

Regulation on Abuse of the Dominant Position of the Western Balkan Countries with EU Practices

Professor doctor **Gani ASLLANI**¹
Associate professor **Bedri BAHTIRI**²
Professor doctor **Simon GRIMA**³

Abstract

In this paper, we analyse competition as a basic element of the market economy and compare the extent to which the countries of the Western Balkans have managed to adapt the best practices of the European Union. The paper has a special focus on the dominant position of enterprises and the regulation of these enterprises. A comparative analysis of data collected from primary and secondary sources is conducted to demonstrate the current state of competition in the Western Balkan countries and to determine the most appropriate tools to build a strong and efficient competition regime. The analysis shows that the field of abuse of dominant positions is one of the most complex and that reinforcements are needed in terms of its treatment and regulation. The findings from the study reveal that the national competition authorities are still in a stage of development and more ought to be done to create an adequate regime. Based on the findings from the research, the paper emphasises recommendations for further harmonisation of the regulations in the field of competition between the countries of the Western Balkans and the European Union.

Keywords: market economy; competition; abuse of dominant position; competition authority; relevant market.

JEL Classification: K20, K21

DOI: 10.62768/TBJ/2024/14/3/10

Please cite this article as:

Asllani, Gani, Bedri Bahtiri & Simon Grima, 'Regulation on Abuse of the Dominant Position of the Western Balkan Countries with EU Practices', *Juridical Tribune – Review of Comparative and International Law* 14, no. 3 (October 2024): 494-507.

Article History

Received: 17 April 2024
Revised: 20 June 2024
Accepted: 3 August 2024

1. Introduction

The main objective of the European Union (EU) competition rules and policy is to enable the proper functioning of the EU internal market as a key driver for the

¹ Gani Asllani - Financial Department, Faculty of Law, University 'Haxhi Zeka', Peja, Kosovo, gani.asllani@unhz.eu, <https://orcid.org/0000-0003-2416-9321>.

² Bedri Bahtiri - Civil Department, Faculty of Law, University 'Hasan Pristina', Pristina, Kosovo, bedri.bahtiri@gmail.com, <https://orcid.org/0000-0002-8216-808>.

³ Simon Grima - Department of Insurance Finance and Risk Management, Faculty of Economics, Management and Accountancy, University of Malta, Valetta, Malta, Simon.grima@um.edu.mt, <https://orcid.org/0000-0003-1523-5120>.

wellbeing of EU citizens, businesses and society as a whole. For this purpose, the Treaty on the Functioning of the European Union (TFEU) contains rules that aim to prevent restrictions and distortions of competition in the internal market by prohibiting certain agreements between companies, controlling concentrations (mergers and acquisitions) and controlling the abuse of a dominant position, which may negatively affect trade between member states⁴. Dominant positions are assessed in relation to the domestic market or at least a significant part of it.

A dominant position is not in itself a breach of EU competition law, and the holders of such positions are allowed to compete on merit like any other company. However, a dominant position gives the undertaking a special responsibility to ensure that its conduct does not distort competition. This means that the same conduct if engaged in by a non-dominant firm would not necessarily be illegal.

Article 102 TFEU clearly defines the dominant position and the possible forms of its abuse. However, in the Western Balkans, progress in the area of competitiveness has generally been slower than in other policy areas. This can be partially explained by the complex environment in which competition policies and market regulators have been established, but it is also due to other inherited political and economic characteristics.

2. Theoretical framework

Competition is the basis for determining the quality of goods and services offered to consumers.⁵ It is defined as a market situation in which enterprises are driven to become more efficient and able to offer a wide variety of products and services at lower prices, which benefits consumers and the economy in general. Competition policy is an instrument to achieve an efficient allocation of resources, technical progress and consumer welfare.⁶ Competition is an essential part of the market economy. For the state, it is very important to have appropriate competition authorities that are responsible for the development and protection of competition. The competition policy followed by the state authorities aims to develop efficient competition in the common market, exerting an active influence on its functioning.

Competition drives firms and leads to the economic growth of a country.⁷ The effectiveness of the competition and the consumer protection system depends on the efficient functioning of the competition authorities in terms of the implementation of

⁴ See in this regard Săraru, C. S., *State Aids that are Incompatible with the Internal Market in European Court of Justice Case Law*, in Săraru, C. S. (ed.), *Studies of Business Law - Recent Developments and Perspectives*, Peter Lang, Frankfurt am Main, 2013, p. 39-48.

