

Nezaj, Novitet Xh.

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## The development of competition law in Kosovo

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Novitet Nezaj

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Prof. Dr. Markus Kotzur, LL.M. (Duke), Managing Director  
Dr. Konrad Lammers, Research Director  
Windmühlenweg 27  
22607 Hamburg, Germany  
<http://www.europa-kolleg-hamburg.de>

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## **The development of competition law in Kosovo**

Novitet Nezaj\*

### **Abstract**

Competition law is a pillar of a market economy and determines the quality of economic life. This paper explores the origin and development of competition law in Kosovo. It deals with constitutional developments. It attempts to explore how Kosovo's Constitution expresses crucial provisions regarding competition law. Additionally, it takes a broad approach to the relevance of EU competition law for Kosovo. It discusses specific aspects of EU competition law, and the implications of the changes required by the Stabilization and Association Agreement (SAA). This paper seeks to address these aspects by developing theoretical approaches and conceptual tools that can enable the implementation of the SAA's provisions.

### **Keywords**

Competition, SAA, approximation, enforcement, competition authority.

\*Novitet Xh. Nezaj works as a Senior Legal Officer for EU legislation in the Government of the Republic of Kosovo. Since 2009, he has been engaged in the area of the adaptation of the domestic law of Kosovo to EU and international law. Research for this paper was conducted during a visiting fellowship at Europa-Kolleg Hamburg in 2014, financed by a scholarship of the German Academic Exchange Service (DAAD). The author is most grateful to Prof. Dr. Peter Behrens for guidance, support and for his invaluable input in the redaction of this paper. Also, the author is grateful to Sarah Frith and Martin Lieberich for editing assistance. Any inaccuracy, as well as the views expressed, remains fully the author's. The author would also like to thank the DAAD and the Europa-Kolleg Hamburg.

### **Contact information**

Novitet Xh. Nezaj

Ministry of European Integration, Republic of Kosovo

Email: novitet.xh.nezaj@rks-gov.net

## I. Introduction

Competition rules are a core concept of the EU internal market. The EU internal market is a worldwide model. Kosovo is aspiring to become a member state of the EU. In order for Kosovo to become a fully-fledged member of the EU, one important requirement is for Kosovo to enact and enforce the rules and principles of competition law. The core elements of the EU competition rules can be found in the Treaty on the Functioning of the EU (TFEU). In addition, some normative reflections of these rules are part of the Stabilization and Association Agreement (SAA). Kosovo negotiated the SAA with the EU in 2014. This agreement will be a guide towards integration for Kosovo. In general, it contains provisions for developing a market economy in Kosovo, and, specifically, it has a set of provisions relating to competition rules. This paper aims to provide an analytical overview of the existing competition law in Kosovo and the challenges and opportunities of implementing the competition rules. The paper has three main objectives. The first objective deals with constitutional developments. It attempts to explore the crucial provisions in Kosovo's Constitution regarding competition law. Specifically, this analysis focuses on the interpretation of the normative provisions of the Constitution that deal with competition law, provides an overview of the institutional cycle regarding the protection of competition, and has concluding remarks regarding legislative updates in the field of competition and state aid. The second objective takes a broad approach to the relevance of EU competition law for Kosovo. It discusses specific aspects of EU competition law, and the implications of the changes required by the SAA. Furthermore, it discusses the relevance of European competition law for Kosovo, basic features of EU competition law, and how Kosovo should address the implementation of the SAA in the future. Third objective offers specific recommendations regarding the national competition authority of Kosovo. Broadly speaking, the priority of the SAA is to describe a mechanism known as the approximation of legislation. The SAA is the most important legal mechanism for shaping the norms on competition law, and it enhances the institutions that develop those norms and work for their practical implementation. The consideration of the impact of the SAA upon competition policy will be followed by an analysis of the interrelationships between the SAA rules and the Kosovo competition rules. This paper seeks to address these provisions by developing theoretical approaches and conceptual tools that can enable the implementation of the SAA's provisions.

## II. Constitutional basis for competition

The evolution of competition policy differs between countries. The concept of competition is new in the Kosovo legal system. This is because Kosovo was isolated by Yugoslavia and experienced the devastating war of 1999. Competition law has different origins.<sup>1</sup> In contrast to most countries in the Western Balkans, Kosovo's competition law is quite new. During the first years of the emergence of the market economy, the need for effective regulation of competition issues became important. It is important to highlight two phases in the laying down of the constitutional basis for competition in Kosovo.

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<sup>1</sup> Mehta, P. S. 2012. *Evolution of Competition Laws and their Enforcement: A Political Economy Perspective*. Routledge. p.11.

In the first phase, the concept of competition law in Kosovo was enshrined in a legal provision that dates back to 2004 and predates the adoption of the Constitution of the Republic of Kosovo.<sup>2</sup> The law was an important contribution to the market economy. It contained a specific provision for the establishment of a competition authority in Kosovo. No such authority had existed before in Kosovo. Pursuant to Article 21 of this law, the competition authority had responsibility and authority for monitoring competitive conditions in the economy of Kosovo as well as in specific sectors, industries and markets.<sup>3</sup> Since it was adopted in 2004, this law has faced some setbacks to its implementation and enforcement, including a lack of administrative capacity,<sup>4</sup> a delay in establishing the competition authority,<sup>5</sup> politicization regarding the method of appointing the members of the competition authority,<sup>6</sup> and a failure in the implementation of its provisions.<sup>7</sup>

Overall, the law contained significant provisions to ensure the development of a sound market economy in Kosovo, by prohibiting acts that restrict and distort competition.<sup>8</sup> In general, the main aim of these provisions was to eliminate trade barriers that might impede the functionality of the new emerging market economy in Kosovo. Despite a willingness expressed within the law to promote competition in Kosovo, there was no appropriate mechanism for effective enforcement in practical terms.

In the second phase, the concept of competition law was enshrined within the constitutional provisions. The adoption of the Constitution in 2008 marked a new starting point for competition law. This is because, after the independence of Kosovo, much legislation and many policies underwent a process of amendment. Specifically, the Constitution itself emphasizes in a number of Articles the role and importance of competition in the market economy of Kosovo and in Kosovo's economic development. The Competition Authority of Kosovo was established in 2008. In 2010, with the aim of meeting further European standards for competition rules, Kosovo adopted a new Law on Competition. With the adoption of this law, Kosovo marked solid progress towards a market economy and the enforcement of competition rules. Furthermore, some of the provisions in this law have been amended in order to adjust to a changing environment. This marks a new step towards the practical establishment of competition rules in Kosovo. The first cases of infringement of the competition rules date back to 2012/2013.

In 2012, the EU undertook a feasibility study that refers to competition policy as the cornerstone of the free market in Kosovo. The study highlighted good progress. Meanwhile, the competition

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<sup>2</sup> Law No. 2004/36 on Competition, as amended by a new Law No.03/1 -229 on Protection of Competition, *Official Gazette*: 88/2010, 25 November 2010.

<sup>3</sup> Title V (Kosovo Competition Commission, Chapter 1 Establishment, Functions And Organization, Establishment of the Kosovo Competition Commission), Law No. 2004/36 on Competition (amended).

<sup>4</sup> Kosovo (under UNSCR 1244) 2005 Progress Report COM (2005) 561 final, p.36.

<sup>5</sup> Commission Staff Working Document, Kosovo (under UNSCR 1244) 2006 Progress Report EN COM (2006) 649 final, p.26.

<sup>6</sup> Commission Staff Working Document, Kosovo (under UNSCR 1244) 2007 Progress Report Accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2007-2008 COM(2007) 663 final, p.32.

<sup>7</sup> Commission Staff Working Document Kosovo (under UNSCR 1244/99) 2008 Progress Report Accompanying the Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2008-2009 COM(2008) 674, p.37.

<sup>8</sup> See Law No. 2004/36 on Competition (amended).

rules within the SAA require that Kosovo should gradually align, to a greater extent, its competition rules and policy with those of the EU. This alignment should be made in a timely manner, as provided in the SAA.

It is expected that this alignment of Kosovo's competition policy with EU competition policy will take place gradually. The role of competition policy is crucial to Kosovo's national economic goals because of the need to maximize economic benefits. The following sub-themes aim to analyse the development of competition law and the interaction of competition law with other laws within the framework of competition.

## **II.1. Constitutional basis for competition in Kosovo**

Prior to embarking on building its constitutional foundations, Kosovo was specifically focusing on its final political status as an independent country.<sup>9</sup> After declaring independence in 2008, Kosovo had begun to pursue a similar path as other Western Balkan countries by making the orientation towards the EU a main priority in their efforts towards economic development, political stability and the rule of law.

