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Competition Law and Policy in South East Europe

by
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Abstract. *Competition policy is a strong building block foundation of market economies. Development of competition policies in South East Europe ("SEE") aims at creating a level playing field for investment, which is of major importance for the economic progress of the countries in the region. In 2001, a comprehensive programme for building capacities of SEE competition authorities was launched as a contribution to stability, sustainable growth and welfare in the region. Funded by the South East Europe Compact for Reform, Investment, Integrity and Growth, it was organised by the OECD Competition Division in partnership with the competition authorities of Bulgaria, Former Yugoslav Republic of Macedonia, and Slovenia. The long-term objectives of the programme were to strengthen national competition authorities of the region as law enforcers and advocates for economic reform based on competition principles. A major objective was also to support the establishment of intra-regional co-operation in the competition policy area. This concluding report draws on the experiences and the documentation produced by the representatives of SEE competition authorities, and provides an overview of the competition regimes in the SEE countries.*

* The Concluding Report that this article is based upon was prepared by the Competition Division of the OECD Secretariat (Lennart Goranson and János Volkai), and does not necessarily reflect the views of the Governments, institutions or representatives of the participating SEE countries. Neither does it necessarily express the opinions of the OECD members.

EXECUTIVE SUMMARY

The Competition Division of the Organisation for Economic Co-operation and Development has been actively engaged in capacity building activities and technical assistance to the economies in transition in Central and Eastern Europe since the early 1990s. In 2001, a more comprehensive programme for building capacities of South East Europe ("SEE") competition authorities was launched as a contribution to stability, sustainable growth and welfare in the region. This programme was initiated by the Investment Compact of the Stability Pact for South East Europe, and run by the OECD Competition Division in partnership with the competition authorities of Bulgaria, FYR of Macedonia, and Slovenia.

The long-term objectives of the programme were to strengthen national competition authorities of the region, in particular their role as effective competition law enforcers and advocates for economic reform based on competition principles. A major objective was also to support the establishment of intra-regional co-operation in the competition policy area. Important steps have been taken to initiate a process, which eventually would lead to the achievement of these objectives.

This report describes the activities performed and experiences gathered in the period June 2001 through March 2002. It analyses the present situation, describes competition problems, and finally proposes some conclusions and policy recommendations.

This report should be seen as addressing an important and substantive first phase in a path that needs to be pursued by SEE countries. It builds upon the contributions from participants in the form of Status and Problems Inventory Reports ("SPIR") and Activity Plans by individual countries relating to three major aspects of competition policy. This inside perspective of South East Europe competition authorities contributes to the special and unique qualities of the report.

The lack of competition culture is the most pervasive problem in all SEE countries and it is a key impediment to pro-competitive reform and effective fight against attempts to exclude competition. Often, competition authorities are the only potential advocates of competition culture but some SEE competition authorities are not convinced about the importance of the advocacy role or lack sufficient political support for assuming that role. However, most competition problems identified and discussed in the Competition Initiative –

EXECUTIVE SUMMARY *(cont.)*

whether dealing with market reform or establishing an effective competition regime – relate in one way or another to the general attitudes towards competition. Thus, the SEE competition authorities should seize the existing opportunities to involve themselves in competition advocacy and, where necessary and possible, they should receive formal powers and sufficient resources to advocate for competition and to build a better competition culture.

Owing to the lack of a competition culture, many SEE competition authorities have received insufficient resources to enforce their competition laws. Countries where competition authorities suffer obvious resource problems should give higher priority to competition policy. However, a more general resource problem throughout South East Europe relates to priority-setting in competition law enforcement and other duties performed by the competition authorities, which may lead to inefficient use of available resources. Instead of addressing behaviours that have a limited effect on competition, SEE competition authorities should be encouraged to concentrate on the most egregious violations of competition rules, in particular hard-core cartels, and on advocacy against those policy decisions that are most detrimental to competition.

SEE competition laws do not generally provide satisfactory tools to fight attempts to exclude competition. In particular, almost all SEE competition authorities have limited investigation and sanctioning powers, or even if they have sufficient powers by law, technical and procedural problems prevent the effective use of such powers. Further, some SEE laws do not provide for the basic elements of substantive competition rules. In the present process of the EC law approximation, there is a need to address all these problems.

Finally, many SEE competition authorities and regulatory institutions suffer from undue interference from interest groups or other questionable influence. Some SEE countries have competition authorities that are dependent on the government in a way that may affect public trust in competition law enforcement, or assign the task of delivering competition decisions to representatives of the business community. Also in the field of competition advocacy, SEE competition authorities may sometimes have difficulties in upholding an independent opinion.

Competition authorities have an important role to play in the transition to effective market economies by providing guidance to economic reform and defending markets against attempts to restrict or eliminate competition. In this way they contribute to an economic environment favourable to investment and entrepreneurship, key prerequisites for growth and welfare. Strong, competent competition authorities that perform their tasks in an independent manner, free from undue interference is one essential element in the transition to market economies.

1. Background

1.1. Competition law and policy in transition economies

In the last decade a large number of countries have fundamentally changed their economic system, from a centrally planned economy into a decentralised market economy. This process has not been the same in all those countries. Also the pace of reform has been different as a result of previous history, political developments and other factors, mainly of an economic nature.

