

TWENTIETH QUARTERLY
ACCESSION WATCH REPORT



DÉCOR
COMPETITION

*Twentieth Quarterly
Accession Watch Report*

**SHADOW COMMISSION -
DÉCOR COMPETITION**

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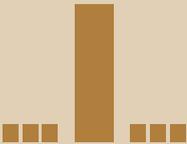
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INTRODUCTION

1.1 WHY THIS RESEARCH?

Competition policy (hereinafter: CP) is a topic that has been undermined by the public in the Republic of Macedonia, partially because of its specificity, but mostly due to its inconsistent implementation and lack of public awareness about its importance and significance. However, on the account of the mechanisms this policy disposes with, its implementation can create tangible effects in terms of improved living standard for the citizens as consumers. Despite its effects and benefits, few people outside the expert and the academic community in the Republic of Macedonia are aware of activities and competences entrusted to the Commission for Protection of Competition (hereinafter: CPC) which, according to the nature of its competences, can be one of the most powerful independent bodies in the state and thereby contribute to greater respect and exercise of the rule of law. Public in the Republic of Macedonia tends to perceive the country's accession in the European Union (hereinafter: EU) as a matter of foreign affairs, without making due consideration of the fact that changes brought forth by the accession process have the greatest effect on the society as a whole and render the country's EU agenda part and parcel of all internal, national policies. In other words, discussion of Macedonia's accession in the EU is more focused on the politics rather than the policy whose alignment with the EU acquis is the greatest outcome of the EU accession process. Due to these reasons, the Macedonian Centre for European Training (MCET) and the Foundation Open Society – Macedonia (FOSM) believed it was necessary to focus on

research, monitoring and education on specific policies and benefits they create for the citizens. In this context, recent Quarterly Accession Watch Reports evolve around particular topics and analyse in detail specific policies and performance records of relevant national institutions involved in the EU accession process.

This document would not have been possible if MCET and FOSM did not possess the expertise needed for monitoring and assessing this policy. Within the capacity-building project for civil society representatives for monitoring EU integrations titled “Shadow Negotiation Teams”, implemented by MCET and FOSM, in cooperation with the Institute for European Policy from Berlin and in the period 2012 to 2014, participants benefited from a training module on strengthening civil society’s capacity to monitor and research matters under Chapter 8: Competition policy. A team of experts was established and equipped to monitor this negotiation chapter, as well as to work on education and awareness-raising about this policy, notably by means of producing public policy documents and organizing public debates.

1.2 WHAT IS COMPETITION POLICY?

CP is defined as set of laws, institutions and measures aimed at preventing any distortion or restriction of market competition, which might result in reduced efficiency, less technical innovations and production of consumption surplus. In other words, any restriction of market competition is detrimental to the welfare of consumers and undertakings. CP is based on the assumption that generally markets are functioning well, and that undertakings make independent business decisions, in compliance with market terms and conditions. This public policy intervenes on the relevant markets, but only under circumstances when undertakings apply business practices that may restrict market competition and negatively affect consumer welfare.

At EU level there is a general understanding about the issues that need to be addressed under the competition policy, those being: (i) prohibition of agreements and practices that restrict free trading and free competition; (ii) prohibition of anti-competition practices and abuse of dominant market position; and (iii) supervision and control of mergers and joint ventures of undertakings.

In 2000 in Lisbon, EU Member-States signed up to a programme of economic reforms designed to make the EU “the world’s most competitive and dynamic knowledge-based economy” by 2010.¹ Therefore, the competition policy became one of the key policy instruments aimed at increased competitiveness of the European industry, consolidation of EU’s internal market and attainment of the competitiveness objective defined in the Lisbon Strategy. The reformed competition policy is characterized by:

- (i) improvement of the regulatory framework for competition, which facilitates vibrant business activity, wide dissemination of knowledge and efficient economic restructuring throughout the internal market;
- (ii) enforcement practices which actively remove barriers to entry and impediments to effective competition that most seriously harm competition in the internal market and imperil the competitiveness of European enterprises.

¹ Communication from the Commission: A pro-active Competition Policy for a Competitive Europe, COM (2004), Brussels

In this way, the objective pursued by EU under the competition policy is not to protect individual undertakings that compete on the market, but to stimulate and maintain a balanced competition among them. Competition is believed to be the best stimulator of economic activity. Implementing a pro-active competition policy enables adjustment of demand and supply to the technical development needs, by increasing efficiency of undertakings and improving consumer welfare. This policy implies efficient utilization of resources for the purpose of attaining the best economic results, primarily for the benefit of consumers.

1.3 COMPETITION POLICY IN THE REPUBLIC OF MACEDONIA

By signing the Stabilization and Association Agreement in April 2001, with the effect of Articles 39, 69 and 70, Republic of Macedonia has committed to develop and implement comprehensive legislation for fighting competition restrictions. Law Against Competition Restrictions (“Official Gazette of the Republic of Macedonia” no. 80/99 from 1999), adopted two years before the signing of SAA, was subject to several rounds of changes aimed at aligning the legal provisions with the newly emerged situation. However, most of these changes were of cosmetic nature and did not address crucial problems that prevented and rendered the law’s enforcement confusing. A more comprehensive Law on Protection of Competition was adopted in 2005 (“Official Gazette of the Republic of Macedonia” no. 04/05 from 2005) which, to a large extent, is aligned with the EU antitrust law. An important novelty introduced by this law was the establishment of the Commission for Protection of Competition (CPC) as an autonomous and independent body competent for implementing the LPC.

Law on Protection of Competition aims to ensure free competition on the domestic market in order to stimulate economic efficiency and consumer welfare. LPC covers three areas of prohibited business practices that might result in competition restriction/distortion, as follows: cartel agreements of undertakings; abuse of dominant market position; and mergers (i.e. concentrations) of undertakings.

New Law on Protection of Competition was adopted in 2010 (“Official Gazette of the Republic of Macedonia” no. 145/10 from 28.2.2010) and is fully aligned with the EU antitrust law. For the purpose of better alignment and transposition of EU regulations in the field of competition policy, the Commission for Protection of Competition, in continuity, adopts various decrees, guidelines and brochures.²

As the analysis will show, despite the satisfactory legal framework in place, Annual Reports on the Activities of CPC provide the conclusion that this policy is marginalized within the system of economic policies. CPC is yet another décor in the institutional set-up. Budget funds disposed by this institution are indicative of the (un)seriousness with which problems arising from various forms of competition restrictions on the domestic market are treated.

Due to these reasons, the key question guiding this analysis is whether, despite the solid legal framework in place, Republic of Macedonia has developed and is implementing a credible competition policy?

² For more information, visit CPC’s official website, available at: <http://www.kzk.gov.mk>

1.4 METHODOLOGY

Overall goal of this Quarterly Accession Watch Report is to raise the question on CPC's existence and success, as well as to analyse its operation and activities as the key independent body tasked with implementation of the competition policy, in the context of the country's accession in the EU.

To answer the question whether, despite the solid legal framework, Republic of Macedonia has developed and is implementing a credible competition policy, MCET and FOSM's team applied the methodology on data collection and analysis described below.

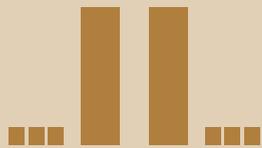
This report provides detailed overview and analysis of key strategic documents adopted by the Republic of Macedonia and the European Commission as part of the country's EU accession process, such as: National Programmes on the Adoption of EU Acquis (NPAA) for the last six years and EC's Progress Reports for the Republic of Macedonia in the same period.

In addition, a thorough analysis was conducted of competition legislation adopted at EU level and competition legislation adopted by the Republic of Macedonia, with special focus on the domestic legislation's alignment with the EU acquis. Analysis included the Annual Reports on the Activities of CPC, decisions taken by this independent body and the rulings of administrative and civil courts in competition cases. For comparison purposes, this report refers to annual reports on the activities of competition authorities from other countries.

Our team made a thorough analysis of the Budget of the Republic of Macedonia in respect to budget funds allocated to support CPC's operation, memoranda of cooperation signed by CPC with other national bodies tasked with implementation of the competition policy, and shorthand notes from Parliament's plenary sessions on reconsidering CPC's performance record and LCP's enforcement. Finally, the analysis relied on public policy documents addressing the competition policy

prepared by MCET earlier this year and the transcript from the public debate organized by MCET and FOSM in March 2014. In order to obtain more relevant data, we relied on the instrument for free access to public information.

For easier navigation, readers are advised of this report's structure. Namely, the analysis starts with an overview of the legislative framework governing the competition policy in the Republic of Macedonia, with a focus on its alignment with the EU acquis. Next is the assessment of financial and human resources disposed by CPC for implementation of relevant legal provisions and the policy as a whole, followed by an assessment of the policy implementation and overview of the right to indemnity on the grounds of distortion and prevention of competition. Then, the report focuses on the administrative and misdemeanour procedures and promotion activities (competition advocacy). Near the end, the team analyses CPC's cooperation with other competent bodies tasked with implementation of the competition policy, provides an overview of EC's assessments, as presented in its Progress Reports for the Republic of Macedonia, and CPC's international cooperation and networking. Report's final section outlines the conclusions and recommendations aimed at improved implementation of the competition policy in the Republic of Macedonia, in compliance with best practices and standards at EU level.



ANALYSIS OF THE LEGAL FRAMEWORK GOVERNING THE COMPETITION POLICY IN THE REPUBLIC OF MACEDONIA

As indicated above, the competition policy in the Republic of Macedonia is implemented pursuant to the Law on Protection of Competition (hereinafter: LPC), including a number of bylaws adopted as decrees or guidelines and transposing EU directives, regulations, notices and guides. The national authority competent for implementation of the competition policy, i.e. the competition law in the Republic of Macedonia is the Commission for Protection of Competition which, pursuant to Article 28 of the LPC, has been entrusted with competences to “monitor and analyse the conditions on the market to the extent necessary for the development of free and efficient competition, conduct administrative procedures and adopt decisions in administrative procedures, in accordance with the provisions of this law and the Law on State Aid”.

General impression obtained on the basis of reviewing the legal framework governing the competition policy in Macedonia, which is given in Table 1 from the Annex, is that the domestic legislation is, to a large extent, aligned with the EU acquis. Analysis of the legal framework provides the conclusion that CPC is active and effective in transposing relevant competition policy acts into the national legislation. Nevertheless, it has not transposed the EU regulations that will be important once Republic of Macedonia joins the EU, majority of which concern the activities and proceedings led in front of the European Commission. CPC should make due consideration of these regulations, directives and notices, in particular because they provide the underlying principles and rules that should be applied in its daily operation.

2.1 LENIENCY PROGRAMME

For several consecutive years, EC's Progress Reports for the Republic of Macedonia reiterated the problems created by Article 283³ of the Criminal Code which stipulates that any restriction or distortion of competition shall be qualified as criminal act that is liable to imprisonment sentence in duration of one to ten years for the responsible person of the undertaking. This article from the Criminal Code institutes a formal barrier for unhindered implementation of the leniency programme. In essence, a leniency programme offers the undertaking participating in a cartel or concerted practice and offering information thereof to assist CPC in easier detection and sanctioning of undertakings that have committed competition infringement to have their fine reduced for anti-competition practices. In order to harmonize Article 283 of the Criminal Code with the provisions from the leniency programme, paragraph 2 was added and reads: "a responsible person in the legal entity that has disclosed or has made a significant contribution in exposing the cartel agreement, decision or concerted practice prohibited by law, thus enabling the national competition authority to establish the existence of the cartel agreement, in compliance with the competition rules, shall be granted immunity or reduction of the fine for the legal entity."

Leniency programmes are an efficient tool for detecting and securing evidence on cartel agreements and concerted practices. For undertakings to be able to apply for the leniency programme, CPC needs to have efficient control and sanctioning policy for participants in cartel agreements that would stimulate undertakings to

refrain from entering such business arrangement and would prevent future competition restrictions.

So far, no undertaking from the Republic of Macedonia has applied for the leniency programme. This situation is a result of several factors: first, until February 2014, Article 283 of the Criminal Code did not allow exemptions for persons assisting competent authorities in detecting and sanctioning cartel agreements or concerted practices, whereby the person in question was still liable to criminal prosecution despite having assisted in identification of competition infringements; the second, more important reason is the inefficient sanctioning policy of the Commission for Protection of Competition, confirmed by repeated infringements on the part of big undertakings and the low number of decisions taken by CPC in cases of cartel agreements and concerted practices.

