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PROJECT AGAINST CORRUPTION IN ALBANIA (PACA)

TECHNICAL PAPER

**PRELIMINARY ASSESSMENT OF THE ALBANIAN COMPETITION
AUTHORITY FOR THE PURPOSE OF ANTI-CORRUPTION RISK
ASSESSMENT**

*Opinion of the Department of the Information Society and Action against Crime
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December 2010

CMU-PACA-01/2011

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This document has been produced with the financial assistance of the European Union. The views expressed herein can in no way be taken to reflect the official opinion of the European Union or the Council of Europe

INTRODUCTION/EXECUTIVE SUMMARY

This Technical Paper provides an overview of the functioning of the Albanian Competition Authority, investigations it has conducted and sanctions imposed, in order to yield a preliminary analysis of the risks of corruption to which the Authority is subject. The main findings of the study are the following:

- The legal framework is largely in line with the EU acquis and international best practices
- 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 either too vague or are not clarified sufficiently in subordinate legal acts or guidelines – unnecessarily providing room for corrupt behaviour
- 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, the Government appears able to ignore its recommendations, and almost none of the sanctions (fines) imposed by the CC to date have been enforced. While collection of fines may significantly improve with implementation of the latest amendments to the law, the ACA will be unable to perform its role optimally without a significant/radical change in the attitude of the Government and other institutions.

1 MAIN FUNCTIONS OF ALBANIAN COMPETITION AUTHORITY

In 2003, the Albanian Parliament established the country's system of competition regulation through the Law on the Protection of Competition (hereinafter the Competition Law), replacing the previous ambiguous and contradictory legislation. The law was amended in October 2010 to achieve closer approximation to EU directives.¹ The law generally implements the provisions of EU competition law and regulations, and is in line with the prerogatives of the Stabilization Association Agreement (SAA) concerning the internal market. The law regulates all competition issues with exception of trademark abuse which is regulated by the law comprehensively defines to whom the law applies and introduces the concept of abuse of dominant position, as well as establishing the Albanian Competition Authority (ACA), responsible for monitoring and preventing anti-competitive practices.

The status of the ACA as an independent public institution is based on the Constitution and 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, and the law attempts to ensure its independence through the criteria and procedures for appointing members of the Commission, including the conditions to be a member of the commission, as well as the prohibition of engagement of candidates in the management structures of political parties. The five members of the Commission are elected 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 provided by the law occurs and the Assembly chooses to dismiss the member through the same procedure as for election.

A candidate for the Competition Commission should meet certain requirements given by the law, including 15 years' professional experience. One of the conditions to be a member given by the article 20 of the law has been amended with a later law in 2006 but the wording of the initial formulation was more accurate, appropriate and clear. The law does not state any criteria regarding ethical qualifications of candidates, except that the candidate must not have been dismissed from his/her job or the civil service with disciplinary measures. This may be seen as insufficient taking into consideration the role and the responsibilities of a member of Competition Commission.

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).

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.

The 2006 National Competition Policy document defines the main goal of competition policy as to correct market distortions.² 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 Markets Investigation (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 if we take into account the scope of activity of this institution and its mandate provided by the law. The law is wide in its applicability, covering all types 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.

1.1 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 three main areas on which ACA investigations may focus are the following:

- *Market concentration.* This includes the monitoring and review of acquisition of controlling stakes, mergers and the creation of new undertakings, in other words market transactions and developments which may lead to or increase a dominant position in the market. All operators who plan a merger or acquisition of a controlling stakes must notify ACA within 30 days from the date of the agreement for merging or creation of a new undertaking in order to get the authorization if certain thresholds of turnover are exceeded thresholds radically lowered by the 2010 law.
- *Cartels (prohibited agreements).* The ACA is responsible for investigating possible cases of prohibited agreements. The ACA may prohibit agreements, but may grant exceptions in certain conditions given by the law.