The establishment of a state of economic wellbeing, social prosperity, respect for the rule of law and economic development<sup>10</sup> is at the heart of the Constitution of Kosovo. The constitutional order of the Republic of Kosovo is based on the principles of free democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, protection of the environment, social justice, pluralism, separation of state powers, and a market economy.<sup>11</sup> The Constitution also stipulates that a market economy with free competition is the basis of the economic order of the Republic of Kosovo.<sup>12</sup>

One important provision on competition law is to be found in Article 119 of the Constitution, regarding economic relations; it emphasizes that actions that limit free competition through the establishment or abuse of a dominant position, and practices that restrict competition, are prohibited, unless explicitly allowed by law.<sup>13</sup> This provision aims to strengthen economic development and protect free competition in Kosovo. Generally, this framework reflects the appropriate legal approach towards strengthening competition law in Kosovo.

Additionally, the Constitution has crucial provisions concerning equality before the law, fundamental rights and freedoms, form of government and separation of powers, the judicial

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<sup>9</sup> See Comprehensive Proposal for the Kosovo Status Settlement, UNSC. Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council. 26 March 2007. Available at: [http://www.unosek.org/docref/Comprehensive\\_proposal-english.pdf](http://www.unosek.org/docref/Comprehensive_proposal-english.pdf) (Accessed: 17.04.2014).

<sup>10</sup> Preamble to the Constitution of the Republic of Kosovo. *Official Gazette*: K-09042008, as amended by amendments on the Constitution of the Republic of Kosovo regarding the ending of International Supervision of Independence of Kosovo, *Official Gazette*: 25/2012 07 September 2012, as amended by amendment of the Constitution of the Republic of Kosovo, *Official Gazette*: 07/2013 26 March 2013.

<sup>11</sup> Article 2 (Values), p.2, Constitution of the Republic of Kosovo. *Official Gazette*: K-09042008, as amended by amendments on the Constitution of the Republic of Kosovo regarding the ending of International Supervision of Independence of Kosovo, *Official Gazette*: 25/2012 07 September 2012, as amended by amendment of the Constitution of the Republic of Kosovo, *Official Gazette*: 07/2013 26 March 2013.

<sup>12</sup> Article 10 (Economy), p.3, Constitution, 2008.

<sup>13</sup> Ibid Article 119 (Economic Relations).

system, economic relations, independent institutions and agencies, and so forth. The constitutional provisions are important for the legal aspects of an open market economy, the protection of free competition and the abuse of dominant position and practices restricting competition.

In general, the Constitution provides clear normative provisions for competition policy. The greatest contribution of the Constitution to competition law lies in its approach towards competition law. It aims to lay down a firm basis for economic development. This is achieved through a number of laws and institutions that are capable of interacting when the rules and principles of competition are infringed. Recognizing the importance of institutional and legal capacities, Kosovo has already established a set of institutions with proper legal rules that can tackle competition issues. As illustrated by the figure below, this set of institutions is empowered to promote and protect the competition rules in accordance with the Constitution and the law.

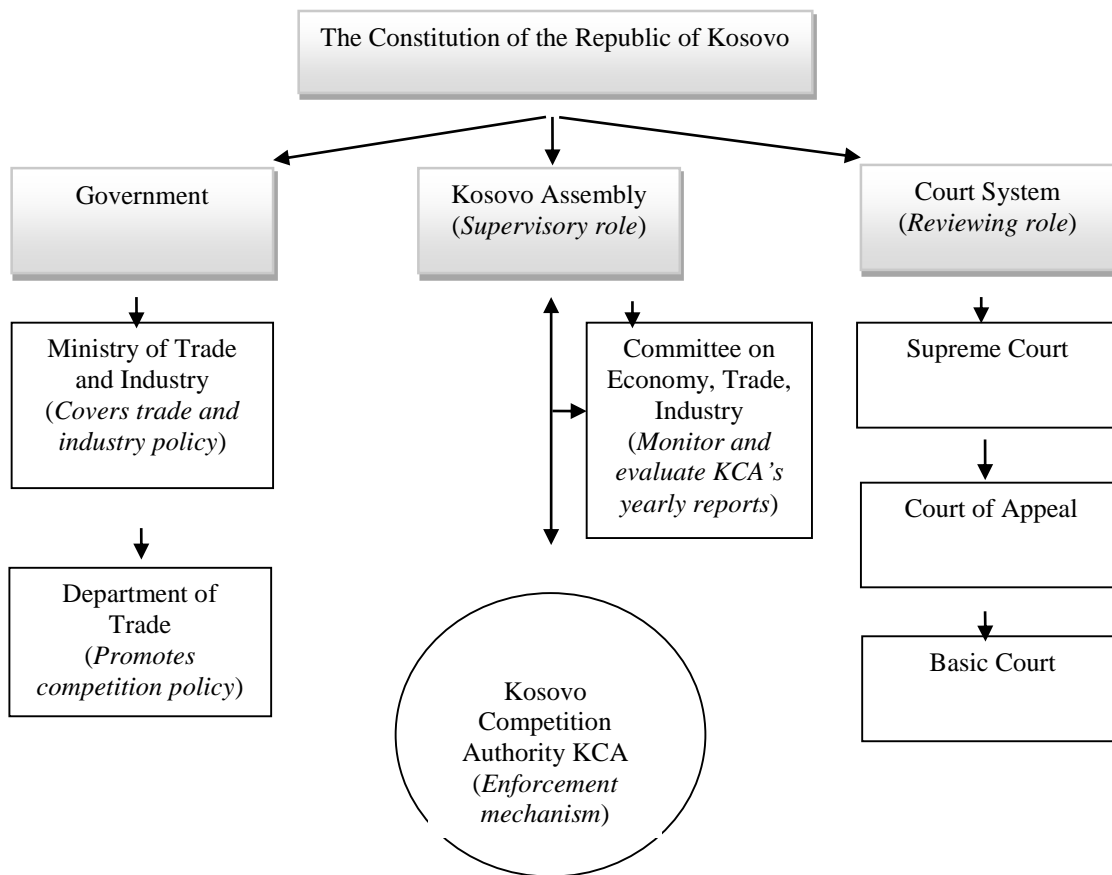


Figure 1. Location of public policy and enforcement institutions in relation to competition in Kosovo.

Competition law within the constitutional context involves the practice of enforcement. For this purpose, the Kosovo Competition Authority (KCA) is the main independent body and has the responsibility and authority for law enforcement and promoting competition, through underpinning the provisions of the competition rules in Kosovo. When it perceives that there may be a breach of the competition rules or principles, the KCA takes proper steps to investigate. The constitutional principles of economic development and competition law set out the fundamental



relationship between the institutions that are in charge of the instruments of public policy on competition law (e.g. the government and the Ministry of Trade and Industry) and the institutions that are in charge of the enforcement instruments (e.g. the Kosovo Competition Authority).

From a textual interpretation and an analysis of the legal provisions as to what constitutes competition law in Kosovo, it follows that:

- The Assembly approves the law on competition, appoints the chairperson and members of the Competition Authority, and approves (in the law on competition and the KCA Statute) the competences of the Competition Authority, its Chairperson and the Secretariat. The Assembly adopts the annual reports of the KCA. The Assembly also approves the annual budget (which constitutes a separate line in the state budget) for the Authority's activity. The Committee for Budget and Finance within the Assembly supervises the budgetary issues. The Assembly also contributes to the coordination of the actions of the KCA and the regulatory agencies on issues related to competition policy.
- Within the Assembly, the Committee on Trade and Economy monitors and evaluates the KCA's annual reports. The Committee on Economy, Trade, and Industry deals directly with issues related to the implementation of competition policy and law. The Committee on EU Integration monitors and analyses the approximation of competition legislation and policy to the EU *acquis*.
- The KCA is a public independent institution that performs its duties in accordance with Law on the Protection of Competition and is accountable to the Assembly. The KCA, which has five members, one of whom is the Chairperson of the KCA. The Chairperson manages the work of the KCA. The members of the KCA are citizens of Kosovo selected by the Assembly for a five-year term.<sup>14</sup> The KCA has the responsibility and authority to enforce the law and promote competition. It has a particularly significant role in establishing a market economy in Kosovo. The independence of the KCA and its power to implement the law and protect and promote competition stem particularly from: (i) the legal guarantee of the Authority's independence, the way the members of the decision-making body are appointed, and the requirements that should be met by those members; (ii) the power provided by the law to the KCA related to its decision-making capabilities and its power to monitor, investigate and impose sanctions; (iii) its administrative capacity; and (iv) the effectiveness of its cooperation with other institutions and the improvement in the competition culture.<sup>15</sup>

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<sup>14</sup> Law No. 2004/36 on Protection of Competition, *Official Gazette*: 88/2010. Later amended by: Law No. 04/I-226 amending and supplementing the Law No. 03/I-229 on Protection of Competition, *Official Gazette*: 17/2014, 10 March 2014. See also *Kosovo - Merger Control* 2014, Sokol Elmazaj / Boga & Associates. International Comparative Law Guides. Available at <http://www.iclg.co.uk/practice-areas/merger-control/merger-control-2014/kosovo> (Accessed: 27.07.2014). See Mancellari, A. and Hyseni, D. *Competition Policy in Kosovo*. In: Penev, S. and Marušić, A. (eds). *Competition Policy in Western Balkan countries*. Westminster Foundation for Democracy (WFD), Western Balkans Parliamentary Network of Committees for Economy, Finance and Budget, Institute of Economic Sciences, Belgrade. pp.151-171.