According to the Criminal Court in Skopje, in the last three years, the Public Prosecution has not motioned any charges and the court has not taken any rulings on the basis of Article 283 of the Criminal Code. Article 283 of the Criminal Code is vague and imprecise about the cases in which it can be used as legal basis, i.e. formulations used in this article stipulate that the sentence of one to ten years imprisonment shall be issued when the responsible person has acquired proceeds of large proportions or has caused damage of great proportions. Courts have discretionary rights to decide what constitutes competition infringement of large proportion and damage of great proportions, in particular because the legislation in effect does not provide definition of these terms.

³ A responsible person in a legal entity, who enters an agreement or participates in concluding an agreement, decision or concerted practice prohibited by law, in order to prevent, restrict or obstruct competition, thus enabling the legal entity to acquire proceeds of large proportions or creates damage of great proportions, shall be sentenced to imprisonment in duration of one to ten years.

Under the EU law, criminal liability for competition infringement is not a binding principle, but additional mechanisms are applied by several Member-States.⁴ These sanctioning mechanisms under the competition policy are primarily based on fines, which are set at maximum 10% of the undertaking's total annual turnover in the last business year.

Criminal liability for competition infringement is unnecessary when the country has established an efficient sanctioning policy which deters the undertakings from repeating the infringement. However, the ultimate goal of undertakings entering cartel agreements and concerted practices is to increase their profits and reduce the market competition, so effective and high fines should be an adequate lesson for undertakings and deter them from repeating these practices, thereby preventing future competition infringements.

Although Article 283 of the Criminal Code is in effect, provisions contained therein seem to serve as décor or "letters on paper", indicating an allegedly serious approach in fighting competition distortion and infringement. Considering the fact that the national legislation stipulates criminal liability for competition distortion and infringement, it would be logical to expect that any consecutive repetition should imply motioning of criminal charges.

⁴ Denmark, Greece, Ireland and the United Kingdom are just few of the countries where competition infringement also implies criminal liability. In Estonia, repetition of competition infringements by one and the same undertaking implies criminal liability. In France, the national competition authority (Competition Council) decides whether the case in question should be referred to the Public Prosecution.



ANALYSIS OF THE COMMISSION FOR PROTECTION OF COMPETITION'S FINANCIAL CAPACITY AND HUMAN RESOURCES

Assessment of CPC's financial (in)capacity is performed on the basis of several indicators, those being: the budget it disposes with, operational expenditure per staff member and structure of budget expenditure.

From its establishment in 2005, there are no significant fluctuations in terms of budget funds allocated for CPC's operation. Table 1.1 shows that contrary to the situation observed in 2010, when this institution's nominal budget has increased to 23,710,000 MKD (around 386,000 EUR), relevant budget funds for the years 2011 and 2012 have been reduced to 16,473,000 MKD and 16,485,000 MKD, respectively (around 268,000 EUR).

	2006	2007	2008	2009	2010	2011	2012
Budget	13,502	20,650	22,049	23,463	23,710	16,473	16,485

Table 1.1. Annual fluctuations of CPC's budget, in the period 2006-2012 (in million MKD)

Source: Budget of the Republic of Macedonia for the years 2006, 2007, 2008, 2009, 2010, 2011 and 2012

In the period 2005-2012, the relative shares of CPC's budget funds in total expenditure under the central budget are very small and, in average, account for around 0.014 % of total expenditure under the central budget.

Operational expenditure per staff member completes the image on CPC's financial incapacity. Table 1.2 provides an overview of CPC's operational expenditure per staff member in the period 2008-2012. In 2012, operational expenditure per staff member has been reduced by around 37% compared to 2008 figures. Budget cuts put the Commission for Protection of Competition in an unfavourable position in terms of implementing the national legislation governing the competition policy.

	2008	2009	2010	2011	2012
Number of staff members	22	23	26	25	28
Operational expenditure per staff member	986	819	645	659	618

Table 1.2. CPC's operational expenditure per staff member, for the period 2008-2012 (in thousand MKD)

Source: Budget of the Republic of Macedonia for the years 2008, 2009, 2010, 2011 and 2012

Analysis of CPC's budget structure does not improve the general perception about the institution's financial incapacity. In the period 2008-2012, the highest share of CPC's budget funds were spent on salaries and salary contributions. In 2012, the share of these costs in the total budget has increased to 84.34%. Remaining portion of budget

funds were spent on procurement of goods and services needed for the institution's current operations.

	2008	2009	2010	2011	2012
Salary and salary contributions	63,49%	58,19%	56,42%	80,39%	84,34%
Goods and services	34,92%	41,17%	42,93%	19,59%	15,66%
Capital expenditure	1,59%	0,64%	0,65%	0,38%	0,00%
Total:	100,00%	100,00%	100,00%	100,00%	100,00%

Table 1.3. Overview of CPC's budget structure, for the period 2008-2012

Source: Budget of the Republic of Macedonia for the years 2008, 2009, 2010, 2011 and 2012

Highest amount of budget funds spent for procurement of goods and services needed for the institution's current operation concerns travelling and per diem costs, as well as outsourced services⁵ (Table 1.4).

⁵ Information and data provided in the Annual Reports on the Activities of CPC and in the Laws on Budget Execution for the analyzed period do not provide insight in the nature of outsourced services, i.e. whether these costs concern expert or technical services.

	2008	2009	2010	2011	2012
Travelling and per diem costs	28,76%	34,08%	33,35%	15,49%	14,76%
Outsourced services	34,16%	45,46%	41,20%	26,95%	22,14%

Table 1.4. Share of traveling and per diem costs and share of outsourced services under CPC's budget expenditure for procurement of goods and services, for the period 2008-2012

Source: Budget of the Republic of Macedonia for the years 2008, 2009, 2010, 2011 and 2012

Information presented in this section provides the conclusion that CPC is facing serious financial limitations. Under such circumstances, it is unjustified to have great expectations that this institution can make credible efforts to promote free competition on the domestic market. Modest results achieved can be partially justified with the limited financial resources this institution disposes with. However, limited financial resources should not be used as an excuse for maintaining the status quo in terms of implementing the competition policy. CPC must find other ways to strengthen its financial capacity.

CPC's inadequate staff structure creates additional limitations for its operation. According to CPC's 2012 Annual Report, the total number of staff members is 28, 7 of which are tasked with implementation of the national legislation governing the competition policy and 7 staff members are tasked with state aid control⁶ (Table 1.5). As regards the education background of CPC staff members, according to information

⁶ In compliance with the provisions from the Law on State Aid ("Official Gazette of the Republic of Macedonia" no. 145/10), CPC is competent to control state aid for the purpose of preventing negative effects on the market competition that might arise from awarded state aid. Analysis of this aspect of CPC's operation is not included in this report. Nevertheless, CPC's performance in terms of state aid control is also burdened with many institutional obstacles that prevent implementation of its law-stipulated obligations.

provided by this institution, majority of them have bachelor degrees in economy and law.

	Number of staff members	Share in total number of staff members (%)
Number of staff members tasked with implementation of LPC*	7	25%
Number of staff members tasked with implementation of LSA**	7	25%
Other	14	(50%)
Total	28	100%

Table 1.5. Share of CPC staff members tasked with implementation of LCP and LSA in 2012
Source: 2012 Annual Report on the Activities of CPC. The situation presented in the table concerns the year 2012.

* Law on Protection of Competition

** Law on State Aid

Comparison against relevant staff structure of national competition authorities in Slovakia, Hungary, Poland and the Czech Republic (Table 1.6) shows that the relatively small number of staff members tasked with implementation of the competition policy does not differ from the relevant situation in Poland and the Czech Republic (especially, having in mind the relevant size of their markets). On the other hand, staff members at the national competition authorities in Hungary (73%) and Slovakia (100%) are primarily tasked with the implementation of antitrust law and merger control. Following is an overview of staff members at competition authorities in the neighbouring countries and the competences they have been entrusted with: although

they fall short in terms of having recruited the optimal number of staff members, expert and supporting services of the national competition authorities in Croatia and Serbia are better equipped compared to the situation observed at the Commission for Protection of Competition in the Republic of Macedonia.

This comparison provides the conclusion that the potential of CPC's staff could be better utilized. Actually, CPC staff could benefit from continuous training for development of skills and competences in performing forensic analyses and processing operational data in cases of reasonable suspicion for violation of relevant legal provisions from the LPC. Increased expert knowledge and skills of staff members deployed at CPC's supporting services could improve this institution's proactive role in competition policy making and implementation. Furthermore, a solid staff policy could increase the number of expert staff members tasked with LPC's implementation and reduce the number of technical staff members. Also, CPC should reconsider the possibility for benefiting from external expert assistance in performing forensic analyses. For these recommendations to be implemented, CPC must first address the financial limitations burdening its operation.

	Number of staff members	Share of staff members tasked with implementation of CPP (%)
Slovakia*	61	100%
Hungary*	120	73%
Poland*	468	28%
Czech Republic*	149	26%
Croatia***	56	66%
Serbia***	32	62,5%
Macedonia**	28	25%

Table 1.6. Overview of the number of staff members and share of staff members tasked with implementation of CPP at the national competition authorities in selected EU countries, for the year 2011, and in Macedonia, for the year 2012

Source: *Global Competition Review 2012;

** 2012 Annual Report on the Activities of CPC

*** 2012 Annual Reports of the national competition authorities in Croatia and Serbia

IV

IMPLEMENTATION OF THE COMPETITION POLICY

This section of the analysis targets the three key aspects in the implementation of the competition legislation. More specifically, the analysis will focus on issues related to the number and structure of cases processed by CPC, control of mergers/concentrations and fines imposed.

From CPC's establishment as an independent institution in 2005 until the end of 2012, this competition authority has initiated and completed a total of 177 cases in the field of antitrust control (cartel agreements, concerted practices and abuse of dominant market position) and in the field of merger control. Majority of cases processed in this period, i.e. around 73% of all cases, concerned merger control (129 notifications), followed by cases related to abuse of dominant market position, which account for 16% of all cases (28 cases), and investigations of cartel agreements, which account for 11% of all cases (20 cases). Low number of cases related to cartel agreements is an additional proof that CPC does not have an active competition policy focused on fighting cartel agreements on the domestic market that cause the greatest distortions of free competition.

Table 1.7 provides an overview of cases processed by CPC concerning cartel agreements of undertakings and abuse of dominant market position in the period 2005-2012, according to the manner in which relevant proceedings were initiated. In the period 2008-2012 there are no cases of possible cartel agreements reported by other market participants, which means that all investigations into cartel agreements have been initiated ex officio. As regards cases of abuse of dominant market position, the number of procedures initiated at the request of other market participant⁷ (in all cases, the initial report comes from a competitor-undertaking) is significantly lower than the number of procedures initiated ex officio (8 and 21, respectively).

year	Cartel agreements		Abuse of dominant market position	
	Ex-officio	At the request of another undertaking	Ex-officio	At the request of another undertaking
2005	1	1	2	1
2006	1	1	2	1
2007	0	1	3	3
2008	3	0	2	1
2009	3	0	1	1
2010	2	0	2	0
2011	3	0	4	1
2012	8	0	5	0

Table 1.7. Overview of processed cases according to the manner in which the procedure was initiated, for the period 2005-2012

Source: Annual Reports on the Activities of CPC

⁷ According to the legal provisions, reports on possible cartel agreement or abuse of dominant market position can be made by any legal or natural person.

Small number of processed cases initiated at the request of legal or natural person having a legitimate interest raises concerns about the following problems: first, it is indicative of the low awareness among business entities about CPC's activities and role in stimulating market competition, and second, this situation could be a result of the poor market culture among market participants. Accordingly, one must not undermine consumers' role in reporting particular forms of uncompetitive behaviour on the part of undertakings. However, due to the absence of specific activities taken by CPC on establishing links between the competition policy and the consumer protection policy and consumers' ignorance about their role in this process, it does not surprise that consumers have not made requests for investigation of or reports on competition infringements.

