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PROJECT AGAINST CORRUPTION IN ALBANIA (PACA)

TECHNICAL PAPER

**CORRUPTION RISK ASSESSMENT OF THE ALBANIAN COMPETITION
AUTHORITY**

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INTRODUCTION/EXECUTIVE SUMMARY

Under Activity 1.1.3 of the PACA Project, corruption risk assessments are to be conducted on selected institutions or sectors/areas. This Technical Paper provides an overview of the functioning of the Albanian Competition Authority (ACA), investigations it has conducted and sanctions imposed, in order to provide an assessment of the risks of corruption to which the Authority is subject. A Preliminary Assessment of the ACA was completed by PACA in December 2010, and PACA used this Assessment as a starting point for the completion of the full Risk Assessment. A substantial proportion of the information in this report was gathered during the Preliminary Assessment, and was not verified by the international expert. It should be noted that this Report provides an assessments of risks and factors that might cause or increase the risk of corruption occurring, and does not in any way provide an assessment of the actual incidence of corruption in the operations of the ACA or other institutions mentioned in the Report.

The main findings of the Assessment are the following:

- The formal legal framework is largely in line with the EU acquis
- However, certain aspects of the legal framework contain risks of corruption – specifically:
 - an appointment process that does not sufficiently guarantee the independence of the Competition Commission, the ACA’s decision-making body;
 - provisions of the Competition Law that are too vague and insufficiently clarified in subordinate legal acts or guidelines – unnecessarily providing room for corrupt behavior, or the appearance thereof. These include the rules that:
 - restrict the application of the law to those undertakings that have or may have an influence on the market, rather than the easier to distinguish category, undertakings, defined in the law as persons performing economic activity;
 - provide a complex combination of general prohibition of anticompetitive agreements, the possibility of exemption, the possibility of applying for exemption ex post, and the possibility of leniency.
 - rules on notification of concentrations that require notifications where a concentration would not harm competition in Albania but where the notification and authorization procedure generate unnecessary corruption risks.

- The most serious shortcomings in the functioning of the ACA and CC however lie in an apparently high degree of impotence. The Commission appears wary of issuing legal strong decisions that would affect powerful economic interests and the Government appears able to ignore its recommendations. As of January 2011 proceedings to enforce only three of the sanctions (fines) imposed by the CC to date had been initiated and none enforced, although in December 2011 the ACA informed PACA that proceedings to enforce all decisions had been initiated. While collection of fines may significantly improve with implementation of the latest amendments to the law, in order for the ACA to perform its role optimally its recommendations will need to be taken seriously by the Government of Albania.

The recommendations of the Assessment are the following:

- The Competition Law should be amended to apply to all undertakings rather than just those that may have an influence on the market.
- Merger notification rules should be amended to require that at least two parties to a transaction must each have turnover above a defined threshold in Albania.
- The rules for the setting of fines should be clarified, and the potential for leniency should be restricted to agreements among competitors to fix prices, share markets or rig bids.
- Reforms of the appointment process for the Commission should be considered that would allow a broader range of institutions to propose members. Also, to reduce the ability of Parliament to infringe on the Commission's independence, changes in compensation approved by Parliament should be lagged, and more objective criteria for removal should be considered.
- A clear interpretation of the Code of Administrative Procedure should be reached that will protect ACA members and employees from civil lawsuits for decisions taken in good faith in the course of their duties.
- The ACA should examine and consider increasing the scope of its archive of intermediate internal work in order to ensure an adequate record of all proceedings.
- The Competition Law should establish that all legal acts and Commission decisions come into force only after publication in the Official Gazette, and that all CC decisions should be made public in their entirety (with appropriate redaction to protect commercial secrets).
- The Government should issue a general statement or commitment – in cases where the ACA has issued a recommendation to it – to provide a public response

within the deadline established by the ACA that explains how the competition concerns will be addressed, or why it believes the public interest to be better served by not doing so.

1 MAIN FUNCTIONS OF THE ALBANIAN COMPETITION AUTHORITY

The Albanian competition institutions, regulations and policies are based on the 2003 Law on the Protection of Competition (hereinafter the Competition Law) as amended in 2010. The law generally follows the provisions of EU competition law and regulations, and is in line with the prescriptions of the Stabilization Association Agreement (SAA) concerning the internal market. The law regulates all competition issues with the exception of trademark abuse. The law defines to whom the law applies, uses language like that in the TFEU (Treaty on the Functioning of the European Union) regarding agreements and abuse of a dominant position, requires pre-notification of concentrations, as well as establishes the Albanian Competition Authority (ACA), responsible for monitoring and preventing anti-competitive practices. The 2003 law replaced the previous 1995 legislation. The law was amended in October 2010 to more closely approximate Albanian law to TFEU provisions and EU regulations.¹

The 2006 National Competition Policy document defines the main goal of competition policy as the correction of market distortions.² The purpose of the Competition Law is to protect fair and effective market competition. The different nuance, as well as the empowerment of the ACA to conduct sector enquires, show that the ACA's scope goes beyond competition law enforcement to include positive advocacy for pro-competitive changes.

1.1 The institutions

The status of the ACA as an independent public institution is based on the Competition Law. The ACA is comprised of two bodies:

- The Competition Commission (CC) - the decision-making body of the ACA, which is elected and controlled by the Parliament.
- The Secretariat - the administrative and investigative body of the ACA.

The Commission acts as a collegial body comprised of a Chairman, Vice-Chairman and three members. The five members are elected by the Parliament—and the Chairman is appointed by the Parliament—upon the proposals of the President of the Republic (1 member), Council of Ministers (2 members) and the Parliament (2 members). They enjoy a mandate of 5 years unless one of a list of circumstances

¹ Law No. 9121 on the Protection of Competition, 27 July 2003, amended by Law No. 9499 (3 April 2006) and Law No. 10,317 (16 September 2010).

² For more details see Annex No.1

provided by the law occurs and the Assembly chooses to dismiss the member through the same procedure as for election. The terms are renewable twice.

The Secretariat is the administrative and investigative body of the ACA. It is headed by the General Secretary, who is appointed by the Commission. Inspectors of the Secretariat enjoy civil servant status and are selected in accordance with the procedures provided in the civil servant law.

Since mid-2007 the ACA has had 35 staff.³ Currently the CC is composed of 5 members (commissioners) and the Secretariat of 3 directorates and 1 section, respectively: the Directorate of Market Supervision/Oversight (10 people), the Directorate of Legal Affairs and European Integration (6 people), the Directorate of Human Resources and Documentation (5 people), and the Sector of Market Monitoring (3 people). This can be considered a relatively small number of staff taking into account the scope of activity and mandate of this institution provided by the law. The law is broad in its applicability, covering the market activities of a wide range of natural or legal entities, both private and public, and their subsidiaries, as well as those entities that as a result of commercial activity outside Albania affect the domestic market. This remit and the terms provided by the law highlight the need for the efficient operation of the ACA.

Ensuring the Commission's independence and professionalism are the purposes of the competition law provisions that establish criteria and procedures for appointing and removing members of the Commission. Among the criteria for appointment is that members may not be in the management structures of either political parties or commercial associations. However, independence may be reduced by the Article 21(4) provision that the Parliament determines Commission members' compensation, and the vagueness of a condition for removal—having “strongly infringed work ethics carrying out his/her duties”—per Article 22(3). Criteria to ensure professionalism include at least 15 years of professional experience, and to be known for their contribution in economics or law or leadership and ‘distinguished professionalism in sectors of the economy’. The law specifies no ethical qualifications of candidates, except that the candidate must not have been dismissed from his/her job or the civil service by disciplinary measures.

In addition to the rules in the civil servant law, Secretariat employees, members of the Commission, and other persons authorized by the Commission to apply the Competition Law are subject to rules on professional secrecy and must not divulge to any person or authority any confidential information acquired as a result of their performing their duties, save when testifying in court (Article 30) or pursuant to a bilateral or multilateral agreement with other competition authorities on condition that the competent foreign authority is subject to the same conditions and guarantees of confidentiality as in Albania (Article 71).

³ Parliament of Albania Decision No. 96, 30 April 2007 “On approval of the structure and organigramme of the Albanian Competition Authority”, Available at: <http://www.caa.gov.al/legal.asp>

The Code of Administrative Procedure provides rules on the functioning of public bodies that have particular relevance in the conduct of a competition authority. Three areas highlighted here are employees' responsibility for damages caused in the course of their exercising their official duties, civil servants' duties to avoid conflicts of interest, and the requirement to provide the factual and legal reasoning that form the basis for administrative acts.