<sup>15</sup> See also Mancellari, A. and Hyseni, D. 2013. *Competition Policy in Kosovo*. In: *Competition Policy in Western Balkan Countries*. Westminster Foundation for Democracy (WFD), Western Balkans Parliamentary Network of Committees for Economy, Finance and Budget, Institute of Economic Sciences, Belgrade. pp.156-159.

- The Ministry of Trade and Industry has its own scope for policy-making and acts as an advocate of competition policy in the public domain, suggesting greater institutional independence and alignment with the EU *acquis*. A particular provision stipulates that the Ministry must “develop work policies and implement legislation to encourage fair competition”<sup>16</sup> by creating a legal framework for trade, industry and commerce, developing policies and implementing legislation and programmes to support industrial and commercial enterprises, especially small and medium enterprises, establishing work policies for the development of the private sector, and so forth. The Department of Trade within the Ministry of Trade and Industry, according to §1.8 of Article 7, is required to “promote foreign trade, promote the competitiveness of local companies and help to increase the local exports”.<sup>17</sup>
- An administrative appeal against a decision of the KCA may be initiated by filing a lawsuit at the competent court (for administrative matters) of Kosovo. Regarding the competent court in Kosovo for an administrative appeal, the Law on Courts<sup>18</sup> contains provisions on the structure and competencies of the courts. According to Article 8 §1 of this law, “The Court system of the Republic of Kosovo consists of: the Basic Courts, the Court of Appeals and the Supreme Court”. A party may initiate an administrative appeal within a period of thirty (30) days from the issuance of the decision by the KCA. Pursuant to Article 32 of the Law on Protection of Competition 03/L-229, stipulates that “the Authority, while practising its function, implements the provisions of the Law on Administrative Procedure, except in cases when this law foresees otherwise”.<sup>19</sup> Article 33 §1 of the Law 03/L-229 on Protection of Competition, stipulates that the “status of parties in procedure belongs to the enterprises against which the authority is executing the procedure which is under its competence...”. It further adds that “an administrative conflict may be initiated by a lawsuit filed at the competent Court of the Republic of Kosovo”. Regarding legal defence, according to Article 62 §1 “the party, within a period of thirty (30) days, may initiate an administrative conflict [*sic*] by filing a lawsuit at the Competent court (for administrative matters) of Kosovo”.

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<sup>16</sup> The § symbol throughout this paper, it mean “provision within an Article”. Annex 8, § iii, Regulation No. 02/2011 on the Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries. Available at: [http://www.kryeministri-ks.net/repository/docs/Rregullorja\\_02-2011-e\\_miratur nga\\_Qeveria-finale.pdf](http://www.kryeministri-ks.net/repository/docs/Rregullorja_02-2011-e_miratur nga_Qeveria-finale.pdf) (Accessed: 27.07.2014).

<sup>17</sup> Article 7 of the Regulation No. 29/2012 on Internal Organization and Systematization of Jobs of the Ministry of Trade and Industry, *Official Gazette*: QRK-29/2012, 14 December 2012.

<sup>18</sup> See Law No. 03/L-199 on Courts, *Official Gazette*: 79/2010. Amended by: Law No. 04/L-171 amending and supplementing the Law No. 03/L-199 on Courts, *Official Gazette*: 37/2012. Law No. 04/L-115 amending and supplementing the Laws related to the Ending of International Supervision of Independence of Kosovo, *Official Gazette*: 25/2012.

<sup>19</sup> Law 03/L-229 on Protection of Competition, *Official Gazette*: 88/2010, 25 November 2010 as amended by the Law No. 04/L-226 amending and supplementing Law No.03/L-229 on Protection of Competition, *Official Gazette*: 17/2014, 10.03.2014.

Overall, the Constitution stipulates appropriate mechanisms for ensuring that the competition rules are applied in practice. From the contextual interpretation in the above analysis, a short conclusion could be that the Constitution of Kosovo provides clear rules promoting free competition and economic development in Kosovo. The EU annually assesses the work of this institutional framework and its compliance with the EU *acquis*. A comprehensive progress report is made on reform and the legislative alignment with the EU *acquis*, including in sectors such as the rule of law, public administration, economy, competition and trade.<sup>20</sup> However, specifically regarding approximation to EU law, the assessment by the EU has emphasized that Kosovo's track record is limited regarding competition cases, because of very weak oversight of anti-competitive practices and state aid. The 2014 Progress Report further adds that Kosovo needs to ensure that the competition authorities are effective and independent.<sup>21</sup>

## II.2. Towards a concept of competition law in Kosovo

The notion of competition law in Kosovo has developed gradually. The ideas about competition law are mainly taken from EU law. Kosovo is in the first decade of utilizing the ideas and principles of competition law. The concepts of competition law emerged into legislation at the beginning of 2004. The concept of competition was considered an essential principle of the market economy within Kosovo. However, there was a different scenario regarding enforcement. This was because of a lack of political will, human resources and experience in this field. For many years, the implementation in practice was absent. New developments emerged later. Ideas about competition law in Kosovo evolved quickly after the EU decided to carry out a feasibility study while negotiating the SAA in 2012. The EU's feasibility study was focused on an assessment of the political and economic ability of Kosovo to enter an agreement with the EU. The strategic interest in the negotiation of the SAA increased the relevance and interest in applying competition law and amending the existing legislation in Kosovo. Consequently, competition law has become the subject of continuing interest from businesses and government agencies. In this way, competition law has become a valuable mechanism for improving the market economy in Kosovo.

Currently, the approach of the government and the business community in relation to matters of enforcement and implementation are of primary importance (see the cases in Annex I). Another advance in competition law in Kosovo occurred after the legislation was amended. This process is referred to as the alignment of the national competition law with EU competition law. In the future, competition law in Kosovo will gradually become aligned to a greater extent with EU competition law. It is of interest to note that this alignment will occur through the approximation of legislation as stipulated by the SAA. The SAA provides that Kosovo's competition rules should be made compatible with those of the EU within a period of ten (10) years. In the future, competition law in Kosovo must be aligned with the EU *acquis* on competition law. This process requires that Kosovo should fulfil its obligations and thereby achieve full implementation of its competition law in practice. Furthermore, this process involves the harmonizing of the legal system in Kosovo with

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<sup>20</sup> Commission Staff Working Document, Kosovo 2014 Progress Report, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Brussels, 8.10.2014 SWD(2014) 306 final, p.1.

<sup>21</sup> Ibid p. 4.

the rules and principles of EU competition law. It is important to note that the SAA will cause EU competition law to become more institutionalized within Kosovo's competition law.

### II.3. Legislative developments after 2008

After 2008, Kosovo began a period of intensive legal developments in competition law. After the establishment of the KCA in 2008, further steps were taken towards strengthening competition law. In 2010, the Assembly adopted the new Law on Protection of Competition. This law aimed to “define the rules and measures for protection of free competition and effective competition on [*sic*] the market”.<sup>22</sup> Moreover, the scope of the law reflects much greater legal accuracy, because it includes “all forms of prevention, limitation or abuse of the competition by the enterprises on the territory of the Republic of Kosovo, or outside the territory of Kosovo, if those actions have impacts in Kosovo”.<sup>23</sup>

Some definitions were improved and new ones were added,<sup>24</sup> new enterprise agreements that may significantly influence or disturb competition in the market were added,<sup>25</sup> and the abuse of a dominant position was better defined.<sup>26</sup> Furthermore, new competences for the KCA were added, such as a requirement for a “professional opinion of the Authority”,<sup>27</sup> in an Article stating that “the Authority, on the request of the Kosovo Parliament, Government of the Republic of Kosovo, central organs of public administration, legal persons with public authority and local organs, provides professional opinion for the laws, regulations and laws that significantly affect market competition”<sup>28</sup> Also, another important Article empowered the Authority to “provide opinions which encourage knowledge about market competition, improve levels of awareness and information relating to the role of law and the market competition policy respectively”.<sup>29</sup> The following Articles show specific features of competition law in Kosovo. There are two main developments in this regard.