⁵ Krakowski, M. (2005), *Competition Policy Works: The Effect of Competition Policy on the Intensity of Competition*, HWWA Discussion Paper, No. 332, Hamburg Institute of International Economics (HWWA), Hamburg, p. 2-16, available online at <https://www.econstor.eu/bitstream/10419/19300/1/332.pdf>.

⁶ Begović, B., Popović, V. 2018. *Competition Authorities in South Eastern Europe: Building Institutions in Emerging Markets*. Cham: Springer Open., p. 57.

⁷ Deniz Dilara Dereli, 2015, *Innovation Management in Global Competition and Competitive Advantage*, p. 1367, available online at www.sciencedirect.com ScienceDirect.

EU law.⁸ The system should eliminate as much as possible reduced choices and also encourage innovation. It should promote initiatives, innovation and the adoption of new technologies.⁹ Experience from many countries shows that the effectiveness of a competition authority depends on the quality of the authority's leadership. This market regulator contributes to the development of a country's economy and to market efficiency.

The independence of national competition authorities and the authority's objective and transparent regulation increases investor confidence in regulated enterprises. An independent and impartial court can ensure the orderly and fair implementation of competition regulation and contribute to the development of the state's long-term planning.¹⁰ For the correct functioning of competition protection, the authorities must be engaged in prevention, and there is a wide range of measures aimed at preventing unwanted practices.¹¹ Establishing the right relationship between competition agencies and other market regulators is an important and ongoing challenge in most countries.¹²

The implementation of the law for the protection of competition by the responsible institutions as well as the development of genuine competition policies (antitrust) to promote competition and increase competitiveness in the market is a continuous work that benefits all market actors.¹³

3. Methodology

The methodological basis of the paper refers to the primary data and other secondary sources that were used, such as the legal regulations of the EU in the treatment of competition, scientific literature, reports of findings of the European Commission, laws on competition and other secondary legal acts in the countries of the Western Balkans and the number of cases handled by the competition authority. Based on the selected indicators, a comparative analysis was made of the abuse of a dominant position in these six countries of the Western Balkans: Albania, Montenegro, Kosovo, Bosnia and Herzegovina, North Macedonia and Serbia.

⁸ Mehta, M., 2002. *Challenges in Implementing a Competition Policy and Law: An Agenda for Action*. CUTS Centre for International Trade, Economics & Environment.

⁹ Aghion, P., Bloom, N., Blundell, R., Griffith, R., Howitt, P. (2005). „Competition and Innovation: An Inverted U-Relationship”, *The Quarterly Journal of Economics*, 120 (2), 701-728.

¹⁰ Decker, C. 2009. *Economics and the Enforcement of European Competition Law*, Edward Elgar Publishing Ltd., Cheltenham, p. 70.

¹¹ Olszewski J. (2004), *Nadzór nad koncentracją przedsiębiorców jako forma prewencyjnej ochrony konkurencji i (Supervision over the concentration of entrepreneurs as a preventive form of competition protection)*, Wydawnictwo Uniwersytetu Rzeszowskiego, Rzeszów, p. 41.

¹² Aşcıoğlu Öz, G. 2006. *The Role of Competition Authorities and Sectorial Regulators: Regional Experiences*. UNCTAD's Seventh Session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva.

¹³ Obradović, M., Lončar, D., Stojanović, F., Milošević, S. 2018. “Public interest consideration in competition policy”, *Ekonomika preduzeća*, Vol. 67 (1-2), December, p. 167-179, DOI: 10.5937/EKOPRE 18081670.

4. The development of competition in the European Union

Competition policy in the European Union has undergone continuous development since the signing of the Rome Treaty of the European Economic Committee in 1957. In this treaty, healthy competition is considered an essential element in the creation of a free market. The treaty also provided a means to achieve these objectives, which were identified as the creation of a common market and the approximation of the economic policies of the member states. The birth of a common market was of fundamental importance, as it marked the birth of a ‘common good’ for European states that would no longer be limited to a single industry sector and where enterprises would have the opportunity to carry out their activity in full competition and under equal conditions without being discriminated against based on nationality.

After the 1990s, with the changes that took place in the Eastern and Southeastern European countries and especially with their transition to the market economy, it was essential that these countries adapt and apply competition rules, not only in the private sector of the economy that was just created but also in the state sector that had to adapt to the new rules of the market economy.¹⁴ EU competition policy was envisaged by the Treaty of Rome in 1957, which set the creation of a system that protects free competition in the common market as one of its goals. Article 3(3) of the Treaty on the European Union (TEU) clearly states that the EU 'shall create an internal market' based on 'a highly competitive social market economy'.