Article 14 provides that bodies of public administration and the employees are responsible for the damages they cause to private persons through unlawful decision-making, unlawful denial of decision-making, and issuing inaccurate written information to private persons as well as for any other cause or other case provided by law. Article 14 of the Code of Administrative Procedure, by assigning responsibility for damages from *inter alia* unlawful decision-making to both the public bodies and employees, may be aimed at giving individual employees greater incentives to use good decision-making processes. However, there is a risk that individual employees may be threatened with lawsuits for damages arising from decisions they took in good faith during the course of performing their official duties. For example, it is not uncommon for courts to not support decisions by competition authorities. Such a threat of personal responsibility for damages can cause employees to change their behavior, perhaps not putting forward recommendations for action by the Commission when it is reasonable for them to do so but there is a risk that a court will find the action not in conformity with the Competition Act. It will be important, to maintain the integrity of the ACA, that the interpretation of Article 14 of the Code of Administrative Procedure protect reasonable decisions taken by employees during the course of performing their official duties.

Concerning conflicts of interest, the Competition Law attempts to ensure independence from business interests by requiring members to recuse themselves from cases where they have an interest or have represented a party (Article 23), and by requiring that that members do not 'engage in economic activity'. Second, Articles 37 through 43 of the Code of Administrative Procedure address when and how civil servants are to be disqualified because of a conflict of interest. A civil servant may not participate in administrative decision-making or represent the administrative body if he has a direct or indirect interest in the case, or his spouse or cohabitant or kinsman to the second degree has a direct or indirect interest, or he or such persons have a direct or indirect interest in a similar case, or if the civil servant has been an expert, counselor or lawyer in the case, or a debtor or creditor of the parties, or if the interested parties have started a court case against him. A civil servant should immediately notify his supervisor or president of the collegial body if he is so disqualified, and faces severe penalties if he does not. Articles 37 through 43 of the Code provide rules on the disqualification of civil servant because of a (potential) conflict of interest. Article 38 provides that a civil servant should immediately notify his supervisor or president of the collegial body if he should be excluded from decision-making. Third, members of the Competition Commission, the Head of Cabinet, legal advisors of the Commission, the General Secretary and heads of

departments of the ACA are all directly subject to the Law on the Prevention of Conflicts of Interest in the Exercise of Public Functions (which is also reflected/transposed in the ACA's own Regulation on the Prevention of Conflicts of Interest in the Performance of Public Functions), and the Law on the Declaration and Audit of Assets and Financial Obligations of Elected Persons and Certain Public Officials. These laws impose extensive obligations on public officials to avoid conflicts of interest, to declare conflicts of interest on a case-by-case basis, and also to annually declare their assets on an annual basis. In addition, according to the Chair of the Commission, on taking up responsibilities for a particular case ACA officials must complete a written declaration of any conflict of interest, which is included in the case file. As for other institutions, officials subject to these laws may be investigated by the High Inspectorate for the Declaration and Audit of Assets, the independent institution responsible for enforcement of the two laws.

Articles 105 through 110 of the Code of Administrative Procedure concern the validity of administrative acts, e.g., decisions of the Competition Commission. Of particular interest are the requirements that administrative acts include an explanation of the facts on the basis of which the act is issued, and the legal basis of the act, and clear reasoning for the act. The obligations to explain the factual basis, legal basis and reasoning for competition decisions can help to reduce the risk of corruption. In particular, if parties can dispute these bases, then it is more difficult for decisions incompatible with the facts, law or reason to be maintained. The timely publication in the Official Bulletin of the decisions of the Commission of the Competition Authority, as provided in the Regulation on the Functioning of the Competition Authority, Article 12/1, helps to ensure that parties know and understand the bases for decisions.

1.2 Initiation and conduct of investigations/administrative proceedings

ACA investigations may be general (of an economic sector) or specific (of a particular transaction, instance or request). The administrative procedures for investigations are based on the regulations of the Code of Administrative Procedure, Competition Law and related by-laws. The Secretariat organizes and conducts administrative proceedings, the findings of which are then presented to the Commission for decision-making. The Commission addresses all cases/initiatives presented by the Secretariat or in some specific cases by other sources.

The four main areas on which ACA investigations may focus are the following:

- *Market studies.* A general inquiry into a sector of the economy can be conducted. Such sectors are identified by price rigidity or other factors that indicate a possible competition restraint or distortion. While the ACA may initiate such studies, they may also be requested by the Parliament or regulatory bodies for their respective sectors of the economy.

- *Concentrations.* The ACA monitors and reviews the acquisition of controlling stakes, mergers and the creation of joint ventures where at least one of the parties has turnover in Albania. The ACA shall prohibit concentrations that limit substantially competition in the market or a part thereof. Undertakings engaged in a concentration meeting certain thresholds must notify ACA.
- *Agreements.* The ACA is responsible for investigating agreements between undertakings, both horizontal (among competitors) and vertical (between customers and their suppliers). Agreements that harm or may harm competition are prohibited, but the ACA may grant exemptions under certain conditions provided in the law. As in the EU, there are both block exemptions for certain categories of agreements and the potential for individual exemptions.
- *Abuse of dominant position.* Abuse of a dominant position is prohibited. The ACA monitors undertakings that hold a dominant position in a market and conducts investigations into suspected or alleged instances of abuse.

Investigations may be initiated in three different ways:

- *Initiation of the administrative procedure based on the request/complaint of an interested party.* Notifications of concentrations are the most common example.
- *Initiation of the administrative procedures on the ACA's own initiative.* The ACA's own on-going market monitoring and analyses are the usual source.
- *Initiation of the administrative procedures on the request/complaint of third parties.* Complaints may be submitted in written form or orally. The ACA must process all complaints.

Within 24 hours of the submission of a complaint/request, the Secretary General assesses whether the request is within the jurisdiction of the Competition Authority, notifies the Commission of the assessment and identifies the section or directorate under whose competence the request falls. The party that filed the complaint or request must be notified by the Secretary-General within 15 days whether the Commission will investigate the issue. If the preliminary investigation unveils indications of a restraint of competition, an in-depth investigation is opened with the approval of the Commission. The Commission determines the priority and schedule for investigations.

The Secretariat, upon authorization of the Commission, may search undertakings' premises and, upon decision of the District Court, the domiciles of directors, officers and employees of undertakings. The Secretariat may examine business records and take copies, or if necessary seize objects. The Secretariat may request the help of the Albanian State Police.

At the conclusion of the administrative procedure/investigation, the ACA must notify the interested parties of the results including any sanctions (fines) imposed. In addition, Commission decisions on infringements must be published in the Authority's Official Bulletin.

1.3 The substantive provisions

1.3.1 Concentration of undertakings

The Albanian competition law defines the concentration and control of undertakings, in a way similar to that as set out by the EU Council Regulations. The law imposes on undertakings engaged in a merger or making an acquisition of a controlling stakes, or establishing a joint venture, the duty to notify ACA within 30 days from the date of the agreement to merge, acquire, or establish a joint venture if certain turnover thresholds are exceeded. Non-notification is subject to a fine.

The 2010 amendments massively lowered (by a factor of 10) the threshold at which parties must notify mergers or acquisitions. Concentrations of undertakings, i.e., mergers, acquisitions or joint ventures, must now be notified to the ACA if in the year prior to the concentration, the following two conditions are met:

- The turnover of all participating parties altogether in the international market exceeds 7 billion lekë **and** the turnover of at least one participating, in the domestic market, exceeds 200 million lekë.
- The turnover of all participating parties put together, is more than 400 million lekë in the domestic market **and** the turnover of at least one participating party is more than 200 million lekë in the domestic market.

1.3.2 Agreements

The Competition Law prohibits all agreements which have as their object or effect the prevention, restriction or distortion of competition. This is parallel to the language of the Treaty on the Functioning of the European Union. However, also parallel to European Union competition law, the general prohibition is softened with a series of exemption possibilities. Agreements that do not substantially restrict competition and that do promote specified economic efficiencies or progress may be granted an "individual exemption" (Article 5). Certain vertical agreements are exempted in subordinate regulations (Article 6), and agreements of minor importance are exempted in the law itself (Article 7), analogous to the structure of the block exemptions in EU rules. The prohibited agreements are analogous to those in EU rules, e.g., agreements which have as their object or effect the prevention, restriction or distortion of competition, with specific reference to agreements to fix prices, restrict supply, create barriers to market entry, share markets or sources of supply, apply dissimilar conditions to equivalent transactions with other trading

parties to the disadvantage of the latter, or setting conditions for contracts with other parties which impose additional obligations that by their nature or according to commercial practices are not related to the subject of such contracts.