The first development is related to the regulation of prohibited agreements and the abuse of a dominant position. The law of Kosovo prohibits agreements between undertakings that aim to prevent competition.

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<sup>22</sup> Article 1 of the Law 03/L-229 on Protection of Competition, *Official Gazette*: 88/2010, 25 November 2010 as amended by the Law No. 04/L-226 amending and supplementing Law No.03/L-229 on Protection of Competition, *Official Gazette*: 17/2014, 10.03.2014.

<sup>23</sup> *Ibid* Article 2.

<sup>24</sup> *Ibid* Article 3.

<sup>25</sup> *Ibid* Article 4.

<sup>26</sup> *Ibid* Article 10.

<sup>27</sup> *Ibid* Article 23.

<sup>28</sup> *Ibid* Article 23.

<sup>29</sup> *Ibid* Article 23.

*Article 4 - Prohibited Agreements<sup>30</sup>*

*1. All agreements between two or more independent enterprises are prohibited, decisions made by business associations and concerted practices that aim or may significantly influence or disturb market competition in relevant market, and in particular the ones that:*

- 1.1. directly or indirectly impose purchase or sale price or any other condition in trade;*
- 1.2. limit or control production, market, technological development and investments;*
- 1.3. share markets or supply sources;*
- 1.4. implement unequal conditions for similar transactions with other enterprises, consequently placing them in an unfavourable competitive position;*
- 1.5. apply conditions for agreements or contracts to rely on other contracting subjects, through other supplementing conditions that do not have any natural or common trade practice connection to the object of such contract.*

Regarding exemptions of vertical agreements:

*Article 6 - Exemption of Vertical Agreements*

*1. Vertical agreements may be exempted from prohibited agreements set forth in Article 4 of this law due to economic efficiency, especially agreements the objective of which is:*

- 1.1. to limit direct contact sales within an exclusive territory or against a group of exclusive clients, reserved for the supplier itself or another distributor authorised by the supplier, if such an agreement does not restrict sales of the distributor's clients;*
- 1.2. to limit sales to end users by the distributor that is engaged in whole trade level activities;*
- 1.3. to limit sales to unauthorised distributors from members of a single distribution system, in which supplying enterprises, directly or indirectly, sell contracted products to distributors selected based on specified criteria;*
- 1.4. to limit the distributors' right to sell component parts to clients, who use the same for production of products similar to that of the supplier.*

Prohibited agreements and exemptions of vertical agreements in Kosovo competition law are mainly addressed through reference to the model of Article 101 of the TFEU. Regarding the regulation of the abuse of market force in Kosovo, Article 10 stipulates:

*Article 10 Ascertaining Dominant Position*

*1. An enterprise has a dominant position if, as a supplier or purchaser of several certain types of goods or services:*

- 1.1. is [sic] not subject to fair competition on the market;*
- 1.2. it has important power in the market compared to its existing or potential competitors, therefore, it is particularly taken into consideration:*
  - 1.2.1. his [sic] participation and position on the corresponding market,*
  - 1.2.2. his [sic] financial power;*
  - 1.2.3. his [sic] approach towards supplies [sic] or markets;*
  - 1.2.4. his [sic] connections with other enterprises;*
  - 1.2.5. legal or factual obstacles of other enterprises on the market;*
  - 1.2.6. current or potential competition with enterprises established inside or outside Kosovo.*

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<sup>30</sup> Ibid Article 4.

2. An enterprise is considered to have a dominant position if it has more than forty per cent (40%) presence at the market. This presence shall not be considered a dominant position in case the respective enterprise argues that it is exposed to competition or does not have a superior position in the market compared to its competitors, taking into consideration facts specified with sub-paragraph 1.2 of this paragraph.

3. Two (2) or more independent enterprises may have a dominant position if, in comparison to their competitors, they operate together on the market.

On the abuse of a dominant position, Article 11 stipulates the following:

*Article 11 Abuse of a Dominant Position*

1. Abuse of a dominant position by one or more enterprises on the corresponding market is prohibited, in particular if:

1.1. direct or indirect setting of unreal purchase or sale prices and other unfair trade conditions, respectively;

1.2. limitation of production, markets or technological development to the prejudice of consumers;

1.3. implementation of different conditions for similar duties with other enterprises thereby placing them in a disadvantageous competitive position;

1.4. agreeing on contracts under condition that other contracting parties accept additional obligations;

1.5. setting prices or other conditions, the objective or the result of which is to prevent entering or exclude certain competitors or one of their products from the relevant market;

1.6. refusal of entrance of another enterprise, by giving an appropriate compensation, in the network or infrastructures of the enterprise with dominant position, if this refusal for usage of the network or infrastructures prevents the other enterprise to act as a competitor of the enterprise with dominant position.

The language of three of the Articles mentioned above appears to reflect a reference to EU law. The wording of the criteria for ascertaining abuse and assessing dominance are a reflection of the TFEU.

The second development is related to the regulation of state aid. After 2008, a new legal development occurred with regard to the State Aid Law. In 2011, the Assembly adopted the Law on State Aid.<sup>31</sup> The law specifically determines the principles and procedures for state aid, in order to support economic and social development, apply the principles of the functioning of the market economy, and protect competition, as well as to implement the commitments arising from international agreements ratified by the Republic of Kosovo that include provisions for state aid.<sup>32</sup> All sectors of production, as well as services, operating in the Republic of Kosovo are included within the scope of this law, except the agriculture and fishery sector.<sup>33</sup> Structurally, this law contains some general definitions<sup>34</sup> referring to policy on state aid. With regard to the distortion of competition, this law specifies that any aid granted from state resources, in whatever form, that directly or indirectly distorts or threatens to distort competition by giving priority to one or more particular enterprises or to the production of certain products<sup>35</sup> is prohibited. Furthermore, this law

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<sup>31</sup> Law No. 04/L-024 on State Aid, *Official Gazette*: 13/2011, 01 September 2011.

<sup>32</sup> *Ibid* Article 2.

<sup>33</sup> *Id.*

<sup>34</sup> *Ibid* Article 3.

<sup>35</sup> *Ibid* Article 4.

sets up two important institutions with regard to its implementation and enforcement: the State Aid Office and the State Aid Commission.<sup>36</sup> First, the State Aid Office is the administrative unit for controlling state aid; it has been established within the Kosovo Competition Authority<sup>37</sup> and is responsible for receiving, analysing and monitoring notifications and other data on aid schemes and individual aid.<sup>38</sup> Second, the State Aid Commission is the decision-making body for state aid.<sup>39</sup> The Law on State Aid contains a set of definitions of the key concepts in the regulatory framework:

*Article 3 Definitions*

*1.1. State Aid – any aid granted by the state or through state resources, in any form, which shall include but is not limited to: grants and subsidies; tax exemption, reduction and differentiation; remission of overdue payments and fines; remission of debt or covering losses; guarantees on loans or granting loans under low interest rates; reduction of social insurance commitments; reducing the price of goods and services provided, or the sale of state property below the market price, or purchase of goods and services with the price higher than the one in the market; increasing state capital in the undertakings or changing its value, in circumstances that are not acceptable for a private investor operating in normal economic conditions.*

*1.5. Aid scheme – any normative act upon which in general form and without the need for other implementing acts, the state aid can be planned or granted.*

*1.6. Individual Aid – any aid granted to a specific beneficiary for a single case, or when the value of the aid granted to a single beneficiary, within an aid scheme, is higher than the minimum allowed ceiling.*

Regarding prohibitions on competition, Article 4 stipulates:

*Article 4 State Aid Prohibition*

*Except the cases provided in this Law, there is prohibited any aid granted from state resources, in whatever form which, directly or indirectly, deforms or threatens to deform the competition giving priority to one or some certain enterprises or for production of certain products.*

In 2013, the government established the State Aid Commission,<sup>40</sup> whose purpose is to “assess the state aid schemes and individual assistance, supervise the use of state aid and the results gained from it, issue respective instructions for the implementation of law, publish interest rate for recovery of the state aid...”,<sup>41</sup> thus providing that state aid in Kosovo is provided in accordance with the applicable Law on the State Aid.

