

The Performance of the Kosovo Competition Authority

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September 2017



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Policy Report 03/2017

The Performance of the Kosovo Competition Authority

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September 2017

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THE PERFORMANCE OF THE KOSOVO COMPETITION AUTHORITY

1. Background

Fair competition is considered the engine of a well-functioning market economy. The regulation of market competition is of utmost significance as it protects consumer interests, promotes efficiency, and, amongst others, ensures market fairness by promoting competitive economic policies. In order to obtain power and enhance profits, firms are inclined to monopolize the market through horizontal mergers, especially when there is a dysfunctional/inefficient oversight mechanism and lack of competition policies. Countries, by implementing policies to regulate market competition, aim to tackle, prevent, and control horizontal/vertical agreements and mergers which enable companies to distort competition and monopolize market power. Therefore, it is of crucial importance, especially for countries in transition and with aspirations for EU integration, to harmonize the legislative framework in line with the EU acquis and develop necessary expertise and knowledge in order to facilitate the comprehensive implementation of competition policies.¹

The Kosovo Competition Authority (KCA), the independent public institution responsible for promoting fair market competition in Kosovo, was established by the Kosovo Assembly in 2008 through the Law on Competition. KCA's primary mission is to ensure sustainable development of Kosovo's market economy by prohibiting actions that limit and distort competition, pursuant to the Law on Protection of Competition.² The KCA is governed by the Commission for Protection of Competition, whose duties are specified in Article 28 of the Law No. 03/L-229 on Protection of Competition, amended and supplemented by Law No. 04/L-226. Pursuant to these legislative frameworks, the Commission is entitled to propose sub-legal acts, issue decisions to initiate and direct the process of determining anti-competitive practices, impose sanctions, propose deadlines and the execution of sanctions, as well as define measures, conditions and deadlines to reinstate competition in the market. In addition, it is also entitled to request from the competent court to issue a decision which authorizes KCA officials to investigate a certain entity without prior consent, promote and increase awareness about fair market competition, provide opinions regarding the compliance of draft-laws and other regulations with the Law on Protection of Competition, define regulations and measures for the protection of competition, and, among others functions, collaborate with international organizations and institutions on issues relating to market competition.³

The Commission for Protection of Competition is composed of five (5) members who are proposed by the Government and approved by the Kosovo Assembly. Members of the Commission should be citizens of Kosovo with qualifications in a relevant field such as law or economics and should have at least 7 years of relevant and professional experience. The chairman and other members of the Commission, after being approved by the Assembly, are granted a 5-year mandate with a possibility of extension. The Law on Protection of Competition stipulates that members of the Commission should not be employed by or have ownership/contractual relations with enterprises established in Kosovo, should avoid conflict of interests such as being a member of or managing a board of any enterprise in Kosovo during the previous year, and should not have ever

¹ Vagliasindi, M. (2001) Competition across transition economies: an enterprise-level analysis of the main policy and structural determinants. European Bank for Reconstruction and Development.

Available at: <http://www.ebrd.com/downloads/research/economics/workingpapers/wp0068.pdf>

² Law on Protection of Competition no. 03/L-229, amended and supplemented by Law no. 04/L-226

³ Law on Protection of Competition no. 03/L-229, amended and supplemented by Law no. 04/L-226

been sentenced to more than six months' imprisonment. It should be noted that in order to form a quorum, the Commission meetings should consist of at least three members, and the decisions should be taken with three affirmative votes. The Commission must approve the annual work report of the KCA before it is submitted to the Assembly, by the 31st of March at the latest, through the Committee for Economic Development, Infrastructure, Trade and Industry.⁴

Given the importance that the KCA holds for well-functioning and fair market competition in Kosovo, this study aims to review the overall performance of the Kosovo Competition Authority since its establishment as well as its operational and budgetary capacities. The following sections of this study are organized as follows: Section 2 provides an assessment of the budget, employees, and the Commission of the Kosovo Competition Authority. Section 3 analyzes the performance and effectiveness of the KCA, focusing on the cases already investigated and reviewed by the KCA as well as those the KCA has neglected such as the case of Homologation.⁵ Section 4 provides an overview of the legislative framework with regard to the private enforcement mechanisms, umbrella-pricing effect, recognition of buyers' legitimacy who were indirectly affected by cartels, as well as the legal responsibilities of enterprises involved in a cartel for the damages inflicted. The last section offers a conclusion and policy recommendations that can further enhance Kosovo Competition Authority's performance based on the findings of this Policy Analysis.

2. Kosovo Competition Authority: Budget, Employees and Commission

This section will elaborate on the various pillars of the KCA and its performance by analyzing its human resource capacities and their expertise, allocated budget, and amongst others, the composition of the Commission throughout the years.

i) Overall budget

This sub-section sheds light on the budgetary allocation for the Kosovo Competition Authority from 2009 to 2017. The KCA has its own budget line allocated from the Kosovo budget and approved by the Assembly of Kosovo. Over the years, it has received a very modest budget considering the importance of its functions. In 2009, the yearly budget was €205,900 which increased to €259,420, roughly 26%, in 2010. It should be noted that the budget for the following year decreased to €240,298, by approximately 7%. The highest amount allocated to the KCA was €296,783 in 2012, which represented an increase of 23.5% compared to 2011. The total amounts allocated by the Government to the KCA in 2013, 2014, 2015, and 2016 were €255,043, €255,043, €266,350, and €224,810, respectively. In 2017, the total budget increased roughly by 12% (see Table 1).⁶

The average annual budget amount (€250,734) allocated for the daily functioning of the KCA is not sufficient and in turn poses various difficulties which undermine its performance and efficiency. According to the KCA officials, the allocated budget is inadequate, especially for these budget categories, wages and salaries and goods and services.⁷ The insufficient budget negatively impacts the Commission's ability to increase internal capacities, expertise, acquire necessary investigative tools and equipment, and conduct feasibility studies of the market as required by the

⁴ Law on Protection of Competition no. 03/L-229, amended and supplemented by Law no. 04/L-226

⁵ Bota Sot (2017) "Të thyhet monopoli për homologimin e automjeteve". [Online] Available at: <http://www.botasot.info/ekonomi-lajme/676358/te-thyhet-monopoli-per-homologimin-e-automjeteve/> [Accessed: 15 July 2017]

⁶ Data retrieved from Kosovo's Budget: 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017

⁷ Interview with representatives of the Kosovo Competition Authority, 21st June 2017

European Reform Agenda.^{8 9} As a result, increasing the KCA's annual budget is of paramount importance in order to enhance its overall performance and achieve the desired and expected results.

ii) Employees

The organizational chart of the Kosovo Competition Authority includes the Commission, the Secretariat, the Administrative and Judicial Department, and the Market Supervision Department. Currently the KCA has only 18 employees. According to the budget of Kosovo, the number of KCA employees approved by the Assembly has always been higher than the actual number of employees, due to budget constraints. From 2013 until 2017, the number of employees approved by the Assembly amounted to 23, whereas the actual number of employees varied between 12 and 18 during these years (see Table 1). According to KCA representatives, its employees, in general, are paid less compared to employees of other independent regulatory agencies.¹⁰