The Commission is the sole body competent to grant exemptions under Articles 5, 6 and 7. To receive an individual exemption, the undertakings or association of undertakings must notify the ACA, providing truthful information. If the Commission decides to deny the exemption, the Commission may not apply fines for contravention of the law during the period when the application was being considered. Decisions to exempt an agreement can be revoked with retroactive effect if *inter alia* the factual basis for the decision changes or the parties abuse the granted exemption. In the event of a civil lawsuit claiming harm as a result of a prohibited agreement, if the respondent subsequently applies for an exemption, then the District Court must suspend proceedings and await the Commission's decision whether to grant an exemption (Article 68).

1.3.3 Abuse of dominant position

The Competition Law prohibits the abuse of a dominant position, and provides a non-exhaustive list of examples of such abuse. The wording is parallel to that of the Treaty on the Functioning of the European Union. The definition of what constitutes a dominant position is the same as that of the European Court of Justice in *United Brands vs European Commission*, and is defined as a situation where the economic power held by one or more undertakings gives them the ability to prevent effective competition in the market, making them capable of acting independently from the other participants in the market in terms of supply or demand as competitors, clients or customers.

Abuse of a dominant position may be committed by one or more undertakings, and is defined as:

- establishing, directly or indirectly, unfair purchase or sale prices or other unfair trading conditions;
- limitation of production, markets or technical development;
- application of unequal conditions of trade with different parties for similar market operations, thereby placing one or more of them at a competitive disadvantage;
- setting conditions for contracts with other parties which impose additional obligations that by their nature or according to commercial practices are not related to the subject of such contracts.

The wording of the Competition Law is parallel to that of the European Union's approach towards abuse of dominance and, in the background, the commitment to

adopt the *acquis communautaire* implies that the body of Court of Justice decisions on market dominance and its abuse also form part of the law.

1.4 Deadlines for decisions

According to the amended Law:

- Within 24 hours of the submission of a complaint/request, the Secretary General assesses whether the request is within the jurisdiction of the Competition Authority, notifies the Commission of the assessment and identifies the section or directorate under whose competence the request falls. The party that filed the complaint or request must be notified by the Secretary General within 15 days whether the Commission will investigate the issue. The Commission determines the priority and schedule for investigations to be held as well as the related schedule.
- The ACA must decide on the approval or prohibition of concentrations within two months of notification. If the Commission fails to make a decision within two months of the notification the proposed merger shall be considered authorized. The deadline for the preliminary procedures may be extended by up to two weeks if the undertakings involved have presented - within one month of their notification of the concentration to the Commission - commitments to take measures to reverse/eliminate any 'indications of the creation or strengthening of dominant position'.
- If the Commission decides to launch an in-depth investigation on any issue (i.e. concentrations, possible prohibited agreements or abuse of a dominant position), the investigation must be concluded within three months. This deadline may be extended for up to two months in the same circumstances as for preliminary proceedings, except that the commitments of undertakings must be presented to the Commission within two months of the commencement of the investigation. The Law does not state any limit on the number of times an investigation may be extended.

1.5 Cooperation with other public institutions/agencies

Public institutions at central and local level should cooperate with ACA by supplying necessary information and documents. In case of an investigation, the law obliges interested parties to provide ACA with required information and documentation concerning the issue in question. The cooperation of the National Registration Centre (NRC) is of great importance since every action among undertakings should be reflected in the trade register which is maintained and updated by NRC. In addition, the ACA has signed a number of memoranda of understanding with the other public institutions such as the General Prosecution office, High Inspectorate of Declaration of Assets, Public Procurement Agency and

the Supervisory Board of Bank of Albania aiming to share information and coordinate actions against restriction of competition.

According to the Competition Law, the Commission is also authorized to provide evaluations and recommendations to central and local administration and other public institutions, trade associations, labor unions, consumer associations, commercial and industrial chambers on issues that relate to competition, and explicitly defines the ACA's obligation to assess regulations that create barriers to or restrict competition. However, the Law does not oblige such bodies to respect the Commission's recommendations, and as the Diesel D2 case and the sale of the Albanian electricity producer indicate, cooperation in at least two important cases has been less than ideal.

1.6 Sanctions, appeals and enforcement

The ACA may impose fines of up to 1% of the party's or parties' previous year's turnover for infringements that are 'not serious' and fines of up to 10% of turnover for conduct that is a 'serious' infringement. Periodic penalty payments of up to 5% of average daily turnover may also be imposed to incentivize prompt correction of infringements. Undertakings may, however, receive partial or total relief from fines if they provide information that helps to end violations of the provision prohibiting anti-competitive agreements.

As a general matter, infringements that are 'serious' are those that violate the substance of the Competition Law or specific decisions of the Commission, whereas those that are 'not serious' are those that impede the effective enforcement of the law. Thus, 'serious' infringements consist of engaging in agreements that restrict competition (and which have not been exempted), abuse of dominance, implementing a concentration which has the effect of restricting competition, and not complying with the Commission's interim orders or conditions and obligations. Non-serious infringements are defined as, essentially, providing inaccurate, incomplete or false information, statements or documents in response to a request or decision of the Commission or during an inspection, or in a notification, as well as providing information after specified deadlines. The category also includes obstructing inspections and refusing to answer questions related to facts. Failure to notify a concentration is also a 'not serious' infringement.

Appeals against Commission decisions can be filed up to 30 days from a decision.

The amount of the fine is to be based on the duration and severity of the infringement, but neither the Competition Law nor the Regulation on Fines and Leniency provide much guidance. Indeed, the only guidance is that the fine will be no smaller than illegal profits gained, if the latter can be objectively estimated. Although the Regulation on Fines and Leniency indicate that the amount of the fine will be the result of multiplying a "basic amount" by various figures, how to arrive at the starting point, the "basic amount," is not explained. The "basic amount" can range up to 10% of the involved undertakings' turnover in the previous year,

apparently without restriction on market or geography. Other jurisdictions, by contrast, usually start with an estimate of the amount of sales affected by the infringement within the jurisdiction, then determine a multiplicand influenced by objectives like deterrence and fairness. Deterrence implies a certain degree of predictability. Fairness relates to many of the aggravating and mitigating circumstances also cited in Albania, such as whether an undertaking had been a leader or instigator of a cartel, as compared with having been a follower, and an undertaking's ability to pay the fine calculated..

Partial or total relief from fines is available to undertakings engaged in anticompetitive agreements that provide information to the Commission that helps to end the infringements. Albania is unusual in applying leniency to any type of anticompetitive agreements: Many of the jurisdictions that have a leniency program apply it to so-called hard-core cartels, those agreements involving price fixing, market sharing or bid rigging, where the agreement is usually secret and there are unlikely to be any efficiency benefits. Leniency is used, in those jurisdictions, to generate incentives for at least one member of a secret cartel to come forward and disclose it.

A key change in the enforcement of the law has come through a combination of the new Law on Administrative Contraventions passed in June 2010 and the amended Competition Law. Commission decisions on sanctions (fines) now have the status of executive title, meaning they are to be executed (collected) according to the Code of Civil Procedure. This means that the Commission applies to a court for decisions to be enforced by the bailiff authority, rather than relying on the Tax Police as was the situation under the previous law until the Tax Police were abolished in 2007. The ACA is exempted from the fee for the bailiff service. In addition, these changes mean that the fined entity is obliged to pay even if it files an appeal. Previously, the entity fined would not have to pay the fine until a final decision was issued.

While Albanian lawyers are not entirely convinced whether the new legal framework is unambiguous – since the concept of executive title is not crystal clear in Albanian legal terminology—the new framework will make a radical difference to the enforcement of Commission decisions if it is implemented as some hope. Currently the ACA is involved in a series of cases from before the new legal framework came into effect (1/3 of all cases that constitute final decisions) to convert those decisions into executive titles.

1.7 Proceedings, Decisions and Sanctions

Basic statistics on the number and breakdown of ACA decisions are provided in Table 1. The statistics indicate that the majority of decisions on market transactions up to 2009 have been on “concentration of undertakings”, with fewer decisions on abuse of a dominant position. However, from January to October 2010 there have been 3 decisions on abuse of a dominant position (an increase) and 4 on concentration (a decrease).

Table 1. Decisions of the Competition Commission, 2004-October 2010⁴

Year	Number of Decisions	Concentrations	Abuse of dominant position	Prohibited agreements	Exempted Agreements	Internal Regulations and Guidelines	Recommendations to public institutions	Decisions imposing fines	Other Decisions
2004	13	2				6	1	-	4
2005	17	-				2	3	1	11
2006	14	4				-	1	1	8
2007	25	9	1	3		4	2	5	2
2008	29	11	1	1		4	5	-	7
2009	36	8	1	2	1	2	10	2	10
2010 (Jan-Oct)	19	4	3	2	-	2	2	2	6
Total	154	39	6	7	2	20	24	11	48

Source: ACA, 2010

⁴ ACA, 'Annual Report 2009 and Main Objectives for 2010', page 35, available at: <http://www.caa.gov.al/file/publikimet/Annual%20report%20ACA.pdf>. Data for 2010 provided by ACA Chair.