One common factor, however, is the central role of competition law and policy in creating an economic environment where consumers' preferences and the efforts to compete with economic operators to satisfy those demands, lead to economic efficiency and welfare.

Planned economies are generally characterised by a high degree of economic concentration. Other typical features are state or other collective ownership, absence of an effective price mechanism, lack of administrative autonomy for economic entities, and insufficient framework setting up transparent and common rules. All these issues will have to be addressed in the transition process by building up a competitive economy.

However, a competitive economy does not mean an unregulated economy. An unregulated economy would not provide the desired economic or social benefits. The rule of law, reliable institutions, good governance, and efficient infrastructure contribute to an environment where growth and investments lead to increased welfare. Competition law, effectively enforced by independent authorities and regulatory reform guided by competition principles, is particularly important for making markets work to the benefit of all citizens.

There is persuasive evidence from all parts of the world that competitive markets allowing free access, bans on discrimination and a level playing field are the best way to encourage the investment and the entrepreneurship necessary for growth. Recent OECD work has further concluded, on the basis of extensive empirical analysis, that lack of product market competition has significant negative effects on employment rates of OECD countries, in some countries up to three percentage points.

The social, economic and legal environment of the transition economies is usually different from that in settled market economies. Unlike in most developed economies, the state has a very strong role in the economy and, consequently, in economic transition. In addition, the entry of new competitors is hindered by various factors, *e.g.* regulatory and technical barriers to entry, lack of a legal and institutional infrastructure, limited amount of capital and lack of entrepreneurial spirit and competition culture.

Experiences from many transition economies show that competition authorities may have an important role to play in dealing with these specific

problems. The application of competition policy principles to regulatory and structural reform has been vital to recent economic progress in many economies in transition. Having established competitive markets, sound competition law enforcement is necessary to prevent enterprises from creating cartels and/or abusing monopolies with the aim of excluding existing or potential competitors or otherwise preventing the market from operating efficiently. Building up independent competition authorities includes providing necessary capacities and powers for taking action against anti-competitive behaviour. This also includes recognising the role of these authorities as advocates of pro-competitive solutions in designing, developing and implementing government policy and legislation.

1.2. Competition law and policy in SEE countries

1.2.1. General political and economic developments

The South East Europe countries have a common trait in that their transition from planned economies to market economies is a part of the general political changes in Central and Eastern Europe having started more than ten years ago. However, the SEE countries present a broad variety of characteristics and backgrounds, which has led to differences in their development and pace of reform.

Three of these countries, Albania, Bulgaria and Romania, have retained their geographical boundaries in this period, whereas Bosnia-Herzegovina, Croatia, FYR of Macedonia and FR Yugoslavia were all part of the same country before the hostilities in the Balkan region in the 1990s.

Two countries, Bulgaria and Romania, are in the process for accession to the European Union, and have concluded Europe Agreements. In 2001, FYR of Macedonia and Croatia concluded Stabilisation and Association Agreements with the European Union, similar to the Europe Agreements. Albania will start negotiations of the Stabilisation and Association Agreement in 2003. The ambition to approach the EU and the European internal market has stimulated institutional and economic reforms in all countries, but at different pace and to a varying degree. Privatisation programmes and efforts to attract foreign investments are salient aspects of economic reform. Generally, there are needs to strengthen the legal and judicial infrastructure and to fight against corruption more effectively.

All SEE countries experienced a heavy drop in GDP in the early 1990s, and most of them have not yet reached the level of 1989. GDP per capita is mostly below levels in the Central European countries but since 2000 there has been significant GDP growth in all countries of the region.

1.2.2. Implementation and development of competition regimes

In the second half of the 1990's, six of the seven SEE countries adopted or significantly updated their competition laws, whereas Bosnia-Herzegovina started to prepare its competition legislation. To a diverging extent, all those legislations follow the EC law, and practically all competition laws provide for the possibility of judicial appeal.

Although there are some exempted sectors, in general, SEE competition laws apply to the whole economy. These laws often extend to fields beyond the merger control and the prohibition of cartels and abuse of dominance. For example, competition legislation may also cover fairness of competition, corruption, or state aids.

The six SEE countries with competition legislation have all established a specialised body for enforcing competition laws. Such bodies have various levels of organisational independence from the Government. Also the factual independence of the competition authorities may vary amongst countries.

Some competition authorities have advisory bodies. Except in Bulgaria and Romania, competition authorities are small, and only in Romania there are offices at the regional level.

1.2.3. Competition reform

The transition to market economy in South East Europe generally started in the first years of the 1990s, or even before. However, progress was often slow and hampered by difficulties and setbacks. For example, economic crises hit Bulgaria in 1996-97, Albania in 1997 (the pyramid schemes) and Romania in 1997-99. Croatia experienced a recession in 1998-99. Political unrest or open hostilities in different parts of former Yugoslavia and Albania in mid- and late 1990s held back further advances in economic reform. As a result, the reform process in some of the countries has gained new momentum after the millennium shift.

