

Introducing the Concept of Private Enforcement in Competition Law

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INTRODUCING THE CONCEPT OF PRIVATE ENFORCEMENT IN COMPETITION LAW

1. Introduction

In today's economy, protection of the free market and competition represents the nucleus of the European Union and developed countries. Adhering to the principles of free competition has ensured not only the opening up of national markets, but it has also enabled co-operation in other political areas.¹The significance of protecting the EU competition lies in the competences that member states have entrusted to the European Commission regarding the preservation of competition as well as the increased activity of the European Court of Justice and European lawmakers in this field.² The importance that the EU and member states have devoted to protection of the competition, is also reflected in the within the integration process of candidate countries that aspire to become part of the EU. All Stabilization and Association Agreements signed with candidate countries, like Serbia³, Croatia (now a member state)⁴ or Albania⁵, have paid particular attention to the protection of competition, not only by prohibiting and deterring forms of agreements that would distort the market, but also by harmonizing the national legislation with the *acquis*. Kosovo, being the last state, ratified the Stabilization and Association Agreement on 2nd of November, 2015, marking the first contractual agreement between Kosovo and EU.⁶ As a signatory party, the Republic of Kosovo has undertaken the obligation of approximating its national legislation to that of the *acquis* also in the field of protection of competition and free market.⁷ As elaborated below, the protection of competition, namely combating prohibited agreements which distortion the competition, is nowadays developed in two directions: public-administrative (public-enforcement) and private-civil (known as private enforcement). In Kosovo, however, the law on protection of competition recognizes only the protection of competition from the public point of view, although there are rumors that private enforcement can be practiced through ungrounded enrichment. In spite of this, no case has been filed with Kosovo courts regarding damages caused by prohibited agreements.

This report aims to analyze the system of EU competition protection by focusing on private enforcement and recent developments in this area, in order to analyze modalities of how this mechanism can be incorporated into the national legislation, namely how private enforcement can assist the Competition Authority in protecting competition and damaged parties in Kosovo. Finally, the report will offer a set of recommendations which should be considered by relevant stakeholders and Competition Authority towards strengthening the protection of competition in Kosovo.

2. Protection of competition from prohibited agreements

a) Protection of competition in general

Competition can only exist in countries with a free market economy and is based on the foundation when the law enforcement subjects exercise their freedom of action⁸. However, because of its complexity, all the attempts for an exact definition of the term "competition" have failed. Even

¹Thomas, S (2011). Der Schutz des Wettbewerbs in Europa – Welcher Zweck heiligt die Mittel?. Juristische Zeitschrift. p. 485.

²Ibid.

³ See: SAA Serbia. Title VI available at:

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

⁴SAA Croatia. Title VI available at:

<http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=584>

⁵SAA Albania, Title VI, available at:

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

⁶Law No. 05/L -069 on Ratification of the Stabilization and Association Agreement, available at:

<https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=11239>

⁷ Law No. 05/L -069 on Ratification of the Stabilization and Association Agreement, Article 74-75, available at:

<https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=11239>.

⁸Kling M/Thomas S (2016). Kartellrecht. München. p. 4

though competition is distinguished by some features, based on which the term of competition might be grasped. ⁹. These common competition features include:

- the existence of markets,
- presence of at least two applicants or bidders.
- who have opposite (non-cooperative) behavior among themselves, trying to improve their position at the expense of others ¹⁰.

With the existence of competition in the free market, the benefits are numerous and diverse. First, the existence of many market players positively affects the quality of products and services offered on the market given buyers have the opportunity to explore and choose the most desired product or service among many different choices. Also, from a large number of products, customers have the opportunity to choose the cheapest product or service. Thus, the competition affects the lowering of the prices for products and services. In order to escape this constant pressure, companies /enterprises in the market often make various deals with which they try to eliminate competition between them, thus setting the product prices, regional distribution of the markets, and, among others, the quantity of production.

Prohibited agreements encompass all "agreements of any kind concluded between enterprises with or without binding forces, decisions or recommendations of groups of enterprises as well as concerted practices between enterprises operating at the same level or at different market levels¹¹, which intend or may significantly affect the distortion of trade competition in the relevant market. Particularly, forbidden agreements, known as "hardcore cards",¹² are recognized for fixing purchase or sales prices, limiting or controlling production, markets, technical development or investments, as well as sharing of markets or supply sources. Such agreements are initially considered invalid, as their primary aim is to extinguish or restrict the market. On this note, these prohibited agreements between enterprises are also known as "cartels".

Regularly, the existence of prohibited contracts translates into inflated prices and lower quality of products or services, as well as undermines the innovative power of enterprises thus causing damage to the economy and especially to consumers.¹³ For this reason, the relevant state authorities, namely the administrative bodies, are keen towards protecting the fair market and competition. Their main responsibilities include the disclosure, extinction of cartels and sanctioning of the enterprises involved in cartel agreements.

b) Protection of competition in EU and EU Member States

Protection of competition by administrative bodies

As elaborated above, competition represents the economic and political backbone of the European Union. Traditionally, prohibited agreements/cartels in the EU and its member states are fought through administrative procedures by relevant administrative authorities by disclosing, prohibiting and imposing fines - known as the 'public enforcement'. The administrative combating of prohibited agreements in the EU is the competence of the European Commission. The level of importance that the EU has dedicated to the protection of competition is reflected in the increased activity of both the European Commission in detecting and sanctioning cartels and the European Court of Justice in the development of jurisprudence through its decisions. Constitutional status

⁹ Kling M/Thomas S (2016). Kartellrecht. München. p. 5-6.

