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**INVESTIGATIVE POWER IN PRACTICE – Breakout session 2: Requests for
Information – Limits and Effectiveness**

Contribution from Albania

- Session IV -

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More documentation related to this discussion can be found at: oe.cd/invpw.

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Investigative Powers in Practice

Breakout session 2 - Requests for Information Limits and Effectiveness -

- Contribution from Albania -

This paper first describes the legal framework and investigative power in Albania and ways of requesting for information (RFI). Then the paper describes three success stories on each of the investigative procedures, sector inquiry, preliminary investigation and in depth investigation, by stating the Albanian experience in requesting information and collection of data during the dawn raids. At the end, the paper draws some final remarks.

1. Legal Framework and investigative power

1. Albanian Competition Authority (ACA), is a public independent institution that function based on the Law no. 9121 dated 28.07.2003 “On competition Protection”-amended. The ACA mission is “Assuring a free and effective competition in the market through the implementation of the “Competition Protection” law, to prevent, detect and prohibit anti competitive firms’ conduct: prohibited agreement, abuse of dominant position, control on mergers and acquisitions; to promote competition through advocacy; to implement the legal framework of an independent institution in the Republic of Albania. The ACA is composed by the Competition Commission (CC) elected by the Parliament that acts as the decision making body, and the Secretariat that is the executive body.

2. The competition law applies to the “undertaking” and to “association of undertakings”. The undertaking is any legal or natural person, private or public, which performs an economic activity. Public and local administration bodies, as well as public authorities and entities, are considered as undertaking if they engage in economic activity. The “association of undertakings” are any kind of legal or factual association, legal or natural person, private or public, profitable or not profitable, which represents the interests of member undertakings.

3. Based on the competition law, the ACA can request for all kind of relevant data and information from undertakings and third parties for all its procedures. This information can be collected in written form via an official request for information letter, through interviews, meetings, questionnaires or inspections. Based on the articles 33-38 of the competition law, the ACA can request data from the undertakings under investigation or inspect through dawn raids and IT forensics to their premises.

4. Obligation to inform (art. 33); The Authority, by means of a request from the Secretariat or the Commission, may always request of third parties, undertakings or associations of undertakings to provide it with all the information required for the implementation of this Law, including confidential information or business secrets. Where the undertakings or persons do not provide the information required within the period set in the request of the Secretariat or provides incomplete information, or when the CC considers the information as necessary, the Commission may demand the information

concerned by a decision. The Secretariat request and the CC decision shall set the legal basis, the purpose and the time limit within which such information must be provided, as well as the fines provided by the Law in case of incompliance with the request or decision.

5. A special article on the competition law, art. 34, is dedicated to request for information (RFI) for the public entities. Obligations of public administration structures Central and local administration bodies, as well as other public institutions, co-operate with Competition Authority to ensure the provision of necessary information and evidences.

6. The Investigative Competencies (responsibilities) are foreseen in the article 35, where it is stated that the Secretariat conducts all the necessary investigations to the undertakings and associations of undertakings. Upon the Secretariat request, the CC shall give a written authorization to the Secretariat investigators to conduct necessary investigations, according to the procedures provided by this Law. The Secretariat investigators must present the authorization when conducting an investigation, which contains the object and the purpose of the investigation and also the sanctions. When the necessary investigation is delayed, the ACA requires the assistance of the State Police.

7. Inspection in business premises (article 36) can be done by the Secretariat investigators and other persons authorized by the CC. They may carry out searches by:

- entering into the premises, the means of transport, and on the premises of undertakings during working hours;
- examining the books and other business records, irrespective of the medium on which they are stored, such as in a written or electronic form;
- taking or providing, copies, or extracts from the books or records;
- sealing any premises or books or business records, for not more than 72 hours, if it is necessary for the investigation;
- asking any representative or member staff of the undertaking for explanation relating to the subject-matter for facts and documents regarding the object and the purpose of the inspection.

8. Inspections in other premises (article 37), may take place, by the Secretariat investigators authorized through a decision of the District Court, which has jurisdiction power in the place of the inspection. The investigators are empowered to enter: a) the domicile of the administrators, managers, directors and other staff members, as well as at the domicile and on the business premises of individuals (and legal persons, whether external or internal, in charge of commercial, accounting, administrative, tax and financial management, between 7.00 and 18.00; b) other premises, equivalent to the domicile, if there is reason to believe, given the facts and concrete circumstances of the case, that in such premises are to be found books or other professional documents which are deemed necessary to prove a serious infringement of Articles 4 and 9 of this Law.

9. Beside the power given by the law, the ACA has in place also its secondary legislation to collect data and information. By decision no.176, dated 24.02.2011, the Competition Commission approved the regulation “On Investigative procedures of the ACA”. This regulation is approximated and is in compliance with the EC Regulation 1/2003 of 16 December 2002 “On the implementation of the competition rules according articles 81 and 82 of the Treaty” (32003R0001). This regulation defines the procedures that the authority implements during the investigation phases (sector inquiry, preliminary

phase, in-depth phase) and the relations with undertakings under investigation and other the third parties.

