



Research Article

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ECJ Case 27/76 United Brands v Commission and Case 85/76 Hoffmann-La Roche analyzed in the framework of Albanian Competition law

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DOI: <https://doi.org/10.2478/ajbals-2023-0002>

Abstract

The aim and scope of this article is the analysis of two landmark cases of the European Court of Justice, which have helped shape law and rights with regards to Commercial law and more specifically the law and rights on market competition. The article aims to highlight the significance of the two judgements and the implications and importance they hold toward EU candidate countries, through the case of Albanian legal framework on competition. The article will focus on the practical effect of the degree of legislation approximation in Albania, by taking a look into the ranking and international indices score of Albania in the field of market competition. By contrasting and comparing, conclusions will be made regarding the future implications in this legal area in Albania and possible “next steps” in the legal approximation area, by hypothesizing upon which aspect should be approximated next.

Keywords: competition, market dominance, dominance, economics, ECJ case law, antitrust law.

1. Introduction

The accession process of candidate countries in the Western Balkans is often said to be, and has been, a rather slow process, which has been dragged on for more than two decades (EEAS, 2023). Different actors blame this slow progression on different factors, from which the lack of implementation and approximation of the European legal framework, is said to hold a considerable portion of the “blame”. Nonetheless, before making any such assumptions, it is crucial to look at the approximation process and its effects in a critical manner.

As the European Union came to be, first and foremost as a union that promotes peace,

makes war impossible and that would increase the wellbeing of Europeans through free economic activity and movement across borders (Schuman, 1950), we can comment that market freedom and market functionality is at the heart of European Integration.

Keeping that in mind, it will appear that the legal framework relating to market freedom is thus of utmost importance to candidate countries, as it is the legal framework that maintains the “beating heart” (Harbour & Zuleeg, 2015) of the EU economy.

This article will look into that aspect in detail in order to determine the correlation between the degree of approximation of market competition legislation and the effects that has had into actual market competition on the case of Albania.

Albania’s history of market competition protection legislation starts in 1995, with law no. 8044, which, according to scholars, was modeled by the German model (Këllezi, 2009).

This was thought of as a transitory law of sorts for the transitory period the country found itself in (Këllezi, 2009). After that, the next piece of legislation on competition in Albanian law, is the current law that is yet in force.¹

2. Methodology and objectives of the study

This article will aim to draw conclusions on the level of approximation of legal frameworks between Albania and the European Union, by looking specifically at a legal and economic concept originating from the case law of the European Court of Justice, as the indicator of the article. It will also draw conclusions from the degree to which this concept has been integrated in the Albanian framework on market competition. This part of the analysis will be strictly in the form of literature and legal review, taking only into account the pieces of legislation, the two court decisions and articles in this field of study.

The second part of the article, however, will, through secondary research, take a look and analyze the degree of implementation of the legal framework to date. In this sense reports from trustworthy organizations and institutions will be analyzed.

The article aims to draw conclusions on the following:

1. The existence (or rather the form it has taken) and definition of market dominance in Albanian legal framework on market competition;
2. The degree of legal and doctrinal approximation of that concept between ECJ case law and Albanian legislation;
3. The degree to which the Albanian market has adapted the legal provisions;
4. The near-term needs of Albania for approximation to achieve closer integration with the EU as a candidate country;

3. Results and discussion

3.1 The Concept of Dominance in the United Brands case

The United Brands case is part of the significant case law that relates to market com-

¹ Law no. 9121 “On the Protection of Competition” (QBZ, 2023).

petition. Its significance relates to the establishment of the definition of the concept of dominance in the market. Up until that point 1978, the position of dominance, despite its abuse being prohibited since Article 86 of the EEC Treaty, did not yet have a definition. Due to this, the United Brands case, is the one in which the ECJ decided and crafted the definition of dominance.

The case related to one of the largest economic giants in the market of bananas, which argued that the existence of other fruits, evidenced that "similar goods" existed and there was no dominant position. The Court, nonetheless maintained that there was a position of dominance enjoyed by United Brands and it defined the concept of dominance as:

"A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately of its consumers".