In substance, the transition has to a large extent met the same needs for reform in all SEE countries. Price liberalisation and trade liberalisation has often been approached at an early stage. Also privatisation has mostly been high on the agenda. Privatisation schemes have related to different sectors of the economy, from small units in agriculture, trade and manufacturing, to monopolies and other major enterprises that have attracted the interest of foreign investors.

The creation of a pro-market legislation includes a large number of legislative areas, *e.g.* commercial law, bankruptcy law, contract law, property law, securities law, legislation on industrial and intellectual property. The adoption of competition laws is an important element in this reform area. The

need for more effective fight against corruption and black markets is broadly recognised.

Financial sector reform has generally been recognised as a vital prerequisite for entrepreneurial activity and investment. Both regulatory and structural issues have been approached in this field.

Liberalisation in the utilities and infrastructure sectors – electricity, gas, telecommunications, postal services, public transports, etc. – is presently underway in most SEE countries. Some important steps have been taken, aiming at opening such sectors (or parts of them) to competition. Still more important are the present schemes for continued competition reform in these sectors.

1.2.4. The importance of competition law and policy in the South East Europe region

In strengthening their economies, creating fundamentals for sustainable economic growth, and building up necessary physical, legal and institutional infrastructure, the SEE countries will need to implement competition law enforcement and integrate competition policy into various fields of economic policy.

Some examples of specific measures are:

- re-structuring economic sectors in order to open up to effective competition;
- securing stable and transparent rules of the game for foreign investors;
- regulating network industries in order to facilitate access, prevent discrimination, and promote competition among operators in competitive parts of the sector;
- using competitive procurement techniques in the utility sectors;
- developing consistent competition law enforcement throughout the region, based upon sound and established competitive principles;
- facilitating market entry and establishment of new companies through actions against discriminatory and exclusionary measures detrimental to small and medium-sized enterprises by both established companies and local/regional government;
- through competition policy advocacy, preventing regulation in other policy fields from unnecessary restriction of competition, and proposing alternative solutions; and
- through competition advocacy, creating a "competition culture" and enhancing public understanding of the benefits the competitive markets create for consumers.

2. Scope and activities of the Initiative

2.1. The organisation of the Competition Law and Policy Initiative

In 1999, at the European Union's initiative, the Stability Pact for South Eastern Europe was adopted. More than 40 partner countries and organisations undertook to support the countries of South Eastern Europe "in their efforts to foster peace, democracy, respect for human rights and economic prosperity in order to achieve stability in the whole region".

"Competition Law and Policy in SEE" is a Regional Flagship Initiative (RFI), initiated and funded by the Investment Compact of the Stability Pact and run by the OECD. The OECD Competition Division set up a small project team responsible for organising and carrying out the different activities under this Initiative. In order to benefit from the local knowledge on specific characteristics of the SEE economies as well as of the existing networks among SEE competition officials, the Initiative was organised in partnership with the competition authorities of Bulgaria,[1] FYR of Macedonia[2] and Slovenia.[3] Slovenia, not being a beneficiary, has a special role as provider of technical assistance to neighbouring countries in the field of competition law and policy. Thus, various activities of the Competition RFI have been co-ordinated with initiatives funded by the Republic of Slovenia supporting the competition authorities of the least developed countries in the region.

Before launching the initiative in spring 2001, co-ordination took place with the European Commission (EC) in order to ensure that duplication of activities was avoided. EC representatives from DG COMPETITION and DG EXTERNAL RELATIONS explained that the OECD initiative was supporting and complementary to EC activities in the region. The liaison with the Commission has since then been upheld through the participation of the EC representatives in several meetings. The Commission has later on confirmed that there are no indications of the Initiative overlapping with other EC activities in the field. On the contrary, the Commission officials aware of the activities in the field have expressed their positive opinion on the work being done by the Competition Law and Policy Initiative.

The beneficiary countries of this Initiative are Albania, Bosnia and Herzegovina, Bulgaria, Croatia, FYR of Macedonia, Romania and FR Yugoslavia (Serbia and Montenegro). Moldova, a more recent member of the Stability Pact, was invited to join but has so far not been able to participate in any of the activities under the Initiative.

In spring 2001, the OECD Competition Division, in partnership with the competition authorities of FYR of Macedonia and Slovenia, submitted a proposal for a multi-year competition policy Regional Flagship Initiative to the Project Team of the Investment Compact. The long-term goal of this Initiative is to improve economic performance in the SEE region by strengthening its

competition authorities in order to enforce competition laws effectively, to play a major role as advocates of competitive reforms and to support each other through informal international co-operation.

In June 2001, a budget allocation for the activities until the end of the year made possible the Initiative launching at a meeting in Ljubljana with representatives of all beneficiary countries, the organising partners,[4] the European Commission and the Investment Compact. The proposed Initiative was strongly supported and the SEE competition authorities agreed to contribute actively to the programme.

2.2. Objectives and working methods

The RFI "Competition Law and Policy in SEE" should be seen as a contribution to stability, sustainable growth and welfare in the South East Europe region. In particular, the initiative aims at providing know-how on the creation of competitive markets and knowledge on how to protect markets from attempts to restrain or eliminate competition. To this end, a process has been initiated to help beneficiary countries to *a)* develop their abilities to identify competition problems, *b)* find the best tools for dealing with them, *c)* formulate appropriate activity plans, and d) build up networks with nearby countries for mutual support and sharing of experiences.

