

SCF

Sofia Competition Forum

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SPECIAL PROJECT

Comparative overview of the Balkan competition regimes



BULGARIAN COMMISSION
ON PROTECTION OF COMPETITION



UNITED NATIONS CONFERENCE
ON TRADE AND DEVELOPMENT

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Abbreviations used for SCF members in this report:

ALB: Albania



BIH: Bosnia and Herzegovina



BUL: Bulgaria



CRO: Croatia



KOS: Kosovo



MKD: Macedonia



MNE: Montenegro



SRB: Serbia



Introduction

The Sofia Competition Forum (SCF) is a joint initiative of the United Nations conference on trade and development (UNCTAD) and the Bulgarian Commission on Protection of Competition (CPC). The founding document by which the Forum was established was the Memorandum of Understanding signed by the UNCTAD and the CPC on 11 July 2012 in Geneva.

The SCF aims to assist the Balkan competition authorities in adopting and enforcing competition law in compliance with the best European and international practices and to maximize the benefits for their countries of well-functioning markets. The main beneficiary competition authorities are those of Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Kosovo, Montenegro, the Republic of Macedonia and Serbia. The beneficiaries have signed the Sofia Statement of 12 November 2012 by which they have committed to deepen the cooperation among themselves and to contribute to the activities and initiatives of the SCF. In view of the fact that most countries in the Balkan region face similar challenges in their transition to market economy, the problems in competition law enforcement are also of the same kind. This created the need to establish an informal platform for technical assistance, capacity building and exchange of experience on areas of interest for the countries in the region.

This report aims to provide a comparative overview on the institutional substantive and procedural aspects of the Balkan competition jurisdictions in order to promote mutual understanding of the existing laws in the region. The European competition *acquis* serves as a benchmark for comparison of the reviewed competition regimes. The document can also serve as a basis for well-informed discussions on the need for further convergence and how this can be best achieved.

The report is based on the information provided by **8 jurisdictions** members of the SCF (**ALB, BIH, BUL, CRO, KOS, MKD, MNE, and SRB**).

I. Institutional issues

1. Establishment of the Balkan competition authorities

In all Balkan jurisdictions, the competition authorities have been established as independent specialized state bodies responsible for the application of the competition law in the respective countries. Most competition authorities in the region were established in the years after 2000, with the exception of **BUL** in 1991 and **CRO** in 1995. The Croatian Parliament adopted a decision to establish the competition authority in 1995 but it started being operational in 1997.

Table 1.1. Year of establishment of the Balkan competition authorities

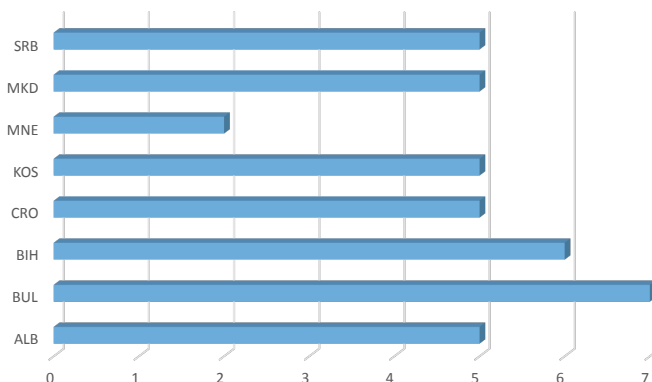
Competition authority	Year of establishment
BUL	1991
CRO	1995
ALB	2004
BIH	2004
MKD	2005
SRB	2005
KOS	2009
MNE	2013

Most of the Balkan competition authorities report on their activities to the national parliaments while the youngest competition agency (**MNE**) is accountable for its performance to the government. The authorities are financed by the State budget and their main objective is to protect the free and effective competition in the market. It should be noted that some of the agencies (e.g. **ALB** and **MNE**) were part of other ministries and public bodies before becoming independent institutions. For example, prior to the establishment of the **MNE** competition agency, competition law and policy were applied by the Administration for Protection of Competition, and before that by a directorate within the Ministry of Economy.

2. Composition of the Balkan competition authorities

The majority of the Balkan agencies which took part in this survey are collegiate bodies, consisting of a president/chairperson and members of the council/commission/board. In most cases the collegiate body is composed of 5 members (**ALB, CRO, KOS, MKD, SRB**). In **BUL** the Commission consists of 7 members, while in **BIH** they are 6. A peculiar feature of the **BIH** competition agency is that each year a new chairperson is elected out of the six members of the collegiate body. In the case of **MNE**, the agency is managed by one director who is assisted by a deputy director.

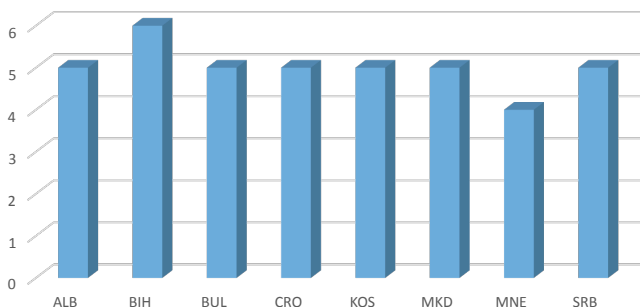
Figure 1.1. Number of members of the collegiate body



The collegiate body is usually elected by the National Assembly. In **KOS** the Government nominates the candidates and submits the nominations for final approval and appointment by the Assembly. In **MNE** the director and the deputy director are appointed by the Government.

In most Balkan jurisdictions, the council/commission/board is appointed for a 5-year term. In **ALB** the commission members are elected for a 5-year term, but only for the first appointment at the time when the competition law entered into force, the Chair was appointed to serve a 5-year term, the Deputy Chair – a 4-year term and three other members – a 3-year term. The director and the deputy director in **MNE** serve a 4-year term and in **BIH** the term of office is set to 6 years. The president and members of the **CRO** competition authority serve a term of five years with the possibility for reappointment and are appointed and relieved from duty by the Parliament on the proposal of the Government.

Figure 1.2. Term of office of the collegiate body



In all jurisdictions, the council/commission/board is the decision-making body and in its work it is supported by the administration of the agency, which carries out the investigations of ongoing cases. The administration is usually divided into specialized directorates which ensure the implementation of the competition act and the other laws which the agency enforces (e.g. public procurement law, concessions law, state aid law).

3. Competence

The Balkan competition authorities which took part in this survey have more or less similar competences, although some competition authorities have more powers to apply the law than others. In particular the functions of the authorities may be divided into the following groups: 1. Enforcement of the competition law; 2. Market supervision; 3. Competition advocacy; 4. International cooperation; 5. Others.

3.1. Enforcement of the competition law

The main competences of the competition authorities regarding enforcement of the competition law are presented in the table below.

Table 1.2. Enforcement of competition law

Competence	Authority							
	ALB	BIH	BUL	CRO	KOS	MKD	MNE	SRB
Establish infringements under the competition law	x	x	x	x	x	x	x	x
Establish infringement of Art. 101 and/ or Art. 102 TFEU			x	x				
Impose sanctions	x	x	x	x	x	x		x
Impose interim measures	x	x	x	x	x	x	x	x
Approve commitments of the undertakings	x		x	x		x	x	x

Impose the appropriate behavioural and/or structural remedies to restore competition	x	x	x	x		x	x	x
Assess concentrations	x	x	x	x	x	x	x	x
Adopt regulations for the implementation of the competition law	x	x	x	x	x	x	x	

As shown in the table, the Balkan competition authorities have a lot of similarities in their competences with respect to the enforcement of the competition law. However there are some particularities in their competition enforcement powers.

The jurisdictions of **BUL** and **CRO**, as members of the European Union, are also empowered to apply Art. 101 and Art. 102 of the TFEU provided that the respective agreement or practice may affect trade between EU Member States. In addition, the two authorities are empowered to cooperate with the European Commission and the other national competition authorities within the European Union in accordance with Regulation (EC) No. 1/2003 and Regulation (EC) No. 139/2004.

Although the jurisdiction of **SRB** is not empowered to adopt regulations on the implementation of the competition law, it may propose to the Government to adopt such legislative acts. Another specific function of the jurisdiction of **SRB** is to keep records of notified agreements between undertakings and of market participants that have a dominant position on the market. In **MNE** and **SRB** the jurisdictions are also empowered to keep records of notified concentrations. A specific competence of the competition authority of **BIH** is to regulate the definitions and calculation methods for specific areas of economic activity, such as banking, insurance, etc.; to regulate and to provide interpretation of general and specific definitions of the competition terms, as well as calculation methods for the key competition terms. Interesting is the power of the competition authority of **MNE** to establish expert and advisory bodies for the purpose of enforcing the law. These bodies are formed when there is need for an expert opinion on a specific topic. In **MNE** the authority is empowered to determine methods for assessment of competition dynamics, current and prospective competition trends, etc. The competition authority of **BIH** is also empowered to establish expert and advisory bodies. In **KOS** the commission may propose a methodological basis to study market competition through an administrative direction and may define regulations and measures for the protection of competition.

3.2. Market supervision

Market supervision falls within the competences of all Balkan competition authorities. The jurisdictions monitor and analyze the conditions on the markets through the conduct of sector inquiries of the competitive environment in different sectors of the economy.

3.3. Competition advocacy

The competition advocacy is one of the main functions of all jurisdictions in the Balkan region. It is accomplished in many different ways, such as through the assessment of the compatibility of draft legal acts and legal acts in force with the competition rules and the adoption of opinions proposing to the competent state authorities to amend or revoke their acts, which distort competition; cooperation with other state authorities in order to ensure the effective enforcement of the competition law; organisation of different initiatives with the aim to raise the public awareness about the necessity to protect competition rules.

3.4. International cooperation

The national legal frameworks empower all Balkan competition authorities to cooperate with their counterparts from other countries and international organisations in the field of competition policy.

3.5. Others

All jurisdictions are empowered to prepare annual reports for their activity and maintain registers of their enforcement acts with a view to ensure publicity and transparency. The authorities may also adopt rules on their internal organisation.

4. Major reforms

Over the years, the countries of the region have undertaken a number of steps in order to bring their competition legislations in line with the European *acquis* and the international best practices. In particular:

- In 2012 in **ALB**, in compliance with the National Action Plan for the Implementation of the Stabilization and Association Agreement and the approximation of the secondary legislation, four regulations, mainly in relation to technical rules on block exemptions, and a guideline on the control of concentrations were adopted.