² For more details see Annex No.1

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>

- *Abuse of dominant position.* The ACA monitors undertakings that hold a dominant position in the market and conducts investigations into suspected or alleged cases of abuse 'abuse with dominant position', which is prohibited by the Law.

Investigations may be initiated in three different ways:

- *Initiation of the administrative procedure based on the request/complaint of an interested party.* The main example of this is merger/acquisition applications.
- *Initiation of the administrative procedures on the ACA's own initiative.* This is generally based on ACA's own on-going market monitoring and analysis
- *Initiation of the administrative procedures on the request/complaint of third parties.* These may be submitted in written form or orally. The Competition Authority 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. The Commission determines the priority and schedule for investigations.

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 Official Bulletin.

1.2 Concentration of undertakings

The Albanian law defines the concentration and control of commercial undertakings, as set out by the EU Council Regulations. It imposes the duty of entities intending to merge or make acquisitions to notify this and apply for permission to the ACA where this would lead to a dominant position in the relevant market. It also defines and prohibits the abuse of dominant position.

The 2010 amendments massively lowered (by a factor of 10) the threshold at which parties must notify mergers or acquisitions. Concentrations of undertakings (mergers/acquisitions) must now be notified to the ACA if the combined turnover in the previous year of the enterprises merging was over ALL 7 billion globally or ALL 400 million in the domestic (Albanian) market, or the turnover of at least one participating undertaking was ALL 200 million in the domestic market. The thresholds were 70 billion, 800 million and 500 million previously.

1.3 Prohibited agreements (cartels)

The Competition Law prohibits all agreements which have as their object or effect the prevention, restriction or distortion of competition. Specifically, prohibited agreements are agreements to 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 law allows individual agreements to be exempted from prohibition under certain conditions when they provide benefits to the market and consumers. Agreements of negligible importance may also be exempted. Categories of agreement may be exempted on the basis of detailed Commission regulations. Although the conditions under which an agreements may be exempted are given by the law, space remains for subjective factors to influence such decisions.

1.4 Abuse of dominant position

The Competition prohibits the abuse of dominant position, and provides for a non-exhaustive list of examples of such abuse. The definition of what constitutes a dominant position matches with that provided by 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 dominant position may be committed by one or more undertakings, and is defined as:

- establishing, directly or indirectly, unfair prices of purchase or sale 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 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.

1.5 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 with 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.

1.6 Cooperation with other public institutions/agencies

Public institutions at central and local level should cooperate with ACA in order to supply with needed info and documents. In case of 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 at trade register which is maintained and updated by NRC. In addition, the ACA has signed a number of memorandums 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 or restrictions on competition. However, the Law does not state any obligations of such bodies with respect to recommendations the Commission issues, 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.

1.7 Sanctions, appeals and enforcement

Under the 2003 Law, if it identified violations the ACA could issue fines of up to 1% of the previous year's turnover for 'not serious infringements', or from 2-10% of turnover from the conduct being sanctioned if it constituted a 'serious infringement'. Under the amended Law, the fines for non-serious infringements remain the same, but the concept of 'non-serious infringement' has been clarified; the fine for serious infringements is defined as 'up to 10%'.

Serious infringements are the violations of the core requirements of the Competition Law – i.e. prevention, restriction or distortion of competition, abuse of dominant position, failure to comply with conditions of obligations imposed through Commission decisions. Non-serious infringements are defined as cases where undertakings: provide inaccurate, incomplete or false information in response to the request or decision of the Commission; do not provide information within the time limit specified in the commission's decision or on request of the Secretariat; provide inaccurate, incomplete or false statements, or inaccurate and incomplete information or documents; produce the required accounts or other business records in incomplete form during inspections; refuse to submit to or obstruct inspections; refuse to answer questions about the facts or answer incorrectly; break the seal authorized by ACA officials; or fail to notify a concentration, which under the 2003 law was defined as a serious infringement.

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

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 they file 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 hoped. 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.