The rules of competition in this market are now included in Articles 101 to 109 of the Treaty on the Functioning of the European Union (TFEU). The notion of an internal market is built on the principle that market participants should operate with the greatest possible degree of economic freedom, unimpeded by any (national) barriers to competition. Articles 82–86 (now replaced by Articles 102–106) of the European Union Treaty defines the abuse of dominant positions:¹⁵ “*any abuse by another undertaking of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member states*”.

Dominant position refers to a position of economic power enjoyed by an enterprise that enables it to prevent effective competition in the relevant market by giving it the power to behave to a significant extent independently of its competitors, customers and final consumers. European law does not punish a dominant position but only its abuse. In essence, Article 102 TFEU provides two main requirements: a dominant position and abuse of the dominant position. If the Commission finds such a dominant position and an abuse, it can impose a fine on the dominant company.¹⁶

¹⁴ Vaeld Zhezha, 2016. "Analysis of Competition Policy in the European Union", PhD thesis. <https://unitir.edu.al/analize-e-politikes-se-konkurrencas-ne-bashkimit-evropian/>.

¹⁵ Treaty establishing the European Community (Nice consolidated version) - Part Three: Community policies - Title VI: Common rules on competition, taxation and approximation of laws. 24 December 2002. Document 12002E082. <https://eur-lex.europa.eu/Lex>.

¹⁶ Dethmers, F. and Engelen, H., 'Fines under Article 102 of the Treaty on the Functioning of the European Union', *European Competition Law Review*, 32, issue 2, 2011, p. 86-98.

The wording of Article 102 TFEU requires that the following conditions be met to prove an infringement: *“(i) a dominant position in the relevant market must be held by one or more companies; (ii) the position must be held in the domestic market or in a significant part of it; (iii) abuse of dominant position; (iv) actual or potential effect on trade between Member States”*.¹⁷

An analysis of the dominant position in the market begins with the determination of the relevant market and continues with the analysis of the market share owned by the company. The power of other competitors operating in the market and other competitors who may enter the market within a short period is then analysed.¹⁸ An enterprise is considered to have a dominant position if it has a market share greater than 40%. This participation is not considered a dominant position if the company in question shows that it is exposed to competition or that it does not have a superior position in the market compared to its competitors. Article 82 defines the state of dominant position: *“[It] is the position of one or more enterprises, which allows them to be able to act, as regards supply or demand, independently of other market participants, such as: competitors, client or consumers”*.

A company may individually possess a dominant position. Two or more companies could have a joint dominant position. This definition is in accordance with European jurisprudence on Article 82 TEC. The European Court of Justice defines the dominant position in the market as: *“a position of economic power that enables an enterprise to prevent the maintenance of effective competition in the relevant market by allowing it to behave quite independently vis-à-vis its competitors and customers, and finally, vis-à-vis consumers”*.¹⁹

Article 102 TFEU applies only to enterprises that have a dominant position in the relevant market. The relevant market must be established by defining the appropriate product markets and geographic market. In other words, a deep analysis must be conducted of the category of products that consumers consider as substitutes due to their characteristics, use and price.²⁰ Enterprises that have a dominant position in the market have a special responsibility; they cannot undertake the same actions as other competitors. The actions of these enterprises are prohibited if they have the effect of hindering other competitors and further strengthening their own position. Each competitive constraint is analysed with a specific market in mind. Based on this market, the parts of the market that belong to each enterprise are determined.

The market that is taken as a basis for calculating market shares and determining competition restrictions is called the relevant market. Regulation 2003/1 of the EU provides a definition of the market, which includes: *“products that are evaluated as substitutable by consumers or other customers, in terms of their characteristics, price and function and that are offered or demanded by enterprises in a geographical area with the same competitive conditions, this area is being separated*

¹⁷ Lorenz, M., *An introduction to EU competition law*. Cambridge University Press, 2013, p. 189.

¹⁸ Competition law and policy OECD, 2010. DAF/COMP (2009)21. <https://www.oecd.org/competition>.

¹⁹ Court of Justice of the European Community, <http://curia.eu.int>.

²⁰ Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ No. C 372 of 9 December 1997, p. 5.

from other limiting areas”.

5. Forms of abuse of dominant positions

High prices. According to Article 102 of the TFEU, the setting of unfair prices may constitute abuse, which means, among other things, the setting of high prices that are the result of exploiting a strong economic position.²¹ To judge whether the price is high in the sense of these provisions, the Court of the European Community compares the price charged with the ‘economic value’ of the good or service.