- In **BIH** the competition law was amended twice – in 2007 and 2009, in order to increase the efficiency of the agency.

- In **BUL** the law of 2008 introduced a new sanctioning policy. In line with EC law, the sanctions are now defined as a certain percentage of the turnover of the undertakings during the previous year, rather than as a lump sum, as was the case under the repealed law. The 2008 Law specifically spells out some of the requirements that a cartel member needs to satisfy in order to qualify for exemption or a reduction of fines. As a result of the country's accession to the EU the competences of the competition authority in the area of assessment and control of state aid dropped and were transferred to the European Commission.

- In **CRO**, substantial reforms in the internal structure of the authority took place in 2011 when a Chief Economist Office was established, as well as specialized departments for cartel investigations and competition advocacy. In view of the country's accession to the European Union in 2013, the agency had to adjust its internal structure one more time in order to assume its new competences given by the Regulation (EC) 1/2003. The new competences refer to the direct application of Art. 101 and 102 of the TFEU and the participation of the **CRO** competition agency in the European Competition Network.

- Currently **KOS** is in the process of amending its competition law and the new act will soon become effective.

- Since 2007, the competition agency of **MKD** has been the competent body which conducts a misdemeanour procedure as a result of which it establishes infringements of competition law and imposes sanctions on the infringers. Further to this, with the new law of 2010 a leniency program was introduced and a bylaw on leniency was enacted in 2012.

- In **MNE** the new Law on Protection of Competition entered into force in 2012 with the aim to harmonize the national law with the EU rules in the field of competition. An important reform was the establishment of a functionally independent entity – the Agency for Protection of Competition.

- The jurisdiction in **SRB** has carried out significant amendments of its competition law in the past several years, whereby, among others, the provision on dominance was redefined and supplemented, changes to the provision on merger control were introduced, and the provision on the protection of confidential information was specified.

5. Independence

The Balkan competition authorities are established under their national laws as independent public bodies specialised in enforcing competition rules.

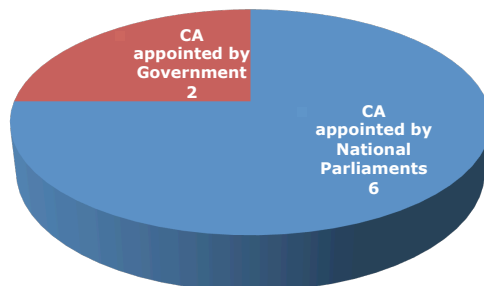
With regard to financing, most of the competition authorities are supported by the state budget. In **MNE** the competition authority participates in the budgetary procedure by adopting a financial plan which is submitted to the Government for approval. In addition to the resources provided by the state, the authority of **MNE** is allowed to fill its budget from fees paid to the Agency, donations and other sources allowed by law.

As part of their transparency efforts, all of the authorities are obliged to publicly report on their activities on an annual basis. In most jurisdictions the report has to be submitted to the National Parliament (**ALB, BUL, CRO, KOS, MKD, MNE, SRB**), while in **MNE** the report must also be sent to the Government. In the case of **BIH**, the report is submitted only to the Government.

All national legislations which took part in this study contain provisions guaranteeing the impartiality and independence of the competition authorities. Most competition authorities are appointed by the National Parliaments (**ALB, BUL, CRO, KOS, MKD and SRB**), while some of them are appointed by the Governments (**BIH and MNE**). All national laws list the necessary criteria for the appointment of the members of the authorities and contain an exhaustive list of reasons for the early

termination of the mandate. The majority of competition authorities take decisions as a college of members.

Figure 1.3. Appointment of competition authorities



6. Conclusion

The competition authorities of the Balkan region are independent state authorities empowered to protect the free competition on the markets by applying the provisions of the competition law. All of them have wide range of competences, many of which are similar. During the last few years, in order to strengthen their enforcement powers and to bring their national legislations in line with the European *acquis*, all of the jurisdictions have undertaken measures and reforms.

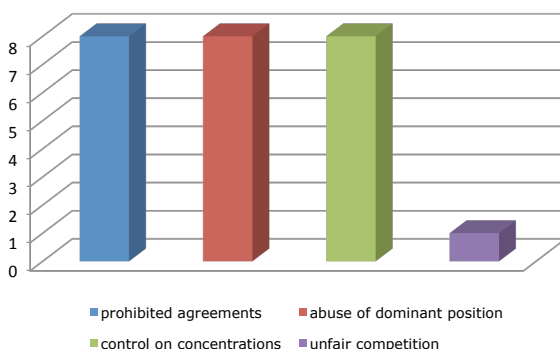
All national competition laws contain provisions for safeguarding the independence of the competition authorities and restricting any possible external interference in the investigatory and decision-making process. This is an important prerequisite for an effective enforcement of the competition rules in every Balkan competition jurisdiction.

II. Substantive provisions

1. Areas of operation

The national competition authorities of all SCF members are empowered to apply antitrust provisions on prohibited agreements and abuse of dominant position. All SCF members have competences with regard to the control of concentrations. Only the **BUL** authority applies rules in the field of unfair competition.

Figure 2.1. Areas of operation



2. Prohibited agreements

In all Balkan competition jurisdictions the provisions concerning prohibited agreements are identical to Art. 101 of the Treaty on the Functioning of the European Union (TFEU) – agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. The particular forms of prohibited agreements listed in the provisions are those that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development, or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

These forms are envisaged in the relevant provisions in Balkan jurisdictions. In addition, one country has also included agreements that impose the obligation to apply particular resale price or otherwise ensure the application of recommended resale price (**MNE**).

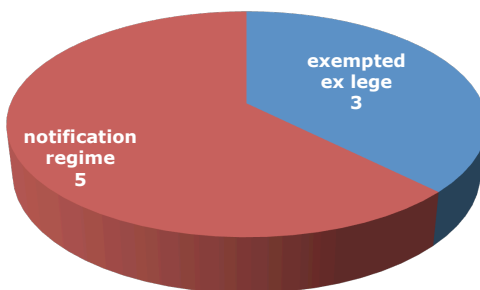
3. Notification regime for exemption of agreements

The laws of all SCF members provide for the possibility of individual exemption of agreements. The conditions for exemption in all SCF members are similar to those in Art. 101 (3) TFEU – the agreements shall not be prohibited if they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

In most of the competition jurisdictions in the region notification regimes apply regarding the agreements between undertakings. In 3 of the jurisdictions (**BUL, CRO, MKD**) there is no notification regime. The agreements that meet the criteria for exemption are considered exempted *ex lege* and it is not necessary for the companies to preliminarily inform the competition authority of their agreements. This is in line with the modernisation of the EU competition rules under Regulation (EC) 1/2003.

All competition legislations of SCF member countries provide possibilities for block exemption of certain categories of agreements, decisions and concerted practices.

Figure 2.2. Notification regime for exemption of agreements



4. Abuse of dominant position

The national provisions of the countries in the region with regard to the prohibition of the abuse of dominant position are largely in line with the EU law in this field.

As regards the definition of "dominant position", most of the SCF members, similarly to the EU law, consider it as the position of one or more undertakings which are independent of their competitors, suppliers or customers (**ALB, BIH, BUL, CRO, MNE, SRB**), and hence do not apply presumption of dominance based on certain

market share (**ALB, BIH, BUL, SRB**). The Balkan legislations which envisage such presumption are **CRO, KOS and MKD** (40%), **MNE** (50% and 60% for collective dominance). Only one jurisdiction uses the term "monopoly position" as distinctive from "dominant position" (**BUL**). The monopoly position is defined as a position of an undertaking which by law has the exclusive right to carry out a certain type of economic activity.

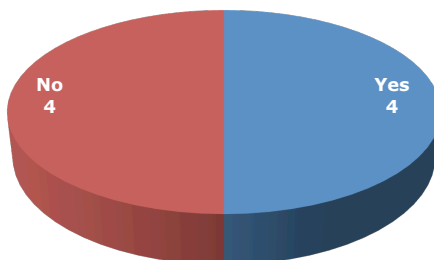
Similarly to Art. 102 TFEU all Balkan competition jurisdictions have envisaged the following forms of abuse of market dominance:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In addition some of the legislations have also included:

- unjustified refusal to supply goods or to provide services to actual or potential customers in order to impede their economic activity (**BUL, MKD**). In **MKD** this form is more broad and includes also encouraging and requesting from other undertakings or association of undertakings not to purchase or sell goods and/or services to a certain undertaking, with an intention to harm that undertaking in a dishonest manner;
 - setting prices or other conditions, the objective or the result of which is to prevent entering or exclude certain competitors or one of their products from the relevant market (**KOS**);
 - unjustified refusal to allow another undertaking access to its own network or other infrastructure facilities for adequate remuneration, if without such access, as a result of legal or factual reasons, the other undertaking becomes unable to operate as a competitor on the relevant market (**KOS, MKD**).

Figure 2.3. Presumption of dominance based on market share



5. Control on concentrations

All Balkan competition authorities have competences with regard to the preliminary control on concentrations between undertakings. In all jurisdictions, the undertakings are obliged to notify in advance any concentration that covers the respective threshold of the undertakings' turnover.

Similarly to Regulation (EC) 139/2004, the following forms of concentrations are assessed: mergers (all SCF members), acquisitions of control (all SCF members), joint ventures (**BIH, BUL, CRO, KOS, MKD, MNE, SRB**).

Some of the competition authorities, similarly to Regulation (EC) 139/2004, assess the concentrations using the "Significant impediment of effective competition" (SIEC) test (**ALB, BIH, KOS, MKD, MNE, SRB**). The SCF members which apply the dominance test review it not only in terms of market structure, but also as a two cumulative criteria: whether the concentration leads to creating or strengthening of the dominant position and whether it affects the effective competition on the relevant market (**BUL**). **CRO** decides on a case-by-case basis but takes into account the same criteria: dominant position and significant impediment of effective competition. Thus basically all SCF members apply the same criteria when assessing concentrations.

6. Conclusion

There is a high degree of convergence between the Balkan competition jurisdictions with regard to the competences of the competition authorities. However there are some differences with regard to the legal framework that regulates the way these competences are applied and more particularly whether there is a notification regime for agreements and whether there is a presumption for dominant position in case a certain market share is reached.