1.7.1 Investigations and Decisions

The Commission has conducted investigations and issued important decisions in several important cases of alleged market dominance or alleged anticompetitive agreements. These include investigations of a market dominant position by Raiffeisen Bank in Treasury Bills, and market sharing for third-party liability insurance (TPL), as well as restricting competition through the application of different conditions of trade on local and imported products.

The following cases are examples:

- In December 2008 on the basis of a request from a business association, the Commission recommended to the Council of Ministers the abrogation of its July 2008 Decision ‘On the quality of combustible fuel produced by the refinement of local crude oil’ on the basis that it restricted market competition through the application of different conditions on trade regarding local and imported products. The decision had effectively given the exclusive right to trade in Diesel D2 fuel to one privatized company (ARMO). The government approved a second decision in January 2009 which contained the same restriction of competition. The same association then submitted a request to the Constitutional Court, which in June 2009 ruled the Decision as unconstitutional and in contradiction with the Competition Law, on the grounds that it applies unequal trading conditions to different enterprises; the Decision specifically recommended the abrogation of the original government decision, although it rejected the application to have the implementation of the decision suspended. The Government did not react to this decision.
- Raiffeisen Bank was investigated for alleged abuse of dominant position in the primary and secondary market for Treasury Bills (the bank held a 74% share of the domestic market in savings deposits in 2004, falling to 34% in 2008). This investigation was started in December 2008 because high yields on Treasury Bills were observed. The investigation over possible abuse of a dominant position covered the period from 2005 and was completed in March 2010. The Commission Decision confirmed Raiffeisen’s dominant position in the market, identified some barriers to entry in the primary market for Treasury Bills, and also identified a sudden spike in the yield of Treasury Bills during the third quarter of 2006. The Decision did not identify any violation but ‘imposed several requirements based on the engagements agreed by the bank during the hearing session’, included the reduction for a three-year period by 50% of commissions charged to individuals buying Treasury Bills, and improvements in provision of information on TB yields.
- The Commission issued several decisions relating to the Agency for Vehicle Insurance (AVI), which was a private association of eight insurance providers

licensed by the Insurance Supervision Authority. In 2007 the Commission ruled that the AVI had restricted competition in the market for third party motor liability insurance and reduced the number of competitors and imposed a fine on the insurance companies involved equal to 2% of their 2005 turnover (Decision 50 in Table 2), and recommended that the Financial Supervision Authority revoke the AVI's license, which FSA did in 2007. The decision imposing the fine is still being contested in court.

In general, the Commission's decisions and statements suggest that there have been cases where it may have not used its its actions (particularly recommendations) have been ignored, or sanctions imposed have not been enforced.

1.7.2 Sanctions imposed

Table 2 shows the status of all of the decisions by the Competition Commission imposing fines from 2004 until October 2010. The fines imposed have been between 1% and 2% of turnover and total 1.1 billion ALL. Fines have been imposed on a wide range of businesses, including the leading mobile telephone companies, insurance companies, commercial banks, airlines, oil refining companies, bread producers, wholesale machine traders, and cement producers.

Around 25% of the cases in which the CC issued fines up to 31 January 2010 (31 cases) had neither been appealed by the sanctioned parties nor executed at that time. Around 20% of cases (6 cases) where fines were imposed were overturned in the Appeal Court, but were not further appealed to the High Court by the Commission, raising questions about the Commission's determination to ensure that the sanctions it imposes are confirmed and executed.

Appeal proceedings in some cases have been lengthy, in particular the 2005 decision to fine mobile telephone operator AMC, which as of mid-2011 was still ongoing in the first instance court after being returned by the High (Supreme) Court. This is also important due to the fact that until recent changes in the legal framework fines were not payable unless they were not appealed or a final court decision was reached.

If implemented properly, the amended Law should allow more efficient collection of fines. Based on the amendment, according to the the Commission it has secured through the courts the conversion of all decisions it has issued to the status of executive title and submitted them to the Bailiff's Office for execution.

Finally, the poor implementation and enforcement situation has likely been exacerbated by the absence of administrative courts, which it is hoped would shorten the time needed to process cases and increase the professionalism and interest of the various institutional actors in legal competition issues.

Table 2. Fines imposed by the Competition Commission, 2004-October 2010

No	Date	Enterprise	Fine (ALL)	Fine (% of Turnover)	Status of CC Decision
27	12.12.2005	AMC	160m	1	Returned by High Court to District Court
38	16.05.2006	ÇALIK, HOLD (BKT)	6.5m		Confirmed in High Court, not executed
50	21.03.2007	SIGMA	15.2m	2	In High Court
		SIGAL	21.8m	2	In High Court
		INSIG	28.2m	2	In High Court
		EUROSIG	1.7m	2	In High Court
		ATLANTIK	8.2m	2	In High Court
		INTERSIG	7m	2	In High Court
		INTERALBANIAN	5m	2	In High Court
		ALBSIG	3.9m	2	In High Court
59	09.11.2007	AMC	211.5m	2	In High Court
		VODAFONE	242.6m	2	In Appeal Court
63	3.12.2007	PROCREDIT	7.2m		Confirmed by High Court, not executed
66	18.12.2007	ALBAN, TIRANA	447,915		Confirmed in court, under procedure to issue as executive title
		BEST, CONSTRUCT	235,367		Confirmed in court, under procedure to issue as executive title
		BETON, EXPRESS	178,534		Not appealed, under procedure to issue as executive title
		FERRO, BETON	436,959		Not appealed, under procedure to issue as executive title
		HALILI,	172,519		Not appealed, under procedure to issue as executive title
		ITAL-BETON	201,086		Not appealed, under procedure to issue as executive title
		KIRCHBEGGER	508,279		Not appealed, under procedure to issue as executive title
		QARRI-02	169,652		Not appealed, under procedure to issue as executive title
		SHKODRA, BETON	396,974		Confirmed in court, under procedure to issue as executive title

67	24.12.2007	KAJO,HALLKA	30,000		Not appealed, under procedure to issue as executive title
123	18.09.2009	ALBANIAN AIRLINES, MAK shpk	2.6m		Not appealed, under procedure to issue as executive title
125	08.10.2009	BLOJA sha	38.6m		In Appeal Court
		ATLAS sha	27.9m		In District Court
150	20.07.2010	ARMO sha	271.9m		In District Court
154	1.10.2010	CLASSIC, shpk	25,712,000		In District Court
		HUYNDAI AUTO Albania	5.4m		In District Court
		ULTRA MOTORS shpk	1.5m		In District Court
		NOTI shpk	3m		In District Court
11		TOTAL PENALTIES	1.1bn		

Source: ACA, 'Annual Report 2009 and Main Objectives for 2010', p. 35, available at: <http://www.caa.gov.al/file/publikimet/Annual%20report%20ACA.pdf>.
Data for January-October 2010 provided by ACA Chair.

2 RISKS OF CORRUPTION IN THE OPERATION OF THE ALBANIAN COMPETITION AUTHORITY

For the assessment of risks of corruption in ACA's activities, the following key aspects have been taken into consideration: the operational independence of the decision-making body of this institution (CC); vague and/or unclear aspects of the legal framework; the ethics rules; and interaction between the ACA and the courts and other third parties (government, regulatory entities, Bailiff Office etc.)

2.1 Operational independence of the Competition Commission

Confidence in a competition authority's fair application of a competition law rests, in part, on its independence from business interests and, in individual decisions, independence from political interests. The law's requirements that Commission members refrain from engaging in economic activity (Article 22(1)), and recuse themselves from cases where they have an interest or have represented a party (Article 23), are both aimed at ensuring independence from business interests. Given the appointment process for the CC, in the Albanian context the effective control of the Parliament by the Government raises some doubts over the Commission's real independence. In theory at least, the ability of the government majority to determine four of five CC members may create potential for decisions that favour business interests close to those that control the government, or conversely damage business interests close to opposition forces.

Parliamentary powers to reward and punish sitting members of the Commission may be incompatible with their independence. Parliament determines Commission members' compensation (Article 21(4)) and whether the conditions for removal—"strongly infringed work ethics carrying out his/her duties" (Article 22(3))—have been met.

Transparency of decision-making can help to ensure operational independence (from both business and political interests) because transparency allows unreasonable decisions to become the subject of public scrutiny. Some of the building blocks exist. In particular, the Code of Administrative Procedure Articles 105 through 110 requires *inter alia* the factual and legal basis and reasoning of administrative acts to be written. The Competition Law (Articles 47, 52, 64) requires the publication of the 'main content' of decisions in the Official Bulletin of the ACA, and the Regulation on the Functioning of the Competition Authority Article 12/1 establishes a 15 day deadline for this. However, Modifying the Regulation on the Functioning of the Competition Authority so that the entire decision must be published, with appropriate redaction to ensure protection of business secrets, would go some way towards ensuring transparency.