¹⁰More about the competition term see: Mestmäcker E. Zwischen Lämmerweide und Wolfsrudel-Gedanken zur Naturgeschichte des Wettbewerbs. Zeitschrift für Wettbewerbsrecht. V. 1/2010.

¹¹ Law Nr. 04/L-226 Amending and Supplementing the Law no. 03/L-229 on Protection of Competition. Article 2.1. <https://gzk.rks-gov.net/ActDetail.aspx?ActID=9326>.

¹² As mentioned decisively in the article 4.1 of Law Nr 04/L-226. gzk.rks-gov.net/ActDetail.aspx?ActID=9326

¹³ Bundeskartellamt. Kartellverbot. Bundeskartellamt.

[bundeskartellamt.de/SharedDocs/Publikation/DE/Broschueren/Informationsbroschuere%20-%20Erfolgreiche%20Kartellverfolgung.html;jsessionid=C45BC054BAAE9F62D6269CB0D5B4A041.2_cid387?nn=3591496](https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Broschueren/Informationsbroschuere%20-%20Erfolgreiche%20Kartellverfolgung.html;jsessionid=C45BC054BAAE9F62D6269CB0D5B4A041.2_cid387?nn=3591496)

given to this area¹⁴ and legislative intensity, has made the protection of competition to be among the most regulated and harmonized areas within the EU acquis and its member states. The European Commission from 1990 to date has discovered dozens of cartels extending to two or more-member states. The Commission has so far sanctioned the enterprises involved in the cartel with over 26.7 billion Euros, of which only in the last four years were fined with over 8.4 billion Euros.¹⁵ It should be noted that for prohibited agreements or enterprises involved in cartels, the consequences of which occur only in a national or local market, competent for their investigation, detention and sanction are the national competition authorities.¹⁶ These authorities have investigated dozens of cartels and fines imposed included billions of Euros.. The German Competition Authority during three years (2014-2016) has discovered several cartels and consequently fined these enterprises with fines amounting to over 1.4 billion Euros¹⁷; in Austria in 2016 fines imposed amounted to 18.6 million Euros ¹⁸, while in France in 2015 fines imposed amounted to 1.25 billion Euros, reaching the national record ¹⁹. The increased activity of competition authorities reflects also the austerity of global competition, where the former prevents the creation of cartels as main deterrents of innovation development and competitiveness of national markets.

Protection of competition in private enforcement

In recent years, in addition to the administrative battle against cartels, the right of every individual to seek compensation for the damage caused by a prohibited agreement was also recognized and accepted. Since the Courage²⁰ and Manfred²¹ ruling, the European Union started recognizing this right at the European level. The adoption of the EU Directive no. 2014/104/EU in 2014 resulted in a unanimous recognition of this right in all the legislations of EU member states.²² According to this Directive, every person, physical or legal, has the right to seek compensation for the damage caused by participating enterprises/cartels in a prohibited agreement. Recognition of this right has led to the addition of private enforcement, alongside the public administrative enforcement, as a supporting mechanism in the fight against prohibited agreements and cartels.

c) Protection of competition in Kosovo

Kosovo Competition Authority

In 2004, the Assembly of Kosovo, as part of the provisional institutions of self-governance, adopted the Law no. 2004/36 on Competition. This law recognized the Competition Commission as the regulatory agency for the protection of competition. After the declaration of independence and the institutional decision to harmonize the laws partially or fully with the EU acquis, the Assembly of the Republic of Kosovo in 2010 adopted the Law no. 03/L-229 on Protection of Competition. In 2014, the latter was supplemented and amended by Law no. 04 / L-226 on Amending and

¹⁴Treaty on the Functioning of the European Union. Article 101,102.Consolidated Version to the Treaties of the European Union.: meiks.net/repository/docs/Traktati_i_Lisbones_-_Consolidated_Version.pdf.

¹⁵Competition Directorate General. Cartel Statistics. European Commission.
<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>

¹⁶ List of competition authorities in Europe see: Competition authorities in Europe. Bundeskartellamt. bundeskartellamt.de/EN/AboutUs/LinksAddresses_neu/Europe/Europe_node.html

¹⁷ Drucksache18/12760-Unterrichtung durch die Bundesregierung Bericht des Bundeskartellamtes über seine Tätigkeit in den Jahren 2015/2016 sowie über die Lage und Entwicklung auf seinem Aufgabengebiet und Stellungnahme der Bundesregierung. Deutscher Bundestag. F. VIII, 30.
<http://dip21.bundestag.de/dip21/btd/18/127/1812760.pdf>

¹⁸Tätigkeitsbericht 2016. Bundeswettbewerbsbehörde. F. 3.
bwb.gv.at/Documents/Taetigkeitsbericht%202016%20BWB_final.pdf

¹⁹Advocacy for an agile economy-2015 Annual Report Summary. Autorité de la concurrence. F. 7.
autoritedelaconcurrence.fr/doc/ra2016_uk_web.pdf

²⁰GjED. C-453/09 – Courage.

<http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30d661b0d856ae014ba3af5ff48cfbefe4d6.e34KaxiLc3qMb40Rch0SxyMb3r0?text=&docid=46604&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=1157115>

²¹GjED. C-295/04 - Manfredi.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004CJ0295:DE:PDF>

²²see: Directive 2014/104/EU Of The European Parliament And Of The Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union,

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=DE>

Supplementing the Law no. 03/L-229 on Protection of Competition. Kosovo has a law in the field of administrative protection of competition, which is harmonized with the EU acquis. However, the current legal framework does not regulate the private protection of competition -private enforcement-, namely the right of the damaged parties to seek compensation for the damage caused by cartels or prohibited agreements, as in the EU and its member states.

