rights.

Also, this legislation framework should create the environment where firms will work under effective competition conditions but with strict rules for all the parties. The new legislation should take into consideration the protection of the interests of consumers.

#### *1995- The first law on competition*

In December 1995, Albanian Parliament approved the first law in the competition field, the law Nr 8044 'On Competition'. This law applied in the period when Albanian economy was dominated by the state sector. Especially this law handled with monopolies, dominant position and unfair commercial practices. But we should emphasize that this law made possible the institutionalization of the competition policy.

For the first time it was created the Competition Commission, in the Ministry of Economy and Trade, that had the authority of the application of the law in the territory of the Republic of Albania.

<sup>1</sup> Disclaimer: The views expressed in this paper do not necessarily reflect any official position of the Albanian Competition Commission. Responsibility for the information and views expressed lies entirely with the authors.

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*2003-A modern competition law*

The changes that happened in the Albanian economy after the year 2000 like: the increase of macroeconomic stability, trade liberalization, the privatization of state enterprises and the fact that the existing law excepted from the application some important sectors of the economy, made the review of the existing law and its amendments a necessity.

Another important factor was the opening of the negotiation for the Stabilization and Association Process, where the chapter of the Competition and the adaptation with the legislation of the ‘Acquis Communautaire’ was an important part. These factors threw the necessity for reviewing the law on competition.

The main objective was to realize the approximation of the articles 81 and 82 of the Treaty of Rome for an efficient application of the competition rules from the enterprises that operated in the Albanian market. The Albanian parliament in 28 July 2003 approved the law Nr 9121 ‘On Competition Protection’, which entered into force in 1 December 2003. This law widely reflects the European Legislation in the competition field almost in three important columns:

abuse with dominant position, merger control and prohibited agreements.

The main development of this law was the fact that it authorized the creation of a public and independent institution that would have been responsible for the application of the competition law and policy in the country.

For the first time, in 3 March 2004 the Competition Commission was gathered and this is the date of creation of the Albanian Competition Authority.

*2010-Latest amendments of the Competition Law*

On September 2010 the Albanian Parliament approved some amendments on the Law “On Competition Protection”. It is important to highlight that the existing Competition Law was a modern law and it was almost approximated with the European Legislation.

Anyhow in the framework of the approximation of competition legislation to Acquis Communautaire, ACA launched and applied successfully the initiative for the revision of the provisions of the Law No. 9121, dated 28.07.2003 “On Protection of Competition”.

The philosophy of the changes in Law came for at least two main reasons. First of all is required to realize the approximation of the Law with the EU Treaty and the second to reflect the challenges of practical application during these years.

The main change for the approximation of the Competition Law with the Acquis-communitaire is to include in Law the exclusive rights and monopolies income oriented, which will expand the activity of the Competition Authority.

The agreements between enterprises are important for the activity of the Authority for securing free and effective competition in the market. For the first time in the law revision, it is foreseen the block exemption agreements and “de minimis” agreements. Another change is the revision of the provisions for abuse of dominant position.

The approximation of the legislation also remove the margins of penalties (in the old Law is 2% in the new Law is up to 10% of the annual turnover) determining that penalty according to the infringement

and the turnover in the relevant market (cartels, abuse of dominant position and mergers) and will be up to 10 % of general turnover of previous year.

Also, the reduction of the thresholds for the notification of mergers and acquisitions is expected to increase the number of the cases to be analyzed from the Competition Authority.

## **2. Important Issues that Competition Authorities Faces in Small Economies**

According to different authors, small economies can spend more financial and human resources, in comparison with their Gross Domestic Product, for building and functioning of the Competition authorities than big countries.

The objectives and the instruments of the application of the Competition law and policy are similar with small economy countries and the same is even for big economy countries. This happens because the world economy is going toward globalization which makes the application of same policies in different countries more and more indispensable.

Albania is one of the first countries in the region of Southeast Europe that has applied an antitrust law according to the standards of the European legislation.

Even though the small size of the economy, where the GDP is 979 milliard lek<sup>4</sup>, (round 10 milliard American dollars), the objectives of the competition law and policy are identical with those that are applied in big and developed economies.

From this point of view the Competition Commission has uphold its decision-making in the principles of the protection of free and effective competition in the market, in function of the prosperity of the economy and increasing welfare of the society.

But in small economies the application of the anti-trust law has to be seen with attention for the combination of the competition policy with other policies like: industrial policy, monetary and fiscal policy, and also for the size of the enterprises with dominant position or the effect of a cartel (prohibited agreement) in the relevant market or in the economy. The first complications of the application of the law, relates to the differences in the objectives of the competition policy with other policies for example industrial policies.