10. Also by decision no. 410, dated 31.03.2016, the CC approved the “Regulation on administration of electronic data during inspections”. This regulation defines the procedure of administration of the electronic data collected during inspections.

11. As it is foreseen by article 30 of the competition law, the ACA should keep confidentiality and commercial secrets: The members of the CC and all Secretariat employees, or other persons authorized by the CC shall be subject to professional secrecy and shall not divulge to any person or authority whatsoever confidential information acquired owing to their duties, except the cases when it is needed to testify before a court. Such obligation continues to apply also after the termination of the duty. Secretariat publications shall not contain information constituting commercial secret.

12. The ACA investigators during dawn raids can seize the documents and evidences. If it is necessary for the investigation, the investigators may seize objects, which may be important as evidence in the investigation for not more than 72 hours. The person affected by the seizure shall be informed thereof without undue delay. The District Court where the seizure takes place, by a request of the ACA may extend the time limit of the seizure as referred in paragraph 1 of this article, for not more than 6 months. The investigators must take minutes, a copy of which shall be presented to the person affected by the seizure. The person affected shall be informed of the right to request judicial review of the seizure.

13. In cases when the data provided to the authority is incorrect, incomplete, misleading information or undertakings refuse to answer any questions on facts or delay the deadline for providing the data, fines for not serious infringement may apply. The amount of fine that the CC by decision on undertakings or associations of undertakings fines not exceeding 1% of their aggregate turnover in the preceding business year.

2. Request for Information Success Stories

2.1. Sector Inquiry in the Banking Sector

14. The CC by decision no. 373, dated 16.09.2015 “On the opening of a sector inquiry into the banking sector” decided to open a sector inquiry in order to make an assessment whether was any competition infringement in different services and products offered by the 16 banks of the second level in Albania. The products/services that were analyzed in this inquiry were: current accounts, deposits, loans, overdraft, mortgage, debit and credit cards, money transfers, treasury bonds, e-banking. The objectives of this inquiry were evaluating legal barriers, market structure and performance, concentration indicators, conduct of banks regarding competition, assessment of the consumer choice to switch banks especially in the mortgage and loan market, and assessment of the contractual relationship the banks had with notaries, real estate evaluators, insurance companies and their selection procedure of this contracts.

15. During this procedure, the ACA requested written information from the Central Bank of Albania as the regulatory body in the banking sector. The information collected was mostly used to cross-check especially the quantitative data that was provided by the 16 banks of second level operating in Albania after requesting individual RFI to them. RFI was also sent to the Albanian Association Bank (AAB).

16. In order to collect quantitative data especially related to the consumer choice and contractual relationship of the banks with third parties (notaries, evaluators and insurance companies) there was compiled a written questionnaire that was sent in electronic and through official letter to banks. Even though the questionnaire was sent the same format to all of the banks, there was a huge amount of data collected and different data format from banks, as different banks had different ways of reporting the data and slightly differentiated for similar products. Organizing and analyzing the data was the main challenge of this inquiry.

17. The main findings of this inquiry were compiled in the report that was presented in a roundtable organized with the representatives of the AAB, Central Bank and representatives of the Ministry of Economic Development, Tourism, Trade and Enterprise.

18. At the end the CC by decision no. 453, dated 07.03.2017 "On giving some recommendation to the Bank of Albania, AAB and banks of second level" decided to close the investigation with recommendations. Recommendations were given to the Central Bank of Albania on issues related to cooperation on competition issues with the ACA. Another recommendation was related customers transparency for conditions in the product of current accounts and time deposit accounts, the banks have to notify their customers and get their approval when they makes contractual changes. Other recommendations were given as the Central Bank of Albania has to identify measurements to decrease the cost of money transfers; has to promote the e-banking service and has to identify measurements to decrease the usage of cash in Albanian economy.

19. Recommendations were given to AAB regarding the compilation of a Code of Conduct to be used by all of the banks of second level in order to increase the transparency toward customers for their products.

20. Recommendations were given to banks of second level to allow to the customers to choose from a list for the real estate evaluator and the notary; to promote the usage of local cards that have lower costs; to create easiness for customers to switch banks by decreasing the blocking cost that keep the customer blocked with a certain bank.

2.2. Preliminary Investigation in the market of movie screenings in cinema chains in Tirana

21. After a monitoring process conducted by the Secretariat of ACA, in the market of movie screenings in cinema chains in Tirana, it was found that this market has an oligopolistic structure with only three undertakings operating in this market. The market is very transparent related to prices and time schedules, as every cinema publishes them in the official websites and outside in screens at their premises. The cinemas have similar conduct related to the tickets prices as well regarding to marketing and special discount/offers. This conduct might be subject of investigation under the Albanian competition law.

22. The ACA by decision no. 466, dated 20.06.2017 decided to open a Preliminary investigation in the market of movie screenings in cinema chains in Tirana".