1.8 Statistics

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”, while those on dominant position in the market were less. However, from January to October 2010 there have been 3 decisions on dominant position (an increase) and 4 on concentration (a decrease).

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

| Number of Decisions | Concentrations | Abuse of dominant position | Prohibited agreements | Exempted Agreements | Internal Regulations and Guidelines | Recommendations to public institutions | Decisions imposing fines | D |
|----------------------------|-----------------------|-----------------------------------|------------------------------|----------------------------|--|---|---------------------------------|----------|
| 13 | 2 | | | | 6 | 1 | - | |
| 17 | - | | | | 2 | 3 | 1 | |
| 14 | 4 | | | | - | 1 | 1 | |
| 25 | 9 | 1 | 3 | | 4 | 2 | 5 | |
| 29 | 11 | 1 | 1 | | 4 | 5 | - | |
| 36 | 8 | 1 | 2 | 1 | 2 | 10 | 2 | |
| 19 | 4 | 3 | 2 | - | 2 | 2 | 2 | |
| 154 | 39 | 6 | 7 | 2 | 20 | 24 | 11 | |

CA, 2010

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

1.9 Proceedings and Sanctions Imposed

1.9.1 Investigations and Decisions

From the examination of documentary sources is difficult to find detailed information about the investigations conducted by ACA before 2007. The Commission has conducted investigations and issued important decisions in several important cases of alleged market dominance or agreements in alleged violation of the law. These include investigations of market dominant position by Raiffeisen Bank in the Treasury Bills, and market sharing for third-party liability insurance (TPL), as well as the restricted market competition through the application of different conditions on trade regarding 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 of observations of high yields on Treasury Bills (i.e. expensive Treasury Bills). The investigation over possible abuse with dominant positions 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. Considering the high

level of treasury bills of that time and the dominant position of Raiffeisen Bank on this market, and the fact that the 'requirements' did not constitute any formal obligation for Raiffeisen Bank, the Decision might be regarded as over-lenient.

- 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 licence, which FSA did in 2007. The decision imposing the fine is still being contested in court.
- In 2009 the Commission approved the sale of the Albanian electricity distribution company OSSH to CEZ Group. The aftermath of the privatization has illustrated the limited influence of the Commission. For example, the Electricity Regulatory Authority (ERE) set electricity tariffs for 2010 without consulting the Commission, contrary to the Competition Law (then Article 69) and a Memorandum of Understanding between the Commission and the ERE.

In general, the Commission's decisions and statements suggest that there have been important cases in which it has either failed to act, or its actions (particularly recommendations) have been ignored, or sanctions imposed have not been enforced. An example of the failure to act may be the Commission's reaction to the decision in November 2010 by the Electronic and Postal Communications Authority (EKAP) to issue a 3G license to just one operator (Vodafone). On 9 December the Commission issued a press release stating that "[T]he granting of a single license even for a short period of time constitutes a restriction of competition..', and called on the Minister for Innovation, Information and Communication Technology (under which the EKAP falls) to grating licenses to other operators as soon as possible. Prior to the EKAP decision all four Albanian mobile operators (including Vodafone) had publicly called on the Government to issue licenses to more operators for a lower fee. While there is no indication of corruption in this case – the Government appears to be have been motivated by the prospect of a large fee for a single license – the response of the Commission in only issuing a press release appears to be weak, given its authority under the law to initiate a formal investigation of possible restrictions of competition.

