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

by

Dijana Marković-Bajalović*

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Abstract

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

Résumé

Le modèle administratif d'application du droit de la concurrence est le modèle qui prévaut dans les États membres de l'UE. Bien que les États membres puissent choisir entre le modèle administratif et le modèle judiciaire ou leur combinaison, nombreux sont ceux qui ont opté pour le modèle administratif en prenant le modèle de l'UE comme modèle. La même remarque vaut pour les pays candidats des Balkans occidentaux. La directive 2019/1 traite la question de la sauvegarde des droits fondamentaux dans les procédures de concurrence en termes généraux seulement, tandis que les accords de stabilisation et d'association posent l'État de droit comme principe fondamental, sans toutefois en préciser les caractéristiques du modèle d'application des règles de concurrence. Les pays candidats n'ont pas tenu compte des exigences de l'État de droit lors de la conception de leurs modèles d'application des règles de concurrence. Les autorités de concurrence combinent des pouvoirs d'enquête et de décision, les empêchant ainsi de prendre des décisions impartiales. Les règles de nomination, c'est-à-dire de l'élection des membres des organes de décision, et la durée limitée du mandat, ont rendu les autorités de la concurrence sensibles à l'influence politique. Les tribunaux administratifs sont en charge des procédures engagées contre les décisions des autorités de

la concurrence en deuxième instance. Les limites imposées à l'application des procédures de pleine juridiction et la modeste expertise des juges administratifs en matière de droit de la concurrence ne permettent pas aux tribunaux de traiter au fond les affaires de concurrence. Il manque donc un contrôle juridictionnel efficace des décisions des autorités de concurrence. En conclusion, la Commission européenne devrait vérifier le respect des principes juridiques fondamentaux en matière d'application du droit de la concurrence lorsqu'elle évalue l'état de préparation des pays candidats à l'adhésion à l'UE.

Key words: competition enforcement models; the administrative model of competition enforcement; Directive 2019/1; stabilisation and association agreement; Western Balkan countries; the rule of law.

JEL: K21, K23, K40

I. Introductory remarks

The fundamental principle of the rule of law is embedded in the EU founding treaties.¹ The Charter of Fundamental Rights reiterates its significance for the EU and its member states.² The observance of the Charter is obligatory for EU institutions and member states in line with Article 6 of the Treaty on European Union.³ Adherence to the rule of law is among the essential criteria when assessing the ability of a candidate country to join the EU (European Council, 1993, p. 13).

Several countries of the Western Balkans (hereinafter; WB) aspire to join the EU. Albania, North Macedonia, Montenegro, and Serbia have obtained the candidate status already,⁴ while Bosnia and Herzegovina and Kosovo⁵ are

¹ Article 2 of the Treaty on the European Union.

² Article 47–50 of the Charter of Fundamental Rights of the EU, OJ C 202, 7.6.2016.

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

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

⁵ This designation is without prejudice to positions on status and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

still potential candidates.⁶ As of 2016, stabilisation and association agreements (hereinafter; SAA) between all these countries and the EU have entered in force.⁷ The SAAs lay down the rule of law as one of the general principles.⁸ The European Commission (hereinafter; EC) monitors the advancement in fulfilling the criteria for each candidate country, and it gives the highest priority to the assessment of the criteria in the monitoring process. In 2018 the EC reiterated: “For the prospect of enlargement to become a reality, a firm commitment to the principle ‘fundamentals first’ remains essential. Structural shortcomings persist, notably in the key areas of the rule of law and the economy. Accession countries must deliver on the rule of law, justice reforms.... Embracing core European values such as the rule of law is central to the generational choice of aspiring to EU membership.” (EC, 2018b, p. 2).

The accession process fostered the adoption of competition laws harmonised with EU law in the WB countries.⁹ The negotiation chapter on competition policy (Chapter 8) represents by far one of the toughest parts of the negotiation process between the candidate countries and the EC.¹⁰ One of the reasons for the complexity of accession negotiations in this field is the power given by Regulation 1/2003 to national competition authorities and courts of member states to implement the EU competition rules hand in hand with the EC.¹¹ There is no break time for a competition authority and courts

⁶ Bosnia and Herzegovina submitted its application to join the EU on 15.02.2016. The SAA between the EU and Kosovo entered into force in April 2016.

⁷ SAA agreements between the EU and countries of the Western Balkans:

- SAA between the European Communities and their Member States and the Republic of Albania, OJ L 107, 28.04.2009.
- SAA between the European Communities and their Member States and Bosnia and Herzegovina, OJ L 164, 30.06.2015.
- SAA between the European Communities and their Member States and the FRY Macedonia. OJ L 84, 20.3.2004.
- SAA between the European Union and the European Atomic Energy Community and Kosovo(*), OJ L 71, 16.3.2016.
- SAA between the European Communities and their Member States and the Republic of Montenegro, OJ L. 108, 20.04.2010.
- SAA between the European Communities and their Member States and the Republic of Serbia, OJ L 278, 18.10.2013.

⁸ Article 2 SAA EU-Albania, Article 2 SAA EU-Bosnia and Herzegovina, Article 3 SAA EU-Kosovo, Article 2 SAA EU-Montenegro and Article 2 SAA EU-Serbia.

⁹ See Article 71 SAA EU-Albania, Article 71 SAA EU-Bosnia and Herzegovina, Article 75 SAA EU-Kosovo, Article 73 SAA EU-Montenegro and Article 73 SAA EU-Serbia.

¹⁰ The chapter on competition policy was among the last closed in the negotiation process between the EC and its youngest member state – Croatia. See EC (2012).