Low prices. Regulation 1/1993 refers to low prices. This practice is known as ‘predatory pricing’. According to the regulation, the following are prohibited:

a) the setting of prices or other conditions. Price reduction is also practiced when the competition acts properly. When the price is lower than the variable cost, it is assumed that we are dealing with ‘predatory pricing’: An enterprise in a dominant position has no interest in setting a price below the variable cost (that is, the costs that change as a function of the quantity produced) except to eliminate competitors so that it can then raise prices thanks to a monopoly position, as long as for each sale the loss is equal to the sum of total cost (that is, costs that remain constant regardless of the quantity produced) and at least a part of variable cost in relation to the unit produced.

b) the setting of prices that have as their object or consequence an entry barrier or the exclusion from the relevant market of specific competitors or one of their products.²² This condition constitutes the difference between the predatory price and the price set in a competitive situation. As expressly provided by law, the exclusion of competitors from the market or the obstruction of their entry into the market may be the object or consequence of the actions of the undertaking in a dominant position. This means that when the consequence of these actions is exclusion from the market, there is no need to prove that the undertaking in question intended such a result. A predatory pricing strategy is profitable for the provider only if competition weakens so much that the provider can subsequently raise prices or otherwise benefit from a dominant market position.

Discriminatory treatment of prices. Article 82 (c) of the EU Treaty does not provide a definition of price discrimination. It simply considers it as abuse when one or several firms hold a dominant position due to ‘Applying different conditions to equivalent transactions with other trading parties, placing them at a competitive disadvantage’. The European Court of Justice has extended this notion of abuse to the opposite situation of applying similar conditions to unequal transactions.²³ Price discrimination is a term economists use to describe the practice of selling the same

²¹ 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 (Text with EEA relevance).

²² Ibid.

²³ Pranvera Këllezi, ‘Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence’, in Mark-Oliver Mackenrodt, Beatriz Conde Gallego, Stefan Enchelmaier (eds.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, Springer, 2008, p. 55-88.

products to different customers at different prices even though the selling cost is the same for each of them. More precisely, the products are sold at a price or prices such that the ratio of price to marginal costs is different in different sales.²⁴ We also have discriminatory treatment when the company in a dominant position practices price reduction based on loyalty (fidelity rebates) and not on quantity (quantity rebates).

Limitation of production, markets and technical development. Article 82 (102) includes cases in which the dominant company reduces its production or prevents other competitors from increasing their production or entering new markets. The company reduces its production so that the demand will exceed the supply and thus the prices will increase. This article also limits sales by a wholesaler or distributor.²⁵ This is a case of exploitation, while the obstacle to others is a case of exclusion of competitors.

Bound contracts. Regulation 1/1993, Article 82, letter d) addresses the case in which the conclusion of the contract for the sale of a product is conditional on the purchase of a product or the acceptance of an extra service (the tied product) that is not related to the first product. Such practices are known in the literature as 'tying' (related sales) or 'bundling' (grouped sales). This practice enables the company in the dominant position in the market of the main product to take advantage of its position and extend it to another neighbouring market. Tied sales refer to the sale of two products by a single supplier. One of the products – the linked product – is sold on the condition that it is combined with another product – the linked product. In bundled sales, a firm may sell two or more products together as a package and charge more attractive prices for the package than for its component parts.²⁶

Collective dominance. Article 102 TFEU prohibits the abuse of a dominant position by one or more enterprises. The provision confirms that two or more enterprises can jointly hold a dominant position (duopoly/oligopoly). The primary requirement for establishing collective dominance is the existence of a link between the undertakings that are alleged to have jointly violated Article 102 TFEU.²⁷

6. The functioning of competition institutions in the Western Balkans

The countries of the Western Balkans are in the initial phase of combating unfair competition and started to create competition agencies in the 2000s. These countries now have independent competition authorities: Kosovo (2009), Serbia (2003), Albania (2004), Bosnia and Herzegovina (2004), North Macedonia (2005) and Montenegro (2012). In the following, we present the practices and the way in which

²⁴ See ECJ, 17 July 1963, *Italian Republic v. Commission*, 13-63, ECR-165 in the context of the ECSC Treaty.

²⁵ Richard Posner, *Antitrust Law*, second edition, University of Chicago Press, Chicago and London, 2001, p. 79-80.

²⁶ David Spector, *The Strategic Uses of Price Discrimination, in The Pros and Cons of Price Discrimination* published by the Swedish Competition Authority, 2005, p. 34.

