

Competition Law in Kosovo: Problems and Challenges

by

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Abstract

Competition Law is an important aspect of free market economy. It determines the functioning of the economic system based on the free market principles of supply and demand.

Competition law is in the initial stage of its implementation in the Republic of Kosovo. Its development began in 2004 with the adoption of Kosovo's Law on Competition, the country's very first law passed to regulate the legal basis of free market competition. The Law on Competition of 2004 had many shortcomings both with respect to its content and implementation. New legislation was thus passed in 2010 under the name the Law on the Protection of Competition. The latter act is in force now along with an Amendment that entered into force in early 2014. Taken in its entirety, Kosovo's competition law meets the standards and is in accordance with EU legislation. Kosovo, although it is only in the initial stage of its contractual relations with the EU, has aligned most of its laws with the requirements of EU legislation. Kosovo is Europe's youngest country and as such, it has various problems when it comes to the functioning of the rule of law. This paper will discuss several topics related to the development of competition law in Kosovo including: the political, legal and economical situation in the field of competition law; the legal bases for the protection of competition in Kosovo; the Kosovo Competition Authority and the insufficiency in its capacities to combat competition law infringements; legal provisions on restrictive practices and merger control. The paper also includes comprehensive conclusions. A number of competition cases deal with by the Kosovo Competition Authority will be mentioned throughout the paper.

Résumé

Droit de la concurrence est un aspect important de l'économie de marché libre. Il détermine le fonctionnement du système économique basé sur les principes de l'offre et de la demande. Dans la République du Kosovo le droit de la concurrence est dans la phase initiale de sa mise en œuvre. Son développement a commencé en 2004 avec l'adoption de la Loi sur la concurrence, la première loi jamais adoptée pour réglementer les bases juridiques de la libre concurrence. Cette loi avait des nombreuses défauts concernant son contenu et sa mise en œuvre. En effet, une nouvelle législation sous le nom de la Loi sur la protection de la concurrence a été adoptée en 2010, qui est actuellement en vigueur avec un amendement introduit au début de 2014. Pris dans son ensemble, le droit de la concurrence de Kosovo répond aux standards européens et est conforme à la législation de l'UE. Kosovo, même si cela n'est que dans la phase initiale de ses relations contractuelles avec l'UE, a déjà aligné la plupart de sa législation avec les exigences du droit européen. Kosovo est le plus jeune pays de l'Europe et en tant que tel a des divers problèmes concernant le fonctionnement de la règle de droit. Cet article discute plusieurs sujets liés à l'évolution du droit de la concurrence au Kosovo, notamment: la situation

politique, juridique et économique dans le domaine du droit de la concurrence; les bases juridiques pour la protection de la concurrence au Kosovo; l'Autorité de la concurrence de Kosovo et sa capacité limitée pour lutter contre les pratiques anticoncurrentielles; les dispositions juridiques concernant les pratiques restrictives et le contrôle des concentrations. L'article contient des conclusions exhaustives. Il évoque aussi un certain nombre des affaires de concurrence traités par l'Autorité de la concurrence de Kosovo.

Classifications and keywords: abuse; agreement; authority; commission; competition law; concentration; dominant position; Kosovo; state aid

I. Introduction

Competition law is known as antitrust law in the legal terminology of the United States of America. 'Antitrust laws were put in place by federal and state governments to regulate corporations. They keep companies from becoming too large and fixing prices, and also encourage competition so that consumers can receive quality products at reasonable prices. These laws give businesses an equal opportunity to compete for market share. Preventing monopolies ensures that consumer demand is met in a fair and balanced way. There are four sections that the laws focus on including agreements between competitors, contracts between buyers and sellers, mergers and monopolies'¹.

Having been the engine of economic development, competition seems a necessary subject of regulation laws. Thus, the operation of fair competition in the free market economy is regulated by legal provisions which set out the general framework of its operation. Competition law is made by the totality of all legal rules designed by the State to regulate fair market competition.

'Competition law may have two different definitions. The first definition, very large, proposes to review the entirety of competition law rules governing the rivalry between economic agents who are looking for clients or who want to keep them. The second, narrower definition, sees competition law as a set of rules designed to prevent and to fight, if necessary, practices which distort competition'².

Kosovo's current Law on the Protection of Competition (hereafter, LPC), approved by the Assembly in 2010, is a reflection of Kosovo's intention to ensure fair competition and to protect its consumers. The LPC is in accordance with the standards, and is roughly in line with the laws and enforcement practices of

¹ <http://www.antitrustlaws.org/>.

² C. Nourissat, *E drejta e biznesit e Bashkimit Evropian*, Papirus 2012, p. 231.

the EU. The LPC provides for the establishment of the Kosovo Competition Authority (hereafter, KCA or Authority). Unfortunately, the Authority's sound institutional foundations have not yet been reflected in its work. Although multiple instances of serious violations of Kosovo's competition law are well known to have taken place, the KCA has failed to take the necessary measures to resolve them. Still, some enforcement practice does exist covering restrictive practices (prohibited agreements and abuse) as well as concentration control (both a clearance of a notified operation and a prohibition). Except for the LPC, a separate Law on State Aid regulates the granting of state aid and its unacceptable cases.

1. The historical and political context of Kosovo

The Republic of Kosovo is the youngest independent European State and it is in this context that the development of its competition laws must be viewed. The Constitution of the Republic of Kosovo was adopted on 9 April 2008 and entered into force on 15 June 2008. According to the Constitution, 'the Republic of Kosovo is independent, sovereign, democratic, unique and inseparable'³.

Kosovo emerged from the breakup of the former Socialist Federation of Yugoslavia. However, on the dissolution of the federation in the early 1990s, Kosovo's right to secession was not accepted. After NATO's humanitarian intervention, a United Nations Mission was installed in Kosovo (known as UNMIK) under Resolution 1244 of the Security Council of the UN. The mission exercised legislative, executive and judiciary powers in Kosovo⁴.

Representatives of the Kosovo Assembly proclaimed its Declaration of Independence on 17 February 2008. From this date forth, Kosovo has acquired the status of an independent State and as such, it is now recognized by more than 100 members of the UN. The unilateral declaration of independence was the result of failed talks between the representatives of Kosovo and the representatives of Serbia, mediated by the Special Envoy of the UN Secretary General, Mr. Martti Ahtisaari. It was Mr Ahtisaari who drafted the plan (known as the Ahtisaari package) for the final settlement of Kosovo's status. The plan envisaged the creation of an independent State of Kosovo with enhanced rights for its minorities. However, the plan was rejected by Serbia, and it was ultimately not put to the vote in the UN because of Russia's opposition.