Comparison of the annual numbers of initiated and completed procedures for the analysed period (2005-2012) shows small differences between procedures initiated and procedures completed. Relatively short duration of procedures led by CPC (in particular, procedures on cartel arrangements and abuse of dominant market position) raises concerns about the credibility of CPC's analyses and its economic approach in conducting these analyses.

	2007	2008	2009	2010	2011	2012
Notifications	16	29	17	22	22	23
Approved	13	26	17	18	18	22
Rejected	0	0	0	0	0	0
Conditionally approved	1	1	0	0	0	0
Does not fall under LPC	2	1	0	3	0	0

Table 1.8. Analysis of procedures led in the field of merger control, for the period 2007 - 2012

Source: Calculations presented in the table are based on CPC's Annual Reports

Detailed analysis of data on merger control presented in Table 1.8 shows that the highest number of merger notifications (114) were unconditionally approved, and only 2 were conditionally approved. This is indicative of the formal approach pursued by CPC in analysing and appraising merger notifications. Evidence in support of this conclusion is found in the following statements. First, data presented in CPC's Annual Reports do not allow conclusions to be inferred about the nature of, i.e. goal pursued by, the merger in question and the effects thereof. Moreover, in the analysed period there are no rejected merger notifications.

In the period 2007-2012, the total amount of fines imposed by CPC accounts for more than 13.5 million EUR. In most cases (90%), fines were imposed on the grounds of abuse of dominant market position (Table 1.9).

	2007	2008	2010	2011	2012
Failure to provide CPC with requested data	17.279	-	202	-	-
Cartel agreement	8.263	-	-	-	779.534
Abuse of dominant market position	2.342.598	8.080.446	807.735	1.747.927	1.951
Unreported merger	28.961	-	-	-	2.992
Total	2.397.103	8.080.446	807.937	1.747.927	784.477

Table 1.9. Overview of fines imposed by CPC on various grounds, for the period 2007-2012
Source: Calculations presented in the table are based on CPC's Annual Reports (amounts are given in EUR)

In this period, 12 of the total number of fines were imposed to five undertakings. In other words, one undertaking was imposed more than one fine on the same legal basis, i.e. abuse of dominant market position. Following is the breakdown of fines and undertakings: T-Mobile Macedonia was fined twice, JSC Butel – Skopje was fined three times, and Macedonian Telecom was fined three times, while ONE and EVN were imposed two fines, each.⁸ Considering the highest fine issued per year, obvious is that the fined undertakings operate in market sectors characterized by high market concentration (Table 1.10).

	2007	2008	2010	2011	2012
Highest fine	2.297.929	4.100.000	798.756	998.000	775.984
Type of infringement	ADMP	ADMP	ADMP	ADMP	Cartel agreement
Undertaking	Macedonian Telecom	T-Mobile Macedonia	T-Mobile Macedonia	Macedonian Telecom	Alkaloid Cons and MD Panovski

Table 1.10. Overview of the highest fine per year, type of competition infringement and fined undertaking, for the period 2007-2012 (amounts are given in EUR)

Source: Annual Reports on the Activities of CPC

Note: ADMP – abuse of dominant market position

⁸ In the case of ONE and EVN, the first fines were issued at the time when these undertakings were owned by *Cosmofon JSC Skopje* and *Electricity Company JSC Skopje*, respectively.

The fact that majority of fines are imposed to small number of undertakings whereby one and the same undertaking is fined more than once allows the conclusion that CPC's sanctioning policy is inefficient, i.e. it does not deter undertakings from pursuing non-competitive practices, but on the contrary they are repeatedly fined for having committed the same competition infringement. Therefore, it is logical to expect that undertakings in other economy markets will feel comfortable in practicing prohibited anti-competition business strategies. Reduced number of fined undertakings and small number of identified cartel agreements are indicative of the leniency programme's inefficiency.⁹ Hence, the conclusion is inferred that, although they are formally transposed in the national antitrust legislation, principles and objectives underlying the sanctioning policy¹⁰ are not fully adhered by CPC.

As regards the fines imposed, it should be noted that according to the legislation in effect, undertakings are entitled to appeal the misdemeanour decision and fine in front of the Administrative Court of the Republic of Macedonia, which can either confirm or revoke CPC's decision. CPC's Annual Reports do not include information on the actual amount of fines collected on the grounds of violation of the LPC, which prevents monitoring and assessment of financial effects created by CPC's operation.

As regards the analysis of CPC's operation, "significant" are the results it has achieved in analysing certain economy sectors. From 2008 onwards, the most frequently analysed is the financial, i.e. banking sector, whereby CPC has not determined competition restrictions and distortions. Moreover, CPC has only once analysed the state-of-affairs in the electronic communications sector and the electronic media advertising market, and again CPC has not found restrictions or distortions of market competition. In 2009, CPC initiated an analysis of the retail market in non-specialized commodities, but the relevant findings from this analysis have not been integrated in CPC's Annual Reports or uploaded on its official website. This raises concerns about the criteria applied by CPC when selecting an economy or market sector that will be subject to detailed analysis, as well as the methodology it applied for analysing the state-of-affairs on the said market.

⁹ 2005 Law on Protection of Competition stipulated fines for the responsible person at the undertaking fined for violation of legal provisions. On several occasions, CPC has issued fines of this type in the amount of 500 EUR.

¹⁰ For the purpose of disciplining and deterring undertakings from applying anti-competition business practices

V

RIGHT TO INDEMNITY FOR COMPETITION DISTORTION AND INFRINGEMENT

Private enforcement of the competition policy is marked by great pressure exerted by damaged parties, i.e. natural persons and undertakings that are victims of cartel agreements and that motion private lawsuits with indemnity claims for such market behaviour in front of the national courts in the Member-States. In order to enable protection of individuals as victims of restricted competition, EU established the principle of redress awarded to any natural person or undertaking suffering damages from such behaviour.

In the Republic of Macedonia, the principle of redress actions against anti-competitive behaviour is implemented in Article 58 of the Law on Protection of Competition, which reads:

“If any action constituting a misdemeanour in accordance with the provisions of this law causes damage, the damaged party may seek indemnification in accordance with the law”.

This is the single provision that enables private enforcement of the LPC in the Republic of Macedonia.

Interpretation of this legal provision allows us to conclude that any final and enforceable decision taken by CPC is considered proof in front of the national courts. On this account, damaged parties can use these decisions as evidence and can make indemnity claims in front of civil courts in the Republic of Macedonia pursuant to Article 58 of the Law on Protection of Competition and Article 141(1)¹¹ of the Law on Contractual Relations.

¹¹ A party causing damage to another party is obliged to indemnify it.

A decision that has been contested in an administrative dispute and has been confirmed by the Higher Administrative Court should be irrefutable evidence in proceedings led in front of civil courts.

According to Article 142 of the Law on Contractual Relations, damage is defined as “reduction/diminution of one’s property (ordinary damage), prevention of property accrual (loss of earnings), and infliction of physical or mental distress or apprehension (non-physical damage)”. Moreover, according to Article 178, paragraph 1 of the Law on Contractual Relations “the damaged party is entitled to both compensation for ordinary damage and loss of earnings”.

According to the EU law, i.e. White Paper on Damage Actions for Breach of European Antitrust Rules from 2008, redress awarded to the damaged party should be complete, i.e. it should compensate ordinary damage and loss of earnings, plus an interest. This principle, confirmed in the White Paper and established in the European Court of Justice’s case law, implies that: “redress originates from the principle of effectiveness of the European legal order and the right of all individuals to seek compensation of losses caused by means of an agreement or behaviour that restricts or hinders competition. Complete redress for the damaged parties does not address only ordinary damage (damnum emergens), but also loss of earnings (lucrum cessans), plus an interest”.

In the period 2005-2012, Macedonia’s competition authority, i.e. CPC, has adopted 48 decisions¹² on determining concerted practices, abuse of dominant market position and cartel agreements that have inflicted damages to many citizens. Nevertheless, due to the ignorance on the part of citizens and undertakings about the possibility for court protection and redress they are entitled to, this opportunity remains underutilized. By using the instrument on free access to public information, the Macedonian Centre for European Training made an attempt to answer the question on the number and frequency of civil lawsuits initiated pursuant to Article 58 of the Law on Protection of

Competition, however ACMIS (court database) did not disclose such information. A simple Internet-browsing exercise resulted in identification of only one judgment taken by the Basic Court in Vinica.¹³ It should be noted that the damaged party making the indemnity claim did not refer to Article 58 of the LPC, but filed the lawsuit on the basis of unlawful accrual of proceeds. Nevertheless, the judge – whose actions are not confined by the lawsuit claim – inferred that the damaged party is seeking redress pursuant to Article 58 of the LPC. Examples of this type are indicative of the low awareness among attorneys-at-law and citizens about the existence of this legal remedy and, in general, about the competition policy and rules. Greater utilization of this possibility in Macedonia necessitates greater expertise and knowledge on the part of judges and attorneys-at-law, public awareness on this possibility and additional legal clarifications about the private enforcement of the competition law.

In the Republic of Macedonia, there are unclarified issues about the private enforcement of the LPC and they need to be regulated by means of legislative acts. One of them concerns the dilemma whether the court will admit the indemnity claim as grounded in cases when the damaged party has motioned a lawsuit on the basis of Article 58 of the Law on Protection of Competition in the absence of a final decision taken by CPC. In such cases, the court first decides whether the Law on Protection of Competition has been violated and after having established the violation it can determine the scope of redress. Namely, according to the Council Regulation (EC) no. 1/2003, the national courts have the power to directly apply Articles 101 and 102 of TFEU, i.e. Articles 7 and 11 of the Law on Protection of Competition. In the capacity of candidate-country for EU membership, Republic of Macedonia should accept this solution and implement it in the national legislation. In case of indemnity claims motioned directly in front of civil courts and based on Article 58 of the LPC, in the absence of decision taken by the Commis-

¹² Official website of the Commission for Protection of Competition: <http://www.kzk.gov.mk/mak/index.asp>

¹³ MALV 31/2013 from 31.5.2013, Basic Court in Vinica

sion for Protection of Competition, the court can proceed in two ways. First and most important is for the court to decide whether there has been a competition infringement, and then it should determine the scope of damages caused and redress entitled. One of the two possible ways to do that is for the court to decide whether there has been a competition infringement, as preliminary matter,¹⁴ in compliance with Article 11 of the Law on Litigation Procedure. Alternatively, the court can discontinue its proceedings and wait for CPC to adopt a decision, i.e. wait for CPC to establish whether there has been a competition infringement. Only after CPC's decision becomes enforceable (i.e. has been confirmed by a ruling taken by the Higher Administrative Court), the civil court can decide on the scope of the redress, in cases when it has been established that there has been a competition infringement.

Another important issue that needs to be addressed is collective redress in cases of a group of citizens affected by one decision taken by CPC whereby it has been established that there has been a competition infringement. Collective indemnification is needed in cases when CPC has taken a decision on competition infringement committed by big undertakings that have abused their dominant market position and have thus caused damages to a high number of customers. Examples thereof are CPC's decisions taken against EVN Macedonia and T-Mobile Macedonia, which abused their dominant market position and have charged their customers unjustified manipulative costs.

At EU level, in the absence of binding regulation and directive on collective redress, Member-States regulated this issue in different manner. In July 2013, the European Commission adopted a Recommendation on common principles for collective redress (Official Journal L 201 from 26.7.2013), published in the section on EU law,¹⁵ which sets out the underlying principles

of actions for collective redress. Republic of Macedonia has not transposed this Recommendation in the form of law or decree. Underlying principles set out in the Commission Recommendation include:

- Member-States should establish collective redress mechanisms and temporary measures;
- Member-States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility: the entity should have a non-profit making character; the entity should have sufficient capacity in terms of financial resources, human resources and legal expertise; these should be a direct relationship between the main objective of the entity and the rights that have been violated by competition infringement;
- Member-States should respect the "opt-in" principle, i.e. the claimant party should be formed on the basis of expressed consent for participating in the action for collective redress. An exception of this principle, by law or by court order, should be duly justified by reasons of sound administration of justice;
- Member-States should ensure that judicial collective redress mechanisms are accompanied by appropriate means of collective alternative dispute resolution available to the parties before and throughout the litigation. Use of such means should depend on the consent of the parties involved in the case;
- Member-States should ensure that the collective redress procedures are fair, equitable, timely and not prohibitively expensive.