1.9.2 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 (31 cases up to 31 January 2010) have neither been appealed by the sanctioned parties nor executed. Around 20% of cases (6 cases) that imposed fines 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 is 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, the Commission has secured through the courts the conversion of all decisions except two on fines 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

| Year | Enterprise | Fine (ALL) | Fine (% of Turnover) | Status of CC Decision |
|-------------|-------------------|-------------------|-----------------------------|---|
| 2.2005 | AMC | 160m | 1 | Returned by High Court to District Court |
| 5.2006 | ÇALIK, HOLD (BKT) | 6.5m | | Confirmed in High Court, not executed |
| 3.2007 | 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 |
| 1.2007 | AMC | 211.5m | 2 | In High Court |
| | VODAFONE | 242.6m | 2 | In Appeal Court |
| 2.2007 | PROCREDIT | 7.2m | | Confirmed by High Court, not executed |
| 2.2007 | 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 |
| | HALIL, | 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 |
| 2.2007 | KAJO,HALLKA | 30,000 | | Not appealed, under procedure to issue as executive title |

| | | | | |
|--------|-----------------------------------|--------------|--|---|
| 9.2009 | ALBANIAN AIRLINES, MAK shpk | 2.6m | | Not appealed, under procedure to issue as executive title |
| 0.2009 | BLOJA sha | 38.6m | | In Appeal Court |
| | ATLAS sha | 27.9m | | In District Court |
| 7.2010 | ARMO sha | 271.9m | | In District Court |
| 2.2010 | 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 |
| | TOTAL PENALTIES | 1.1bn | | |

ACA, 'Annual Report 2009 and Main Objectives for 2010', p. 35, available at: [http://www.caa.gov.al/file/publikimet/Annual%20report%20January-October 2010](http://www.caa.gov.al/file/publikimet/Annual%20report%20January-October%202010) 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 legal framework on competition protection law; 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

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.

2.2 Legal framework regulating ACA activity

Recent legal amendments of September 2010 have achieved further harmonisation as per the requirements of the Stabilization and Association Agreement and EU competition rules. Despite this, the following corruption risks may be identified:

2.2.1 Vague terms/conditions for evaluating/permitting concentrations/agreements

CC has the exclusive authority to authorize or prohibit a concentration. However, 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 space for discretion in CC decisions and the possibility of influence by external parties on decisions. A particularly striking example is Article 5 of the amended Law, which states that Commission issues internal regulations to allow exemptions to categories of agreements that are referred to in Article 4.1, i.e. 'agreements which have as their object or effect the prevention, restriction or distortion of competition...', i.e. by fixing prices, limiting production etc. This appears to provide the Commission with very wide discretion to permit the restriction of competition. In addition. The new Article 5 appears to be in contradiction with Article 84, which limits the types of internal regulations the Commission may issue, and does not include those referred to above.

⁵ Competition Law, Article 13.1.

⁶ Competition Law, Article 74.3d.

2.2.2 Discretion in setting fines

The authority of the CC to impose fines within a wide range (up to 10% of the previous year's turnover) also creates clear risks. These are exacerbated by the use of terms such as those mentioned above, in the absence of a clear methodology or guidelines for their interpretation, as well as a clear methodology for determining the size of fines in particular cases.

2.2.3 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 fulfill 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.

2.2.4 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 can not 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 wide space for corruption in the form of collusion of persons that control the government with business interests to ensure unfair favourable market conditions for the latter. The weakness of the Commission in this respect appears to have led to its resignation from attempts to assert itself, most recently relating to the recent Government decision to issue only one 3G mobile license, where the Commission issued a critical statement but has taken no further action.

2.2.5 The enforcement framework

In addition to any factors concerning the functioning of the ACA itself, it is vital to note the need for other institutions to function in order for Commission decisions to have the impact they are intended to have. In the context of corruption, the most important issue here is that to the extent the courts are affected by corruption, the confirmation of Commission decisions which are appealed will be undermined. Similar considerations apply to the enforcement of final court decisions by the bailiffs.

2.2.5 Other issues

Other issues of possible concern include

- The capacity of the ACA, particularly since the amended Law radically decreased the thresholds for notification of concentrations. Increasing the ACA's workload without an increase in resources might be seen as indirectly increasing risks of corruption.
- The lack of a binding cooperation with the National Licensing Centre and National Registration Centre to ensure that ACA has access to all data on registrations of companies and other commercial activities.