¹¹ Article 5 and 6 of the Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ EC L 1, 4.1.2003.

of a new member state after joining the EU to improve their capacities for competition law enforcement. They must be prepared to apply EU competition law from the very beginning of their EU membership.¹²

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

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

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

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

II. The EU Directive 2019/1

Recently, the EU has taken steps to strengthen the status of national competition authorities (hereinafter; NCA) by adopting Directive 2019/1. The Directive aims to empower the NCA to be able to enforce EU competition law effectively. The Directive's Preamble states that many NCA lack necessary guarantees of independence, resources, and enforcement and fining powers.¹⁴ Directive 2019/1 does not interfere with the rights of Member States (hereinafter; MS) to select the most appropriate model of competition law enforcement. MS can entrust the enforcement of Articles 101 and 102 TFEU exclusively to an administrative authority, as is the case in most jurisdictions, or they can assign this task to both judicial and administrative authorities.¹⁵ However, the exercise of powers conferred by the Directive to a NCA "should be subject to appropriate safeguards which at least comply with general principles of Union law and the Charter of Fundamental Rights of the European Union, in particular in the context of proceedings which could give rise to the imposition of penalties. These safeguards include the right to good administration and the respect of undertakings' right of defense, an essential component of which is the right to be heard."¹⁶ When specifying MS obligation to comply with general principles of Union law and the EU Charter, the Directive explicitly refers to safeguards in respect of the undertakings' right of defense, including the right to be heard and the right to an effective remedy before a tribunal.¹⁷

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

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

¹⁴ Par. 5.

¹⁵ Par. 13.

¹⁶ Par. 14.

¹⁷ Article 3.

Article 6(1) ECHR and Article 47(2) EU Charter. One could argue that these notions have already been explained in the case-law of the European Court for Human Rights (hereinafter; ECtHR) and the Court of Justice of the EU (hereinafter; CJEU), so that there was no need to lay down more detailed rules in Directive 2019/1. In the ECtHR interpretation of ECHR Article 6(1), the notion of ‘tribunal’ comprises not only courts of law integrated within the standard judicial machinery of the concerned country,¹⁸ but also other bodies, provided that they comply with substantive and procedural guarantees laid down in Article 6(1).¹⁹ A tribunal needs to perform a judicial function, that is to say, to determine matters within its competence based on rules of law and after proceedings conducted in a prescribed manner.²⁰ A tribunal must have the power to decide cases,²¹ namely to issue a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party.²² This power must be executed in full jurisdiction.²³ It means that the tribunal must examine all questions of fact and law relevant to the dispute before it.²⁴ However, a tribunal is not precluded from performing other functions, such as administrative, regulatory, adjudicative, advisory, and disciplinary.²⁵ A tribunal must also satisfy a series of other requirements,²⁶ namely: independence from other branches of state power, in particular from the executive, but also vis-à-vis the parties;²⁷ the manner of appointment of the members of the tribunal, the duration of their term of office, the existence of sufficient safeguards against the risk of outside pressures²⁸ and the appearance of independence;²⁹ impartiality of the tribunal, both in subjective (non-existence of personal prejudice or bias of a particular judge) and objective terms (the tribunal itself and its composition offer sufficient guarantees to exclude any legitimate doubt in respect of its impartiality);³⁰ procedural guarantees, several of which appear in the text of Article 6(1) ECHR itself.

¹⁸ *Mutu and Pechstein v. Switzerland*, 40575/10 and 67474/10, 2.10.2018, par. 139.

¹⁹ *Rolf Gustafson v. Sweden*, 23196/94, 1.07.1997, par. 45.

²⁰ *Sramek v. Austria*, 8790/79, 22.10.1984, par. 36; *Belilos v. Switzerland*, 10328/83, 29.04.1988, par. 64.

²¹ *Bentham v. The Netherlands*, 8848/80, 23.10.1985, par. 40.

²² *Van de Hurk v. The Netherlands*, 16034/90, 19.04.1994, par. 45.

²³ *Mutu and Pechstein v. Switzerland*, par. 139.

²⁴ *Ramos Nunes de Carvalho e Sá v. Portugal*, 55391/13, 55728/13 and 74041/13, 21.06.2016, par. 176–177.

²⁵ *H. v. Belgium*, 8950/80, 30.11.1987, par. 50.

²⁶ *Coëme and Others v. Belgium*, 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, par. 99.

²⁷ *Beaumarin v. France*, 15287/89, 24.11.1994, par. 38; *Sramek v. Austria*, par. 42.

²⁸ *Ramos Nunes de Carvalho e Sá v. Portugal*, par. 153–156.

²⁹ *Sramek v. Austria*.

³⁰ *Micallef v. Malta*, 17056/06, 15.10.2010, par. 93.

The ECtHR confirmed several times that it is in line with Article 6(1) ECHR to confer to administrative authorities prosecution and punishment of ‘minor’ criminal offenses, provided that a defendant is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6.³¹ Administrative authorities, which do not themselves satisfy Article 6(1) requirements, must be subject to a subsequent review by a judicial body that has full jurisdiction. The ECtHR equalled full jurisdiction with the power to quash in all respects, on questions of fact and law, the decisions of the body below.³² It did not require the second instance court to have the power to substitute its own decision for the decision of the lower level body, which is the regular understanding of full jurisdiction. However, in cases where the second instance court does not have the power to examine facts by itself, the issue of the intensity of the court’s review becomes essential.³³ This view became critical in competition cases where an administrative body is deciding in the first instance, while an administrative court in the second instance controls the legality of the lower body’s decision.