In the capacity of candidate-country for EU membership, Republic of Macedonia must implement an effective and equitable mechanism for protecting individuals and groups whose rights have been violated by breach of competition rules, in the spirit of the EU law.

¹⁴ When the court's decision depends on the preliminary matter concerning the establishment of a right or legal relation, and when the preliminary matter has not been resolved or decided upon by the court or another competent court, the court can decide to make a ruling in the preliminary matter if it has not been otherwise stipulated by law.

¹⁵ Section L of the Official Journal concerns the legal acts of the European Union, while section C contains Commission notices and communications.

VI

ADMINISTRATIVE AND MISDEMEANOUR PROCEDURE LED BY THE COMMISSION FOR PROTECTION OF COMPETITION

Law on Protection of Competition defines two procedures led in front of the CPC, i.e. administrative and misdemeanour procedure, and therefore decisions are taken in either administrative or misdemeanour procedure.

Decisions under the administrative procedure are adopted by the Commission for Protection of Competition, while decisions under the misdemeanour procedure are taken by a separately established Commission on Misdemeanour Matters within CPC. Commission on Misdemeanour Matters is comprised of 3 members from the Commission for Protection of Competition, one of which acts as the President. President¹⁶ and members of the Commission on Misdemeanour Matters are also members of CPC. Commission on Misdemeanour Matters initiates the misdemeanour procedure by means of a procedural order that cannot be appealed. Procedures are initiated ex-officio, at the request of CPC's Secretary General, or at the request of any natural person or legal entity having a legitimate interest in determining the competition infringement. Key difference between the two types of procedures is the fact that misdemeanour procedures imply establishment of the infringement and impose a fine, whereas decisions taken in administrative procedures only establish the infringement, restriction or distortion of competition and the undertaking is instructed to avoid anti-competition business practices in the future. Failure to act upon the decision on establishing competition infringement or restriction on the part of the concerned undertaking triggers misdemeanour proceedings.

¹⁶ The President of the Commission on Misdemeanour Matters is the former President of the Commission for Protection of Competition.

According to the LPC, the administrative procedure also includes:

- analysis of individual economy sectors;
- requesting data from the undertakings;
- collecting evidence at the site (inspection and evidence collection at the undertaking);
- issuing interim measures.

CPC has broad investigative authorizations for easier detection of competition distortions. CPC can inspect the offices, computers, records and materials contained therein, as well other documents kept by undertakings, for the purpose of finding information that undertakings may wish to conceal and would not disclose to CPC upon a request for disclosure of relevant information. However, to present CPC has not used these authorities. CPC's inactivity and failure to exercise its minimum law-stipulated authorizations further confirm the conclusion that this institution is only formally established to approve mergers and state aid, and occasionally reacts to acute and major infringements of market competition. Namely, CPC has failed to act in a series of market situations that have necessitated its action, but unfortunately that never happened. Examples of such situations include the following cases:

Certain restaurants and cafe bars offer limited range of products, i.e. they serve Pepsi or Coca-Cola (soft drinks), Skopsko or Dab (beer), but never both. This form of restrictions is set by distributors and is contrary to market competition rules.

Predatory pricing, i.e. reduction of prices for particular commodities aimed at driving competitors out of the market. In reality, low prices of commodities are only momentary and pursued for the purpose of making their commodity the only one available on the market, thereby allowing the manufacturer or distributor to dictate future market prices.

Many undertakings have dominant or monopoly position on the local markets and, therefore, they must behave carefully, i.e. avoid abusing their position. In cases when local undertakings (utility companies, water-supply companies, funeral service companies and other public enterprises) act contrary to market trends and institute inadmissible surcharges as part of their bills, the citizens, as consumers of their services, have legitimate interest to initiate a procedure in front of the Commission for Protection of Competition.

All decisions on increasing prices of public goods (water, electricity, heating) should be under the scrutiny of the Commission for Protection of Competition. Although the decisions on increased prices of public goods have been approved by the relevant regulatory bodies (competent to determine the terms and conditions and set prices in particular economy sectors), CPC is competent to monitor these markets and determine whether the pricing policies are in compliance with the market terms and conditions and would not disturb the market competition.

Macedonian consumers pay the most expensive telephone devices in the region. Relevant offers (mobile phone plus tariff package) made by mobile operators in the neighbouring countries and in the EU include much cheaper mobile phones. In Macedonia, mobile phones offered by the relevant operators as part of tariff packages are more expensive compared to their retail price at mobile phone stores. Commission for Protection of Competition should investigate these practices.

Actions against the decisions taken by CPC under administrative and misdemeanour procedure are allowed in front of the Administrative Court and this legal remedy is in compliance with the EU law, which guarantees legal remedy (appeal) against first-instance decisions.

Analysis of duration of procedures led by CPC¹⁷ until a final and enforceable decision¹⁸ is taken shows that, in average, these procedures last for 2 years and 2 months: the shortest duration being 1 year and 1 month and the longest one being 4 years. Pursuant to Article 46, paragraph 2 of the LPC, initiation of an administrative dispute against a decision taken in misdemeanour procedure suspends the decision's execution, whereas pursuant to Article 53, paragraph 2 of the LPC, initiation of an administrative dispute against a decision taken in administrative procedure does not suspend the decision's execution. Due to these reasons, administrative disputes involving CPC's misdemeanour decisions must be completed as soon as possible for the purpose of maintaining the momentum gained by the misdemeanour fine, in particular because CPC's decision become enforceable after four years.

Long duration of misdemeanour procedures is primarily due to the complicated procedure established by CPC. First, under an administrative procedure, CPC takes a decision on establishing violation of the Law on Protection of Competition. In compliance with the law which guarantees the right to an appeal, an administrative dispute can be initiated against CPC's decision in front of the Administrative Court, followed by an appeal in front of the Higher Administrative Court of the Republic of Macedonia. Only after CPC's decision has been confirmed by the Higher Administrative Court, CPC can initiate a new procedure led by its Commission on Misdemeanour Matters and the competition infringement is established by means of a new decision, which also sets the fine for the undertaking.

¹⁷ See Table 2 in the Annex.

¹⁸ Enforceable decision is a decision confirmed by a higher court instance. In this case, it is the Administrative Court or the Higher Administrative Court.

Again, in compliance with Article 46 of the LPC, the said decision can be contested in an administrative dispute.

Analysis of decisions taken by CPC to present (i.e. decisions published on its official website) shows that, in some cases, four years elapse from the moment CPC takes the decision on establishing the competition infringement to the enforceability of the decision on issuing misdemeanour sanctions. Instead of doubling their work, i.e. taking separate decisions for the same infringement under administrative and misdemeanour procedure and holding separate sessions by the relevant commissions, i.e. Commission for Protection of Competition and the Commission on Misdemeanour Matters, the two decisions can be merged into one that would both establish the violation and set the fine. By doing so, CPC will reduce the procedure duration and will simplify the already complex procedure on issuing misdemeanour sanctions. In turn, this will increase CPC's efficiency. Namely, the Supreme Court's opinion no. 03-1463/011 from 17.1.2010 states that: "according to the Law on Protection of Competition, CPC is the only body authorized for issuing misdemeanour sanctions for competition infringement".¹⁹

Undue proceedings might jeopardize the right to indemnity guaranteed under Article 58 of the Law on Protection of Competition. According to Article 365, paragraphs 1 and 2 of the Law on Contractual Relations: "the statute of limitations for an indemnity claim is set at three years from the moment the damaged party has learned about the damage and the natural or legal person that has committed it, i.e. five years from the moment the damage has been inflicted."

An example of undue proceedings is the case related to CPC's decision no. 07-242/7. Namely, this procedure was initiated on 7.9.2007, but CPC adopted the misdemeanour decision against EVN as late as 2011. "CPC has established that EVN Macedonia JSC Skopje holds a

¹⁹ Opinion no. 03-1463/011 delivered by the Supreme Court of the Republic of Macedonia

dominant market position in terms of electricity supply to captive consumers and has abused this position by calculating and charging its captive consumers a manipulative cost in the fixed amount of 6 MKD on their monthly bills, which represents a violation of Article 14, paragraph (2), item (1) of the Law on Protection of Competition. By the effect of the decision, EVN Macedonia JSC Skopje is prohibited to calculate and charge manipulative costs to its captive consumers as part of their monthly bills. EVN Macedonia JSC Skopje contested CPC's decision by motioning an administrative dispute in front of the Administrative Court of the Republic of Macedonia. Acting upon the appeal, the Administrative Court examined CPC's decision no. 07-242/7 from 7.9.2007 and admitted the appeal as grounded. Later it adopted the ruling U/no. 4794/2007 from 27.11.2008 whereby it annulled the contested decision on the basis of erroneous application of the material law."²⁰ Acting upon the Administrative Court's ruling and for the purpose of determining the actual situation, as part of the repeated proceedings CPC conducted an insight in numerous additional evidence, such as communication letters, tariff rulebooks and decisions taken by the Energy Regulatory Commission, EVN Macedonia and other entities. CPC took the second decision under the repeated procedure on 26.1.2009. This decision was again contested by EVN Macedonia, while the case was finally completed with the decision taken by the Higher Administrative Court on 6.9.2010. CPC's misdemeanour decision was adopted as late as 2011, i.e. 16.3.2011. EVN Macedonia has not motioned an administrative dispute against this decision, but settled the misdemeanour fine within the deadline.

Another case led by CPC provides evidence on the long and complicated proceedings in place and concerns CPC's decision on establishing competition infringement taken in 2006 for which the relevant misdemeanour fine was imposed in 2011. Namely, CPC found that Mac-

edonian Telecom abused "its dominant position on the telecommunications market by directly imposing unfair trading conditions on the territory of the Republic of Macedonia, i.e. by calculating and charging an additional fee as part of the monthly bills for its subscribers called manipulative cost for billing in the fixed amount of 6 MKD (subscribers with basic package), 25 MKD (resident subscribers) and 50 MKD (business subscribers)"²¹ in 2006. CPC's decision was confirmed by the Administrative Court under the ruling UP/II no. 09-2/2 from 08.2.2007. Later, the Commission on Misdemeanor Matters within CPC adopted the misdemeanour decision PP/no. 09-05/5 from 21.4.2011, after which Macedonian Telecom settled the fine within the deadline without initiating an administrative dispute against the misdemeanour decision.

It is evident that in both cases, the period elapsed from the decision on competition infringement until the decision on misdemeanour sanctions was three and a half, i.e. four and a half years, respectively.

Table below provides the conclusion that the Administrative Court (or other competent courts) approved 88% of CPC's decisions. Administrative court has taken only 3 rulings whereby it has decided contrary to the disposition given in the decisions taken by the Commission for Protection of Competition:

- Administrative court's decision UZ/no. 795/2013 elaborates that case-related documents lack evidence on the basis of which CPC has established the factual situation, i.e. there are no relevant pricelists that have been referred to as basis for establishing the factual situation. Therefore, the Higher Administrative Court's ruling annulled CPC's decision no. 08-195/25 from 19.7.2010 in the section concerning the auto-motive company T from T.

-In the second case, the Higher Administrative Court adopted the ruling UPRZ/no. 250/2013 where it has found that the disposition from CPC's decision does not include the mandatory elements, such as

²⁰ Decision no. 07-242/7 from 7.9.2007

²¹ CPC's decision no. 07-296/3 from 28.12.2006

the infringement's duration and the relevant actions taken by the offender that constitute competition infringement. On this ground, the Higher Administrative Court confirmed the Administrative Court's decision thereby annulling CPC/Commission on Misdemeanour Matter's decision PP/no. 09-12/41 from 5.10.2012.

- Decision UZ/no. 794/2013 refers to the fact that the administrative appeal in front of the Higher Administrative Court has not been motioned by the competent body (State Attorney's Office), whereby the Administrative Court's decision UP/no. 08-187/7 from 22.10.2010 on annulling CPC's decision is confirmed.