Protection of competition in Kosovo is entrusted to the Kosovo Competition Authority, which was established by the Kosovo Assembly in 2008. The former reports to the Assembly on annual basis regarding its operations and investigations. The Authority consists of the Chairperson of the Commission and four commissioners nominated by the Assembly of the Republic of Kosovo.²³ Due to lack of political will, the Authority for more than three years was dysfunctional in the absence of the election of the Commission members.²⁴ However, in June 2016, the Commission members were appointed by the Assembly.²⁵ As an independent regulator, the Authority has the responsibility and authority to enforce the Law on Protection of Competition, promote competition between enterprises as well as protect consumers in Kosovo. Particularly, the Authority 's responsibilities include investigation, disclosure and punishment of enterprises involved in prohibited agreements, namely enterprises that abuse their dominant positions.²⁶

Performance of the Competition Authority

The three-year failure of the Assembly of Kosovo to functionalize the Authority by electing members of the Commission has resulted in a poor performance of this authority compared to other national regulatory agencies. Given the sensitive field it regulates, this failure has also contributed towards reducing the competition in Kosovo's market, the burden of which is always carried by the Kosovar consumers. Even though functional, the Authority is facing some specific obstacles preventing the institution's performance from improving. The lack of experience and expertise of the Commission's members, political pressure, lack of parliamentary oversight, small budget and lack of investigative staff are just some of the obstacles that characterize the authority for the low number of decisions towards combating banned agreements and abuse of dominant positions²⁷. Without improving these impediments, the Authority's performance will continue to remain constant levels. Therefore, reinforcing the work of the Authority through private enforcement would represent a significant support to the work of this institution, following the case of EU and its member states.

²³ About us. Kosovo Competition Authority. <https://ak.rks-gov.net/?cid=1,11> w

²⁴ Competition Authority, three years without board. Zwri Newspaper. <http://zeri.info/ekonomia/72647/autoriteti-i-konkurrencas-tri-vjet-pa-bord/>

²⁵Article 4 and 11, Law no. 03 / L-229 on Protection of Competition. <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2727>

²⁶Article 4 and 11, Law no. 03 / L-229 on Protection of Competition. <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2727>

²⁷See more: Elshani D, Pula E, Ajeti D (2017). The Performance of the Kosovo Competition Authority. Policy Paper. Group for Legal and Political Studies. <http://www.legalpoliticalstudies.org/wp-content/uploads/2017/10/GLPS-Policy-Report-KCA-Performance.pdf>

3. Private enforcement

What is Private Enforcement?

According to a number of various reports, the continuous growth of markets and the number of enterprises are the main reason behind competition authorities in Europe and elsewhere being overwhelmed in fighting cartels and abuse of dominant position.²⁸ This has led to the necessity of finding other mechanisms which would complement the work of the administrative bodies towards preventing and punishing enterprises involved in cartels. Competition authorities' main goal is not only to preserve free market competition, but also to maintain its efficiency²⁹. On the other hand, protection of the damaged parties from cartels has remained unregulated until recently. The regulation of compensating the damaged parties by a cartel does not only serve the damaged parties but also creates a foundation of protection of competition and consumers. Thus nowadays, combating prohibited agreements functions not only through administrative sanctions imposed by administrative bodies, but also through civil-law fighting or otherwise known as 'private enforcement'.

Private enforcement functions

Private enforcement is a mechanism which enables the performance of a number of functions in protecting the competition, including the compensation for damage³⁰, preventive function³¹ and the function of complementing the actions of the competition authority³². Through the *damage compensation* function, full compensation of damage is intended for those individuals who have been damaged from a forbidden agreement.³³ From a criminal justice perspective the compensation of the damaged party is the sole purpose, whereas in the competition framework, this function aims to prevent enterprises to participate in cartels.³⁴ Another interrelated function of the private enforcement is also the *preventive function*. The latter, by enforcing the right of the injured party to seek compensation from the cartel, leads to such agreement being unfavorable³⁵. This said, apart from being sanctioned from the competition authority³⁶, those agreements/enterprises violating the Law on Competition must also fear the innumerable lawsuits by third parties in contractual relations with enterprises involved in cartel-namely anyone who has suffered from such prohibited agreement³⁷. From a different point of view, private enforcement also supports the competition authorities in their affairs by facilitating their work through civil lawsuits, and, simultaneously, developing judicial practices in terms of protection of competition – thus, the complementary and support function.^{38,39}

²⁸Emmerich V (2014). *Kartellrecht – Ein Studienbuch*. München. F. 100.

²⁹ Generally: Thomas S. der Schutz des Wettbewerbs in Europa – Welcher Zweck heiligt die Mittel. *JuristenZeitung* 10/2011. f. 486.

³⁰Ibid

³¹Schmidt C (1977). *Kartellverfahrensrecht-Kartellverwaltungsrecht*. Köln, f.328,329.

³² Bundeskartellamt. Private Kartellrechtsdurchsetzung – Stand, Probleme, Perspektiven – Diskussionspapier für die Sitzung des

Arbeitskreises Kartellrecht am 26. September 2005. Bundeskartellamt.

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

³³Krüger H (2007). Öffentliche und private Durchsetzung des Kartellverbots von Art. 81 EG. Wiesbaden. f. 212.