²⁷ Whish, Richard, *Competition Law*, sixth edition, Oxford University Press, Oxford, 2008. p. 728. See also Commission Decision of 18.07.1988 relating to a proceeding under Article 86 of the EEC Treaty. Case No. IV/30.178.

these authorities operate.²⁸

Kosova. The Assembly of Kosovo approved the Law on Competition in 2004, and in November 2008, it established the Kosovo Competition Commission (now the Competition Authority) as an independent body responsible for the implementation of this law, which began its work in March 2009.²⁹ In 2022, the Assembly of Kosovo approved the new law: Law NO. 08/L-056 for the Protection of Competition, which is currently in force.³⁰

North Macedonia. Competition in North Macedonia is regulated by the Law on Protection of Competition, approved on 11 January 2005.³¹ The law defines the Competition Commission and its Secretariat. The Commission is an independent state body with the status of a legal entity, independent in its work and decision-making process within the powers defined by law. The Commission consists of the chairman and four members who are appointed by the Assembly of the Republic of North Macedonia for a period of five years but with the right of reappointment. Investigative activities and other professional work are carried out by the departments of qualified personnel. According to the Law on State Aid from June 2006, the monitoring and control of state aid in the Republic of Macedonia was transferred to the Commission for the Protection of Competition.

Albania. The Competition Authority is a public body that is independent in the performance of its duties. The Authority became active on 1 March 2004 based on law no. 9121 of 28.07.2003 ‘On the Protection of Competition.’ This law has so far undergone substantial amendments. The first amendment was made on 3 April 2006, while the second was in 2010. The law specifies the role that must be played by the Competition Authority in the regulation of economic activity in cooperation with central and local administrative bodies, regulatory entities and other institutions. The Competition Authority’s decision-making body is the Commission, which consists of five members elected by the Assembly of Albania and the Secretariat as an executive body.³²

Bosnia and Herzegovina. The Law on Competition in Bosnia and Herzegovina was adopted in 2001, while the Competition Council was established in May 2004. The Law on Competition regulates competition policy and is one of the most important instruments to create and strengthen the space for action by enterprises and the market economy in Bosnia and Herzegovina. The new Competition Law entered into force on

²⁸ Bellamy and Child, *European Competition Law and Competition*, edited by David Bailey and Laura Elizabeth John, Oxford University Press, 2001, pp. 9–41.

²⁹ Slavica Penev, Andreja Marušić (eds.), 2013. *Competition policy in Western Balkan countries*, published by Westminster Foundation for Democracy (WFD), Western Balkans Parliamentary network of committees for economy, finance and budget and Institute of Economic Sciences, Belgrade, https://npcbal.kan.net/admin/doc/Competition_Policy_in_Western_Balkan_Countries.pdf.

³⁰ Official Gazette of the Temporary Institutions of Self-Government in Kosovo / Pristina: Year II, No. 14/ 01 July 2007. Law No. 2004/36 on competition. <https://ak.rks-gov.net>

³¹ Official Gazette of the Republic of Kosovo / No. June 14 / 7, 2022, Pristina. Law No. 08/L-056 for the protection of competition. Official Gazette of the Republic of Macedonia, no. 04/05. <https://ak.rks-gov.net>

³² Zajmi, I. (2012). *European Competition Law*, Tiranë. p. 45-46.

27 July 2005.³³ The Competition Council consists of six members who are appointed with a mandate of six years, with the possibility of re-election. Three members are appointed by the Council of Ministers of Bosnia and Herzegovina, two members are appointed by the Government of the Federation and one member by the Government of the Republika Srpska. The Council of Ministers of Bosnia and Herzegovina appoints the Chair of the Competition Council (members of the Council) for a period of one year, without the right to re-election during the term of the Competition Council.

Serbia. Serbia adopted the Competition Law in 2005. It also established the Commission for the Protection of Competition, an independent state institution, with responsibility for law enforcement. This Commission started its activities in 2006. In 2005, Serbia replaced the Anti-monopoly Law of 1996. In 2010, with the help of the United Nations Conference on Trade and Development (UNCTAD), the new Law on Competition was prepared at the same time as the law on State Aid Control, with both laws applicable from 1 January 2010.³⁴ Serbia has established a functionally independent authority, which began operating in March 2010, that has been entrusted with the necessary powers to implement the law and to authorise state aid schemes and individual aid grants.³⁵

Montenegro. The legal framework in the field of competition is the Law on the Protection of Competition, which entered into force on 26 November 2005 and has been applied since January 2006. Based on the Decree on amendments to the Regulation on the Organization and Operation of the State Administration, which entered into force on 24 November 2007, the Directorate for the Protection of Competition received powers over operations for the protection of competition. In 2016, Montenegro created an independent Competition Authority. In 2012, the new Law for the Protection of Competition was issued.³⁶

7. Empirical analysis

To provide a clearer picture of the current situation in the Balkan region, Tables shows the important features, such as: the date of the first legislation, the year of establishment of the Competition Authorities, the percentage of the dominant position and the heavy fines for violations.