III. Procedural provisions

1. Initiation of proceedings

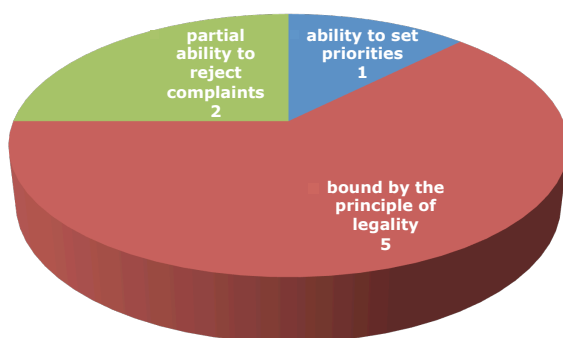
The competition authorities of **ALB, BIH, BUL, MKD and SRB** can initiate proceedings both following a complaint and *ex officio*. However **CRO, KOS and MNE** can initiate antitrust proceedings only *ex officio*. Some of the authorities issue a formal decision to open proceedings (**ALB, BIH, CRO, KOS, and MNE**) while others initiate proceedings by an administrative order (**BUL, MKD**) or a resolution of the president of the authority (**SRB**).

In most of the Balkan jurisdictions the competition authorities are under the procedural obligation to inform the parties of the initiation of proceedings with a formal letter (**ALB, BIH, BUL, CRO, KOS, MKD, and SRB**). In **MNE** the decision for opening of proceedings is published in the *Official Gazette of Montenegro* and on the website of the Agency.

2. Priority setting

All Balkan competition authorities have the power to set priorities by initiating proceedings *ex officio*. However, in terms of complaints most of them are bound by the principle of legality and have to deal with each case that is brought to their attention (**ALB, BIH, KOS, MKD and MNE**). In **BUL** and **SRB** the competition authority is obliged to open formal proceedings only if the complaint is properly filed and the legal conditions for initiation of the proceedings are met. However, in all other cases the authority can decide whether to continue with an in-depth analysis and eventually open a case or to reject the request on the basis of preliminary assessment. Only in **CRO** the competition authority has the power to reject a complaint and not to initiate proceedings if there is lack of public interest.

Figure 3.1. Priority setting as regards complaints



3. Conclusion

There are some differences with regard to the procedure of initiation of proceedings before the Balkan competition authorities. The most important is that all of them have the ability to set priorities by initiating proceedings *ex officio*. However, only one of the authorities is able to prioritize cases on the basis of complaints, the reason being that most of the Balkan competition authorities are bound by the principle of legality and have to consider every competition case that is brought to their attention.

IV. Case investigations

1. Available investigative powers

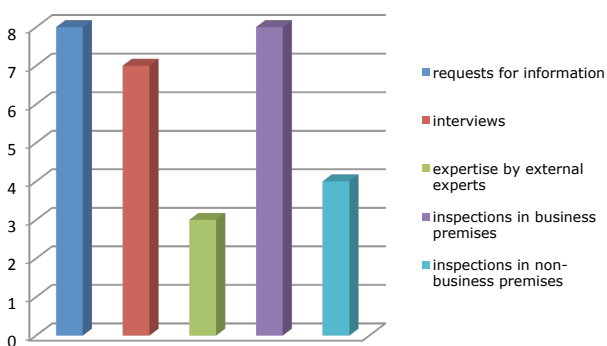
All Balkan competition authorities have the power to request information. In **ALB** the request for information can be a two-stage process. If the undertaking or natural person does not provide the requested information, the competition authority may request it by a decision. In **SRB** in case the party does not provide the requested

documents and information until the conclusion of the procedure, the competition authority shall take a decision based on the state of evidence available in the case, and the suspicion resulting from the lack of the mentioned evidence shall be against the party not responding to the order.

Most of the SCF members have the power to take oral statements from persons (**ALB, BIH, BUL, CRO, KOS, MNE, SRB**) while three of them may entrust the conducting of expertise to external experts (**BUL, MNE, SRB**).

All the authorities are empowered to make inspections on spot (dawn raids) in the business premises of the respective undertakings. However, only half of them have the power to inspect non-business premises (**ALB, BIH, CRO, SRB**).

Figure 4.1. Investigative powers

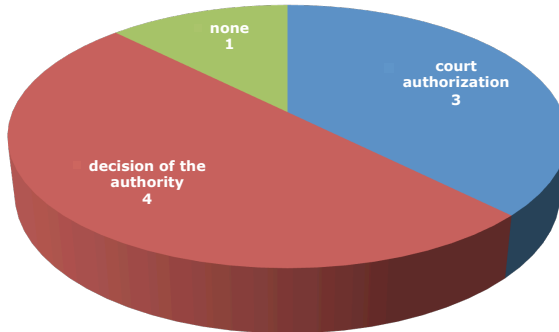


2. Requirements to make unannounced inspections (dawn raids)

In some SCF members there is an explicit legal requirement that proceedings must be open in order to carry out an inspection (**BUL, CRO**).

In three jurisdictions in order to make an inspection an authorization by court is required (**BUL, CRO, KOS**). In all of these countries the warrant is issued by one centralized court. In four countries a formal decision of the competition authority is enough to make an unannounced inspection on spot (**ALB, BIH, MNE, and SRB**). However, in **ALB** and **BIH** for an inspection of non-business premises a preliminary authorization by the relevant local court is required. In **SRB** a court warrant is necessary only when the owner or holder of non-business premises opposes to an inspection on spot. In **MKD** the competition authority does not need any kind of court approval or a formal decision to conduct a dawn raid.

Figure 4.2. Requirements for an inspection in business premises



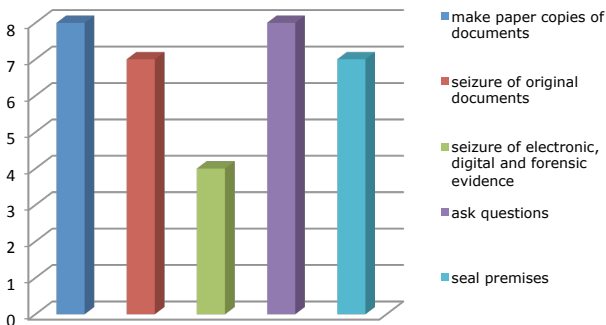
3. Powers during inspections

During the inspections on spot all Balkan competition authorities have the right to make paper copies of documents. The seizure of original documents is usually done with the purpose to make copies (**BUL, CRO, KOS, MKD, MNE, SRB**). The laws of some countries explicitly mention that the seizure of original documents is allowed if it is not possible to obtain copies of the documents (**BUL, CRO, MKD, MNE and SRB**). The competition authority of **ALB** may seize original documents for not more than 72 hours.

Seizure of electronic, digital and forensic evidence is envisaged in four jurisdictions (**ALB, BIH, BUL, CRO**).

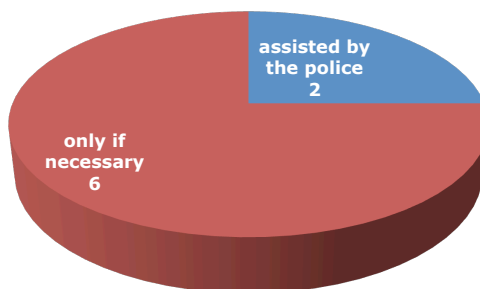
All SCF members have the power to ask questions and almost all are allowed to seal premises for the purposes of the inspection (**ALB, BIH, BUL, CRO, MKD, MNE, and SRB**).

Figure 4.3. Powers during inspections



In all SCF members the competition authorities are or have the power to be assisted by the police. In two jurisdictions the competition authorities are assisted by the police during inspections (**BUL and MKD**) while in six countries the competition authority requires the assistance of the police only if this is deemed necessary (**ALB, BIH, CRO, KOS, MNE and SRB**).

Figure 4.4. Assistance by the police during inspections



4. Conclusion

The Balkan competition authorities have at their disposal the basic investigative powers in competition cases – requests for information, interviews and inspections on spot. The most significant difference appears to be the right to inspect non-business premises which is possible for only half of the surveyed competition authorities. There are also differences with regard to the necessity of court authorization to make an unannounced inspection and with regard to the role of the police when conducting inspections. Generally, the competition authorities are equipped with enough powers during inspections, including the power to collect paper copies and original documents, and to ask questions. However, the seizure of electronic, digital and forensic evidence is envisaged only in half of the competition authorities in the region.

V. Procedural fairness

1. Access to file

In all Balkan competition jurisdictions, parties to the proceedings before the competition authorities are entitled to the right of access to the case file.

In general, access is granted after a party to the procedure or an interested third party has submitted a request to the competition authority. In most countries, access takes place at a specific stage of the proceedings. For example, in **ALB**, the procedure is divided into preliminary and in-depth investigation and parties are not entitled to access the file during the preliminary investigation, but are granted access before the hearing sessions. In **BUL, CRO, MKD, KOS**, parties can view the case file after receiving the Statement of objections (SO) or its equivalent. Nevertheless,

although the competition law of **BIH** provides that access to the case file should be granted to the parties, it does not specify at which stage in the proceedings this should happen. It is worthy to mention that in **MNE** and **SRB** access to the file may be exercised at any moment during the proceeding. For the purposes of granting the right, the **MNE** competition authority applies the Law on Administrative Procedure, as there are no specific provisions on this matter in the competition law.

Access to internal documents of the authority itself, however, is not granted in all Balkan competition jurisdictions. The scope of what is defined as internal documents is very similar in the different countries.

2. Treatment of confidential information

In all Balkan jurisdictions parties are entitled to request that the information they submit be treated as confidential, substantiating their claims and explaining the possible damage which would arise as a result of its disclosure. Most national competition laws provide for specific criteria to determine whether particular information should be considered a business or trade, or commercial secret (**BUL, CRO, KOS, MNE**). In **MNE** and **SRB** the request for confidential treatment is assessed on the ground of whether the undertaking's private interest is more important than the need to inform the public.

It is worthy to mention that in **CRO** and **SRB** the law contains explicit provisions on legal professional privilege. Pursuant to that principle, any letters, notices and other exchange of information between the undertaking and its lawyer shall be considered as privileged information and, therefore, treated as confidential information.

3. Statement of objections

Before taking a final decision, all Balkan competition authorities issue an SO or equivalent which is then addressed to the parties to the proceedings.