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

³¹ *Öztürk v. Germany*, 8544/79, 21.02.1984, par. 56; *A. Menarini Diganostics S.r.L. v. Italy*, 43509/08, 27.09.2011, par. 58–59; *Flisar v. Slovenia*, 3127/09, 29.12.2011 (final), par. 33.

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

³³ *Ramos Nunes de Carvalho e Sá v. Portugal*, par. 183.

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

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

³⁶ However, in *Jusilla*, several judges dissented stating that Article 6 ECHR does not provide a basis to make a distinction between hard-core and beyond hard-core cases. See: Medzmariashvili (2012).

able to verify that the Authority had made proper use of its discretionary powers. Appellate courts were able to examine whether the authority's decision was substantiated and proportionate and even to check its technical findings.

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

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

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

³⁷ *Menarini*, paras. 65–66.

³⁸ *Menarini*, par. 67.

³⁹ *Silvester's Horeca Service v. Belgium*, 47650/99, 4.03.2004, par. 28.

⁴⁰ *Obermeyer v. Austria*, 11761/85, 28.06.1990, par. 70.

⁴¹ *Dubus S.A v. France*, 5242/04, 11.06.2009.

⁴² *KME Germany and others v. Commission*, C-272/09 P, 8.12.2011, par. 129.

protection in Article 47 of the EU Charter.⁴³ This view was confirmed in *Chalkor*,⁴⁴ as well as in *Schindler*, where the CJEU explicitly referred to the *Menarini* qualification of competition cases as criminal cases.⁴⁵

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

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

⁴⁴ *Chalkor AE Epexergasias Metallon v. Commission*, C-386/10 P, 8.12.2011, par. 54.

⁴⁵ *Schindler Holding Ltd. and Others v. Commission*, C-501/11 P, 18.07.2013, par. 33.

III. The competition enforcement model in stabilisation and association agreements

SAAs between the EU and its MS and the WB countries encompass identical provisions concerning competition. They declare as incompatible with the proper functioning of SAAs, insofar as it may affect trade between the EU and the respective country: i) all agreements between undertakings, decisions of associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition; ii) abuse by one or more undertakings of a dominant position in the territories of the EU and the respective country as a whole or in a substantial part thereof; iii) any state aid which distorts or threaten to distort competition by favouring certain undertakings or certain products.⁴⁶ The legality of the named practices must be assessed based on the criteria arising from the application of the competition rules applicable in the EU, in particular from Articles, 101, 102, 106 and 107 TFEU, and interpretative instruments adopted by the EU institutions.⁴⁷

Concerning institutions in charge of competition enforcement, SAAs oblige candidate countries to entrust the operationally independent authority with powers necessary for the full application of the specified provisions.⁴⁸ The notion of ‘operationally independent authority’ has not been defined in SAAs, thus making the obligations of candidate states in that respect obscure (Popović, 2018). In our view, the said term should be interpreted in line with Article 4 Directive 2019/1, laying down minimum guarantees of the independence of national administrative competition authorities. EU MS need to ensure that staff and persons who take decisions in national administrative competition authorities:

- a) are able to perform their duties and exercise their powers for the application of Articles 101 and 102 TFEU independently from political and other external influence;
- b) neither seek nor take any instructions from government or any other political or private entity when carrying out their duties and exercising

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

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

⁴⁸ Article 71(3) SAA EU-Albania; Article 71(3) SAA EU-BH; Article 75(3) SAA EU-Kosovo; Article 73(3) SAA EU-Montenegro; Article 69(3) SAA EU-North Macedonia; Article 73(3) SAA EU-Serbia.

- their powers in the application of Articles 101 and 102 TFEU, except for the right of a government to issue general policy rules that are not related to sector inquires or specific enforcement proceedings; and
- c) refrain from taking any action which is incompatible with the performance of their duties and/or with the exercise of their powers for the application of Articles 101 and 102 TFEU and are subject to a procedure that ensures that for a reasonable time after leaving their office, they refrain from dealing with enforcement proceedings that could give rise to a conflict of interests.⁴⁹

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

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

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

⁴⁹ Article 4(2) Directive 2019/1.

⁵⁰ *Commission v. Germany*, C-518/07, 9.03.2010, par. 18.

⁵¹ Article 4(4) Directive 2019/1.

⁵² Article 4(2) Directive 2019/1.

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

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

⁵³ Article 4(1) Directive 2019/1.

⁵⁴ See, for example, the explanation of the CJEU in the case *Krajowa Rada Sądownictwa*, C-585/18, C-624/18 and C-625/18, par. 121–122: ‘According to settled case-law, the requirement that courts be independent has two aspects to it. The first aspect, which is external in nature, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions... The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.’

⁵⁵ Article 2 SAA EU-Albania; Article 2 SAA EU-BH; Article 3 SAA EU-Kosovo; Article 2 SAA EU-North Macedonia; Article 2 SAA EU-Montenegro; Article 2 SAA EU-Serbia.

Securing the candidate countries' compliance with SAAs' obligations represents yet another problem. The EU approach in the context of the stabilisation and association process of the WB countries is characterised by the conditionality principle. The fulfilment of SAAs' obligations is an essential condition for the accession of the candidate country to the EU. The WB countries will only be able to join the EU once the criteria of Article 49 TEU and the Copenhagen criteria are met (EC, 2018a, p. 3). However, full membership in the EU is not guaranteed by SAAs (Vukadinović, 2015, p. 96). They only provide a perspective of joining the EU once the candidate country fulfils the required obligations. During the accession process, the EU sets requirements for opening and closing of negotiation chapters. The progress is being monitored by setting interim benchmarks and controlling actual enforcement of legislation. The EU cannot force candidate countries to fulfil SAAs' obligations since it is candidate countries that mainly determine the pace.⁵⁶ The new EU methodology for enlargement introduced a possibility for accelerated integration for candidates advancing in reforms. However, it is also possible to sanction stagnation or backsliding in meeting the requirements of the accession process by putting negotiations on hold or even suspending them, re-opening closed chapters, etc. (EC, 2020).