As elaborated above, the low budget allocated to the KCA has made it difficult to increase its number of employees, which is necessary for enhancing the output and efficiency of this independent regulatory body. According to its representatives, the KCA lacks the sufficient number of market investigators and legal advisors needed to cover all necessary market investigations. Moreover, the Authority does not have an IT investigator which is necessary for properly conducting investigations.¹¹ In the 2016 Work Report submitted to the Committee on Economic Development, the KCA highlighted the need for additional staff, namely three competition investigation inspectors and three senior market analysts.¹²

Table 1: KCA's Budget and Employees

Year	Budget (€)	Budget increase or decrease %	Number of approved employees	Number of actual employees
2013	255,043	-	23	15
2014	255,043	-	23	13
2015	266,350	4.43% ↑	23	12
2016	224,810	-15.59% ↓	23	17
2017	252,965	12.52% ↑	23	18

Source: Data retrieved from Kosovo's Budget, OECD report 2016, and Kosovo Competition Authority

iii) Budgets and Employee Comparison among Independent Regulatory Agencies

When compared to other regulatory agencies operating in Kosovo, there are large discrepancies in terms of both the number of employees and budget allocation. In this regard, regardless of the significance KCA holds towards market regulation, it lags behind all other

⁸ European Reform Agenda (ERA) (2016) Kosovo – EU High Level Dialogue on Key Priorities. Prishtinë

⁹ Interview with representatives of the Kosovo Competition Authority, 21st June 2017

¹⁰ Interview with representatives of the Kosovo Competition Authority, 21st June 2017

¹¹ Interview with representatives of the Kosovo Competition Authority, 21st June 2017

¹² Kosovo Competition Authority. Report of the work of the Kosovo Competition Authority - 2016. Prishtinë March 2017

regulatory agencies, as shown in the table below. The highest difference is observed between the KCA and the Commission for Mines and Minerals. More precisely, in 2017, while the Assembly approved 23 employees and a budget of €252,965 for the KCA, the Assembly approved 77 employees and a budget of €1,386,981, 448% larger than the KCA's budget, for the Commission for Mines and Minerals. On the other hand, the smallest differences exist between the KCA and the Railway Regulatory Authority, for which the Assembly has approved 24 employees and a budget roughly 20% greater than that of the KCA. Despite the importance that the KCA holds in regulating market competition, the low budget allocated by the Government negatively impacts the KCA ability to fulfill its responsibilities specified in the relevant legislation.

Table 2: Comparison of the 2017 Budgets and Number of Approved Employees between the Kosovo Competition Authority and other Independent Agencies in Kosovo

Agencies ↓	Budget (€)	Differences in the budgets/% (compared to the KCA)	No. of employees approved	Difference in the no. employees/%
Kosovo Competition Authority	€252,965	-	23	-
Commission for Mines and Minerals	€1,386,981	€1,134,016/ 448.28%	77	54/234.78%
Independent Media Commission	€1,214,276	€961,311/ 380%	31	8/34.78%
Regulatory Authority of Electronic and Postal Communications	€1,178,068	€925,103/ 365.70%	39	16/69.56%
Civil Aviation Authority	€925,274	€672,309/ 265.77%	30	7/30.43%
Energy Regulatory Office	€768,316	€515,351/ 203.72%	33	10/43.47%
Public Procurement Regulatory Commission	€430,053	€117,088/ 70%	39	16/69.56%
Railway Regulatory Authority	€303,823	€50,858/ 20.10%	24	1/4.34%

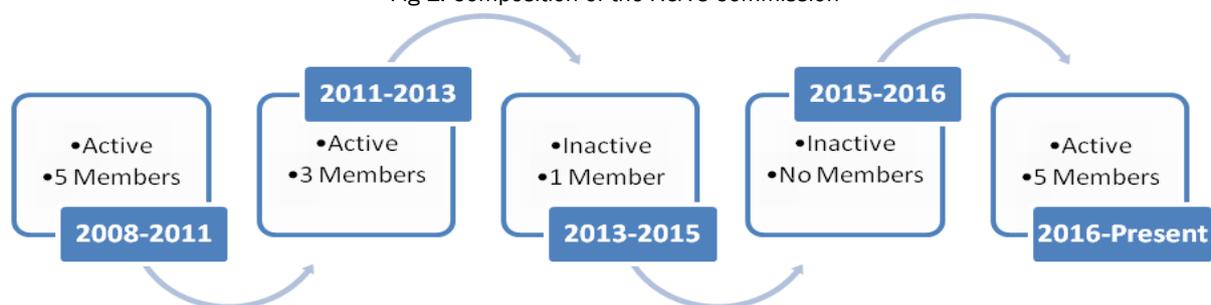
Source: Data retrieved from Kosovo's 2017 Budget

iv) The composition of the Commission throughout the years

The KCA Commission is composed of five members. Since its establishment in 2008, the Commission has undergone multiple transformations which have affected its functionality and structure.

Beginning in 2008, the Authority had an active and complete Commission until November 2011 when the mandate of two members expired. The Commission was relatively functional and continued its daily activities for a period of two years with only three members, given it still had a quorum. Nevertheless, the remaining members of the Commission did not recognize each other's authority during this period, which was evident also while reporting to the Committee for Economic Development, Infrastructure, Trade and Industry.¹³ Despite frequent internal disagreements, the Commission carried on with its everyday responsibilities until November 2013 when the mandate of another two members expired, leading to an inactive Commission with only one member until April 2015 when the last Commission member's mandate expired. From this time until June 2016, the Authority remained without a Commission, thus paralyzing all KCA activities/decisions and market investigations for over a year.¹⁴

Fig 1: Composition of the KCA's Commission



It should be noted that the Government failed to propose members of the Commission from November 2013 to June 2016, which potentially allowed for monopolies and unfair competition in Kosovo's market. Despite many struggles to appoint the new members of the Commission, in June 2016, the Assembly managed to approve the Commission members proposed by the Government. Since then, the Commission has been composed of five members and performs their daily responsibilities in accordance with the law.¹⁵

With regard to the latest appointment of Commission members, there were many claims suggesting that the elected members are either politically affiliated and/or professionally incompetent. According to the Chairman of the Committee for Economic Development, Infrastructure, Trade and Industry, the proposed members of the Commission lacked the expertise necessary to regulate market competition in Kosovo.¹⁶ Experts and representatives of civil society in Kosovo have also claimed that the KCA Commission members, which were proposed by the Government and approved by the Assembly, were subject to political influence which directly affects their decisions when fighting monopolies and corruption in Kosovo's market.¹⁷ Many CSOs

¹³ Hoxha, D. (2013) Rregullatori i Konkurrencës Nën Menaxhim të Çrregullt. [Online] *Jeta ne Kosove*. 5 August 2013. Available at: <http://kallxo.com/gjnk/rregullatori-i-konkurrences-nen-menaxhim-te-crregullt/> [Accessed: 01 July 2017]

¹⁴ Hoxha, D. (2013) Rregullatori i Konkurrencës Nën Menaxhim të Çrregullt. [Online] *Jeta ne Kosove*. 5 August 2013. Available at: <http://kallxo.com/gjnk/rregullatori-i-konkurrences-nen-menaxhim-te-crregullt/> [Accessed: 01 July 2017]