³⁴ Poelzig D (2012). *Normdurchsetzung durch Privatrecht*. Tübingen. F. 172.

³⁵ Ibid.

³⁶ In Kosovo, for a breach of competition law, an enterprise cannot be punished by a fine exceeding 10% of the total revenue the enterprise has realized in the last three years for which the financial report has been completed. More generally see Article 56, Law Nr. 03/L – 229 for the Protection of Competition. <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2727>

³⁷ European Commission, *Grünbuch Schadenersatzklagen wegen Verletzung des EU-Wettbewerbsrechts*. European Commission. f. 4. <http://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:52005DC0672&from=DE w>

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³⁸ Ajeti D (2016) *Schadenersatz für Preisschirmschäden im Kartellrecht: Preisschirmschäden im deutschen und europäischen Kartellrecht*. AV Akademiker Verlag. f. 5,6.

³⁹ Bundeskartellamt. Private Kartellrechtsdurchsetzung – Stand, Probleme, Perspektiven – Diskussionspapier für die Sitzung des Arbeitskreises Kartellrecht am 26. September 2005. Bundeskartellamt. F. 3.

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

4. Prohibited agreements and damages under EU law

As elaborated, the main objective of this paper is to analyze the private enforcement in the EU, and the possibility of its incorporation in the Kosovo competition framework. For this purpose, this section will analyze the types of damages caused by prohibited agreements, the active and passive legitimacy, as well as some important procedural issues.

Types of damage caused by cartels

According to Boyer and Kotchoni (2015), the price of products and services on the market, due to prohibited agreements and/or cartels, increases on average by 15%.⁴⁰ Such a price increase damages not only the enterprises but also the buyers -irreversible damage- the compensation of which can only be demanded by the injured party. The term damage means diminishing someone's wealth (ordinary damage/harm); obstructing the growth (profit loss) as well as causing immaterial damage⁴¹ as a result of a violation of a legal or contractual provision governing this area. In the case of competition law, the free market competition and its participants are the main subjects to be protected. In this line of thought, any violation of the Law on Competition damages free market competition including its participants.

Damages caused directly by market participants and competitors of the enterprises involved in the cartel

The main purpose of the cartel is to increase economic gains. Regardless of the agreement reached (rising prices, lowering production, geographical distribution of markets), the ultimate goal of the enterprises involved in the cartel is to increase profits. Usually, the price increase is transferred to 'the buyers' which purchase the products and services from the enterprises involved in the cartel, so they can sell them to the final customers. In this case, 'buyers' find themselves in front of two scenarios: in the first scenario, the buyer takes the burden of the price increase, thus experiencing a profit loss, in order to retain its customers; whereas in the second scenario, the buyer transfers the burden of the price increase to customers. In the second scenario, there is always the risk that customers will not accept such price burdens, thus will seek for the same products elsewhere. It should be noted that in both cases, the 'buyer' suffers damages, in the form of profit loss, directly from the enterprise involved in the cartel. In addition, enterprises operating in the same sector may also suffer damages from the cartel-owned enterprises. On this note, when enterprises lower the prices of products through prohibited agreements, the enterprises not involved in the cartel would be obliged to lower their prices as well in order to retain their customers. Thus, according to the ECJ ruling in the Courage case "each individual" that is damaged by such agreements has the right to be compensated for the damage, including also the competing enterprises in the market.

Damages caused by "passing on defense"

Since the ECJ ruling in the Courage⁴² and Manfred⁴³ cases, the right of "each individual" to claim compensation for damages caused by a cartel is recognized in EU and its member states. However, it should be noted that this right is recognized only for those who have been directly damaged from enterprises involved in prohibited agreement.

On the other hand, there are frequent cases when the increased price from a cartel is transferred to the other participants in the market - known as the effect of passing-on defense. Passing-on defense or the transfer of damage represents the case when the buyer, directly supplied by the enterprise involved in the cartel (direct buyer), carries the increased price from the cartel either fully or partially to the other chain buyers (indirect buyers).

⁴⁰Boyer M/Kotchoni R (2015). How much do cartels over charge? .CIRANO Scientific Series. F. 28-29. <https://irano.qc.ca/files/publications/2015s-37.pdf>

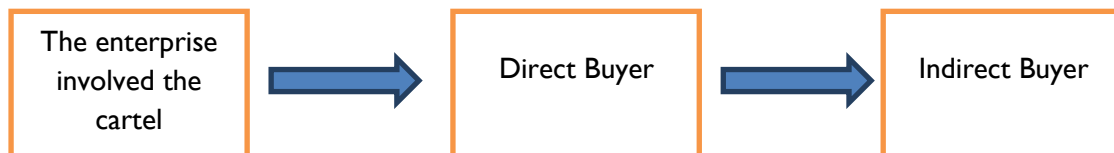
⁴¹ Article 137.1, Law no. 04 / L-077 on Relations and Obligations. <http://gzk.rks-gov.net/ActDetail.aspx?ActID=2828>

⁴² GjED. C-453/99-Courage. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61999CJ0453&from=EN>

⁴³ GjED. C-295/04-

Manfredi.

