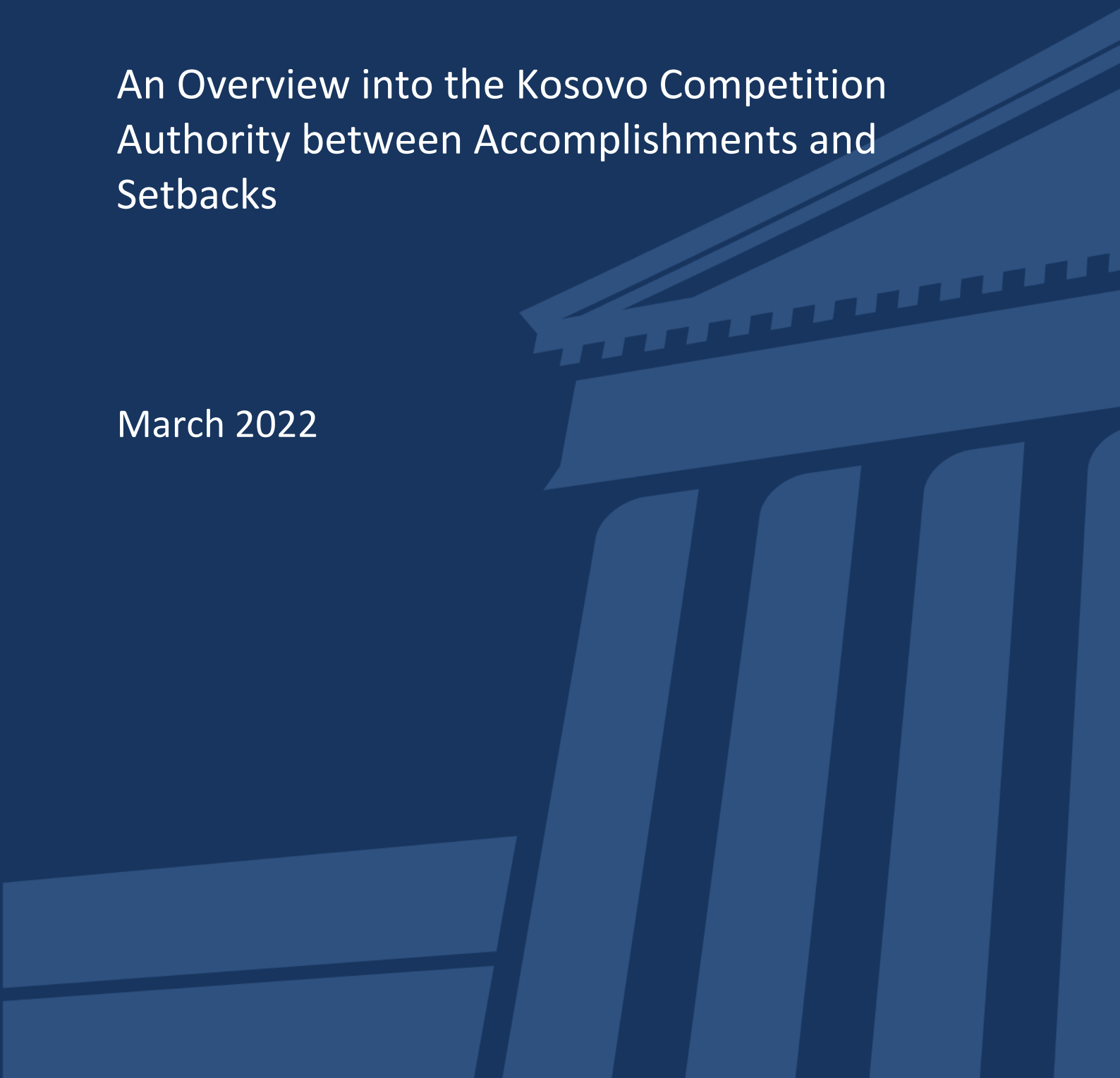


# ERA I AND ERA II: IMPROVING THE BUSINESS ENVIRONMENT IN KOSOVO

An Overview into the Kosovo Competition  
Authority between Accomplishments and  
Setbacks

March 2022



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Policy Analysis 01/2022

## ERA I and ERA II: Improving the Business Environment in Kosovo. An Overview into the Kosovo Competition Authority between Accomplishments and Setbacks

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March 2022

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# ERA I and ERA II: Improving the Business Environment in Kosovo. An Overview into the Kosovo Competition Authority between Accomplishments and Setbacks

## EXECUTIVE SUMMARY

The need for launching a European Reform Agenda (ERA) derives from the illusion that the Stabilization and Association Agreement (SAA), entered into force in 2016 and to be realized over a period of 10 years, would have been enough to bring Kosovo closer to the EU. ERA is a sort of a compass, built up on political priorities, guiding the Kosovar authorities towards the necessary steps for moving forward. Also, it has been developed around three pillars: good governance and rule of law, competitiveness and investment climate, employment and education.

ERA has not been created from scratch. Rather it relies on, without replacing them, existing strategies and mechanisms such as the SAA, the National Plan for Implementation of the SAA (NIPSAA) and the National Economic Reform Programme (ERP). Also, ERA priority actions have been jointly identified by the Kosovo's government and the EU in close consultation with International Financial Institutions (IFIs), the civil society and social partners. What's more, ERA opportunities are enormous and its actions, once implemented fully, will support the SAA implementation, improve governance and business environment, while consolidating Kosovo's statehood.

ERA (I) was first drafted in November 2016, and its priorities were to be fulfilled by the end of 2017. Yet, this has not materialized. Therefore, the European Commission (EC) acknowledged the importance to build on the priorities of the first stage and continue on other set of priorities under ERA (II). The Action Plan for *implementation of the second phase of political priorities* agreed between the EU and Kosovo, to be implemented by mid-2023, was adopted on the 4<sup>th</sup> of October 2021. The new agenda of priority reforms retains the 3-pillar approach, while reflecting the evolving context and the preferences. As for pillar II, this is the most important component in terms of policy areas covered by the SAA, the NPISAA and the ERP, while affecting the largest number of Chapters of the *acquis*. Also, improving the business environment is central for Kosovo's economy to be competitive locally, regionally, and in its relations with the EU.

The purpose and scope of ERA I and ERA II are more or less the same, meaning that they serve the implementation of the SAA quicker and faster. Yet, differences outnumber similarities. Specifically, and with a look at competition, there is much more detail about this policy under ERA II if compared to ERA I. Moreover, whereas ERA I is more focused on capacity-building, ERA II pays more attention to legislation-drafting and the guarantee of its implementation. In general terms, ERA II is much more concentrated on 5 priorities only, instead of 22 under ERA I. Also, some priorities are clearer under ERA II. Besides that, ERA II action plan is more ambitious and new things were added. Overall, ERA II is more realistic. Despite the differences, moving to ERA II has also been a learning process. In fact, the Berlin Process, a priority under ERA I, has not been incorporated by its successor, because it has been acknowledged that it was not easy to implement under this framework. In addition, it is not under Kosovo's government control.

By focusing on Pillar II and competition policy the current non-governmental monitoring mechanisms in Kosovo do not take into consideration the role of the Kosovo Competition Authority (KCA) and the competition policy. And this analysis aims at filling the gap. In fact, monitoring and assessing the status of a fair and free competition is crucial for Kosovo meeting the competitiveness targets, as set forth under the SAA. Yet, much more work remains to be

done for boosting the KCA's capacities on the one hand, while increasing awareness about competition policy among the wider populace on the other hand.

## INTRODUCTION

Current monitoring and reporting mechanisms on ERA and carried out by local NGOs (Group for Legal and Political Studies-GLPS, the Gap Institute-Gap, and the Pristina Institute for Political Studies -PIPS) do not deal with competition policy and the role of the KCA, under ERA Pillar II. *Is this a sign of carelessness? Was this omission done per purpose?* Whatever is the answer, one thing is certain though: competition policy is crucial to boost Kosovo's competitiveness locally and regionally, while bringing it closer to the EU.

ERA II focus on competition is better structured than its predecessor (ERA I), and what it foresees is doable by the end of 2022. Also, there is much more detail about competition policy under ERA II. And, whether a fair competition is central to Kosovo's EU membership, much more efforts should be undertaken to make the country able to cope with it. Concretely, this will require a consistent action in terms of enhancing the KCA's capabilities, while also contributing to awareness raising on competition law in a more decisive way. As for the first one, the KCA has carried out a comprehensive report in 2017, as required under ERA I, assessing the status of monopolies countrywide, while coming up with opinions and recommendations. Yet, whether there has been a follow-up on them is unknown at present. Overall, the KCA lacks transparency and accountability undermining its overall performance in a significant way. At the same time, the KCA remains understaffed and/or lacks specialized personnel dealing with cases and commercial issues. For addressing this concern, the KCA has been carrying out, jointly with the EU, various trainings. With a look at awareness raising, the KCA has been distributing leaflets to the relevant institutions, as well as undertaking various activities in terms of advocacy. Yet, awareness on competition policy, as well as the understanding of it, countrywide remains low.

This analysis is divided into 8 parts. The 1<sup>st</sup> part describes the origin, purpose, and rationale of launching a European Reform Agenda for Kosovo. The 2<sup>nd</sup> part deals with the ERA monitoring and reporting process, where a crucial role is played by the Office of the Prime Minister (OPM), as well as by the civil society and business organizations. The 3<sup>rd</sup> section investigates the reason of adopting ERA II. The 4<sup>th</sup> part is dedicated to Pillar II and its centrality for Kosovo's future EU membership. Also, it pinpoints the core aspect of strengthening competition policy countrywide on the one hand, while referring to the key role of the KCA in this regard on the other hand. The 5<sup>th</sup> part covers the KCA's structure and functioning, by outlining that its *modus operandi* is still a work in progress. The 6<sup>th</sup> part examines whether the KCA has been following up on its work. Particularly, the reference is to the 2017 Report on monopolies. The 7<sup>th</sup> part looks into the similarities and differences between ERA I and ERA II, by also focusing on competition policy. The 8<sup>th</sup>, and last, part depicts the situation of the KCA's capacity-building, implementation and understanding of competition policy, as well as legislation-drafting. The analysis ends with key policy recommendations for the relevant stakeholders.

## I. A EUROPEAN REFORM AGENDA FOR KOSOVO (ERA I): ORIGIN, PURPOSE AND RATIONALE

The EC confirmed the intention to launch a feasibility study for a SAA with Kosovo in March 2012. This marked a crucial step towards the establishment of mutual contractual relations. Entered into force in 2016, the SAA provides a framework for political dialogue and covers co-operation in a wide variety of sectors,<sup>1</sup> while foreseeing mutual rights and obligations.<sup>2</sup>

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<sup>1</sup>I.e., including justice and home affairs, trade, education, employment, energy, environment, and a range of other policy areas.

Also, it aims at establishing an area allowing for free trade and the application of European standards in endeavours, among others (i.e., state aid and intellectual property), like competition. Such an association is to be realized over a period of 10 years. In charge of monitoring, on an annual basis, the implementation of the SAA, as well as the adoption by the Kosovar authorities of the necessary legal, administrative, institutional, and economic reforms, is the Stabilization and Association Council (SAC) then issuing recommendations and eventually taking decisions.<sup>3</sup>

At the beginning, and at least for the first 5 years, it was thought that the SAA was enough. But the EC came with the idea of ERA afterwards. On a positive side, this is better because it has more of a political focus, and the government is directly concentrated on something that is smaller, and more attractive for the country. Otherwise said, it can sell politically better those reforms taking place under ERA. In short, ERA political priorities are in place to serve the EU to better focus on the main reforms that are required under the SAA being solely a legal document, which cannot be implemented directly. In fact, a planning structure should be set up for its execution and follow-up. Overall, the SAA is *acquis*-based, it is a bit more bureaucratic and difficult to work on with at the political level.<sup>4</sup>

Therefore, to guide reforms under the implementation of the SAA, the Commission and Kosovo started to work on ERA outlining priority actions in the field of good governance and the rule of law, competitiveness and investment climate, employment and education.<sup>5</sup> ERA is made up of political priorities, and it bears this name to make it politically catchy. It was launched with the idea to focus on the one hand on the implementation of a few priorities that can be worked on at the political level. On the other hand, its purpose is to carry out reforms that will prepare a better stage for implementing the SAA requirements. In short, ERA helps – within the SAA framework – to streamline discussions on the most important priorities. In addition, sometimes, some ministries have some difficulties in coordinating and implementing, because of lack of capacities. So, having a clearer hierarchy of documents helps them to take political decisions.<sup>6</sup>

ERA opportunities are enormous and, if implemented fully, its actions will support the SAA implementation above, improve governance and business environment, while consolidating Kosovo's statehood.<sup>7</sup> Besides that, ERA is perceived as a platform to move Kosovo to the next phase in the accession process, namely the application for EU membership.<sup>8</sup> In short, ERA helps the country to plan key actions in a target-oriented way and to undertake the concrete steps for their fulfilment. It is a mechanism making easier the *rapprochement* to the EU. Also, it is not a

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<sup>2</sup>European Commission. Commission Staff Working Document Kosovo\* 2016 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2016 Communication on Enlargement Policy, SWD (2016) 363 final, Brussels, 9 November 2016: 73 [online]. Available at: [https://wbcrti.info/object/document/15514/attach/20161109\\_report\\_kosovo.pdf](https://wbcrti.info/object/document/15514/attach/20161109_report_kosovo.pdf) [Accessed: 21 September 2021].