3 AREAS TO TARGET 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, as following :

3.1 Legal framework in the Field of Competition

As indicated in Section 4, the legal framework in the field of competition could be specified more, particularly the conditions for authorising concentrations or exempting agreements from prohibition, as well as rules for the setting of fines.

3.2 Operational Independence of ACA

To ensure the operational independence of ACA, it may be wise to consider an appointment process that is broader in the sense of the institutions proposing members (for example including the Constitutional Court or other institutions of key importance), and in which the required education and professional experience of the CC members is made more stringent. The expert believes specifically that the law should alter professional requirements of members to try and ensure a higher representation of lawyers in the Commission, and to require an educational background on European competition law. This would enhance the ACA's ability to defend its decisions (if necessary in court and against enterprises enjoying the services of the best lawyers), as well as assisting communication with other regulatory bodies, as well as with other the countries counterparts institutions.

3.3 Transparency

In order to increase the transparency and the enforcement power of ACA, it would be useful if the Competition Law required all legal acts regulating to ACA activity, as well as CC decisions should 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 the current law mandates.

4 RESOURCES AND SOURCES FOR RESEARCH

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source
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4. Annual Report for 2008 and Objectives for 2009, Tirana 2008, Source:
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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>
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<http://www.caa.gov.al/file/kuadri/Some%20additions%20and%20ammendments.pdf>

Stakeholders to Interview

| Institution | Executive Director | Website | Contact |
|---|--------------------|--|--|
| Public Agencies/ Institutions | | | |
| Regulatory Entity of Telecommunication | n.a. | | E-mail: info@ert.gov.al Tel: 259571 |
| Energy Regulatory Authority | Bujar Nepravishta | www.ere.gov.al | Tel/Fax: + 355 4 222963 E-mail: erealb@ere.gov.al |
| Financial Supervisory Authority | Elisabeta Gjoni | www.amf.gov.al | E-mail: konsumatori@amf.gov.al Tel: +355 4 2269 329 |
| Public Procurement Agency | Mursel Rraci | www.app.gov.al | Tel. & Fax. 23 04 34, Tel. 23 26 52, Email: infoapp@app.gov.al |
| 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 |
| National Registration Center | Eneida Guria | www.qkr.gov.al | Tel: +355 4 250066 Fax: +355 4 255532 E-mail: info@qkr.gov.al |
| High Council of Justice | Kreshnik Spahiu | www.kld.al | Tel./Fax.: 259817 E-Mail : office@kld.al |

| Institution | Executive Director | Website | Contact |
|---|--------------------|--|--|
| National Organizations / Consultancy and Law Firms | | | |
| PETROLIFERA | n.a. | www.gruppopir.com/en/la-petroliera-italo-albanese | Tel: +355 033 231100 / Fax 033 237800 E-mail: pia@gruppopir.com |

| | | | |
|-------------------------------|---------------------|--|---|
| 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 |
| Foreign Investors Association | Marinela Jazoj | www.fiaalbania.com/ | Phone/Fax: ++355 4 22 25 553 Mobile: 0682055818/ 0692034469 E-mail: fiaalb@albaniaonline.net |
| Deloitte & Touché | Maksim Caslli | www.deloitte.com/al | - |
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| 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 |

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|---|--------------------|--|---|
| Business Organizations/NGOs | | | |
| 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 |
| 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 |
| Albania Association of Banks | Gazmend KADRIU | www.aab.al | Tel:+355 4 2280 372 E-mail: secretariat@aab-al.org |
| KonfIndustria | Gjergj Buxhuku | | |

| Institution | Executive Director | Website | Contact |
|---|--------------------|--|--|
| Associations, NGOs | | | |
| Transparency international Albania | Lutfi Dervishi | Error! Hyperlink reference not valid. | Phone : +355 4 22 67 457 E-mail(s): leginet@albaniaonline.net |
| 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 |
| 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),
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- 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 personal Communication with ACA Chairwoman, November 2010.