At least once, the Competition Commission has expressed its views, for the execution of a decision that for the policy of the industrial development of a sector was in contrary with the principles of free and effective competition in the market.

Another important implication, that came from the 'geographic isolation' and from the lack of knowledge for the law, was the conclusion of a prohibited agreement that increases the costs and fixes the price of a product in a town.

From the context of the effect in the economy and the welfare of consumers, with out neglecting the high rate of informality of some competitors that were not part of this agreement, the Competition Authority treated this case carefully penalizing only the initiators of the agreement.

Another challenge for the Competition Authorities in small economies countries like Albania, is the treatment of efficiencies of productivity (related to economies of scale) with those that are distributed for the consumers (the rate of concentration of the market) in the cases of merger notification. From one side, the Commission should stop 'apriori' mergers that create or consolidate dominant position

<sup>4</sup> Preliminary evaluation from the Ministry of Finance, source INSTAT and Bank of Albania

(according to dominance test) but the best world practices recommend that the evaluation of a notified merger is made based on market efficiency and consumer benefits.

The challenge for small countries (from the characteristics of GDP and from the income/person) where the number of competitors is relatively smaller than in big industrial economies, is finding the equilibrium between the power that one or more enterprises can have and the optimal number of competitors that accept small and in developed markets.

### **3. The Determination and Aspects of “Small Economy”**

In economic literature does not exist any specific determination for small economies? In this literature small economies are those that from the population number, the surface and from their size and economic power of the enterprises that operate in these economies, do have a low rate of GDP and are dependent from foreign countries.

Generally such economies try to attract foreign investments for developing their economy. This should not create the risk for their markets to be based on imports because having in mind that these imports can come from more efficient markets and large firms, and this would make easier pulling out home firms from the market.

Under these conditions, Competition Policy should reflect an evaluation for trade objectives and investment policy in a small economy. In an economy like the Albanian one, Competition Law and Policy be applied not only for home enterprises but also for foreign ones which exercise their activity in the internal market. In this case it is necessary a careful application of the law for taking into consideration the objectives in the trade and investment field and also to promote an environment where home firms can compete effectively with foreign firms.

On the other hand is known that if a firm is able to compete this depends on the market structure where the firm operates. The market structure is affected from the natural market conditions, mainly from the rate of concentration and entry barriers. These conditions are stronger in small economies than in large ones, making many industries (branches) to be characterized from a relatively small number of firms that operate in these branches. These particularities should be taken in to account for the application of the competition law both in the field of controlling mergers and in that of cartels or abuse with dominant position.

### **4. The Objectives of Competition Policy in Small Economies**

The main objective of the Competition policy is keeping competitive markets. It acts as an instrument for inducing industrial efficiency, optimal allocation of sources, technical progress and flexibility for adapting to a changing environment. For realizing this objective the duty of the competition authorities is the reservation of competing process and the inducement of effective competition in the market.

The reservation or the inducement of effective competition is necessary taking into consideration the restrictions of the private or public sector, so the competition law prohibits the agreements for price fixing and abuse with dominant position and mergers that abuse with their power in the market.

The realization of this objective is a condition for economic welfare of the society. Developing competition, having equal rules in the market, inducing innovation, having more opportunities of choice and quality of products and services, reaching market equilibriums that produce with real prices, competition policy is an important factor for the economic development of the country.

Competition policy is presented in the form of a strategic plan that takes into account economic, social and cultural competition conditions.

It is necessary to take into point out even in some other objectives like:

- Protecting the freedom and the activity of different participants in the market,
- Reducing entry barriers in the market for creating a proper environment for inducing enterprise and increasing the number of small and medium enterprises
- Reserving honesty and correctness of the business relationship

For increasing the competition in the country, the competition policy should give an important contribution for improving the macroeconomic indicators like: the level of prices, employment and economic growth.

The competition policy should be coherent with other microeconomic or macroeconomic policies, especially with trade policies and regulators for different markets and also with investment policies.

As it is mentioned above, for small economy countries, as Albania, that have high rate of foreign trade, competition policy is closely related with trade policy.

Liberal policies are the most important ones for countries like Albania where trade deficit is high. They can reduce small economy disadvantages through increasing exports and imports, that will increase the competition among importers and home producers.

## **5. The Impact of Informality, Cartels and the Implication of the Law**

### ***V.1. Distorting of competition by informal undertakings***

The literature identifies some elements that make the undertakings act formally or informally in the market. The advantage of being “formal” relates in general with the access in financing, the programs of the financial aid from the government and the constraint to act formally especially in regulated sectors where the number of competitors is limited. From the other side the factors that induce the undertakings to act informally pertain the financial and timely costs of the business registering/licensing, the formalities and charges of social insurance and taxation.