The court also maintained that a 40% or 45% market share did not automatically indicate a dominant position in the market (United Brands case, 1978).

Although this definition is deemed by some scholars to contain two distinct parts (the one that related to the effectiveness of preventing the competition and that which maintains disregard toward competitors, customers and consumers), community courts have not drawn any distinction between the two elements (Geradin et al., 2005).

3.2 Dominance in the Hoffman-La Roche case

The next, crucial case-law regarding market competition, and most importantly position of dominance, is the Hoffman-La Roche case of 1979, which deals with barriers to enter the market, due to the lack of competitors to a Swiss pharmaceutical company. The court discussed the issue of abuse of dominant position as:

"Influence the structure of a market where, as the result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

As for the concept of dominance the Court maintained:

"Such a position does not preclude some competition which it does where there is a monopoly or quasi-monopoly but enables the undertakings which profit by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment".

The Court, in its decision upon this case, regarded the abuse of a dominant position as an objective concept, giving the subjective intent of the entity that would exert such abuse, non-relevant, with some exceptions.

These two cases were adjudicated very close in time (1978-United Brands and 1979-Hoffmann La Roche), crafted the definition of the dominant position, a concept

from which the EU protected itself prior to even establishing the definition. These definitions and criteria were implemented in the Council Regulation 1/2003, which entered into force on 1 May 2004, together with the 773/2004 Regulation (that regulated the procedural aspects of 1/2003).²

3. 3 Dominance in the Albanian legal framework on competition

Albanian legislation on market competition, started in 1995, with the aim of protecting the market from unfair competition (Law No. 8044, 1995). This law defined the dominant position in Article 4, paragraph 6 and also laid out criteria on when this position was abused towards other competitors. The “dominant position” was indirectly prohibited outright by article 5 of this law, which required that all undertakings that enjoyed a dominant position should be divided into independent undertakings from one another. The division of the companies should take only six months from the day in which the decision to be divided is taken. For the process of separation, dominant undertakings had to report a number of documentations to the Directorate on Economic competition (established by this law) under article 6. Aside from these articles, article 41 listed the ways in which a dominant undertaking would be abusing its position of dominance. This law was thought of as a first step in a “step-by-step” approach to opening the market and competition (Këllezi, 2009). Since Albania had yet to be accustomed to the private economy, the goal was the customization with some rules on competition with low sanctions, so as to be adapted better into the private market sector. The lack of importance given to sanctions is also attested by the fact that the sanctions section contained only two articles with one article listing all the possible sanctions and the other being an article of penal responsibility.

With regards to the approximation of this law with the EU legislation, as there was no other legal provision that determined the prohibition of abuse dominant positions in the market, its definition and its criteria, other than article 102 TFEU, the law of that time in Albania, was not approximated (it did not even contain the ECJ definition of dominant position, rather having a definition of its own), yet it is to be noted that the criteria listed in article 41 are close to those of Hoffman-La Roche. Furthermore, the Albanian law essentially prohibited any dominant position from being formed by requiring that those undertakings divide themselves. In Case 6/72 Continental Can [1973] ECR 215, the ECJ was close to maintaining that the very existence of a dominant position is directly an abuse of that position (Kaczorowska, 2016), a view that it seems the Albanian legislation of the time implemented. Another thing to note is that law no. 8044 created a direct checkpoint for a position of dominance as any company that enjoyed more than 40% of the market (Article 4, paragraph 6), which was not in full accordance with EU practice (United Brands, 1978).

The law no. 8044 “On competition”, was replaced with law no. 9121 “On the Protection of Competition”, which had a very different structure and provisions than its predecessor. This same law (no. 9121) is still in force to this day, with changes implemented in 2006 and 2010. This longevity of legislation is atypical for Albania, making

² For more info see: https://competition-policy.ec.europa.eu/index_en.

it all the more intriguing to research the reasons behind it. It is interesting to note that this law was drafted and passed in the same timeframe the 1/2003 Regulation was being drafted. It actually entered into force on 1 December 2003 before the 1/2003 Regulation entered into force in Member States on 1 May 2004.