³ Article 1 of Constitution of the Republic of Kosovo.

⁴ For more details see: <http://www.un.org/en/sc/documents/resolutions/1999.shtml>.

2. Legal situation

Kosovo's political circumstances have enabled a sustainable development of its legal system. As a former socialist country, Kosovo has inherited legislation inconsistent with its new situation. Initially, UNMIK was led by a Special Representative of the Secretary General of the UN (hereafter: SRSG) – the acting chief administrator approved the Regulation on the Authority of the Interim Administration in Kosovo. Under this UN Regulation, laws applicable in the territory of Kosovo prior to 24 March 1999 were to continue applying insofar as they did not conflict with standards referred to in section 2⁵ of this Regulation, the fulfillment of the mandate given to UNMIK under UN Security Council Resolution 1244 (1999), or present or any other Regulations issued by UNMIK⁶.

The Constitutional Framework for Provisional Self-Government was passed in 2001⁷. On its basis, the first free parliamentary elections took place in late 2001; Kosovo's institutions were constituted at the same time. From then on, it was the Kosovo Assembly that enacted laws, but in order for them to enter into force, they still needed to be proclaimed by the SRSG. Following such an announcement by the SRSG, they would turn into UNMIK Regulations. This situation lasted until the entry into force of the Constitution of the Republic of Kosovo on 15 June 2008. The current conditions for the shaping of Kosovo's legal system were created upon the entry into force of its Constitution.

The Constitution states that 'Kosovo is a democratic republic based on the principle of separation of powers and checks and balances among them, as provided in this Constitution'. As a democratic republic, each branch of the government exercises its functions under the Constitution and other laws by not interfering in the functions of others. 'The Assembly of the Republic of Kosovo exercises the legislative power. The President of the Republic of Kosovo represents the unity of the people [and] is the legitimate representative of the country inside and out and the guarantor of the democratic functioning of the institutions of the Republic of Kosovo in accordance with this Constitution. The Government of the Republic of Kosovo is responsible for enforcing state laws and policies and is subject to parliamentary control. Judicial power is

⁵ See UNMIK/REG/1999/1: 'In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, color, language religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status'.

⁶ UNMIK/REG/1999/1, 25 July 1999.

⁷ Regulation No. 2001/9, Constitutional Framework for Provisional Self-Government in Kosovo, 15 May 2001.

exclusive, and is exercised by independent courts. The Constitutional Court is an independent body of constitutional protection and the final interpreter of the Constitution. The Republic of Kosovo has its own institutions for the protection of its constitutional order and territorial integrity, public order, which operate under the constitutional authority of the democratic institutions of the Republic of Kosovo⁷ (Article 4 of the Constitution).

The establishment, competences and structure of Kosovo's courts are regulated by a special legal act. According to the Law on Courts in the Republic of Kosovo (Law No. 03/L-199): '[t]he court system of the Republic of Kosovo consists of: Basic Courts, the Court of Appeals and the Supreme Court'. Basic Courts are courts of 1st instance established in Kosovo's main centers (7 cities), with their branches located in smaller municipalities. Appeals against decisions of Basic Courts are heard by the Court of Appeals which acts in the 2nd instance. It has territorial jurisdiction throughout the entire Republic of Kosovo. The Supreme Court is the highest judicial instance in Kosovo with jurisdiction covering its entire territory. As the court of final instance, it has jurisdiction to deal with extraordinary legal remedies against final decisions of the courts in criminal matters⁸ and review 2nd instance judgments.

3. Economic and business environment

'A market economy with free competition is the basis of economic regulation of the Republic of Kosovo'⁹. Kosovo has a young and dynamic open market economy. However, its economy originates in a centralized system which has undergone profound transformation after 1999. Situated in Southeastern Europe, Kosovo's economy has become part of the region's economic integration process, which provides sufficiently large market expansion opportunities. Kosovo is a member of the Central European Free Trade Agreement (CEFTA). It has joined the International Monetary Fund (IMF), the World Bank (WB) and other mechanisms facilitating robust economic and financial development. They include the European Bank of Reconstruction and Development (EBRD) and the Development Bank of the Council of Europe (CEB), where Kosovo was accepted as a full member in June 2013.

⁸ Under Kosovo's Criminal Procedure Code, final judicial decisions can be reviewed for various reasons on the basis of so-called extraordinary legal means such as: the application for the protection of legality submitted by the State Prosecutor, review of the criminal procedure, and request for extraordinary mitigation of the ruling.

⁹ Article 10 of the Constitution of the Republic of Kosovo.

Table 1. Key macroeconomic indicators for Kosovo (2008–2013)

		2008	2009	2010	2011	2012	2013
Real GDP growth (%)	%, y-o-y	6.9	2.9	3.9	5.0	2.5	3.1
GDP nominal	EUR billion	3.7	3.9	4.2	4.6	4.9	5.3
GDP per capita	EUR	2 100	2 330	2 520	2 530	2 721	3 117

Source: Kosovo Agency of Statistics and Central Bank of the Republic of Kosovo

Business activity in Kosovo is regulated by the Law on Commercial Companies (Law no. 02/L-123) approved on 27 September 2007. Accordingly, business organizations can take the following forms in Kosovo: Business Individual (BI), general partnership (OP), joint Sh.KM Partnership, limited liability Sh. PK, and Joint Stock Company (JSC). A separate Public Companies Law exists which regulates the establishment and management of public enterprises.

II. The legal basis of competition law in the Republic of Kosovo

Competition law in the narrow sense of the term is understood as a set of rules designed to prevent and fight, if necessary, practices that distort free and legitimate competition. The Republic of Kosovo has a certain experience in the field of competition law, given the fact that it was, until the early 1990s, part of the Socialist Federation of Yugoslavia. After 1999, opportunities emerged to create economic legislation which is based on the principles of free market economy.

1. Competition Law

In 2004, the Kosovo Assembly adopted a Law on Competition (Law No. 2004/36) which was intended to ensure the development of a sustainable market economy in Kosovo. Accordingly: '[t]he purpose of this law is to ensure the development of a sustainable market economy in Kosovo by prohibiting actions that restrict, suppress or distort competition. This law shall apply to all undertakings engaged in economic activity within, or having economic impact within, the territory of Kosovo'¹⁰. The above law was adopted at a time when UNMIK was the main decision-making authority in Kosovo and thus it did

¹⁰ Article 1 of the Law on Competition – Law No. 2004/36.

not meet internationally accepted criteria and standards. The original act was repealed with the adoption in 2010 of the Law on the Protection of Competition (Law No. 03/L-229), which is currently in force. Approximately 3.5 years after the introduction of the LPC, the Law on Amending and Supplementing the Law No. 03/L-229 on the Protection of Competition (Law No. 04/L-226) was approved on 13 February 2014 (hereafter, LPC Amendment).