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

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

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

⁵⁸ Article 129(2) SAA EU-Montenegro.

IV. General features of the competition enforcement model in WB countries

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

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

V. Particular WB countries' models

1. Albania

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

⁵⁹ Law No 9121, 28.07.2003, amended by the Law No 10317, 16.09.2010.

⁶⁰ Article 18 LCP.

and decision-making body, and the Secretariat. The Commission consists of five members elected by the Parliament upon a proposal of the President (1 member), the Council of Ministers (2 members), and the Assembly (2 members). The LCP defined requirements for the election and the premature term of Commission members.⁶¹ A public debate related to the procedure of the election of the Commission members took place in the past. It was suggested that the independence of the ACA would be strengthened if proposals of candidates would not come from governmental institutions, and if the requirements regarding the educational and professional experience of the candidates would be more stringent (Penev et al., 2013, p. 55).

The Secretariat is declared by law as functionally independent from the Commission. However, the functional separation is not complete since the Commission supervises the Secretariat's work,⁶² and it elects the Secretary-General, who manages the Secretariat.⁶³ The Secretariat is in charge of conducting investigations. After the completion of an investigation, the Secretary-General submits a report to the Commission, who decides on a case.

The ACA starts investigations *ex officio*, based upon a decision taken by the Commission, or upon a complaint of third parties.⁶⁴ The ACA's investigative powers are similar to those of the EC. However, the ACA needs the court's authorisation to carry out an unannounced inspection of private premises. After the completion of an investigation, the Commission regularly holds a hearing to allow parties to be heard.⁶⁵ Before taking a final decision, the Commission discusses a case together with the Secretary-General, department heads, and members of the investigation group.

The Commission can take infringement decisions, commitment decisions, and decisions on interim measures in antitrust cases. It can impose fines, periodic penalty payments, and single procedural fines. The number of investigations and finalized cases has constantly been rising since the establishment of the ACA.⁶⁶ The maximum amount of fines is in line with EU law. The ACA tended to impose high fines in practice. It imposed a fine at the rate of 5,69% of the total turnover in the case *SGS Automotive Albania*,

⁶¹ Article 22(3) LCP.

⁶² Article 24(c) LCP.

⁶³ Article 27(1) LCP.

⁶⁴ Article 29.1 LCP. See also: UNCTAD (2015), p. 38.

⁶⁵ *Ibid.*, 47.

⁶⁶ In 2018 and 2019, the ACA adopted 87 and 93 decisions respectively. It significantly increased the number of decisions compared to the period 2011–2017 when the average yearly number of decisions was below 50. However, these numbers reflect decisions taken in every activity. The ACA finalised 10 antitrust cases in 2019 (Competition Authority of Albania, 2019, p. 6–7).

For more detailed analysis of cases in the period before 2015 see Nazifi and Broka (2015).

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

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

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

⁶⁷ Decision No. 562, 25.10.2018.

⁶⁸ According to the EC, there has been no application for leniency since 2016.

⁶⁹ Widespread corruption and weak rule of law manifested by incompetent, ineffective and non-independent judiciary are seen as the main institutional weaknesses of competition law enforcement in the Western Balkans. See: Buccirossi and Ciari (2018); Begović and Popović (2018).

⁷⁰ Article 7, Law No 49/12 on Organisation and Functioning of Administrative Courts and the Adjudication of Administrative Disputes.

⁷¹ Law 49/12, Article 17.

that it deems crucial for solving the case.⁷² The burden of proof lies with the ACA. It needs to prove the facts of the case and to provide legal arguments to the court.⁷³ Judgments of the first instance Administrative Court can be appealed to the Administrative Court of Appeal. The Court of Appeal can hold a hearing if it finds it necessary to verify new facts and evidence submitted with the appeal, or if the first instance court based its decision on severe procedural breaches or false facts.⁷⁴ Concerning the effectiveness of judicial control, Albanian courts can apply the ECHR as a formal source of law, as well as SAA provisions (Pogaçe, 2008, p. 34–35), which opens the possibility of invoking ECtHR and CJEU case-law in proceedings before Albanian courts. The need for in-depth expertise, and more precise rules of the judicial review, has been indicated as the main obstacle for more effective judicial review (Penev et al., 2013, p. 72).

2. Bosnia and Herzegovina

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

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

⁷² Law 49/12, Article 34.

⁷³ Law 49/12, Article 35(1).

⁷⁴ Law 49/12, Article 51.

⁷⁵ Official Herald BH, No 48/05, 76/08, 80/09.

⁷⁶ Article 21.

⁷⁷ Bosnia and Herzegovina is composed of two entities, Federation of Bosnia and Herzegovina and Republika Srpska. The former entity is populated dominantly with Bosnian and Croatian ethnicity, while in the latter Serbian ethnicity represents most of the population.

⁷⁸ Article 31 and 34 LC BH.

⁷⁹ E.g. cases initiated by a complainant. The complainant has a party status by law and the Council is obliged to start a proceeding upon every complaint. Article 32 LC BH.

of the investigation, the rapporteur prepares a draft decision and submits it to the Council.