<sup>3</sup>Title 1, General Principles, Article 9, in Council of the European Union. Stabilisation and Association agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo\*, of the other part, Interinstitutional file: 2015/0095 (NLE), 10728/1/15, REV1, LIMITE, COWEB 69, 2 October 2015: 15 [online]. Available at: <https://data.consilium.europa.eu/doc/document/ST-10728-2015-REV-1/en/pdf> [Accessed: 16 September 2021].

<sup>4</sup>Interview with Artan Çollaku, director of the department for coordination on the EU integration agenda in the Office of the Prime Minister (OPM), Pristina, 23.11.2021.

<sup>5</sup>European Commission. Commission Staff Working Document Kosovo\* 2016 Report, *op. cit.*: 73.

<sup>6</sup>Interview with Artan Çollaku, director of the department for coordination on the EU integration agenda in the Office of the Prime Minister (OPM), Pristina, 23.11.2021.

<sup>7</sup>European Reform Agenda for Kosovo: Challenges to the Good Plan, Policy Briefing, Balkans Policy Research Group: 4 [online]. Available at: <https://bit.ly/3ilwjYF> [Accessed: 8 November 2021].

<sup>8</sup>European Reform Agenda for Kosovo: Challenges to the Good Plan, *ibid.*: 4.

novum, considering that other Balkan countries willing to join the EU make use of this same instrument.<sup>9</sup>

The Government of Kosovo and the EC, represented respectively by Prime Minister Isa Mustafa and the EU Commissioner for Enlargement and Neighbourhood Policy Johannes Hahn, drafted ERA I on the 11<sup>th</sup> of November 2016. This sets out Kosovo's main priorities under the SAA, as briefly mentioned above, to be fulfilled by the end of 2017.<sup>10</sup> It comprises 22 measures, divided into the 3 pillars referred to in the previous page.<sup>11</sup> Its main purpose is to maximize the political and economic benefits of the SAA,<sup>12</sup> ERA is complementary to. Its adoption came just two days after the EC published its 2016 annual enlargement package report for Kosovo stating that the country's overall performance in EU-related reforms was in its early stages. At a roundtable discussion hosted by GLPS, Gerrie Willems, Netherlands Ambassador to Kosovo, said that ERA is a concrete guideline for Kosovo's progress towards the European integration.<sup>13</sup>

Not solely is ERA complementary to the SAA. Rather its objectives are consistent with those of the ERP, a document including macroeconomic and fiscal policy reforms for Kosovo.<sup>14</sup> A new ERP 2020-2022 was adopted in January 2020. Its overall policy foresees, among other key intervention areas,<sup>15</sup> a set of structural reforms addressing key obstacles, along with economic growth, in supporting the development of competitive economic sectors.<sup>16</sup> In the meantime, the joint conclusions issued on the occasion of the Ministerial meeting on Economic and Financial Dialogue between the EU and the Western Balkans and Turkey in May 2016 provide targeted policy guidance which should be implemented by Kosovo.<sup>17</sup> In fact, it is recognized that for Kosovo to make full use of the SAA and all the opportunities it offers, it needs to be accompanied by urgent economic reforms, as set out in the ERP aforementioned, and underpinned by the rule of law.<sup>18</sup> Yet, the ERP is more focused on economic reforms, and it does not foresee key other ones such as those in the public administration (i.e., senior appointments depoliticization of civil

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<sup>9</sup>Interview with Bekim Millaku, director market surveillance, Kosovo Competition Authority, Pristina, 22 November 2021.

<sup>10</sup>Albana Merja. A new ERA for Kosovo: Perspectives on the European Reform Agenda, 2 June 2017 [online]. Available at: <http://www.legalpoliticalstudies.org/new-era-kosovo-perspective-european-reform-agenda/> [online][Accessed: 22 October 2021].

<sup>11</sup>Agenda for European Reform (ARE) (2016) Kosovo - EU High Level Dialogue on Key Priorities, <https://bit.ly/2fF3mr0>, quoted in European Reform Agenda. Monitoring Report for 2018, February 2019: 3 [online]. Available at: [https://www.institutigap.org/documents/646\\_ERA%20-%20english2018.pdf](https://www.institutigap.org/documents/646_ERA%20-%20english2018.pdf) [Accessed: 25 October 2021].

<sup>12</sup>Kosovo-EU High Level Dialogue on key Priorities – European Reform Agenda (ERA), February 2017: 9. Official document received from Miss Kaltrina Zeka, Head of Cabinet of the First Deputy Prime Minister, Republic of Kosovo, 26 October 2021.

<sup>13</sup>Kosovo adopts the European Reform Agenda, Pristina Insight, 15 November 2016 [online]. Available at: <https://prishtinainsight.com/kosovo-adopts-european-reform-agenda/> [Accessed: 22 October 2021].

<sup>14</sup>European Reform Agenda (ERA) High-level dialogue between Kosovo and the European Union, Group for Legal and Political Studies, GAP Institute, Pristina Institute for Political Studies, ERA Monitoring Report, January-June 2018: 2 [online]. Available at: [https://www.institutigap.org/documents/95153\\_ERA%20final%20draft\\_eng%20\(2nd%20report\)%20\(1\).pdf](https://www.institutigap.org/documents/95153_ERA%20final%20draft_eng%20(2nd%20report)%20(1).pdf) [Accessed: 8 November 2021].

<sup>15</sup>I.e., a ruled-based fiscal policy oriented towards stability and public finances and, within the available fiscal space, supporting economic growth through capital investments, increased funding for priority development areas, and tax incentives for domestic producers.

<sup>16</sup>Economic Reform Programme 2020-2022, January 2020 [online]. Available at: <https://mf.rks-gov.net/desk/inc/media/8578F7DC-479A-4C30-BE55-69D44F7988C7.pdf> [Accessed: 30 October 2021].

<sup>17</sup>Kosovo-EU High Level Dialogue on key Priorities – European Reform Agenda (ERA), February 2017, *op. cit.*: 9.

<sup>18</sup>Kosovo-EU High Level Dialogue on key Priorities – European Reform Agenda (ERA), February 2017, *ibid.*: 9.

service). Also, activities are formulated a bit differently. Besides that, it is aligned with the NIPSAA.<sup>19</sup>

ERA is not a new list. Priorities were picked from other existing documents, including the SAA, the ERP, and brought together into one document with a corresponding timeframe.<sup>20</sup> Otherwise said, ERA does not replace the existing strategies. Rather, it aims to help in the prioritization of specific actions to be carried out in the short-term and ensuring the commitment of the Kosovo's government through the necessary allocation of resources, as well as buy-in by other domestic and international stakeholders. In short, the Agenda aims to fully seize the opportunities provided by the SAA.<sup>21</sup> Also, it is a tool to mobilize the relevant institutions to draft laws and programs ensuring urgent economic reforms.<sup>22</sup>

ERA priority actions have been jointly identified by the Kosovo government and the EU in close consultation with the IFIs, the civil society, and social partners.<sup>23</sup> In terms of *modus operandi*, a high-level dialogue on ERA would meet (bi-)annually to take stock of the progress achieved. This is chaired by the Commissioner on the Commission side, and the Prime Minister plus selected government ministers on the Kosovo side. Regular monitoring and reporting were going to be done through the SAA dialogue kicking off after the first SA Council with Kosovo in autumn 2016. Also, the priorities would be updated, as appropriate, once a year.<sup>24</sup> ERA implementation would be evaluated and reviewed in the same way it was developed, jointly by the government and the EU.<sup>25</sup>

## II. ERA MONITORING PROCESS: HOW DOES IT WORK?

In terms of monitoring and reporting there is one internal monitoring and reporting within the responsible institutions, and between them and the OPM as a coordinating body. Also, there is the cooperation of the OPM with the EC to have jointly the same understanding on where things are. Besides that, there is also the monitoring carried out by the civil society and business associations. Moreover, the OPM disposes, internally, of an electronic database, where ministries and other institutions report regularly on a quarterly basis. The idea, however, was to introduce a monthly reporting by the end of November 2021. Also, there are regular monthly monitoring activities reflected in internal reports, but they serve internally only, with a view at speeding-up the decision-making process, while addressing potential delays. Furthermore, the OPM also work with the data shared by the relevant institutions, and as a follow-up the OPM compiles quarterly reports. The 1<sup>st</sup> quarterly report, covering the 3<sup>rd</sup> quarter, has been completed. For this purpose, the OPM met with GLPS and other organizations to discuss those data and to inform the civil society and the business associations thereupon. At the same time, this was a format intended to seek their contribution, while possibly receiving some feedbacks on those aspects they think implementation is not working well on, as well as on the impact of those reforms which are

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<sup>19</sup>Interview with Artan Çollaku, director of the department for coordination on the EU integration agenda in the Office of the Prime Minister (OPM), Pristina, 23.11.2021.

<sup>20</sup> European Reform Agenda for Kosovo: Challenges to the Good Plan, Policy Briefing, *op. cit.*: 6.

<sup>21</sup>Kosovo-EU High Level Dialogue on key Priorities – European Reform Agenda (ERA), February 2017, *op. cit.*: 9.

<sup>22</sup>European Reform Agenda (ERA) High-level dialogue between Kosovo and the European Union, Group for Legal and Political Studies, GAP Institute, Pristina Institute for Political Studies, ERA Monitoring Report, January-June 2018, *op. cit.*: 2.

<sup>23</sup>Kosovo-EU High Level Dialogue on key Priorities – European Reform Agenda (ERA), February 2017, *op. cit.*: 9.

<sup>24</sup>Kosovo-EU High Level Dialogue on key Priorities – European Reform Agenda (ERA), February 2017, *ibid.*: 10.

<sup>25</sup>European Reform Agenda for Kosovo: Challenges to the Good Plan, Policy Briefing, *op. cit.*: 8.



effectively pushed forward. In addition to that, there is also the practice of regular monthly meetings between the OPM and the EC, where the discussion about the impact takes place. As for the action plan, even if this is locally owned, the EC ultimately carries out joint assessments, while looking into the degree of implementation. Internally, there also exist coordination structures for the European integration. Concretely, ERA is discussed every quarter at the highest political level with the Ministry responsible for European integration, comprising the Prime Minister and other key ministers, but also other institutions and bodies, like the Assembly and judicial institutions. This works more at the domestic level. At the level of joint monitoring with the EC, the OPM also carries out monthly meetings where views and data are compared to reflect on everything that happened. Additionally, there are consultation mechanisms as well. Concretely, the OPM meets every quarter inviting ideally heads of Non-Governmental organizations (NGOs), Civil Society Organizations (CSOs), and business communities and associations dealing with ERA only. Also, deputy prime ministers attend these consultations to exchange views. Currently, the OPM is working on the possibility to gather those CSOs into 3 groups under each pillar of ERA, so that they can carry out more of a technical work. Ideally, these groups should meet every month. The idea behind their involvement is that, since CSOs have expertise, they can support, stimulate, and promote public discussions on why things are going well or not. This will inevitably exercise more public pressure at the political level to push the implementation forward. Moreover, the OPM takes part in different events organized by the various CSOs on the necessary reforms, as well as on broader issues to have a more public discussion.<sup>26</sup>

Apart from the monitoring and reporting mechanisms above, there exist a joint project between GLPS, the Gap Institute, and PIPS, which has been monitoring ERA, as per the involvement of NGOs and CSOs as mentioned above. Also, the ERA Monitoring Online Platform, the first platform of this kind was launched in Kosovo, on the 15<sup>th</sup> of March 2019, by GLPS, Gap, and PIPS.<sup>27</sup> On the platform one can find detailed information for the media and the public on the monitoring process, performance, and efficiency in Kosovo fulfilling the obligations as set forth under ERA. Yet, both projects above do not take into consideration the role of the Kosovo Competition Authority (KCA) and the competition policy under Pillar II,<sup>28</sup> and this analysis aims at filling the gap. Otherwise said, monitoring and assessing the status of a fair and free competition is crucial for Kosovo meeting the competitiveness targets as set forth under the SAA, and for possibly joining the EU.

