Albanian process to EU integration and the free market legal reform

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Abstract

The establishment of the free market and fair competition is a challenge for many countries aiming for accession to the EU, because this model helps in the consolidation of democracy, rule of law, economic development and protection of human rights. After 90s Albania has undertaken a series of initiatives to reform its internal market with new regulations in conformity with EU standards with a view to fulfill the duties of the approximation of legislation as the process of integration needs. Creating a free market and fair competition is accompanied in Albania with great legislation effort, which not only have had to reform market system in the country, but also to harmonize the needs of citizens in terms of new open market, globalization and the rules of EU in this respect. This paper aims to highlight all legislative procedures followed to improve the market system and to guarantee a fair competition in the framework of harmonization with EU rules in order to set conclusions about the current situation in this field.

Keywords: Albania, EU, Integration, Free legal market.

Introduction

The Community discipline of competition has played a very important role in creating the Steel and Coal Community, and is configured as one of the key instruments through which the European Community has persecuted its goals for economic integration and the creation of a single European market.
Although the European Community has been enlarged with other European countries, reaching the present number of 28 members, this enlargement has not produced substantial consequences on competition rules. Both the principle of free competition and that of the market economy have continued to be ranked among the basic principles of the Community. The European Community Treaty ECT has indeed ranked first among the goals of the Community "the creation of a common market", thus acknowledging a special importance to the free competition and not to the distorted one (Article 3, ECT). In the framework of the internal market the implementation of the community rights should be achieved through the creation and the operation of a system based on the principles and rules of competition and not through the intervention either of the community organs or the member state organs (Bastianon, 78, 2005).
On the other hand the choice in favor of the market economy and undistorted competition has been nowadays embraced by all industrialized countries. The community system of competition presents a special importance not only in terms of

the importance of the economic field in which it is applied, and the development achieved in 50 years, but also in the influence it has exercised on member countries' legislation. Starting from the 80's, there has been a broad process of approximation of national laws through the borrowing of similar or identical provisions to article 81 and 82 of the ECT (Bartole, 57, 1993). As a result of this process the competition law has become an essential ingredient of the European Union institutional framework. This is testified by the fact that among the commitments that member countries are required to undertake in order to become new members of the European Union, starting from May 1, 2004, there is the obligation to enact a national antitrust legislation, compatible with the European legislation on competition and also the obligation to establish a new authority which will ensure the implementation of this normative. Therefore, this paper examines how the centrality of the free discipline principle is reflected also in the Albanian system and thus being transformed into a pillar towards the Integration into the EU.

The first legal reform on market protection in Albania

The first normative on market protection in Albania, the law no.8044, of year 1995 had no precedents in the Albanian system, but it appeared as a new regulation that marked a new stage in the history of state intervention in the economic activities allowing even the Albanian system, at least formally, to become equal with the European systems that provided a discipline on the protection of the free market. I will try to briefly analyze how the first discipline, even though apparently in opposite direction with the European discipline, paved the way for the transition into the current discipline on the protection of market and competition in Albania.

The law took effect in January of year 1996 and was repealed by law n.9121 dated 28.07.2003 "On the Protection of Competition." The first law was completely a novelty for the Albanian system of law. It provided the prohibited agreements for which there was no possibility of exemption from prohibition, the dominant position which was in itself considered prohibited as well as the activities of concentration that created a dominant position in the market. Although this regulation was presented as very strict and not in line with the European discipline of competition, we really need to analyze not only the whole social, economic, political and legal situation under which this discipline came into being also its purpose. We should consider that the bill was drafted in 1994, only three years from the former totalitarian regime, from a totally centralized economy where the terms "private property and economic freedom" didn`t exist at all. On a formal basis the free market had begun to be created three years ago, but as a matter of fact in those years the market in Albania was in a state of real chaos (Duka, 128, 2007). The legislator of that time was aware of the situation.

The first discipline on competition was drafted with a fixed purpose. Lack of prediction of the system of exemption for prohibited agreements sought to hit hard and not to leave legal spaces to the abusive situations that dominated the market. With the severity in punishing the dominant position the legislator sought to fight monopolies by favoring the entry into the market of an increasing number of enterprises, by trying not to allow the privatization process of becoming just a transfer of the dominant

position from the State to the private sector (Angjeli, 24, 2007). So, analyzed from this viewpoint this discipline even though it is a strict one and not in line with the corresponding European discipline, actually responded to a social and economic necessity that was "the need to create a market" (Areeda, 39, 2004). Based on this need we can assert that the function of the first law was that of protecting the market as a form of market and economy development as a whole.