¹⁵ TELEGRAFI (2016) "Pas pesë vjetësh kompletohet Autoriteti i Konkurrencës". [Online] Available at: <http://telegrafi.com/pas-pese-vjetesh-kompletohet-autoriteti-konkurrences/> [Accessed: 13 July 2017]

¹⁶ Kosova Press (2016) Emrat për Autoritetin e Konkurrencës pa përvojë të duhur. [Online] Available at: <http://www.kosovapress.com/sq/ekonomi/emrat-per-autoritetin-e-konkurrences-pa-pervoje-nuk-reflektojne-per-mbrojtjen-e-konkurrences-71113/> [Accessed: 21 July 2017]

¹⁷ [2] Kosova Sot (2016) Autoriteti i Konkurrencës, në shërbim të mafio-oligarkeve. [Online] Available at: <http://www.kosova-sot.info/lajme/198846/autoriteti-i-konkurrences-ne-sherbim-te-mafio-oligarkeve/> [Accessed: 20 July 2017]

in Kosovo have requested that the Government abolish previous decisions and reappoint members who have adequate expertise and experience and who are not politically affiliated.¹⁸ However, the Government of Kosovo has ignored these continuous requests from civil society as well as recommendations from the European Union to end the politically influential appointments of board members of independent agencies.¹⁹

v) Kosovo Competition Authority – summary

In conclusion, compared to other regulatory agencies, the Authority has not received an annual budget sufficient for carrying out all the responsibilities stemming from its mandate. Despite the significance of this regulatory body for ensuring a well-functioning economy and fair market competition, the KCA's budget has not increased enough to allow it to recruit the additional experts and market investigators needed for investigating larger-scale and more substantial cases of unfair market competition. The Authority's already modest performance further deteriorated in 2013 (until 2016) due to the absence of an active Commission. The lack of a functional KCA Commission was partly the result of the Government's negligence with regard to proposing candidates. However, given the significance that this regulator has for the market competition in Kosovo, the situation was prolonged due to many conflicts between the two major ruling parties of the coalition who each hoped to have their choice candidates appointed.²⁰

3. Performance and effectiveness of the Authority

The primary aim of the KCA is to ensure free and effective competition in Kosovo's market by focusing on three main pillars, the 'abuse of dominant position,' prohibited agreements in the form of cartels,' and 'mergers or concentrations of undertakings'.²¹ 'Abuse of dominant position' occurs when a supplier or purchaser has engaged in unfair competition, has significant market and financial power in comparison with competitors, exceeds 25% of market coverage, or if two or more independent enterprises dominate the market by operating together.²² The second pillar focuses on prohibited agreements between two or more independent undertakings (cartels) which intend to distort the fair market competition by: fixing a selling and/or purchasing price, controlling and/or limiting production, sharing the market or sources of supply, and amongst others, applying different conditions for the same transactions with other commercial undertakings, as a result placing them in a disadvantageous competitive environment.²³ The final pillar is centered on preventing concentrations of enterprises which may significantly damage competition, especially when such concentration results in strengthening of current dominant position or creation of a new dominant position.²⁴

Additionally, the KCA, as specified in the relevant legislation, should provide professional opinions on the following: laws, regulations, and other legal acts that affect the market competition; the compatibility of the existing laws and regulations; views that encourage knowledge about market competition; and the comparison of practices in the legislation and market competition policies, when requested by the Assembly and central or local Governments.²⁵

¹⁸ Halimi, S. (2016) Militantë edhe në Bordin e Konkurrencës. [Online] Available at: <http://zeri.info/ekonomia/81303/militante-edhe-ne-bordin-e-konkurrences/> [Accessed: 21 July 2017]

¹⁹ European Commission. Kosovo 2016 Report, Brussels November 2016

²⁰ Glauk Konjufca (LVV), Interview, 28th July 2017

²¹ Kosovo Competition Authority. Mission . [Online] Available from: <http://ak.rks-gov.net/?cid=2,21> [Accessed: 18 July 2017]

²² Law on Protection of Competition no. 03/L-229, amended and supplemented by Law no. 04/L-226, art. 10

²³ Law on Protection of Competition no. 03/L-229, amended and supplemented by Law no. 04/L-226, art. 4

²⁴ Law on Protection of Competition no. 03/L-229, amended and supplemented by Law no. 04/L-226, art. 13, 14

²⁵ Law on Protection of Competition no. 03/L-229, amended and supplemented by Law no. 04/L-226, art. 23, para. 1 and 2

Pursuant to the law, the KCA should release decisions when assessing small-value agreements identifying and imposing administrative sanctions for violations relating to the abuse of a dominant market position, assessing the permissibility/eligibility of mergers, specifying special measures for restoring competition in response to prohibited mergers and concentrations, and, amongst others, determining temporary measures, regulations, or sanctions for enterprises which do not obey the KCA's decisions.²⁶

i) Cases investigated and reviewed by the Authority

Since 2009, the Kosovo Competition Authority has investigated and resolved various cases. Since the establishment of the KCA in 2008 until November 2013, when the Commission became inactive, the KCA investigated cases and issued approximately 20 decisions. In addition, since the instatement of the new Commission in June 2016, the KCA has investigated various cases and issued 23 decisions. This suggests that the newly appointed Commission is considerably more effective than the previous one in terms of number of cases investigated and resolved. However, it should be noted that not all of the decisions of the Commission have been published on the website since, according to the representatives of the KCA, the website's maintenance contract has expired and they have to undergo several procurement procedures in order to contract a new company.²⁷

Given that the competition market in Kosovo is characterized by many irregularities, the total number of cases investigated and managed by the KCA since its establishment is surprisingly low. Upon commencing its mandate, the new Commission received 28 pending cases which required immediate attention, of which 22 were received during the time when the Commission was inactive. The current Commission closed some of these cases, while others are under investigation.²⁸ In addition to the total number of cases addressed by the KCA, another barometer for evaluating KCA performance relates to the number of cases for which the KCA has imposed sanctions. While the first KCA Commission imposed €1.2 million of fines from 2009 - 2013, the current Commission has yet to impose any sanctions on enterprises which may have distorted fair market competition.²⁹ Compared to the fairly modest punitive approach taken by the Kosovo Competition Authority since its establishment, other countries in the region have adopted a more strict approach towards sanctioning businesses which engage in restrictive agreements or abuse their dominant position in the market.³⁰ In 2017, the Macedonian Competition Commission has, amongst other actions, imposed fines amounting to €5.8 million and €2.7 million respectively for two brewing companies which engaged in restrictive agreements.³¹ While in 2016, the Serbian Commission for Protection of Competition imposed a sanction of €2.7 million on the EPS electric power distributor for abusing a dominant market position.³²

Despite the fairly low level of sanctions imposed in Kosovo, the Authority has investigated and resolved various cases, such as price fixing agreements for beverages, raspberries, bakeries and oil derivatives, the abuse of dominant positions and concerted practices related to the fiscal cash register sector and insurance companies, the distortion of market competition related to

²⁶ Law on Protection of Competition no. 03/L-229, amended and supplemented by Law no. 04/L-226, art. 54

²⁷ Interview with representatives of the Kosovo Competition Authority, 21st June 2017