2.2.1. Key strategies

In order to make the Initiative successful, seven key strategies were applied:

1. *Demand-driven:* The organisation of events started by approaching real competition problems, as perceived by participating countries. Consequently, participants themselves worked out status reports with competition problem inventories.
2. *Deliverables:* Going for deliverables was achieved by initiating and supporting a process leading to concrete action. As a basis for such action, the participants and the OECD Secretariat produced working documents and other concrete outputs.
3. *Co-operation:* Competition authorities in the region often face similar challenges, although there are considerable differences between them in terms of development and capacities. Co-operation was supported in order to help participants build networks between the competition authorities and the competition officials in the region.
4. *Local ties:* The RFI was to have a strong regional focus. Local ties were ascertained by engaging SEE partners in the organisation of the initiative and having all meetings in the region.

5. *Developing participants' capacities:* The RFI was organised as a process by which participants were supported to develop their capacity to identify and deal with competition problems in their economies in effective ways. Consequently, events put strong emphasis on participants' own contributions. Language skills are a necessary precondition for making use of, and eventually contributing to, the global dialogue on competition law and policy. The working language of the RFI was therefore English only.
6. *Coherence:* Activities under the Investment Compact have focused on six main policy clusters. Four of these bear strong relevance to the competition law and policy, *viz.* FDI, SME support, corporate governance, and Public-Private Partnerships for infrastructure. Coherence means co-ordinating the planning of the Competition Law and Policy RFI with other policy areas.
7. *Synergies:* To the extent possible, other related activities in the region were taken into account, *e.g.* those of the EU. The aim was to avoid duplication in relation to other organisations, and also to identify possibilities of co-ordination and mutual support.

2.2.2. Medium-term and long-term objectives

The Competition Law and Policy in SEE RFI aims at promoting efficient, open and stable international and domestic markets in SEE by improving the capacity of the competition authorities to halt exclusionary and other anti-competitive practices and effectively advocate market-oriented regulatory reform. In order to make this general goal operational, a set of medium term and long-term objectives were set up. In accordance with the established OECD management principles, these objectives were to be specific, measurable, agreed, realistic, time bound, and tough. The medium-term objectives were to be achieved by the end of the first phase of the Initiative, after approximately one year, whereas the long-term objective should be seen in a three to five year perspective.

The medium-term objectives agreed with the participants stated that the competition authorities in all countries of the region have:

- identified major impediments to the development of competitive markets,
- identified appropriate tools and remedies, and
- drafted plans focusing those tools and achieving those remedies.

As long-term objectives of the Initiative, the competition authorities in all countries of the region:

- enforce competition rules pro-actively and effectively,
- initiate regulatory and structural reforms aiming at creating competitive markets, and
- support each other through a well established but informal co-operation.

2.2.3. Working methods

Given that regional integration is one of the objectives of the Stability Pact, a first step was to establish a limited but permanent group of participants in the Initiative. This approach aimed at safeguarding continuity between the various activities. However, not of less importance, it has served the purpose of building confidence, as a necessary prerequisite for the creation of a network developing into a regular intra-regional co-operation between competition authorities. Thus, the participants are heads and other leading officials of the national competition authorities of the seven SEE countries. To the extent such an independent authority has not yet been established, Ministry officials responsible for preparing rules and institutions in the competition policy area have represented the participating country.

Establishing a real competition-oriented economic environment is a long-term process. Beyond adopting laws and regulations, and establishing institutions, a crucial element is the creation of a competition culture. The process of accepting and actively supporting the development of competitive markets involves a wide variety of players, including the political level, the public administration, the trade and industry, the opinion leaders, and not least the consumers.

Recognising these challenges for a competitive reform, the Initiative has set up objectives to be achieved in the long run. This approach has equally been decisive in organising the Initiative which aims at initiating a coherent process where different elements interact and build upon each other, rather than carrying out a number of separate, stand-alone events.

The proposal for the Competition RFI and the Project Plan adopted by participants in June 2001 was based upon a programme running in three separate phases.

In a first phase, the Initiative included a series of meetings with the group of heads and other leading representatives of the national SEE competition authorities, each meeting focussing on specific aspects of competition law and policy. Participants agreed to submit analytical papers on the situation in their country and the major problems relating to the theme of the meeting. At the meeting these contributions were discussed among the participants and with a panel of competition experts, mainly from the OECD members. The panellists also gave substantive presentations on topics relevant to the theme of the meeting, which were supported by background materials provided by the OECD. Based upon the expert presentations and the problem inventories, the participants and the panellists also discussed possible remedies and solutions to the problems identified by the participating SEE representatives. After the meetings, the participants produced activity plans on how to approach the most important problems identified. Those plans were discussed at the next meeting.

The second phase of the programme envisaged country reviews on the progress of the competitive reform, which constituted the basis for a regional comparative review.

The final third phase envisaged regular OECD-style peer reviews, as well as other country-specific activities in response to needs identified in the cross-regional comparison.