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

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

⁸⁰ Article 24(2) CC BH.

⁸¹ By comparison, the Competition College of the Belgian Competition Authority consists of a president and two assessors coming from different language groups (Article IV.22, Book IV of the Code of Economic Law). However, representatives of both language groups need not to participate in the Competition College in each case. Members of the College do not have a veto power when making decisions.

⁸² Article 41.

⁸³ Decision No 05-26-I-014-374/II/13, 10.06.2014. The LC BH laid down in Article 18(6) and (7) a legal presumption that a concentration is deemed approved if the Council does not issue a decision within the time limit established by the law.

⁸⁴ Article 5(2) and 11(2) LC BH.

⁸⁵ Decision S1 3 U 023347 16 U.

it took another eight months to issue a decision rejecting a complaint because of procedural reasons.⁸⁶ However, the Court's condemnation of the practice produced little effect. The Council stopped the practice, but it turned instead to more sophisticated methods of escaping having to decide on the merits. In a new case of abuse of a dominant position started against BH Telekom, the Council simply informed the complainant that the expert witness was not able to produce a report due to the unavailability of economic data. Since the Council considered that there exists no other evidence that it could take, it informed the complainant that it would cease the case.⁸⁷

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

Complaints exist also regarding other severe infringements of Article 6 ECHR in proceedings before the Competition Council. Allegedly, the Competition Council infringed the principle *non bis in idem* by sanctioning the same undertaking twice for an identical anticompetitive practice based on identical facts. *Prima facie*, it seems that the Council was wrong for doing this since the description of facts and legal qualification of the case are almost the same in the decisions issued in 2015 and 2017.⁸⁹ The Council failed to define in the decision the exact period during which the defendant practiced the condemned behaviour. It seems possible that the defendant continued to behave in the same way after the 2015 decision, which made the Council issue a new decision. However, the Court of BH ignored the *non bis in idem* objection of the defendant, thus infringing his right to get a reasoned judgment.⁹⁰ The Court also declared that the Competition Council is not obliged to inform the defendant about elements upon which it would base its decision (to provide

⁸⁶ Decision S1 3 U 003765 10 U.

⁸⁷ UP-01-26-2-018-127/17 24.04.2020.

⁸⁸ U 25/14, 9.07.2015, Official Herald BH No 72, 14.09.2015. Two foreign members of the Constitutional Court, judges Greewe and Caca-Nikolovska, submitted a separated opinion, finding the disputed provisions of the LC BH discriminatory.

⁸⁹ No. 06-26-2-006-143-II/15, 23.12.2015, and No. 04-25-2-004-113-II/15, 20.12.2017.

⁹⁰ S1 3U 027851 18 U and S1 3 U 027851 19 Uvp. The case is still pending before the Constitutional Court, which is competent to decide upon appellations against BH courts in cases of ECHR infringements.

a statement of objections).⁹¹ In the view of the Court, it has been left in the discretion of the Council to do this. This view is entirely in contravention of EU *acquis*,⁹² as well as of the general rules on administrative proceedings in BH.⁹³

The Court of BH decides upon lawsuits brought against the Council's decisions under the Law on Administrative Disputes.⁹⁴ The Court of BH decides merely upon the legality of a decision.⁹⁵ It explicitly stated that in administrative disputes, a court decides upon facts determined in the first instance administrative proceedings.⁹⁶ As a rule, it cannot substitute its decision for that of the Council. If it finds the appellants' claims justified, it will declare the disputed decision null and void. However, the Court can issue a decision substituting a disputed act in the following cases: 1) where the annulment would cause irreparable damage to the appellant, 2) where case facts are manifestly different from the facts established in the disputed act, or 3) the Court had previously annulled the act in the same dispute and the administrative organ did not follow the Court's instructions. The Court will then find the facts alone and adopt a decision to solve the merits of the case.⁹⁷ The Court has not used these powers in competition cases yet.

The LC BH has not classified fines for competition infringements,⁹⁸ even though BH law distinguishes between criminal and misdemeanour offenses. Criminal chambers of ordinary courts are in charge of criminal offenses, while special misdemeanor courts deal with the latter type of offenses. Notwithstanding the constitutional principle of separation of powers, legal writers confirmed that independent administrative bodies could act like tribunals within the meaning of Article 6 ECHR (Ademović, Marko and Marković, 2019, p. 162). It seems that the LC BH takes the view that infringements of its provisions do not amount to criminal offenses, since it stipulated that decisions of the Council do not affect criminal or civil responsibility of the offender, which remains within the court's competences.⁹⁹ However, the BH Code of Administrative Proceedings and the LC BH lack provisions specifying rights of defendants in cases where the Council intends to impose the fine. Article 52 LC BH makes the only exception, obliging the Council to consider 'intent and duration of the infringement' when determining a fine. Since legal

⁹¹ U 027851 19 Uvp, 7.

⁹² Article 27 Regulation 1/2003.

⁹³ Article 134(3) Code of Administrative Proceedings BH.

⁹⁴ Official Herald BH No. 19/2002, 88/2007, 83/2008, 74/2010.

⁹⁵ Article 11.

⁹⁶ U 027851 19 Uvp, 7.

⁹⁷ Article 34(3).

⁹⁸ Article 48–51.

⁹⁹ Article 46(6) LC BH.

persons are competition violators in most of cases, it remained unclear whose intent the legislator had in mind.