Is clear that in general the unregistered activity of the undertakings affects inter alia the competition with the other firms in the market that act formally. The concern of the informal economy and its consistency in the tax evasion, distortion in the labor market and competition as well as the notably payments in *cash* are essential issues for the economy of Albania and the other countries in development. According to a stand in the literature the consumers profit from the lower prices offering the economies with a high informality (that avoid taxes and other costs of registration) and this prices become a competitive pressure for the registered businesses.

But another theory indicates that formal undertakings are more efficient than the informal ones due to the economies of scale, the access in capital and technology and the more contemporary methods of production and distribution.

For these reasons, in the long term the competition that comes from informal undertakings reduces competition because restricts productivity, the access in technology and borrowing and the expansion of the formal undertakings. So, in the long run the prices would be even lower if the market would formalize and the competition between formal undertakings would increase.

Most of the monitored and/or investigated cases from the Albanian Competition Authority, the issue of informality was obvious. Although the theory reckons as admissible a certain degree of informality, in the case of Albania where informality is relatively high (from 30-60 %), the Competition Authority assessed widely the influence of the informal economy of the undertakings involved or not in the investigation.

***V.2. Naive cartels, first case of ACA***

The bread production and commerce was a market where the Competition Authority developed the investigation procedures in a region of the country, Fier where the degree of informality was high.

Based on some evidence of the media, the Authority began an investigation on the existence of an agreement that fixes the price of bread among the producers in this region. From the point of view of the article 4 of the Law “On the Protection of Competition”, this is a prohibited horizontal agreement that fixes prices (from 60 to 80 leke/bread).

The implications in the enforcement of the Law from this agreement lead up to the decision of the Commission based on the article 45 of the law for the immediate prohibition of the implementation of the agreement. “Automatically” the participants of this agreement should be penalized from 2-10 per cent of the annual achieved turnover. But watching the case carefully results a phenomenon: the high probability that in countries like Albania (with a few experience in the appliance of the free market economy- from year 1992) and because of the short time from the application of the Law (1<sup>st</sup> December 2003), makes possible that the participants in the agreement wasn’t in the know of the consequences on the competition of the market.

In these cases considered as naïve cartels, the participants in the agreement do not try to “cover” the created “cartel” since they don’t know that have committed one of the hardest infringements of the Law “On the Protection of Competition” and the consequences of this infringement. In this case of naïve cartel the procurement of the evidence didn’t comprise a problem but the investigation focused further on the market, the other participants in the market, the market share and the division of the competitors.

From the market analyses it results a high degree of the informal economy with small operators that sold the products in the square of the cities and villages in this district and wasn’t registered. This makes more difficult the definition of the size of the market because except the formal players of the market, informal businesses competed as well. This evidence was utilized as an argument of the participants in the agreement for evidencing the difficulties of their business due to the more competitive prices (lower ones) of bread of the informal undertakings, which do not pay taxes and other expanses. This, according to formal undertakings, had set them in difficulty and with very low rates of earnings or in the majority of the cases, loss as a result of the pressure of the “underground” supply. During the analyses of the case is taken in consideration that “bread baking” does not comprise any industry with large invested capitals and low rates of earnings (failures) during this period and what is more important the lack of knowledge of “the bread-baking entrepreneurs” related to the restraints brought to the competition in the market infringing article 4 of the Law “On the Protection of Competition”. From the other point due to the high degree of informality as a result of the high level of “ the grey” economy in Albania but also by reason of the special qualities of this business, in the assessment of the case was penalized only the head of the association of Bread baking, who was the organizer and the initiator of the agreement for bread price increase with about 20%. From the other point, the Competition Authority evaluated that does not exist barriers of entry in the

market and signaled the fiscal authorities regarding the high degree of informality of this market in the district of Fieri.

**V.3. Hard core cartel- bid rigging in new vehicle market**

A cartel is a form of union of legally and economically independent companies to limit their competition, based on mutual accord in the form of agreements and within the range of said accord, while maintaining their respective independence

The cartels are

During the preliminary investigation in the procurement of new vehicles, it has been noted that electronic and hard copy evidence exists of coordination between four companies, Alpha, Beta, Gama and Delta for participating in public procurement, which may constitute a coordinated behavior between the companies that operate in the relevant market. The companies use the scheme of covered offers by accepting to offer at a higher price than the bid of the preferred bidder.

