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OECD Global Forum on Competition

CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION

Contribution from Albania

-- Session II --

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CHALLENGES/OBSTACLES FACED BY COMPETITION AUTHORITIES IN ACHIEVING GREATER ECONOMIC DEVELOPMENT THROUGH THE PROMOTION OF COMPETITION¹

1. Overview on competition policy and competition law in general

1. An effective competitive policy is an indispensable element for the efficient activity of the market economy and in the nowadays framework of markets globalisation and deregulation, the importance of that policy is becoming ever-growing.

2. The main objective of the competition policy is to keep and encourage competition, in order to promote efficient usage of the resources protecting the freedom of economic activity of different participants in the market. Improvement of the entry access and opening of the markets through deregulation, privatisation, tariff reduction, or quotas licences removal has been particularly considered as important objectives in the administration of the competition policy. This means that the competition authority can have influence on supporting solutions determined by the market, through active participation in the development of public policies and by giving comments and intervening in regulation procedures.

3. As far as competition law is concerned, it is usually a law with a general action: it is applicable on all sectors of economic activity, with exception of the cases where it has been foreseen differently. In this context, there are very complex relationships between competition policy and other economic policies, such as commercial policies, including tariffs, quotas, subsidies, antidumping actions, internal regulations, export restrictions, industrial policies, of regional development, industrial property, privatisation, scientific and technologic development, investments and taxes-relationships which are reflected in the respective legislation. This factor has a direct influence on which level the objectives of competition law can be achieved, without being constrained of restricting or contradicting objectives of other public policies.

2. Challenges and obstacles

4. In our view point, the absence of competition culture in Albania constitutes the root cause of impediments to competition. After the approval of the law no. 8044 (7 December 1995) "On Competition", the competition structure has been established within the Ministry of Economic Co-operation and Trade. But from year 1995 to 2001, there has been no consistency in maintaining this structure in charge of enforcing the competition law.

5. The very specific weaknesses of this competition structure include:

1. lack of an appropriate legal framework;
2. lack of an independent institution;
3. lack of sufficient and qualified staff;
4. lack of financial resources in conducting surveys for market data collection.

6. In particular, in regard to the lack of appropriate legal framework: the law no. 8044 (7 December 1995) "On Competition" didn't provide adequate powers in investigating and imposing sanctions. According to this law, an investigation could be opened by the Competition Department only on the basis of a formal complain. There was no specific provision in the law where Competition Department

could open a case under its own initiative. Also, it was not empowered to enter into premises during an investigative procedure, could not seize documents to be accepted as evidence for the case, could not compel witnesses to testify or to require the production of documents or written responses to questions, or could not impose sanctions either for the timely and complete provision of documents. Finally, there were very insignificant fines for antitrust infringements.

7. Regarding the legal framework, we have to add also the non application of the competition law to some important economic activities. The articles on prohibition of horizontal and vertical agreements, or on price fixing of the law no. 8044 (7 December 1995) “*On Competition*”, did not apply to companies in public services or to some specific sectors of the economy, such as agriculture or forestry.

8. As a small country in transition, one of the main challenges for the competition authority is also related to the small size of the population. There are few major businesses and thus the explicit collusion is easier to hide and the tacit collusion is easier to occur. Furthermore, the links between political and business classes may complicate the situation.

9. Having regard to the continuous changes of the Albanian Competition Structure reflected also by a very limited staff members, the challenge related to small GDP is also identified. A small country as Albania can only afford competition authority of a small size.

10. According to statistics, the informal sector in Albania represents about 30% of the economy. There is a concern that this figure is higher, and as such, its repercussions in competition enforcement are worthier to be considered. Despite some positive effects, the informal sectors have in transitional or emerging economies, such as reducing unemployment, in these informal markets a set of anticompetitive practices can be verified, such as refusal to deal. Also, Competition Department had to face limited access to the information on these markets. Furthermore, the informal sector has manifested its negative impact also on the formal sector. Several unfair competition-related complaints, due to the activities in the informal sector, have been submitted to the Competition Department.

