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More documentation related to this discussion can be found at: [oe.cd/cmkt](http://oe.cd/cmkt).

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## *Competition for-the-market*

### **- Contribution from Albania-**

This paper first describes the Albanian experience when assessing the concessions under the framework of competition law. Two main cases will be described in the abuse of dominant position.

#### **1. Legal Framework and assessment power**

1. Albanian Competition Authority (ACA), is a public independent institution that function based on the Law no. 9121 dated 28.07.2003 “On competition Protection”-amended. The ACA mission is “Assuring a free and effective competition in the market through the implementation of the “Competition Protection” law, to prevent, detect and prohibit anticompetitive firms’ conduct: prohibited agreement, abuse of dominant position, control on mergers and acquisitions; to promote competition through advocacy; to implement the legal framework of an independent institution in the Republic of Albania. The ACA is composed by the Competition Commission (CC) elected by the Parliament that acts as the decision making body, and the Secretariat that is the executive body.

2. The competition law applies to the “undertaking” and to “association of undertakings”. The undertaking is any legal or natural person, private or public, which performs an economic activity. Public and local administration bodies, as well as public authorities and entities, are considered as undertaking if they engage in economic activity. The “association of undertakings” are any kind of legal or factual association, legal or natural person, private or public, profitable or not profitable, which represents the interests of member undertakings.

3. Based on the article 69 of the competition law, “Duties of central and local administration structures”, central and local administration bodies require from the ACA to assess any draft normative act which, in particular, deals with: a) quantitative restrictions concerning trading and market access; b) establishment of exclusive rights or special rights in certain zones, for certain undertakings or products; c) imposing uniform practices in prices and selling conditions. The ACA assess the level of restriction or prevention of competition from draft normative acts *ex-ante* and *ex-post*.

4. The concessions are assessed under the article 8 of the competition law “Appraisal of dominant position”. The dominant position of one or more undertakings shall be determined particularly by establishing the following: a) the relevant market share of the investigated undertaking/s and that of the other competitors; b) the barriers to entry to the relevant market; c) the potential competition; ç) the economic and financial power of the undertakings; d) the economic dependence of the suppliers and purchasers; dh) the countervailing power of buyers/customers; e) the development of the undertaking's distribution network, and access to the sources of supply of products; ë) the undertaking's connections with other undertakings; f) other characteristics of the relevant market such as the homogeneity of the products, the transparency of the market, the undertaking cost and size symmetries, the stability of the demand or the free production capacities.

5. The *ex-ante* or *ex-post* evaluation is done according to article 9 of the competition law “Abuse of dominant position”. 1. Any abuse by one or more undertakings of a dominant position in the market shall be prohibited. 2. Such abuse may, in particular, consist in: a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; b) limiting production, markets or technical development; c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; ç) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations; d) the under-cutting of prices or other conditions which have as their object or effect the prevention of entry or the expulsion from the market for specific competitor(s) or one of their products; dh) refusal to deal or refusal to license; e) refusal to allow another undertaking access to its own networks or other infrastructure facilities of undertakings with a dominant position, against adequate remuneration, provided that without such concurrent use the other undertaking is unable to operate as a competitor of the undertaking with a dominant position. 3. Practices of one or more undertakings with a dominant position in the market shall not be considered abusive if these undertakings prove that these practices are committed for objective reasons, such as technical reasons or legal commercial reasons.

## 2. Concession assessment

6. During the recent years, nine (9) cases of concession assessment have been evaluated by ACA. Two (2) cases related to predatory pricing, five (5) cases related to refuse to deal/supply, and two (2) other assessments ending by giving recommendations by the CC to the relevant regulators in the relevant markets.

### 2.1. EMS Albanian Port Operator

7. The loading and unloading services and related activities for bulk cargo at the East Terminal, Port of Durrës are provided by the undertaking "EMS- Albanian Port Operator" (EMS-APO) LTD, which enjoys the rights set in the concession contract for the management, operation and maintenance of the eastern terminal of the port of Durres, signed on 06.05.2013. Therefore, EMS-APO hold the 100% of the relevant market by also having essential facility in this port.

8. In 2017, the ACA started a preliminary investigation based on a complaint by one of the stevedore undertaking, pretending that the concessionaire refused to supply the services of loading and unloading and related activities for bulk cargos in this port.<sup>1</sup>

9. Being in a situation of urgency due to the risk of serious and irreparable damage to competition on the basis of abuse of dominant position the CC decided to give an interim measure (as foreseen by article 44 of the competition law “Interim Measure”)<sup>2</sup>.