<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=56474&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=625262>



To clarify the effect of the passing-on defense an example will be presented: Manufacturer A that is part of a cartel, along with other enterprises, decides to increase its product price by about 15%. Thus, Manufacturer A sells this product to wholesale enterprise B with a 15% price increase. Enterprise B, on the other hand, bearing in mind that selling a product with 15% increase in price is quite difficult and might lead to the loss of customers, decides to sell this product to enterprise C with only 8% increase in the price. Following the same logic, the latter sells the product to customers with only 6% increase in price, thus bearing the burden of the 2% price increase. As portrayed, the transfer of the price in passing-on defense does not damage only the final consumer but also all those enterprises included in the sale chain. This said, this case represents a distribution/transfer of the damage in a couple of levels, caused by the banned cartel agreement. In the European Union, according to the Chapter IV of the EU Directive⁴⁴, the effect of transferring the damage from prohibited agreements has been recognized within the competition legal framework, thus also the right to sue the enterprises involved in the cartel, and the assessment of damages caused

Damage caused by the "Umbrella Pricing" effect

As elaborated above, according to EU acquis, the EU member states, through primary and secondary sources, have recognized the right of direct and indirect buyers/enterprises (including customers) to claim the compensation of damage caused by enterprises involved in cartel and those abusing with their dominant position. However, it should be noted that there are particular side effects caused by the existence of cartels and abuse with the dominant position in the market, namely known as the 'umbrella-pricing effect'. Umbrella-pricing effect is manifested when an enterprise in the market not involved in the prohibited agreement or cartels, raises the price of its products or services after noting an increase in in market prices due to the prohibited agreements or cartels...⁴⁵ Thus, the umbrella pricing effect happens when a market share, not part of the prohibited agreement or cartel, indirectly increases prices of products and services.⁴⁶ The price increase of cartel-generated products and services creates an "umbrella" which, besides the cartel enterprises, provides the opportunity for other enterprises to benefit by increasing prices; thus, their profits as well.⁴⁷ Said this, these enterprises indirectly benefit from the protection of the 'cartel umbrella', without being part of prohibited agreement. Such enterprises are usually small and medium-sized enterprises with small market relevance, exploiting possibilities for profit maximizing.⁴⁸

On the other hand, the price increase by the cartel has an impact also in other chain enterprises, excluding those enterprises which benefited from the umbrella effect, by purchasing the products with the increased prices. Consequently, these price-increased products are sold to the final customers.⁴⁹ Thus, under the umbrella-pricing effect, both direct and indirect buyers suffer damages as a result of prohibited agreement. Until 2014, neither the EU nor any EU member state recognized and acknowledged the damages caused by the 'umbrella pricing' effect. According to lawyers, there was no proof of causality between damages caused by the umbrella pricing effect and violation of the law (the cartel agreement), given a third event (price increase from non-cartel

⁴⁴Directive No. 2014/104/BE. <http://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32014L0104&from=DE>

⁴⁵ Bundeskartellamt. *Private Kartellrechtsdurchsetzung Stand, Probleme, Perspektiven*. 2005, F. 3-4, https://bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/Bundeskartellamt%20-%20Private%20Kartellrechtsdurchsetzung.pdf?__blob=publicationFile&v=4

⁴⁶ Ajeti D (2016). *Schadensersatz für Preisschirmschäden im Kartellrecht: Preisschirmschäden im deutschen und europäischen Kartellrecht*. AV Akademikerverlag, F. 6.

⁴⁷ Beth H/ Pinter C. *Preisschirmeffekte: Wettbewerbsökonomische Implikationen für kartellrechtliche Bußgeld- und Schadensersatzverfahren*. *Wirtschaft und Wettbewerb*. 2013, F. 229.

⁴⁸ Logemann H (2009). *Der kartellrechtliche Schadensersatz : die zivilrechtliche Haftung bei Verstößen gegen das deutsche und europäische Kartellrecht nach Ergehen der VO (EG) Nr. 1/2003 und der 7. GWB-Novelle*, Berlin. F. 237.

⁴⁹Inderst R/Thomas S (2015). *Schadensersatz bei Kartellverstößen*. F. 306.

enterprises) disrupts the causality relationship between these two.⁵⁰ However, this argument was dismissed from the European Court of Justice in 2014, in the Kone case, which led to the acceptance of damages caused by the umbrella pricing effect and the right for compensation of damaged parties.⁵¹ Since then, the EU member states have started to implement this ruling also in their national law.

The enterprises involved in cartels, as a result of prohibited agreements, cause various damages including the loss of wealth of direct buyers; damages caused to indirect buyers through the passing on defense or damage transfer; and damages caused to enterprises -not part of the cartel- through the umbrella pricing. The European judicial practice and EU directive no. 2014/104 recognizes all these damages caused as a result of prohibited agreements. Recognition of these damages and, most importantly, of the right to be compensated is a significant achievement which, in general, positively affects the protection of free market competition in general.

Kosovo, despite the legislative framework governing the competition field, has not regulated yet the above-mentioned damages. Recognition of the latter caused by prohibited agreements, in particular from 'passing on defense' and 'umbrella pricing', would significantly improve the free competition in the market. In particular, the effect of Article 4.1 of the Law on Protection of Competition is fairly limited if individuals and enterprises do not have the right to claim compensation for damages caused by prohibited agreements. Given the recognition of such damages are of civil nature, they do not pose any financial implication or administrative burden. Another positive effect stemming from the recognition of such damages is the ability of businesses and consumers to be compensated for damages caused by prohibited agreements. Thus, policymakers should establish the legal basis by which any natural or legal person in Kosovo is allowed to seek compensation for those damages caused as a result of the violation of the law by enterprises involved in cartels.