²⁸ Interview with representatives of the Kosovo Competition Authority, 21st June 2017

²⁹ Interview with representatives of the Kosovo Competition Authority, 21st June 2017

³⁰ Muhamet Mustafa (LDK), Interview, 1st August 2017

³¹ Karanović & Nikolić (2017) Record Antitrust Fines In Macedonian Beer Market. [Online] Available at: <https://www.karanovic-nikolic.com/knnews/Pages/2017/05/25/Record-Antitrust-Fines-in-Macedonian-Beer-Market.aspx> [Accessed: 2 August 2017]

³² Gecić Law (2016) The Highest Antitrust Fine to Date Issued in Serbia to EPS Distribution. [Online] Available at: <https://www.geciclaw.com/antitrust-fine-serbia-eps-distribution/> [Accessed: 2 August 2017]

services provided by the Post of Kosovo, mergers and concentrations related to Phoenix Pharma DOOEL and Exclusice Pharma, British American Tobacco and Bulgarian Tobacco Bulgartabac, and Ljubljanska Mlekarne and BSB Lactalis Grup. Given that not all of the decisions, conclusions, opinions of the Authority are made public on its website, this study was not be able to analyze all the cases which were investigated by the KCA. However, some of the cases investigated by the Authority are evaluated below.

Case 1: The case between the non-banking financial institutions/Post of Kosovo J.S.C and Municipalities and the Ministry of Internal Affairs: In 2015 the Post of Kosovo signed cooperation agreements with the Ministry of Internal Affairs and Municipalities of Prishtina, Gjilan and Mitrovice, which allowed the Post of Kosovo to provide payment services within these institutions. Similar agreements were reached between the Municipality of Ferizaj and Vllesa–CO and the Municipality of Gjakova and Banka Ekonomike. In response, certain non-banking financial institutions - Moneta L.L.C, Propaid L.L.C, Vllesa-CO L.L.C and Capital L.L.C - requested that the Competition Authority investigate the aforementioned agreements in order to protect fair and effective market competition.

In 2016, the Kosovo Competition Authority thoroughly investigated these cases and, based on the evidence and information gathered, concluded that these agreements distorted fair market competition and were in violation of the Law on Protection of Competition, which stipulates that enterprises may not “apply different conditions for similar transactions with other enterprises, consequently placing them in an unfavorable competitive position”.³³ As a result, the Authority required that these entities terminate their agreements within 60 days following the signature of the decision.³⁴ Consequently, the Post of Kosovo’s employees and management protested and filed to appeal KCA’s decision. However, the Basic Court and the Court of Appeals ruled in favor of the Authority. It should be noted that the above mentioned agreements have not been terminated as the Court’s decision has not yet entered into force.³⁵

Case 2: Price fixing agreements in Ferizaj: The Kosovo Competition Authority, in 2016, was informed by various sources that owners of cafes and restaurants in Ferizaj have orally agreed to increase the price of coffee, water and beer.³⁶ The KCA, after monitoring the market and gathering information from the owners of cafes, concluded that the owners reached an oral agreement without being aware of the provisions of the Law on Protection of Competition. Due to many complaints, the implementation of this agreement did not have any direct consequence for the involved entities and lasted for only a week.³⁷ As such, representatives of the KCA stated that this was a ‘naive agreement’ which did not ultimately distort fair competition in the market, and, thus, there were insufficient grounds to initiate an investigative procedure in line with the Law on Protection of Competition.³⁸

Case 3: Price fixing agreements in Gjilan: On a similar note, in April 2017, the Kosovo Competition Authority was informed of a comparable case relating to fixing and increasing prices of some beverages in Gjilan cafes. The KCA investigated the case and managed to prevent the implementation of this agreement, given that such anti-competitive behavior is prohibited and punishable by the Law on Protection of Competition. KCA investigative inspectors communicated

³³Put the Article 4, Paragraph 4 citation here

³⁴ Interview with representatives of the Kosovo Competition Authority, 21st June 2017

³⁵ Kosova Press (2017) “Dy vendime të Gjykatave “shuplakë” Postës së Kosovës”. [Online] Available at: <http://www.kosovapress.com/sq/ekonomi/dy-vendime-te-gjykatave-shuplake-postes-se-kosoves-104274/> [Accessed: 24 July 2017]

³⁶ TELEGRAFI (2016) “Kafenetë e Ferizajt rrezikojnë gjoba për shtrenjtim të makiatos”. [Online] Available at: <http://telegrafi.com/kafenete-e-ferizajt-rrezikojne-gjoba-per-shtrenjtim-te-makiatos/> [Accessed: 15 July 2017]

³⁷ Kosovo Competition Authority. Conclusion 29 Aug. 2016

³⁸ Kosovo Competition Authority. Decision No. 41/16. Prishtine, 6 Dec 2016

to the owners of these cafes, detailing the impact this cartel agreement would have on customers and the legal consequences of distorting competition in a free market.³⁹

Case 4: Raspberry price fixing agreement in Podujeve: The ‘raspberry case’ was initiated in 2016 by the Mayor of Podujeve and raspberry cultivators who raised questions over whether collectors were setting, directly or indirectly, the purchase and selling prices of raspberries, which would be a violation of the Law on Protection of Competition. The Kosovo Competition Authority monitored and investigated the raspberry market not only in the Municipality of Podujeve but also throughout all of Kosovo and did not find such agreement between the owners of collection points. The authority concluded that there was no cartel or price-fixing agreement between the collectors and that the price-change (decrease) was a consequence of the peak production during the summer season.⁴⁰ As the Authority found no violation of the Law on Protection of Competition, precisely Article 4, it did not proceed with investigative procedures.⁴¹

Case 5: The case of concentration between Phoenix Pharma DOOEL and Exclusive Pharma LLC: Pursuant to the Law on Protection of Competition, an enterprise is obliged to notify the Authority and request a permit for the ‘Execution of Concentration.’ As such, Skopje-based Phoenix Pharma DOOEL, who intended to buy 100% of the shares of Prishtina-based Exclusive Pharma LLC in 2016, requested that the Kosovo Competition Authority provide a decision which authorizes this concentration to take place. After conducting a thorough investigation, the Authority determined that this concentration does not violate, limit or damage free and effective market competition. As a result, the enterprise may proceed with this concentration and consequently contribute to Kosovo’s Budget with an amount totaling €3,000, a fee which is paid to the KCA when authorizing concentrations in accordance with the Administrative Instruction No 06/2012.⁴²

Case 6 and 7: Abuse of dominant position by GEKOS LLC and Dukagjini LLC: The Government of Kosovo decided to introduce fiscal cash registers for businesses in order to minimize tax evasion. As a result, in 2009, the Government announced a public tender for selling, installing and maintaining the fiscal cash registers. The Ministry of Economy and Finance licensed two enterprises, GEKOS LLC and DUKAGJINI LLC, to provide these services throughout the entire territory of Kosovo for a period of four years. Worrisome was the fact that only one of these Enterprises, GEKOS LLC, provided these above-mentioned services. Following these events, the Authority suspected that this tender created illegal competition in the market which is in direct violation of the Law on Protection of Competition, Article 3 and 15. As a result, in 2010, the Authority began investigating the concerted practices between these two enterprises and whether the execution of this tender resulted in the abuse of a dominant market position. After a thorough investigation, the Authority proclaimed that there was a concerted practice in the market which distorted fair competition in this sector and that DUKAGJINI enabled GEKOS to abuse the dominant position in the market. Following these decisions, the Authority fined both enterprises to the amount of €100.000 each.⁴³

In response, GEKOS filed a law-suit against the Authority's decision with the Basic Court of Prishtina. The latter decided that the Authority’s decision was not in accordance with the law.