### **III. A SECOND EUROPEAN REFORM AGENDA FOR KOSOVO (ERA II): WHAT IS NEW?**

The ERA I started in a good spirit and all the concerned institutions were showing commitment, because it was the first year of the SAA. At that time, things seemed promising, but after one year or more the country witnessed political instability. Otherwise said, political circumstances were not favourable to implement ERA I. In principle, its implementation was to be done by the end of 2017. Yet, it took more than two additional years. In that context the EC acknowledged the importance to build on the priorities of the first stage and continue on other set of priorities, which are narrower, under ERA II. At the same time, it has been thought of as a

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<sup>26</sup>Interview with Artan Çollaku, director of the department for coordination on the EU integration agenda in the Office of the Prime Minister (OPM), Pristina, 23.11.2021.

<sup>27</sup>GLPS, GAP and PIPS presented the European Reform Agenda Monitoring Report and launched the ERA Monitoring Online Platform, 15 March 2019 [online]. Available at: <https://bit.ly/34PPrLn> [Accessed: 8 November 2021].

<sup>28</sup> ERA Monitoring, 2018. Available at: <https://www.eramonitoring.org/en/category/competitiveness-and-investment-climate/> [online]. Accessed: 9 November 2021.

learning process. In other words, some priorities are clearer under ERA II, its action plan is more ambitious, and some new things were added. Yet, for some priorities like the Berlin Process (i.e., connectivity measures, energy/infrastructural projects), the lesson under ERA I was that it was not easy to implement, because it is not under the Kosovo government's control. Just as an example, the Peace Highway, which was reflected in ERA I could not be implemented, because of Serbia's continuous boycotting. Besides that, some energy projects were delayed. Therefore, this priority – unlike the Green Agenda for the Western Balkans and some energy priorities and infrastructural reforms – have not been included under ERA II. Overall, ERA II is more realistic, and there is the hope of having a stronger stability with it. In terms of implementation ERA II scored 60% at present, whereas ERA I rate was under 50%. Things seem more optimistic, and there is the willingness of achieving at least 75% of its execution by the end of 2021 for this year's indicators.<sup>29</sup>

The Action Plan for *implementation of the second phase of political priorities* agreed between the EU and Kosovo was adopted on the 4<sup>th</sup> of October 2021.<sup>30</sup> Its endorsement confirmed the positive trend of Kosovo's renewed commitment to EU-related reforms.<sup>31</sup> The new agenda of priority reforms retains the 3-pillar approach, while reflecting the evolving context and the preferences.

A key emphasis of this 2<sup>nd</sup> phase of ERA is on the implementation and enforcement of legislation and reforms, enacted under the first phase of ERA, to ensure a real difference for citizens, businesses, and investors. Based on the priorities agreed with the EU, the Government of Kosovo - in close consultation with Brussels and with the contribution of civil society - has prepared the two-year ERA Action Plan (PV ERA II), which is intended to be implemented by mid-2023. PV ERA II has defined in detail and with clear deadlines specific, realistic, measurable, and achievable actions to target these ambitious priorities.<sup>32</sup>

The idea behind ERA II is to push for more progress and to include areas which were not contained in ERA I. The latter was, in fact, a 2-year program, which turned to last longer, as previously mentioned, and it is not completed yet. Despite this, what is foreseen under ERA II, with a focus on competition, is doable by the end of 2022, because things are at an advantaged stage, and the current program is better structured. ERA I objectives were far too ambitious to be achieved within a 2-year timeframe, and for that reason many things just did not happen. The 3 pillar-structure, as mentioned in the previous pages, remains untouched under ERA II, but the content of the two programs is different. For example, under the competitiveness pillar as per ERA I, there was some very vague information, for instance, about, among others (i.e., about state aid control), competition policy. Under ERA II there is much more detail about this policy. Otherwise said, this has been given a focus, it didn't have before. Besides that, ERA II is prioritizing legislation, because that was not completed properly. All in all, the program under ERA II should ensure, on the one hand, an optimal approximation of legislation with the EU, and what

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<sup>29</sup>Interview with Artan Çollaku, Director of the Department for Coordination on the EU Integration Agenda in the Office of the Prime Minister (OPM), Pristina, 23.11.2021.

<sup>30</sup>Second Phase of EU-Kosovo Political Priorities: European Reform Agenda (ERA) II, October 2021: 3. Official document received from Miss Kaltrina Zeka, Head of Cabinet of the First Deputy Prime Minister, Republic of Kosovo, 26 October 2021.

<sup>31</sup>European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2021 Communication on EU Enlargement Policy COM (2021) 644 final, 10 October 2021: 54 [online]. Available at: <https://bit.ly/36sVoOE> [Accessed: 8 November 2021].

<sup>32</sup>Second Phase of EU-Kosovo Political Priorities: European Reform Agenda (ERA) II, *op. cit.*: 9.

is required under the SAA. Besides that, it should guarantee effective implementation of all legislation adopted.<sup>33</sup>

The Assembly of Kosovo will play an important role in the implementation and monitoring of ERA II, in particular for those reforms under its direct responsibility, the adoption of laws and the oversight of the work of the Government in the overall implementation process. Also, its main role is to ensure that draft laws are passed on time.<sup>34</sup>

Similarly, the engagement of the civil society has been essential to the preparation of PV ERA II, as previously mentioned, and should be so in monitoring its implementation as well. For this purpose, joint and public consultations were organized with the CSOs before finalizing the action plan. Regular and structured monitoring consultations with them will also be established throughout its implementation.<sup>35</sup> And, the execution of ERA II will be reviewed annually.<sup>36</sup>

#### **IV. PILLAR II COMPETITIVENESS AND INVESTMENT CLIMATE. ITS CENTRALITY FOR KOSOVO'S FUTURE MEMBERSHIP**

Whether all 3 pillars of ERA (I and II) are fundamental for accompanying the country's progress towards meeting the requirements under the SAA, and possibly joining the EU, pillar II is the most important component in terms of policy areas covered by the SAA mentioned above, NPISAA and the ERP, while affecting the largest number of Chapters of the *acquis*.<sup>37</sup>

NIPSAA is more a domestic document, and it does enjoy more ownership than the ERP and ERA.<sup>38</sup> A new one has been adopted on the 4<sup>th</sup> of October 2021. It is the 6<sup>th</sup> program in a row for the implementation of the SAA between the EU and Kosovo. It is the main national policy and planning document for the execution of reforms for the endorsement of the entire EU *acquis* in national legislation. And it is implemented in conjunction with, and related to, ERA II by setting priorities and reforms to meet them.<sup>39</sup> NPISAA 2021-2025 is comprehensive in scope, and it contains both short-term reforms for 2021 and medium-term priority objectives until 2025 to meet the obligations under the SAA, through the alignment of national legislation with the EU *acquis* and the implementation of approximated legislation. It is divided into 3 blocks: political criteria, economic criteria, and European standards. Specifically, block 2 (economic criteria) is harmonized with the ERP above. It also reflects priorities and activities arising from other mechanisms of dialogue with the EU, such as annual priorities, conclusions of SAA structures, or from multilateral mechanisms, such as agreements with the IMF, etc. This block contains 2 chapters: the existence of a functioning market economy, and the capacity to cope with

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<sup>33</sup>Interview with Dr. Eugene Stuart, team leader of the EU Funded Project "Support for the Kosovo Competition Authority and State Aid Commission", Pristina, 5 November 2021. Project available at: <http://eufaircompetition-kosovo.org/>. [online]. Accessed: 7 November 2021.

<sup>34</sup>Interview with Artan Çollaku, director of the department for coordination on the EU integration agenda in the Office of the Prime Minister (OPM), Pristina, 23.11.2021.

<sup>35</sup>Second Phase of EU-Kosovo Political Priorities: European Reform Agenda (ERA) II, *op. cit.*: 9.

<sup>36</sup>Second Phase of EU-Kosovo Political Priorities: European Reform Agenda (ERA) II, *ibid.*: 9.

<sup>37</sup>European Agenda for Kosovo: Challenges to a good plan, Balkans Policy Research Group, 15 November 2016: 8 [online]. Available at: <https://balkansgroup.org/european-agenda-for-kosovo-challenges-to-the-good-plan/> [Accessed: 25 October 2021].

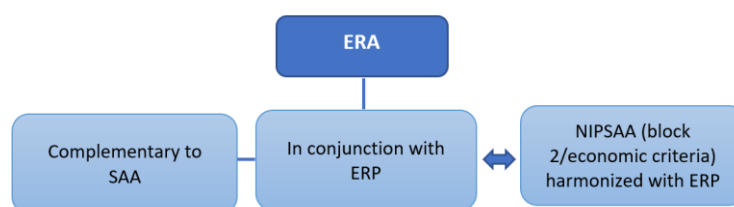
<sup>38</sup>Interview with Artan Çollaku, director of the department for coordination on the EU integration agenda in the Office of the Prime Minister (OPM), Pristina, 23.11.2021.

<sup>39</sup>National Programme for Implementation of the Stabilisation and Association Agreement (NIPSAA) 2021-2025, October 2021:3 [online]. Available at: <https://kryeministri.rks-gov.net/wp-content/uploads/2021/10/3-PKZMSA-2021-2025-miratar-nga-Kuvendi-ENG.pdf> [Accessed: 27 October 2021].

competitive pressure and market forces within the Union.<sup>40</sup> This block is to be viewed in conjunction with ERA Pillar II. As for the NIPSAA's focus on the economic criteria, their fulfilment for membership is based on the requirements arising from the 1993 European Council conclusions referred to as the Copenhagen criteria. Besides that, a functional market economy is the 1<sup>st</sup> Copenhagen economic criterion.<sup>41</sup> All in all, the priority objectives and measures within the economic criteria aim at reflecting the substance of structural reforms as contained in the ERP.<sup>42</sup> In terms of progress with regard to fulfilling the economic accession criteria, Kosovo needs to continue its efforts in creating a functional market economy, capable to cope with competition, by directing the budget towards growth generating investments, and by strengthening the competitiveness, which in turn would positively reduce the external misbalance.<sup>43</sup>

NIPSAA can, thus, be viewed, via its harmonization as per its block 2 (economic criteria) with the ERP, as a part and parcel of ERA II (Pillar II). Also, NIPSAA is to be looked at as the result of a national product, whereas ERA is built more on a consensus between the EU and the government.<sup>44</sup>

**Graph I. ERA and its relations with existing strategies**



Source: the graph is by the author.

In short, ERA relies on existing strategies, and it is to be considered as a framework for boosting those plans' priorities, while keeping track on the necessary reforms.

ERA I 2<sup>nd</sup> pillar comprises 7 main categories: promoting foreign direct investment; improving the business environment; systematically implementing the adopted strategy and action plan to fight informal economy; supporting SMEs development; further developing a number of sectoral statistics, key to policy-making in the area of national accounts, trade and business statistics, energy and social statistics; enhancing the regional connectivity; enhancing energy security and adopting a comprehensive energy strategy for the period 2017-2026. Its successor ERA II (2<sup>nd</sup> pillar) added to the categories above, the following ones: work towards meeting energy efficiency and renewable energy targets, tackle priority environmental challenges, further strengthen implementation of public financial management and public procurement reforms, further strengthen competition and state aid institutions.

<sup>40</sup>National Programme for Implementation of the Stabilisation and Association Agreement (NIPSAA) 2021-2025, *ibid.*: 13-14.

<sup>41</sup>National Programme for Implementation of the Stabilisation and Association Agreement (NIPSAA) 2021-2025, *ibid.*: 41.