Table 1. General information about Competition Authorities

<i>Countries</i>	<i>The first law on competition</i>	<i>Year of foundation</i>	<i>The law in force</i>
Albania	2003	2003	2003
Bosnia & Herzegovina	2001	2004	2009

³³ Official Gazette of Bosnia and Herzegovina nr 48/05. <http://www.bihkonk.gov.ba/>.

³⁴ https://unctad.org/system/files/official-document/ditcclp2011d2overview_en.pdf.

³⁵ <http://www.kzk.org.yu>; Official Gazette of the Republic of Serbia. No. 79/05, <https://www.kzk.org.rs/en>.

³⁶ Official Gazette of the Republic of Montenegro no. 37/07. Official Gazette of the RM nr. 06/07. <https://azzk.me>.

Serbia	2005	2005	2013
North Macedonia	2005	2005	2010
Kosova	2004	2009	2022
Montenegro	2005	2016	2012

Sources: Annual reports of Competition Authorities, 2022

Based on the data obtained from the national Competition Authorities for the countries of the Western Balkans, the first competition laws were approved in the 2000s and are relatively new laws, while their implementation came later due to the difficulties of establishing competition authorities.³⁷

The number of cases undertaken for the regulation of competition and the cases handled are still symbolic, and the enforcement of the competition laws needs to be strengthened. The cases of abuse of a dominant position are among the fewest cases handled, as shown in Table 2, while there is an increase in the handling of cases for the notification of concentrations as well as an increase in the giving of opinions and recommendations.

Table 2. *Statistical data regarding competition cases for 2018*

	Albania	Kosova	BH	North Macedonia	Serbia	Montenegro
Prohibited agreements	2	4	6	7	5	6
Abuse of dominant position	2	2	8	7	3	5
Notification of concentrations	13	4	12	50	49	2
Opinions	21	1	6	3	7	8
Total	38	11	32	67	64	21

Source: G Asllani, S Grima - European Research Studies Journal, 2018.

³⁷ G. Asllani, S. Grima, „Competition policy in the Western Balkan countries”, *European Research Studies Journal*, Volume XXII, Issue 2, 2019, pp. 353-366.

Table 3. Determination of the dominant position

Jurisdiction	Articles of law – Dominant position
Kosova	<p>‘a) Unless proven otherwise, the company with a participation of forty percent (40%) or more in the relevant market is considered to have a dominant position.</p> <p>b) Legally independent economic enterprises may have a dominant position if:</p> <p>b.1) their joint participation in the market exceeds sixty percent (60%);</p> <p>b.2). enterprises operate to a significant extent independently of competitors, customers, buyers or suppliers; and</p> <p>b.3) companies are present or act together in the relevant market.</p> <p>c). The authority has the burden of proving the dominant position of:</p> <p>c.1) enterprises with individual participation below forty percent (40%) of the relevant market;</p> <p>c).2. grouping of enterprises with joint participation under sixty percent (60%) of the relevant market’.³⁸</p>
North Macedonia	<p>‘1) The economic entity has a dominant position in the relevant market of goods and services, due to its market power it can significantly and independently influence real and potential competitors, buyers, consumers or suppliers.</p> <p>2) It is assumed that the economic entity has a dominant position in the market of goods and services if it has a participation greater than 40% in the relevant market.</p> <p>(3) It is assumed that more economic subjects have a dominant position in the market of goods and services if in the relevant market two or three have a cumulative participation of more than 60%.</p> <p>(4) It is assumed that multiple economic subjects have a dominant position in the market of goods and services in the relevant market if all four or five subjects cumulatively have a participation greater than 80%’.³⁹</p>
Bosnia and Herzegovina	<p>‘(1) An economic operator has a dominant position in the relevant market for goods or services, because of this it can direct its market forces to a significant extent, independent of factors or potentials, competitors, customers, consumers or suppliers, also taking into account the share of that business, an entity in the relevant market, the shares held by its competitors in that market, as well as legal entities and other barriers to entry for other businesses.</p> <p>(2) It is assumed that the economic operator has a dominant position in the market for goods or services if it has a participation of more than 40% in the relevant market.</p> <p>(3) It is assumed that more economic operators have a dominant position in the market of goods and services if, in the relevant market, two or three economic entities have a combined market share of a greater extent than 60%.</p> <p>(4) It is assumed that more economic operators have a dominant position in the goods and services market if, in the relevant market, four or five business entities have a common market share greater than 80%’.⁴⁰</p>

³⁸ Official Gazette of the Republic of Kosovo / No. June 14 / 7, 2022, Pristina. Law No. 08/L-056 for the protection of Competition, p. 7-8.