The Competition Council may refer to CJEU and EC case-law when deciding cases. This power has been explicitly stipulated in Article 43(7) LC BH, albeit as a discretionary power and not an obligation. This is contrary to SAA competition provisions obliging BH to apply EU competition rules and interpretative instruments adopted by EU institutions.¹⁰⁰ The Council referred to EU case-law in the case *ASA Auto*. The Court of BH¹⁰¹ and the Constitutional Court¹⁰² confirmed the Council's decision in this case.

3. Kosovo

The Parliament of Kosovo adopted the new Law on Protection of Competition (hereinafter; LPC) in 2010.¹⁰³ The EC assessed Kosovo antitrust rules as being broadly aligned with Article 101, and 102 TFEU (EC, 2018b, p. 55).

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

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

¹⁰⁰ Article 71(2) SAA EU-BH.

¹⁰¹ Decision S1 3 U 005412 10 Uv.

¹⁰² Decision 8.12.2015.

¹⁰³ Law No 03/L-229. It was amended by the Law on Amending and Supplementing the Law 03/L-229 on Protection of Competition, approved on 13.02.2014.

The LPC regulated investigative and decision-making powers of the KCA, as well as rights of parties mainly in line with the EU Regulation 1/2003. The KCA is authorized to collect information from parties and third persons and to carry out unannounced inspections. The KCA must provide parties access to files, protect parties' and third persons' business secrets, notify a party with a statement of objections, and hold a hearing before making a decision. A defendant may propose remedies and obligations to eliminate the negative consequences of its behaviour (a commitments offer). If the KCA accepts the proposed offer, proceedings will be suspended. Besides, the KCA may adopt interim measures against the defendant undertaking, before taking a final decision. The National Programme for Adoption of the Acquis specified several activities that should promote the independence and accountability of the KCA, namely: giving the KCA freedom from ministerial and political control; getting clear professional criteria for appointing Commission members; appointing highly professional officials for relevant fields within the KCA; providing clear and substantive annual reports on KCA activities (Nezaj, 2015, p. 22).

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

Ordinary courts decide upon lawsuits against KCA decisions since administrative courts were not formed in Kosovo in the 2009 courts' reform. A chamber for administrative disputes exists in the Prishtina Basic Court, which is the first instance court in charge of all administrative disputes. A single professional judge adjudicates in administrative disputes (Pepaj, 2015, p. 165). Administrative judges in Kosovo consider that they can only declare a disputed act null and void and resend it to the administrative body to issue

a new act. In their interpretation of the Law on Administrative Disputes,¹⁰⁴ full jurisdiction proceedings are not allowed in administrative disputes (Kosovo Law Institute, 2017, p. 15). This interpretation is in contradiction to the actual meaning of Article 43(3) of the Law on Administrative Disputes, which specifies that the court may establish facts by itself and issue a judgment on merits if requirements similar to those existing in BH law are fulfilled. The Administrative Chamber of the Basic Court has never used powers to decide a case in full jurisdiction proceedings (Kosovo Law Institute, 2017, p. 15).

4. Montenegro

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

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

¹⁰⁴ Law No 3/L-202 on Administrative Disputes.

¹⁰⁵ Official Journal of Montenegro, No 44/2012.

¹⁰⁶ Article 111 of the Misdemeanors Law, Official Journal of Montenegro, No 1/2011, 6/2011, 39/2011, 43/2017-decision of the Constitutional Court and 51/2017.

¹⁰⁷ Article 67 LPC 2012.

¹⁰⁸ Article 69 LPC.

¹⁰⁹ Official Journal of Montenegro, No 13/2018.

members. The Council adopts final decisions in proceedings taking part before the APC on a proposal of the Director.¹¹⁰ The investigative function rests with the APC Director. The Director issues a decision to start an *ex officio* investigation and a conclusion to perform specific investigative actions (e.g., an unannounced inspection).

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

The facultative character of an oral hearing represents the main shortcoming of APC proceedings. A party can submit a reasoned motion to the APC to hold a hearing, but the APC is free to decide whether to hold it or not. The APC can also decide to hold a hearing on its own motion.¹¹¹ The LPC 2018 does not state clearly which APC organ should hold a hearing. Since the provision on an oral hearing existed in the LPC 2012, and the 2018 amendments did not make any express provision regarding the removal of this function from the Director, it seems that the Director has remained in charge of conducting the hearing. This stipulation is contrary to the immediacy principle since the decision-making body does not hear parties.

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

¹¹⁰ Article 20f and Article 22(1)(4) LPC 2018.

¹¹¹ Article 36 LPC.

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

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

5. North Macedonia

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

¹¹² No. 02-UPI-8/65-18.

¹¹³ http://www.azzk.me/jml/images/docs/Savjet_Agencije_za_zatitu_konkurencije_na_osnovu_1.pdf

¹¹⁴ No. 02-UPI-81/67-15.

the CA made in 2007 (hereinafter; CA 2007),¹¹⁵ the CPC received the power to impose fines. The CA 2007 created separate proceedings for imposing fines and laid down provisions on judicial review of the Commission's decisions by administrative courts.¹¹⁶ The enforcement model laid down by the CA 2007 has remained mainly unchanged, even though the new Law on Protection of Competition (hereinafter; LPC) came into force in 2010.¹¹⁷

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

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

¹¹⁵ Law 22/07.

¹¹⁶ Article 13(3) of the Constitution of North Macedonia sets forth that administrative authorities can impose misdemeanour sanctions in cases provided by the law.

¹¹⁷ Official Herald of the Republic of Macedonia, No 145/2010, 136/11, 41/14, 53/16 and 83/18.

¹¹⁸ Article 51 and 52 LPC 2010.

¹¹⁹ Article 27(8) LPC 2010.