11. Another challenge for the competition structure has also been to develop other institutions awareness and adaptation with the competition rules. After the first law on competition has been adopted, time has been needed for all institutions to be aware of and to comply with the competition rules. These government or non-government based institutions sometimes have taken actions that undermined competition, in particular as regard to regulatory, procurement, strategic sectors and privatisation policies. There has not been a legally-based co-operation amongst regulatory entities and the Competition Department, and there have been several cases where the state-owned companies have been privileged as compared to the private ones in the procurement procedures.

12. It is worthy to put emphasis on the links between privatization and liberalization of important economic sectors from one side, and the establishment of regulatory entities and competition authorities on the other side. From our experience it is very important that market openness be accompanied with a complete regulatory reform, including an adequate legal framework and strong institutions to implement it. If the process of privatisation, from small to the large scale, takes place before these institutions have been set up, the results of an intended efficient economic reform would be far from those expected.

3. Responses to challenges and obstacles

13. The law no. 8044 (7 December 1995) “*On Competition*” has constituted the very first step in dealing with issues concerning monopolies, dominant position or unfair competition, even though not in thorough way.

14. However, the application of this law, as mentioned before, has encountered lots of problems in resolving the cases of the existing transformed economic situation. In particular, the privatisation and liberalisation of strategic sectors has made indispensable compiling the anti-trust law approximated with the European one. Also, some of the provisions of this law, as those dealing with condemning the dominant position *per se*, rather than the abuse of dominant position, did not comply with the European competition legislation.

15. So, considering problematic issues raised by this law and to better respond to the new needs and developments in the Albanian economy, a new antitrust law has been compiled by the Competition Department, with the assistance of GTZ, being harmonised with “*acquis communautaire*”. The new law no. 9121 (28 July 2003) “*On the Protection of Competition*” has been enacted by the Parliament of Albania and has entered into force by 1st December 2003.

16. As in all European competition legislation, the pillars of this law are agreements, abuses of dominant position and concentrations. It stipulates the establishment of an independent competition authority, compound of the competition commission, as a decision-taking body being elected by the Parliament and the Secretariat as an investigative body. The competition authority decisions are only appealed to the First Instance Court of Tirana District. It has foreseen also all due procedures to effectively investigate upon the cases, fines categorised according to serious or not serious infringements, leniency-related provisions, and also specific provisions on co-operation between competition authority and other public institutions.

17. In this way the lack of appropriate legal framework has been successfully addressed with this new law. It still needs to be accompanied with proper regulations, which for the time being, have been drafted and will be enacted soon by the Competition Commission, to be elected by the Parliament.

18. With the intention that the new law can be adapted easily by all institutions, the new law purposely has been discussed with about 60 different institutions, directly or indirectly related with the competition issues. The law, in its discussion phase, has been sent for comments to all align ministries, regulatory entities, Business Consultative Council, legal bureaus, research institutions and so on. In this way, these structures will get more easily adapted with the new competition rules and will be co-responsible for their effective application.

19. Being committed to fulfil successfully its mission, with due persistence, the Competition Department has had an active attitude also on decisions and different administrative practices, which influence the normal functioning of the market. The Competition Department has given its comments for liberalisation reforms or for the privatisation of undertakings in strategic sectors of the Albanian economy, which could be accompanied with non-competitive effects, such as in the case of privatisation of Savings Bank, Albtelecom, INSIG; etc, aiming at giving proposals for alternative solutions for opening to competition even these markets.

20. In conclusion, in order for the competition policies to have their own place, it is necessary that effective actions of Competition Authority be combined with an effective implementation of the law by courts and a progressive conscientiousness of the competition legal framework. Only in this way, we can prohibit cartels agreements and concerted practices, the abuses of dominant position and monopolists’ practices or we can have an influence in minimising actions of different structures in supporting, by public funds and on non-transparent basis, undertakings or particular sectors of economy.

21. Organisation of roundtables, workshops, and also continuous information of media on conceptual problems, as well as discussions of concrete cases will be effective instruments, through which the Competition Authority should fulfil this objective.

NOTE

1. This report has been prepared by the Competition Department and does not necessarily express the views of the Albanian Government.