³⁹ Koha.net (2017) “Autoriteti i Konkurrencës pengon shtrenjtimin e koordinuar të makiatos në Gjilan”. [Online] Available at: <http://www.koha.net/kosove/13910/autoriteti-i-konkurrences-pengon-shtrenjtimin-e-koordinuar-te-makiatos-ne-gjilan/> [Accessed: 20 July 2017]

⁴⁰ Gazeta Fjala (2017) “Komisioni i Konkurrencës nuk merret me bankat, pavarësisht dyshimeve”. [Online] Available at: <http://gazetafjala.com/komisioni-i-konkurrences-nuk-merret-me-bankat-pavaresisht-dyshimeve/> [Accessed: 20 July 2017]

⁴¹ Kosovo Competition Authority. Conclusion 29 Aug 2016

⁴² Kosovo Competition Authority. Decision No. 32/16. Prishtine, 24 Oct 2016

⁴³ Kosovo Competition Authority. Decision No. 03. Prishtine 1 Sept. 2010; Kosovo Competition Authority. Decision No. 04. 1 Sept. 2010

Displeased with the Basic Court's decision, the Authority then sent the case to the second instance. The Court of Appeals upheld the Basic Court's decision and ruled in favor of both enterprises, thus annulling the Authority's decision and the resultant fines.⁴⁴

Ultimately, the cash register market remained dominated by these two enterprises whose market coverage reached to around 90 percent. Considering the market advantage held by these two enterprises, as the sole licensed companies in this sector initially, the entry barriers and cost of entering the market were very high for other interested companies licensed at a later period.⁴⁵

ii) Potential Cases that must be investigated by the Authority

There are still many sensitive sectors and core cases which need immediate investigation and intervention in order to further prevent unfair competition in the market, the abuse of dominant position, and, prohibited agreements in the form of cartels. The Authority has failed to investigate some very pressing issues in Kosovo's market, such as the case of vehicle homologation and price fixing by airline companies, and to properly look into certain sectors such as the telecommunication, electricity, water, insurance, pharmaceutical and banking sectors.

The reluctance of the Authority to thoroughly investigate these sectors might be related to the political appointment of the Commission,⁴⁶ political influence, lack of expertise and experience, or insufficient budget, staff, investigative equipment, and infrastructure. The case of vehicle homologation services which requires immediate attention and investigation, but which was neglected by the Authority, will be examined below. This case clearly represents a situation in which the government has not acted in the interest of its own citizens and enabled unfair market competition by favoring a certain company.

Vehicle Homologation Services in Kosovo

In 2009, the Ministry of Transport and Post Telecommunication signed a contract giving Eurolab Company the exclusive rights to provide homologation services for those vehicles which should be registered in Kosovo for the first time. The homologation of vehicles is required by the Law on Road Traffic Safety and is usually carried out for imported vehicles, new ones without an eligibility certificate, and those which undergo changes in design or equipment.

This exclusive contract, which did not follow any tendering procedures, enables Eurolab to provide homologation services for a period of ten years, from 2009 until 2019. Through this contract, the Ministry of Transport and Post Telecommunication restricted other companies from entering the market or providing homologation services in Kosovo. This contract was very beneficial for Eurolab Company – besides becoming the only service provider in this sector, it also charges very high prices compared to other countries in the region and also in Europe. This sector is properly regulated in the regional countries, which grant the opportunity to various companies to provide homologation services and simultaneously promote fair competition in the market. While the 'Eurolab Monopoly' in Kosovo charges €100 for a vehicle homologation, five homologation centers in Macedonia provide the service for between €30 and €70, seven homologation centers

⁴⁴ Koha.net (2015) "Gjykata e Apelit vërteton vendimin e Gjykatës Themelore për shitjen e arkave fiskale". [Online] Available at: <http://archive.koha.net/?id=&l=85049> [Accessed: 25 July 2017]

⁴⁵ Democracy for Development (2013) "Taksa e fshehur: Pse kosovarët paguajnë më shumë?", Prishtinë

⁴⁶ Glauk Konjufca (LVV), Interview, 28th July 2017; Muhamet Mustafa (LDK), Interview, 1st August 2017

in Montenegro provide the service for between €30 and €80, and the centers in Serbia provide similar services only for around €30.⁴⁷

In 2015, the Government of Kosovo requested that all ministries, based on the approved decision no. 17/44, identify all contracts and cases which impede free competition in the market or allow for/involve the abuse of a dominant market position or other practices which hinder free and fair competition. Although the KCA did not investigate or intervene in the Eurolab monopoly case, following the Government's request, the Ministry of Infrastructure highlighted that Eurolab Company exercised monopoly power by distorting fair competition in this sector. As a result, the Ministry requested that Eurolab Company review this contract as it undermines fair competition in the market. However, the company rejected the Ministry's offer, arguing that even some of the European countries allow for a homologation monopoly.⁴⁸

The Authority has stressed that they cannot intervene and further investigate this case given that Eurolab Company operates based on a legal contract with the Ministry of Transport and Post Telecommunication, now Ministry of Infrastructure. According to the KCA Chairman, the Authority can only issue an opinion to these entities recommending that they lower the prices of homologation services.

iii) Performance and effectiveness of the Authority – Summary

Since its establishment, the Competition Authority of Kosovo encountered various challenges and difficulties which hindered its ability to function properly. In addition, the Authority also lacked commitment towards fighting and regulating the free market competition in Kosovo. Throughout the years, the Authority has investigated and issued decisions/conclusions and opinions on a number of cases which distorted free and fair competition in the market. Some of the recent cases investigated by the Authority included the price fixing agreements between the cafe owners in Gjilan and Ferizaj, the raspberry price fixing agreement in Podujeve, and amongst others, the agreements distorting fair market competition between the Post of Kosovo J.S.C and Municipalities. Despite the importance that this regulatory body has in fighting illegal competition practices in the market, the Authority has not published all of its decisions and the cases investigated on its website, which diminishes its transparency and accountability. Regardless of the KCA's modest commitment in regulating the market competition in Kosovo, it should be noted that the Authority has neglected to investigate many essential sectors prone to unfair competition. Sectors which need immediate interference as to prevent unfair competition, abuse of dominant position, and other prohibited agreements include, but are not limited to, homologation, telecommunication and cable services, electricity, water, insurance, pharmaceutical and banking, and air transport (airline companies).