Review of decisions by an independent judiciary may also reduce improper influence since a court would normally not support poorly reasoned decisions.

Other jurisdictions use or have used other mechanisms to maintain a balance of power on a commission. These include restricting the number of members who can belong to the same political party to, say, three on a five-person commission, or, if a degree of capture of the commission is acceptable, having different associations, such as the chamber of commerce or consumer association, which are steered by different sets of interests, appoint different members. The latter solution results, of course, in under-representation on the Commission of “outsiders” such as potential entrants who can bring greater dynamism to competition in markets.

2.2 Legal framework regulating ACA activity

Amendments of the Competition Act in 2010 achieved further harmonisation with EU competition rules as per the requirements of the Stabilization and Association Agreement. Nevertheless, vague and subjective terms generate corruption risks, as discussed below.

2.2.1 Ill-defined coverage

Under Article 2(1)(a) of the Competition Law, the application of the law is restricted to those undertakings or associations of undertakings that have or may have an influence on the market, rather than the easier to distinguish category, undertakings or associations of undertakings (undertakings are defined later as persons, natural or juridical, who perform economic activity). If the Competition Law has an actual constraining effect, then there can be economic incentives to convince the ACA that a given undertaking or association cannot, in fact, influence the market. This could be the case for, e.g., small and medium sized enterprises that may or may not influence a market depending on a variety of characteristics of the market and the enterprises in question. Articles 5, 6 and 7 would seem to provide for arrangements among SMEs that promote economic efficiency and do not substantially restrict competition.

2.2.2 Vague terms and conditions for evaluating concentrations, agreements, and dominant firms conduct

The Competition Commission appears to have broad discretion in how it evaluates concentrations, agreements, and conduct by dominant firms. The law contains a number of unclear or unmeasurable terms, such as “...limits to a considerable extent...”⁵, “...which have restriction effects of competition in the market...”⁶) and conditions based on which the authorization or prohibition of a concentration is to be decided, inevitably creating scope for discretion in CC decisions and the possibility of influence by external parties on decisions.

Competition laws that aim at the effect, rather than the form, of conduct share this characteristic of apparent vagueness and excess discretion. The competition laws of the European Union, of its Member States, and of other major jurisdictions share the

⁵ Competition Law, Article 13.1.

⁶ Competition Law, Article 74.3d.

characteristic that, except in certain well-defined areas, they do not have simple decision-making rules. While the fundamental concepts of what is unlawful can usually be clearly described, the factual context in which a concentration, agreement, or dominant firm's conduct is assessed greatly influences the effect of the concentration/agreement/conduct. Since the factual context can differ in complex ways, it is difficult to design simple, general decision-making rules.

The scope for discretion is reduced in a number of ways. First, the *acquis communautaire* that constrains the Competition Commission includes also European Court of Justice decisions. These decisions have made more precise some aspects of competition law. However, many unaddressed questions remain and new ones arise. Second, Albanian court decisions will, over time, constrain the CC. Other competition authorities develop guidelines to facilitate consistent decision-making under similar conditions, and to help organize analysis when conditions are novel. They often widely circulate drafts and encourage comments from the international competition community. While guidelines are not binding, deviations would be noted by external observers and perhaps encourage appeal for judicial review. In addition, press releases, speeches, articles and the like that explain the reasoning behind decisions, while protecting business confidential information, can help external observers to identify whether a decision is well-reasoned. In addition, commentaries among the lawyers, academic observers, and economists outside the competition authority help to develop an evolving consensus. Key to this development is publication of the factual and legal basis and reasoning for decisions, while respecting business secrets.

2.2.3 Individual exemption procedure and civil lawsuit

The interaction between a civil lawsuit and the Commission's individual exemption powers generates concerns for consistency and efficiency. If a civil claimant alleges harm as a result of a prohibited agreement, then the respondent, that is, the party who is alleged to be causing the harm, could subsequently apply for an exemption that would suspend proceedings at the District Court until the Commission decides whether to grant an exemption (Article 68). If the civil claimant really has been harmed, then the additional delay while the Commission considers the application discourages injured persons from making claims. If the Commission nevertheless grants an exemption, the District Court may not overturn the decision (Article 48) and may find it difficult to find that the claimant had been harmed only for the period up to the date on which the exemption was applied for. This potential further discourages civil lawsuits. In sum, the way these two processes— in the court and in the Competition Commission— interact can give rise to delays and inconsistencies. Non-suspension of court proceedings would reduce delays, and judicial reviewability of exemptions would increase consistency. But the absence of specialized courts could lower the quality of decision-making to such a degree that the current arrangement would yield greater consistency. The institutional arrangements should weigh these various factors.

2.2.4 Merger notification procedures

The Competition Act requires concentrations such as mergers, acquisitions and joint ventures to be notified, and such concentrations may not be implemented before authorization. The Act establishes thresholds based on turnover. Contrary to international best practice, under the Competition Act the transaction must be notified if only a single party to the concentration has domestic turnover exceeding a threshold (ALL 200 million) and all participating parties also exceed a threshold (ALL 400 million). Best practice is to require that at least two parties to the transaction each have domestic turnover exceeding a threshold, to ensure that transactions that do not affect domestic markets do not need to be notified. The existing set of rules means that concentrations must be notified, and cannot be implemented, even if they would not affect domestic competition. Indeed, the simplified notification form is used for notifying concentrations “When this concentration has no impact on the competition in the relevant market.” The filing fees are ALL 15000 to initiate a procedure, and ALL 0.5 million to issue an authorization. Under Article 60.1 of the Competition Law the ACA may grant an authorisation for temporary concentration if there are important reasons, notably ‘to prevent serious or irreparable damages to participants in the concentration or third parties and taking into account the threat to competition posed by the concentration.’ However, this does not clearly ensure that concentrations that do not affect the domestic market will receive authorisation. Moreover, the procedure for granting a temporary authorisation itself may create opportunities for bribery. In general, there is no reason to require parties to notify and/or apply for authorisation of a merger or acquisition that does not affect competition in Albania.

Notification of a concentration must be made within 30 days of conclusion of the agreement, or the acquisition of controlling interest, or the announcement of the public bid. The notification must be in the Albanian language, with foreign-language documents accompanied by a corresponding notarized translation. While incomplete or false information is subject to a fine of up to 1% of turnover, the parties and the Secretariat may reach an agreement as to what information requested in the notification form does not need to be submitted. Among the documents that must be enclosed are copies of the final or latest versions of all documents about the concentration, data to support relevant market definitions, and market size and share estimates for those markets, documents that are likely not created during the normal course of business.

The Competition Authority, if it finds conditions for the use of the Simplified Form are not met, requires the parties to submit a Complete Form. It is unclear how the notification deadline interacts with the extensive information requirements envisaged under the Complete Form.

2.2.5 Discretion in setting fines

The authority of the CC to impose fines within a wide range (up to 10% of the undertakings’ previous year’s worldwide turnover) creates clear risks. Neither the

Competition Law nor the Regulation on Fines and Leniency provide much guidance in how the level of fines are set, nor what undertakings need to do in order to get various degrees of leniency. The Regulation establishes that the fines will be set between the amount of illegal profits obtained (if that can be objectively calculated) and 10% of the aggregate turnover of undertakings involved, and that the exact amount of fine selected will be determined as follows (Article 2.5):

“Depending on the circumstances, account should be taken, once the above calculations have been made, of certain objective factors such as a specific economic context, any economic or financial benefit derived by the offenders, the specific characteristic of the undertakings in question and their ability to pay in a specific social context.”

The Regulation does not provide any guidance as to which circumstances should be taken into account – for example by providing example of “specific economic context” and how to measure it. Since it can be very difficult for outside observers to gauge the value of any particular information given to the CC at the time it was provided, it is difficult to second-guess whether the degree of leniency was indeed justified. With the potential for very large fines, there could be incentives for exert improper influence to reduce or eliminate fines to a degree that is not commensurate with the cooperation provided in the investigation of an infringement.

According to the ACA there have been no challenges in court to the methodology used for setting fines. However, this should be taken in the context of a low level of enforcement up to 2011. Less discretion in setting fines could help and would make Albania’s rules more consistent with other jurisdictions. One method is first to estimate how much of the guilty undertakings’ commerce was affected by the unlawful conduct, for example their turnover in the relevant product market in the relevant geographic market or Albania, whichever is smaller. Then to impose a tight band for the size of the multiplicand, such as the 30% of the undertaking’s turnover in the relevant market as provided in the EU Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, or the 20% of the undertaking’s volume of commerce over the period of the infringement in the US Sentencing Guidelines.