2. Law on the Protection of Competition

The Law on the Protection of Competition was approved by the Assembly of Kosovo on 7 October 2010, promulgated by the Decree of the President of the Republic of Kosovo No. DL-061-2010 of 25 October 2010. The LPC entered into force 15 days after its publication in the Official Gazette. According to Article 1 LPC: '[t]his law defines the rules and measures to protect free and effective competition in the market, competences and organization of the Competition Authority and the procedures to implement this law'¹¹. The LPC applies to all forms of prevention, restriction or misuse of competition by enterprises in the territory of the Republic of Kosovo, or outside its territory provided these actions have effects in Kosovo.

The law provides two manners of supervising market competition:

1. Control of the actions of enterprises
2. Control of the structure of the market

Controlling the actions of enterprises takes place by overseeing agreements between enterprises that restrict competition and possible abuses committed by enterprises that hold a dominant position in the market¹². The legal definition of what constitutes an 'enterprise' is provided by the LPC Amendment. Accordingly, Article 2(2) defines an enterprise as: 'any business activity, regardless of the manner or form of organization management, public entrepreneurship established to carry out activities in the public interest, and any other natural or legal person or public authority that carries out economic activities whether or not it considered a business entity'.

Controlling the structure of the market is achieved by supervising concentrations in order to prevent the creation of a market structure that can facilitate anti-competitive exchanges between enterprises and the creation of a dominant position which may lead to higher market prices. The difference between reviewing agreements and dominance on the one hand, and concentrations on the other hand, is that the analysis of restrictive practices focuses on the past (performed *ex post*), whereas the assessment

¹¹ Article 1 of the Law on the Protection of Competition – Law No. 03/L-229.

¹² S. Kabashi, G. Asllani, *Konkurrenca dhe e Drejta e Konkurrencës*, Prishtinë, 2012, p. 64.

of concentrations is based on predictions made for the future (conducted *ex ante*)¹³.

Graphic 1. Power *ex ante* and *ex post*

<p><i>Ex ante</i>:</p> <p>Control of Concentrations</p>	<p><i>Ex post</i>:</p> <ul style="list-style-type: none"> • Tracking cartels • Abuse of a dominant position • Decisions on penalties
<p><i>Ex ante</i> or <i>Ex post</i></p> <ul style="list-style-type: none"> • Advocacy 	

Source: <http://ak.rks-gov.net> (official website of the Kosovo Competition Authority)

The LPC, along with the LPC Amendment, constitutes the legal basis for the regulation of market competition in Kosovo. The LPC has 12 parts with a total of 70 articles. Part I contains general provisions specifying the purpose of the law, the scope of its application and definitions. Part II covers prohibited agreements. Part III is dedicated to exemptions and allowances. Part IV addresses the abuse of a dominant position. Part V deals with concentrations. Part VI considers the professional opinion of the Kosovo Competition Authority: ‘1. The Authority, on the request of the Kosovo Parliament, Government of the Republic of Kosovo, central organs of public administration, legal persons with public authority and local organs, provides its professional opinion for the laws, regulations and other bylaws that significantly affect market competition. 2. The Authority may provide its opinion to organs referred to in paragraph 1 of this Article about compatibility of existing laws and other regulations with this law, it may provide opinions which encourage knowledge about market competition, improve the level of awareness and information relating to the role of the law and competition policy respectively, as well as provides professional opinions on resolutions and comparative developments of practices in the field of legislation and market competition policies’¹⁴. Part VII covers the establishment, structure and organization of the KCA while Part VIII speaks of its procedures. Part IX contains penalty provisions. Part X foresees the instances of the KCA’s cooperation with other bodies as well as judicial protection. Part XI deals with the implementation of the decisions or penalizing measures issued by the KCA and their statute of limitations. Part XII contains transitional provisions and addresses the issue of law enforcement stating expressly, in Article 66 LPC, that: ‘The implementation of this law should be in accordance with European

¹³ Ibidem.

¹⁴ Article 23 LPC.

Union directives for competition'. This means that even though Kosovo has no contractual relations with the EU, it already largely harmonizes its laws and their implementation with the requirements of EU legislation. In this context, the KCA is authorized to propose bylaws, which must be approved by the Government, for the implementation of the LPC.

Kosovo's main competition law provisions will be examined in the following part of this paper. It is worth stressing that the recent LPC Amendment eliminated some of the LPC's original technical problems and provided some additional legal provisions related to fines/ penalties that may be imposed by the KCA.

3. Law on State Aid

The legal basis for the regulation of competition in Kosovo also includes the Law on State Aid (Law No. 04/-L-024) adopted on 29 July 2011. 'With this law the principles and procedures are defined, in accordance with which state aid is allowed and controlled, in order to support economic and social development, to apply the principles of functioning of the market economy, to protect competition, and to fulfill obligations stemming from international agreements ratified by the Republic of Kosovo, including provisions on state aid. This law applies to all sectors of production and services operating in the Republic of Kosovo, with the exception of agriculture and fisheries'¹⁵.

The Law on State Aid is relatively short consisting of only 21 articles. Incidentally, it is clearly stated therein that '[t]o implement this law in terms of content and procedures, related institutions must adhere to the case law of the Court of Justice of the European Union and the European Commission'¹⁶.

III. Kosovo Competition Authority

The Kosovo Competition Authority (hereafter, KCA) was established in accordance with the original Law on Competition no. 2004/36 by the Assembly of Kosovo on 7 November 2008. The Authority is operational since March 2009. The KCA is an independent body and has the responsibility, and the authority, to enforce the law and promote competition among enterprises and to ensure consumer protection in Kosovo¹⁷.

¹⁵ Article 1 and 2 of Law No. 04/-L-024.

¹⁶ Article 20 of the Law No. 04/-L-024.

¹⁷ <http://ak.rks-gov.net/?cid=1,11> (official website of the Kosovo Competition Authority).

The KCA is a legal entity with an independent public power to carry out its duties stipulated in the LPC and in the Law on State Aid. The Authority answers for its work to the Assembly of Kosovo; its headquarters are in Pristina¹⁸. In carrying out its work, the KCA is prohibited from being under any form of influence which could affect its independence and impartiality. The internal structure and working of the Authority, as well as other issues relevant to its work, are set out in the Statute of the KCA which was drafted by the Authority itself and approved by the Assembly of Kosovo. The finances needed to perform its duties are provided from the Budget of the Republic of Kosovo. Penalty payments imposed by the KCA constitute public revenue that goes into the State Budget.