5. Passive and active legitimacy

This section of the report will elaborate more on the active and passive legitimacy, specifically who has the right to seek compensation for damages (active legitimacy) and to whom this claim should be addressed (passive legitimacy). The active legitimacy presents the right of an individual, whom rights has been violated, to seek legal enforcement in the court proceedings. While the passive legitimacy is the person to whom the claim is directed.⁵²

Active Legitimacy

Since the ruling of the European Court of Justice in the Courage Case, Manfredi, and Kone, as well as with directive no. 2014/104/EU, active legitimacy is now known to any individual who has suffered damage as a result of the violation of the provisions of the competition law⁵³. Generally, there are two levels of damages: the horizontal -among competitors-, and vertical one- among buyers of the enterprises involved in the cartel⁵⁴. Based on the types of damages elaborated above, four types of injured groups can be identified, which are entitled to the active legitimacy: competitors, direct and indirect buyers, and damaged enterprises not involved in the cartel.

The first group includes the competitors of the enterprises involved in the cartel. They have the right to seek compensation for the damages caused as a result of the violation of the competition law. The second group of the damaged includes the enterprises directly damaged by the cartel

⁵⁰Alexander Ch (2010). *Schadensersatz und Abschöpfung*. F. 388-389.

⁵¹GjED. C-557/12- Kone.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=153312&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1078732>

⁵²Aktivlegitimation. JuraForum. juraforum.de/lexikon/aktivlegitimation

⁵³Article 3.1. Directive No. 2014/104/BE.

<http://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32014L0104&from=DE>

⁵⁴Inderst R/ Maier-Rigaud F/ Schalbe U (2013). Quantifizierung von Schäden durch Wettbewerbsverstöße. F. 12 f.

<http://www2.wiwi.uni->

[frankfurt.de/fileadmin/user_upload/dateien_abteilungen/abt_fin/Dokumente/PDFs/Allgemeine_Dokumente/Inderst_Downloads/Competition_IO/Quantifizierung_von_Schaeden_durch_Wettbewerbsverstoesse_2013.pdf](http://www2.wiwi.uni-frankfurt.de/fileadmin/user_upload/dateien_abteilungen/abt_fin/Dokumente/PDFs/Allgemeine_Dokumente/Inderst_Downloads/Competition_IO/Quantifizierung_von_Schaeden_durch_Wettbewerbsverstoesse_2013.pdf)

enterprises, otherwise known as a direct buyer. According to the Directive no. 2014/104/EU, the direct buyer is any physical or legal person who has purchased a product or service those enterprises violating the provisions of the competition law.⁵⁵ The third from group includes all buyers who have suffered indirect damages stemming from enterprises involved in cartel. According to Directive Nr. 2014/104/EU, indirect buyers are either physical or legal persons who purchased the product or service from the direct buyer or the chain buyers – but not from the cartel enterprises.⁵⁶ Meanwhile, the fourth group entitled to active legitimacy includes all those buyers who have suffered from the effect of umbrella-pricing, i.e. buyers who have purchased the products or services from enterprises not included in a cartel, but which increased the prices of their products and services consecutively following similar action of from cartel enterprises.

Passive legitimacy

This report elaborated how the EU and its member states through private enforcement have managed to strengthen the fight against prohibited agreements and abuse of dominant position by increasing the number of active legitimate groups entitled to claim the right to compensation for damage caused. This section will try to provide answers for the question how the enterprises involved in a prohibited agreement or those abusing with dominant positions will be held accountable for the damages caused and the injured parties?

EU legislative framework has regulated the area of civil liability of violators of legal provisions regarding the competition law. First of all, an explanation of the term ‘enterprise’ will be offered. It should be noted that the term enterprise in the competition law differs from the term enterprise in commercial law. According to Law no. 04/L-226 on Amending and Supplementing the Law no. 03 / L-229 on Protection of Competition, the enterprise is any business activity regardless of its organization or management from; a public enterprise established to perform the activities for the public interest; and any other natural or legal person or state authority that carries out economic activity regardless of whether its is or it is not a business entity.⁵⁷ In general, according to the directive no. 2014/104/EU, the enterprises involved in the cartel are jointly and liable for the damages caused by the cartel.⁵⁸ This responsibility is inherent in the civil law with regard to the damages caused, as regulated by the Law on Obligational Relationships ⁵⁹. Accordingly, each company in the cartel externally is responsible for all the damage caused, whereas internally they are responsible depending on the severity of the fault, and their share/participation in the cartel. However, the European lawmakers have foreseen certain exemptions from such responsibility. Specifically, small and medium-sized enterprises that hold less than 5% of the market during the existence of the cartel are liable only for the damages caused to their direct and indirect buyers.⁶⁰ In addition to this condition, these enterprises must demonstrate that the application of the normal rules of joint and several liability would damage the value of the enterprises and their economic viability.⁶¹ This rule, however, does not apply if the enterprise that meets the above conditions has been the leader of the cartel; has persuaded other undertakings to be part of this activity, and, if the enterprise has already violated the provision sof the competition law ⁶²Such regulation aims to preserve the small and medium-sized enterprises from huge financial burden, which would otherwise result in a loss of their capacities and, consequently, their possible of shutdown. . Such an exception would be welcomed also for enterprises operating in Kosovo, where the backbone of economy is the small and medium enterprises, responsible for the majority of economic activity in Kosovo. Another exception of joint and several liability is the privilege offered to the cartel enterprises that expose the prohibited agreement. While the legislative framework of the EU, its

⁵⁵Article 2.23. Directive No. 2014/104/BE. <http://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32014L0104&from=DE>

⁵⁶Ibid. Neni 2.24.