The current law on Competition in Albania regulates the three areas of competition law, recognized by EU Policy consisting of antitrust, cartels and mergers,³ which were heavily drafted after Regulation 1/2003. Unlike the previous law, it focused specifically on these three areas of competition legislation and the procedural aspects that related to the functioning of the National Authority on Competition, while the previous law focused in all areas of the market and possibilities of unfair competition that in the current legal framework are integrated into specific legislations.⁴

Regulation 1/2003 of the EU Council was adopted in Albanian law no. 9121, save for the chapters relating to the powers of the European Commission, which are inapplicable (17-45 articles). The EU Commission's competences were transferred towards the National Competition Authority, by dividing this authority in two structures (Article 18):

- The Authority Commission;
- The Authority Secretariat;

The Albanian law, as similar other national laws in this area, goes beyond articles relating only to the establishment and functioning of the National Authority on Competition and covers also articles relating to antitrust and merger legislation. Nonetheless, the Albanian law has a heavier emphasis on the definitions and specifications of antitrust and merger provisions than it has to the National Authority on the Protection of Competition or the procedural aspects of the Authority's work. With particular interest is Article 3, which contains the definition and meaning of a position of dominance in the current Albanian framework. That definition is the verbatim translation to the definition established in the United Brands case, which shows once more the tendency of the Albanian legislator of the time, to be as close to the EU standards. Even the articles dealing with abuse of dominance (articles 8 and 9) follow verbatim what has been highlighted in the EU case Hoffman-La Roche, unlike the previous law in which the idea was the same but wording differed from that of the ECJ.

As mentioned above, the only provisions in which the Albanian law differed (which were considerable in number) are the provisions that deal with the European Commission's competences, and with good reason, because Albania cannot engage the European Commission to that level of high commitment of market monitoring as the Member States have. Regardless, even these provisions have been aimed to be approximated to an extent and as a result, there are also procedural dispositions that deal with the Authorities competences, in which the Albanian Parliament takes the role of the Commission in the EU Council Regulation 1/2003.

³ For more info see: https://competition-policy.ec.europa.eu/index_en.

⁴ For example, the previous law on competition, no. 8044, had provisions on the prohibition of unfair competition by the former employee to the employer, which is currently integrated in the Code of Labor in Albania, thus it has been integrated into area-specific legislation.

3.4 Competition in the Albanian market (Practical implications)

As has been established above, the current Albanian legal framework follows closely that of the EU, with most articles being copied and translated verbatim from EU legislation. However, what interests Albanian citizens and the European Union, when it comes to the accession process, is the actual state of the Albanian market and the true effect that the legislation produces effects and legal consequences or protects legal rights.

In Albania today, there are concerns on the concentration of market power, i.e., dominance, in the hands of a selected number of oligarchs and a great portion of the daily news or political and economic television shows discuss this problem daily (Ziu, 2021). Even recent surveys (IRI, 2023) and reports (CSDG, 2023) show that the economy and corruption are believed by Albanians to be the most pressing problem of the society (IRI, 2023) and by some sources, over 60% of Albanian respondents believe that the country is governed in the interest of some groups (IRI, 2023).

In a country with EU-level legislation on market competition for two decades (not to mention the first steps taken under the 1995 law), it is alarming to have this low level of competition in the market and it also raises questions as to when and where did Albania go wrong. It might well be that the perceptions that oligarchs rule the economic scene and by extension the country, is just that: a perception, but that is also not a plausible conclusion, keeping in mind that different Embassies in Tirana ring the alarm bell on the oligarchs quite often (Keka et al., 2022).