The KCA is a collegial body governed by the Kosovo Competition Protection Commission, which consists of 5 members: the President of the Commission and four Commissioners appointed by the Assembly of Kosovo, following the proposal submitted by the Government. The Authority consists of two categories of staff. The first group includes staff part of the Competition Commission (the managerial body of the KCA); the second category includes support staff elected in a public competition and covered by the Law on Civil Service. The Competition Commission constitutes the decision-making part of the KCA while the support staff assists the Commission in the implementation of the powers arising from the LPC.

1. Election, appointment and composition of the Competition Commission members

According to the LPC, the Competition Protection Commission is a collegial body that manages the work of the Authority, consists of five (5) members, one of whom is the President of the Commission. The [KCA] is represented by the President of the Commission. In case of the absence of the President, it is represented by the deputy or other authorized [member] of the Commission. The President of the Commission leads organizes and directs the work and the activities of the [KCA] and is responsible for the professional work of the [KCA].

The President, Deputy President and other members of the Kosovo Competition Commission are proposed by the Government and appointed by the Kosovo Assembly¹⁹.

¹⁸ Article 11(2) of the Law no. 04/L-226 Amending the Law No. 03/L-229 for Protection of Competition.

¹⁹ Article 12(1)(1) of the Law No. 04/L-226.

To be elected as a member of the Commission, candidates must meet the criteria outlined in the LPC. Each candidate must be a citizen of the Republic of Kosovo, must have superior qualifications in law, economics or equivalent, must have 7 years professional experience in the field of competition. The President and members of the Commission shall be appointed for a term of 5 years, and may be reappointed for one more term if so proposed by the Government. None of the members has the right to engage in political activities and cannot have ownership or contractual relationship with any enterprise in Kosovo.

60 days before the end of the mandate of a member of the Commission, the Government proposes to the Assembly candidates for the appointment or reappointment to the Commission.

Commission meetings are held when at least three of its members are present. Decisions are taken with at least 3 affirmative votes.

2. Duties and responsibilities of the Commission

Duties and responsibilities of the Commission are explicitly defined in the LPC and the Statute of the Commission. In the performance of its duties and functions, the Commission must act in accordance with its granted powers based on the Law on Administrative Procedure. Thus the law enforcement activity undertaken by the Commission is administrative in nature and is conducted in accordance with the Law on Administrative Procedure, except in cases where a special law (that is, the LPC) provides otherwise.

According to Article 28 LPC, the Commission has the following duties and responsibilities, it:

- proposes the issue of bylaws under the provisions of the LPC;
- takes decisions based on which the KCA initiates and directs the process of determining a disturbance of competition;
- imposes punitive measures for violations of the LPC;
- sets deadlines and conditions for their execution;
- finalizes procedures and defines measures, conditions and deadlines for the re-establishment of effective competition on the market;
- submits a request to the competent court to authorize the officials of the KCA to perform an unannounced investigation, to enter premises or other objects, open depots and transportation means, inspect personal documents and other items found in that location, as well as to place seals (lead-stamping) and temporarily sequester investigated items pursuant to Article 40(1) and Article 42 LPC;

- actively promotes competition law knowledge, increases awareness as well as the level of information about the role of politics and fairness of trade and competition respectively;
- gives opinions on the compatibility with the LPC with other draft laws and legal acts;
- proposes a methodological basis for the research of market competition through administrative direction;
- formulates laws and measures for the protection of competition;
- provides its professional opinion on request of the Assembly, the Government as well as central and local public institutions, on issues related to different public policy fields and mechanism of competition in trade;
- cooperates with international institutions and organizations in the field of competition regarding the fulfillment of Kosovo's international obligations which were transferred into the KCA's competencies;
- drafts the annual report on the work of the KCA and submits it to the Assembly of Kosovo at the latest by the 31 March of each coming year.

All members of the Commission are required to behave in a manner which will not diminish the reputation of the KCA during the decision-making process.

The Commission has wide powers to protect competition in the Republic of Kosovo. It is the Commission that begins an investigative procedure *ex officio*. However, a request, proposal, opposition or any other written statement can be submitted to the KCA by other entities: any natural or legal person, professional association, economic interest group, chamber of commerce, consumer association, the Government of the Republic of Kosovo, or central and local public administration body. A concentration control procedure starts, in principle, with a request of its participants under Article 17 LPC. The KCA may also initiate the procedure *ex officio* if: the participants do not represent the concentration according to Article 15 LPC; in the case of a suspension or amendment of a merger decision under Article 21 LPC; and in the case of measures following the performance of an illegal concentration referred to in Article 22 LPC²⁰.

The LPC gives the KCA the power to request documents and to require other actions by all institutions, associations or companies and other persons, which the KCA finds to be relevant to its assessment procedure. The KCA has also the power to request the parties to the proceedings to give the Authority access to all their shops, real estate and movable property, business books and

²⁰ Article 35(2) LPC.

databases contained in other documents. Investigated entities (that is, entities towards which proceedings have been initiated by the KCA) are obliged to respond to such requests. In certain cases, and by the decision of a competent court, the KCA has the right to make an inspection as well as control the documents and facilities of entities subject to open proceedings without a warning.

3. Legal Acts and Punitive Measures

All procedural actions, from a moment of the initiation of the investigation until the final receipt of the KCA's decision, are administrative in nature and must take place in accordance with the Law on Administrative Procedure of the Republic of Kosovo. Decisions adopted by a designated authority are administrative acts.

Based on Article 28 LPC, the KCA takes particular decisions which:

- assess small value agreements in the sense of the provision set forth in Article 8(3) LPC;
- ascertain abuse of a dominant position, specify measures in the sense of the provisions of Article 12 LPC and decide on punitive administrative measures foreseen for violations of this Article;
- assess the permissibility of concentrations and specifies measures in the sense of provisions set forth in Article 20 LPC;
- annul decisions pursuant to provisions set forth in Article 21(1) and (2) LPC and decide on punitive administrative measures foreseen for violations of this Article;
- change decisions and specifies measures pursuant to Article 21(3) LPC;
- determines special measures for the re-establishment of market competition after a prohibited concentration pursuant to Article 22 LPC and imposes punitive measures foreseen for violations of this Article;
- determines temporary measures pursuant to Article 48 LPC, that the enterprise is not complying with instated measures, provisions and terms pursuant to Article 46(7) LPC;
- imposes punitive measures in conformity with the LPC;
- establishes that market competition has not been disturbed in the sense of the provisions of the LPC²¹.

Punitive measures which the KCA imposes are divided into: punitive measures for serious violations of competition rules; punitive measures for

²¹ Article 54 LPC.

minor infringements and; punitive measures for violating other rules of market competition.