<sup>42</sup>National Programme for Implementation of the Stabilisation and Association Agreement (NIPSAA) 2021-2025, *ibid.*: 41.

<sup>43</sup>National Programme for Implementation of the Stabilisation and Association Agreement (NIPSAA) 2021-2025, *ibid.*: 41.

<sup>44</sup>Interview with Dr. Eugene Stuart.

Overall, and among the sectors above, *improving the business environment* is inevitably central for Kosovo's economy to be competitive locally, regionally, and in its relations with the EU. This foresees various sub-priorities.<sup>45</sup> Yet, among them, *aligning legislation, enhancing the capacity of Competition (and State Aid bodies)*<sup>46</sup> and *ensuring they start implementing their mandates* is of outmost importance. For achieving this priority, 2 key actions have been foreseen: strengthening internal procedures and capacity in the KCA<sup>47</sup> to conduct investigations, and the need for the Competition Authority to research and prepare a report on the state of play of monopolies in the market in Kosovo with appropriate recommendations.<sup>48</sup>

## V. KOSOVO COMPETITION AUTHORITY: A WORK IN PROGRESS

As for the first action, and since its creation in 2010, various steps have been undertaken to boost the Authority's capacities. Yet, the body's overall *modus operandi* is still a work in progress.

The KCA is a public institution, independent in performing its duties specified by the Law No.03/L-229, and it is accountable before the Assembly of the Republic of Kosovo. It is a legal entity, and its financing is guaranteed via the consolidated budget of the Republic of Kosovo. Besides that, punitive measures, fines issued by the Authority are incomes that are deposited in the budget of the Republic of Kosovo.<sup>49</sup> The Authority issues, among others, professional opinions on regulated and deregulated markets. Also, it gives non-binding opinions to institutions like ministries, the Energy Regulation Office (ERO), etc., while assessing the market and looking into whether there have been infringements. Yet, it is in the interests of those ministries and institutions to act in this regard. However, the KCA's recommendations, even if not binding, should be taken into consideration.<sup>50</sup>

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<sup>45</sup>I.e., focus on improving the World Bank 'Doing Business' indicators; b. Align rules with international accounting, auditing & financial reporting standards; c. Reduce the regulatory burden to firms, in particular by making transparent the fees and procedures required to get permits and licenses; d. Introduce legislative changes to improve the management, coordination and enforcement of market surveillance. See Kosovo – EU High level dialogue on key priorities – European Reform Agenda (ERA), February 2017, *op. cit.*

<sup>46</sup>For the scope and reach of this policy analysis, the focus will be on the Competition Authority only.

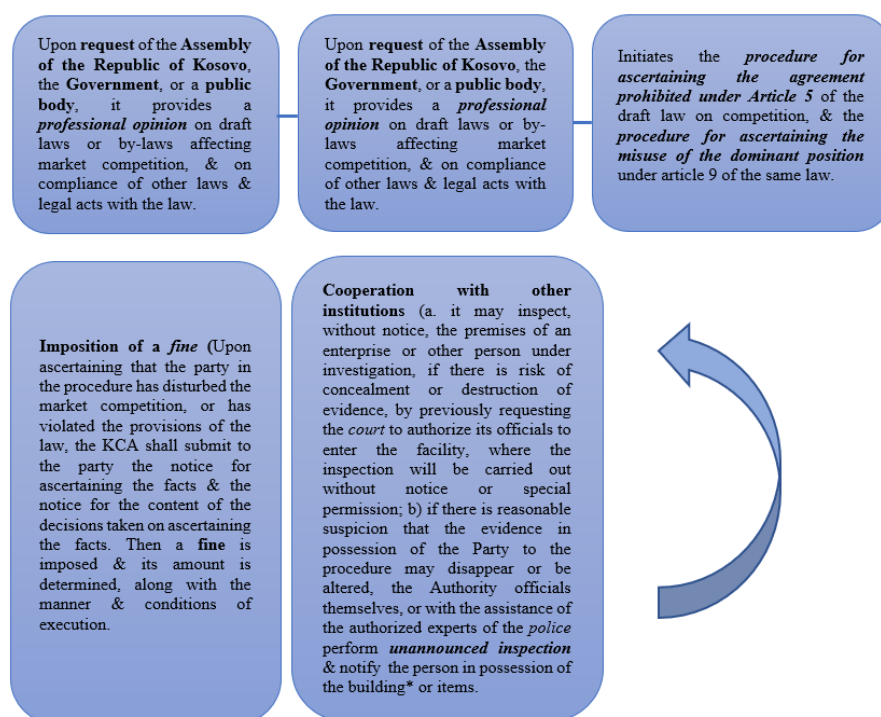
<sup>47</sup>Competencies and organization of the Authority for Protection of Competition are set forth under the Law No.03/L-229 on protection of competition [online]. Available at: <https://bit.ly/369gO3D> [Accessed: 26 October 2021].

<sup>48</sup>Kosovo-EU High Level Dialogue on key Priorities – European Reform Agenda (ERA) I Competitiveness and Investment Climate (2. Improving the business environment), February 2017, *op. cit.*: 12 & 19.

<sup>49</sup>Chapter VII Kosovo Competition Authority, Article 24 Establishment, Operation and Organization (1) (2) (5) (6), Law No.03/L-229 on protection of competition, *op. cit.*

<sup>50</sup>Interview with Bekim Millaku, director market surveillance, Kosovo Competition Authority, Pristina, 22 November 2021.

**Graph II. – Kosovo Competition Authority. Competencies and Cooperation with other institutions**



Source: The graph is by the author. Chapter V (Article 21), Chapter VI (Article 32 & Article 36), Chapter VII (Article 36, Article 40, 41, 42 & 50), Draft Law on Protection of Competition, 20 October 2021. Available at: <https://bit.ly/3JkamFz> [Accessed: 21 October 2021]; see also, Chapter VI Professional Opinion of the Authority, Article 23 Providing Professional Opinion, (1) (2), Law No.03/L-229 on protection of competition, *ibid*.

As for the procedure for the agreement prohibited under Art. 5, are meant those agreements aimed at preventing, restricting, or distorting competition in the relevant market under those conditions, as these are specified under the Draft Law on Competition. Likewise, with a look at the misuse of a dominant position, as set forth under article 9, this might occur when the enterprise or group of enterprises directly or indirectly impose an unfair purchase or sale price or other unfair trading conditions; restrict productions, markets or technological development to the detriment of consumers; apply different conditions for equivalent transactions with other enterprises, by setting them at a competitive disadvantage; conditions the conclusion of the contract with additional obligations that by nature or commercial use are not related to the object of the contract; imposes prices or other conditions with the purpose of preventing the entry into the relevant market or the removal from the relevant market or specific competitors or their product; deny the other enterprise access in return of adequate remuneration in the network or infrastructure, making it impossible for it to act as a competitor.<sup>51</sup>

As for fines, these can be imposed for both serious (up to 10% of the total turnover realized worldwide in the last year) and minor offences (up to 1% of the total turnover realized worldwide in the last year), when certain conditions have been violated.<sup>52</sup> Besides that, there are mitigating and aggravating circumstances on whose basis the Authority might decide on either

<sup>51</sup>Chapter III dominant position, Article 8 Determination of the dominant position, in Draft Law on Competition, *ibid*.

<sup>52</sup>Chapter VIII punitive provisions, Article 57 Fines for serious offences & Article 58 fines or minor offences), in Draft Law on Protection of Competition, 20 October 2021, *ibid*.

downsizing and/or increasing the amount always within the range above. Specifically, in the case of aggravating circumstances the basic amount of the fine is increased by one hundred percent (100%). Also, the Authority may raise the amount of the fine as necessary by seizing the property that the enterprise has acquired in violation of the law, if the benefit can be calculated. At the same time, however, *the Authority may reduce the amount of the fine if the undertaking committing the violation is in a difficult financial situation and proves that the imposition of the fine may irreversibly damage its economic stability and the value of the property.*<sup>53</sup> Besides that, when there are legal or organizational changes within an undertaking participating in a breach, the Authority may prosecute and impose a fine on the legal or economic successor of the undertaking. Additionally, the Authority determines with a sub-legal act the procedure, manner and criteria for imposing fines provided by this law. Likewise, it determines the criteria in accordance with the competition norms of the European Union, according to Article 70 of this law.<sup>54</sup>

Apart from the scenarios above, the Authority might exempt from a fine under certain circumstances. Yet, *the exemption from the fine does not apply to the enterprise being the initiator or instigator of the prohibited agreement.* The Authority with a sub-legal act determines *the procedure and criteria for exemption from fine and reduction of fine* according to article 62.<sup>55</sup>

As for the unannounced inspection, *buildings may be subject to such a procedure, if there is a reasonable suspicion that they hide business books or other documents.* Also, the inspection can be conducted against the will if the enterprise, group of enterprises or the owner of the building refuses to allow the entry of authorized officials; prevents viewing of business books of other documents; or otherwise complicates the conduction of the unannounced inspection. The inspection against the will is performed by the authorized officials with the help of the authorized police officers.

Certainly, the KCA's daily work, in matters related to the distortion of competition in the territory of the Republic of Kosovo, is strictly reliant on the close cooperation with judicial bodies and other institutions.

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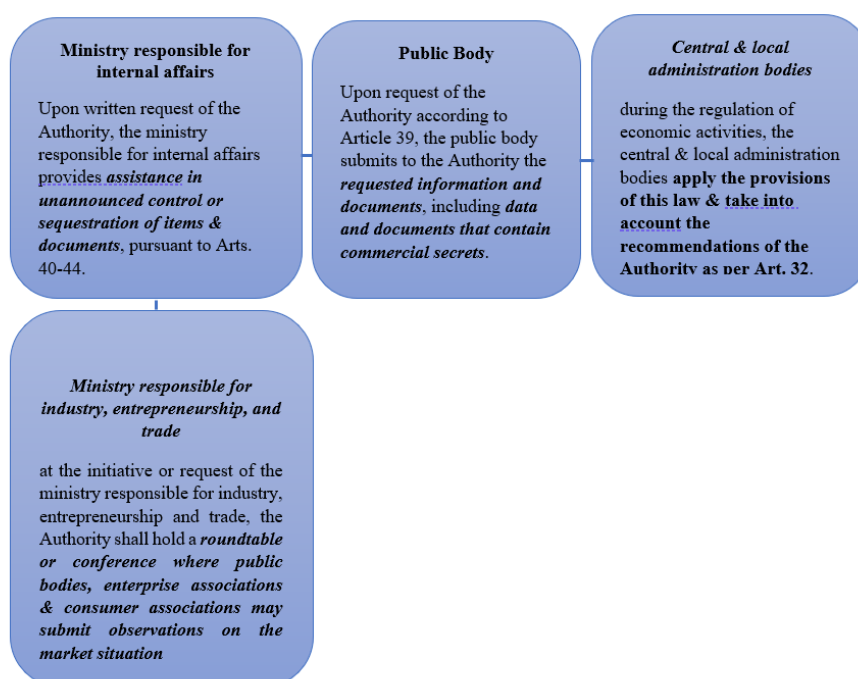
<sup>53</sup>Chapter VIII punitive provisions, Article 61 Manner and criteria for imposing the fine, in Draft Law on Protection of Competition, *ibid.*

<sup>54</sup>Chapter VIII punitive provisions, Article 61 Manner and criteria for imposing the fine, in Draft Law on Protection of Competition, *ibid.*

<sup>55</sup>Chapter VIII punitive provisions, Article 62 Exemption from fine and reduction of fine, in Draft Law on Protection of Competition, 20 October 2021, *ibid.*



### Graph III. Cooperation of judicial bodies and other institutions



Source: The graph is by the author. See Chapter IX Cooperation with other bodies and judicial protection, Art. 64 Cooperation of the Authority with the judiciary and other bodies, in Draft Law on Protection of Competition, 20 October 2021, *ibid*. See also, Chapter X Cooperation with other institutions and legal defence, (1), Law No.03/L-229 *op. cit*.