A hypothesis could be that the legal framework is not directly proportional to the market competition performance of countries. To determine this, we will take a look and aim to contrast and compare Albanian competitiveness ranking and scores with those of the European Union Member States. As there are numerous indices from different international organizations and each of those follow different methodologies and trying to compare and contrast so many different indices would be a very complex analysis, which this paper cannot achieve. For this reason, we will focus on the World Economic Forum Global Competitiveness Index of 2019.⁵ Unfortunately, 2019 is the latest report that contains a comprehensive, country by country analysis, as the 2020 report goes over the global competitiveness climate in general, while reports after that year are not available. The report mentions also the European Commission regional competitiveness index, but as this index refers to each region of the EU and sometimes regions between countries, and since it follows another methodology of scoring than that of the WEF index, the references will be mostly of illustrative purposes.

Albania scored 57.61 points out of 100 and went down 5 ranks on the 2019 Global Competitiveness Report published by the World Economic Forum. The only country located in the European Continent that performed worse, was a fellow Western Balkans country, North Macedonia that took the 82nd place with a 57.3 score (WEF, 2019). The closest EU country in ranking, was Croatia, which stood 18 places higher

⁵ For more info see: <https://www.weforum.org/reports?query=Global+competitiveness+report>.

with a 61.94 score (WEF, 2019).

Analyzing the performance of countries in this index, with data from 2007 to 2019 it can be seen that Albania's lowest score was 3.48, while its highest was 58.10. Comparing this with Romania's and Bulgaria's scores (which became Member States in 2007) of highest 64.36 and lowest 3.97 for Romania and highest 64.90 and lowest 3.92 for Bulgaria, shows an optimistic view of semblance. Yet, Albania's scores are lower in both parameters and this optimistic view dissipates when looking at the data of the EU Regional Competitiveness Index 2.0,⁶ when looking at the trend that less economically developed countries have had towards more competitiveness in the past year but especially when being reminded of the fact that the Netherlands placed 4th in the globe with a score of 82.4 in the same report in the same year (WEF, 2019).

When looking at the data, it seems that Albania is barely on par only with the lowest-performing EU countries.

4. Results and discussion: Possible implications of the future of the Albanian market, with regards to the accession process

While the legislation on competition law in Albania has not been updated in 13 years, the EU has not limited itself only to Regulation 1/2003. Instead, it has passed a directive relating to the optimizing of cooperation between the European Commission and the National Authorities on Competition with the aim to increase the cooperation between the Union level and the national level, so that the effectiveness of market competition monitoring will be felt.

What does that mean for Albania?

It is first and foremost evident that should Albania join the EU, a number of the competences that the current Albanian Competition Authority enjoys, will be transferred to the European Commission. Furthermore, it is crucial that Albania starts putting its biggest market undertakings in front of actual consequences regarding the competition legislation. The research in this study could not find any data on the number of the cases in which the Albanian National Authority had imposed any sanctions on these undertakings. Looking at the official website of the Albanian Competition Authority, there is a good number of cases, which only contain a public notice for the case in very brief description of the facts, with an invitation towards the public to give information towards the Authority, but no actual decision whatsoever.⁷ By comparison, the European Commission's website is also very clearly organized and it also contains the decisions in full of the Commission, with extensive description of the facts and legal basis upon which that decision is based.⁸ This level of transparency is something that Albania should implement in the road towards accession. It is also debatable whether this level of transparency would aid the public perception of the Albanian level of competition in the market, as there is no media coverage whatsoever on the fines and penalties towards companies that violate competition rules. On

⁶ For more info see: https://ec.europa.eu/regional_policy/assets/regional-competitiveness/index.html.

⁷ For more info see: <http://www.caa.gov.al/>.

⁸ For more info see: https://competition-policy.ec.europa.eu/index_en.

the other hand, it is difficult to know whether there have been such decisions at all, since one cannot find them on the official websites.

Despite the hopeful significant changes in legislation and administrative practices regarding competition in Albania, the specifications defining dominance are unlikely to change much, as they are quite close to the European standard, in spite of the current degree of implementation. The most likely to change are the procedural provisions, since those are also the ones that differ from the Eu Council Regulation 1/2003 the most.