⁵⁷ Article 2.2. Law No. 04/L-226 Amending and Supplementing the Law no. 03 / L-229 on Protection of Competition. <https://gzk.rks-gov.net/ActDetail.aspx?ActID=9326>

⁵⁸Article 11 (1). Directive 2014/104/BE.

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=DE>

⁵⁹Article 190.1.: “For the harm that some people have caused together, all participants respond solidly”, Law no. 04/L-077 on Obligations and Relations, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2828>

⁶⁰Article 11 (2) a), Directive 2014/104/BE.

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=DE>

⁶¹ Ibid. Article 11 (2) b).

⁶²Ibid, Article 11 (3) a), b).

member states, and of Kosovo recognize privileges for these enterprises in the form of release or reduction of disciplinary measures, this privilege is also transferred to the other side of the coin - compensation for caused damages. On this note, these enterprises are liable only for their direct and indirect purchasers⁶³. However, if other damaged parties do not get fully compensated from the other cartel enterprises, then the former has the right to ask for compensation also from the enterprise which exposed the cartel agreement. ⁶⁴ Such legal provisions aim to extinguish the fear associated with exposing prohibited agreements and cartels. This is quite reasonable given most of the prohibited agreements are usually exposed from enterprises which are included in cartels and prohibited agreements.⁶⁵

The legislative framework of the EU and its member states, namely the active and passive legitimacy or the right to claim the damages caused by the cartel enterprises, has led to the reward of many individuals who suffered damages from prohibited agreements. Thus, the recognition of these damages has increased the warning effect for the enterprises involved in the cartel. On this note, Kosovo needs to make a progress regarding the terms of recognizing active and passive legitimacy for the damaged parties and violators of the law on protection of competition. Such legal provisions do not pose financial implications for the state budget, given this can be regulated and facilitated through the private enforcement mechanisms.

6. Important procedural issues

Follow-on Nature Claims

Recognizing the right of the injured party to seek compensation for damages caused by a prohibited agreement leads to the problem of proving the violation of the law on protection of competition and consequently the damage caused by the violation of the law. The inability of direct and indirect purchasers to prove that the law on protection of competition has been violated, thus the compensation for damages caused due to prohibited agreements, there was the need for a mechanism which would assist the potential injured parties towards proving the violation of the law on protection of competition. Most of the civil lawsuits against the violations occur after the agreements are announced as prohibited, known as Follow-on-Lawsuit. The latter includes the lawsuits or compensation of damages caused which occur right after the decisions of the competition authority to sanction and prohibit the existence of a cartel.⁶⁶ For this purpose, the EU acquis has obliged the courts to accept the final decision of the competition authority - which proves and sanctions the existence of the cartel - as indisputable and final evidence. The rationale rests upon the fact that it is much more difficult for the injured parties/plaintiffs to prove the existence of a prohibited agreement compared to the competition authority which has the mandate as well as the professional capacities⁶⁷. Such an adjustment is also necessary for the case of Kosovo, given this would facilitate the process for injured parties to prove the violation of the law as well as damages caused to them.⁶⁸

Proof of the of the damage degree caused by the forbidden agreement

The proof of the damage degree is one of the biggest challenges in the judicial process. Direct buyers must hypothetically prove the increased price by the cartel, and the circumstances proving that they have been affected by a cartel; while indirect buyers, amongst other things, must witness

⁶³Article 11 (4), Directive 2014/104/BE.

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=DE>

⁶⁴ Ibid.

⁶⁵The exemplary case currently serves to disclose the banned deal of German car makers, where it is suspected that the VE firm discovered the prohibited agreements it had with other firms such as Audi, Porsche, BME und Daimler- now known as the "5- five". According to the media, this fifth since the 1990s has held over 60 working groups with more than 200 employees employed in these firms. See more German Weekly Spiegel, <http://spiegel.de/wirtschaft/soziales/volkswagen-audi-porsche-bmw-und-daimler-unter-kartellverdacht-a-1159052.html>

⁶⁶Kling M / Thomas S (2007). *Kartellrecht*, München. F. 853.

⁶⁷Kling M / Thomas S (2007). *Kartellrecht*, München. F. 853.

⁶⁸Wissenbach K. Schadensersatzklagen gegen Kartellmitglieder-Offene Fragen nach der 7. Novellierung des GWB. *Beiträge zum Transnationalen Wirtschaftsrecht*, Vvllimi 60. F. 22.

and proof the price transfer made at their expense.⁶⁹ Therefore, according to the directive no. 2014/104/EU, each state has the autonomy to regulate on its own the procedure of proof.⁷⁰ However, the directive requires that the degree of proof should not be so high as to make it difficult to prove the damage.⁷¹ Also, courts should be given the opportunity to assess the damage caused, of course, based on provided evidence.⁷²

Regarding the method of measuring the damage caused, the European Commission in 2013 issued a practical guide which determines the extent/degree of damage for the compensation of damage claims caused by the violation of the provisions on protection of competition (in the case of the EU: Articles 101 or 102 of the Treaty on the Functioning of the European Union).⁷³ Generally, there are several methods of quantifying the damage caused. The most popular and used ones by parties and courts are the "benchmarking methods". According to these methods, the observed data (such as the price, sales volume, profits or other economic variables) in earlier markets or markets not included in prohibited agreement are used as a reference point for the hypothetical scenario that would exist without the violation of the law.⁷⁴ There are several methods of comparison, among which the most popular are:

- Comparison of the same market before or after the violation of the competition provisions (prohibited agreement) - time comparison of markets;
- Comparison of a market other than the one where the infringement was committed, but geographically similar - geographical comparison of the markets;
- Comparison of a market other than the one where the infringement was committed, but similar products or services - comparison of the markets by product.
- Lastly, there is the possibility of combining time, geographical or product comparison altogether - name the combined comparison.⁷⁵

In addition to the above-mentioned comparison methods, there is also a market simulation method which, through various market simulations, aims to achieve the hypothetical increased priced by the prohibited agreements.⁷⁶ This method, even though questionable and not legally regulated, it is used by courts and parties to calculate the damage caused by prohibited agreement.