Not solely the KCA cooperates with the bodies above. Also, *it may mutually work with sister institutions. Yet, it is nowhere specified in the draft law which these sister institutions are and/or could be.*<sup>56</sup>

The Authority's work is managed by the Commission, a collegial body composed of 5 members, including the President and the Vice-President of the Authority, appointed by the Assembly of the Republic of Kosovo.<sup>57</sup> The Commission's responsibilities are, among others (i.e., proposing and endorsing sub-legal acts in accordance with the legislation, issuing a decision for allowing concentration, defining conditions, measures, and deadlines for performing concentration, etc.), deciding to initiate procedures for investigating competition disturbances; imposing fines for violation of the law; informing and increasing public awareness about market competition; defining methodological principles for investigating market competition; defining rules and measures for protection of competition, approving the annual work report of the authority and presenting the same to the Assembly of the Republic of Kosovo by the 31<sup>st</sup> of March of the following year, performing market studies and collecting data pursuant to the law.<sup>58</sup>

In terms of capacity-building the KCA doesn't have the required staff (i.e., dealing with cases), and this obviously undermines its overall performance. Yet, the institution has been

<sup>56</sup>Chapter IX Cooperation with other bodies and judicial protection, Article 65 Cooperation of the Authority with sister institutions, in Draft Law on Protection of Competition, 20 October 2021, *ibid*.

<sup>57</sup>Chapter V The Authority Article 21 Determination of the Authority, in Draft Law on Protection of Competition, 20 October 2021, *ibid*. See also, Chapter VII Kosovo Competition Authority, Article 25 Commission for Protection of Competition (1) (3), Law No.03/L-229, *op. cit*.

<sup>58</sup>Chapter V The Authority Article 26 Responsibilities of the Commission, in Draft Law on Protection of Competition, 20 October 2021, *ibid*. See also, Chapter VII Kosovo Competition Authority, Article 28 Duties and Responsibilities of the Commission (1) 1.1, to 1.13, Law No.03/L-229, *ibid*.



forwarding requests thereupon to the government. In the meantime, it is still waiting for a response, and this stalled situation is more a political issue. However, with a view at supporting capacity-building, the Authority is jointly carrying out trainings with the EU.<sup>59</sup> Also, various actions have been undertaken in the meanwhile. For instance, on the 29<sup>th</sup> of September 2021, a roundtable was held with the management of the KCA to present the analyses, findings, and key recommendations of an initial project assignment regarding the structures, processes, resources, and IT needs of the Authority. This work, aiming at improving the efficiency and effectiveness of the KCA and to benchmark the Authority with other similar competition agencies across Europe, was requested by the former Kosovo Competition Commission. Since the beginning of June this year (2021), the KCA has remained without a chairman and the 4 Members of the Commission required by the Law on the Protection of Competition, following the completion of their term of office. The need of increasing the KCA's capacities has been highlighted at the roundtable. Also, the main purpose of the exercise was to advise the KCA on how to increase its efficiency and effectiveness and to introduce best practices and methodologies into the operational aspects of both the KCA Secretariat and the Kosovo Competition Commission. This was the 1<sup>st</sup> phase of the exercise, and a 2<sup>nd</sup> phase will commence soon.<sup>60</sup>

Moreover, between 15 September and 7 October 2021, the EU Project "*Support to the Kosovo Competition Authority and State Aid Commission*" provided a 3-module intermediate training course for the officials of the KCA. This covered key topics regarding competition law and policy that constitute the main pillars of the work and mandate of the KCA: abuses of dominant market positions, prohibited agreements/cartels and concentrations. These trainings were intended to allow the KCA's officials, in regard to each of the three areas, to explore in some detail key principles and approaches regarding EU and Kosovo legislation, typical legal and economic analysis in different types of competition cases, landmark EU cases and interesting national cases and remedies which can be applied for major competition concerns. These trainings are expected to be followed by the preparation of enforcement manuals for the KCA in each of the 3 areas mentioned above, which will supplement the trainings, provide a convenient reference for KCA's enforcement officials, and contribute to the sustainability of these trainings. This EU project represented an important support in terms of capacity-building for the KCA.<sup>61</sup>

## **VI. MARKET'S STATE OF PLAY: GOOD PERFORMANCE AND DRAWBACKS. IS THE KOSOVO COMPETITION AUTHORITY FOLLOWING UP?**

The KCA carried out its 2017 Report as part of ERA I, as mentioned in the previous pages, with the purpose of looking at the current state of monopolies in the Kosovo's market.<sup>62</sup>

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<sup>59</sup>Interview with Bekim Millaku, director market surveillance, Kosovo Competition Authority, Pristina, 22 November 2021.

<sup>60</sup>European Union Kosovo. Project provides analyses and key recommendations for the reorganization of the Kosovo Competition Authority, 1 October 2021 [online]. Available at: <https://bit.ly/3JwGGEY> [Accessed: 29 October 2021].

<sup>61</sup>Kosovo Competition Authority completes advanced training provided by EU Project, 8 October 2021 [online]. Available at: <https://bit.ly/3MRQ1cR> [Accessed: 29 October 2021].

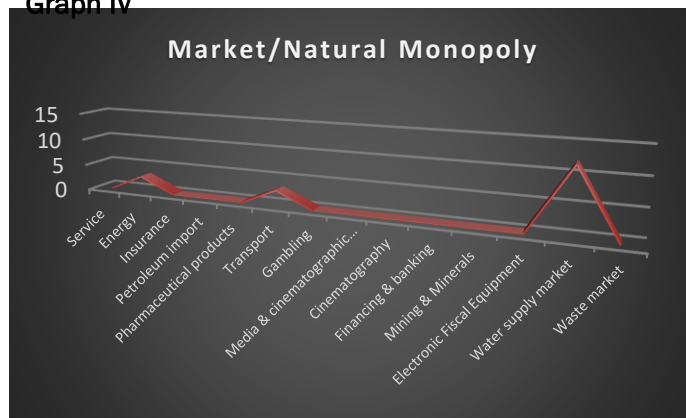
<sup>62</sup>The report has been a joint work between the KCA and various institutions (i.e., the Tax Administration of Kosovo (TAK); Kosovo Customs; the Central Bank of Kosovo (CBK); the Water Regulator Authority (WRA); the Independent Media Commission (IMC); the Regulatory Authority of Electronic and Postal Communications (RAEPC); the Independent Commission of Mines and Minerals (ICMM); the Energy Regulator Office (ERO); the Kosovo Agency for Medicinal Products and Devices (KAMPD); the Public Procurement Regulatory Commission (PPRC); the Ministry of Infrastructure; the Ministry of Finance; the Ministry of Health; the Ministry of Trade and Industry; the Ministry of Environment and Spatial Planning). See Report on Performance of duties deriving from the European Reform Agenda, Kosovo Competition Authority, 20 December 2017: 5 &

Concretely, it analyzed the following sectors: transport, gambling industry, media and cinematographic products; financing and banking; mining and minerals market; fiscal equipment market; water supply market; and waste market. A total of 479 companies have been considered for its study.<sup>63</sup>

**Table I**

| Market                           | Nr. companies |
|----------------------------------|---------------|
| Service                          | 17            |
| Energy                           | 4             |
| Insurance                        | 15            |
| Petroleum import                 | 28            |
| Pharmaceutical products          | 54            |
| Transport                        | 219           |
| Gambling                         | 13            |
| Media & cinematographic products | 27            |
| Cinematography                   | 6             |
| Financing & banking              | 31            |
| Mining & Minerals                | 33            |
| Electronic Fiscal Equipment      | 7             |
| Water supply market              | 12            |
| Waste market                     | 13            |
| <b>Tot. 479</b>                  |               |

**Graph IV**

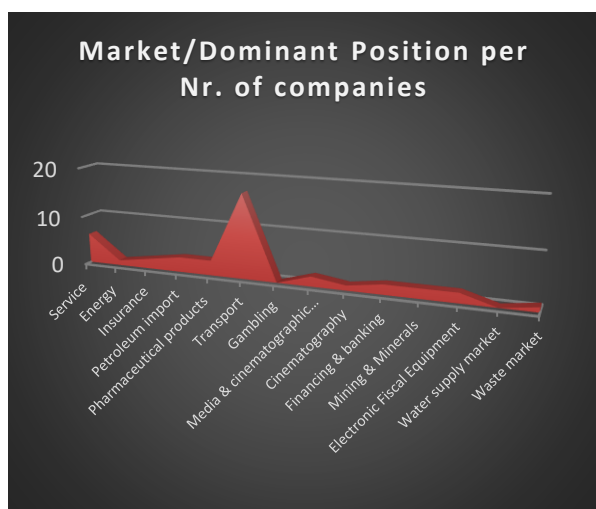


**Source:** Data for all tables and graphs (above and below in the next pages) have been taken from the KCA's Report 2017, *ibid*. The companies holding a monopoly per sector are referred to in the table in terms of numbers.

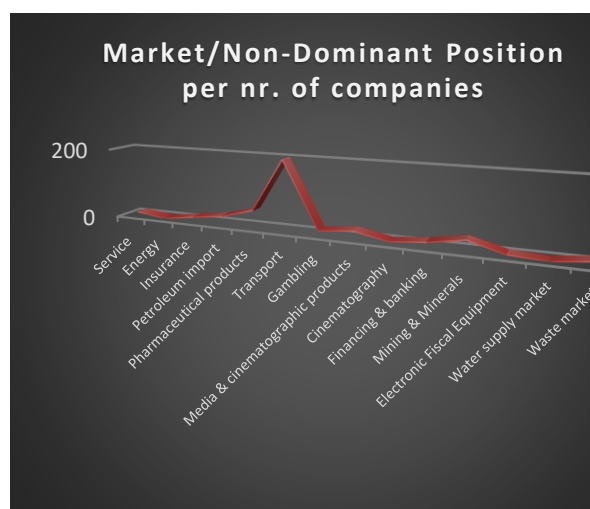
62 [online]. Available at: <https://ak.rks-gov.net/assets/cms/uploads/files/Report%20on%20ERA.pdf> [Accessed: 22 October 2021].

63 All data referring to the 2017 Report's findings have been taken from the Report itself. Report on Performance of duties deriving from the European Reform Agenda, Kosovo Competition Authority, *ibid*.

**Graph V**



**Graph VI**



### Information:

*Service sector* includes landline service sector; Mobile Telephone service; internet service; and Postal services. *Energy sector* includes production sector; distribution sector; supply market sector; transmission sector. *Insurance market* includes life insurance and non-life insurance. *Pharmaceutical products* include wholesale of pharmaceutical products; retail Trade of Pharmaceuticals in Specialized Stores (Pharmacies); Retail trade of Orthopedic and Medical Products, in specialized stores/Nr. Companies; Import of pharmaceutical products; production of basic pharmaceutical products. *Transport sector* includes air; contracted airline companies; sales of airline touristic tickets; Railways; Railway transport (transport services); road transport bus (Pristina/Mitrovica/Gjilan/Prizren/Peja/Ferizaj/Gjakova region; Road transport taxi services (Pristina/Mitrovica/Gjilan/Prizren/Peja/Ferizaj/Gjakova region); Road transport (freight transport); Road transport (vehicle maintenance); Vehicle technical control (Pristina/Mitrovica/Gjilan/Prizren/Peja/Ferizaj/Gjakova region); Road transport vehicle homologation; gambling; *media & cinematographic products* (media television market; web portal & newspaper publishing; newspaper printing; artistic creation; *cinematography*; Voice recording and other; *Financing & banking* (banks & services; microfinance & institution services; non-bank financial institution); *Mining & Minerals* (exploitation; exploration sector; special activities); *electronic fiscal equipment*; *water supply market* (drinking water; water for irrigation); *Waste market*.

Source: the 2 graphs and the table above are by the author. Data have been extracted from the KCA's 2017 Report, *ibid*.