The unsatisfactory performance of the Authority, in addition to their lack of commitment, can be also attributed to the political influence resulting from politically affiliated appointments of the Commission, the lack of expertise and experience of the Commission and staff, and, amongst others, insufficient budget, staff and investigative equipment. According to the 2016 European Commission Country Report, KCA's current staff lacks adequate expertise as well as investigative and decision making capacities.⁴⁹ In addition to the above, the Assembly and the Committee for Economic Development, Infrastructure, Trade and Industry did not hold the Authority accountable

⁴⁷ Kosova Sot (2016) "Autoriteti i Konkurrencës hesht për monopolin e Devollëve!". [Online] Available at: <http://www.kosova-sot.info/lajme/147461/autoriteti-i-konkurrencës-hesht-per-monopolin-e-devolleve/> [Accessed: 31 October 2016]

⁴⁸ Insajderi (2016) "Kërkohet Hetim për Kontratën që Krijon Monopol në Homologimin e Veturave". [Online], available at: <http://www.insajderi.com/kerkohet-te-niset-hetim-per-kontraten-10-vjecare-per-homologim-te-veturave/> (accessed: 20 July 2017).

⁴⁹ European Commission. Kosovo 2016 Report, Brussels November 2016

for its unsatisfactory performance. Nor did the Committee require regular feedback and justifications from the Authority (beyond the annual report submitted to the Committee for Economic Development, Infrastructure, Trade and Industry and approved by the Assembly) regarding their investigations. The reports which are submitted to the Assembly are not published on the KCA's website or made available to the public. This contributes to the lack of transparency and accountability of this regulatory body and makes it challenging for other relevant actors and institutions to easily assess the overall performance of the KCA. A GLPS study found that the KCA's accountability index is one of the lowest compared to other independent regulatory agencies in Kosovo, with a score of 0.36 (with 1 being highly accountable and 0 being not accountable at all).⁵⁰ This suggests that the Authority is facing serious challenges with regard to accountability and justifying its performance to the Assembly and public at large. In addition to low levels of accountability, the Authority has been characterized as having low efficiency compared to other regulatory bodies in Kosovo.⁵¹

4. The regulation of private enforcement as a baseline for combating prohibited agreements

The protection of a free market is a fundamental pillar of the European Union. The importance the EU and member states place on protecting competition is reflected in the integration process of potential EU candidate countries. The Stabilization and Association Agreements between the EU and countries in the region such as Serbia, Croatia or Albania paid particular attention to the protection of competition, namely the prohibition and obstruction of certain agreements which distort market competition.^{52,53,54}

After signing the Stabilization and Association Agreement in November 2015, Kosovo was tasked with approximating its national legislation with the *acquis* in the field of protection of competition and free market, amongst others.⁵⁵ In order to align national legislation with the *acquis*, the Law on Protection of Competition was Amended and Supplemented in 2014.^{56,57} However, the current law is not entirely in compliance with the recently amended *acquis*.

As various studies suggest, the relevant competition authorities are overwhelmed with fighting the companies involved in cartels.^{58,59} As such, fighting cartels nowadays is not only achieved through administrative sanctions but also through private enforcement. The aim of this

⁵⁰ Rexha, A. (2017) Accountability of Independent Regulatory Agencies in Kosovo: A view on current perspectives and key challenges. Group for Legal and Political Studies

⁵¹ Interview with representatives of the Committee for Economic Development, Infrastructure, Trade and Industry, 7th August 2017

⁵² See: SAA Serbia. Title VI.

https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/serbia/key_document/saa_en.pdf

⁵³ SAA Croatia. Title VI. <http://ec.europa.eu/eurld/agreements/downloadFile.do?fullText=yes&treatyTransId=584>

⁵⁴ SAA Albania. Title VI. <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=13127>

⁵⁵ Law No. 05/L -069 on Ratification of the Stabilization and Association Agreement.

<https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=112399>. Article 74-75.

⁵⁶ Law No.03/L -229 On Protection Of Competition. <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2727>

⁵⁷ Law No. 04/L-226 On Amending And Supplementing The Law No. 03/L-229 On Protection Of Competition.

<https://gzk.rks-gov.net/ActDetail.aspx?ActID=2727>.

⁵⁸ The enterprise under the Law on Protection of Competition does not include only commercial companies. According to Article 2.2 of Law no. 04 / L-226 On Amending and Supplementing the Law no. 03 / L-229 On Protection of Competition, an enterprise is understood as "any business activity regardless of organization manner or management form, public entrepreneur established to carry out activities for public interest and any other natural or legal person, or state authority that carries out economic activities regardless of the fact if it is considered a business subject or not."

⁵⁹ In this section, the term "cartel" will be used as a synonym for the term "prohibited agreement."

section is to examine the significance and impacts of using private enforcement mechanisms to fight the existence of cartels in Kosovo.

Private enforcement incorporates all those actions initiated by private parties with the main aim of enforcing the Competition Law policy.⁶⁰ In addition, it also represents the norms through which market participants, who have been damaged by cartels, are compensated accordingly.⁶¹ Private enforcement carries out three functions: damage compensation, intimidation, and completion of competition authority actions.^{62,63,64} Through damage compensation functions individuals can claim their property damage compensation caused by prohibited agreements.⁶⁵ The intimidation function, on the other hand, plays a role of frightening participants of prohibited agreements. Besides the fear of getting sanctioned by the Competition Authority, violators of the competition law should be intimidated also from dozens of other law-suits not only from buyers with contractual relationship with enterprises which violated the law but also from individuals who have suffered from such prohibited agreements.^{66,67} In addition, private enforcement also assists Competition Authorities towards fighting prohibited agreements, an effect well-known in the United States.^{68,69}

In 2001, the European Court of Justice ruled in the *Courage* case that the effectiveness of Article 101 of the Treaty on the Functioning of the European Union would be limited "if not every individual could seek compensation for damage inflicted by a contract or similar conduct that restricts competition or may distort it".⁷⁰ As a consequence, in 2014, the European Union issued the EU Directive no. 2014/104, which regulates the right to compensation for individuals who suffered from market distortion.⁷¹

Kosovo's Law on Protection of Competition provides for, inter alia, the administrative fight against prohibited agreements.⁷² However, it does not regulate private enforcement. Nonetheless, private enforcement is slightly regulated analogia iuris through the law on Obligational Relationships (hereinafter: LOR), more specifically Article 136, which foresees compensation for

⁶⁰ Komninos, EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts, p.1

⁶¹ Ajeti, D. (2016) *Schadensersatz für Preisschirmschäden im Kartellrecht: Preisschirmschäden im deutschen und europäischen Kartellrecht*, AV Akademikerverlag, p. 3.

⁶² Ibid.

⁶³ Schmidt C. (1977). *Kartellverfahrensrecht-Kartellverwaltungsrecht*, Bürgerliches Recht. Köln. 328-329.

⁶⁴ Bundeskartellamt (2005). *Private Kartellrechtsdurchsetzung – Stand, Probleme, Perspektiven – Diskussionspapier für die Sitzung des Arbeitskreises Kartellrecht am 26. September 2005*.

https://bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/Bundeskartellamt%20-%20Private%20Kartellrechtsdurchsetzung.pdf?__blob=publicationFile&v=4

⁶⁵ Krüger, H. (2007) *Öffentliche und private Durchsetzung des Kartellverbots von Art. 81 EG*. Wiesbaden. p.212.