As a result of the lack of funding, the programme was concluded after the first phase. However these is provision for a follow-up review meeting in May 2003 to establish what progress is being achieved and clarify major issues that still require attention and action.

2.3. Principal themes of the Initiative

As a major outcome of the Initiative, the participating competition authorities are expected to strengthen their capacity to play a major role as *a)* pro-active and effective enforcers of competition rules, and *b)* initiators of regulatory and structural reforms aiming at creating competitive markets. An effective competition regime rests upon four cornerstones, viz. *a)* creating the adequate legal tools, *b)* applying them in a correct and effective way, *c)* having sufficient institutional capacity and resources, and *d)* being recognised as an advocate of competition principles to guide regulatory reform.

In order to build up such effective competition regimes, the competition authorities need to recognise the different aspects of promoting and defending competitive markets.

2.3.1. "Creating" competition where there is none

The starting point is a situation where no competition exists. This may be a result of a conscious political choice, *e.g.* when a planned and regulated economy is preferred to an open market economy. The transition economies in SEE and other regions are examples of a change in the political system from precluding to supporting competition.

Technically, there are different mechanisms that may preclude competition in an economic sector. A legal monopoly prevents the establishment of more than one company in the sector. However, competition may in practice also be eliminated through rules limiting market behaviour or access. For instance, when an administrative authority sets prices, companies are unable to use the price mechanism as a competitive tool. In some instances a lack of competition is due to a factual but not legal monopoly. For example, rules or structures that in practice deter potential competitors from establishing themselves in a sector may lead to such a situation.

Strictly speaking, competition can not be created through political or administrative decisions. Competition occurs in a market when there are

sufficient incentives to compete and there are no impediments preventing market entry. The process of "creating" competition consequently consists in identifying the factors that preclude competition, and remove them.

In some countries competition authorities have the power to remove or change rules that exclude competition. However, the normal role of the competition authority in this field is to *a)* identify impediments to competition, *b)* analyse these impediments, *c)* find alternative solutions, and *d)* advocate for change.

The first theme of the Initiative deals with various aspects of market opening. The dialogue started by discussing the characteristics of a competitive market and how to build a competition culture. This theme includes identifying obstacles to competitive markets and models and techniques for opening markets for competition. The discussions have recognised that there may be markets where competition is not possible or desirable, and that these markets have to be regulated in special ways. In some countries interventionist approaches have been applied to markets where competition does not work properly. Experience shows that such approaches may have serious drawbacks. Finally, a crucial topic within the first theme is the role competition authorities could and should assume in relation to the opening of markets to competition.

2.3.2. The substantive and procedural tools for fighting competitive restraints

Opening a market for competition is never final. Also in the markets characterised by free competition, which are open to the challenges of new entries, the danger of attempts to limit or eliminate existing competition remains. There are two principal sources of such threats, *a)* the public rules and the administrative application of such rules, and *b)* the behaviour by market actors.

The first category of competitive restraints includes laws, rules and regulations that limit or distort competition. In some cases the anti-competitive effect is intentional. However, mostly such rules have the purpose of achieving objectives in other policy areas, and the distortion of competition is an unintended side effect. In some instances the rules are not anti-competitive by themselves, but applied by government agencies in a discriminatory way.

The role of the competition authorities in dealing with competitive restraints originating from public rules and governance is mainly similar to the approach described above on the opening of markets to competition. Although competition authorities in some countries may have powers to overrule political or administrative decisions, the main tool is advocacy based on fact-finding and analysis.

The second category deals with behaviour by market actors. In a competitive market there is also an incentive for companies to gain market power allowing them to increase profits. As long as these efforts take the form of attempts to better meet consumer needs, increased efficiency, *etc.*, they result in an increased welfare. Competition policy has the purpose of preventing market actors from achieving market dominance through anti-competitive means, such as colluding with competitors, unilaterally abusing a dominant position, or creating a market structure that eliminates future competition.

In order to effectively fight against such attempts to eliminate or restrict competition, competition authorities need tools in the form of legal rules. Those rules are of two kinds: substantive rules and procedural rules.

The substantive rules identify those kinds of behaviour that are deemed detrimental to competition, and set out the legal consequences of such actions. Examples of such substantive rules are the prohibitions of cartels and unilateral measures that eliminate or restrict competition. In the field of mergers, competition rules may state that they are subject to administrative control when certain criteria are met. Competition laws from different countries display a considerable variety in their substantive rules. However, in the later years, there has been a clear tendency of convergence towards a limited number of core principles, especially among developed economies.

Competition authorities' opportunity to enforce the substantive competition rules strongly depends upon the available procedural tools. Such tools may in particular include rules for getting information on infringements and rules on sanctions in order to deter companies from violating the substantive provisions.

The second theme of the Initiative deals with the legal tools allowing competition authorities to effectively fight any competitive restraints. The theme approaches questions on the substantive rules to be included and not to be included in a competition act, as well as on the dividing line in relation to other pieces of legislation, *e.g.* on intellectual property protection, advertising and fraudulent information on products. Other topics touch upon the concept of "unfair" competition, the importance of taking a firm stand against hard core cartels, the limitations to an excessive use of abuse of dominance rules, and the pros and cons of including merger control in the early stages of a national competition regime.