Complementary rules concerning competition law are incorporated in the criminal code. Some of these rules are set out in the present Criminal Code. The Criminal Code (2012) contained specific

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<sup>36</sup> Ibid Articles 6.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Ibid Article 8.

<sup>40</sup> Regulation MoF – No. 1/2013 on Organization and Functioning of the State Aid Commission. Available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=10147> (Accessed: 11.12.2014).

<sup>41</sup> Ibid Article 2.

provisions on competition law.<sup>42</sup> Chapter XXV<sup>43</sup> (Articles 284 to 318) particularly addresses criminal offences against the economy. The Code prohibits any activity that:

*limits the free movement of capital, people, goods, services, work or means of reproduction in the Republic of Kosovo, or denies or limits the right of a business organization or legal person to engage in the circulation of merchandise or services in the Republic of Kosovo, or places a business organization or legal person in an unequal position with respect to another business organization or legal person in relation to working conditions or the circulation of merchandise or services, or limits the free exchange of merchandise or services, and thereby causes considerable profit for one business organization or legal person or considerable damage to another.*<sup>44</sup>

The Code includes specific provisions on irresponsible economic activity,<sup>45</sup> causing bankruptcy and causing false bankruptcy,<sup>46</sup> entering into harmful contracts,<sup>47</sup> violating patent rights and copyright,<sup>48</sup> misusing a position of monopoly,<sup>49</sup> prohibited trading and prohibited production,<sup>50</sup> and so forth.

Specifically, the Code addresses the protection of competition law through the following:

- provisions regarding economic activities that misuse a position of monopoly or a dominant position in the market or a substantial part of the market by “demanding payment or other business terms that differ from those that would very likely prevail if effective competition existed”,<sup>51</sup>
- provisions on agreements in restriction of competition upon an invitation to tender,<sup>52</sup>

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<sup>42</sup> Criminal Code No. 04/I-082 of the Republic of Kosovo, *Official Gazette*: 19/2012 Under Chapter XXXV Transitional and final provisions, Article 439, on repealing of legal and sub-legal acts, states, “Provisions in UNMIK Regulations and the Criminal Code of the Republic of Kosovo UNMIK REG 2003/25 covering matters addressed in the Criminal Code of Kosovo shall cease to have effect upon the entry into force of this Code.” This Code was later amended by: Law No. 04/I-129 amending and supplementing the Criminal Code of the Republic of Kosovo No. 04/I-082, *Official Gazette*: 30/2012 (Published: 09.11.2012), and Law No. 04/I-273 amending and supplementing the Laws related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo, *Official Gazette*: 32/2014, 15 May 2014.

<sup>43</sup> Criminal Code No. 04/I-082 of the Republic of Kosovo, *Official Gazette*: 19/2012, 09 November 2012.

<sup>44</sup> Ibid Article 284.

<sup>45</sup> Ibid Article 285.

<sup>46</sup> Ibid Articles 286-287.

<sup>47</sup> Ibid Article 291.

<sup>48</sup> Ibid Articles 295-296.

<sup>49</sup> Ibid Article 301.

<sup>50</sup> Ibid Articles 305-306.

<sup>51</sup> Ibid Article 301, § 1.8.

<sup>52</sup> Ibid Article 309, § 1 and 2.



- provisions regarding collusion and fraud in respect of government securities, when “two or more persons who enter into an agreement to cooperate for their mutual benefit in order to limit open market competition or to gain an unfair advantage”.<sup>53</sup>

This Code addresses two important issues with regard to competition law; these are contained in its transitional provisions for the jurisdiction of the special prosecution office, and its transitional provisions for the jurisdiction of the EULEX judges and prosecutors in criminal proceedings. First, the Code provides “exclusive competence to investigate and prosecute the following crimes and the attempt and collaboration offenses related to such offenses”<sup>54</sup> regarding “agreements in Restriction of Competition Upon Invitation to Tender as set forth in Article 309 of this Code.”<sup>55</sup>

Second, it spells out that “the EULEX judges and prosecutors assigned to criminal [*sic*] will have jurisdiction and competence over any case that can be investigated or prosecuted by the Special Prosecution Office of the Republic of Kosovo”<sup>56</sup> pertaining to “agreements in Restriction of Competition Upon Invitation to Tender as set forth in Article 309 of this Code.”<sup>57</sup> Overall, the Code encompasses a comprehensive overview of the rules and principles for the protection of competition within the legal system of Kosovo. Furthermore, the Code’s provisions aim to complement and reinforce competition law in Kosovo.

Recently, another development has emerged in terms of amending the competition law in force. At the beginning of 2014, the Assembly amended the existing law on competition. The main effects of the new development are:

- a rewording of definitions such as “the agreement” to include an agreement of any kind concluded between enterprises, with or without binding force, decisions or recommendations of groups of enterprises, and coordinated practices between enterprises that operate at the same level or at different levels of the market (Article 2);<sup>58</sup>
- a rewording of the definition of “enterprise” so that it includes any business activity regardless of manner of organization or form of management, any public entrepreneur established to carry out activities for the public interest and any other natural or legal person or state authority that carries out economic activities regardless of whether it is considered a business subject or not (Article 2);<sup>59</sup>
- other provisions regarding the competent court for administrative matters dealing with competition cases.

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<sup>53</sup> Ibid Article 312, § 4.

<sup>54</sup> Ibid Article 441. All legal provisions are taken from the official English translation of the Official Gazette of the Republic of Kosovo.

<sup>55</sup> Ibid Article 441, § 2.21.

<sup>56</sup> Ibid Article 442, § 1.

<sup>57</sup> Ibid Article 442, § 2.21.

<sup>58</sup> §1.1 of Article 2, Law No. 04/L-226 on amending and supplementing the Law No. 03/I-229 on Protection of Competition. *Official Gazette*: 17/2014, 10 March 2014.

<sup>59</sup> Ibid Article 2 §1.7.

In the future, a further alignment with EU competition law will take place once Kosovo begins to implement the SAA's rules and principles on competition law. These rules and principles on competition law will be analysed in the following section.

### III. The relevance of the European Union competition law for Kosovo

Competition is crucial for a market economy. Fair competition is the main principle behind the free interplay of market forces.<sup>60</sup> In the EU internal market, the enactment and enforcement of competition rules are a precondition for fair competition. EU competition law is quite unique in this regard and has many specific features. The core of the EU remains the internal market that is set up between the Member States for the purposes of furthering economic development. The relevance of EU competition law for Kosovo relies on its offer of rules and principles that identify the types of practices that will harm a free market.

Kosovo is aiming to build an open market economy based on fair competition. In Kosovo, competition rules are generally understood as rules by which the economic agents operate at the same level in respect of a product. However, the enforcement of these rules in practice is very weak. This may have a negative impact on the establishment of a competitive market system. This is a minimalist concept of the application of competition rules. In the future, it will be necessary for more EU rules and principles regarding competition to be enacted and enforced in Kosovo. Enactment and enforcement will be required in many sectors such as agriculture and food, energy and the environment, financial services, information and communication technologies, the media, pharmaceuticals, postal services, professional services, transport etc. Additionally, it will be necessary to enact and enforce more rules and principles with regard to antitrust, cartels, mergers, liberalization and state aid. These rules will prevail over the national rules of Kosovo. The successful enactment and enforcement of these principles will be a great milestone for Kosovo.

In the coming years, undertakings in Kosovo are expected to compete under identical conditions and to succeed only on their own strength and merit. Enactment of the EU framework for state aid, which contains a stern prohibition on the transfer of public funds to a given recipient or industry sector, brings balance to the competitive process. For Kosovo, the existence of a framework for the control of state aid and the implementation of this framework would be a positive signal to foreign investors. Efficient and transparent control on state aid will have a positive impact on Kosovo's exchange of goods and services. Actually, as a potential candidate country for EU membership, Kosovo is expected to align its laws with the body of rules and practices referred to as the EU *acquis*. The *acquis* includes primary and secondary law laid out in successive treaties adopted by the EU Member States. Some of the *acquis* on competition law is a normative part of the SAA between the EU and Kosovo. The prerequisites stated in the SAA clearly see the dismantling of domestic mechanisms that affect free trade between Kosovo and the EU as a priority. This process is related to the freedom of movement of goods, services, capital and workers.