In terms of punitive measures for serious violations of Kosovo's rules on market competition, the KCA imposes up to 10 % of the total revenue that the firm has generated over the past year. Such penalty is imposed when it is determined that the enterprise: originates a prohibited agreement or in any other way participates in an agreement which has disturbed competition; abuses its dominant position; participates in the execution of a prohibited concentration; does not act in compliance with a decision of the KCA which determines measures for the re-establishment of competition, or determines temporary measures pursuant to sub-paragraphs²².

Punitive measures for minor violations of Kosovo's rules on market competition include fines of 2% of the total revenue in the previous year. These penalties are imposed in cases where the enterprise: did not submit a necessary merger notice; submitted inaccurate or false information in the context of merger control; hampers the performance of a court order²³.

The KCA can also impose punitive measures for other violations of Kosovo's rules on market competition totaling between 1,000 and 3,000 Euros. Such measures are imposed on an enterprise which does not have the status of a party to the proceedings but which does not act upon a request of the KCA.

IV. Prohibited agreements

In accordance with the LPC Amendment, the term 'agreement' covers agreements of any kind, between undertakings, with or without binding force, decisions or recommendations of associations of undertakings and concerted practices between undertakings, operating at the same level or at different levels of the market. The definition covers written and unwritten as well as silent agreements (so-called gentleman agreement) which violate the provisions of the LPC.

The LPC explicitly provides for cases where an agreement between business entities is considered illegal. Accordingly: 'all agreements between two or more independent enterprises are prohibited, decisions made by business associations and concerted practices that aim or may significantly disturb market competition in a relevant market, and in particular those that:

1. Directly or indirectly impose purchase or sale prices or any other condition of trade;

²² Article 56 LPC.

²³ Article 57 LPC.

2. Limit or control production, markets, technological development and investments;
 3. Share markets or supply sources;
 4. Implement unequal conditions for similar transactions with different enterprises, consequently placing them in an unfavorable competitive position;
 5. Making the conclusion of contracts subject to the acceptance by the other contracting parties of supplementary conditions which have no connection, by their nature or trade practice, with the object of such contracts²⁴.
- Prohibited agreements can be horizontal or vertical in character²⁵.

1. Identified cases of prohibited agreements

The KCA has made an in-depth investigation into the insurance market for the compulsory insurance product Third Party Liability (hereafter, TPL). During the investigation, the Competition Commission found that a pricing agreement existed between insurance companies for the sale of auto liability insurance policies covering third party liability. Ten insurance companies operating in Kosovo were party to the proceedings.

After several months of investigations, completion of the accumulated documentation, collection of evidence and the conduct of oral hearings, the Commission observed that there is a suspicion of illegal practices between insurance companies for fixing the price of auto insurance policies for third party liability (TPL). During the investigation, the Commission found a copy of a written agreement between the insurance companies (dated 3 July 2009, from the town of Djakovica) containing a ban on price reductions on the insurance market.

The Commission has determined that an agreement was in operation between the investigated insurance companies whereby they have fixed prices of insurance policies so as to prevent clients from choosing the most favorable offer. This multilateral practice represents a restriction and distortion of competition in the market that breaches Article 3 LPC.

The Commission has verified that all of the investigated insurance companies were party to this agreement and imposed administrative fines in the amount of 100,000 EUR each, totaling in a fine of 1 million EUR²⁶.

²⁴ Article 4 LPC.

²⁵ M. Drakulic, *Osnovi Poslovnog Prava*, FOM, Bg. MST Gajic, 1993, p. 184.

²⁶ Brief summary of the case with which the Authority has imposed a penalty for violation of the Act, is taken from <https://ak.rks-gov.net> (the official web site of Kosovo Competition Authority).

V. Abuse of a dominant position

1. Introduction

‘Competition can be ruined also by the abuse of a dominant position in the common market or in significant part of it by one or more undertakings’²⁷.

‘Economically dominant position fully corresponds with a monopolistic or oligopolistic situation in the market where a company, or a small number of companies, has legal or factual strength independently of the conditions of exchange, not taking into account the interests or the position of other participants in the same market’²⁸.

In two decisions taken in the late 70s, the Court of Justice of the European Union has proposed a definition of a dominant position. According to the Court’s interpretation, dominant position ‘is a situation of economic power held by an enterprise, which gives her the ability to prevent effective competition in respect of the market in question and gives the opportunity to act as an independent in a largely opposed competitors, customers and ultimately of its consumers’²⁹.

According to the LPC:

1. An enterprise has a dominant position, as a supplier or purchaser of certain types of goods or services:
 - 1.1. if it is not subject to free competition in the market;
 - 1.2. if it has significant market power in comparison with existing or potential competitors, [taking] into account, in particular:
 - 1.2.1. its participation and position in the relevant market;
 - 1.2.2. its financial power;
 - 1.2.3. its access to supplies or markets;
 - 1.2.4. its links to other enterprises;
 - 1.2.5. legal or factual barriers for other companies in the market;
 - 1.2.6. actual or potential competition by undertakings established within or outside of Kosovo.

An enterprise is considered to hold an individual dominant position if it holds more than 25% of the market. ‘Two or more independent undertakings may be in a dominant position in relation to competitors if they act together in the relevant market and [where] their overall participation in the market is higher than forty (40%) percent (collective dominant position)’³⁰.

²⁷ M. Hetemi, *Disa Tema Aktuale të Ekonomisë së Tregut*, Prishtinë 2005, p. 231.

²⁸ *Ibidem*, p. 232.

²⁹ 27/76 *United Brands* [1978] ECR 207; 18/76 *Hoffmann-La Roche* [1979] ECR 461.

³⁰ Article 6(3) of the Law No. 04/l-226 amending the Law No. 03/l-229 for Protection of Competition.

2. Prevention the abuse of a dominant position

According to the LPC, the abuse of a dominant position held by one or more undertakings in the relevant market is prohibited, and especially the:

- 1.1. direct or indirect setting of unfair purchase or sale prices and other unfair trade conditions, respectively;
- 1.2. limitation of production, markets or technological development to the prejudice of consumers;
- 1.3. implementation of different conditions for similar duties with other enterprises, thereby placing them in a disadvantageous competitive position;
- 1.4. agreeing on contracts under the condition that the other contracting parties must accept additional obligations;
- 1.5. setting prices or other conditions, the objective or the result of which is to prevent market entry, or exclude certain competitors or one of their products from the relevant market;
- 1.6. the dominant company refusing access to its network or infrastructures by another enterprise, despite appropriate compensation, if such refusal prevents the other enterprise from acting as a competitor of the enterprise with the dominant position.