On the procedural side, the second theme deals with the powers to demand information from companies, including inspections without prior notice, the so-called *dawn-raids*. Amnesty or leniency programmes have been used in some countries to encourage the participants in prohibited cartels to offer full co-operation with the competition authority. The effectiveness of such programmes depends upon the actual risk of discovery and the severity of the sanctions. The procedural rules on sanctions and how they are applied

in practice also have a strong impact on the competition authority's ability to retrieve information. Finally, sanctions are important as the main disincentive for companies to engage in prohibited competitive restraints.

2.3.3. The institutions and their external relations

Although national competition regimes have exceptionally been established only by a competition act, applied through private action in general courts of justice, the predominant approach is to set up an independent competition authority responsible for the enforcement of the competition legislation. However, there is a multitude of ways to structure the institutions in the competition policy area and how to allocate competences to different bodies.

The vertical aspect of the institutional structure deals with the different phases of competition law enforcement: receiving a complaint or notification, taking an initiative, investigating the facts, analysing the case, making a proposal or bringing a case for action, taking a decision, and overruling a previous decision. These different steps may be allocated to institutions in different ways. For instance, the competition authority may have powers to take some decisions whereas other decisions are taken by higher instances. In some countries the decision-making body is a board or council – included in or separate from the competition authority – and in others specialised or general courts make rulings on competition cases.

There is also a horizontal aspect of the institutional structure. On the one hand the competition authority may either be responsible for only the competition legislation or in addition apply other related laws. One obvious example is that competition authorities in several countries also have responsibility for consumer protection. On the other hand, in some countries the competence to enforce the competition law is shared by more than one authority. As an example, sector regulators may have powers to apply the competition law in their respective sectors – exclusively or in parallel with the competition authority.

As a result of the institutional structure and the allocation of competences there are different needs for liaison, co-ordination and co-operation between the competition authority and other bodies. Vertically, a major issue is the degree of independence of the competition authority from the political level. The most effective degree of autonomy may differ between countries and depend on priorities and most important challenges by balancing the objectivity and transparency of the competition law enforcement against the need to influence economic reform.

One aspect of the competition authority's external relations is international co-operation with corresponding institutions in other countries. Economic integration and globalisation call for stronger co-ordination between competition

authorities in all countries, as anti-competitive practices are increasingly becoming international. However, co-operation and exchange of experiences amongst peers is also a vital element in the development of the competition policy approaches and the refinement of techniques. For countries that are presently in a phase of strong developments in the competition policy area, such as economies in transition and emerging market economies, this exchange of experiences with countries facing similar problems is of particular importance.

Topics dealt with under the third theme include ways to organise competition authorities and their relations with other bodies and the decision-making structure in competition law enforcement as well. The theme also covers formal and informal international co-operation between competition authorities.

3. Opening markets to competition

The first thematic meeting of the Competition Initiative addressed the issue of opening markets to competition. This approach reflects the experience that the creation of competition conditions in sectors where competition is possible and desirable is of key importance in the transition process.

Economic transition does not start off from a situation of absolute "competition-vacuum"; in fact, there might be elements of competition even in a planned economy. However, economic transition should ultimately lead to a market economy, which is predominantly based on competition because in most economic sectors competition is the most beneficial for society. Accordingly, economic transition necessarily involves the reform of the sectors where competition could bring optimal benefits for society, but imperfect economic regulation precludes entry by competitors or effective competition among market players.

The primary goal of competition policy in such sectors is to promote pro-competitive reforms, and a competition authority is normally not a direct decision-maker, but certainly the primary advocate of such reform. Since advocating for pro-competitive reform is a gradual on-going process, competition authorities need to continuously analyse the ways in which competition could better work in those sectors, and identify ways to eliminate the obstacles to competition.

Competition advocacy is limited in three ways. Firstly, for certain economic activities competition is not possible or desirable even in a market economy, and effective incentive-based economic regulation might bring more benefits for society than competition. Competition authorities may help identify the activities falling in that category to be able to distinguish them from the sectors where at least some competition would be possible and desirable. Secondly, competition advocacy might promote the competition conditions, but pro-competitive reform and ultimately competition presupposes active support by

the various stakeholders. Accordingly, competition authorities need to nurture support for competition by promoting a competition culture. Thirdly, competition advocacy might ultimately lead to increased competition, but competition authorities need to protect competition through effective competition law enforcement.

The following analysis deals with opening the SEE markets to competition. Based on the Status and Problem Inventory Reports submitted by the SEE countries for the first thematic meeting, the analysis describes the current situation in South East Europe and focuses on the economic developments of the last decade and its effects on the role of competition in various sectors (Part 4.1). This is followed by the analysis of the major region-wide problems of opening markets to competition based on the problems identified by the SEE participants in their Status and Problem Inventory Reports and Activity Plans relating to the first thematic meeting (Part 4.2). Drawing on the Activity Plans on opening markets to competition, Part 4.3 addresses the activities planned by the SEE countries to resolve those problems. Finally, Part 4.4 provides for conclusions and regional policy recommendations by the OECD.