³⁹ Law for the Protection of Competition, Official Gazette of the R.M., No. 145/2010. Article 11 LPC.

⁴⁰ Law on Competition ("Official Gazette of Bosnia and Herzegovina", no. 48/05, 76/07 and 80/09). Article 9. Dominant position.

Montenegro	<p>‘(1) A market participant is assumed to have a dominant position in the product (goods or services) market if its share in the relevant market is greater than 50%. It is assumed that two or more market participants have a dominant position in the market for goods and services if there is no significant competition between them and if their total share in the relevant market is greater than 60% (collective dominance).</p> <p>(2) The burden of proving that a dominant position in the market can also be held by a participant whose share in the relevant market is less than 50%, or lower than 60% in the case of collective dominance, is on the Agency’.⁴¹</p>
Albania	<p>‘The dominant position of one or more enterprises is assessed, taking into account, in particular: a) the relevant market share of the enterprise or enterprises under consideration and of other competitors; b) barriers to entry into the relevant market; c) potential competition; ç) the economic and financial strength of enterprises; d) economic dependence of suppliers and buyers; d) countervailing power of buyers; e) the development of the distribution network of enterprises and the possibilities of using product resources; f) economic ties with other enterprises; g) other characteristics of the relevant market such as homogeneity of products, market transparency, uniformity of cost and size of enterprises, stability of demand or free production capacities’.⁴²</p>
Serbia	<p>‘A dominant position is a market participant who, because of its market power, can operate in the relevant market to a significant extent independently of actual or potential competitors, customers or suppliers.</p> <p>The market power of market participants is determined in relation to relevant economic and other indicators, in particular: 1) the structure of the relevant market; 2) the market share of the market participants whose dominant position is established, especially if it is greater than 40% in the relevant market; 3) actual and potential competitors; 4) economic and financial power; 5) the degree of vertical integration; 6) advantages of entering supply and distribution markets; 7) legal or factual obstacles to access to other market participants; 8) customer power; 9) technological advantages, intellectual property rights.</p> <p>Two or more legally independent market participants may have a dominant position if they are linked by economic ties so that they together act or act as a participant in the relevant market (collective dominance)’.⁴³</p>
European union	<p>‘Article 102 of the Treaty on the Functioning of the European Union ("TFEU") does not define the term "dominant position", less detail how the dominant position will be assessed. The legal definition of a dominant position in EU law is: "A position of economic power by an enterprise which allows it to prevent effective competition in the relevant market by giving it the power to bring itself to a considerable extent independent of its competitors, its customers and ultimately its consumers". A dominant firm is one that accounts for a significant portion of a given market and has a significantly larger market share than its largest rival. Dominant companies are usually considered to have market shares of 40 percent or more’.⁴⁴</p>

Source: *Laws of National Competition Authorities.*

⁴¹ Law on Protection of Competition published in the Official Gazette of the Republic of Montenegro, no. 44/2012 of 9 August 2012. Article 14, p. 5.

⁴² Law No. 9121, of 28.7.2003 on the protection of competition. Article 8.

⁴³ Law on protection of competition “Official Gazette of the RS”, no. 51/2009 and 95/2013. <http://www.kzk.org.rs>.

⁴⁴ Rule No. 1/2003. European Commission for Competition. <https://competition-policy.ec.europa.eu>.

8. Conclusions

The countries of the Western Balkans have faced many political and economic problems in the past and have relatively new competition institutions. Much effort was needed to make the authorities functional in applying competition law. To create a sustainable competition regime, the national competition authorities of the Western Balkans should focus on addressing issues related to prohibited agreements, abuse of a dominant position and control of concentrations; the validity and implementation of laws and other by-laws that may create favouritism and monopolies; the strengthening of human resources; and improving market analysis through professional expertise. The establishment and abuse of a dominant position is quite complex and is also related to prohibited agreements and concentrations (integrations and mergers) that strengthen the dominant position of the enterprise or collective dominance.