In **BIH**, however, issuing an SO is not a mandatory part of the proceedings. All competition authorities give parties the right to reply to the SO or equivalent and to submit their written observations. Most competition laws set a minimum time-period for replying and sending written observations. In general, it starts to run from the day of receiving the SO. Noteworthy, in **MKD** the competition authority issues a preliminary SO and a final SO. The deadlines for replying to them are fixed (15 and 8 days). Thus, the **MKD** gives parties two opportunities to express their views on the authority's findings and allegations at two different stages in the proceedings.

The minimum time-periods for replying to the SO or equivalent for the different SCF jurisdictions vary as follows:

- **ALB** – 10 days
- **BIH** – not provided for in the law
- **BUL** – 30 days
- **CRO** – 30 days
- **KOS** – 30 days
- **MKD** – 8 days

- **MNE** – 15 days
- **SRB** – the law does not specify any duration

In most jurisdictions the SO is addressed primarily to the defendant in the competition proceedings. A non-confidential version of the SO could be sent to the applicant in the proceedings and/or an interested third party.

None of the national laws of SCF members provide for a privilege against self-incrimination in the competition proceedings.

4. Conclusion

Based on the above, it appears that all Balkan competition authorities are striving to guarantee an adequate protection of the procedural rights of defence of the parties to the proceedings. A constant challenge to competition authorities is to set the right balance between the effectiveness of the proceedings and the procedural fairness. This is a topic which deserves a continuous discussions and exchange of best practices.

VI. Resolution on cases

In all jurisdictions in this study the competences regarding the investigation and deciding upon the case are granted to one institution – the competition authority.

In **MKD** the decision in misdemeanour matters is adopted and the sanction is imposed by a Commission on misdemeanour matters. It consists of the President and two members of the Competition Commission.

In **ALB, BIH, CRO** and **KOS** the proceedings are initiated with a decision of the Commission while in **BUL, MKD, MNE** and **SRB** the cases are opened with an administrative act (order or decision) of the head of the competition authority. In all jurisdictions the case handlers who are part of the specialised administration of the authority are responsible for carrying out the investigation, drafting and addressing the SO to the parties, drafting the proposal for a decision on substance. In **BIH** and **BUL** the investigation is supervised by a member of the competition authority while in **KOS** this task is fulfilled by the Commission.

In most of the countries of the Balkan region after closing the investigation the case handlers submit a draft report to the board of the competition authority. The following additional aspects can be highlighted:

- In **ALB**, after closing the investigation, the working group presents a report to the directors and to the Secretary General of the Authority. The report then is delivered to the Cabinet of the Commission, which contains the factual, legal and economic analysis of the case as well as a proposal concerning the manner of conclusion of the proceedings. After that, a Competition Commission meeting is held, where the working group represent its findings to the Commission.
- In **BIH**, once the procedure is finalized, a member of the Commission submits a report on the proceedings together with a proposal of the decision to be taken at the session of the authority.
- In **BUL**, for example, the case team presents a report to the supervising member of the Commission, which contains the factual, legal and economic analysis of

the case, as well as a proposal concerning the manner of conclusion of the proceedings. The supervising member informs the Chairperson of the completion of the investigation. The Chairperson issues a resolution scheduling a closed sitting of the decision making body, where it decides on the further course of the proceedings.

The Agency of **MNE**, in merger cases, is empowered to adopt the decision immediately, without conducting an investigation, if the party in its request for issuance of the approval for implementation of a concentration supplies facts or submits evidence on the basis of which it is possible to determine that the notified concentration fulfils all admissibility requirements on the basis of criteria referred to in the law or if such state of play can be established on the basis of generally known facts or the facts known to the Agency, except if the conditions for investigating concentration *ex officio* are established or met.

In all of the jurisdictions the board of the competition commission is responsible for the decision-making process.

1. Types of decisions

The competition authorities are empowered to adopt many different types of decisions, but the one that is common to all of them is the so-called "infringement decision" – by which the authorities establish the committed infringement, the infringer and impose sanctions. Decisions establishing that no infringement has been committed (positive decisions) may be adopted only by the authorities of **ALB**, **BUL** and **KOS**.

The types of decisions, which can be adopted by the Balkan competition authorities are presented in the table below.

Table 6.1. Types of decisions

Type of decision	Competition authority							
	ALB	BIH	BUL	CRO	KOS	MKD	MNE	SRB
Infringement decision	x	x	x	x	x	x	x ¹	x
Positive decision	x		x		x			
Commitment decision	x		x	x	x		x	x
Decision to exempt from sanction or to reduce the amount of sanction			x		x			x
Decision to exempt certain categories from the prohibition	x	x	x		x			x

¹ The authority is not empowered to impose sanctions for the infringement. It proposes to the court to impose sanction

Decisions ruling that the respective decision on block exemption shall not apply to the specific case		x	x	x				
Decision imposing behavioural/ structural remedies	x		x	x		x		x
Decision imposing interim measures				x	x	x		x
Decision for granting individual exemption		x					x	x
Decision to authorise a concentration	x	x	x	x	x	x	x	x
Decision to authorise a concentration with commitments proposed			x	x	x	x	x	x
Decision to authorize a concentration under conditions		x	x	x	x	x	x	x
Decision to prohibit a concentration	x	x	x	x	x	x	x	x
Decision that the transaction does not constitute a concentration or does not fall within the scope of the prior notification obligation			x					x
Decision assessing agreements of minor importance				x				
Decision to discontinue the proceedings if the applicant withdraws the request							x	x
Revoke the decision authorizing a concentration			x	x	x	x		x
Opinions on draft legal acts and legal acts in force	x	x	x	x	x		x	x

In addition, some of the authorities (**ALB, BUL**) are empowered to adopt decisions approving the results of a sector inquiry.

With regard to the procedural aspect of the proceedings, the competition authorities of **ALB, MKD** and **MNE** may adopt decisions for initiation of proceedings. Some of the authorities (**ALB, BUL, KOS**) may adopt decisions for termination of the proceeding. In case where no infringement of the law is established, the jurisdiction of **ALB** may take a decision to close the investigation. In **ALB**, the authority is also empowered to adopt a decision authorizing an inspection.

In **CRO**, the competition authority may adopt a decision on non-compliance with the conditions, obligations and time limits for commitments. With regard to the

commitment decisions, the jurisdiction of **BUL** besides approving commitments, may also adopt decisions for reopening the proceedings.

The competition authorities of **BUL** and **CRO** as members of the EU can adopt specific decisions stemming from their EU membership:

- In **CRO** and **BUL** the jurisdictions are empowered to adopt decisions by which they terminate the proceedings when the same case is being dealt with or has been dealt with by the European Commission or a competent competition authority of an EU Member State.

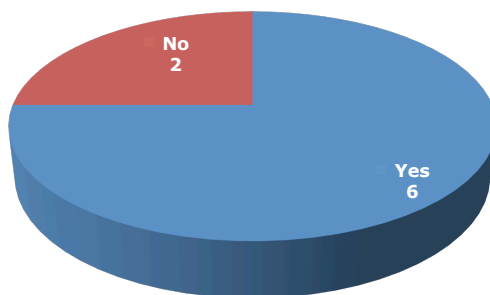
- The **BUL** jurisdiction is empowered to adopt decisions for rendering assistance under Regulation (EC) No 1/2003 and Regulation (EC) No. 139/2004 and decisions for termination of proceedings on rendering of assistance.

- The **BUL** authority may also adopt decisions by which it withdraws the application of an EU Regulation on block exemption from the prohibition of Art. 101, paragraph (1) TFEU in case that the conditions under Article 29, paragraph (2) of Regulation (EC) 1/2003 are present and specify a time limit within which the parties have to bring their agreement into compliance with Article 101, paragraph (1) TFEU or terminate it.

2. Commitment decisions

The legal framework of most jurisdictions (**ALB, BUL, CRO, MNE, MKD and SRB**) provides for the right of the undertakings, investigated for infringement of antitrust law, to propose commitments in order to overcome the negative effects on the competition caused by the infringement.

Figure 6.1. Commitment decisions



In **BUL, CRO** and **MKD** the national laws exclude the possibility for the competition authority to approve commitments in the case of hard core restrictions. In **BUL** the competition authority may refuse to review a proposal for undertaking

commitments: where the undertaking did not comply with a previous decision of the commission that has entered into force; where there is a precedent to the alleged infringement either sanctioned in a previous decision or put into evidence by a past behaviour; where the alleged infringement is continuing or where the infringement has caused significant damages to a large number of persons who would have legal interest to claim indemnity before the civil courts. The authority of **MNE** may not accept the proposed measures if the party to the proceedings generated considerable profit by the impairment of competition in question.

When deciding whether to accept or reject proposed commitments the Balkan competition authorities follow certain conditions and obligations. The main condition in all jurisdictions is the one requiring recovery of the competition shortly after the adoption the commitment decision. The following further aspects can be highlighted:

- In **BUL** the legal framework envisages that the commitments, in order to be approved by the authority, must be proportionate to the harm done, lead to the immediate recovery of the competition and not only to the termination of the unlawful conduct, be relevant to the essence of the infringement, be unconditional, adequate and sufficient in order to guarantee the effective resolution of the competitive problems, as well as to allow the authority to exercise subsequent control over their fulfilment.

- In **CRO** the Agency may accept the proposed commitments in the cases where the infringement is of short duration, where the undertaking concerned is open to cooperation to the proceedings carried out by the Agency and commits itself to meeting certain conditions and obligations in the first six months of the proceedings, where the action by the Agency involves a large number of parties and in other particular cases where the Agency deems the acceptance of the proposed commitments justified and appropriate for efficiency reasons with the view to re-establishing the effective competition on the relevant market without carrying out unnecessarily lengthy procedures.

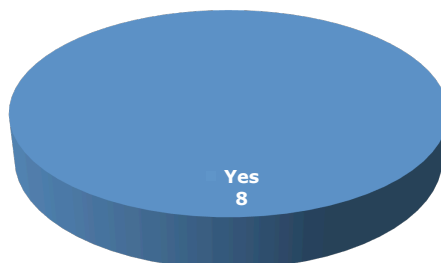
- The Agency of **MNE** shall approve the proposed commitments if the following requirements are fulfilled: the impairment of competition lasted for a short time; the party to the proceedings fully cooperates with the Agency; the proceedings include a large number of parties, and the cost-effectiveness of the proceedings is ensured.

- In **MKD** the Commission shall accept the offered commitments by means of a procedural order if they are sufficient for overcoming the distortion of competition caused by actions or failure to take actions by the person against whom the proceedings has been initiated.