3. Identified cases on the abuse of a dominant position

The KCA has sanctioned the Company L.L.C. GEKOS for the abuse of its dominant position under the Law on Competition of 2004 (decision PA/III/08/2010). An administrative sanction of 100,000 Euros was imposed by the Authority on L.L.C. GEKOS, after the KCA concluded that the offender was the only operator offering the sale, installation and maintenance of electronic fiscal devices in the entire territory of Kosovo. Under contract no. 1/10, it had sold its products through the enterprise Eternet under the logo Dukagjini-Eternet-Gekos. However, Eternet also sold products under the Dukagjini name, and ‘this was an action which is considered a concerted practice which is contrary to the law, and thus in this way it abused its dominant position’³¹.

According to the decision of the KCA, L.L.P. GEKOS and L.L.P. DUKAGJINI concluded a secret agreement for the sale of fiscal cash registers in the territory of the Republic of Kosovo. This agreement resulted in the creation of a dominant position in the market. As a result of the dominant

³¹ A description of a case can be found at: https://ak.rks-gov.net/repository/docs/Vendim_arkat_fiskale_Gekos_Dukagjini.

position, prices of fiscal cash devices in Kosovo remained very high generating high costs for their purchasers.

L.L.P. GEKOS was punished with 100,000.00 Euro for its sales of fiscal cash devices and creation of a dominant market position (monopoly) as well as the abuse of its dominant position in the entire market of the Republic of Kosovo.

L.L.P. DUKAGJINI was punished with 100,000.00 Euro for the concerted practice that enabled L.L.P. GEKOS to create a monopoly in the relevant market and abuse its dominant position in the market of the Republic of Kosovo.

At the same time, the Authority has recommended the Ministry of Finance to liberalize the above market and open it to other economic operators.

VI. Concentration of enterprises

1. Prohibited Concentrations

The union of independent enterprises can create an economic and legal situation which can seriously harm market competition. For this reason, the LPC has regulated situations when enterprises can legally join as well as the procedure for allowing such concentrations.

According to Article 13 LPC, a 'concentration of enterprises is created upon by installing permanent control through which is acquired: merging of two or more independent enterprises or parts of these enterprises; direct or indirect control or the influence of the dominating position of one or more enterprises or parts of enterprises; taking over the majority share or its part; taking over the majority of voting rights; in another way in the sense of the provisions of applicable laws and regulations.

Gaining control according to Article 13(1) LPC takes place through the transfer of rights, contracts or other acts through which one or more enterprises, individually or jointly, while taking into account all juridical and factual circumstances of the case, gain decisive influence over one or more enterprises on a lasting basis.

The creation of a joint venture by two or more independent enterprises, which works on a lasting basis as an independent economic entity, will be considered a concentration according to the LPC.

In all cases of an intended concentration, enterprises are obligated to apply to the KCA for the concentration to be cleared and for the purpose of functioning of the same one. Approval can take place after the enterprises present the legal facts of the case foreseen by the law.

After receiving the concentration notice, the KCA begins the procedure and evaluates the legality of the concentration. The Authority confirms the effects of the transaction on market competition and possible market entry barriers which would appear after the implementation of the concentration, especially if the operation creates a new dominant position or strengthens an existing one.

Within the evaluation of the effects of a concentration, the KCA specifically confirms:

- The structure of the relevant market, existing and potential competitors on the market in the territory of the Republic of Kosovo or abroad, the structure of demand and offer on the market including their trends, prices, risks, economic and legal obstacles, and other obstacles for entering or exiting the market;
- Position, market participation and economic and financial power on the relevant market, level of competitive capability of the participants in the concentration, possible changes in their business and alternative supply sources for buyers arising as a result of the concentration;
- The notified concentration's effects on other enterprises or on consumers, short distribution routes, reduction of transportation costs, specialization in the production process, technological innovations, reduction of production or service costs as well as other advantages resulting from the execution of the concentration.

The KCA is obliged to consult all enterprises, professional associations, employers' association, the association for consumer rights and other individuals which are not party to the procedure, who were presumed to have knowledge about existing market relationships, in order for them to present their comments and opinions regarding the possible effects of the notified operation on their activities in the relevant markets. Enterprises which operate on markets upstream, downstream and neighbouring to where such concentration is to take place should also be consulted.

The Authority will take a decision which will enable a notified concentration or which will put a stop to it. When the KCA refuses to permit a notified concentration, it will continue to track the situation of its intended participants and the market structure where they act.

Concentrations that can harm competition are prohibited, especially if they result in the strengthening of a dominant position or creation of a new dominant position³².

³² Article 14 of the LPC.

2. Practical example of concentration control

On 11 September 2012, the KCA permitted a concentration realized through the acquisition of 100% shareholders capital of the Kosovar Company for Distribution and Supply of Electricity (KEDS) by Kosovo Calik Limak Energy Inc.³³.

The company being acquired, the Kosovo Company for Distribution and Supply of Electricity (KEDS) was at that time fully owned by the Government of the Republic of Kosovo and held the legal status of a public enterprise. The acquirer, Limak Kosovo Calik Energy Inc., purchased 100% of the shares of Kosovar Company for Distribution and Supply of Electricity (KEDS) from the Government of Kosovo and asked the KCA to allow its union with Kosovar Company for Distribution and Supply of Electricity (KEDS). The Authority permitted the merger.

VII. State aid

According to Kosovo's Law on State Aid, State aid can be defined as: any help that is given from State resources in whatever form, which includes but is not limited to: grants and subventions; reductions in taxes and their classification; remission of late payments and fines; remission of debts or covering losses; loan warranty or lending with a low interest rate; reducing liability of insurance companies; reducing the prices of offered goods and services, or selling State property below its market price, buying goods and services at a price exceeding the market price, in circumstances that are not acceptable for a private investor which operates under normal economical conditions³⁴. State aid providers include all public bodies of local and central administration, public enterprises or authorities acting on behalf of the State that provide benefits to companies or particular sectors.

Permitted aid includes: social aid given to consumers if there is no discrimination related to the origin of the products; aid provided in cases of damage caused by natural disasters or; aid for specific cases related to national security; *de minimis* aid (if its amount does not exceed thirty thousand (30,000) Euro over any three (3) year period) irrespective of the form of the aid or the purpose for which it is granted and, simultaneously, is not granted for export-related activities, it is not conditioned with the use of domestic products vis-à-vis those imported and the beneficiary is not an undertaking in difficulty.

³³ https://ak.rks-gov.net/repository/docs/vendimi_3sq.pdf.

³⁴ Article 3(1)(1) of the Law on State Aid – Law No. 04/-L-024.