Proving that there has been a violation of the law on protection of competition and, therefore, the calculation of the damages caused, are the most difficult parts of the private enforcement mechanism. For this reason, the EU lawmakers have accepted the follow-on lawsuit to prove the violation of the provisions relating to the protection of competition. Also, the Directive Nr. 2014/104/EU instructs the EU member states to specify the easiest criteria for determining the degree/level of the damage. Such provisions should not, however, constitute a barrier to the injured parties, and should leave room for the court to make a self-assessment of the damages caused. Otherwise, the regulation of private enforcement, in the case of Kosovo, would not be efficient. On this note, the law on contested procedure provides a good basis; however, the nature of civil competition disputes has several other features the regulation of which should be done within the law on protection of competition.

⁶⁹ Schweitzer H (2013). *Schadensersatz im Europäischen Kartellrecht*. Zentrum für Europäisches Wirtschaftsrecht. F.22. jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Sonstige/Zentrum_fuer_Europaeisches_Wirtschaftsrecht/Schrift_enreihe/Heft_212_Schweitzer.pdf

⁷⁰Article 17. Directive no 2014/104. <http://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32014L0104&from=DE>

⁷¹Ibid.

⁷²Schweitzer H (2013). *Schadensersatz im Europäischen Kartellrecht*. Zentrum für Europäisches Wirtschaftsrecht. F.22. jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Sonstige/Zentrum_fuer_Europaeisches_Wirtschaftsrecht/Schrift_enreihe/Heft_212_Schweitzer.pdf

⁷³ European Commission. Praktischer Leitfaden zur Ermittlung des Schadensumfangs bei Schadensersatzklagen im Zusammenhang mit Zuwiderhandlungen gegen Artikel 101 oder 102 des Vertrags über die Arbeitsweise der Europäischen Union. http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_de.pdf

⁷⁴Ibid. F. 17.

⁷⁵Ibid.

⁷⁶ Competition Competence Report. *Berechnung von Schadensersatzanforderungen*. European E & M Consultants. F. 3. mc.de/fileadmin/migrated/content_uploads/Kartell_Schadensberechnungen_03.pdf

7. Conclusion and Recommendations

Nowadays, the public enforcement is not seen as the only mechanism used to protect competition from prohibited agreements. Despite the fact that the role of competition authorities continues to be of crucial importance, private enforcement continues to play a crucial role. Initially, private enforcement offers the chance for a compensation for the injured parties. In addition, it also warns the enterprises that by joining the cartels, in addition of fines by the competition authority, they might face numerous claims from potential injured parties, whose compensation might even exceed the penalty imposed by the competition authorities. Private enforcement helps to protect the free market competition and, above all, it enables the injured parties to seek compensation for damages caused by a prohibited agreement.

Recommendations

- ✓ Kosovo, as an aspirant country to become a member of the European Union, must make profound legislative changes in the field of economy, with special focus on protection of competition. The latter, being the backbone of the EU markets, is one of the most regulated area, and consequently, one of the main conditions which should be integrated and harmonized within the national legislation of potential candidate countries.
- ✓ Kosovo policy makers should make amendments to the law on protection of competition. These amendments should be oriented towards recognizing the right of the damaged parties to seek compensation for such damages stemming from the violation of the law on protection of competition.
- ✓ The Law on Protection of Competition should recognize all types of damages caused by the violation of the law governing the protection of competition, including damages caused to co-competitors, direct buyers, as well as damages caused to direct buyers through passing on defense and by the umbrella pricing effect. By recognizing these damages, the main principle of competition -established by the European Court of Justice in the Courage, Manfredi and Kone case- can be functionalized by recognizing the right to damage compensation for "any individual who has been harmed by violation of the Law on protection of competition".
- ✓ The legislative framework in Kosovo should recognize the passive legitimacy of enterprises involved in the cartel. In particular special attention should be given to provisions of the EU Directive no. 2014/104/EU, which provide some exceptions for the enterprises exposing the cartel, and small and medium-sized enterprises involved in the cartel which do not cover more than 5% of the market share. Such provisions aim to incentivize enterprises involved in the cartel to expose the existence of the cartel and prohibited agreements. In addition, these provisions aim to also preserve the small and medium enterprises as the main pillar of the European economy, but also that of Kosovo.
- ✓ Finally, private enforcement disputes in the competition area require special procedural rules which differ from those of public-administrative law. In this regard, the policy makers in Kosovo should acknowledge the Competition Authority's decision as evidence that there have been certain violations of the competition law in the market, and should provide smoother conditions to prove the allegedly damage caused to the injured party. In addition, courts should have the opportunity to assess the damage caused, and familiarize with the methods of calculating the damage caused stemming from the violation of the law on protection of competition.
- ✓ Relevant institutions should increase the budget allocated to the Authority, enabling them to further increase the number of their investigative staff. On the other hand, the Kosovo Assembly should be more dedicated regarding its oversight role on the Authority, thus increasing overall transparency and accountability in the competition field.

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Policy Analysis

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