3. Interim measures

The national legislations of all Balkan countries within the SCF empower their competition authorities to adopt interim measures decisions in the course of the investigation on competition cases. The authorities shall order interim measures where there is risk of serious and irreparable damage to competition.

Figure 6.2. Interim measures



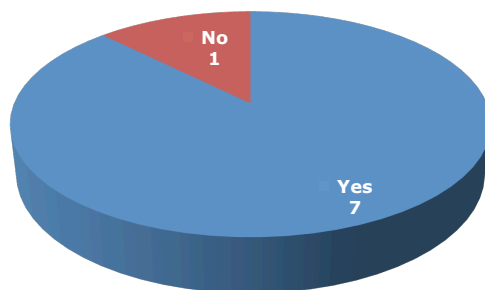
The time-limits of the duration of the interim measures vary in the different countries. In **BIH** and **BUL** the term of effect of the interim measures shall be up to 3 months as of the time they are ordered. If necessary, the time limit may be extended. The duration of the measures can be extended by the competition authority of **ALB**. The legal framework of **MKD** envisages that the duration of the measures shall be proportionate and suitable to the goal that has to be attained. In **CRO** and **KOS** the duration of the measures may not exceed a period of 6 months. However, the law of **CRO** establishes that the time-limit may be renewed if the Agency finds it necessary in a particular case. The interim measures ordered by the authority of **MNE** and **SRB** may last until the final decision of the Agency is adopted.

4. Structural or behavioural remedies

The national legislations regulating the imposition of structural and behavioural remedies of most countries of the Balkan region are in line with the EU law.

In order to restore the free competition on the relevant market, most of the competition authorities (**ALB, BIH, BUL, CRO, MKD, MNE and SRB**) are empowered by the law to impose structural or behavioural remedies. In **BIH** such remedies may be imposed only with regard to cases for assessment of a notified concentration (in cases when a concentration was conducted contrary to the decision of the Competition Council, which assessed the concentration to be incompatible and secondly – when the concentration was carried out without the filing of notification of concentration, which led to significant distortion of market competition).

Figure 6.3. Structural or behavioural remedies



In **MNE** and **SRB** the behavioural remedies must be proportionate to the gravity of the infringement committed and directly related to the acts or practices that caused the infringement.

It is a general rule for all Balkan competition jurisdictions that the competition authority shall impose structural remedies only where there is no behavioural remedy which would have an equivalent effect or when such behavioural remedy which has equivalent effect would be more burdensome for the respective undertaking than the structural remedy. In **ALB** the authority should allow the undertakings to participate in the process of determining the remedy to be imposed.

5. Conclusion

Typical for all jurisdictions of the Balkan region is that the competition authority is responsible both for carrying out the investigation and deciding upon the competition cases. Generally the investigation is conducted by experts (case-handlers, inspectors) from the specialized administration who form case teams. After closing the investigation their report is submitted to the responsible member of the commission or to the decision-making board. The board of the commission takes the final decision on the merits of the case.

In general all of the jurisdictions are empowered to adopt similar types of decisions, as for example infringement decisions, decisions for authorization of a concentration, decisions on competition advocacy, etc. Most of them may adopt commitment decisions, decisions imposing interim measures, imposing structural or behavioural measures. However, some of the jurisdictions may adopt some specific types of decisions.

VII. Sanctions & Leniency

1. Sanctions

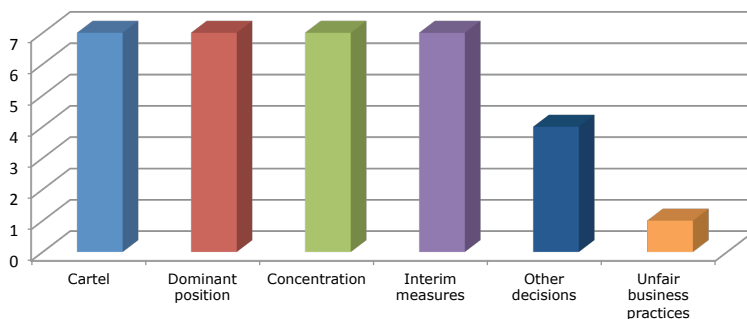
The sanctions which the competition authorities may impose vary among Balkan countries. In all countries these sanctions are of administrative nature.

1.1. Sanctions for substantive infringements

In most of the Balkan competition jurisdictions, the competition authorities are allowed to impose sanctions for substantive infringements of competition law (**BUL, ALB, KOS, MKD, BIH, CRO, SRB**). However, the competition authority of **MNE** is not allowed to directly impose such fines and instead must apply to the national court system to do so through court proceedings. Another particularity is that the **BUL** competition authority may also impose sanctions for infringements on natural persons who assisted or participated in the substantive infringement. Aside from **MNE**, for the remaining seven national competition authorities the substantive infringements for which sanctions are imposed are:

- Cartel agreements (**MKD, CRO, BIH, ALB, KOS, BUL, SRB**)
- Abuse of dominant position (**MKD, CRO, BIH, ALB, KOS, BUL, SRB**)
- Implementation of a concentration, which has been prohibited (**MKD, CRO, BIH, ALB, KOS, BUL, SRB**)
- Participation in a concentration, which has not been notified (**CRO, MKD, BUL**)
- Implementation of a concentration before its approval (**MKD, BIH, BUL**)
- Lack of compliance with a decision on commitments necessary for limiting the anticompetitive effects of a concentration (**BIH, ALB, KOS, BUL**)
- Participation in unfair business practices (**BUL**)
- Lack of compliance with decisions on interim measures (**MKD, CRO, BIH, ALB, KOS, BUL, SRB**)
- Lack of compliance with other commission decisions (**MKD, CRO, ALB, BUL**)

Figure 7.1. Substantive infringements sanctioned by the competition authority

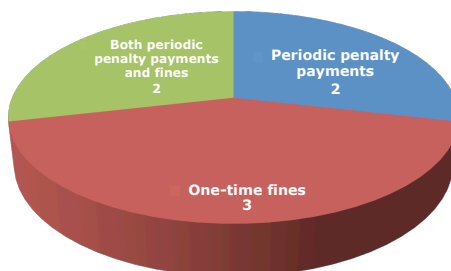


1.2. Sanctions for procedural infringements

All the Balkan competition jurisdictions provide for the possibility to impose sanctions for procedural infringements aimed at enabling the competition authorities to fulfil their investigations on cases and demanding compliance from undertakings.

Some jurisdictions provide for periodic penalty payments (**MNE, SRB**), some for one-time (single) fines (**BIH, CRO, MKD**), and others allow for both with regard to the procedural obligations of the parties to the proceedings (**BUL, ALB**).

Figure 7.2. Types of sanctions for procedural infringements



1.2.1. Single procedural fines

Most of the procedural infringements sanctioned in the Balkan competition jurisdictions are of similar nature. One such example refers to the information gathering during the investigation phase through information requests. Some competition authorities sanction the refusal by an undertaking to comply with information requests within the specified time limit (**BUL, ALB, BIH, CRO, MKD**), or supplying incomplete, misleading or inaccurate information (**BUL, ALB, MKD**).

Especially with regard to the inspections on spot, a few different procedural infringements are sanctioned, such as presenting the required files or other business records in an incomplete form or a refusal to submit them for an inspection (**ALB, MKD**), answering incompletely or fraudulently or refusing to answer altogether during an inspection, (**ALB, MKD**), destroying a seal (**BUL, ALB, MKD**) or failure to provide access to all relevant premises and documentation during an inspection (**MKD**). Furthermore, there are more general breaches, which are similarly sanctioned, such as obstructing or opposing an inspection (**ALB, CRO**), failure to provide assistance (**BUL, BIH, MKD**) or failure to comply with a procedural order (**MKD**).

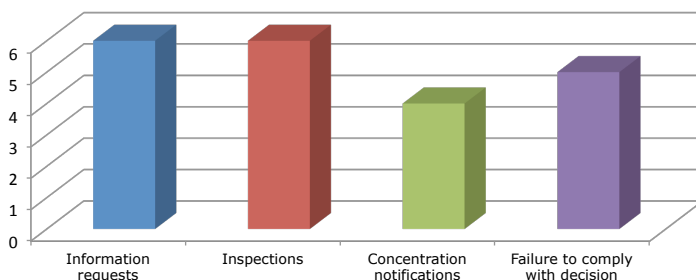
With regard to concentration notifications, there are further procedural infringements specified in the laws, including the failure to notify a concentration (**CRO, BIH, ALB**), provision of incorrect, misleading information in such a notification (**BIH, CRO**), failure to provide information on compliance with imposed commitments (**BUL**) or failure to comply with these commitments altogether (**BIH**).

1.2.2. Periodic penalty payments

Besides imposing single procedural fines, some Balkan competition jurisdictions provide for periodic penalty payments in case of procedural infringements with a view to bring them to an end.

In **SRB** such payments may be imposed when an undertaking acts contrary to the competition authority's orders or does not comply with an order, establishing an infringement of competition law. In this regard, some jurisdictions provide for periodic penalty payments in cases of failure to comply with a decision ordering the termination of an infringement (**BUL, ALB, BIH, SRB**), failure to comply with a decision imposing commitments (**BUL, ALB, BIH**) and failure to comply with interim measures (**BUL, ALB, MNE**).

Figure 7.3. Procedural infringements sanctioned by the competition authorities



Since the **MNE** is empowered to impose only periodic penalty payments and no one-time fines, the procedural infringements with regard to inspections are sanctioned through such payments. In **ALB**, on the other hand, the competition authority can apply both periodic penalty payments and single procedural fines with regard to the same infringements. The authorities impose periodic penalty payments with a view to bringing to an end the respective procedural infringements committed by the parties to the proceedings, such as the failure to comply with a request for information (**MNE, ALB**), supplying incorrect, incomplete or false information (**MNE, ALB**), obstruction or prevention of an inspection or the collection of information during an inspection (**MNE, BUL, ALB**), an expiration of the deadline to cooperate or to submit complete and accurate information (**BUL**) and hiding information by designating it as privileged communication (**MNE**).

1.3. Conclusion

It appears that generally most of the Balkan competition jurisdictions sanction similar substantive and procedural infringements, although some variations among the wording of the relevant laws can be found. It is clear that the main substantive infringements of competition law which all members of the SCF sanction, with the exception of **MNE**, are cartel agreements, abuse of dominant position, implementing a prohibited concentration and not complying with interim measures. With regard to procedural infringements, on the other hand, while some use broader wording, which could encompass many types of impediment to the proceedings, other authorities have gone into more detail to establish specific infringements. Generally, however, similar procedural issues are sanctioned – non-compliance with information requests, obstruction of inspections, and failure to duly cooperate with the competition authority.