The Office of State aid operates within the structure of the KCA as an administrative unit responsible for the control of State aid in Kosovo. The Office is responsible for receiving, analyzing and monitoring reports and other data related to aid schemes and individual aid. It prepares reports on state aid and the decisions taken by the Commission.

Kosovo's law prohibits every aid given from State resources, given in any form whatsoever, which directly or indirectly threatens competition, while giving preferential treatment to certain enterprises for producing certain products. Even though Kosovo's existing legislation is compatible with EU standards, there are no cases so far of the law being implemented. This illustrates well the practical workings of the institutions assigned to enforce it. In this aspect, Kosovo's institutions are in need of professional assistance from the EU for developing its enforcement capacities.

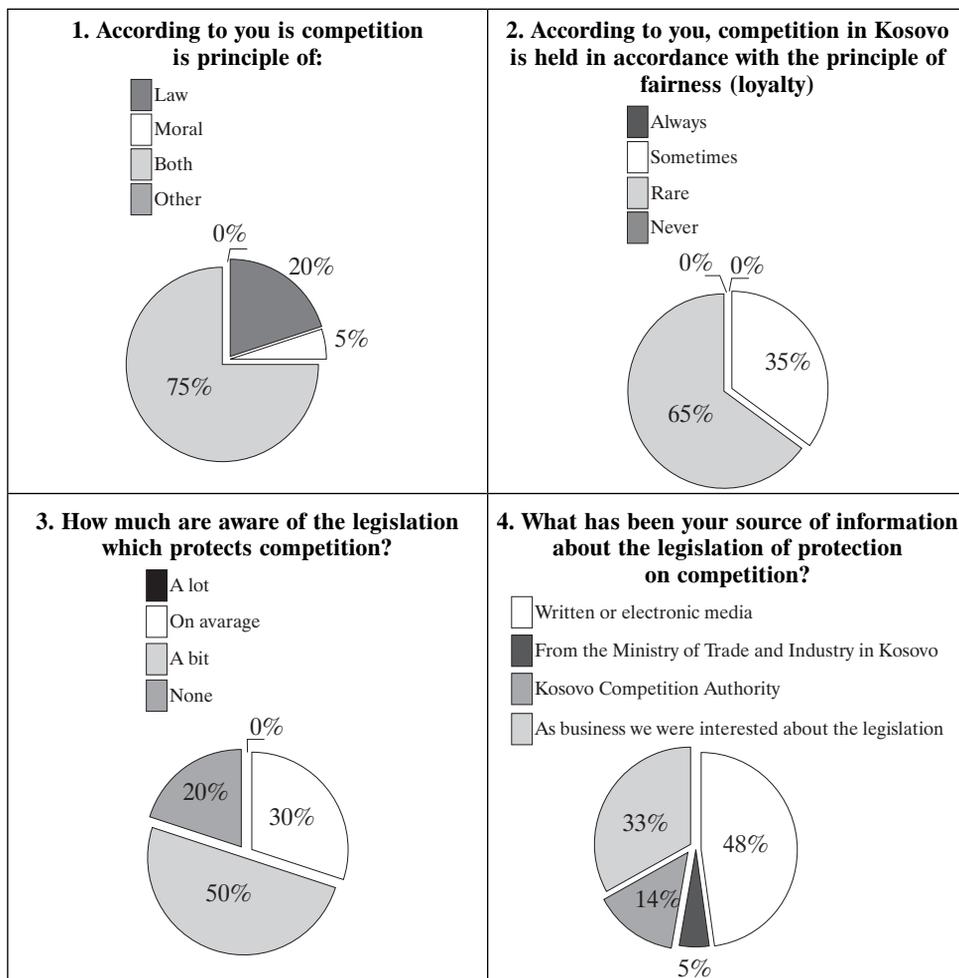
VIII. Research on competition law in Kosovo

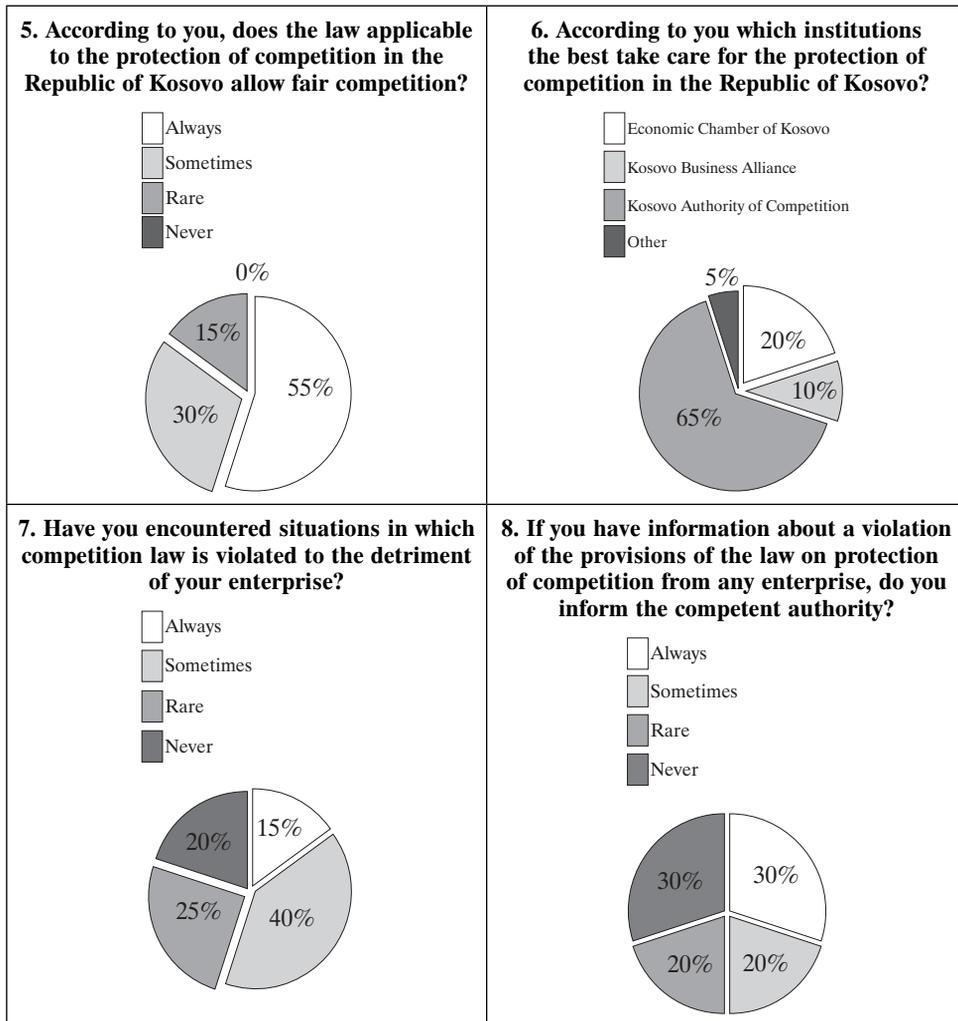
A research project was conducted in April and May 2014 in Pristina, the Republic of Kosovo. The project's respondents included companies in various economic fields operating in the Kosovo market. The purpose of the research was to assess their level of satisfaction with the LPC and its implementation by the KCA, to evaluate how much companies in Kosovo know about competition law, available source of information on competition law, the registration of cases which violate the LPC, and to evaluate the performance of the KCA. The research project was also meant to assess the positive impact of professional business organizations in Kosovo on compliance with competition protection rules.