¹²⁰ Article 55 of the Misdemeanor Law sets out down the following: '(1) The procedure before the misdemeanor authority shall be conducted by a Commission deciding on misdemeanors, specified by law or by other regulation. (2) The members of the Commission stipulated in paragraph 1 of this article shall be authorised officers with an appropriate level of professional background and necessary work experience required by law, among which at least one of the members shall be a graduated lawyer who has passed the bar exam.'

¹²¹ Article 27(8) LPC 2010.

the Commission, since the CPC President appoints the Secretary-General.¹²² The Secretary-General issues requests for information¹²³ and conclusions to conduct unannounced inspections.¹²⁴

The Secretary-General and the relevant third party have the party status in misdemeanour proceedings initiated by them.¹²⁵ In this way, controversial elements are introduced into the proceedings. In proceedings before the CPC, the rules of the Misdemeanour Law¹²⁶ and the Law on General Administrative Procedure are applied as subsidiary rules to the LPC.¹²⁷ The application of the Misdemeanour Law ensures better protection of parties' rights, since this law defines rules on the defendant's rights in more detail. However, the combined application of three laws in the same proceedings can lead to problems in their interpretation, and it increases legal uncertainty.

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

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

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

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

¹²² Article 29(1) LPC 2010.

¹²³ Article 49 LPC 2010.

¹²⁴ Article 50 LPC 2010.

¹²⁵ Article 38 LPC 2010.

¹²⁶ New Macedonian Misdemeanour Law was adopted on May 17, 2019. The Law in Macedonian language is available at <https://www.pravdiko.mk/zakon-za-prekrshotsite/>

¹²⁷ Article 31 LPC 2010.

¹²⁸ Article 34 and 35 LPC 2010.

cases.¹²⁹ According to legal writers, the establishment of administrative courts in North Macedonia improved the procedure in competition cases (Karova and Botta, 2010, p. 71). The scope of this article did not allow us to verify whether the Administrative Court used its powers fully in practice. It seems that courts rely mainly on facts and evidence established by the CPC. For example, in a case dealing with an agreement to fix prices, the Court oddly decided by cumulatively applying LPC articles on prohibited agreements and provisions on the abuse of a dominant position. The Court stated that the CPC did not need to find written evidence to prove the existence of the agreement, but it failed to explain which other facts and evidence support the finding that the defendant participated in the prohibited agreement.¹³⁰

The EC expressed concerns regarding the lack of trained staff and the lack of independence and capacity of courts to deal with antitrust cases as a significant obstacle to effective implementation of competition law in North Macedonia (EC, 2019c, p. 64). This statement is confirmed by the non-existence of antitrust cases in 2018 and 2019. The last antitrust case was decided at the beginning of 2018, when the CPC imposed a fine to the brewery 'Prilepska pivarnica' A.D. for price-fixing.¹³¹ Although the case dealt with resale price-maintenance clauses in agreements between the brewery and its distributors, the CPC inexplicably failed to initiate proceedings against distributors. The amount of a fine is not publicly available. According to some reports, the CPC imposed a fine to 'Prilepska pivarnica' amounting to 2,7 mil EUR. In 2017, the CPC finalized the investigation against another brewery, 'Pivara Skopje' A.D., imposing a 5,8 mil. EUR fine (Doklešić, Repić and Gajin, 2017).

6. Serbia

The Commission for Protection of Competition (hereinafter; CPC) was established in 2005 as an independent administrative body with legal capacity, accountable to the National Assembly.¹³² Since the Law on Protection of Competition 2005 defined competition violations as misdemeanour offenses, the CPC could not impose fines. Misdemeanour courts did not impose even a single fine under the 2005 Law. The Administrative Chamber of the Supreme Court decided on lawsuits against CPC decisions in antitrust and

¹²⁹ Извештај за работа на Управен суд за 2018. година, available at: <http://www.vsrn.mk/wps/portal/usskopje/sud/izvestai/svi>

¹³⁰ *Commission v. AMD Vinica*, U/5. 889/2010.

¹³¹ No. 09-9/2, 7.02.2018.

¹³² The Law on Protection of Competition, Official Herald of the Republic of Serbia, No 9/2005.

concentration cases. The Court was inclined to annul CPC decisions without a profound reasoning on the merits of cases. It dealt mainly with minor issues of procedure.¹³³

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

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

¹³³ See on that point the report prepared by a judge of the Administrative Court (Đurić, 2012; Penev et al., 2013).

¹³⁴ Official Herald of Republic of Serbia, No 51/2009, 95/2013.

¹³⁵ The last one was submitted in 2017 by the Bar Association of Serbia. The full text of the initiative is available at <https://www.geciclaw.com/wp-content/uploads/2017/09/INICIJATIVA-USTAVNOM-SUDU-ZA-OCENU-USTAVNOSTI-ZAKONA-O-ZA%C5%A0TITI-.pdf>

been qualified as manifest violations of the constitutional principle of non-retroactivity of law (Marković-Bajalović, 2012; Vasiljević and Popović, 2012). The Administrative Court annulled these CPC decisions.¹³⁶ In the more recent period, the CPC has delayed with starting investigations upon complaints of third parties. Although the CPC should respond to a complainant in 15 days, the CPC extended this period substantially, thus *de facto* denying third parties the right to initiate proceedings.

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

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

¹³⁶ See, for example, judgment of the Administrative Court 1 U 1154-12, 4.04.2012. Available at <http://www.up.sud.rs/latinica/news/article/presuda-1-u-1154-12-od-04.04.2012.-zastita-konkurencije>

¹³⁷ Official Herald of Republic of Serbia, No 111/2009.