2. Setting the sanctions

The calculation of fines in all Balkan competition jurisdictions is based to a certain extent on the turnover approach. Furthermore, in the countries where the competition authorities calculate and impose the sanctions, a two-step approach is taken, initially calculating a basic amount of the fine, following pre-determined

criteria, and subsequently adjusting this amount upwards or downwards to accommodate aggravating or mitigating circumstances. As pointed out earlier, the **MNE** competition authority does not have the power to impose sanctions on undertakings.

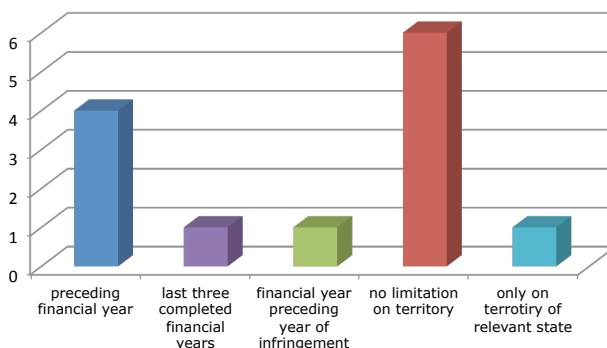
2.1. Calculation of the basic amount of the sanctions

In order to set the sanctions, all Balkan competition authorities firstly individualize basic amounts of the sanctions which are subsequently adjusted for aggravating or mitigating circumstances.

Some limitations apply with regard to the basic amount of the fine. For example, in three of the SCF members, the basic amount of the fine may not be more than 30% of the income of the undertaking, which was gained exclusively from the relevant market in which the infringement took place (**KOS, CRO, MKD**). The **ALB** takes a different approach and limits the basic amount at maximum 30% of the total sales value of the undertaking. It is worth mentioning that the **ALB** competition agency determines the basic amount of the fine to be not less than the illegal gains from the infringement, when it is possible to calculate or estimate them objectively. Following these limitations, there are further considerations for the calculation of the basic amount.

When calculating the basic amount of the fine, most of the Balkan competition authorities take into account the gravity and the duration of the infringement, (**BUL, ALB, BIH, CRO, MKD, SRB**), and three of them multiply the basic amount of the fine by the number of years of the infringement (**ALB, CRO, MKD**). Some take into account the income achieved on the basis of the violation (**BIH, ALB**), while others consider the consequences of the infringement, wording it either as "damages caused" or "extent of the distortion" (**CRO, MKD, SRB**).

Figure 7.4. Considerations in determining the basic amount of the fine



2.2. Adjustment of the basic amount of the sanction

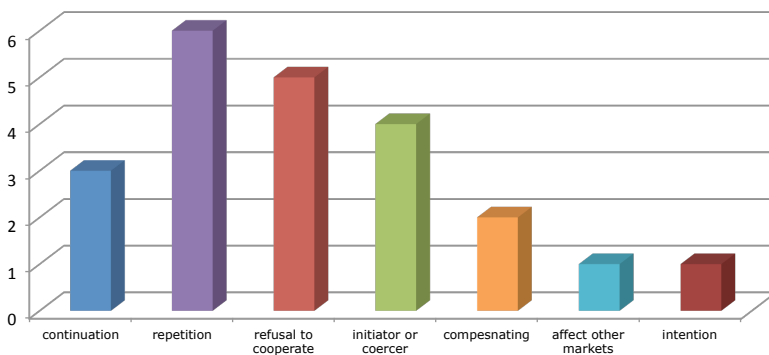
After the basic amount has been calculated, it can be altered depending on various mitigating and aggravating circumstances. Some countries have determined the exact effect of these circumstances on the basic fine, for example an increase/decrease by 10% for each aggravating/mitigating circumstance (**BUL**), an increase by up to 100% of the total fine (**ALB**) or an increase by 100% of the fine specifically for the continuation or repetition of an infringement by an undertaking(s) (**KOS, CRO, MKD**).

2.2.1. Aggravating circumstances

The specific aggravating circumstances to be taken into account when adjusting the basic amount of the sanction vary among the Balkan competition jurisdictions.

Aggravating circumstances, which are widely found among all jurisdictions, are the continuation of an infringement (**KOS, CRO, MKD**), the repetition of the same or similar infringement (**BUL, KOS, ALB, CRO, MKD, SRB**), a refusal to cooperate with the relevant authority or obstruction of the investigation (**BUL, ALB, CRO, MKD, SRB**), playing the role of an initiator, leader, instigator or coercing others into the infringement (**BUL, ALB, CRO, MKD**), and offering compensation to other undertakings in order to tempt them into joining the infringement (**BUL, SRB**). **BUL** considers affecting the competition in neighbouring markets as an aggravating circumstance. **SRB** takes into account whether the infringement was done intentionally.

Figure 7.5. Aggravating circumstances

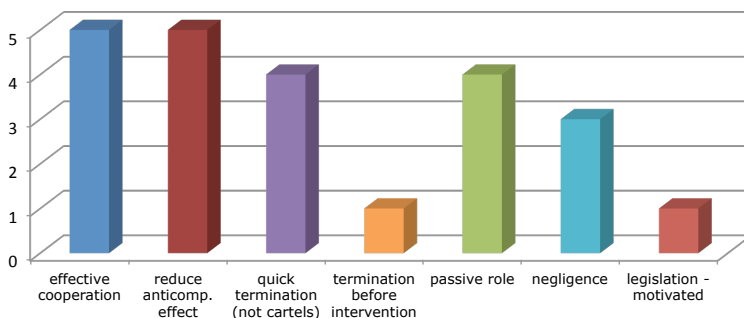


2.2.2. Mitigating circumstances

Besides aggravating circumstances, the Balkan competition authorities may take into account various mitigating circumstances when adjusting the basic amount of the sanctions.

Most jurisdictions recognize effective cooperation with the competition authority beyond the requirements of the leniency programmes or of the laws as mitigating (**BUL, ALB, CRO, MKD, SRB**), as well as the undertaking taking due measures to reduce the unfavourable anticompetitive consequences of its actions (**BUL, ALB, CRO, MKD, SRB**). The termination of an infringement as soon as the authority's intervention takes place may also be taken into account, except for cases of cartels (**BUL, ALB, CRO, MKD**), and suspending the infringement even before finding out that the infringement is revealed or investigated may also be considered (**SRB**). A passive or limited role in the infringement is further recognized as mitigating the blame in many jurisdictions (**BUL, ALB, CRO, MKD**), while causing the infringement due to negligence is considered by three countries (**ALB, CRO, SRB**), although only **SRB** recognizes intention as an aggravating circumstance (see above). **ALB** considers the authorization, motivation or support by a public authority or legislation for anticompetitive behaviour as a mitigating circumstance.

Figure 7.6. Mitigating circumstances



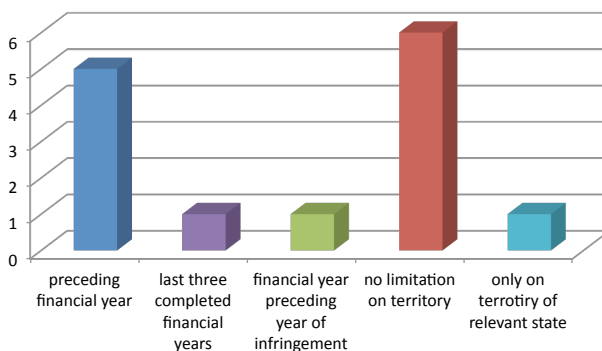
2.3. Legal maximum of the sanctions

All Balkan competition authorities use the legal maximum of up to 10% of the aggregate annual turnover; however, differences exist with regard to the period and markets for the calculation of the turnover.

With regard to the period, five of the Balkan competition authorities focus on the preceding financial year (**BUL, ALB, BIH, SRB, CRO**) and the others look at either the income from the last three completed financial years (**KOS**) or at the financial year preceding the year when the infringement was committed (**MNE**). It is noteworthy that the law of **SRB** defines the income to be considered as the annual income realized only on the territory of the country prior to tax reductions, while the

other national laws do not contain explicit territorial limitations and thus refer to the undertakings' worldwide turnover. Finally, both **ALB** and **CRO** recognize two further considerations with regard to the full amount of the fine. They can both take into account an undertakings' *inability to pay* when setting the fine and they can both increase the amount of the fine to exceed the improper gains from the infringement, where it is possible to estimate them objectively.

Figure 7.7. Time and territorial limitations of the legal maximum of the sanctions



2.4. Conclusion

Generally, convergence among the members of the SCF is found as all of them apply a turnover-based approach and a two-step methodology in calculating the sanctions beginning with a basic amount and subsequently adjusting it upwards or downwards for aggravating and mitigating circumstances. Furthermore, some similar considerations are taken into account for the formation of the basic fine – mainly the gravity and duration of the infringement; however, national variations exist when it comes to some other considerations which are also taken into account. The generally recognized aggravating circumstances include the repetition of an offense, non-cooperation during the investigation and coercing others into the anticompetitive practice, while the most widely accepted mitigating circumstances include effective cooperation with the competition authority, attempts to reduce the anticompetitive effect of the illegal conduct, quick termination of the infringement and a passive or limited role during the infringement. A turnover-based approach is also used in all jurisdictions with regard to the maximum amount of the sanctions although there are different perceptions as to the time and territorial limitations of the turnover which could be taken into account when setting the legal maximum of the sanctions.

3. Leniency policy

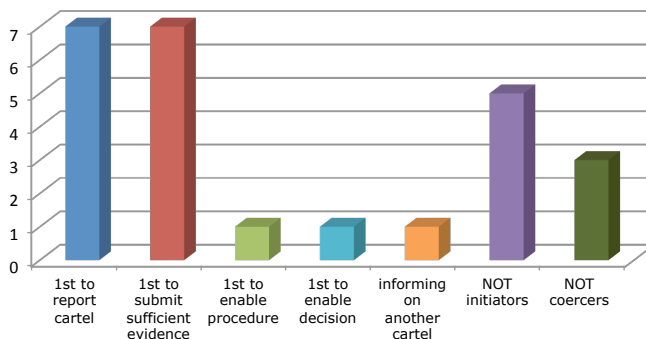
All Balkan competition jurisdictions provide for leniency programs and all envisage both full and partial immunity from sanctions. Leniency policies are relatively new in these jurisdictions, established in their currently applicable forms in the recent

years. The leniency programmes are designed to apply to cartel agreements which are considered the most harmful competition infringements and the most difficult to detect and prove.