Pursuant to Article 67 of the Law on Protection of Competition, CPC is tasked to publish its misdemeanour decisions, as well as all court rulings related thereto. Nevertheless, CPC's decisions that have been annulled by the Higher Administrative Court are removed from its official website. Practices like this are confusing, as some of these decisions are only partially published in CPC's Annual Reports. Namely, Annual Reports on the Activities of CPC clearly indicate the undertakings against which it has taken relevant decisions. To avoid such confusion, CPC should publish these decisions together with the relevant rulings of the Administrative Court and the Higher Administrative Court on annulling them.

It should be noted that decisions and the rulings no. 3, 4, and 5 in Table 2 from the Annex have been initiated by a natural person and concern local market monopoly position abused by a public enterprise. Nevertheless, the Commission has taken a conclusion whereby it has not found abuse of the dominant market position. Later, CPC's conclusions have been confirmed by the Higher Administrative Court.

In general, the Administrative Court confirms CPC's decisions unless it has found serious shortcomings of procedural nature, i.e. unless CPC has erroneously and incompletely established the factual situation.

Analysis of CPC's decisions adopted under administrative or misdemeanour procedure provides the conclusion that, in general, these deci-

sions are straightforward, easy to understand and include all evidence on the basis of which the relevant decision was taken, while in the case of establishing abuse of dominant market position, they include analysis of the relevant market and calculations on the basis of which the dominant market position was confirmed. In cases of erroneous application of the material law or in cases when the factual situation has not been completely and accurately established, the Administrative Court has duly informed CPC of the said procedural shortcoming. Actually, in cases²² when the Administrative Court has annulled CPC's decision due to procedural or material shortcomings, CPC is tasked to repeat the relevant procedure, re-examine the case and take a new decision in compliance with the court-issued guidelines.

²² Decisions UPRZ/no. 250/2013, UPRZ/no. 250/2013 and UZ/no. 794/2013 taken by the Higher Administrative Court of the Republic of Macedonia

...VII...

ACTIVITIES FOR PROMOTION AND STIMULATION OF MARKET COMPETITION (COMPETITION ADVOCACY)

7.1 DEFINITION AND CHARACTERISTICS

In addition to enforcement of the Law on Protection of Competition, CPC is also entrusted with competences related to active participation in drafting the state competition policy and contributing to development of other economic policies, in particularly for the purpose of preventing distortions of market competition and enabling unhindered performance of economic activities. CPC's competences as part of national competition authorities are focused on promotion and stimulation of market competition, i.e. competition advocacy, including awareness-raising on the need for market competition. In this regard, CPC has an advisory role. According to the generally accepted definition of competition advocacy adopted by the International Competition Network, the concept of promotion and stimulation of market economy implies the activities taken by competent authorities for the promotion of competitive economic

activities, by means of so called non-enforcement mechanisms (i.e. activities beyond administrative or misdemeanour procedures initiated by competition authorities), mainly through interactions with economic entities and other actors in society and awareness-raising in the public about the benefits of market competition. This definition entails two sets of actions. The first one includes activities implemented by national competition authorities and do not include formal enforcement of the law (proceedings taken upon violation of the LPC). The second set of actions defines the targets of and goals pursued by competition advocacy. More specifically, a comprehensive competition advocacy policy is directed at institutions and economic policy creators, on the one hand, and undertakings and consumers, on the other hand, as they should enjoy the benefits of greater market competition.

In the initial years of implementing competition advocacy activities, the national authorities were limited to actions on directly influencing market participants about the need for awareness-raising on the benefits of greater market competition. As the market and the society as a whole are developing, the focus of competition advocacy changed and shifted to cooperation with governmental institutions tasked with policy-making aimed at strengthening competition, especially in the areas of privatization, regulated market sectors, public procurements and other policies.

Definition of activities for promotion and stimulation of market competition (competition advocacy) raises the dilemma whether the implementation of the competition policy should give priority to enforcement of legal provisions from the LPC or to activities related to promotion and stimulation of market competition (competition advocacy). The expert public has accepted the position that market reforms in developed countries and countries in advance stage of development have been achieved as a result of intensive decision-mak-

ing processes based on the principle of the rule of law. Here, the assumption is that the dialogue between institutions and policy makers is on high level and ensures harmonized positions even at the early stages in the process which, in turn, guarantees that the policies developed would not result in competition distortions. Furthermore, as regards the relationship between sector-based regulators and competition authorities, the position of the latter, being less susceptible to lobbying by various interest groups and well organized bodies and being independent of any influence, will ensure protection of the free market competition. Third, law enforcement in young and inexperienced economies requires specific changes to be made under their relevant judicial systems, which is often challenging. In its Peer Review of Competition Law and Policy in Chile, the Organization for Economic Cooperation and Development (OECD) stressed that for developing countries without well-established competition regimes, promoting competition principles to the general public is an ongoing task, and indeed perhaps the most important task, at least at first.

Following are the principles underlying the promotion and stimulation of market competition (competition advocacy):

1. State interventions in the economy can cause distortion of competition by imposing various limitations or favouring certain public and private enterprises. In addition to processing violations of competition arising by the private sector, the national competition agencies should complement their activity by averting or limiting the possible damages caused by government adopted decisions and other forms of state intervention in the economy;
2. National competition agencies must fight against the insistence of certain interest groups which want to secure privileged position at the market by means of lobbying at government institutions. As a rule, these groups are better organized and have more financial

power than their competitors, and therefore the task of the competition agencies is to act on behalf of the less powerful enterprises and to enable effective opposition to the offers given by their opponents in order to maintain fair competition;

3. The counselling function and the realization of the activities for promotion and stimulation of market competition (competition advocacy) serve to prevent the adoption of regulations and rules aimed to competition restrictions. This reduces the costs that could occur by possible lobbying for adopting measures contrary to the rules of free competition and the probability of regulatory engagement, whereby the private enterprises adjust regulators' interest to their own would be reduced.

For the purpose of exercising these principles of competition advocacy, the national competition authorities must fulfil certain prerequisites. OECD analyses identify at least three prerequisites:

1. National competition agencies should have a significant degree of independence from political influence from both inside and outside the government. It has long been recognised that independence is important for the law enforcement function of a national competition agency, but it is a necessary component of effective advocacy as well;

2. National competition agencies should have sufficient resources to support both law enforcement and advocacy functions. This is important since the agencies seldom have enough resources to perform both functions. Therefore, good management of available resources is important due to optimal implementation of the said functions;

3. National competition agencies must acquire credibility as an effective and impartial advocate for competition. Their reputation must extend throughout the public and private sectors. Policymakers, companies, workers and consumers must understand how competi-

tion benefits an economy, and have confidence in the national competition agencies as advocates for sound competition policy. This requires a multi-faceted effort on the part of competition agencies. It is in part an educational effort – the imparting of information about how competitive markets work and the benefits that result for consumers. Last, but not least, the competition agencies must achieve some demonstrable success in both, law enforcement and advocacy efforts, and there must be observable and immediate gains to consumers.

7.2 COMPETITION ADVOCACY WITHIN THE COMPETITION POLICY IN THE REPUBLIC OF MACEDONIA

Based on the competition advocacy purpose and tasks, obvious is that competition authorities have a significant role in awareness-raising about the importance of market competition. Republic of Macedonia, as a country that develops its market economy and a country whose strategic goal is membership in international organizations whose Member-States have reached the highest level of developed political and economic relations, must develop complementary instruments for policy making and implementation aimed at successful development and growth. In the capacity of candidate-country for EU membership and signatory party to the SAA with EU Member States, Republic of Macedonia has committed to align its policies with the EU acquis. As regards the competition policy, policy elements related to awareness-raising about the importance of competition can be an exceptionally important instrument for successful implementation of this policy. CPC has an important role in this regards as it is the key authority competent for implementing this policy. Under the current circumstances, where stakeholders are unfamiliar with the competition policy, competition advocacy efforts should be in the focus of

CPC's activities, in particular for the purpose of creating an adequate culture on its importance and benefits for end consumers. Nevertheless, successful implementation of competition advocacy efforts comes with many challenges. CPC's unconditional independence, organizational set-up, management practices and, of course, sufficient financial resources are key factors that affect successful implementation of competition advocacy efforts. Publicity of CPC's activities and operation, by means of intensive cooperation with the media and direct contacts with the policy stakeholders, is very important. Finding the right balance between activities related to competition law enforcement and competition advocacy would distinguish CPC as an exceptionally successful agency and would rank the Republic of Macedonia among the countries that are able to develop, organize and implement complex policies that produce benefits for the citizens.

VIII

ACCOUNTABILITY BEFORE THE PARLIAMENT OF THE REPUBLIC OF MACEDONIA

CPC is an independent body, established by the Law on Protection of Competition, and it is held accountable before the Parliament of the Republic of Macedonia. Moreover, the Parliament is competent to appoint and dismiss members of the Commission for Protection of Competition.

In order to assess the Parliament's awareness on the importance of this policy, the team reconsidered the shorthand notes from the plenary sessions on which MPs discussed and adopted CPC's Annual Reports on its Activities.

CPC's 2012 Annual Report (discussed and adopted in 2013) was approved on a plenary session without a single MP putting forward a reply or question for the President of the Commission for Protection of Competition, followed by a unanimous vote on the part of 58 MPs in attendance.

CPC's 2011 Annual Report was approved with 53 votes FOR and 20 votes AGAINST. Contrary to the situation observed with the 2012 Annual Report, MPs discussed CPC's 2011 Annual Report in terms of several aspects of its work. First, major concerns have been raised in regard to state aid awarded by the government and approved by CPC. Then, MPs remarked CPC's financial dependence from the central budget that could affect its independence. MPs that took the floor expressed serious concerns about CPC's inability to act in pro-active manner, especially in cases of undertakings holding dominant market position, such as MEPSO, ELEM, T-Mobile and the many public enterprises that act as local monopolies and abuse their position to impose charges to their respective customers for costs that are inadmissible according to the Law on Protection of Competition.

This provides the conclusion that in the course of 2013, the Parliament has lost its interest for the competition policy, although the information provided in CPC's 2012 Annual Report should have raised interesting discussions and dilemmas.

IX

COOPERATION WITH OTHER REGULATORY BODIES

In 2007, CPC established its formal framework on institutional networking with other domestic regulatory bodies by signing individual memoranda of understanding with the Energy Regulatory Commission, the Agency for Electronic Communications, the Bureau of Public Procurements and the Agency for Audio and Audiovisual Media Services (formerly known as the Broadcasting Council).

Memoranda of understanding signed by CPC aim to regulate competition issues on the energy market, electronic communications market, organization and implementation of public procurements, as well as the broadcasting activity.

According to the information provided in CPC's Annual Reports for the period 2008-2012, this institution maintains regular contacts with other regulatory bodies in compliance with the cooperation provisions from the respective memoranda of understanding. However, CPC's Annual Reports do not allow any conclusion to be inferred on the actual role played by CPC and the possibilities to advocate for greater competition in these market sectors.

In this period, CPC monitored the market competition in the telecommunications sector (2008), energy sector (2008), liquefied petroleum gas (LPG) sector (2010) and the broadcasting media (TV outlets) advertising market (2011 and 2012). With the exception of the telecommunications sector, where CPC has found distortion and restriction of market competition on the part of different operators, other market-based analyses developed by CPC have not established any competition infringements in the respective sectors.

Having in mind different stages of market liberalization and the need for creating conditions for free and fair competition in the respective sectors, CPC should be more engaged in analysing the state-of-play on the regulated market sectors and be more transparent in publishing its findings concerning the competition practices. In cases CPC has found unsatisfactory competition on the respective market sectors, it should put forward specific recommendations aimed at eliminating any competition restrictions.

X

COMPETITION POLICY IN EC'S PROGRESS REPORTS FOR THE REPUBLIC OF MACEDONIA AND NPAA

Republic of Macedonia's candidate-country status for EU membership in November 2005 overlapped with the adoption of the Law on Protection of Competition, which established CPC as an independent institution competent for its implementation. EC's Progress Reports for the Republic of Macedonia include a section on assessing the state-of-affairs and developments under Chapter 8: Competition policy. Relevant remarks and progress assessments for the period 2006-2013 provide the following conclusions:

10.1 ASSESSMENT OF NATIONAL LEGISLATION'S ALIGNMENT WITH THE EU ACQUIS

By signing the SAA in 2001, Republic of Macedonia has committed to align the national legislation with the EU acquis within a given period of time.