I am of the opinion that the Albanian legislator had it clear, arising from the tendency of the Europeanization that had swept Albania since 1991, that once the market mechanisms would become stable and the market would function as a market should function in a market economy system, then he would intervene again with a new legal adjustment which would result in line with the European discipline. And so it happened. Therefore I think that the shift from the economic function of the normative to the that of protecting the competition, conceived as a form of enhancement of the consumer welfare and as a better as possible distribution of resources (the current goal of the normative) was not a casual one, instead it was a shift in which it was aimed to be achieved since at the moment of the first law approval that resulted entirely in line with both the process of the market evolution in Albania and that of the legislative approximation with the European market discipline.

EU legislation influence in drafting and implementation of the new law on protection of competition in Albania

As I mentioned above, the first normative on the market protection was repealed with the entry into force of the law n. 9121 dated 28.07.2003 "On Protection of Competition". A determining factor in the drafting of the new normative was the community influence which gains a special importance if we consider in one hand the central role that the economic constitution plays within the "*Acquis communitaire*", and on the other hand Albania's strong tendency towards the integration into the great European family.

Thus, we can read the history of this tiny Balkan country in recent years as long trajectory towards democracy, rule of law, stable institutions and market economy. The principal instrument by which Albania and the EU pursue the integration objective is the Stabilization and Association Agreement which entered into force on April 1, 2009. It is through this agreement that Albania is engaged to progressively approximate its antitrust legislation to that of the Community by undertaking all the necessary reforms to achieve the community standards.

In the fourth part of SAA we have "The commitment of the parties to strengthen political and economic freedoms that form the basis of the agreement as well as the commitment to respecting human rights and the rule of law" whereas in the sixth part is stated: "The parties are engaged to apply the free market principles." In a candidate country in order for the principles to become concrete criteria, before the negotiation process on competition is completed, it is important that three elements be fulfilled (Lowe, 2004, 58) the existence of a legislative discipline on competition, 2) the existence of a well-functioning administrative authority and 3) a policy on competition in line with the *acquis communitaire*. I would like to emphasize that all

these three elements have begun to be fulfilled with law no.9121 of year 2003 "On Protection of Competition" (Official Journal, 23, 2003).

This law was drafted in the framework of the obligations that a country should fulfill in order to join the European Union. Even though the law was passed before the signing of the Stabilization- Association Agreement, in fact the work and negotiations on the drafting of the agreement had already begun at that time. Therefore, the Albanian legislator in drafting the second normative, the law no. 9121/2003, was based on the community model and on several models of the competition discipline of EU member states.

The Stabilization and Association Agreement (SAA) contains in its article 71 the obligation to observe the competition rules according to the community model of market discipline. In fact, this obligation refers to those external anti-competitive practices, which refer to trade relations between Albania and the Community. The agreement stipulates that such practices should be interpreted according to the criteria of the application of the community competitions rules and the interpretative instruments issued by the Community institutions. The agreement also defines the commitment of the parties to give the necessary powers to a public and independent organ to ensure the implementation of the normative with regard to enterprises that enjoy special rights.

In front of the multipurpose nature of the community antitrust law (Black 102, 2005), which includes extra-competitive objectives of the market integration or the economic policies, the obligation of determining an interpretation in conformity with the community principles should be considered together with the general obligation stipulated in article 70 of the SAA for legislative approximation. I think that the definition of an interpretation according to the community principles and the contemplation of the establishment of an independent authority for the implementation of the normative even though they refer explicitly to the trade relations between Albania and the Community, they should actually be interpreted as binding for the legislator , the judge and the Albanian competition authority in the framework of a wider process of approximation of Albanian norms and principles to those of the community in order to pave the way for the Albania's entry into the European single market.

It is through this interpretation that the community expects the Albania Competition Authority to bear into consideration the community competition law and principles as well as the interpretation of the internal antitrust law-thus, in the implementation of the normative against those abusive practices that do not affect trade with the Community. This situation should not be understood as a kind of dependence of the national system to that of the community, but as an insurmountable limit of the variants in which national antitrust law compared to the community one can be represented (Bellamy, 98, 2008).