5. Conclusion

In the field of market competition, and especially with regards to the concept of market dominance and abuse of the position of dominance, Albania has a good degree of approximation to EU norms, often coping the verbatim definitions and criteria of ECJ case law in its own legislation, with no adaptation or modification whatsoever, despite the legislation of Albania coming out at the same time as the EU Council Regulation 1/2003.

In practical terms, Albania's competitiveness is plausible only when its highest score is compared to EU's lowest score, which does not attest for a good degree of competitiveness.

Albanian legislation in the field has not been updated/amended for more than a decade, meanwhile, the Authority on Competitiveness/Competition has not investigated in transparency the behavior of the biggest undertakings in Albania with regards to their position in the market, despite numerous public accusations by a number of media channels, which in turn, makes it reasonable to expect that the low performance of competitiveness in international indexes is no mere coincidence. To conclude, the approximation level of legislation seems to be the least contributing factor to Albania's sluggish progress in market competitiveness.

6. Limitations and recommendations for further studies

This article is based solely on secondary research and public-available sources. Further studies should be conducted on the work of the Albanian Competition Authority with the focus being on the actual decisions the Authority has undertaken. Furthermore, the findings of this study should be updated with the most recent global data regarding competitiveness, as the currently available data, dates from 2019, making it a four-year old information in a highly dynamic field such as that of the economic market.

References

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.
ECJ Case 27/76, *United Brands v Commission*, [1978] ECR 207.

-
- ECJ Case 85/76, Hoffmann-La Roche v Commission, [1979] ECR 461.
- European Commission. (2022). Regional Competitiveness Index 2022: Methodology guide (2nd ed.) [PDF file]. Retrieved from https://ec.europa.eu/regional_policy/sources/work/rci_2022/eu-rci2_0-2022_en.pdf.
- Geradin, D., Petit, N., Walker, M., & Hofer, P. (2005). The concept of dominance in EC Competition Law. SSRN Electronic Journal. <https://doi.org/10.2139/ssrn.770144>
- Harbour, M., & Zuleeg, F. (2015). Strengthening the beating heart of the European economy. <https://www.epc.eu/en/Publications/Strengthening-the-beating-heart~1cfde0>
- Kaczorowska, A. (2016). European Union Law. (3rd ed.). London: Routledge.
- Keka, G., Çoçoli, F., Zotaj, Prof. Asoc. Dr. B., & Bejko, B. (2022, June). The US raises the alarm, Albania in a critical situation, the oligarchs and organized crime govern the country. Politike. <https://sot.com.al/english/politike/shba-ve-alarmin-shqiperia-ne-situat-kritike-oligarket-dhe-krimi-i-orga-i519608>
- Këllezi, P. (2009). Competition law in Albania. *Concurrences Revue Des Droits de La Concurrence*.
- Law No. 9121, dated 28.07.2003 "On Protection of Competition" (as amended).
- Law No. 10 221, dated 29.03.2010 "On Competition".
- Schuman, R. (1950). Schuman declaration May 1950. European Union. https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en
- Treaty Establishing the European Economic Community, art. 86, Mar. 25, 1957, 298 U.N.T.S.
- Vox, R. (2023, February). Shënim: Pse Oligarkët Janë e Keqja e Shqipërisë? Retrieved 2023, from <https://www.voxnews.al/analiza/shenim-pse-oligarket-jane-e-keqja-e-shqiperise-i33560>.
- Western Balkans EEAS. (2023). https://www.eeas.europa.eu/eeas/western-balkans_en#9519
- World Economic Forum. (2019). How to End a Decade of Lost Productivity Growth. Retrieved from <https://www.weforum.org/reports/how-to-end-a-decade-of-lost-productivity-growth>
- Ziu, M. (2021, February). Oligarkët e shqipërisë i vodhën shqiptarëve 1.1 miliardë euro tendera vetëm për 2020-ën. Gazeta Telegraf. Retrieved 2023, from <https://telegraf.al/politike/oligarket-e-shqiperise-i-vjedhin-shqiptarëve-1-1-miliarde-euro-tendera-vetem-per-2020-en/>.