As regards the competition policy, the national legislation's alignment with the EU law on antitrust, abuse of dominant market position and merger control is pursued under a satisfactory dynamics (looking at the process as a whole), whereby crucial provisions of the EU law have been incorporated in the first Law on Protection of Competition from 2005. In the next years, this law was gradually amended and improved, accompanied with the relevant bylaws that contributed to the attainment of satisfactory alignment. Long-standing EC comments in the field of competition policy include the delayed enforcement of CPC's decisions until the completion of relevant court proceedings and non-implementation of leniency measures due to the conflict with the legal provisions from the Criminal Code (2014 amendments to the Criminal Code removed the obstacle for implementation of "a leniency programme").

10.2 ENFORCEMENT RECORD

EC has noted serious shortcomings in the implementation of the competition policy that should legitimize CPC's existence and actions.

Despite the seemingly satisfactory number of adopted decisions for control of concentrations (mergers of undertakings, which are treated as technical matter), the number of investigated and processed cases of cartel agreements and abuse of dominant market position (resulting in the greatest competition distortions) remains insufficient, both in quantity and quality. Key shortcomings are identified in CPC's investigative and economic analyses of negative consequences on market competition in sensitive economy sectors such as the telecommunications market, banking sector, media sector, energy market, transport market, pharmaceutical market, construction works and the so-called liberal professions. Detailed rules governing the cooperation between CPC and other state authorities, especially the sector-based regulatory bodies, is of crucial importance for the successful implementation of the law. As regards the judiciary system, which is an indispensable link in the implementation of this policy, there is a trend on continuous training of judges residing in competition cases. However, EC repeats its vague remarks on the need for improved quality of judges and their decisions, which actually means that they are far from attaining EU norms and standards. Judiciary system, as a whole, is one of the most negatively assessed state institutions, which does not allow expectations that the quality of its work in respect to the LPC would be different.

10.3 ORGANIZATIONAL SET-UP

According to EC's Progress Reports for the Republic of Macedonia, especially Chapter 8: Competition policy, in the initial period following its establishment CPC's human resources were insufficient, but are improved in the following years, reaching a satisfactory number of staff members for unhindered implementation of the competition law. Although it has been noted that CPC staff possess relevant knowledge and skills, emphasized is the need for advance and continuous training, in particular by means of attending seminars organized at EU level or by the European Competition Network (ECN), the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD). In this context, it should be noted that funds available under IPA are insufficiently utilized for the purpose of financing advanced training, improving CPC's case management, procuring the necessary equipment for IT forensic activities, etc. As regards CPC's financial resources, EC's Progress Reports underline the fact that this institution disposes with an exceptionally small budget which prevents quality operation and fulfilment of its competences.

10.4 STATE AID²³

As regards state aid, EC noted that the national legislation is not fully aligned with the EU acquis, despite the improvements noted with every new Progress Report. It has been assessed that CPC disposes with sufficient expert staff dealing with state aid matters and benefits from continuous training. Nevertheless, EC repeated its remark on the need for better quality of CPC's decisions, in particular with regard to the issue of the qualification of state aid approved. In addition, it has been noted that greater efforts are needed in terms of awareness activities about the state aid providers' obligation to request ex-ante approval of state aid from CPC. It has been noted that reporting institutions are hesitant or reluctant to present CPC with state aid notifications. Special concerns are raised with respect to decisions on granting state aid to companies investing in the free technology and industrial development zones because the amount of granted state aid is not published and due to non-transparent control and reporting channels on the manner in which the state aid has been spent, entities responsible for possible irregularities and the inertness on the part of the Parliament of the Republic of Macedonia as the institution holding CPC accountable, including the undermining behaviour on the part of institutions (Government, Agency for Foreign Investments and Agency for Free Technology and Industrial Development Zones as the biggest state aid provides) competent for granting state aid. This undefined circle of institutions competent for state aid granting and control is a clear indicator of the actual state-of-affairs and creates serious distortions on the free market and possibilities for corruptive behaviour on the part of state institutions. In turn, competent institutions (especially CPC) are completely powerless to take measures aimed at elimination

²³ This section is informative and it was not subjected to detailed analysis and elaboration.

of anomalies and securing fair competition among economic entities on the market. When Republic of Macedonia starts the accession negotiation process, Chapter 8 will be one of the most difficult chapters to close in the negotiations and will necessitate complete change of behaviour and practices on the part of state institutions with a view to accept and uphold the underlying values of the competition policy aimed at market economy development and creating a society in which responsible management practices include honesty, transparency and accountability.

10.5 MARKET LIBERALIZATION²⁴

According to EC's Progress Reports, advancement in terms of market liberalization is the least satisfactory. In spite of the certain progress made in the energy field, for example, introducing a job possibility for operation of multiple electricity suppliers, the production and exploitation of lignite are still managed by the same company. Gas supply and heating energy markets are dominated by individual suppliers. Railways, water supply and postal services (public enterprises) are also managed by the state. The fact that market liberalization was not addressed under EC's 2013 Progress Report speaks volumes about the actual situation in this area.

²⁴ Ibid

XI

INTERNATIONAL COOPERATION AND CAPACITY- BUILDING ASSISTANCE

In a globalized economy, efficient implementation of the competition policy necessitates intensive and overarching international cooperation. Cooperation between authorities competent for implementation of this policy creates multifold benefits such as standardized legal settings, awareness-rising on the need for increase knowledge and exchange of information and coordination and establishment of identical or similar conditions for competition among market participants.

From its establishment in 2005 to present, CPC has engaged in cooperation with international organizations and competition authorities from different countries, notably by means of attending various conferences, seminars, training and education programmes and other activities.

11.1 CPC'S RELATIONS WITH THE EUROPEAN UNION

According to the SAA, activities of CPC are in compliance with the articles directly related to the competition policy. In other words, under Article 69 of the SAA the Republic of Macedonia has committed to apply Articles 81, 82 and 87 of the Treaty Establishing the European Community.²⁵ Under Article 68 of the SAA the Republic of Macedonia has committed to align the domestic legislation with the EU acquis. Articles 70 and 72 of the SAA stipulate the Republic of Macedonia's commitments related to the operation of public enterprises and organization of public procurements, respectively. Moreover, Articles 70 and 72 of SAA entrust CPC with tasks related to monitoring and advising competent institutions about possible competition infringements and market entry barriers.

²⁵ Articles 101, 102 and 106 of the Treaty on the Functioning of the European Union

In order to deliver on these commitments, CPC has established regular communication with the EU Delegation in the Republic of Macedonia and the Directorate General in Brussels and submits them, at request, periodical information on the progress achieved, its enforcement record and institutional capacity building. CPC participates in the work of the Subcommittee on Internal Market and Competition and presents it with information necessary for drafting the Progress Reports for the Republic of Macedonia. Also, CPC participates in the work of the Stabilization and Association Committee competent for overseeing SAA's implementation.

11.2 BILATERAL COOPERATION

CPC efforts related to bilateral cooperation are mainly focused on the countries in the region, primarily due to the close relations in the past and the fact that a large number of economic entities operating on these markets are driven by a business capital in the region. This ensures conditions for faster and safer exchange of information about possible cartel agreements which are usually of regional character. Moreover, cooperation includes sharing experiences on competition policy development and implementation, especially having in mind the fact that some countries in the region have recently completed the EU accession process and others are engaged in or are about to start their respective accession negotiations. To date, CPC has signed memoranda of understanding with its counterparts in the Republic of Bulgaria (2006), Croatia, Bosnia and Herzegovina, and Albania (2007). Odd is the fact that since 2007 CPC has not signed new memoranda of understanding or institutional agreements with important countries in the neighbourhood with which Macedonia has important economic exchange (Serbia, Kosovo and Greece). Particularly worrying is CPC's inactivity in terms of expanding the cooperation with important competi-

tion authorities such as Bundeskartellamt (Germany), the Federal Trade Commission (USA) and others that would facilitate capacity building for CPC staff members by means of internships and other forms of cooperation. In the future, this should be defined as one of CPC's priorities.

11.3 MULTILATERAL COOPERATION

In 2005, CPC became a member of the International Competition Network and presents it with reports and analyses needed to determine successful approaches to problem solving and general convergence of procedures led by different national competition authorities. CPC regularly attends ICN's annual conferences organized for the purpose of discussing various aspects of the competition policy and its development.

Although it is not a member of the Organisation for Economic Cooperation and Development (OECD), Republic of Macedonia participates in the work of the Regional Centre for Competition (RCC) seated in Budapest. RCC organizes seminars and training on various topics related to the competition policy for employees of national competition authorities.

Energy Community's Competition Network was established in 2012 with a seat in Vienna, Austria. Network members are the national competition authorities from EU Member-States, the Western Balkans, Moldova and Ukraine plus Armenia and Georgia in the capacity of observing members.

First meeting of the Competition Forum, which is a regional initiative for cooperation in the area of the competition policy, was held in 2012 in Sofia, Republic of Bulgaria. This initiative is based on the principles of the Organisation for Economic Cooperation and Development (OECD), the International Competition Network (ICN) and the UN Conference on Trade and Development (UNCTAD), i.e. it is organized as a platform for exchange of experiences, knowledge and information in

the area of competition policy. In addition to immediate benefits, cooperation within this forum and similar organizations fosters regional cooperation as a precondition for EU membership.

CPC is recommended to intensify its communication and cooperation with UNCTAD, whose specialized analyses and reports (peer reviews) provide multilateral overview of competition systems established by UN countries. Peer reviews are developed by experts from countries that are leaders in competition policy and represent an important indicator about the state-of-play with regard to competition policy pursued by individual countries, including recommendations aimed at improving the situation. Peer review of the situation in the Republic of Macedonia can be funded by relevant agreements with developed countries that have already established funds to support our country's development.

CPC should also intensify its cooperation with the Global Competition Review (GCR), a company similar to the International Competition Network (ICN), except for the fact that GCR members are experts in the field of law, business and other areas. GCR's main activity is organization of seminars focused on business/market sectors that are most liable to competition infringements. GCR publishes a magazine and a yearbook of best practices in competition policy.

11.4 INTERNATIONAL SUPPORT AND UTILIZATION OF IPA AND OTHER PRE-ACCESSION FUNDS

International support for the development of the competition policy in the Republic of Macedonia is pursued by means of projects that address CPC's needs and needs of other policy stakeholders and are funded and implemented by foreign state development organizations (GTZ/GIZ), financial institutions, such as the World Bank, and EU

pre-accession assistance funds available to the Republic of Macedonia as a candidate-country for EU membership. These projects imply capacity building for CPC and other actors involved with a view to develop and establish an adequate legal system, including national legislation's alignment with the EU acquis, strengthening organizational and professional skills for case management, training of judges and awareness-raising on the policy's importance. In the period 2002-2014, a total 5 projects were implemented in our country, one of which was implemented as IPA-funded twinning project (IPA Component I, 2009). In general, these figures correspond with the overall situation related to low absorption of IPA funds and indicate the fact that in the seven-year period of IPA I (2007-2013), CPC benefited from only one project in the amount of 1 million EUR, although the total amount of IPA funds made available for the Republic of Macedonia accounted for 620 million EUR. Nevertheless, the said twinning project brought benefits in terms of advanced training on state aid control for CPC staff. On the other hand, CPC has failed to advocate for projects aimed at improving its technical capacity, which is very important having in mind CPC's permanent lack of financial resources to implement competition advocacy activities, i.e. to promote this policy in the public (academic community, chambers of commerce, media, central and local level state authorities, NGOs, etc.). For that purpose, once IPA II (2014-2020) enters in effect, CPC and other policy stakeholders should be more proactive and develop a solid competition strategy and relevant projects that fulfil EU's stringent criteria for approval and funding, whose implementation will result in better conceptualization and implementation of the competition policy.

11.5 CPC AS HOLDER OF NPAA ACTIVITIES UNDER CHAPTER 8: COMPETITION POLICY

National Programme for Adoption of the EU Acquis (NPAA) is a comprehensive long-term document that defines the adoption dynamics of the EU acquis, strategic guidelines, policies, reforms, relevant structures, resources and deadlines for the activities that the Republic of Macedonia needs to implement in order to fulfil EU membership criteria.