The survey polled a total of 20 business organizations. The survey consisted of a general part containing questions about the surveyed institution (such as its legal status and contact details) as well as 8 specific questions:

- 1) According to you, is competition a principle of: law, morality, both or other?
- 2) According to you, competition in Kosovo is held in accordance with the principle of fairness (loyalty): always, sometimes, rarely or never.
- 3) How aware are you of the legislation that protects competition: a lot, average, a bit, not at all?
- 4) What sources of information about competition protection legislation have you used: written or electronic media, data from the Ministry of Trade and Industry in Kosovo, sources of the Kosovo Competition Authority, as a business we were interested about the legislation.

- 5) According to you, does the law applicable to the protection of competition in the Republic of Kosovo allow fair competition: always, sometimes, rarely, never?
- 6) According to you, which is the best institution to take care of the competition protection in the Republic of Kosovo: Economic Chamber of Kosovo, Kosovo Business Alliance, Kosovo Competition Authority, other?
- 7) Have you encountered situations in which competition law is violated to the detriment of your enterprise: often, sometimes, rarely, or never?
- 8) If you have information about a violation of the provisions of the Law on the Protection of Competition from any enterprise, do you inform the KCA: always, sometimes, rarely, or never? *Research done with companies in various fields operating in the Kosovo market





The research results have shown that commercial companies have information about the LPC mainly from print or electronic media and that competition protection legislation provides a good basis for the development of fair competition in Kosovo. According to the respondents, the KCA takes care of competition protection in the country, even though the number of cases dealt with by the Authority is minimal. Despite the fact that businesses have encountered cases of competition law violation to the detriment of their firm, most are reluctant to notify them to the Authority.

IX. Conclusion

Competition law is an important aspect of the economic wellbeing of the free market. As such, it deserves special attention from State institutions. Considering the history and unique circumstances of the Republic of Kosovo, its competition law cannot be considered in isolation from the overall development of its legal, economic and political system.

The paper made it clear that Kosovo, despite being a very new country with no contractual relations with the EU as of yet, has made great efforts in shaping its legal system to be in accordance with the requirements of the EU accession process. Part of fulfilling such legal criteria is also its Law on the Protection of Competition, adopted by the Kosovo Assembly in 2010. The LPC protects the market while hindering orchestrated, anti-competitive actions undertaken by private entities.

The Kosovo Competition Authority is the institution responsible for the supervision and implementation of the LPC. The KCA has extensive powers, its main role being the enforcement of the LPC. Although the activity of the Authority has been fluctuating, it can nevertheless be generally concluded that the KCA has so far failed to accomplish the mission for which it was established.

Since its founding in March 2009, very few cases of punitive measures taken by the KCA can be identified here in comparison to the far larger number of LPC allegations that are being made in the Kosovo market. The KCA has thus failed to withstand the various political pressures exercised upon its work. As a result, it is fair to say that many companies have violated the LPC in Kosovo, and yet the KCA has not held them accountable for it.

Despite efforts, competition law in Kosovo is at the initial stage of its development. It faces a number of problems and challenges. Kosovo's competition law can be viewed from a legal, economic and institutional perspective. Positive and negative sides can be identified in each area.

Considering the legal perspective first, the positive features of Kosovo's competition law include the fact that it is modern and in line with EU requirements. Moreover, its legal provisions have been designed in an understandable language and several administrative guidelines for its implementation have already been approved. On the negative side, Kosovo's competition law is not being implemented in the right manner or volume.

Considering the economic perspective next, the only positive feature that can be identified here is that a climate of trust exists in Kosovo that its competition law will be implemented and will benefit businesses. On the negative side, Kosovo's competition law is not applied in practice and has not realized its

goal of providing the country with a decent level of competitiveness. Moreover, legislation has proven unable to eliminate state monopolies (exclusive licenses granted by the State to certain enterprises, price fixing in the insurance field set by the Central Bank of Kosovo, etc.). Finally, enterprises have been convicted of infringing competition rules in a selective manner.

Considering the institutional aspect of Kosovo's competition law, the establishment of the KCA is certainly a positive outcome, as is the fact that the Authority has developed investigative procedures and punished at least some of the offending companies. It is also to be commended that Kosovo's institutions are to adhere to the practice of the Court of Justice of the European Union and of the European Commission when it comes to the implementation of the Law on State aid. Among the negative institutional features of Kosovo's competition law system is the fact that the impact of political circles on the KCA has been substantial. The KCA lacks human capacity for performing its professional duties and the members of the Competition Commission have little experience in implementing the LCP. It seems that the activities of the KCA are dominated by corruption and that other abuses of official duty are taking place. This observation derives from the fact that the Authority has repeatedly failed to prosecute well known competition law breaches, even in cases clearly identified by the business community, the media, and civil society experts.

Among the challenges facing Kosovo's competition law system lays the selection and appointment of the members of the Competition Commission, which must be based on high moral credibility and proven expertise in this field. Political pressures on the work of the Authority must be removed and cooperation strengthened with other institutions, the business community at large, experts in different fields and the civil society, etc.. Improving the performance of the KCA by employing professional administrative staff is also necessary. Fighting collusion that disturbs market competition in Kosovo, through both companies and associations, must become a priority. The imposition of maximum penalties for companies that abuse their dominant position remains a challenge as does more widespread control of concentrations (Kosovo has very few concentration cases). Existing problems include also market liberalization and increasing the number of economic operators in areas currently monopolized by the State (mobile telephony, fiscal cash registers, etc.). State aid control must increase and any future changes to the LCP should consider the recommendations of the business community.

In order for Kosovo's competition law system to develop, the involvement of the judiciary is essential. Competition cases must thus undergo judicial review and yet so far, very few such cases have been referred to ordinary courts.

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