A brief overview of the graphs above, displays the scenario with the water supply market holding the highest number (nr. 12) of monopolies countrywide, followed by the energy and transport sector (both nr. 3 each). All other sectors are monopoly-free.<sup>64</sup> The dominant position<sup>65</sup> is hold by the transport sector with 17 companies, followed by services (nr. 6),

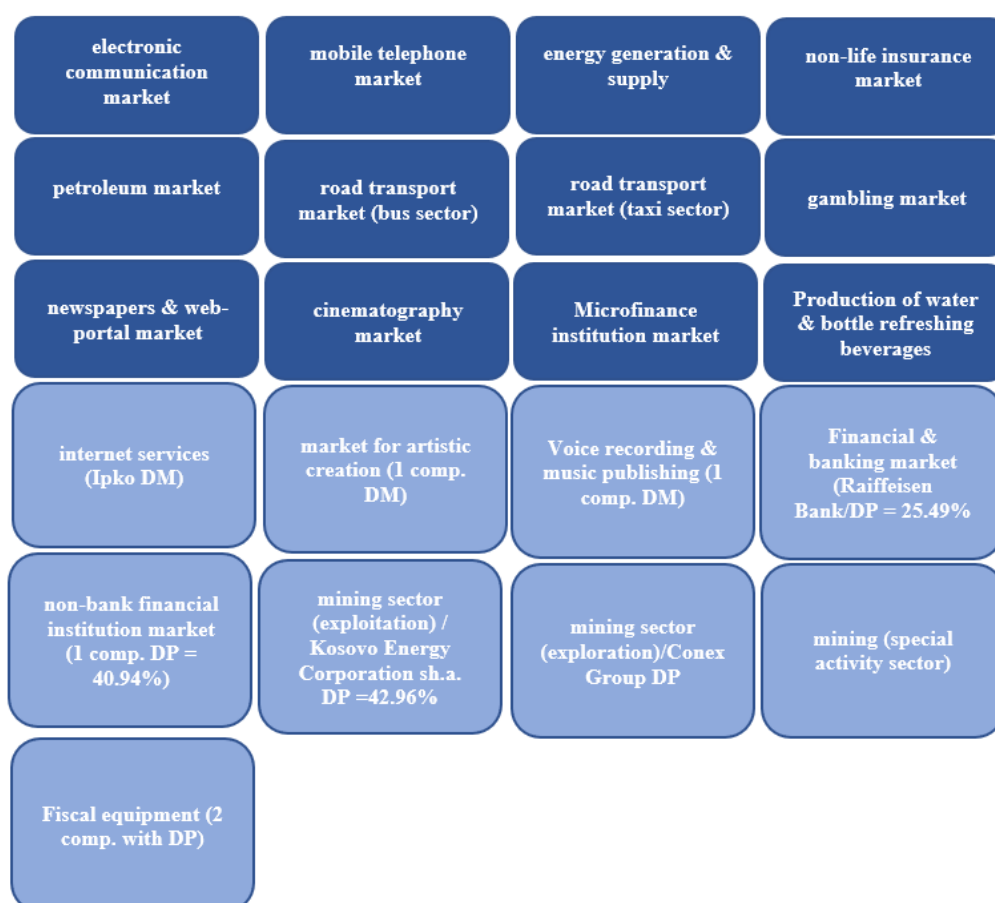
<sup>64</sup>The legislation defining the rules and measures for protection of a free and fair competition is the Law No.03/L –229 on protection of competition, *op. cit*.

<sup>65</sup>An enterprise is considered to have a dominant position if it has more than forty percent (40%) presence in the market. See Law No. 03/L-229 on protection of competition, *ibid*. See also Chapter IV Abuse of a Dominant Position and Restrictive Measures, Art. 10 Ascertaining Dominant Position, (1), 1.1 to 1.2.6, (2), (3) Law No.03/L –229 on protection of competition, *ibid*.

pharmaceutical products & petroleum import (both nr. 3), insurance, media & cinematographic products; financing & banking; mining & minerals; electronic fiscal equipment; insurance (all nr. 2); and waste (nr.1). As for the non-dominant position, this is chaired by the transport sector. Also, as per the petroleum import and pharmaceutical products, there are respectively 106 and 167 companies holding a cumulative share and with no dominant position.

Following its analysis, the KCA issued, wherever deemed so necessary, its professional opinions and/or recommendations. Yet, *at present there is no follow-up on those measures, if any*. This raises inevitably a serious concern in terms of commitment, transparency, and accountability. Despite this, 2 sectors display a proper level of competition, whereas a market is competitive when there is a presence of more than one operator providing similar products/services:<sup>66</sup> the road freight transport market, and the road transport services market (vehicle maintenance). Also, some markets have been considered as competitive and liberalized, whereas others, even though competitive, *will need continuous monitoring from the KCA*, because of at least 1 enterprise holding a dominant position in the market. *However, nothing is known about this monitoring, and if it is taking place after all.*

**Graph VI – Liberalized Sectors and Sectors in Need of Monitoring**



Source: the graph is by the author. Sectors completely liberalized are in dark blue color, whereas those in need of monitoring are in light blue. Data have been taken from the KCA's 2017 report, *op. cit.*

<sup>66</sup>Report on Performance of duties deriving from the European Reform Agenda, Kosovo Competition Authority, 20 December 2017: 7-8, *ibid.*

Insufficient competition has been detected by the KCA in the following sectors/markets: the *energy supply* with KESCO covering 100% in terms of market's participation; in the *petroleum market*; in the *pharmaceutical market*; in the *air transport market* with the Prishtina Airport being a natural monopoly created by the Government of the Republic of Kosovo with a concessionary contract by the Ministry of Finance, Public Private Partnership Department (PPP); in the *rail transport market* with TRAINKOS holding a monopoly position in transport of passengers; in the *transport freight (railway)* with 2 operators, holding dominant positions, to exercise this economic activity, namely TrainKos and Rail Trans; in the *road transport market (bus)*: where in some regions (i.e., Gjilan/Gnjilane and Ferizaj/Uroševac), the bus companies have significant dominant positions; in the *road transport market (taxi)* with some regions (i.e., Gjilan, Peja and Gjakova) having companies with significant dominant positions; in the *homologation sector* being a natural monopoly created by the Government of the Republic of Kosovo; in the *road transport services market - sector of technical control* with some regions (i.e., Prishtina, Mitrovica, Prizren, Ferizaj, Peja and Gjakova) having companies holding dominant positions; in the *waste market* with most municipalities having one public operator only.

For some sectors with companies holding a dominant position, whether the Authority did not issue a recommendation, it should have monitored all the enterprises holding such a position in the relevant market. In accordance with Law 03/L-229 on Protection of Competition, a dominant position is not illegal, but its abuse<sup>67</sup> is in violation of provisions of this law. Therefore, the KCA would continuously monitor the behavior of those companies operating in the bus, taxi sector, and road transport services (technical control). The same is valid for the following sectors: television and radio market; newspaper printing market with a company holding a dominant position (55.38%); market for artistic creation; voice recording and music publishing market; banking sector; non-bank financial institution market; mining sector (exploitation) with KEC sh.a., briefly mentioned above, holding a dominant position in the relevant market, and with the risk of its abuse; mining sector (exploration) with Conex Group Sh.p.k holding a dominant position; fiscal equipment with 2 companies in a dominant position, as mentioned above. Yet, if this monitoring process has occurred in the practice, is unknown at present. And there is no information thereupon on the KCA's official website.

In the meantime, the KCA issued various recommendations. Also, in this case if there has been a follow-up is unknown.

**Table II. KCA's recommendations per market/sector**

|                                      |  |
|--------------------------------------|--|
| <b>Mobile telephone market</b>       | the sufficient frequency band in the mobile telephone market should be opened to enable further development of networks and services, which would influence further dynamism of this market.   |
| <b>Energy supply (price setting)</b> | the best practices provided by the Energy Community Secretariat & the member states should be used when supplying electricity  |
| <b>Petroleum market</b>              | Ministry of Trade and Industry should establish a database for collecting data from business entities holding a license for trading & turnover of petroleum products in the territory of the Republic of Kosovo, being available to relevant institutions and market regulators. Such a database would enable monitoring of the following data: wholesale turnover of petroleum products (in liters); revenues |

<sup>67</sup>The KCA is in charge of ascertaining the misuse of dominant position. See Article 10 Ascertaining misuse of a dominant position, in Draft Law on Protection of Competition, *op. cit.* Also, the abuse of dominant position is prohibited under various circumstances, as these are set forth under Law No.03/L-229 Chapter IV Abuse of a Dominant Position and Restrictive Measures, Art. 11 Article 11 (1), 1.1 to 1.6, Abuse of a Dominant Position, Law No.03/L-229 on protection of competition, *op. cit.*

|  |  |
|--|--|
|  | from wholesale of petroleum products (in Euros); retail sales of petroleum products (in liters); -revenues from retail sales of petroleum products (in Euros); total number of gas stations per category   |
| <b>Pharmaceutical market</b>                   | The Kosovo Agency for Medical Products (KAMPD) should establish a database, available to relevant institutions and market regulators, for collecting data from economic operators holding a license for trading and turnover of pharmaceutical products, equipment and production.   |
| <b>Transport (Air transport)</b>               | The Ministry of Finance (MoF) should address, on all occasions where competition is concerned, the Kosovo Competition Authority for Professional Opinion based on the Law.   |
| <b>Transport passenger (railway)</b>           | the Railways Regulatory Authority should take all legal steps to liberalize the passenger transport market. Also, it should further continue to create both the legal and technical conditions for liberalization of the freight transport market.   |
| <b>Homologation sector</b>                     | The Kosovo Competition Authority will provide several recommendations (Professional Opinions), or decisions to the relevant institutions as to what they shall undertake in relation to this issue   |
| <b>Road transport sector (vehicle control)</b> | Upon analyzing the Law no. 05/L-132 on Vehicles, article 87 paragraph 2 & article 89 paragraph 3, is in collusion with Law no. 03/L-229 on Protection of Competition, the scope and field of its implementation as set out in Sections 1, 2 & 4 para. 1.2 and 1.3. The Ministry of Infrastructure is, thus, recommended to amend Law no. 05/L-132 on Vehicles, respectively Article 87, paragraph 2 & Article 89, paragraph 3, which restrict the provision of services to customers within the municipality where the owner of the vehicle is residing. Otherwise said, he/she is directed to certain municipal or regional operators when obtaining services for vehicle technical control. Yet, this procedure is not in line with competition rules and practices. |
| <b>Waste market</b>                            | regulatory and municipal institutions should liberalize this market by creating favorable competitive conditions for the introduction of new operators in the market.  |

Source: data have been taken from the KCA's 2017 Report.

A lack of transparency and accountability is also encountered, by browsing on the KCA's website, where activities underway (i.e., prohibited agreements, dominant position, mergers/acquisition, professional opinion) are displayed. *Yet, many of these documents are not accessible.*

To start with, of all prohibited agreements (tot. 39) displayed on the KCA's website, none of them is available, except one organigram (2012)<sup>68</sup> providing no information. This inevitably hinders the KCA's transparency and accountability.<sup>69</sup> As for the dominant position 4 cases are displayed, but not uploaded.<sup>70</sup> Of the tot. 16 documents referring to

<sup>68</sup> Kosovo Competition Authority. Prohibited Agreements. Available at: <https://bit.ly/3tkmMaA>[online]. [Accessed: 1 November 2021].

<sup>69</sup> Prohibited agreements [online]. Available at: <https://ak.rks-gov.net/en/vendimet> [Accessed: 1 November 2021].

<sup>70</sup> 4.12.2020-Decision for initiation of investigative procedure against KEDS and KESCO; 27.02.2018-Conclusion on non-opening of investigative proceedings (EO vs. BIK); 12.02.2018-Conclusion on non-opening investigative proceedings (KTV vs. IPKO); 24.04.2017-Conclusion on Case Closure (Liridon vs. 24 Starts). Dominant Position [online]. Available at: <https://ak.rks-gov.net/en/vendimet> [Accessed: 1 November 2021].



mergers/acquisitions and uploaded on the KCA's website, none of them is accessible.<sup>71</sup> Of a tot. of 23 professional opinions displayed (some of them even with an attachment),<sup>72</sup> 3 have been effectively uploaded on the KCA's website only. These refer to: i) *subject*: the need of stimulating new air services offered by/at Pristina International Airport (PIA) by reducing cargo handling services (Cargo). *KCA's recommendation*: need for the ground handling pricing list set in place by LIMAK / PIA (Pristina International Airport), and offering to airlines as a package, should be broken down into a *list of priced services* that operators will only be able to pay for the services they receive. As such, the existence of a list would avoid the need to give incentives;<sup>73</sup> ii) *subject*: upon request from the Ministry of Infrastructure and Transport-Department of Civil Aviation on the assessment issue of the Draft Proposal for the development of the air transport market of the republic of Kosovo, the KCA suggested the Ministry of Infrastructure and Transport and Pristina International Airport "Adem Jashari" to ensure that in selecting potential operators who will benefit from the Market Promotion Incentive Program, Air Transport of the Republic of Kosovo, the provisional prerequisites in the incentive scheme should not be of a discriminatory nature and will not exclude competitors who have the potential to perform certain services provided in the incentive program for market development. Also, the KCA reminded that the fundamental principle of competition law and policy is to provide free market access to any undertaking meeting the conditions to compete in that market in the interests of users of products/services and can compete on price and quality. Therefore, it recalled that any form of distortion of competition (being discriminatory and exclusionary in nature) will be subject to the KCA's monitoring;<sup>74</sup> iii) *subject/recommendation*: upon request from the Civil Aviation Authority of Kosovo on the "issue of competition of operators engaged in providing ground services at PIA" Adem Jashari, the KCA reminded that any legal or factual limitation on the number of operators who are potentially to engage in an activity in a given market (*numerus clausus*) is generally undesirable from a competition point of view. Particularly, the Authority considers that operators should not be restricted by discriminatory/exclusionary conditions and criteria. Such restrictions may lead to the benefit of one particular operator, by placing other operators at a disadvantageous competitive position. It finally recalled that efficient competition would enable companies to compete with their offer, which will ultimately be in favour of end-users/users capable of selecting the most appropriate offer for the operators' products/services.<sup>75</sup> *Yet, if there has been a follow-up on the Authority's professional opinions above is unclear.* And, much more efforts should be undertaken for effectively boosting its capacities.