Leniency programs have proven effective in uncovering secret cartels in jurisdictions where prosecution of cartels is a credible threat. And leniency programs are now a part of the *acquis communautaire*. But leniency is ineffective in generating whistleblowing where successful prosecution of a secret cartel absent such a “tip” is unlikely. And global cartelists focus their efforts during the limited window for submitting leniency applications on those jurisdictions where they risk large fines. Thus, a leniency program in Albania probably has very little benefit in terms of uncovering secret cartels and generates corruption risk. If the possibility is foreseen in the Stabilization Association Agreement, it may be better to suspend the implementation of a leniency program until conditions are in place that would make the program effective.

In any case, leniency should be limited to instances of whistleblowing related to hard-core cartels, and not be used for any and all types of agreements. Incentives generated by a leniency program in other contexts than hard-core cartels can be perverse. For example, there can be a resource-sapping denouncement of an agreement generating efficiencies including for consumers, but where one of the parties has pocketed its benefits and wishes to be freed of remaining obligations. If limited to hard-core cartels, then the ACA resources used to follow-up a leniency application will, very likely, be directed towards fulfilling the objectives of competition law.

2.3 Corruption risks related to ethics

The Competition Authority approved a Code of Ethics for the ACA on February 2010. Under the Code ACA staff must fulfil obligations of loyalty, correctness and discretion. Commissioners and employees are obliged to protect the confidentiality of all information relating to inquiries and inspections made by ACA's departments. Whether the Code of Ethics is a sufficient instrument to prevent illicit disclosure of information and collaboration of inspectors with interested parties during the investigation process is a major question, given the financial importance (impact) of CC decisions and the resulting incentives for interested parties to attempt to influence decisions.

The practice of noting all contacts with parties can help to create a record of when and how information was acquired. Electronic storage of documents received also helps in this regard. Preservation of intermediate work product, which would reflect the evolving thinking of case-handlers, may be useable to identify, *ex post*, shifts in position or acceleration or deceleration of the process that are not the result of new information or other results of the investigation. According to the ACA, an archive of internal work is maintained, but it is not clear whether this goes beyond the protocolling and filing of reports and opinions. A record of contacts, information flows, and the development of analysis may possibly help to highlight instances of improper influence, although perhaps only a whistleblower would make it worthwhile to incur the cost of reviewing the record. The Regulation on the Functioning of the Competition Authority Article 24, which establishes a general register to register, store, and enable the use of all incoming and outgoing correspondence, goes some way towards creating such a contemporaneous record. But the archiving of intermediate internal work product would aid in estimating whether analysis had been distorted in a way that led to improper decisions.

Concerning conflict of interest, the legal framework appears to be largely adequate. One possible problem, however, is that one of the ways in which a civil servant can be in a situation of a conflict of interest under the Code of Administrative Procedure may be open to manipulation by parties: A civil servant is disqualified if the interested parties have started a court case against him. If a party wishes a particular person to be disqualified, it appears that a lawsuit, even if unfounded, could have the desired effect for a sufficient duration for a competition investigation to take

shape. It would be useful if the article were interpreted to exclude unfounded lawsuits.

The ethical qualification for Commission members provided in the Competition Law is that the candidate must not have been dismissed from his/her job or the civil service by disciplinary measures. This ethical threshold may be seen as insufficient taking into consideration the role and the responsibilities of a member of the Competition Commission.

2.4 Impotence of ACA recommendations

Cooperation between the ACA and the government on the amendment of the legal framework – in particular to ensure approximation of legislation with the EU *acquis communautaire* – has been generally effective. The same cannot be said in the case of the Commission's recommendations concerning government decisions such as the decision on D2 fuel mentioned in Section 3.1, which was based essentially on the identification of a violation of the Competition Law. The ability of the Government to ignore Commission recommendations entirely in such cases appears to imply scope for corruption in the form of collusion between government and some business interests to ensure unfair favourable market conditions for the latter. The weakness of the Commission in this respect appears to have led to it making fewer attempts to assert itself, for example where the Commission issued a statement critical of the recent Government decision to issue only one 3G mobile license, but has taken no further action.

2.5 The enforcement environment

In addition to the functioning of the ACA itself, other institutions also need to function in order for Commission decisions to have the intended impact. In the context of corruption, if the courts are affected by corruption, then Commission decisions will be undermined: Those decisions that are appealed and not supported by reason of corruption undermine the Commission not only in the particular case, but also make it more difficult to predict the state of the law when the Commission must decide other cases in the future. This uncertainty also undermines the Commission. Similarly, if corruption affects the enforcement of final court decisions by the bailiffs, the Commission's authority is undermined.

3 RECOMMENDATIONS

Based on the analysis of risks for corruption and consideration of the legal framework of competition protection, it can be concluded there are three main directions for minimizing the risk of corruption in ACA's activities. These are described in the following subsections.

3.1 Legal framework

As indicated above, the legal framework could be better specified. Particular points include broadening the coverage of the competition law to include all undertakings and defining the thresholds of which concentrations must be notified to exclude those which are highly unlikely to affect competition in Albania. As in many competition legal frameworks, the conditions for authorising concentrations, the rules by which agreements and dominant firms' conduct are assessed, as well as rules for the setting of fines, are vague.

The ill-defined limits of the coverage of the Competition Law can generate arguments as to whether the law applies to particular undertakings or associations of undertakings. In particular, if they have or may have an influence on the market, then they are covered by the law, otherwise they are not. The Competition Law should be amended to apply to all undertakings rather than just those that may have an influence on the market, in order to reduce the scope for corruption; if the ACA enjoys discretion to determine which undertakings 'have an influence on the market', then there is a higher risk of corruption than if the provisions of the law simply apply to all undertakings.

The merger notification procedures place parties to transactions with little or no likelihood of affecting competition in Albania in the position of having to notify and receive authorization before they may proceed, where the notification must be received within a tight deadline, accompanied by notarized translations of documents likely not generated in the normal course of business. The Competition Act should be amended to require that at least two parties to the transaction have turnover above a threshold in Albania, in order to reduce notifications and wasted resources reviewing transactions having little or no likelihood of domestic economic effect. The merger guidelines or guidelines on internal procedures should provide guidance as to how and when agreements are reached with parties on suspension of the obligation to provide information and documents in connection with merger notifications; this would reduce the opportunities for ACA officials to extract bribes in situations where parties have strong economic incentives for seeking rapid approval of a merger and large fines may be imposed for noncompliance. The merger guidelines should specify time limits for the Secretariat to determine whether parties need to submit a Complete Form, as well as a reasonable limit for parties to submit a Complete Form in light of the information and documentation required and the timing of possible concurrent review in other jurisdictions.

In Albania, as in many jurisdictions, the conditions for authorising concentrations, the rules by which agreements and dominant firms' conduct are assessed, as well as rules for the setting of fines, are vague. However, not only the Competition Law but also regulations and the *acquis communautaire* provide more guidance. The use of guidelines, other publications, and speeches to provide guidance to the legal and business community, as do other competition authorities, can act as a constraint. The Competition Commission has adopted instructions and regulations that parallel EU guidance on the assessment of concentrations, agreements and agreements of minor importance, among others (see Annex 2.) However, the rules on setting of fines should be clarified further, including in particular how the basic amount is

calculated, and the option for being granted leniency should be restricted to agreements that fix prices, share markets or rig bids. Consideration should be given to adopting guidance on the assessment of exclusionary abuses of dominant firms. While guidelines are not legally binding, a deviating decision would attract attention and perhaps condemnation and appeal for judicial review. Speeches and publications by ACA officials or Commission members should clarify competition policies and objectives, not only to clarify how the law and guidelines will be applied in Albania, but also to promote fair and effective market competition more broadly.

3.2 Operational Independence of ACA

To ensure the operational independence of ACA, it would be wise to consider an appointment process that allows for a broader constellation of institutions that can propose members. Consideration might be given to additional requirements, for example ensuring that no more than three of the Commission's members are also members (or recent members) of one political party. While the Competition Law requires that members of the Commission have significant professional qualifications, it may be advisable to ensure that at least one member has significant legal experience, and a similar requirement for economics and for business experience. As a general rule competition authorities rely on the employees to have the specific relevant professional expertise and the ability to present arguments to the Commission.

A fear of unfounded lawsuits against individual employees could reduce their professional independence. In order to maintain the integrity of the ACA, the interpretation of Article 14 of the Code of Administrative Procedure should protect reasonable decisions taken by employees during the course of performing their official duties.

An archive of intermediate internal work product would aid in estimating whether the analysis in a case had been distorted in a way that led to improper decisions. The Regulation on the Functioning of the Competition Authority Article 24 establishes a general register of all correspondence. If it were amended to also require deposit of intermediate internal work product, such as internally prepared summaries of interviews, research, and legal and economic analyses, it would help create a contemporaneous record which could be reviewed in the event of a subsequent claim of corrupt decision-making.