In the future, Kosovo, as a candidate country for EU membership, will be required to address and take the necessary steps towards the reform of its domestic framework for competition law. Reforms will be carried out with a view to adhering to the liberalized EU common market. The implementation of the SAA implies a long road towards a great milestone for Kosovo. However,

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<sup>60</sup> Egge, M. G. 2001. The Harmonization of Competition Laws Worldwide. *Richmond Journal of Global Law & Business*, Vol. 2:1. p.94.

new perspectives and challenges are ahead as regards the implementation of competition rules within the legal system of Kosovo. The following sub-themes offer an overview of the basic features of EU competition law, the impact of the SAA on the legal order in Kosovo, and the mechanism by which the EU assesses the progress of Kosovo in this matter.

### III.1. Basic features of European Union competition law

Competition law involves rules that promote or maintain market competition by regulating anti-competitive conduct.<sup>61</sup> The fundamental objective of EU competition law is to prevent the distortion of competition. This is a condition for achieving a free market and promoting general economic welfare. Competition rules are the nucleus of every market economy. These rules have played a crucial role in the protection of the market in the EU. The alignment of national law with EU law is required for every country that aspires to become a member of the EU.<sup>62</sup> As Anestis Papadopoulos says, “competition law and policy have been considered one of the most important mechanisms for the successful implementation of liberal national policies”.<sup>63</sup> Competition rules are described as one of the most influential areas in EU law. In particular, they have been further developed in the case law of the Court of Justice of the European Union (CJEU).<sup>64</sup> In the EU, competition policy has long held a kind of “rock star status”.<sup>65</sup> The development of EU competition law has gone through many stages. Basedow explores the historical basis of EU competition law, and explains it as follows:

*The history of the law against restrictions of competition in Europe can be divided into four stages. The first stage, running up to foundation [sic] of the European Economic Community in 1957,... gave rise to the second stage, which may be called the pioneer phase. The Community had to conceive devices for the effective implementation of competition law: In the 1960s the direct applicability and the priority principles were stated in the Court of Justice, and the Commission and Council instituted the notification system, block exemption regulations and comfort letters. The third stage of the 1970s and 1980s is the state of expansion: Community competition law conquered new horizons, defeating the idea of exempted markets, particularly in the regulated industries, and gradually developed merger control. The fourth stage of European competition law, which may be called the post socialist stage which is characterized by three major developments: the decentralization of public enforcement by Regulation 1/2003, the quest for private enforcement, and the growing impact of economic thought in the implementation of competition law, the so-called more economic approach, which is the focus of this symposium.*<sup>66</sup>

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<sup>61</sup> Taylor, M. D. 2006. *International Competition Law*. Cambridge University Press. p.1.

<sup>62</sup> See Vassiliou, G. (ed.) 2007. *The Accession Story The EU from Fifteen to Twenty-Five Countries*. Oxford University Press.

<sup>63</sup> Papadopoulos, A. S. 2010. *The international dimension of EU Competition Law and Policy*. Cambridge University Press. p.15.

<sup>64</sup> See Lenaerts, K. and Van Nuffel, P. 2011. *European Union Law*. 3<sup>rd</sup> ed. Sweet & Maxwell. pp.524-534. Additional reference is available from Moens, G. and Trone, J. 2010. *Commercial Law of the European Union. Ius Gentium: Comparative Perspectives on Law and Justice*. Volume 4. Springer. pp.183-221.

<sup>65</sup> Kelemen, R. D. 2011. *Eurolegalism: The Transformation of Law and Regulation in the European Union*. Harvard University Press. p.143.

<sup>66</sup> Basedow, J. and Wurmnest, W. (eds.) 2011. *Structure and Effects in EU Competition Law. International Competition Law Series – Studies on Exclusionary Conduct and State Aid*, Wolters Kluwer, pp.3-4.

Along the same lines, Lowe argues that competition law is crucial to the proper functioning of markets.<sup>67</sup> He further argues that:

*competition policy must act on a number of fronts at the same time. First, it must enforce competition law whenever there are harmful effects on Europe's citizens or businesses. Second, it must also ensure that the regulatory environment fosters competitive markets. Thirdly, it must help shape economic governance through promoting the convergence of substantive competition rules, strengthening cooperation with other jurisdictions and promoting a shift of emphasis from trade regulation to competition regulation. Finally, it must develop a competition culture in the society in which it operates. Ultimately competition policy must make markets work better for consumer [sic] and businesses in Europe.*<sup>68</sup>

This definition sets out the essence of competition, and aims to show how the regulatory environment, the promotion of trade regulation, and the competition culture within economic life have an effect on business. The same views can be found in similar literature such as the work of Jones and Sufrin, who argue for the importance of competition law in a free market economy. According to Jones and Sufrin, “competition law is concerned with ensuring that firms (undertakings) operating in the free market economy do not restrict or distort competition in a way that prevents the market from functioning optimally”.<sup>69</sup> According to this definition, the application of competition law in the market will produce positive results in the free market economy. In addition, from the economic perspective competition law prohibits commercial practices that damage the operation of the markets.<sup>70</sup>

The competition law of the EU is found mainly in Articles 101-109 of the TFEU, which contain rules on competition in the internal market, a prohibition on anti-competitive agreements between undertakings, and a provision that businesses with a dominant market position must not abuse their position in a way that adversely affects trade between Member States. In this regard, mergers and takeovers with an EU dimension are monitored by the EU Commission and may be prevented in certain cases (Articles 101-109 TFEU). Furthermore, state aid is prohibited when it leads to distortion of competition. Specifically, Section 1 (Articles 101-106 TFEU) deals with competition rules applicable to undertakings. Articles 101 and 102 contain the basic rules on competition. Articles 103-106 describe the implementation and administration of these rules. Section 2 (Articles 107-109 TFEU) concerns aid granted to undertakings.<sup>71</sup>

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<sup>67</sup> Lowe, P. 2008. *Competition Policy Newsletter*. No. 3. Available at: [http://ec.europa.eu/competition/publications/cpn/cpn2008\\_3.pdf](http://ec.europa.eu/competition/publications/cpn/cpn2008_3.pdf) (Accessed: 02.08.2014) p.5.

<sup>68</sup> Ibid. p.5. See also the references cited in Jones, A. and Sufrin, B. 2014. *EU Competition Law: Text, Cases, and Materials*. 5<sup>th</sup> ed. Oxford University Press. p.3.

<sup>69</sup> Jones, A. and Sufrin, B. 2014. *EU Competition Law: Text, Cases, and Materials*. 5<sup>th</sup> ed. Oxford University Press. p.2.

<sup>70</sup> Chalmers, D., Davies, G. and Monti, G. 2014. *European Union Law Text and Materials*. 3<sup>rd</sup> ed. Cambridge University Press. p.944.

<sup>71</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Consolidated version of the Treaty on European Union Consolidated version of the Treaty on the Functioning of the European Union Protocols, Annexes, Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, Tables of equivalences. Available at: *OJ C 326*, 26.10.2012, pp. 1-390.

From the normative context, the basic features can be summarized as follows:

- economic operators may not agree to fix prices or divide up markets amongst themselves (Article 101 TFEU);
- economic operators may not abuse a dominant position in a particular market to squeeze out smaller competitors (Article 102 TFEU); and
- government assistance to businesses (state aid) is monitored by the European Commission (Article 107 TFEU).

At the EU level, the EU Commission is the custodian of competition policy. National Competition Authorities (NCAs) are empowered to apply Articles 101 and 102 of the TFEU fully, to ensure that competition is not distorted or restricted. National courts may also apply these provisions to protect the individual rights conferred on citizens by the Treaty. EU competition law grew from different sources of EU law such as primary and secondary legislation and case law.<sup>72</sup>

These elements of EU competition law are contained within the SAA, and the SAA refers to the harmonization of legislation and competition rules. The implementation of the EU competition rules as stipulated in Articles 101-109 of the TFEU is of paramount importance for Kosovo. This requires a solid legal framework and institutional capacities. This is an indispensable condition for the proper functioning of the market system in Kosovo. The enactment and enforcement of specific aspects of EU competition law in Kosovo will lead to the following benefits:

- economic stability in Kosovo;
- an appropriate framework for the development of close economic relations with the EU;
- support for the efforts of Kosovo to enhance a functioning market economy and foreign investment; and
- the development of a free trade area between the EU and Kosovo and the fostering of regional cooperation with all SAA countries such as Albania, Montenegro, Bosnia and Herzegovina, Macedonia and Serbia.