Generally, the leniency programmes require that an undertaking applies for leniency to the relevant competition authority. The authority may either give a full immunity or a reduction of the fine, which would otherwise be imposed, or when it cannot itself impose fines, may decide not to submit a request to the relevant court initiating infringement proceedings, withdraw an already existing request or propose a more lenient punishment (**MNE**). The competition agency of **ALB**, prior to receiving leniency applications from undertakings, may issue an advice of leniency indicating the conditions for application, which should remain confidential. There are limitations on who may be granted leniency. Undertakings which initiated or organized the conclusion or application of the cartel agreement cannot qualify for full immunity (**MNE, KOS, MKD, SRB, CRO**), neither can parties that coerced others into joining or remaining within the cartel (**BUL, BIH, MKD**). Nevertheless, in **MKD** these may receive a reduction of their fines if they fulfil the necessary conditions.

The basic conditions for applying for leniency vary among jurisdictions but overall there are two general conditions to qualify for a full immunity from fines: (1) either the undertaking is the first to report the existence of a cartel and provides evidence thereto, (2) or it submits sufficient evidence to the authority to allow it to reach a decision to establish a cartel. Both conditions are recognized by all jurisdictions (**ALB, BIH, BUL, KOS, CRO, MKD, MNE, and SRB**)

Figure 7.8. Who can acquire full immunity

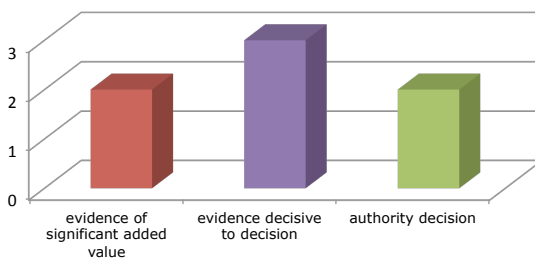


For receiving full immunity from fines, often additional conditions are imposed on the applicant. The termination of involvement in the cartel at the time of the submission of the application is important (**BUL, BIH, CRO, MKD**), however, an exception is envisaged in **CRO** when the competition authority considers the continued involvement in the cartel reasonably necessary to preserve the integrity of the unannounced inspection in the premises of the cartel participants. Besides, further conditions include not informing the other participants of the leniency application or its

content (**BIH, CRO, MKD**), effective cooperation throughout the whole procedure (**BIH, CRO, MKD**) and not destroying, falsifying or concealing evidence (**CRO, MKD**). In **BUL** the leniency submission must include, inter alia, a confession of the involvement, information on the other undertakings and persons involved in the cartel, detailed description of the cartel, including its aims, activities, affected products, services and territory, duration, information on the contacts between the cartel members, and others. All of this should be backed by evidence and accompanied by declarations that the involvement has ended and that the undertaking has not coerced any of the other participants.

If an undertaking fails to qualify for a full immunity from fines, it could still qualify for a reduction of its fine. For example, if it provides evidence with significant added value with respect to the evidence the authority already has, it could receive a reduction in different amounts depending on how much this evidence strengthens the case of the authority (**CRO, BUL**). However, in **BUL** the reduction could only be up to 50% of the fine and it depends on how many other participants submitted evidence before that. In this regard, the value of the evidence and the moment of its submission are important. The sanction may also be reduced if the undertaking provides additional valuable evidence which turns out to be decisive to the decision, leading to it paying the smallest fine (**KOS**) or a reduction (**MKD, SRB**). Other authorities simply decide on case-by-case basis on whether the necessary conditions are met and grant reductions in proportion to the contributions made by the respective undertaking (**ALB, BIH**).

Figure 7.9. Who can receive a reduction



Some jurisdictions envisage additional incentives for leniency, such as **MNE**, where an undertaking can also qualify for immunity if it reports and provides evidence for the existence of another cartel agreement, whether it is a party to it or simply has imminent knowledge of it, while in **BUL** the undertaking may gain only a reduction of its fine for providing such information.

3.1. Conclusion

All Balkan competition jurisdictions converge on the generally recognised need of having leniency programs supporting their anti-cartel enforcement practices. Although phrased slightly differently, they all provide for full immunity only to those undertakings, which either come forward first to reveal a cartel or which provide

sufficient evidence to enable the authority to reach a final decision. Further similarities among the jurisdictions exist in that all of them require additional conditions to be met, mainly termination of the involvement in the cartel, maintaining the secrecy of the leniency application and full cooperation throughout the procedure. Finally, almost all SCF members provide for the possibility of reduction of the fines, thus encouraging undertakings which do not qualify for full immunity to further cooperate on cartel cases. This commonly adopted model of a leniency programme makes cooperation and sharing of best practices potentially very beneficial for all Balkan competition authorities.

VIII. Judicial review

1. Subject of judicial review

A general rule applies in all Balkan competition jurisdictions that the final decisions of the competition authorities are subject to judicial review.

Subject to judicial review in **BUL** and **CRO** are also the administrative acts (rulings and administrative orders), which are of rather procedural nature and are not related to the merits of the competition cases. In **CRO** excluded from judicial review are only: 1. the procedural order by which the proceedings are initiated, 2. the procedural order on the basis of which the agency decides to initiate one single procedure against two or more independent undertakings in the case where rights and/or obligations are based on the same or similar facts of the case and on the same legal basis, 3. the procedural order on the basis of which the request for access to files or a part thereof has been denied and the procedural order by which the agency joins two or more new notifications of a concentration previously notified by one and the same undertaking and conducts a joint assessment proceeding.

2. Competent national courts

As the decisions of the Balkan competition authorities are deemed to be administrative acts, the competent courts to hear the cases are the national administrative courts.

The following further aspects can be highlighted:

- The national legislation of **ALB** establishes that the appeals against an authority decision issuing sanctions may be filed before the newly established Administrative Court of Tirana;
 - In **BIH** the competent court is the Court of Bosnia and Herzegovina;
 - In **BUL** the authority's decisions are heard by a first instance chamber (3 judges) of the Supreme Administrative Court, whose ruling can be challenged before a cassation chamber (5 judges) of the same court;
 - In **CRO** the claim is decided by a panel of 3 judges of the High Administrative Court of the Republic of Croatia;
 - In **KOS** the appeals are lodged in before the Supreme Administrative Court and the Appeals Court; In **MKD** the competent court is the Administrative Court;

- In **MNE** the decisions of the competition authority may be challenged before the Administrative Court, whose decisions are appealed before the Supreme Court;
- In **SRB** the new law envisages that the control of the authority's decisions is exercised by the Administrative Court, whose decisions can be appealed before the Supreme Court of Cassation.

3. Lodging of claims

The national legislations of most Balkan competition jurisdictions provide for a 30-day deadline for lodging an appeal against the competition authorities' decisions. The period for appeal of the decisions on misdemeanour matters in **MKD** is shorter – 8 days as of the day of receiving the decision, and in **BUL** – 14 days.

In **BUL** and **MKD** the appeal of the decision defer its enforcement, while in the rest the claim does not postpone its execution. The legal framework in **SRB** envisages one exception of the rule that the claim does not postpone the enforcement of the decision. According to the competition law the Commission may postpone the execution of the decision at the request of the claimant until the final court decision if this execution would cause irreparable damage to the claimant, in particular if it could most likely lead to its bankruptcy or cause termination of business activities of the claimant, provided that such postponement is not against the public interest. In **CRO** in general the claim shall not postpone the enforcement of the decision, save for the part of the decision which relates to the imposed fine.

4. Scope of judicial review

The generally established grounds for contestation by the review courts in the Balkan competition jurisdictions are: essential breach of the administrative and procedural rules; contradiction to the substantive legal provisions and non-compliance with the purpose of the law.

In **BUL** the decisions of the authority can be appealed with regard to the lack of competence and lack of conformity with the prescribed form. The national legislation of **CRO** envisages that grounds for contestation may also be: incorrect or incomplete facts of the case; inappropriate fine and other issues contained in the decision of the agency.

With regard to the scope of the judicial review it should be noted that the national courts in the Balkan countries are empowered to approve the decision of the competition authority; to annul it entirely or partially and to refer it back to the competition authority. In terms of further specificities:

- In **ALB** the competent court may decide on the legality of the decision or parts if it including the amount of the fine.
- In **BUL**, after declaring the invalidity or cancelling the authority's decisions, the court refers the case back to the competition authority with obligatory instructions for the interpretation and the application of the law. By a decision of the court, the sanctions imposed by the authority can be either increased or decreased. The court also has the competence to review the remedies imposed by the authority.

- In **SRB** if by its nature it is needed to take a new decision replacing the annulled one, the competition authority shall be obliged to do so without delay, not later than 30 days as of the receipt of the judgment, thus being bound by the legal reasoning of the court, as well as by the court's objections concerning the procedure.

5. Conclusion

The final decisions of all jurisdictions are subject to judicial review. Being administrative acts they are challenged before the respective administrative courts. In general the grounds for contestation are essential breach of the administrative and procedural rules; contradiction to the substantive legal provisions and non-compliance with the purpose of the law. The national courts are empowered to uphold the decision of the competition authority; to annul it entirely or partially and to refer it back to the competition authority. In most jurisdictions the appeal of the decision does not postpone its enforcement. The deadlines for lodging an appeal vary in the different jurisdictions.

IX. Competition advocacy and sector inquiries

1. Tools of competition advocacy

One of the main goals for all Balkan competition jurisdictions is the promotion of free competition among all sectors of the economy. In order to achieve this, the competition authorities in the region are effectively performing competition advocacy.

The main tool, which all of them use, is the assessment of the conformity to the competition law of provisions of draft legal acts and legal acts in force and other regulations (for example draft acts of associations of undertakings regulating the activity of their members). In terms of further specificities, in **ALB** for example the estimation of draft normative acts includes: quantitative restrictions concerning trading and market access; establishment of exclusive rights or special rights in certain zones for certain undertakings or products; imposing uniform practices in prices and selling conditions. The authority shall assess the degree of restriction or prevention of competition brought by the draft normative acts.