⁶⁶ In Kosovo, for a breach of competition law, an enterprise cannot be penalized by a fine exceeding 10% of the total amount generated during the last three years for which financial reports have been completed. For more details see Article 56, Law No.03/L –229 On Protection Of Competition, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2727> (Accessed: 31.07.2017).

⁶⁷ European Commission. *Grünbuch Schadenersatzklagen wegen Verletzung des EU-Wettbewerbsrechts*. p.4. <http://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:52005DC0672&from=DE>

⁶⁸ Ajeti, D (2016) *Schadensersatz für Preisschirmschäden im Kartellrecht: Preisschirmschäden im deutschen und europäischen Kartellrecht*, AV Akademikerverlag, p. 5-6.

⁶⁹ Reimann M (2008). *Präventiv-Administrative Regulierung oder Private Enforcement?* https://univ-trier.de/fileadmin/fb5/inst/IRP/Bitburger_Gespraech_Einzeldokumente/BitburgerGespr_2008_I_Reimann_113_154_geschezt.pdf.

⁷⁰ European Court of Justice. C-453/99-*Courage*.

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61999CJ0453&from=EN>

⁷¹ Directive 2014/104/EU of The European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=DE> .

⁷² Law No.03/L –229 On Protection Of Competition. <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2727> .

the damage inflicted.^{73,74} According to a 2015 study, Boyer and Kotchoni conclude that due to prohibited agreements, the price of products increase, on average, by 15%.⁷⁵

Therefore, it is of utmost importance to regulate this issue comprehensively with the Law on Protection of Competition. Moreover, legislative changes should take into account recent EU amendments in order to enhance the efficiency of fighting cartels. In order to establish an efficient and effective private enforcement system, the policymakers should consider the following arguments.

i) Recognition of active legitimacy for buyers who were indirectly affected by cartels

Since the ECJ ruling in the *Courage and Manfredi* cases, EU member states recognize the right of "every individual" to claim compensation for damage inflicted by a cartel. In some cases, to minimize the effects of the cartel, the buyer may choose to pass the costs partly or entirely to the consumer (indirect buyer); this is known as passing-on defense.^{76,77,78}

According to the EU directive no. 2014/104, cartels are also held responsible for the damage inflicted to the third parties (indirect buyers).

ii) Recognition of damages cause by the umbrella pricing effect

The side effects stemming from the practices of cartels are known as Umbrella-pricing effects. Umbrella-pricing occurs when an enterprise, not part of the cartel, raises the prices of its products or services after noticing the increase in price by the cartel.⁷⁹

In 2014, the European Court of Justice adjudicated on the *Kone* case, ruling that even damages resulting from umbrella-pricing should be compensated by the enterprises involved in the cartel, as there would not be an umbrella-pricing effect if cartels would have not initially increased their prices.⁸⁰

Had the ECJ not ruled that such damages must be compensated by the enterprises involved in the cartel, the effectiveness of the provisions of the competition protection would be deficient and limited.⁸¹

⁷³ Law No. 04/L-077 On Obligational Relationships. <http://gzk.rks-gov.net/ActDetail.aspx?ActID=2828>

⁷⁴ Article 136.1. "Any person that inflicts damage on another shall be obliged to reimburse it, unless it is proved that the damage was incurred without the culpability of the former". Law No. 04/L-077 On Obligational Relationships. <http://gzk.rks-gov.net/ActDetail.aspx?ActID=2828>; Damage is defined as "the diminution of property (ordinary damage), prevention of the appreciation of property (lost profits), the infliction of physical or mental distress or fear on another person, and encroachment upon the reputation of a legal person."

⁷⁵ Boyer, M. & Kotchoni, R. (2015). *How Much Do Cartels Overcharge?*. CIRANO Scientific Series. p. 28-29. <https://irano.qc.ca/files/publications/2015s-37.pdf>.

⁷⁶ European Court of Justice. C-453/99-Courage <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61999CJ0453&from=EN>.

⁷⁷ European Court of Justice. C-295/04- Manfredi. <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=56474&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=625262>.

⁷⁸ Ajeti, D (2016). *Schadensersatz für Preisschirmschäden im Kartellrecht: Preisschirmschäden im deutschen und europäischen Kartellrecht*. AV Akademikerverlag. p. 10.

⁷⁹ Bundeskartellamt, *Private Kartellrechtsdurchsetzung Stand, Probleme, Perspektiven (2005)*. p. 3-4. https://bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/Bundeskartellamt%20-%20Private%20Kartellrechtsdurchsetzung.pdf?__blob=publicationFile&v=4; Ajeti, D., *Schadensersatz für Preisschirmschäden im Kartellrecht: Preisschirmschäden im deutschen und europäischen Kartellrecht*, AV Akademikerverlag 2016, s. 6.; Logemann H., *Der kartellrechtliche Schadensersatz : die zivilrechtliche Haftung bei Verstößen gegen das deutsche und europäische Kartellrecht nach Ergehen der VO (EG) Nr. 1/2003 und der 7. GEB-Novelle*, Berlin 2009, s. 237.

⁸⁰ European Court of Justice, C-557/12- *Kone*, Nr. 29, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=153312&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1078732>.

⁸¹ *Ibid*, No. 33-34.

The EU's new approach which enables each individual to be compensated for damages inflicted has situated private enforcement as a second pillar in the fight against the distortion of market competition, a model which should be considered in Kosovo. The Law on Protection of Competition should be amended in order to include compensation rights for both the indirect buyers and those who have suffered from umbrella-pricing effects. Such amendments are not a budgetary or administrative burden given that these are civil cases. The practical effects of Article 4.1 of the Law on Protection of Competition would be limited if not every individual in Kosovo could seek compensation for damage inflicted by a contract or conduct that restricts or distorts competition.

iii) The responsibility of the enterprises involved in a cartel

As noted above, the enterprises involved in prohibited agreements are fully liable for damages inflicted. For this purpose, European legislation has foreseen mechanisms for attributing liability for such damages. According to the EU directive no. 2014/104, enterprises involved in a cartel shall be jointly and severally liable for damages inflicted, as regulated by the Law on Obligational Relationships.^{82,83}

Enterprises involved in a cartel are all held jointly liable for damages inflicted while each enterprise/party is held severally liable in accordance with the degree of severity of the damage inflicted. However, the Directive 2014/104/EU has specified some exceptions related to joint and several liabilities. Small and medium enterprises involved in prohibited agreements, if they possess less than 5% of the market share at any time during the infringement of competition law, are liable only for damages incurred by their own direct and indirect purchasers. This exception does not hold when “the SME has led the infringement of competition law or has coerced other undertakings to participate therein; or the SME has previously been found to have infringed competition law”.^{84,85}

Another exception is made for those enterprises involved in the prohibited agreement, which are the first to notify the Authority for the existence of the cartel and provide data, facts and evidence which enable initiation of the investigative procedure. In addition to the leniency granted to these enterprises in terms of administrative sanctions, these enterprises are only liable for damages inflicted upon their direct and indirect purchasers.^{86,87} These enterprises can also only be held liable for these damages if the damaged parties do not receive full compensation from other companies involved in the cartel.⁸⁸

Even though such an arrangement aims to incentivize enterprises to expose the cartels in exchange for lesser administrative sanctions, these enterprises can still be held accountable through private enforcement.⁸⁹

⁸² Directive 2014/104/EU of The European Parliament And Of The Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=DE> . Article 11 (1).