The factual descriptions are in general based upon the situation in the SEE countries at the time of the submission of the Status and Problem Inventory Reports and Activity Plans. However, to the extent more recent information was available, updates have been made in this Final Report.[5]

3.1. Present situation in South East Europe

3.1.1. Developments since 1990

Opening markets to competition is a gradual, long-term project. In order to understand the present situation in opening South East European markets to competition, the process of political and economic transition in the past decade is briefly analysed.

Transition in South East Europe is part of the economic and the political changes throughout Central and East Europe, which followed the collapse of the Soviet regime at the beginning of the 1990's. Nevertheless, economic and political reform in South East Europe has generally been less thorough than in most other countries of Central and East Europe. Although many SEE countries initiated reforms simultaneously to their Central and East European peers, reforms have been interrupted by tragic political and economic developments in the region. Ethnic wars and ensuing political insecurity have halted reforms for years in the middle of the 1990's; moreover, the deterioration of the economic situation and the fully-fledged economic-political crises[6] have had a similar effect. Countries that were saved from direct political conflicts and economic crises have been seriously hit by instability in the region.

As the new millennium started, South East Europe embarked on a more peaceful period and there are signs in many countries of new determination to re-launch economic reform. Foreign attention to the region and support for reform have also increased. Major donors have launched the Stability Pact for South East Europe to provide financial and policy assistance for economic and political reforms. Further, economic and political reforms are a key element of developing relations with the European Union. The Europe Agreements and the Stabilisation and Association Agreements concluded between the EU and an increasing number of SEE countries establish clear requirements of economic and political reform. Combined with EU financial and technical assistance, those requirements should ultimately pave the way for accession to the European Union, which is the top political priority for all countries in the region.

Despite those positive developments of the economic and political reform, the SEE countries have remained politically and economically fragile. Important unresolved political issues, such as the proper functioning of Bosnia-Herzegovina and its constituent entities, the future of the Federal Republic of Yugoslavia, in particular the status of Montenegro and Kosovo, or the relations of the Slavic and the Albanian population in FYR of Macedonia, make the region politically unstable. Embargoes and the lack of thorough structural reforms have led to an impoverished population and a strengthened role of the black economy. Notwithstanding the increased possibilities and the foreign support for economic reform, public support for reforms remains limited throughout the region.

3.1.2. The status of opening South East European markets to competition

In preparation for the first thematic meeting of the Competition Initiative, the South East European participants were requested to elaborate on the status of opening their markets to competition under five headings:

i) sectors under legal monopoly;

ii) sectors under factual monopoly;

iii) sectors where the establishment of new enterprises is controlled;

iv) sectors where market behaviour is controlled; and

v) competitive sectors.

The following analysis draws regional conclusions from the individual country reports by the SEE participants.

i) Sectors under legal monopoly. Although to some degree reforms have taken place in most SEE countries, legal monopolies can be found in several key sectors throughout the region.

In the transport sector, FR Yugoslavia (Serbia and Montenegro) operates its entire traffic infrastructure through state-owned legal monopolies, while in

Albania ports, railroads and air transport are legal monopolies, all qualified as strategic sectors. Bulgarian railroads also enjoy a legal monopoly. Participants did not mention other parts of the transport sector as being legal monopoly; however, they did not explicitly refer to the expiration of any of the legal monopolies in this sector either.

The communications sector, in particular telecommunications, has been the primary area of economic reforms, including the expiration of legal monopolies. This is partly due to the abundant experience on making competition work in this sector as well as to the special requirements of the World Trade Organisation (WTO) regarding the introduction of competition in the telecommunications sector.

At the end of 2002, the legal monopolies relating to the fixed telephony, leasing of lines and forwarding international calls will be lifted in Bulgaria. Simultaneously Romania will abolish the legal monopolies in its telecommunications sector. In Albania fixed telephony will be liberalised as of 1 January 2003. In FYR of Macedonia, the foreign-owned fixed telecommunications operator will lose its legal monopoly at the end of 2004, and the tendering process for the entry of a second mobile operator has been concluded.

At the same time, in FR Yugoslavia (Serbia and Montenegro) fixed telephone services are still provided by a state-owned legal monopoly, and Albania is still in the process of privatising its fixed telephony monopoly.

The postal sector continues to be a legal monopoly in FYR of Macedonia notwithstanding the plans of selling the state-owned post to a foreign strategic investor. There is a legal monopoly in the Romanian postal sector, as well. Bulgaria plans to lift the legal monopoly in its postal sector at the end of 2002.

Although some reforms are also taking place in the *energy* sector, this sector remains the one where competition is probably most hampered by legal monopolies. In FR Yugoslavia (Serbia and Montenegro) all energy, including coal and petrol, is provided by state-owned legal monopolies. Most notably, electricity is provided by a vertically integrated public electricity company. Similarly, in FYR of Macedonia electricity is produced and distributed by a state-owned legal monopoly, albeit the privatisation of electricity production and distribution is under preparation. Albania's oil production sector is dominated by a holding company entrusted with legal monopoly rights concerning production and refining. More than 70% of the oil consumption is imported and the market is now liberalised.

More thorough reforms in the South East European energy sector involve the partial liberalisation of electricity and heat retail in Romania, and the liberalisation of oil and oil derivatives imports in FYR of Macedonia in July 2001.