The achievement of the desired goal for Kosovo will depend on the enactment of the EU competition policy in the years to come. The EU promotes, in particular, policies that lay the foundation for markets and facilitate the creation and growth of efficient and competitive firms that can both deliver goods and services to Kosovo's citizens and engage in trade and competition in the international markets. The approximation of Kosovo law to the EU competition law can help to boost Kosovo's economy to new levels of competitiveness. To embark on this policy, Kosovo negotiated the SAA (2014) that will gradually begin to be implemented during the coming years. In general, the EU competition policy is relevant for Kosovo, because it improves the free functioning of the market, guarantees the effective welfare of society, and can facilitate consumer choice.

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<sup>72</sup> See DG Competition, EU Commission. Available at: [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html) (Accessed:11.11.2014)

### III.2. The impact of the SAA on the laws of Kosovo

The EU has signed association agreements with a number of the Western Balkan countries.<sup>73</sup> The aim of these agreements is the establishment of close relations and the preparation for accession to the EU. The agreements contain rules affecting political dialogue, regional cooperation, approximation of laws, the enforcement of the law and competition rules, cooperation policies, and trade between the Western Balkan countries and the EU. Kosovo negotiated the SAA with the EU in 2014. This agreement aims to create a close association between the EU and Kosovo, and will have an impact on different fields such as the movement of workers, establishment, supply of services, and the movement of capital.<sup>74</sup>

The particular characteristics of the SAA are:

- the creation of political dialogue designed to assist Kosovo during the ten (10) year transition period from its entry into force, in order to initiate reforms;<sup>75</sup>
- the free movement of persons, goods and capital, and the right of establishment;<sup>76</sup>
- the approximation of legislation and the regulation of competition;<sup>77</sup> and
- the creation of economic, financial and cultural cooperation.<sup>78</sup>

In general, within the legal order of Kosovo the SAA will have the status of a treaty. The SAA contains diverse principles with clear purposes. For Kosovo, the rules and obligations of the SAA are a new platform for its relations with the EU. This process is known as the approximation of legislation. The initial enactment of the SAA's provisions in the domestic legislation of Kosovo will challenge its enforcement capacity. It is apparent that it will be hard to begin with for these

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<sup>73</sup> Western Balkan countries: Albania (01.04.2009) Stabilisation and Association Agreement, *OJ L 107*, 28.4.2009, p.166; as last amended by the 2007 Accession Protocol, *OJ L 107*, 28.04.2009, p. 2. Bosnia and Herzegovina (01.07.2008) Interim Agreement on trade and trade-related matters, *OJ L 169*, 30.6.2008, p. 13; as last amended by *OJ L 233*, 30.8.2008, p.6; the former Yugoslav Republic of Macedonia (01.06.2001) Stabilisation and Association Agreement, *OJ L 84*, 20.3.2004, p.13, as last amended by the 2007 Accession Protocol, *OJ L 99*, 10.4.2008, p.2; Montenegro (01.01.2008) Stabilisation and Association Agreement, *OJ L 108*, 29.04.2010, p.3; Serbia (08.12.2009) Interim Agreement on trade and trade-related matters, *OJ L 28*, 30.01.2010, p. 2. Available at:

[http://ec.europa.eu/taxation\\_customs/customs/customs\\_duties/rules\\_origin/preferential/article\\_779\\_en.htm](http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/preferential/article_779_en.htm)

(Accessed: 21.11.2014).

<sup>74</sup> Title I, General principles, Title II, Political dialogue, Title III, Regional cooperation, Title IV, Free movement of goods, Title V, Movement of workers, establishment, supply of services, movement of capital, Title VI, Approximation of laws, law enforcement and competition rules, Title VII, Justice, Freedom and Security, Title VIII, Cooperation policies, Title IX, Financial Cooperation, and so forth.

<sup>75</sup> Title II (Political Dialogue), Article 10, SAA.

<sup>76</sup> Title IV (Free Movement of Goods), Article 19 and Title V (Establishment, Supply of Services and Capital), Article 49, SAA.

<sup>77</sup> Title VI (Approximation of Kosovo's Laws to the EU *acquis*, Law Enforcement and Competition Rules), Article 73, SAA.

<sup>78</sup> Title VIII (Cooperation Policies), Article 91, Article 106 (Cultural Cooperation) and Title IX (Financial Cooperation), Article 119, SAA.

provisions to find their way into the practical jurisprudence of Kosovo. Article 74 of the SAA stipulates:

1. *The Parties recognise the importance of the approximation of the existing legislation in Kosovo to that of the EU and of its effective implementation. Kosovo shall endeavour to ensure that its existing law and future legislation will gradually be made compatible with the EU acquis. Kosovo shall ensure that existing law and future legislation will be properly implemented and enforced.*
2. *This approximation shall start on the date of signature of this Agreement, and shall gradually extend to all the elements of the EU acquis referred to in this Agreement by the end of the transitional period defined in Article 9.*
3. *Approximation will, at an early stage, focus on fundamental elements of [sic] the EU acquis in the field of the Internal Market, and in the field of Freedom, Security and Justice, as well as on trade-related areas. At a further stage, Kosovo shall focus on the remaining parts of the EU acquis. Approximation shall be carried out on the basis of a programme to be agreed between the European Commission and Kosovo.*
4. *Kosovo shall also define, in agreement with the European Commission, the modalities for the monitoring of the implementation of approximation of legislation and law enforcement actions to be taken, including efforts by Kosovo to reform its judiciary to implement its overall legal framework.<sup>79</sup>*

The requirements of this Article will have huge effects on the national legal system. The approximation process should be carried out in the light of this Article, thus avoiding conflicts and incompatibility with other laws. The process should be performed according to the principle of accurate interpretation and in conformity with the SAA provisions. This implies conformity with EU law.<sup>80</sup> The strategic document called the National Programme for the Adoption of the *acquis* (commonly known as the NPAA) is very crucial in this process. This is a planning document that is required in order to harmonize national law with that of the EU.<sup>81</sup>

Specifically, as regards competition and considering the matter from the institutional point of view, the SAA will influence the institutions dealing with competition. The ability of institutions to enforce competition rules will have more impact on the economic development of Kosovo. The following recommendations for the KCA will play a crucial role in implementing the provisions of the SAA regarding the approximation of legislation on competition. The following table shows the specific requirements:

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<sup>79</sup> Article 73, SAA.

<sup>80</sup> Lenaerts, K. and Van Nuffel, P. 2011. *European Union Law*. 3<sup>rd</sup> ed. Sweet & Maxwell. pp.770-812.

<sup>81</sup> National Programme for the Adoption of the *Acquis*.



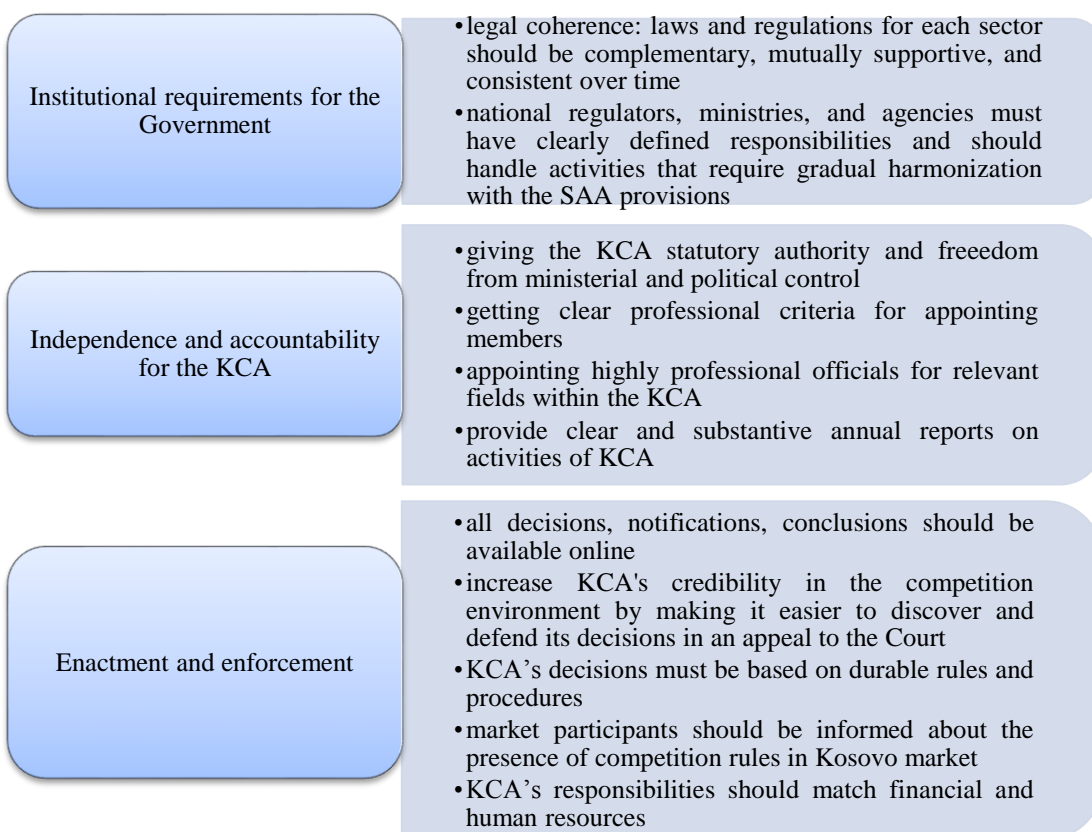


Figure 2. *Specific requirements for implementation of the SAA competition rules in Kosovo.*