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<sup>71</sup> Mergers/Acquisition [online]. Available at: <https://ak.rks-gov.net/en/vendimet> [Accessed: 23 November 2021].

<sup>72</sup> Not uploaded 27.02.2017-Decision (Improvement-Correctional); 08.06.2017-Professional Opinion for the Ministry of Labor and Social Welfare; 29.08.2017-Professional Opinion on ARH for Trainkos case; 6.12.2017-Professional Opinion on the Ministry of Infrastructure for Vehicle Technical Controls; 22.12.2017-Professional Opinion on Draft-Administrative Instruction for Homologation of Vehicles; 21.11.2019 Rekomandim për Agjencionit të Bujqësisë; 22.10.2020-M.P. per Zrre rreth "Vlerësimi i Konkurrencës në Tregun e Energjisë 2018-2019 [online]. Available at: <https://ak.rks-gov.net/en/vendimet> [Accessed: 1 & 2 November 2021].

<sup>73</sup> Professional Opinion. 30.12.2016-Professional Opinion-LIMAK Airport & Ministry of Finance DQPPP [online]. Available at: <https://bit.ly/3CR5k0F> [Accessed: 1 November 2021].

<sup>74</sup> 19.11.2019-Professional Opinion addressed to the Ministry of Infrastructure & Transport-Incentive Programme [online]. Available at: <https://bit.ly/3wb537D> [Accessed: 1 November 2021].

<sup>75</sup> Professional Opinion 19.11.2019- addressed to the Civil Aviation Authority-On the issue of competition of operators engaged in providing ground services at PIA [online]. Available at: <https://bit.ly/36nNDcY> [Accessed: 2 November 2021].

## VII. ERA I AND ERA II: COMPETITION POLICY BETWEEN DIFFERENCES AND SIMILARITIES

The purpose and the scope between ERA I and ERA II are more or less the same, with the purpose meaning that it serves to implement the SAA quicker and faster. Secondly, it brings to the attention of the highest political level the importance of these reforms. In terms of the scope, it is basically about the SAA itself and the most important pillars of the EU integration process, the so-called Fundamentals First (i.e., public administration, rule of law and macroeconomic reforms). These are the 3 fundamental pillars of the process, but there are also some structural reforms that are *acquis*-based.<sup>76</sup>

With a look at the differences between ERA I and ERA II, the latter is much more focused because instead of 22 priorities, it has 15 only. Besides that, these are more detailed. Also, some other areas were added to ERA II, as mentioned in the previous pages. At the same time, the Berlin Process and its connectivity agenda, part of ERA I, were not included in ERA II for the reasons previously referred to above. Overall, indicators are clearer and more measurable under the new document. The timeframe is a bit longer. But it will help hopefully in terms of sustainable reforms.<sup>77</sup>

ERA II will be implemented by the end of 2022, aiming to fulfil the SAA obligations, focusing on, among others, (i.e., strengthening the rule of law and the consolidation of good governance), key economic reforms.<sup>78</sup>

As for ERA II (Pillar II) priority *improving the business environment*, with a focus on the capacity of investigations above, two targeted actions (2.1.c.2. Strengthening market surveillance capacities) as per market surveillance are foreseen, with at least 3 training modules delivered for inspectors (2.1.c.2.1.) to be accomplished by Q2 2022; and 2.e *ensure an effective inspection system, with a view to enhancing effective implementation & enforcement, by developing the legislative framework in the area of inspections* (2.1.e.1.). In fact, a draft-law on general inspections is supposed to be adopted as per Q4 2021.<sup>79</sup> Also, it is a more general draft law on inspections, and it does not solely refer to competition policy and the role of the KCA.<sup>80</sup>

As for ERA I 5 key institutions (see below) have been involved in pursuing the core priorities under Pillar II (improving the business environment). Whereas for ERA II and with a focus on the improvement of the business environment, the Assembly of Kosovo plays a key role in terms of monitoring, as mentioned in the previous pages.

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<sup>76</sup>Interview with Artan Çollaku, director of the department for coordination on the EU integration agenda in the Office of the Prime Minister (OPM), Pristina, 23.11.2021.

<sup>77</sup>Interview with Artan Çollaku, director of the department for coordination on the EU integration agenda in the Office of the Prime Minister (OPM), Pristina, 23.11.2021.

<sup>78</sup>National Programme for Implementation of the Stabilisation and Association Agreement (NIPSAA) 2021-2025, *op. cit.*: 15.

<sup>79</sup>Source: Second Phase of EU-Kosovo Political Priorities: European Reform Agenda (ERA) II, 2.1.c. (Improve the management, coordination & enforcement of market surveillance. Focus on concrete measures to improve quality infrastructure & standards), *op. cit.*: 19.

<sup>80</sup>Interview with Dr. Eugene Stuart.



**Table III.** Involved institutions ERA I and ERA II (Pillar II) focus on improving the business environment

| ERA I   | ERA II  |
|---|---|
| Kosovo Judicial Council (KJC)<br>Ministry of Environment & Spatial Planning (MESP)<br>Ministry of Finance (MoF)<br>Ministry of Trade Industry (MTI)<br>Office of the Prime Minister (OPM) | Academy of Justice (AoJ)<br>Assembly<br>Kosovo Financial Reporting Council (KFRC)<br>Kosovo Judicial Council (KJC)<br>Ministry of Agriculture, Forestry and Rural Development (MAFRD)<br>Ministry of Environment, Spatial Planning and Infrastructure (MESPI)<br>Ministry of Industry, Entrepreneurship and Trade (MIET)<br>Ministry of Internal Affairs (MIA)<br>Ministry of Justice (MoJ)<br>Office of the Prime Minister (OPM) |

*Source:* Kosovo-EU High Level Dialogue on key Priorities – European Reform Agenda (ERA) I Competitiveness and Investment Climate (2. Improving the business environment), *op. cit.*: 19; Second Phase of EU-Kosovo Political Priorities: European Reform Agenda (ERA) II, *op. cit.*: 19.

In the field of competition, the main distinction between ERA I and ERA II, is that the former is more focused on the KCA's capacity-building as well as its independence, while the latter is mainly centered on legislation-drafting and guaranteeing its implementation. As for the legislation-drafting things are promising because there is a strong majority in the Parliament to pass laws. Yet, there is the need of more expertise in the institutions, but also in the drafting process. Otherwise said, those ministries sponsoring laws must also have the required expertise, but this is not always the case.<sup>81</sup>

With a look at capacity-building, there has been something done in the last 2-3 years. And the fact that this is not highlighted in ERA II does not mean, that it would not continue. The competition law had several deficiencies in terms of fulfilling the SAA requirements, and this should be further addressed, along with additional capacity-building measures.<sup>82</sup> Besides that, under ERA I the Authority mainly dealt with the situation of monopolies in Kosovo, and it opened investigations in the energy sector. Under ERA II it has been tasked with carrying out financial analyses, and it is currently working in the banking sector.<sup>83</sup>

## VIII. KCA CAPACITY-BUILDING, IMPLEMENTATION AND UNDERSTANDING OF COMPETITION POLICY, LEGISLATION-DRAFTING. WHERE DO THEY STAND?

ERA implementation relies on those reforms as per the core activities and actions carried out by various actors. Among them the EU plays a pivotal role in this regard. Almost two years after the launch of ERA I, and with a focus on Pillar II, the EU funded the project "EU

<sup>81</sup>Interview with Artan Çollaku, director of the department for coordination on the EU integration agenda in the Office of the Prime Minister (OPM), Pristina, 23.11.2021.

<sup>82</sup>Interview with Dr. Eugene Stuart.

<sup>83</sup>Interview with Bekim Millaku, director market surveillance, Kosovo Competition Authority, Pristina, 22 November 2021.

Support to the Kosovo Competition Authority and the State Aid Commission” in Pristina on the 15<sup>th</sup> of January 2019. The Project seeks to further align competition, along with State aid, legislation with EU rules and to strengthen the operational capacities of the KCA.<sup>84</sup> Moreover, the Project is working with these and other public bodies and stakeholders in both fields to improve awareness and advance training initiatives.<sup>85</sup> Its main purpose is to support the Government of Kosovo to further develop its institutional capacity to create the basis for sustainable economic standards in line with the EU *acquis* and the requirements under the SAA. Particularly, the project is intended to contribute, among others, (i.e., higher level of discipline in regard to State aid), to ensuring a competitive environment in Kosovo and strengthening the efficiency and effectiveness of administrative capacities in the fields of competition (incl. state aid), by guaranteeing the approximation of legislation in these fields with the EU legal framework.<sup>86</sup>

In terms of capacity-building, notwithstanding the achievements above, much needs to be done and the work has recently stalled, because there is no Commission. This intervenes in cases by formal decision to start them, while deciding whether to move to the next stage. Under the current legislation the Commission is appointed for a 5 year-term. The last term expired on the 6<sup>th</sup> of June, until the government selects the new members, there won't be a new Commission. *By law it is not possible to continue with the work, until the new body is appointed by the Assembly. And this is of concern.*<sup>87</sup> The government should be more responsible on that without postponing the appointment of a new Commission. The executive knows well in advance about when the Commission's mandate is going to expire. Therefore, it should be better planned in this regard.<sup>88</sup>

With a look at the implementation of competition policy, this has been problematic in Kosovo. Awareness about this policy is so low that nobody brings cases to the court. Also, there is not enough specialization in the commercial area. For instance, there is one commercial department in the Basic court in Pristina only, whereas all other basic courts don't have one.<sup>89</sup> Overall, competition law is difficult to enforce in a small country, where everyone knows each other, and nobody wants to step on the others. Also, there could be political factors involved. But there is a capacity-building issue as well. If one is working on a somehow defective package of legislation, the likelihood of doing the right job is very minimal, even by working hard. Therefore, the package of legislation should be right. And if this is the case, then the implementation will be carried out on a right track. Besides that, it is to mention that the Competition Authority exists since 2010 and the effective enforcement, and/or any attempt of enforcement, of legislation started in the last 3-4 years only. In the first period pretty much, nothing was done. It was a very unproductive moment in the field of competition policy. The last period has been better, but not great. What's more, the KCA's case-load remains – by international comparison – very low. This means, in effect, that the Authority has been somehow passive regarding implementation. The only exception is if there is a high-profile political issue, like the price of petrol or the price of coffee and cafés in Pristina, then there is the possibility that the case commences. In the

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<sup>84</sup>Along with the State Aid Commission and the State Aid Department.

<sup>85</sup>European Union Kosovo. Ensuring the benefits of fair competition, 15 January 2019 [online]. Available at: <https://bit.ly/34O9hXm> [Accessed: 29 October 2021].

<sup>86</sup>European Union Kosovo. About the Project [online]. Available at: <https://bit.ly/3KPGMb3> [Accessed: 29 October 2021]

<sup>87</sup>Interview with Dr. Eugene Stuart.

<sup>88</sup>Interview with Bekim Millaku, director market surveillance, Kosovo Competition Authority, Pristina, 22 November 2021.