An important part of the advocacy activities in some of the countries is the interaction between the competition agencies and the other state authorities, especially the sector regulators (**BUL, CRO, MNE, SRB**) and some of them have signed cooperation agreements (**BUL, CRO, MNE, SRB**). In order to increase the public awareness of the benefits of competition all of the jurisdictions interact with other stakeholders, such as: judges, undertakings, the academia, business organizations, mass media and the consumers. In this respect the authorities organize educational seminars, conferences and roundtables for the specific stakeholders. Furthermore, in order to enhance competition culture, the jurisdictions are very active in publishing brochures.

In the area of competition impact assessment, all of the jurisdictions are empowered to issue opinions on draft legal acts and legal acts in force on the request of the relevant state authorities. In **SRB** the authority may also issue opinions on other government acts which may have an impact on competition on the relevant market.

In general, the advocacy opinions in all the jurisdictions are not obligatory for the competent state authorities. However, in **MKD** the state authority is obliged to inform the Commission about its reasons for not accepting the advocacy opinion. In **ALB** the Parliament has instructed in its resolution on the Activity of the Albanian Competition Authority that the competent state authorities shall comply with the agency's opinions.

2. Sector inquires

All Balkan competition authorities have competences to conduct sector inquiries on their own initiative, while some of them may also initiate sector inquiries upon a request by other state authorities, such as the National Parliament or other regulatory bodies (**ALB**). For the purposes of the inquiry, the competition authorities have all the powers envisaged in their national laws, except for the power to carry out inspections on spot (**ALB, BUL, CRO, MKD, MNE, and SRB**). If the findings of the sector inquiry indicate that there may be restrictions and distortions of competition on the relevant market, the competition authorities have the power to formally initiate an antitrust investigation (**ALB, BUL, CRO, MKD, MNE, SRB**). They may also inform the competent state bodies of their findings and issue recommendations for improving the competitive environment in the relevant sector of the economy (**ALB, BUL, CRO, KOS, and SRB**).

The competition laws of some of the Balkan jurisdictions contain provisions for making the results of the sector inquiries publicly available through their websites (**MNE, SRB**) or through its public register (**BUL**). Furthermore, in some jurisdictions the competition authorities may invite interested parties to submit their comments on the inquiry results (**ALB, SRB**).

3. Conclusion

All Balkan competition authorities perform competition advocacy. In this respect the majority are empowered to issue opinion decisions on the conformity with the competition law of draft legal acts or legal acts in force. As a rule the advocacy opinions are not binding on the competent authorities. As part of their advocacy activities, the jurisdictions may cooperate with other state authorities, take measures for raising public awareness and organize educational events for the different stakeholders.

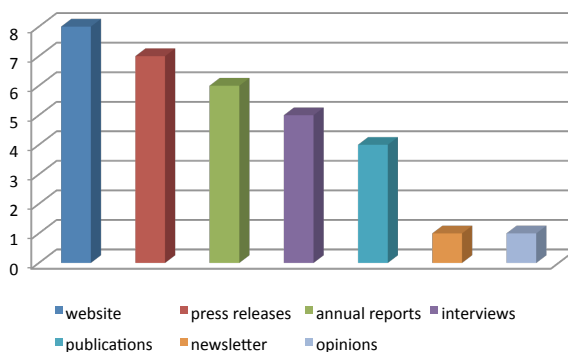
In addition, all competition authorities in the region are empowered to conduct sector inquiries, which are an important tool both for the detection of possible restrictions or distortions of competition and for the improvement of the regulatory conditions for carrying out the economic activity on the relevant market. Sector inquiries are part of the soft powers of the competition authorities which may lead to real beneficial results on the market by means of changing the relevant sector legislation or opening a formal investigation.

X. Publicity and transparency

1. General publicity

The Balkan competition authorities use different means to inform the general public about their functions and activities, such as their website (all of them), press releases (**ALB, BIH, BUL, CRO, KOS, MKD and SRB**), interviews (**ALB, BIH, BUL, CRO and MNE**), annual reports (**ALB, BIH, BUL, CRO, MNE and SRB**), publications (**ALB, BIH, BUL and CRO**). In **CRO** the competition authority issues a newsletter, while **SRB** publishes opinions on the application of the competition law.

Figure 10.1. Tools to inform the general public



2. Publication of the decisions of the competition authority

The decisions of the competition authority are published in all surveyed jurisdictions on the official website. In **BUL** the agency maintains an electronic registry of its acts which is public and is available through the authority's website. In addition to publishing the decisions on the website, some countries also published them in the official state gazette (**MKD, MNE, SRB**). In **ALB**, the competition authority issues an annual bulletin of its decisions, in addition to publishing them on its website.

3. Conclusion

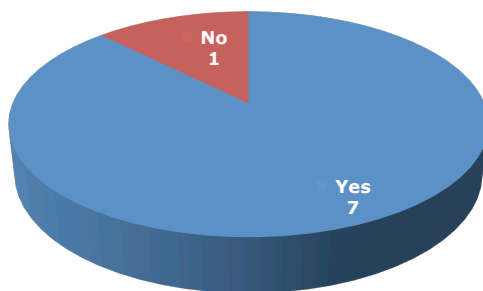
The principles of publicity and transparency are very important for all SCF members. The competition authorities tend to be transparent to a great extent and use different mechanisms to inform the public of their functions, activity and decisions.

XI. Actions for damages

1. Possibility for action for damages

The national legislations of most Balkan competition jurisdictions explicitly provide for the right of victims of competition law infringements to seek compensation for the damages they have suffered (**ALB, BUL, BIH, CRO, MKD, MNE, SRB**). All natural or legal persons, including the indirect purchaser (**ALB, BUL**) may bring a claim before the civil courts. The legal framework of **BUL** and **MKD** establish a form of collective action for bringing private damage claims.

Figure 11.1. Action for damages



In some of the countries of the region (**ALB, BUL, CRO**) the decisions of the competition authority are binding upon the court. The decision of the **ALB** competition authority constitutes evidence whose evidential value can be challenged only if the act is a forgery, is out of the scope of the law or not in the required form. In **BUL** the competition authority's decisions establishing infringements are explicitly envisaged as binding upon the national courts. In most jurisdictions the possibility to bring an action for damages before the courts is not dependent on the preliminary existence of a decision of the competition authority regarding the alleged infringement. However, in **SRB** proceedings for damages can only be instituted if the infringement of competition has been established by a decision of the competition authority. Typical for all jurisdictions whose decisions are binding for the civil court is that the claimants will have to prove before the court the type and the amount of damage they have suffered as well as the causal link between the illegal conduct and the damages.

The limitation periods for bringing a claim vary across the Balkan jurisdictions. In some countries, the general limitation period is applicable (e.g. in **BUL** 5 years), while in other countries it is shorter (e.g. 3 years in **ALB**).

2. Conclusion

The national frameworks of most Balkan competition jurisdictions explicitly envisage the right of victims of competition law infringements to seek compensation for the harm that they have suffered. In most jurisdictions the possibility to bring an action for damages before the civil courts is not dependent on the preliminary existence of a decision of the competition authority. Although that the decisions of some authorities are binding upon the court, the claimants will always have to prove the damage they have suffered.

XII. General conclusion

The jurisdictions which took part in this survey are independent state authorities empowered to protect free competition on the markets. They have a wide range of competences and have undertaken a number of reforms over the years in order to approximate their laws with the European *acquis*.

On the substantive level, even though a high degree of convergence exists in the competences of the Balkan competition authorities, some differences can still be found, particularly with regard to the notification regime for agreements between undertakings and the presumption for dominance.

With regard to the procedural provisions, some jurisdictions can initiate proceedings both following a complaint and *ex officio*, while others can only initiate *ex officio* proceedings. All Balkan competition agencies have the power to set priorities when initiating *ex officio* proceedings. However, when it comes to complaints, most of them are bound by the principle of legality and have to consider every competition case that is brought to their attention.

The surveyed jurisdictions have at their disposal the basic investigative tools to conduct investigations, although some variations are observed. The most important differences refer to the right to inspect non-business premises, the need for a court authorization and the role of the police during inspections.

The competition authorities in the region are striving to guarantee the adequate protection of the procedural rights of defence of the parties to the proceedings, but the constant challenge is to set the right balance between the effectiveness of the proceedings and procedural fairness.

Typical for all jurisdictions in the region is that the competition authority is responsible both for carrying out the investigation and deciding upon the competition cases. The agencies are empowered to adopt similar types of decisions – e.g. infringement decisions, decisions for authorization of a concentration, decisions on competition advocacy, etc. Most of them may adopt commitment decisions, decisions imposing interim measures, or structural or behavioural measures. However, some peculiarities in the enforcement powers can also be observed, such as the power to adopt decisions to grant individual exemption, decisions assessing agreements of minor importance, decisions to discontinue the proceedings if the applicant withdraws the request.

The SCF member competition agencies generally sanction similar substantive and procedural infringements, although some variations among the wording of the relevant laws can be found. Convergence exists in setting the sanctions. All

jurisdictions in the region apply a turnover-based approach and a two-step methodology in calculating the sanctions beginning with a basic amount and subsequently adjusting it upwards or downwards for aggravating or mitigating circumstances. A turnover-based approach is also used in all jurisdictions with regard to the maximum amount of the sanctions.

All Balkan jurisdictions provide for leniency programs and envisage both full and partial immunity from fines. Leniency policies are relatively new in these countries and have been established in only in recent years.

The final decisions of all jurisdictions are subject to judicial review. The national courts are empowered to approve uphold the decision of the competition authority; to annul it entirely or partially and to refer it back to the competition authority.

The competition authorities in the region are very active in their competition advocacy efforts and the legislation review process. As a rule the advocacy opinions are not binding on the competent authorities. In addition, the agencies are able to conduct sector inquiries, which may result in the opening of formal proceedings or issuing recommendations for amending the relevant sector legislation.

The national frameworks of most Balkan competition jurisdictions envisage the right of victims of competition law infringements to seek compensation for the harm that they have suffered.

The present report reveals that even though a lot of similarities in the competences and activities of the SCF member agencies exist, some further efforts are needed in order to achieve greater convergence of the competition regimes and to ensure the uniform application of competition rules to the benefit of the countries in the region.

SCF

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SCF website
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A word cloud of economic and business terms in various shades of white and light gray, set against a red background. The words are arranged in a non-linear fashion, with some appearing larger and more prominent than others. The terms include: support, growth, convergence, efficiency, success, trust, future, and success.