It has been observed that the companies increase the value of the winning bid from 95%–99%, therefore close to the fund limit, which maybe a result of coordination. In tenders where participation is greater than these four companies, the wining bids result at 83% – 86 % of the fund limit.

The results of the preliminary investigation show the possibility of the existence of a coordinated behavior in the meaning of Article 3, paragraph 4 and Article 4 of the Law No. 9121, dated 28.07.2003, titled “On the protection of competition”, between the companies Alpha, Beta, Gama and Delta in the relevant market of new vehicles procured through public funds.

Thus the Competition Commission decided to open an in-depth investigation procedure in the market of procurement of new vehicles into the following companies: Alpha, Beta, Gama and Delta to verify the existence of agreements containing offers that restrict competition in the market of procurement of new vehicles. The main finding of the investigation was that parties has had cooperate to share the market between them through bid rotation, subcontract, false bid etc., so for this reason the Commission decide to interrupt the illegal agreement and to fine both companies participating to this anti-competitive agreement.

*Table1: Number of cartel cases, Albanian Competition Authority, 2006-2010*

<b>Period</b>	<b>Case</b>	<b>Fines(ALL)</b>
2006-2007	4	<b>93,607,657</b>
2008-2009	9	<b>66,396,814</b>
2010	4	<b>35,606,000</b>
<b>Total</b>	<b>17</b>	<b>195,610,471</b>

*Source: Albanian Competition Authority and calculations by authors*

**6. Undertakings efficiency and market power (the abuse of dominant position and the concentration control)**

In the assessment of the infringement of the competition law should be carefully seen the relation between the undertaking efficiency and market power or the classification of one/some undertakings

with dominant position. In the assessment of the dominant position the Albanian Competition Law (that is used also for the authorization or not of concentrations) relies especially on the legal and economic doctrine, as well as in the Commission and European Community law-court decisions.

Especially the implications can be more carefully seen in the case of abuse of dominant position and especially abuses that have as object/effect the exception of competitors from the market. Generally the dominant position of one undertaking leaps as a result of efficiency and its extension in the market, or in regulated markets as a result of denationalizations (in countries coming by the centralized economic system in the free market economy- like the case of Albania).

It is necessary that the Competition Authority in collaboration with the regulatory entities provide that in markets dominated by one/some competitors, the sectional regulatory policies does not create strong entry/exit barriers from the market.

From the other point, in markets where the number of undertakings is limited due to the kind of product/service (natural monopolies, utility services), the regulatory entities should restrict the operators' costs that pursue their activity through clear and explicit methodologies of costs determination and non-incrimination of artificial ones or their reduction through rebuilding.

Anyway, the methodologies of costs determination and according to the price of products/services should be assessed by the sectors and case by case.

*Table 2. Cases on abusing of dominance-Albanian Competition Authority*

Electronic communication	4 cases
Electric Energy and hydrocarbons	3 cases
Banking sector	1 case
Grocery	1 case
Media(pay per view)	1 case

*Source: Albanian Competition Authority and calculations by authors*

In the concentrations assessment, the Competition Authority evaluates the undertaking mergers as an essential instrument in the increase of the market efficiency and authorizes them in case they do not create or strengthen the dominant position. For the small economies concentrations are a very efficient instrument for the growth of efficiency through the increase of the size of the undertakings (through the merger) or their strengthening (control presumption or joint-ventures) and this happens more often than in large economies where the companies have more possibility to expand their capital or the size of the enterprise.

For these reasons the possible anti competitive effects of concentrations should not be automatically presumed with the increase of the degree of concentration in the relevant market after the merger, but the analyses should be focused in the efficiency of the attained concentration.

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As regards the coordinated practices the market conditions in the small economies favor a reduced number of clients (notably in sectors with high entry barriers) and more possibilities of the behavior orientation for the price determination or the market division.

However, in countries with a small economy some “restraints” of competition owing to the alignment in societies of smaller competitors (for example in the electronic communication market the grouping of the small operators could raise the degree of competition with the main operator) can be permitted if they have pro competitive effects.

The evaluations of concentrations executed in small economies should be countenanced till the measure that after the concentration has positive effects for the consumer and increase of the productivity, regardless of the fact that the achieved transaction creates or strengthens a certain market power of the pairs involved in the concentration.

In the cases of anti competitive practices the relatively high degree of economic informality could warp the market conditions analyses. For this reason, Competition Authorities should closely work with the fiscal authorities helping in the reduction of the informal economy, as one of the instruments to put the competitors in equal conditions. The formalizing of the “grey” economy has positive effects not only for the state budget but also for the undertakings themselves, which “formalize” increasing them the axes in information, borrowing, public funds, technology and making them more efficient in the long run.

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