<sup>89</sup>Interview with Artan Çollaku, director of the department for coordination on the EU integration agenda in the Office of the Prime Minister (OPM), Pristina, 23.11.2021.

meantime, the staff of the EU funded project “Support for the Kosovo Competition Authority and State Aid Commission” started to work with the Authority to come up with an *enforcement strategy*, so that the KCA would be able to develop its case-load. Yet, there are many kinds of practical enforcement issues, and a lot of things, that locals don’t understand properly. What is important, is that the base legislation is right. And that it is clear both towards the Agency itself, and towards those who deal with the Agency. That’s the priority to see in ERA II.<sup>90</sup>

Along with the implementation shortcomings above, the understanding of competition policy remains low in Kosovo as briefly mentioned above. First of all, competition policy is new in the country. Also, the main problem rests on the small enterprises, not on the big ones.<sup>91</sup> In the meantime, and with a view at addressing this situation, the KCA has been undertaking a lot of work in terms of raising awareness and advocacy. Also, it has been publishing leaflets and distributing them to all relevant institutions. Besides that, it has been organizing roundtables with both institutions and businesses. Moreover, because of its work, the number of mergers in Kosovo has increased significantly.<sup>92</sup> Additionally, under the EU funded project “Support for the Kosovo Competition Authority and State Aid Commission” awareness-raising has been looked at as in need of being addressed, because the understanding of competition policy is very limited, as previously mentioned. Some work has been done on that, by preparing publications for the KCA, by improving the Authority’s website, which is not perfect, but it is getting better. However, Covid has stopped some of the activities, with the hope of arranging a business conference to fully promote competition in general by next year (2022).<sup>93</sup>

Along with its capacity-building efforts, as well as awareness-raising and advocacy activities for improving the general understanding about competition policy, the Authority is currently working on the financial sector as part of an EU project. Concretely, it is carrying out a quantitative and qualitative analysis, so as to get an encompassing overview and feedback from the various operators in the field. The purpose is to pursue a detailed mapping of the situation on the ground and to see where the intervention of the state is most needed, and/or to assess whether a given sector is enough competitive. Also, the KCA is committed to look at whether infringements to competition have taken place, while starting – if necessary – the required procedure thereupon.<sup>94</sup>

Additionally, the EU team, as per the project mentioned above, is working on 4 main pillars of activity across the Competition Authority (as well as the State Aid Authority), and they are: 1) *legislation development* to achieve full approximation with EU rules as required by the SAA; 2) a wide range of activities involving capacity-building, and covering both *formal training*, and *case-handling support*. Progress was especially recorded in the field of formal training. Yet, there are still some of them mostly based on the existing legislation. But, when the new legislation is in place, the staff must undergo new training. So, there is much to do. Regarding case-handling, it is the area witnessing less activism and in need of serious improvement; 3) *inter-governmental coordination* with key sectoral regulators such as the Central Bank of Kosovo, the Energy Regulator Office (ERO), and to some extent the police. There is some hope for more coordination, but the problem is that one has too “many cooks in the kitchen”. There is much

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<sup>90</sup>Interview with Dr. Eugene Stuart.

<sup>91</sup>Interview with Bekim Millaku, director market surveillance, Kosovo Competition Authority, Pristina, 22 November 2021.

<sup>92</sup>Interview with Bekim Millaku, director market surveillance, Kosovo Competition Authority, Pristina, 22 November 2021.

<sup>93</sup>Interview with Dr. Eugene Stuart.

<sup>94</sup>Interview with Bekim Millaku, director market surveillance, Kosovo Competition Authority, Pristina, 22 November 2021.

more to do than bringing those people together as they wish, and at their own pace; and 4) *awareness-raising* as mentioned above.<sup>95</sup>

In the meantime, and under ERA II with a view at boosting the KCA's efficiency and effectiveness, it is *foreseen the development of an electronic case management system* within the Authority itself. When that is done, there will be much better management inside the KCA about what is effectively going on. *At the moment, it is at the conceptual level, it is not at the design level yet. It is expected to be done by the end of next year, which is feasible.* The case management system is more an internal management information system. But eventually it should feed into a more transparent end-product, whether it is an opinion, a recommendation and/or decision. Yet, it is a complicated issue to develop properly, because there are at least 5 different types of cases the KCA is responsible for (i.e., prohibited agreements, cartels, concentrations, abuse of a dominant position, legal opinions on competition issues whether they involve liberalization or something else). The purpose of designing a case management system in these types of areas is that some actions/activities will be searched all the time in each of the categories above. In this way, the incoming competition Commission will be in the position to look at all these cases in real time and establish whether there is a case of an abuse of dominant position, or not.<sup>96</sup>

With a look at legislation-drafting and guaranteeing its implementation, ERA II key priority as mentioned in the previous pages, the draft law on protection of competition, where the role and competencies of the KCA, among others, are further defined, has been adopted by the Assembly of Kosovo on the 20<sup>th</sup> October 2021.<sup>97</sup> This law shall be implemented, in accordance with the obligations of the Republic of Kosovo deriving from the SAA, with the European Union and the European Atomic Energy Community.<sup>98</sup>

This draft law applies to all forms of prevention, restriction, or distortion of competition by enterprises inside or outside the territory of Kosovo, if their activity affects the market of the republic of Kosovo. Concretely, it applies to enterprises exercising economic activities and performing services of general economic interest and having the character of a revenue-producing monopoly.<sup>99</sup>

The draft law rules that: i) all agreements aimed at preventing, restricting, or distorting competition<sup>100</sup> in the relevant market<sup>101</sup> are prohibited; ii) the share a company must have for having a dominant position is 40% or more on the relevant market (instead of more than 25%); iii) legally independent economic enterprises may have a dominant position if their joint market share exceeds 60%;<sup>102</sup> iv) the misuse of a dominant position is prohibited;<sup>103</sup> v) concentrations<sup>104</sup>

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<sup>95</sup>Interview with Dr. Eugene Stuart.

<sup>96</sup>*Ibid.*

<sup>97</sup>Chapter I General Provisions (Article 1 Purpose) (1) Draft Law on Protection of Competition, *op. cit.*

<sup>98</sup>Chapter XI Transitional Provisions, Article 70 Law enforcement, in Draft Law on Protection of Competition, *ibid.*

<sup>99</sup>Article 2 Scope (1) (2) (2.1, 2.2), Draft Law on Protection of Competition, 20 October 2021, *ibid.*

<sup>100</sup>Chapter II Agreements (Article 5) Prohibited Agreements (cartels), 1. (1.1; 1.2; 1.3; 1.4; 1.5), Draft Law on Protection of Competition, 20 October 2021 [online]. Available at: <https://bit.ly/3wmzEim> [Accessed: 28 October 2021]

<sup>101</sup>It comprises a) the *relevant product market* including all goods or services looked at as interchangeable or substitutable by the consumer, by reason of their characteristics, prices and intended use; and b) the *relevant geographic market* comprising the area where the enterprises concerned are involved in the supply and demand of goods and services, where the conditions of competition are sufficiently homogeneous and can be distinguished from the conditions in the neighbouring areas. See Article 4 (1) (1.1.) (1.2.), Draft Law on Protection of Competition, 20 October 2021.

<sup>102</sup>Chapter III Dominant position (Article 8 Determination of the dominant position), Draft Law on Protection of Competition, 20 October 2021, *ibid.*

that could significantly distort effective competition shall be prohibited, especially if this results in the creation or strengthening of a dominant position.<sup>105</sup>

The new draft law on competition foresees more improvement in comparison with the previous legislation. To start with, it upgraded the Commission's tasks. Also, it allowed for alignment with the EU standards, for instance, in terms of the percentage for defining a dominant position (40% instead of 25%), as mentioned above.<sup>106</sup>

## CONCLUDING REMARKS

This analysis aims at filling the gap on the current reporting and monitoring mechanisms carried out by local NGOs, which have missed to look into competition policy and the role of the KCA. This policy is crucial though for Kosovo's advancement towards the EU, and it is an intrinsic part of ERA pillar II reflecting the requirements under the SAA.

Particularly, ERA II is more detailed about competition policy than its predecessor. This peculiar attention makes believe that Kosovo should intensively focus on this part for the coming year. And, this is inevitably a realistic scenario, considering the low understanding of competition policy countrywide, coupled with a poor performance of the KCA. Concretely, the latter lacks commitment, transparency, and accountability. This ill-fated constellation does not help the institution being a credible interlocutor engaged in boosting competition in the country. Besides that, it lacks personnel dealing with case-load and commercial issues. Currently, the KCA's overall structure and functioning is still a work in progress. Also, the KCA should properly follow-up on those opinions and recommendations as issued to the relevant sectors (i.e., transport, gambling industry, media and cinematographic products, financing and banking, mining and mineral markets, etc.), as per its 2017 Report, mandated under ERA I. Besides that, it is uncertain the fate of all the KCA's monitoring process on specific sectors for companies (i.e., bus, taxi, road transport services, television and radio market, newspaper printing market, etc.) holding a dominant position.

Notwithstanding disorientation, there is urgency about the need for the EU and the Kosovar government to jointly push for concrete results in the field of competition policy, while also boosting the KCA's capacities in a significant way. Failure to do so, will negatively impact Kosovo's further progress towards a possible future membership. Besides that, it will reflect the inability of Brussels to be a credible partner.

## RECOMMENDATIONS

### ERA/ EU Kosovo/OPM:

- They should jointly work on a common website, where all information referring to progress, shortcomings, etc. surrounding ERA's priorities and actions are updated and

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<sup>103</sup> Chapter III Dominant position (Article 9 Misuse of dominant position), Draft Law on Protection of Competition, 20 October 2021, *ibid*.

<sup>104</sup> These might occur by the change of control of enterprises when; i) independent enterprises join together or parts thereof; ii) 1 or more enterprises acquire direct or indirect control over all or part of other enterprises, by earning shares, gaining the majority of voting rights, in other way provided by the legislation in force.

<sup>105</sup> Chapter IV Concentrations Article 12 Prohibited concentrations, Draft Law on Protection of Competition, 20 October 2021, *ibid*. See also, Chapter IV Abuse of a Dominant Position and Restrictive Measures, Article 12 Decision on ascertainment of abuse of dominant position, (1), 1.1, 1.2, 1.3, 1.4, Law No.03/L –229 on protection of competition [online]. Available at: <https://bit.ly/3u24ZEA> [Accessed: 26 October 2021].

<sup>106</sup> Interview with Bekim Millaku, director market surveillance, Kosovo Competition Authority, Pristina, 22 November 2021.

accessible to all. At present anyone who is interested in getting information thereupon must browse schizophrenically on various sources.

#### Draft Law on Protection of Competition

- the financial situation proving that the imposition of a fine by the KCA may irreversibly damage the economic stability of an undertaking, and the value of the property, should be clearly specified;
- the condition of unreasonable suspicion enabling for the carrying out of an unannounced inspection should be comprehensibly indicated;
- as for the Authority's cooperation with sister institutions, these should be properly identified.

#### KCA/Commission

- an ad interim working group, before a new Commission is appointed, should be established so as to guarantee the continuation of work within the Commission.

#### KCA

- at present there is no follow-up about the Authority's professional opinions and/or recommendations issued as per its 2017 Report, so that it is not clear whether these have been implemented, or not. Also, much information on the KCA's website is missing. The KCA should boost its transparency and accountability, by making available its professional opinions and/or recommendations on its website. Also, it should provide accessible data about its 2017's Report follow-up. Besides that, some markets have been considered by the KCA in need of a continuous monitoring, because of at least 1 enterprise holding a dominant position on the market. Yet, nothing is known about this process. The KCA should set up a database displaying the status of its monitoring activities.
- KCA should make sure that the enforcement strategy dealing with its case-load is successfully implemented by mid-March 2022;
  - KCA should start the design of an electronic case management system by the end of December 2021 and ensure its implementation by the end of 2022 latest.

## **Policy Analysis**

Policy Analysis in general is a policy advice paper which particularly aims to influence the key means through which policy decisions are made in both local and central levels of government. The purpose of Policy Analysis is to address, more in-depth, a particular problem, to examine the arguments related to a concerned policy, and to analyze the implementation of the policy. Through Policy Analysis, Group for Legal and Political studies seeks to stimulate wider comprehensive debate on the given issue via presenting informed policy-relevant choices and recommendations to the key stakeholders and parties of interest.



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