Seen from a different point of view, this kind of interpretation allows the Competition Authority to refer to a corpus principles already consolidated in the community experience that will be able to form the main source of inspiration in solving the problems of competition policy that have already found solution in the community area (Official Bulletin, 4, 2009). Referring to a consolidated practice and jurisprudence

the Authority may somewhat catch up with the delay in the introduction of a clear antitrust discipline in compliance with a market economy system. It should be highlighted that it is due to the above reference that the law n.9121/2003 has been effectively implemented since the first year of its entry into force.
Obligations contemplated in the Stabilization-Association Agreement and analyzed above have constituted the starting point in drafting of the law n.9121 of year 2003, of the acts issued by the Authority for the implementation and completion of the above normative as well as of the initiative undertaken by the Competition Authority since 2008, for the revision of the provisions of law no. 9121/2003 with the aim of their improvement and full approximation to the corresponding community and member states provisions. This is a process which has already become a bill.

Current legal framework on protection of competition in Albania

Law no. 9121 of year 2003 is divided into seven parts. Innovations brought about by this law affect the discipline of prohibited agreements, of abuse of dominant position, of concentrations, and for the first time contemplate the establishment of an independent structure entrusted with the implementation of the normative. In the first part entitled "General Provisions" is defined the function of law, the field of enforcement and some of the most important terms in the discipline of competition are provided.
The second part deals with the prohibited agreements. Specifically, article 4 in line with article 81, paragraph 1 of the ECT bans all the prohibited agreements aiming to inhibit, to restrict or distort competition in the market. The law treats all entities equally without distinction between private and public entities. The aim of the legislator in drafting the above discipline was to "enable the consumers to benefit, since the principles of this law require that in a competitive game one manufacturer prevails over the competitor on the basis of the best quality and the lower prices of the goods services offered.
Articles 5,6 in line with article 81, third paragraph ECT and in line with the Commission notification n2001/C3/02, on the horizontal agreements, article 24,31 and 32 and the regulation n.2790/1999 on the application of the third paragraph of article 81 of ECT on vertical agreements and coordinated practices, article 4/b contains the discipline of exemption from the prohibition of horizontal and vertical agreements. Articles 8 and 9 in line with article 82 ECT regulate the abuse of dominant position by defining that is not anymore prohibited the dominant position as such but the abuse of dominant position by defining in the same article some situations that may constitute abuse of dominant position. The aim of the legislator in establishing the dominant position was to eliminate the monopoly positions that reduce consumers' chances of electing the products needed to satisfy their needs (Prosperetti, 34, 2006). Articles 10-17 of the law contain the discipline of concentrations for the drafting of which has been consulted the old community regulation on concentrations (EC) n. 4064/89. Among other resources that have served as a model an important position is recognized to the regulation (EC) n. 1/2003 on the application of the competition rules in compliance with articles 81 and 82 of the Treaty.

The third part of the law titled "The competition authority and the administrative procedures" establishes the first administrative structure, independent and guarantor of the implementation of the normative. In determining the rules on the creation, organization and functioning of this structure the legislator has unified the laws "on the protection of competition" of some European Union" member states. Regarding the administrative procedures the law contemplates the general rule according to which "provisions contemplated in the Code of administrative procedures will be applied only in cases where the law no.9121 does not specify otherwise, "and defines in the subsequent articles, in line with EC Regulation 1/2003 the antitrust defense system. The fourth, fifth, sixth and seventh part regulate the civil procedures, the cooperation of the Authority with other institutions, the administrative violations, the sanctions applied and it is later closed with the final and transitional provisions.