CPC is the holder of activities under NPAA Working Group 3.08: Competition, as the national authority competent for implementation of legislative and institutional activities under Chapter 8 taken for the purpose of fulfilling EU membership criteria. At the same time, CPC chairs NPAA Multidisciplinary Working Group tasked with reviewing progress achieved and activities planned by state authorities that are also competition policy stakeholders. NPAA 2014-2015 anticipates activities aimed at further alignment of national legislation, especially in terms of adopting relevant bylaws, organizing training and seminars for CPC staff members, procuring IT equipment, appointing the chief economist at CPC and implementing awareness-raising measures on the importance of the competition policy.

XII

CONCLUSIONS AND RECOMMENDATIONS

Analysis of Chapter 8: Competition policy in terms of concentrations, abuse of dominant market position, cartel agreements and concerted practices shows that the Commission for Protection of Competition in the Republic of Macedonia is ineffective and inefficient in preventing such behaviour among undertakings operating on the domestic market. Small number of decisions taken by CPC in cases of abuse of dominant market position, cartel agreements and concerted practices, on the one hand, and technical and automatic approval of mergers, on the other hand, provide sufficient evidence that CPC makes little efforts to prevent practices that affect the market competition. Having in mind CPC's financial and human resource limitations and state's (dis)interest in pursuing the competition policy, one cannot expect better results. CPC's financial dependence from central budget funds significantly narrows the scope of actions pursued by CPC. Insufficient budget funds allocated by the Government to support CPC's operation are yet another indicator of the state's (dis)interest for this policy. During the last plenary session with an agenda item on adopting CPC's Annual Report, the Parliament did not initiate discussion on the competition policy and CPC's enforcement record. Furthermore, lack of knowledge among citizens, consumers and undertakings about policy benefits and improvements, rights and liabilities stemming from market competition, is another negative factor. Unresponsiveness on the part of all actors in market competition results in further "marginalization" of this policy. Only positive aspect of the competition policy is the fact that national legislation has transposed the EU acquis. In other words, the legislator has accurately and consistently transcribed EU's legal framework, but Macedonia lacks significant results in terms of law enforcement and policy implementation.

The present analysis conducted by MCET's team identified the shortfalls in the implementation of the competition policy. In order to improve market competition, we defined the following recommendations grouped under several categories.

Capacity building

- CPC needs to strengthen its human resources and capacity with adequate knowledge and skills on the most recent trends in antitrust economic analysis. Special attention should be paid to continuous training and cooperation with its counterparts from developed countries with significant track records in implementing the competition policy. CPC has already established solid communication channels with the relevant international networks and is therefore recommended to proactively use its' membership and participation in these networks.
- For the purpose of strengthening the credibility of its decisions, notably by applying the economic approach to antitrust analysis, CPC should reconsider the possibility for establishing a separate organizational unit exclusively tasked with economic analyses and research, and the possibility for establishing and maintaining adequate databases.
- CPC should intensify its cooperation with renown competition authorities worldwide (USA, Germany, UK, Switzerland, etc.) with the view to enable more possibilities for professional development of its staff members. CPC should increase the number of joint projects implemented with other competition authorities and financed by bilateral donors or with EU funds.
- CPC should apply better human resource management and optimize its activities in areas liable to major market distortions.

Financial capacity

- Continuous problems related to CPC's inadequate budget funds can be solved by withholding portion of funds collected on the grounds of fines imposed to the undertakings. On one hand, this will strengthen CPC's financial capacity, but on the other hand, it will result in greater independence from the government.
- Considering CPC's need to provide advance training for its staff members, improve its organizational set-up and equipment, and having in mind the limited budget funds made available to this institution, efforts are needed to intensify utilization of the Instrument for Pre-Accession Assistance (IPA) and other available funds.
- Given the fact that budget projections for the next years do not anticipate increased budget funds to support CPC's activities, this institution must immediately address the Ministry of Finance with a request for withholding share of funds collected on the grounds of merger approvals and fines imposed to undertakings.

Competition advocacy

- In order to strengthen the market culture and increase awareness on the need for and the positive effects of strong market competition, CPC must be more transparent about its operation. First, it should take actions on information dissemination about its existence, importance and activities. This can be accomplished by means of seminars, courses and training for representatives of various interest groups, such as the private business sector (undertakings, associations, chambers), state companies and institutions, as well as the academic community and students. Furthermore, transparency can be improved by frequent publication of communications on its activities. In this regard, CPC can increase

the number of publications targeting the expert and broader public. By doing so, CPC will increase the scope of its advisory activities, i.e. promotion and stimulation of market competition.

- For the purpose of attaining the second goal pursued by implementation of the competition policy, i.e. consumer protection, CPC should increase its efforts on information dissemination about the benefits created by the competition policy, such as lower prices, better quality and diversity.²⁶ In other words, CPC should work on bringing closer the goals pursued under the competition policy with those pursued under the consumer protection policy (which has been recently recognized and applied as general trend by the European Commission). In expert terms and for the purpose of reliable measurement of benefits for consumer protection, CPC should develop an adequate methodology and include these analyses in its regular annual reports. By doing so, CPC will establish better indicators for measuring the efficiency of the competition policy.

Efficient and effective procedures

- CPC should establish new practices on adopting misdemeanour decisions, i.e. it should merge the two individual procedures into one decision on establishing competition infringement and setting the fine for the undertaking that has committed the infringement. These decisions can be contested in front of the Administrative Court, the outcome of which can imply confirmation of competition infringement and confirmation of the misdemeanour or annulment of the decision establishing the competition infringement and the fine issued. This would be in compliance with the legal provisions

²⁶ Publication of various brochures, guides on the implementing the legislation in the field of competition policy and the like.

from the Law on Protection of Competition, whereby the motion for administrative dispute against CPC's administrative decisions does not delay their enforcement, but the motion for administrative dispute against CPC's misdemeanour decisions delays their enforcement.

- Commission on Misdemeanour Matters should be merged with the Commission for Protection of Competition in order to streamline the procedure and shorten the decision-taking deadline.
- CPC should have better insight in all court proceedings motioned in front of the Administrative Courts, i.e. these courts should publish the rulings whereby they annul CPC's decision with due consideration of personal data protection.

Greater protection of consumers and undertakings from competition distortions

Following activities will make this policy more efficient and will facilitate indemnity claims in front of the courts:

- Further clarification of the procedure for indemnity claims in compliance with Article 58 of the LPC, by adopting amendments to the Law on Protection of Competition, Law on Contractual Relations and Law on Litigation Procedure;
- Training for judges, public prosecutors and attorneys-at-law on the application of the Law on Protection of Competition;
- Public awareness campaign on the possibility for indemnity claims in cases of violation of the Law on Protection of Competition;
- Training for the Commission on Protection of Competition in terms of private enforcement of the competition policy which, in turn, will enable efficient implementation and promotion of private enforcement of the Law on Protection of Competition;
- Drafting the legal framework on proceedings in cases when

the courts are required to directly apply Articles 101 and 102 of the TFEU (or Articles 7 and 11 of the Law on Protection of Competition), i.e. when the courts must first decide whether there is violation of the Law on Protection of Competition and determine the scope of damages and redress entitled;

- Amending Article 58 of the Law on Protection of Competition whereby CPC's decisions will be given mandatory effect in front of the courts in the Republic of Macedonia;
- Establishing judicial mechanism on collective redress in compliance with the recommendations of the European Commission;
- Establishing extra-judicial mechanisms on collective redress in compliance with the recommendations of the European Commission;
- Establishing a platform comprised of experts outside CPC which are able to develop analyses and forensic studies needed for adequate implementation of the competition policy;

Recommendations put forward in this report will enable a more efficient implementation of the competition policy, stimulate pro-active role of policy stakeholders and allow redress for damaged parties (undertakings and citizens) affected by the violation of the competition rules.

Recommendations aimed at improving CPC's operation will improve its credibility and establish this institution as relevant factor in development and implementation of the competition policy. Ultimately, this will increase the economy's efficiency and will improve consumers' welfare.

XIII

ANNEX

Table 1: EU acquis transposed in the competition legislation of the Republic of Macedonia

	EU	Macedonia
CONCENTRATIONS/ Mergers	Council Regulation (EC) No 139/2004 [Official Journal L 24 from 29.1.2004]	Law on Protection of Competition
	Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 [Official Journal L 336 from 14.12.2013]	Decree on the form and contents of concentration notifications [Official Gazette of RM no. 44/12] Guidelines on the manner of submitting and filling-in the concentration notifications [Official Gazette of RM no. 44/12]
	Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty [Official Journal C 101 from 27.4.2004]	Guidelines on the term “concentrations” [Official Gazette of RM no. 145/2010 and 136/11]
	Commission Notice on restrictions directly related and necessary to concentrations [Official Journal C 56 from 5.3.2005, pg. 24-31]	Guidelines on restrictions directly related and necessary to concentrations [Official Gazette of RM no. 145/10 and 136/11]

CONCENTRATIONS/ MERGERS	Commission Notice – Guidelines on the assessment of non-horizontal mergers [Official Journal C 265 from 18.10.2008]	Guidelines on the assessments of vertical and conglomerate mergers
	Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [Official Journal C 267 from 22.10.2008]	Guidelines on possible amendments and commitments in relation to concentrations deemed acceptable by CPC in compliance with Chapter 3: Control of Concentrations/ Mergers from the Law on Protection of Competition
	Commission Notice – Guidelines on the assessment of horizontal mergers [Official Journal C 031 from 5.2.2004]	Guidelines on the assessment of horizontal mergers for the purpose of LPC
	Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 [Official Journal C 56 from 5.3.2005, pg. 4]	Guidelines on determining cases in which the Commission for Protection of Competition takes decision on mergers under simplified procedur
		Brochure on control of concentrations in compliance with LPC
<p>CPC needs to take into consideration the following legislation which will become relevant after the Republic of Macedonia's accession in the EU:</p> <p>Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 [Official Journal C 95 from 16.4.2008, pg. 1]</p> <p>Commission Notice on case referral in respect of concentrations [Official Journal C 56 from 5.3.2005]</p> <p>Commission Notice on the rules for access to the Commission file [Official Journal C 325 from 22.12.2005]</p> <p>Decision of the President of the European Commission on the function and terms of reference of the hearing officer in competition proceedings [Official Journal L 275 from 20.10.2011, pg. 29]</p>		

DOMINANT MARKET POSITION AND CARTELS	Articles 101, 102, 106 and 107 of the Treaty on the Functioning of the European Union	Articles 3, 7 and 11 of the Law on Protection of Competition
	Council Regulation (EC) No 1/2003 [Official Journal L 001 from 4.1.2003]	Law on Protection of Competition
	Commission Regulation (EC) No 773/2004 [Official Journal L 123 from 27.4.2004]	Law on Protection of Competition
	Commission Notice on immunity from fines and reduction of fines in cartel cases [Official Journal C 298 from 8.12.2006, pg. 17]	Decree on detailed terms and conditions for immunity from fines and reduction of fines to be taken into account by the Commission on Misdemeanour Matters
	Commission Notice on the definition of relevant market for the purpose of Community competition law [Official Journal C 372 from 9.12.1997]	Guidelines on the definition of relevant market for the purpose of the Law on Protection of Competition [Official Gazette of RM no. 145/2010]
	Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 [Official Journal C 210 from 21.9.2006]	Guidelines on the method of setting fines pursuant to the Law on Protection of Competition [Official Gazette of RM no. 145/2010]
	Commission Notice – Guidelines on the application of Article 81(3) of the Treaty [Official Journal C 101 from 27.4.2004, pg. 97] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of TEEU [Official Journal C 368 from 22.12.2001]	Guidelines on the application of Article 7, paragraph (3) of the Law on Protection of Competition [Official Gazette of RM no. 145/2010 and 136/11] Decree on detailed terms and conditions for agreements of minor importance [Official Gazette of RM no. 44/2012]

CPC needs to take into consideration the principles derived from the following legislation which will become relevant after the Republic of Macedonia's accession in the EU:

Decision of the President of the European Commission on the function and terms of reference of the hearing officer in certain competition proceedings [Official Journal L 275 from 20.10.2011, pg. 29]

Commission Notice on the best practices on the conduct of proceedings concerning Articles 101 and 102 of the TFEU [Official Journal C 308 from 20.10.2011, pg. 6]