<sup>1</sup> Refer to CC decision no. 450 dated 28.02.2017 “On the opening of the preliminary investigation in the market of services of loading and unloading and related activities for bulk cargos at the East Terminal, Port of Durrës” <http://caa.gov.al/decisions/read/id/864>.

<sup>2</sup>Refer to CC decision no. 45 dated 28.02.2017 “Taking interim measures to restore competition in the market of loading and unloading services and related activities for bulk cargo at the East Terminal, Port of Durrës” <http://caa.gov.al/search?query=451>.

10. The measures were as follows: a) The EMS-APO have to immediately apply the legal obligation to provide loading and unloading services and related activities for bulk cargo to all the licensed operators in the market b) To allow access to licensed stevedore to the port c) EMS-APO to provide its equipments to all stevedore operators.

11. In the end of the preliminary investigation the CC found that the conduct of EMS-APO by applying unfair trade conditions and refusing to supply access to the stevedore undertakings, may constitute as an abuse of dominant position, with severe consequences for market competition, so an in depth investigation was opened<sup>3</sup>.

12. During the in depth investigation the ACA made down raids and contacted with the public institution responsible for regulation of this market, the Ministry of Infrastructure and Energy (MIE), the Port Maritime Authority (PMA) and other stevedore competitors (three stevedore undertakings) in the relevant market. Also during the in-depth investigation *ex-post* analysis of the legal framework has been assessed.

13. After the in depth investigation in this market the CC by decided to close the investigation with some obligations to EMS-APO and recommendations for promoting competition in this market to MIE and PMA.<sup>4</sup>

14. The obligations to the EMS-APO were as follows: (a) Apply equitable trading conditions for the same commercial transactions to undertakings with which it enters into contractual relations; (b) Not impose additional terms/obligations which, by their very nature or commercial practices, are irrelevant to the subject of the contracts in question, when entering into contracts with other parties; (c) The method of providing service shall be carried out according to the principle "*first entering, first served*"; (d) In case of non-fulfillment of the obligations of this decision, EMS-APO shall be fined up to 10% of its annual turnover for serious restriction of competition.

15. In order to follow-up the implementation of the recommendations and obligations given, this market was under monitoring for 1 year. During this period EMS-APO reported every 3-month for the fulfillment of the measures.

16. As the implementation of the recommendation by the public institution MIE and PMA was partially fulfilled the CC expressed itself with two decisions<sup>5</sup>. The monitoring of these two decisions is still ongoing.

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<sup>3</sup>Refer to CC decision no. 477, dated 12.10.2017 "Opening of in-depth investigation against the EMS-APO undertaking in the market of loading and unloading services and related activities for bulk goods at the East terminal of Durrës Port Terminal." <http://caa.gov.al/cases/read/id/15>

<sup>4</sup> Refer to CC decision 567, dated 07.11.2018 "On the closure of the in-depth investigation procedure against EMS-APO in the market of loading and unloading services and related activities for bulk cargo at the East Terminal, Port of Durrës and giving some recommendations" <http://caa.gov.al/decisions/read/id/1002>

<sup>5</sup> Refer to CC decision no. 608, dated 10.04.2019 <http://caa.gov.al/decisions/read/id/1160> & CC decision no. 641, dated 25.07.2019 "On periodic implementation of CC decision no. 567, date 07.11.2018 "... " <http://caa.gov.al/decisions/read/id/1046>

## 2.2. SGS Automotive Albania LTD

17. During 2018, the ACA conducted a preliminary investigation in the market of the mandatory technical control of motor vehicles and their trailers for abuse of the dominant position of the *exclusive rights* services offered by the concessioner SGS Automotive Albania LTD (SGS) as defined in the Concessionaire Agreement “On giving with concession the service of mandatory technical control of motor vehicles and their trailers in Republic of Albania” signed in 2009.<sup>6</sup> The Concession is granted for a period of 10 years from the effective date a until 3.09.2019.

18. In order for customers to meet the obligations set out in the Road Code of the Republic of Albania, any vehicle registered and circulating in the territory of the Republic of Albania shall be subject to periodic technical control, according to the intervals and deadlines set by law. At the end of the Concession Period, the Concessionaire shall return to the Contracting Authority the use of the existing Technical Control Center (TCC), and shall transfer free of charge to the Contracting Authority the ownership of the New Technical Control Center (NTCC) and all Electromechanical and Computer Equipment.