⁸³ ⁸³ “All those involved shall be jointly and severally liable for damage inflicted by several persons together.” Law No. 04/L-077 On Obligational Relationships. <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2828>.

⁸⁴ Directive 2014/104/EU of The European Parliament And Of The Council of 26 November 2014 on certain rules governing actions for damages under national law, for infringements of the competition law provisions of the Member States and of the European Union. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=DE> . Article 11 (2) a).

⁸⁵ Ibid, Article 11 (3) a), b).

⁸⁶ See for example. Article 60 of the Law on Protection of Competition.

⁸⁷ Directive 2014/104/EU of The European Parliament And Of The Council of 26 November 2014 on certain rules governing actions for damages under national law, for infringements of the competition law provisions of the Member States and of the European Union, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=DE> . Article 11 (4),

⁸⁸ Ibid

⁸⁹ An excellent portrayal of the disclosure of prohibited agreements is the German carmakers' case, See more: German Weekly Spiegel, <http://spiegel.de/eirtschaft/soziales/volkswagen-audi-porsche-bmw-und-daimler-unter-kartellverdacht-a-1159052.html> (Accessed on 11.08.2017).

5. Conclusions and Recommendations

As the study depicts, competition authorities play an essential role in regulating market economies and safeguarding free and fair competition. Nonetheless, Kosovo's Competition Authority has not lived up to expectations, having demonstrated only modest commitment towards and success in fighting illegal competition in the market. Since its establishment in 2008, the Kosovo Competition Authority has investigated and resolved various cases of high importance; however, it has not addressed or investigated many key sectors and businesses operating in Kosovo's market which are prone to unfair competition and prohibited agreements. Besides their lack of commitment towards adequately regulating free and fair market competition, the Authority's unsatisfactory results stem from the following challenges and difficulties:

- Dysfunctional Commission for a period of three years due to the Government's unwillingness and inability to propose a list of candidates;
- The approved members of the Commission lack the necessary expertise and experience;
- Political influence exerted on the Commission due to politically affiliated appointments;
- Lack of monitoring and supervision by the Assembly and the Committee for Economic Development, Infrastructure, Trade and Industry;
- Lack of sufficient budget and, consequently, the inability to increase human resource capacities and expertise; and
- Lack of adequate investigative equipment.

Given that free and fair competition is the backbone of a well-functioning market economy, Kosovo's Assembly has undertaken steps to amend and supplement the Law on Protection of Competition in accordance with the *acquis*. Nonetheless, as this study depicts, not all of the latest *acquis* provisions were incorporated into the amendments to Kosovo's current Law on Protection of Competition. More precisely, EU member states also regulate the existence of prohibited agreements (cartels) through private enforcement which is only slightly regulated by Kosovo's legislation. Moreover, the latter does not specifically denote the responsibilities of the enterprises involved in cartels towards the damaged parties nor does it recognize damages caused by 'umbrella pricing effects'. Moreover, private enforcement would highly assist and support the competition authorities and simultaneously would pressure enterprises not to join cartels given that they will be held liable for damages inflicted. More importantly, any individual would have the opportunity to seek compensation from cartel enterprises for damages incurred.

Therefore, Kosovo should include amendments relating to private enforcement, the joint and several liability of enterprises in cartels, and umbrella-pricing effects in the legislative framework in order to protect the fair competition in the market. In doing so, the Assembly should consider the importance of the following: (a) safeguarding small and medium-sized enterprises, (b) protecting enterprises which disclose the existence of cartels, and (c) securing full compensation for damaged parties (through 'joint and several liability').

Based on the findings deriving from this analysis of the performance of the Kosovo Competition Authority, it is of utmost importance for policymakers and relevant institutions in Kosovo to implement and build upon the following recommendations:

- 1.** The Assembly should better supervise the performance of the Authority by inviting the KCA to report on sensitive cases more frequently, by holding the KCA more accountable on its performance, and by requesting the KCA to investigate certain cases of crucial importance. In addition, given that the Committee for Economic Development, Infrastructure, Trade and Industry

oversees a number of regulatory bodies, it would be advantageous to form a sub-Committee specifically responsible for supervising and monitoring the performance and the decisions undertaken by the KCA.

2. The Assembly should take a proactive approach towards evaluating the Work Report of the Kosovo Competition Authority, rather than simply approving it without critique or consequence. The evaluation should include a thorough analysis of the KCA's performance as well as recommendations on how to further improve.

3. The Government should increase the budget allocated to the Authority, which should in turn lead to an increase in expertise and human resource capacities, given that the Authority lacks sufficient market investigators, legal advisors, and IT investigators.

4. The budget increase should also contribute to the purchasing of necessary equipment needed for analyzing market competition.

- The Authority needs an integrated database which allows for the sharing of market information between relevant institutions. This could quicken the investigative processes and, consequently, decision making.
- Raid equipment is needed to allow the KCA to immediately retrieve sensitive information from computers when investigating businesses.

5. The Government, when proposing the new candidates for the Commission, should obey the law and its appointment criteria by identifying experienced and competent individuals rather than making politically affiliated appointments, which has been the case since the Authority's establishment.

6. KCA staff should possess the adequate expertise and professional background needed to conduct successful market investigations. This can be achieved by hiring experienced experts on market competition, and by offering continuous and extensive training modules and professional development opportunities for current staff.

7. It is of paramount importance for the Authority to demonstrate commitment and dedication towards properly conducting investigations of potential cases of unfair competition and prohibited agreements. The cases which are particularly damaging for competition in Kosovo are those which relate to homologation, telecommunication and cable services, electricity, water, insurance, the pharmaceutical and banking sectors, and airline companies.

8. Given the importance of having an accountable and transparent market regulator, the Authority should publish its annual reports and all decisions on cases investigated in order for relevant stakeholders to easily access information and assess the performance of the Authority.

9. In order to enhance the capacity of domestic personnel in conducting market investigations, the Authority should request technical assistance from regional or European competition authorities. This would enable the KCA to acquire the expertise and techniques needed for managing investigations relating to market competition in Kosovo.

10. Including amendments relating to private enforcement, the joint and several liability of enterprises in cartels, and umbrella-pricing effects in Kosovo's legislative framework would be highly beneficial and would not pose any additional financial burden on Kosovo's budget.

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POLICY REPORTS

Policy Reports are lengthy papers which provide a tool/forum for the thorough and systematic analysis of important policy issues, designed to offer well informed scientific and policy-based solutions for significant public policy problems. In general, Policy Reports aim to present value-oriented arguments, propose specific solutions in public policy – whereby influencing the policy debate on a particular issue – through the use of evidence as a means to push forward the comprehensive and consistent arguments of our organization. In particular, they identify key policy issues through reliable methodology which helps explore the implications on the design/structure of a policy. Policy Reports are very analytical in nature; hence, they not only offer facts or provide a description of events but also evaluate policies to develop questions for analysis, to provide arguments in response to certain policy implications and to offer policy choices/solutions in a more comprehensive perspective. Policy Reports serve as a tool for influencing decision-making and calling to action the concerned groups/stakeholders.



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