23. In order to get the facts and necessary data, RFI was sent to the undertakings in the market, and special searches were conducted in the websites of the cinemas in the region in order to perform a benchmark analysis regarding the ticket prices.

24. Inspections were carried out as well. The inspections were done on the same day at the same time at the premises of the 3 undertakings. During the inspections the inspectors had interviews with the representatives of the undertaking to get explanation for the

situation in the market, especially if there were any coordination or communication with the competitors; contractual relationship with national producers of movies; contractual relationship with the distributors of the foreign movies; relationship with the Albanian National Center of Cinematography related to the reporting of the sales of the ticket prices.

25. After the analysis of the data and other collected documents, the case handlers compiled the report on the investigation by describing the situation in the market, market concentration and competition among the undertakings.

26. The main findings of this investigation were related to a dominant undertaking in the market (Cineplexx) and high economic barriers to entry in the market. The dominant undertaking imposed higher prices of the ticket compared to the other undertakings, but this was as a result of the most advanced technology used in movie screening. Compared with the prices of the region, in the capital cities like Podgorica, Skopje, Belgrade and Zagreb, the ticket prices in Tirana were relatively lower. From the comparison of the data between Cineplexx in Albania and the Group Cineplexx in the region, the prices in Albania were lower than prices elsewhere.

27. At the end of case the CC by decision no. 479 dated 26.10.2017 “On closure of the preliminary investigation in the market of movie screenings in cinema chains in Tirana”, decided to close the investigation in the market. In order to keep records on the conduct of the dominant undertakings Cineplexx, the ACA in the decision, requested to the dominant undertaking to send to the ACA every 6 months, each 10th of April, and each 10th of October, data on the sales for the ticket prices, respective costs, and financial data sheet.

2.3. In-Depth Investigation in Bid-Rigging

28. Based on a request that arrived at the authority from the Public Procurement Agency (APP), for a suspected bid-rigging in public procurement procedure “Request for Proposal” with object “Repairing’s of the offices for an object in the Administrative Unit of Lukova” in Municipality of Himara (South of Albania), the CC by decision no. 500, dated 07.03.2018 “On opening the preliminary investigation in the public procurement market for Tea-D and A.E.K&CO” decided to open the investigation.

29. The procurement procedures are done in an electronic system managed by the APP, where each operator offer their bids and upload the required documentation. In this procurement procedure participated 4 operators, and it was found in the system that winner operator “A.E.K & CO”, has uploaded to the electronic system from its own account a document from another operator participating in the same procedure Tea-D.

30. Based on these findings the CC, by decision no. 506, dated 02.05.2018, decided to open the in-depth investigation for "Tea-D" and "A.E.K & Co" to see if there is any signs of bid-rigging on their bids as a competition infringement on prohibited agreements as foreseen by article 4 of Albanian law on “competition protection” between the two operators.

31. The ACA requested through RFI, facts and necessary data from the Municipality of Himara, APP and from the undertakings under investigation. Besides RFI, down raids were performed on the premises of the two operators.

32. The inspections were carried out by two groups of inspectors at the same time, in the same day, in the offices of A.E.K in Saranda city and in the offices of Tea-D in Gjirokaster city. During the inspection, respective “Record for getting explanations for

facts and documentation, related to aim and object of the inspection” and “Record for the inspection on the undertaking” were held with questions and reciprocal responses.

33. The main findings of the investigation were related to mutual documents found in both operators’ offices besides the fact of the distance from each other, which would be the case of covered offer scheme in bid rigging as based on the methodology of the OECD¹ and as foreseen to the Guideline² that the ACA has compiled based on that methodology. Under this scheme, one of the competitors agrees to submit a bid higher than the other’s bid, in order to give the impression of a clean bid and a pure competition process by allowing one operator to win the bid.

34. Under these conditions, the CC by decision no. 535, dated 17.07.2018 “On imposing fines towards the undertakings Tea-D and A.E.K & CO for a bid rigging in a public procurement” decided to fine the two operators for infringement of article 4 prohibited agreements of the competition law. The decision was sent to the APP, in order to proceed with according to their law in force, when operators operate in bid-rigging schemes, they can be suspended from public procurement procedures from 1-3 years.

35. The APP published in their official website the decision to exclude A.E.K & CO from public procurement for 1.5 years. For the operator Tea-D, the APP is in the process of making a decision.

3. Concluding remarks

36. Based on the legal framework, the ACA has its power to request for information to undertakings and other third parties. Other data, evidences and facts can be collected during down raids, and on site inspections. Questionnaire’s and interviews can be used as well during sector inquiry and other investigative procedures. The data collected are organized and storage as foreseen in the internal regulations on administration of the data.

37. The main challenges of RFI are related to the identification of the sources of the data, and collaboration with public institutions especially in submission on time of the requested data.

¹ <http://www.oecd.org/competition/cartels/fightingbidrigginginpublicprocurement.htm>.

² <http://www.caa.gov.al/file/publikimet/brochure.pdf>.