Further approximation of Albanian legislation with EU rules of free market e fair competition

In complying with the obligations laid down by article 84 of the law, the Competition Authority, since at the beginning of its functioning, approved the regulation "on the organization and functioning of the Competition Authority", the regulation on the implementation of procedures relating to concertation between enterprises" based on the old regulation of community concentrations 4064/89 EC, the regulation "on fines and reduction of the amount" which was drafted in reliance with the Commission notification 2003 /C 10/13 EC Notification on exemption from fines and reduction of fines amount in cases of agreement between enterprises "and from the adoption of the regulation on procedural expenses on the part of the Authority."
Later on, reaffirming also the importance of the law "On protection of competition" in the framework of the Stabilization-Association Agreement, the Council of Ministers by Decision n.463 dated 05.07.2006 "On approval of the national plan of SAA implementation" assigned the authority two types of priorities: short and medium term priorities. Short-term priorities consisted in enhancing the Albanian legislation as well as increasing the institutional capacities of the Authority. Medium-term priorities consist in the effective law enforcement on the protection of competition.
Referring to the first priority I want to emphasize that the approximation of the Albanian legal framework in the field of competition to the Community framework has always been a priority of the Authority, not only in fulfilling the obligations undertaken by Albania in the framework of implementing the SAA but also in the need to adapt the provisions of law to the requirements and needs of a modern, dynamic and in continuous development market.
This priority became concrete with the initiative undertaken in 2008 by the authority itself to review the provisions of law no.9121 "On protection of competition" with the aim of full approximation to the European legislation of competition and the legislation of some Member States. This initiative has now been turned into a bill which is expected to be discussed very soon in the Parliament. This approximation would make possible the subsequent drafting of a comprehensive framework of normative acts in observation of the law. These are also required by the national plan for

implementation of the SAA.
Through the proposed amendments it is sought to achieve:1) a better protection of the market and a law enforcement under the Acquis Communautaire, seeking to achieve the same standard of protection of other countries in the region which already enjoy candidate status for EU membership, 2) perfectioning of the function of advocacy and increase of consumers' awareness on the direct or indirect benefits deriving from the conception of competition as "a public right and good at the same time", 3)strengthening and the increase of public mechanisms of observation; 4) Perfectioning of legal and administrative procedures, 5)improving and changing the amount of penalties stipulated by law provisions.
During the six years of law enforcement the Authority emphasizes that it has encountered a series of problems such as: non-observance of the provisions, a poor collaboration between institutions and entities that have to observe the law, the need to improve and supplement the provisions and procedures on the applicable sanctions (*Press, 73, 2004*). These problems were created because of the difficulty in understanding the provisions of law not only by the entities but also by different institutions. Under such circumstances it was necessary the simplification of the law to make it more intelligible and to adapt it to the specifications of national legislation.
In relation with the prohibited practices the proposed changes are mainly formal changes which aim to reorganize the discipline to better adapt it to the respective community discipline. Materially it should be noted that even with the major part of linguistic changes in the drafting of the provisions (in a comparative view between the Albanian and the community provisions) has not gained any major significance in terms of their interpretation. This is also due to the stipulation of article 71, second paragraph of the SAA that as we analyzed above, requires the Albanian Competition Authority to rely on the community principles in interpreting the principal antitrust provisions. And in fact, through decisions taken by the Authority, it is noted that despite the fact that there still exist difficulties in observing the law, which come as a result of the new age of the law and lack of an anti-competitive background in Albania, the Competition Authority tries to constantly become uniform with the best practice of the European Commission and with the jurisprudence of Community Courts (OECD, 12, 2004).

Conclusions

Despite innumerable difficulties that economic transition has produced, the way in which the market rules move seems nowadays a forced one and without turning back. Commitments undertaken with the European Union in the framework of accession, the constitutional principles that ensure the free market economy, the legal framework in the field of competition adapted to the community model are all elements that clearly reaffirm Albanian's goal to integrate and to adapt to the European market.
This bears relation with the fact that for a country to gain membership it is necessary meet the Copenhagen criteria and among them the economic criteria. Stated in other words, a state must ensure the existence of a viable market economy, with the capacity to face market forces and the competitive pressure within the European Union.Thus,

it is also through the process of the evolution of the Albanian market discipline that the Albanian Government is implementing its process of accession into the European Union.

Adoption of the law on competition and its subsequent improvements are serious efforts of Albania to the free market discipline and fairness in competition rules by the European model. Changes are dictated by the process of approximation of legislation and this has brought positive change standards in integration process in this field. However, Albania should strive to enhance the performance of the institutional market regulators and to implement EU directives regarding this aspect of the work. Market in Albania has still many problems of competition which by contemporary laws and the strengthening of relevant institutions could be improved and to be able to meet tomorrow's challenges EU membership within a large community market.

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