Commission Notice on cooperation within the Network of Competition Authorities [Official Journal C 101 from 27.04.2004, pg. 43]

Commission Notice – Guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty [Official Journal C 101 from 27.4.2004, pg. 81]

Commission Communication – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abuse exclusionary conduct by dominant undertakings [Official Journal C 45 from 24.2.2009, pg. 7]

Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [Official Journal C 101 from 27.4.2004, pg. 65]

Commission Notice on informal guidance relating to novel questions concerning articles 81 and 82 of the EC Treaty that arise in individual cases [Official Journal C 101 from 27.4.2004, pg. 78]

Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [Official Journal C 95 from 16.4.2008, pg. 1]

Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [Official Journal C 167 from 8.12.2006, pg. 1]

PRIVATE ENFORCEMENT OF THE LAW ON PROTECTION OF COMPETITION	Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union [Official Journal C 167 from 13.6.2013, pg. 19]	/
	Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of TFEU [COM(2013) 3440]	/
	Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [Official Journal L 201 from 26.7.2013]	/
	Commission Notice on the cooperation between the Commission and the courts of the EU Member States in application of Articles 81 and 82 EC [Official Journal C 101 from 27.4.2004, pg.54]	/
BLOCK EXEMPTIONS	Horizontal agreements	
	Commission Regulation (EU) No 1217/10 [Official Journal L 335 from 18.12.2010, pg. 36]	Decree on the terms and conditions for block exemptions of certain categories of research and development agreements
	Commission Regulation (EU) No 1218/10 [Official Journal L 355 from 18.12.2010, pg. 43]	Decree on the terms and conditions for block exemptions of certain categories of specialisation agreements
	Communication from the Commission - Guidelines on the applicability of Article 101 of the TFEU to horizontal cooperation agreements [Official Journal C 11 from 14.1.2011, pg. 1]	NPAA 2014 anticipates adoption of relevant decree/guidelines
	CPC needs to take into consideration the following legislation which will become relevant after the Republic of Macedonia's accession in the EU: Council Regulation (EEC) no. 2821/71 (Official Journal L 285 from 29.12.1971, pg. 46]	

Vertical agreements	
Commission Regulation (EU) no. 330/2010 [Official Journal L 102 from 23.4.2010, pg. 1]	Decree on block exemptions for certain categories of vertical agreements
Guidelines on Vertical Restraints [Official Journal C 130 from 19.5.2010, pg. 1]	NPAA 2014 anticipates adoption of relevant decree/guidelines
CPC needs to take into consideration the following legislation which will become relevant after the Republic of Macedonia's accession in the EU Council Regulation (EEC) No 19/65 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices [Official Journal 35 from 6.3.1965]	
Technology transfer agreements	
Commission Regulation (EC) No 772/2004 [Official Journal L 123 from 27.4.2004]	Decree on detailed terms and conditions for block exemptions for certain categories of technology transfer agreements, licenses or know-how
Communication from the Commission - Guidelines on the application of Article 101 (formerly Article 81) on technology transfer agreements [Official Journal C 101 from 27.4.2004]	/

*For the purpose of this analysis, the table does not include sector-based regulations and state aid as they have been exempted from detailed analysis although these areas fall within Chapter 8: Competition policy

* **Sources:** Official website of the Commission for Protection of Competition in the Republic of Macedonia and the official website of the EC Directorate General for Competition

* **Commission stands for European Commission**

* **NPAA** stands for National Program on Adoption of the EU Acquis

Table 2: Procedures led in front of the Administrative Court against CPC's decisions

	CPC		ADMINISTRATIVE COURT			HIGHER ADMINISTRATIVE COURT			Duration (in years)
	CPC decision	Date	Ruling	Date	Approved:1 Rejected:2	Ruling	Date	Approved:1 Rejected:2	
1	08-187/7	22.10.2009	U/no. 1276/2010	22.3.11	2	UZ/no. 629/2012	9.4.2012	1	2,6
2	08-358/2	5.12.2012	U-5/no. 20/2013	4.7.2013	2	UZ/no. 1280/2013	23.1.2014	2	1,1
3	07-115/1	13.2.2009	U-5/no. 1004/2010	10.3.2010	2	UZ/no. 391/2012 BD	23.5.2012	2	3,3
4	.07-53/3	13.2.2009	U-5/no. 1005/2010	28.3.2011	2	UZ/no. 498/2012	9.5.2012	2	3,3
5	.07-54/1	26.1.2009	U-5/no. 1003/2010	28.3.2011	2	UZ/no. 390/2012	23.5.2012	2	3,4
6	.07-92/18	10.12.2008	U-5/no. 53/2009	16.6.11	2	UZ/no. 632/2012	9.5.2012	2	3,5
7	07-50/1	26.1.2009	U-5/no. 645/2011	11.7.2012	2	UZ/no. 1077/2012	11.7.2012	2	3,6
8	08-4	19.7.2010	U-5/no. 842/2010	12.4.2012	2	UZ/no. 992/2012	4.10.2012	2	2,3
9	.08-195/25	19.7.2010	U-5/no. 889/2010	24.4.2012	2	UZ/no. 994/2012	2.10.2012	2	2,3
10	08-195/25	19.7.2010	U-5/no. 981/2010	24.4.2012	2	UZ/no. 995/2012	18.10.2012	2	2,3
11	08-195/25	19.7.2010	U-5/no. 907/2010	3.5.2012	2	UZ/no. 1047/2012	18.10.2012	2	2,3
12	08-195/25	19.7.2010	U-5/no. 955/2010	24.4.2012	2	UZ/no. 991/2012	4.10.2012	2	2,3
13	08-93/46	4.5.2010	U-5/no. 576/2010	16.5.2012	2	UZ/no. 1125/2012	22.11.2012	2	2,6
14	07-314/2	16.10.2009	U/no. 6517/2009	6.6.2012	2	UZ/no. 68/2013	5.2.2013	2	3,4
15	08-195/25	19.7.2010	U-5/no. 895/2010	11.7.2012	2	UZ/no. 374/2013	20.3.2013	2	2,8

16	08-195/25	19.7.2010	U-5/no. 917/2010	11.7.2012	2	UZ/no. 795/2013	4.7.2013	1	3
17	08-187/7	22.10.2010	U-5/no. 746/2012	23.11.2012	1	UZ/no. 794/2013	4.7.2013	2	2,9
18	09-12/41	5.10.2012	U/no. 4042/2012 and U/no. 4074/2012	11.7.2013	1	UPZR/no.250/2013	5.12.13	2	1,2
19	08-158/5	12.9.2011	U-5/no. 1031/2011	25.4.2013	2	UZ/no. 1255/2013	12.12.2013	2	2,3
20	08-158/5	12.9.2011	U-5/no. 1052/2011	1.3.2013	2	UZ/no. 1281/2013	30.1.2014	2	2,2
21	07-92/18	18.12.2009	Y-5 бр. 118/2010	6.6.2012	2	/	/	/	2,6
22	Up II/no. 09-4/1	13.1.2006	/	/	/	666/2006	9.5.2006	2	0.4
23	Up II/no. 09-3/1	13.1.2006	/	/	/	547/2006	11.4.2006		
24	08-4	19.7.2010	U-5/no. 842/2010	12.4.2012	2	/	/	/	0,5
25	07/51/1	26.1.2009	U/no. 865/2009	10.12.2009	2	UZP/no. 2472/2010	6.9.2010	2	1,6
26	07-7/2	17.12.2009	U/no. 991/09	17.12.2009	2	UZP/no. 210/ 2010	13.9.2010	2	1,9
27	07-6/2	26.1.2009	U/no. 990/09	10.12.2009	2	UZP/no. 245/2010	5.7.2010	2	1,6
28	07-56/9	12.3.2007	U/no. 3147/2010	21.1.2009	2	/	/	/	1,1
29	07-140/1	9.3.2007	U/no. 3217/2007	6.11.2008	2	/	/	/	0,9
30	07-210/6	7.09.2007	U/no .4848/2007	22.5.2008	2	/	/	/	0,8
31	03-57/14	9.10.2006	PRK/no. 2970/06-0	12.4.2007	1	/	/	/	0,6

Table 3: Opinions issued by CPC on draft-laws and other issues related to the Law on Protection of Competition

Year	Subject	CPC's opinion	Accepted yes/no
2007	Opinion on the Draft Law on Amending the Law on Insurance Supervision	Legal provision under Article 228, paragraph (1) of the Law enables price fixing. CPC proposes this article to be deleted.	yes
	Opinion on the Draft Law on Funeral Services	Remarks of technical nature	yes
	Opinion on the Draft Law on Amending the Energy Law	Intervention in the text under Article 77, paragraph (1) of the Energy Law	yes
	Opinion issued upon the request for assessing the constitutionality of Article 9, 47, paragraph (1), Article 48, paragraph (1) and Article 57 of the Law on Protection of Competition and the Decree on agreements of minor importance		yes

2008	Opinion on the text of the Draft Law on Amending the Criminal Code	CPC proposed Article 283 of the Criminal Code to be amended for the purpose of aligning it with the competition legislation and relevant EU acquis.	Yes, CPC's proposal was incorporated in the 2014 amendments to the Criminal Code.
	Opinion on the amendments to the Law on Misdemeanours	CPC proposed amendments to provisions under Articles 46, paragraph (2) and (3) and Article 67, paragraph (2).	no
	Opinion on the Law on Railway Regulatory Agency	CPC proposed deletion of Article 9 of the Law.	no
	Opinion at the request of the Constitutional Court of the Republic of Macedonia concerning decision U/no. 47/2007 from 16.1.2008 on initiating procedure to assess the constitutionality of Article 2 in Sections 2 and 9 of the Energy Law		no
	Opinion on the amendments to the Criminal Court in regard to criminal acts against public finances, payment operations and the economy.		no
	Opinion on the amendments to the Criminal Court in regard to criminal acts related to unlawful accrual of proceeds.		No comments
	Opinion on the Information about the draft-programme for a gas pipeline feasibility study in the Republic of Macedonia with project design		No comments
	Opinion on the Information about platform negotiations for the multilateral agreement between the European Union and the Western Balkans for establishing the Transport Community		No comments

2009	Opinion on the text of the Draft-Law on Amending the Criminal Code.		No comments
	Opinion on the text of the Draft-Rulebook on the terms and conditions for thermal energy supply	CPC proposed deletion of Article 16, paragraph (7)	yes
	Opinions delivered to the Agency for Electronic Communications	Analysis of relevant market sectors (1,2,3,4,5,6,7,13 and 14)	yes
2010	Opinion on the text of the Draft Energy Law (first working version)		yes
	Opinion on the Draft-Law Law on Inspection Supervision and Control (fifth working version)		No comments
	Law on Administrative Fees	CPC requested the Ministry of Justice to amend the Law on Administrative Fees	no
	Opinions delivered to the Agency for Electronic Communications	Analysis of relevant market sectors (8,9,1,11,12,15 and 17)	yes
	Opinion delivered to the Energy Regulatory Commission	Opinion on ERC's Decision to license ELEM TRADE LTD Skopje for performance of the energy activity "electricity trading"	yes

2011	Opinion on the Draft Law on Amending the Law on Electronic Communications		yes
	Opinions delivered to the Agency for Electronic Communications	Second analysis of relevant market sectors (3,9 and 10)	yes
	Opinion delivered to the Energy Regulatory Commission	Opinion on the proposed procedure for electricity procurement for the purpose of covering losses in the distribution network	yes
	Seventh meeting of the Subcommittee on Internal Market and Competition	Information on the progress made in terms of unbundling production and excavation of lignite from electricity generation	No comments
2012	Opinion on the Draft-Rulebook on electricity supply		Partially (2 comments were approved, 1 was rejected)
	Opinion on the Draft-Rulebook on electricity supply of last resort		Partially (2 comments were approved, 1 was rejected)
	Opinions delivered to the Agency for Electronic Communications	Second analysis of relevant market sectors (7 and 8)	yes
	Strategy on Broadcasting Activity in the Republic of Macedonia for the period 2013-2017		yes
	National Strategy on the Public Procurement System in the Republic of Macedonia for the period 2013-2017		yes

Figure 1: Competition-related procedures led in front of the courts in the Republic of Macedonia