3.3 Transparency

To increase the transparency and the enforcement power of ACA, it would be useful if the Competition Law required all legal acts relating to ACA activity, as well as CC decisions to enter into force only after publication in the Official Gazette, not only its own Official Bulletin as the law currently provides; this is the case for a number of other agencies, for example the Energy Regulatory Authority. In addition, all CC decisions should be made public, not only infringements as mandated in the current law. In particular, the Competition Law should be amended to require the

publication of the entire CC decision, with appropriate redaction to ensure protection of business secrets. Given the potential for delay to ensure such redaction, it may be reasonable not to suspend the decision's entering into effect until the publication of the entire decision, but only until publication of a summary. The entire Commission decision would, in accordance with Articles 105 through 110 of the Code of Administrative Procedure, include an explanation of the facts on the basis of which the act is issued, and the legal basis of the act, and clear reasoning for the act.

4 RESOURCES AND SOURCES FOR RESEARCH

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15. OECD Global Forum on Competition: Collusion And Corruption In Public Procurement (Contribution from Albania), 18-19 February 2010, Source: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2010\)21&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2010)21&docLanguage=En)
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19. Stabilization and Association Agreement between the European Communities and their Member States, of the One Part and the Republic of Albania, of the other Part, Title VI, 'Approximation of Laws, Law Enforcement and Competition Rules', Article 71, Source: http://ec.europa.eu/competition/international/bilateral/albania_saa_comp_extract_s_en.pdf
20. Tina Søreide, 'Competition and corruption - What can the donor community do?', CMI, Corruption Resource Centre, Source: <http://www.cmi.no/publications/file/2758-competition-and-corruption.pdf>
21. Trade Policy Review: Report by the Secretariat – Albania, WTO Secretariat, WT/TPR/S/229, 24 March 2010, Source: http://www.mete.gov.al/doc/20100602094613_tpr_report.pdf
22. Trust Law, 'Anti-corruption profile – Albania', Source: <http://www.trust.org/trustlaw/country-profiles/good-governance.dot?id=579affeb-3f44-4467-9f0d-35604be7af79>
23. USAID, 'Lessons Learned Fighting Corruption In MCC Threshold Countries: The USAID Experience', November 13, 2009, Source: http://pdf.usaid.gov/pdf_docs/PNADS603.pdf

4.2 Albanian Competition Authority Publications

1. Annual Report 2009 and Main Objectives for 2010, Source:
<http://www.caa.gov.al/file/publikimet/Annual%20report%20ACA.pdf>
2. Annual Report for 2006 and Objectives for 2007, Tirana 2006, Source:
<http://www.caa.gov.al/file/publikimet/raporti%20vjetor.pdf>
3. Annual Report for 2007 and Objectives for 2008, Tirana 2007, Source:
<http://www.caa.gov.al/file/publikimet/raporti-2007.pdf>
4. Annual Report for 2008 and Objectives for 2009, Tirana 2008, Source:
http://www.caa.gov.al/file/publikimet/raporti%20vjetor%202008_final.pdf
5. Annual Report for 2009 and Objectives for 2010, Tirana 2009, Source:
<http://www.caa.gov.al/file/publikimet/Annual%20report%20ACA.pdf>
6. Competition Terminology Vocabulary, Source (in Albanian only):
<http://www.caa.gov.al/rpub.asp?id=12>
7. Interactive Official Webpage where all the decisions, legal framework, ACA investigation are accessible, Source: <http://www.caa.gov.al>
8. Leaflets related to the competition right such as: “Competition Right and the Consumer”, “Competition Issues in Economy”, Source:
<http://www.caa.gov.al/file/publikimet/Broshura%20AK.pdf>
9. National Competition Policy, approved by Competition Authority Decision no. 43, dated 28.12.2006, pursuant to Article 24/a, Law no. 9121, “On Competition Protection”, Source:
[http://www.caa.gov.al/file/publikimet/POLITIKA_eng\[1\].pdf](http://www.caa.gov.al/file/publikimet/POLITIKA_eng[1].pdf)
10. Official Bulletin No. 1, Tirana 2007 (including all the Competition Commission decisions from 2005 – 2007), Source:
http://www.caa.gov.al/file/publikimet/buletini_zyrtar.pdf
11. Official Bulletin No. 2, Tirana 2008 (including all the Competition Commission decisions from 2007), Source:
<http://www.caa.gov.al/file/publikimet/buletini%202-1.pdf>
12. Official Bulletin No. 3, Tirana 2008 (including all the Competition Commission decisions from 2008), Source:
http://www.caa.gov.al/file/publikimet/buletini_3.pdf
13. Regulation on “Agreements of Minor Importance, Source:
<http://www.caa.gov.al/file/kuadri/Regulation%20on%20agreements%20of%20minor%20importance.pdf>
14. Regulation on Fines and Leniency, Source:
<http://www.caa.gov.al/file/kuadri/Regulation%20on%20fines%20and%20leniency.pdf>

15. Regulation on the Functioning of the Competition Authority, Source:
<http://www.caa.gov.al/file/kuadri/Regulation%20On%20the%20Functioning%20CAA.pdf>
16. Some Additions and Amendments to the Regulation “On the Functioning of The Competition Authority”, Source:
<http://www.caa.gov.al/file/kuadri/Some%20additions%20and%20ammendments.pdf>

4.3 Other competition law and policy resources

International Competition Network, Recommended Practices for Merger Notification Procedures, Source:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>

4.4 Stakeholders Interviewed by PACA local expert, Mr Zef Preci

No.	Institution	Executive Director	Website	Contact
A - Public Agencies/ Institutions				
1	Regulatory Entity of Telecommunication	n.a.		E-mail: info@ert.gov.al Tel: 259571
2	Energy Regulatory Authority	Bujar Nepravishta	www.ere.gov.al	Tel/Fax: + 355 4 222963 E-mail: erealb@ere.gov.al
3	Financial Supervisory Authority	Elisabeta Gjoni	www.amf.gov.al	E-mail: konsumatori@amf.gov.al Tel: +355 4 2269 329
4	Public Procurement Agency	Mursel Rraci	www.app.gov.al	Tel. & Fax. 23 04 34, Tel. 23 26 52, Email: infoapp@app.gov.al
5	Albanian Patents and Trade Marks Office	Safet Sula	www.alpto.gov.al	Tel/Fax +355-(0)-4-2234-412 E-mail: ssula@alpto.gov.al
6	National Registration Center	Eneida Guria	www.qkr.gov.al	Tel: +355 4 250066 Fax: +355 4 255532 E-mail: info@qkr.gov.al
7	High Council of Justice	Kreshnik Spahiu	www.kld.al	Tel./Fax.: 259817 E-Mail : office@kld.al

No	Institution	Executive Director	Website	Contact
B - International Organizations / Consultancy and Law Firms				
8	PETROLIFERA	n.a.	www.gruppopir.com/en/la-petroliera-italo-albanese	Tel: +355 033 231100 / Fax 033 237800 E-mail: pia@gruppopir.com

9	Bankers Petroleum Ltd	Richard L. Ferguson	www.bankerspetroleum.com/index.php?page=albania	Office: +355-(0)3422-0845/46/47 Mobile: +355-(0)6940-74514 E-mail: rlferguson@bankerspetroleum.com
10	Foreign Investors Association	Marinela Jazoj	www.fiaalbania.com/	Phone/Fax: ++355 4 22 25 553 Mobile: 0682055818/ 0692034469 E-mail: fiaalb@albaniaonline.net
11	Deloitte & Touché	Maksim Caslli	www.deloitte.com/al	-
12	Boga associates	Genc Boga	www.bogalaw.com	Tel: +355 4 225 1050 E-mail: gboga@bogalaw.com
13	KPMG	Anila Goxhaj	www.kpmg.com.al	Tel: +355 4 227 4524 E-mail: al-office@kpmg.com agoxhaj@kpmg.com
14	Wolf Theiss	Sokol Nako	www.wolftheiss.com/index.php/Albania.html	Tel. +355 4 2274 521 /Fax. 4 2274 521 Mpbile: +355 682031896 E-mail sokol.nako@wolftheiss.com

No.	Institution	Executive Director	Website	Contact
C - Business Organizations/NGOs				
15	Tirana Chamber of Commerce and Industry	Nikolin Jaka	www.cci.al/	Tel: +355 4 22 30 284 / Fax: 22 27 997 E-mail: sekretaria@cci.al
16	American Chamber of Commerce in Tirana	Floreta Luli-Faber	www.amcham.com.al	Tel. +355 (0)4 2259779/ 069 20 48 168 E-mail: floreta@amcham.com.al
17	Albania Association of Banks	Gazmend Kadriu	www.aab.al	Tel:+355 4 2280 372 E-mail: secretariat@aab-al.org
18	KonfIndustria	Gjergj Buxhuku		