19. According to the competition law, SGS holds a dominant position as the only provider of this service in the relevant market (100% shares of the market) and after the preliminary investigation the CC decided that SGS conduct might abuse with its power.

20. Therefore the CC decided to open an in-depth investigation in the market to check whether the competition might be distorted under article 9, point 2, ç abuse of dominant position, making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations<sup>7</sup>.

21. After finding proofs of the abusive conduct, the CC fined SGS at the rate of 5.69% of the total turnover of the previous financial year (2017), namely in the amount of 51,091,005 ALL (fifty-one million ninety and one thousand five) ~42, 000 EUR (forty two thousand). The above fine imposed is fully executed<sup>8</sup>.

22. The CC also decided to give obligations to SGS to stop the infringement of the competition and within 45 days to take the necessary measures, as follows: (a) Immediately apply the legal obligation to provide qualitative, satisfactory service, by using the Mobile Technical Control Centers (MTCC) within the TCC with the largest flow of customers; (b) To put into operation 100% of the capacity of all TCCs and MTCCs. (c) To remove the point three from the Statement signed by the clients before submitting the requested documentation; (d) Develop a plan for redesigning the redistribution of service delivery posts in order to increase efficiency and increase the level of service, in the sense that those TCCs where the posts are unused or at a low level of use can be moved towards TCCs

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<sup>6</sup> Refer CC decision no. 497 dated 08.02.2018 “On opening the preliminary investigation in the market of the mandatory technical control of motor vehicles and their trailers” <http://caa.gov.al/cases/read/id/49>

<sup>7</sup> Refer to CC decision no. 514, dated 17.05.2018 “On the opening the in-depth investigation in the market of the mandatory technical control of motor vehicles and their trailers against SGS” <http://caa.gov.al/decisions/read/id/981>

<sup>8</sup> Refer to CC decision no. 562, dated 25.10.2018, "On the imposition of fines and obligations to the undertaking "SGS in the market for the mandatory technical control of motor vehicles and their trailers and the giving recommendations". <http://caa.gov.al/decisions/read/id/1001>

where there is a higher inflow. (e) Develop a plan of measures for offering and improving the service in the market of technical control for vehicles, with better trading conditions in accordance with the contract, and to notify the ACA; From the monitoring process resulted that some of the points of the CC decision are fulfilled, thus there is partly fulfillment of the CC decision.

23. Besides the above mentioned obligations the CC gave some recommendations to MIE as follows: (a) Liberalization of the market in terms of offering this service, including providing technical service, as offered by most EU countries. (b) For the time of extension of this concessionaire, within 90 days: - must adopt a regulation for the functioning and monitoring of the SGS, in which all provided procedures and services are defined, - the approval of the annual investment plan, in order for the service to be qualitative and responsive to development trends, increasing the flow of vehicles annually and distributing the population. (c) Review of the technical manual and in particular of the testing time of equipping the vehicles with the certificate of technical control. (d) Completion of legal and sub legal acts by clearly defining the role of state bodies in accordance to the relationship between the Concessionaire, which has in management and administration the TCC infrastructure, and the way of resolving the disputes between them by the regulatory bodies.

24. MIE, didn't fulfill the recommendations as the Concession Contract ended at 03.09.2019. So the CC decided<sup>9</sup>: 1. Pursuant to article 69 of law 9121/2003 to request to MIE to liberalize the market since the concession contract dated 03.09.2009 "On the mandatory technical control of road vehicles and their trailers in Republic of Albania" ends on 03.09.2019. 2. To notify the Parliament Assembly of the Republic of Albania on the non-implementation of the CC decision no.562, dated 15.10.2018 by the MIE.

25. This market is still in monitoring process.

### 3. Concluding remarks

26. Based on the legal framework, the ACA has its power to assess the concessions given in different markets of the economy.

27. In the last years, nine (9) cases of concession assessments have been evaluated by the ACA: two (2) cases related to predatory pricing, five (5) cases related to refuse to deal/supply, and two (2) other assessments ending by giving recommendations.

28. The main challenges related to concessions assessment are related to the implementation of the recommendations given to the public institutions that results in a partial or moderated fulfillment of Competition Commission Decisions.

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<sup>9</sup> Refer to CC decision no. 645 datë 31.07.2019 "On Monitoring the Implementation of the Recommendations of the CC decision no. 562 of 15.10.2018" on the market of compulsory technical control of motor vehicles and their trailers in the Republic of Albania" <http://caa.gov.al/decisions/read/id/1169>