In the light of this, the KCA should start to address new concepts on the quality of competition legislation and the effectiveness of legal harmonization through the process of the practical implementation of the SAA provisions on competition rules. Choosing methods and programmes to attain the effective implementation of the competition rules is one of the serious and decisive approaches towards the progressive implementation of the SAA in the area of competition.<sup>82</sup> This is an imperative step for the KCA in the process of enforcing competition law. Since Kosovo is small and young country, it is possible for it to develop a sound and independent system of competition law.

To sum up, the Copenhagen criteria (EU Council, 1993) are the same for all aspiring countries. However, countries are allowed to proceed with integration at different speeds according to their capabilities.<sup>83</sup> In the coming years, the approximation process stipulated by the SAA must be accepted without deviation. Kosovo's legal system must follow all European ideas: this is commonly known as the Europeanization of legislation. Such approximation would not be a

<sup>82</sup> This refers to the future updated NPAA (National Programme for Adoption of the *Acquis*), Action Plans, and Strategies.

<sup>83</sup> See Wohlgemuth, Michael and Brandi, Clara. 2006. Strategies of Flexible Integration and Enlargement of the European Union. A Club-theoretical and Constitutional Economics Perspective. *Discussion Papers on Constitutional Economics. Freiburger Diskussionspapiere zur Ordnungsökonomik*: 06/7. Walter-Eucken-Institut.



difficult task for Kosovo if the institutional assets, transparency and accountability were in place. By implementing the SAA, the domestic legal system can achieve entirely new perspectives and opportunities. Such effective implementation will open up opportunities in the economic and political context that are factors in the success of Kosovo.

### III.3. Assessments by the EU Commission

The EU Commission is the principal executive body of the EU. The Commission has general executive and management functions, has power to initiate legislation and has important executive responsibilities in policies such as competition and external trade.<sup>84</sup> Regarding the power to monitor the implementation of EU law, the Commission is required to ensure that the Treaties themselves (primary legislation) and any decision taken to implement them (secondary legislation) are properly enforced.<sup>85</sup> The main power vested in the Commission includes enforcing competition rules and keeping state aid under review.<sup>86</sup> The Commission has the power to negotiate international agreements on behalf of the EU, represents the EU in international organizations, and makes recommendations and delivers reports and opinions on many subjects. In order to monitor progress on implementing priorities and carrying out reforms, it has developed a screening mechanism. This screening mechanism is relevant for every European country that aspires to EU membership, and is referred to as the EU progress report system. The progress report sets out the way forward for the coming year and takes stock of the progress made over the last twelve months by each candidate and potential candidate country. It is a monitoring tool used by the EU Commission to check annually on progress. The annual report for Kosovo follows the structure of the Copenhagen criteria (1993), assesses the progress made and identifies the areas in which Kosovo needs to increase its efforts in respect of the enactment and enforcement of EU law. In addition to this, the progress reports present an assessment of what Kosovo, as a potential candidate, and later as a candidate country, has achieved over the reporting period. Reading the combined European Commission's annual reports, which are prepared using the framework of the stabilization and association process, provides ample information to draw one's own conclusions.<sup>87</sup> There is real power behind the veil of the EU's progress reports. This is particularly important for Kosovo, as an aspiring country on the trajectory of European integration. Thus, any step taken by Kosovo as part of the integration process, and especially steps taken in fulfilling recommendations and benchmarks, should involve a thorough legal analysis. This is related to the implementation of recommendations and the proper fulfilment of benchmarks according to recommendations given in the assessment by the EU Commission. This assessment by the EU Commission involves several areas, such as:

- the relationship between Kosovo and the EU within the stabilization and association process;

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<sup>84</sup> See Article 17, Treaty on European Union (TEU), and Articles 234, 244 to 250, 290 and 291, Treaty on the Functioning of the European Union (TFEU), *OJ C 326*, 26.10.2012.

<sup>85</sup> Article 258, TFEU, *OJ C 326*, 26.10.2012.

<sup>86</sup> Article 108, TFEU, *OJ C 326*, 26.10.2012.

<sup>87</sup> Blockmans, S. 2006. *Impact of EU Accession on the Role of (Potential) Candidate Countries' Executives*. In: Kellermann, A. E., Czuczai, J., Blockmans, S., Albi, A. and Douma, W. T. (eds.) *The Impact of EU Accession on the Legal Order of New EU Member States and (Pre-) Candidate Countries – Hopes and Fears*. The Asser Institute. T.M.C Asser Press. p.292.

- political dialogue, economic development and the capacity to take on the obligations involved in implementing the *acquis* (Copenhagen Criteria, 1993, including the additional Madrid criteria of 1995<sup>88</sup> with reference to administrative organization);
- the progress made in the preceding year;
- the criteria that must be satisfied; and
- the formulation of recommendations.

The assessment by the EU Commission is of crucial importance, because it highlights the state of readiness of Kosovo for joining the EU. Many of the recommendations and benchmarks require the alignment of Kosovo's legal system with EU law. Regarding competition law, many of the recommendations and benchmarks seek to address the existing legal system in Kosovo and align it with EU competition law rules. The factors behind the recommendations and benchmarks within the EU's assessment tools may vary, but what is common to them all is the challenge of transforming them into policy and legislation and at the same time monitoring their implementation. The human capacities available and the institutions within Kosovo are critical in such cases. The institutions need to understand the legal viewpoints and jurisprudential approaches in order to gain a necessary perspective on the future alignment of Kosovo's competition law with European Union competition law. The assessment by the EU Commission is a benchmark document that will assess and guide Kosovo in its work towards the implementation of the SAA during the coming years.

#### IV. Conclusion

Competition law is a crucial principle of a free market economy. Kosovo is aiming to become an open market economy. It is currently going through times that are highly significant for its future. This paper has highlighted the fact that in the coming years, an entirely new perspective will be opened for the country, and its institutions will be endowed with additional competences and responsibilities in the light of the implementation of the SAA's provisions on the approximation of laws, law enforcement and competition rules. The SAA is the most important legal mechanism for shaping the norms in the different areas and institutions that are necessary for its implementation. This paper has argued that the norms on competition law are of particular importance. Enhancing the institutions that develop those norms and that work for their practical implementation is of particular importance. In addition, Kosovo must re-fashion the approach of the legal order and must accept the principles that are crucial to the functioning of the market economy. Special attention needs to be given during the approximation to the EU *acquis*. Awareness of the phenomenon of the Europeanization of Kosovo's law is the key to preparing the economic life of Kosovo for its participation in the internal market of the EU. The institutional improvement of the KCA is of particular significance. A new alignment with the *acquis* on competition and the enforcement of the competition rules will, in turn, demand fundamental changes in the KCA. As time goes on, the KCA must have the powers necessary for the full application of the competition rules, state aid rules, state aid schemes and grants of aid, in conformity with EU law. In future research, detailed consideration should be given to the approximation of certain sectors (e.g. telecommunications, energy and the environment, consumer

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<sup>88</sup> Madrid European Council, 15 and 16 December 1995, *Presidency Conclusions*. Available at: [http://www.europarl.europa.eu/summits/mad1\\_en.htm](http://www.europarl.europa.eu/summits/mad1_en.htm) (Accessed: 21.11.2014)

goods and so forth) with the EU *acquis*. A study of the modes of approximation of national legislation with that of the EU would be advantageous for a European future for Kosovo. It would lead to a prospective accession to the EU and economic development, and would enhance consumer choice in Kosovo.

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