¹³⁸ Article 43(1) of the Law on Administrative Disputes.

¹³⁹ Article 43(2) of the Law on Administrative Disputes.

¹⁴⁰ Article 72(3) LPC.

established in the first instance proceedings and decides based upon legal arguments submitted by parties.

In recent years, the CPC has completed the majority of cases by accepting commitments or ceasing the case after finding the non-existence of a competition violation. In the period 2016–2019, the CPC issued eight decisions in antitrust cases, adopted commitments in seven cases, and terminated nine cases. The major recent antitrust case against the state-owned undertaking ‘Elektrodistribucija’ ended in 2018 by an informal settlement. The CPC accepted commitments proposed by the defendant after the Administrative Court had annulled earlier CPC decisions two times.¹⁴¹ In two cases finalized by decisions imposing fines upon undertakings, the defendant submitted appeals to the Constitutional Court alleging the infringement of the constitutional right to a fair trial. In the case decided upon the appeal of ‘Frikom’ A.D., the Constitutional Court rejected the appellant’s assertion that the fine imposed on him was of a criminal law nature. The fine imposed in this case amounted 3 mil. EUR. The Court referred to the ECtHR case *Nestle St. Petersburg and Others v. Russia*¹⁴² decided in 2004, to justify its assertion that competition law cases are of an administrative-misdemeanour character. However, referring to this case was not appropriate, since the ECtHR dealt with the powers of the Russian Antimonopoly Office to impose remedies rather than fines. The ECtHR, applying the *Engel* criteria, decided that the third criterion on the severity of fine was not fulfilled in this case. The Constitutional Court disregarded the *Menarini* case, albeit the applicant referred to it.

In a case decided in 2019,¹⁴³ the appellant disputed the Administrative Court’s decision on the grounds that the Court had decided the case without holding a hearing, and it had not provide sufficient reasoning for its judgment. The Constitutional Court rejected the appeal by invoking the administrative dispute principle of the administrative court’s reliance on facts determined in the first instance administrative proceedings. The Constitutional Court explained that the Administrative Court did not need to provide reasoning for all claims of the claimant, when these claims had been already submitted and assessed in the first instance proceedings. The Constitutional Court referred to two ECtHR decisions, *Chaudet v. France*¹⁴⁴ and *Sigma Radio Television Ltd. v. Cyprus*.¹⁴⁵ It is doubtful whether referring to these cases was appropriate since the first case did not deal with the imposition of fine at all, while in the

¹⁴¹ Decisions of CPC are available at <https://www.kzk.gov.rs/odluke/tipovi/povreda-konkurencije>

¹⁴² No. 69042/01, 3.06.2004.

¹⁴³ Už 5371/2017.

¹⁴⁴ No. 49037/06, 29.10.2009.

¹⁴⁵ No. 31281/04 and 35122/05, 21.10.2011.

second case, the fine was imposed, but the amount was not mentioned in the ECtHR decision. Besides, in both of these cases, the ECtHR underlined the court's obligation to examine all submissions made by the applicant, on factual and legal grounds,¹⁴⁶ that is, to assess the central issues of the case.¹⁴⁷

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

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

VI. Conclusion

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

¹⁴⁶ *Chaudet v. France*, par. 37.

¹⁴⁷ *Sigma Radio Television Ltd. v. Cyprus*, par. 156.

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

The results of voting for candidates in the 2019 election process showed clearly that the ruling coalition SNS-SPS-PUP fully supported the proposed candidates, while members of opposition parties sustained from voting or were absent from voting. Out of the 250 members of the Assembly, 132 voted for the proposed candidates, 1 member sustained from voting and 117 members were absent. Results of the voting can be viewed at the Open Parliament website: <https://otvoreniparlament.rs/glasanje/4108>

for the administrative model of enforcement, with a collegial body governing an administrative authority and deciding in the first instance on competition violations, and administrative courts deciding in the second instance. Without exception, administrative competition authorities combine investigative and decision-making powers. In some of the WB countries, like Albania, North Macedonia and Montenegro, investigative functions have been entrusted to separate, supposedly independent organs within the same authority. However, in reality, their independence is compromised with rules on the nomination of head officers and the supervisory power of decision-making bodies.

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

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

Powers of administrative courts differ in the WB countries. A full jurisdiction procedure is possible in most of the countries, albeit under limited circumstances. Administrative courts have not availed themselves yet of the opportunity to decide upon the merits of a case in competition law disputes. Courts regularly base their decisions on facts determined in the first instance proceedings. An oral hearing can take place in proceedings

before administrative courts, and in some jurisdictions (e.g., Serbia), it is even obligatory. However, in practice, courts tend to avoid holding a hearing and taking new evidence. As a consequence of such practice, competition cases are decided without defendant parties having an opportunity to present their arguments orally, and to cross-examine witnesses and experts in front of a decision-making body at any stage of the proceedings. First instance decision-making bodies decide upon facts investigated by investigating officials and presented to them in writing. A second-instance court decides upon files of a case submitted by a first-instance authority. The members of the first-instance decision-making bodies and the courts cannot build an autonomous opinion on a case in this way. Fundamental elements for impartial decision-making are lacking both in the first and the second instance proceedings. The modest expertise of administrative law judges in competition law, and the overload of different types of cases, represent additional obstacles for a competent and efficient adjudication of competition cases.

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

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

Regarding the second level of enforcement, the most appropriate improvement to ensure merit-based and efficient solving of cases would be the setting up of a specialised court to deal with competition cases, similar to

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

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

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