No.	Institution	Executive Director	Website	Contact
D - Associations, NGOs				
19	Transparency international Albania	Lutfi Dervishi	www.tia.al	Phone : +355 4 22 67 457 E-mail(s): leginet@albaniaonline.net
20	Institute for Development and Research Alternatives	Auron Pasha	www.idra-al.org	Tel: +355 4 253288 Tel/Fax: +355 4 253352 E-mail: idra@albic.net
22	Consumer Protection Association	Altin Goxhaj	www.konsumatori.org	Tel: 67 20 0 45 45 E-mail: konsumatori@gmail.com / konsumatorishqiptar@gmail.com

5 ANNEXES

5.1 Annex 1: Excerpts from National Competition Policy

The Competition Authority aims⁷ at:

- Being an independent public institution with the necessary power and capacity to take active actions against anti-competitive behavior, and establish a competition - friendly environment;
- Being a fair arbiter, ensuring free and effective competition among market players, like in a football match where everyone is satisfied if all play to the rules
- Ensuring the competition policy and its implementation ensure that all market players compete with each other and win only on the basis of their merits;
- Contributing to the process of establishing a competitive economy in the regional and European market;
- Further completing the legal framework with implementation legislation such as regulations and instructions, as per the SAA requirements, and implementing them duly.
- Developing and effectively implementing the National Competition Policy;
- Monitoring and assessing market conditions for the development of free and effective competition;
- Being a competition advocate, performing assessments and giving recommendations to Parliamentary committees, central and local administration bodies and other public institutions, business associations, chambers of commerce and industry, for the development of sector policies and other strategies and policies that affect competition and its relevant legislation;
- Cooperating with other central and local administration institutions, regulators and other public and private foreign and domestic institutions on issues related to competition;
- Establishing contacts and mutual bilateral and multilateral regional and international organizations for an effective implementation of competition law and policy;

⁷ As per National Competition Policy, Approved by Competition Authority Decision no. 43, dated 28.12.2006, pursuant to Article 24/a, Law no. 9121, "On Competition Protection", p. 17-18

- Establishing contacts with counterpart authorities in the region and beyond in order to ensure information exchange in the context of competition policy implementation;
- Actively participating in various training events in the country and abroad, related to administrative capacity strengthening, and in other events (seminars, and conferences) on the competition in the region and beyond.

5.2 Annex 2: Approximation of Legislation

Specifically, the Competition Authority has adopted and aligned a series of regulations, guidelines and reports of the European Commission by including them as internal legal framework of the Competition Authority. Also, it has amended some of the regulations and institutions reflecting the new European legislation in the field of competition.

The legal framework of the Competition Authority consists of the following acts which are available at the official website in the Competition Authority www.caa.gov.al.

- Law No. 10.317, dated on 16.09.2010 "For some changes and amendments in Law no. 9121, dated 28.7.2003, "For the Protection of Competition", Available at the Legal Acts Library – Act Content: LAW, (Reference: <http://80.78.70.231/pls/kuv/f?p=201:Ligi:10317:16.09.2010>)
- Law No. 9121, dated on 28.07.2003 "On Protection of Competition" (as amended) (Adapted and approximated to the Lisbon Treaty on the functioning of European Union Regulation no. 1 / 2003 of 16 December 2002 (dated 16 December 2002) of European Council (EC) "On the application of competition rules under Articles 81 and 82 of the Treaty", 32003R0001 (OJ L 1, 4.1.2003, p 1-25, etc.).
- Regulation "On the functioning of the Competition Authority" approved by Decision No. 58, dated 15.10.2007, as amended by Decision No. 115, dated 26.05.2009;
- Regulation "On the procedures of concentration of enterprises" approved by Decision No. 80, dated 05/06/2008 (Adapted and approximate 32004R0139 Council Regulation (EC) Nr. 139/2004 dated 20 January 2004 on the control of concentrations between undertakings (Regulation of Concentrations) (OJ L024, 29/01/2004 P.0001-0022).
- Instruction "Complete form of Notification of Concentration" and related Annexes I and II, approved by decision No. 82 dated 23.06.2008 to the Competition Commission (Adapted and aligned European Commission Regulation no. 802/2004 dated 7 April 2004 on the implementation of Council

Regulation no. 139/2004 on the control of concentrations between undertakings (32004R0802);

- Regulation "On determination of expenses to follow the procedure close to ACA" approved by Decision No. 10, dated 29.06.2004 of the Competition Commission;
- Guidelines for the form of notification of agreements and the templates for Notification of the Agreements;
- Regulation "On Fines and Leniency from them", approved by Decision No. 120, dated on 10.09.2009 of the Competition Commission (Adapted and approximate Notice 2006 / C 298/11, dated 08.12.2006 of the European Commission "on Immunity from fines and reduction of them in cartel cases" 52006XC1208 (2004) (OJ C 298, 08/12/2006 P.0017-0022) Guideline 2006 / C 210.02, the European Commission dated 01.09.2006 "On the methodology for setting fines under section 23 (2) (a) of Regulation 1 / 2003" 52006XC0901 (2001) (2006 / C 210/02) (OJ C 210, Q.2-5);
- Code of Ethics of the Competition Authority, approved by Decision No. 69 dated 24.12.2007 to the Competition Commission (approximate model of the Italian Code of Ethics).
- Instruction "On the definition of the market", approved by decision No. 76 dated 07.06.2008 to the Competition Commission (Commission Notice on the definition of the relevant market for purposes of Community Competition Law (97 / C 372/03)
- Instruction "On the Effects Assessment of the Legislation on Competition", approved by Decision No. 68, dated 24.12.2007 of the Competition Commission;
- Regulation "On Preventing Conflict of Interest in the Competition Authority" approved by Decision No. 83, dated 02.07.2008 of the Competition Commission;
- Regulation "For the Agreements of Minor Importance", approved by Decision No. 121, dated 10.09.2009 of the Competition Commission (Commission Notice on agreements of minor importance which do not significantly restrict competition under Article 81 (1) of the Treaty (*de minimis*) Official Journal C 368, 22/12/2001 P. 0013-0015 (52001XC1222 (03)
- Instruction "On the Assessment of Vertical Agreements" approved by Decision No. 145, dated 15.04.2010 of the Competition Commission (Commission Notice Guidelines on vertical restraints (2000 / C 291/01));
- Instruction "On the Assessment of Horizontal Agreements" approved by Decision No. 137, dated 05.02.2010 of the Competition Commission (Commission Notice

Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements (2001 / C 3 / 02)

- Instruction "On the Evaluation of Non-horizontal and Conglomerate Concentrations between Undertakings", approved by Decision No. 132, dated 07.12.2009 of the Competition Commission (Guidelines for the evaluation of non-horizontal concentrations under Council Regulation on the control of concentrations between undertakings (2008 / C 265/07)
- Guidelines "On the Assessment of Horizontal Agreements between Undertakings", approved by Decision No. 131, dated 07.12.2009 of the Competition Commission (Guidance on the assessment of horizontal concentration under Council Regulation on the control of concentrations between undertakings (2004 / C 31/03)).
- Complaint Form (according to the model of the EU).

5.3 Annex 3: ACA Draft Legal Act Under Preparation⁸

The Competition Authority has foreseen to adopt and approximate respective regulations, which anticipate the exclusion of those categories of agreements, such as:

- "For the Agreement Categories of Research and Development" in compliance with the Regulation no. 2659/2000, dated 29 November 2000 (Dated 29.11.2000, effective date on 01.01.2001) of European Commission "For Implementation of Article 81/3 of the Treaty for the categories of Research and Development Agreement" 32000R2659, (EC) (OJ L 304, 05/12/2000 P.007-0012),
- Regulation "For the Agreement Categories of Specialization" in compliance with the Regulation no. 2658/2000, dated 29 November 2000 (Dated 29.11.2000, effective date on 01.01.2001) of European Commission "For Implementation of Article 81/3 of the Treaty for the categories of specialization agreements" 32000R2658 (CE) (OJ L304, 05/12/2000, P.0003-0006),
- Regulation "For the Agreement Categories of Technology Transfer", in compliance with the Regulation no. 772/2005 e dated 27.04.2004 (dated 27.04.2004, effective date 01.05.2004) of European Commission "For Implementation of Article 81/3 of the Treaty for the categories of Technology Transfer Agreements" 32004R0772 (EC) (OJ L123, 27/04/2004 P.0011-0017) etc.

⁸ Information based on communication between Zef Preci and ACA Chairwoman, November 2010.