Competition authorities should cooperate with regulated entities and use their best expertise when investigating cases to ensure compliance with the legislation. It is particularly important to promote the importance of competition and the recognition of competition law protection as well as the preparation of secondary legislation in this area. To strengthen the effectiveness of law enforcement in specific cases, the authority should also implement administrative measures against the violation of competition by effectively using sanctions and issuing fines in cases of abuse.

Bibliography

1. Aghion, P., Bloom, N., Blundell, R., Griffith, R. & Howitt, P. (2005). „Competition and Innovation: An Inverted U-Relationship”, *The Quarterly Journal of Economics*, 120 (2), 701-728.
2. Aşçıoğlu Öz, G. 2006. *The Role of Competition Authorities and Sectorial Regulators: Regional Experiences*. UNCTAD's Seventh Session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva.
3. Asllani, G. & S. Grima, „Competition policy in the Western Balkan countries”, *European Research Studies Journal*, Volume XXII, Issue 2, 2019, pp. 353-366.
4. Begović, B. & Popović, V. 2018. *Competition Authorities in South Eastern Europe: Building Institutions in Emerging Markets*. Cham: Springer Open.
5. Bellamy and Child, *European Competition Law and Competition*, edited by David Bailey and Laura Elizabeth John, Oxford University Press, 2001, pp. 9–41.
6. Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ No. C 372 of 9 December 1997.
7. Competition law and policy OECD, 2010. DAF/COMP (2009)21. <https://www.oecd.org/competition>.
8. 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 (Text with EEA relevance).
9. Decker, C. 2009. *Economics and the Enforcement of European Competition Law*, Edward Elgar Publishing Ltd., Cheltenham.
10. Dereli, Deniz Dilara, 2015, *Innovation Management in Global Competition and Competitive Advantage*, available online at www.sciencedirect.com ScienceDirect.

11. Dethmers, F. & Engelen, H., 'Fines under Article 102 of the Treaty on the Functioning of the European Union', *European Competition Law Review*, 32, issue 2, 2011, p. 86-98.
12. Këllezi, Pranvera, 'Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence', in Mark-Oliver Mackenrodt, Beatriz Conde Gallego, Stefan Enchelmaier (eds.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, Springer, 2008, p. 55-88.
13. Krakowski, M. (2005), *Competition Policy Works: The Effect of Competition Policy on the Intensity of Competition*, HWWA Discussion Paper, No. 332, Hamburg Institute of International Economics (HWWA), Hamburg, available online at <https://www.econ.stor.eu/bitstream/10419/19300/1/332.pdf>.
14. Lorenz, M., *An introduction to EU competition law*. Cambridge University Press, 2013.
15. Mehta, M., 2002. *Challenges in Implementing a Competition Policy and Law: An Agenda for Action*. CUTS Centre for International Trade, Economics & Environment.
16. Obradović, M., Lončar, D., Stojanović, F. & Milošević, S. 2018. "Public interest consideration in competition policy", *Ekonomika preduzeća*, Vol. 67 (1-2), December, p. 167-179, DOI: 10.5937/EKOPRE 1808167O.
17. Olszewski J. (2004), *Nadzór nad koncentracją przedsiębiorców jako forma prewencyjnej ochrony konkurencji i (Supervision over the concentration of entrepreneurs as a preventive form of competition protection)*, Wydawnictwo Uniwersytetu Rzeszowskiego, Rzeszów.
18. Penev, Slavica & Andreja Marušić (eds.), 2013. *Competition policy in Western Balkan countries*, published by Westminster Foundation for Democracy (WFD), Western Balkans Parliamentary network of committees for economy, finance and budget and Institute of Economic Sciences, Belgrade, https://npcbal.kan.net/admin/doc/Competition_Policy_in_Western_Balkan_Countries.pdf.
19. Posner, Richard, *Antitrust Law*, second edition, University of Chicago Press, Chicago and London, 2001.
20. Săraru, C. S., *State Aids that are Incompatible with the Internal Market in European Court of Justice Case Law*, in Săraru, C. S. (ed.), *Studies of Business Law - Recent Developments and Perspectives*, Peter Lang, Frankfurt am Main, 2013, p. 39-48.
21. Spector, David, *The Strategic Uses of Price Discrimination, in The Pros and Cons of Price Discrimination* published by the Swedish Competition Authority, 2005.
22. Whish, Richard, *Competition Law*, sixth edition, Oxford University Press, Oxford, 2008.
23. Zajmi, I. (2012). *European Competition Law*, Tiranë.
24. Zhezha, Vaeld, 2016. "Analysis of Competition Policy in the European Union", PhD thesis, <https://unitir.edu.al/analize-e-politikes-se-konkurrencens-ne-bashkimin-evropian>