There are legal monopolies in the *utilities* sector, as well, in particular as regards the drinking water. In Romania there are legal monopolies in the provision of drinking water; in FR Yugoslavia (Serbia and Montenegro) the same services are carried out by a state-owned legal monopoly.

In some sectors, the potential negative effects of legal monopolies are reduced by a pre-determined time limit and by a competition for the market, *e.g.* in the form of public tenders. This is the case, for instance, in the Romanian local transport sector, where there are open tenders for the provision of services. Similarly, Albania grants mining concessions based on competition for the market through open tenders.

ii) **Sectors under factual monopoly.** In certain sectors, even when the legal rules do not grant monopoly rights, competition might not develop, leaving such sectors entirely to factual monopolies. Parts of the financial sector are a primary example of factual monopolies, where entry might not be legally excluded, but lack of trust in financial institutions and the ensuing absence of demand might in practice prevent it. For instance, apart from banks the underdeveloped Albanian financial system includes only one securities exchange, which operates only in treasury bills and no shares.

Often, factual monopolies stem from former state monopolies that remain uncontested even following privatisation. In FYR of Macedonia such factual monopolies include:

- the organisation of economic fairs and exhibitions carried out by the privatised former state monopolist;
- the privatised former state monopoly running greengrocery markets; and
- the privatised former state monopoly providing funeral services in Skopje.

The strength of the factual monopolies may also stem from the fact that they have been privatised to foreign investors. Croatia mentions the food and tobacco sectors where recent privatisation makes factual monopolies "perhaps one of the hardest issues to tackle".[7]

iii) **Sectors where the establishment of new enterprises is controlled.** The establishment of new enterprises and the market entry is limited in various sectors throughout South East Europe. In some cases, the rationale of licensing regimes is technical, such as the limited number of frequencies for the national television channels,[8] or public policy concerns, such as the protection of artefacts or preventing risks relating to the use of dangerous substances, weapons,[9] etc.

Nevertheless, even when such justified considerations apply, there might be competition concerns: for instance, where possible, there should be competition for the market even when eventually the number of companies

operating in the market is limited. This is the case in Bulgaria, where there is a tendering procedure for mobile communications, cable telecommunication networks and ground handling services.

The probably most impressive approach in this context is the programme in Bulgaria involving a thorough assessment of the legislative and regulatory obstacles to market entry. With the active involvement of the competition authority, a special commission appointed by the Prime Minister examined about 520 regulatory regimes, of which 330 were considered as likely to affect the development of business. As a result, some of these regimes were simplified, while others were abolished, and a programme has been established for the continued abolishment of unnecessary regimes.

Licensing regimes exist in several sectors. For instance, based on a WTO commitment, Albania does not limit the number of *pharmaceuticals* producers, wholesalers and retailers; however, there is a licensing procedure based on technical rules. Similarly, Bulgaria has a licensing regime for the production of, and trade with drugs and tobacco products. FYR of Macedonia has a licensing regime in the pharmaceuticals industry and with regard to health services.

There are entry requirements also in the *financial* sector. For instance, in Bulgaria a license is necessary to enter the banking and insurance markets. In FYR of Macedonia the entry to the banking market in general is relatively easy: there are more than 20 banks due to the liberalisation of banking. However, a minimum € 9million of subscribed capital is required for obtaining the license to perform foreign payment transactions. Further, in FYR of Macedonia there is a licensing requirement for broker and insurance companies.

In the *energy* sector, for instance, Bulgaria has a licensing regime for the heat generation, the gas and petrol transmission, and the distribution and storage of gas. FYR of Macedonia also has a licensing regime concerning the trade of combustibles.

In *telecommunications*, Bulgaria has a licensing regime, under which a spectrum has recently been allocated for a second GSM operator.

In the *transport* sector in Bulgaria licenses are required for international freight and passenger transportation, public transport, taxi services, and for air transport. Airport operators are also subject to a licensing regime.

***iv)* Sectors where market behaviour is controlled.** There are several possible ways to control market behaviour. The most common type in South East Europe is the price control, which is applied in various sectors.

In the energy sector Albania applies price control on the energy provision to different consumer groups, such as:

- residential households;

- market players in key sectors of the economy;
- other manufacturing entities;
- service providers; and
- state institutions.

In Bulgaria electricity, gas and heating suppliers propose prices according to a pre-determined methodology, and the government reserves the right to approve or reject the price proposals. In FYR of Macedonia the price of electricity, natural gas, heating and oil derivatives is set according to a pre-determined method. Maximum prices are set for the production and trade of oil and oil derivatives. In FR Yugoslavia (Serbia and Montenegro) the price of oil and oil derivatives is set by the Republic government.

In the postal sector Bulgaria sets the prices of universal postal services offered by the state-owned Bulgarian posts. FYR of Macedonia also mentions price regulation in the postal sector. In FR Yugoslavia (Serbia and Montenegro) the prices are proposed by the post monopoly. The Federal government has the right to approve or reject the price proposals.

In the transport sector Albania sets the rates of the railroad passenger transportation and the urban and interurban bus services. In FR Yugoslavia (Serbia and Montenegro) the Federal government has the right to approve or reject the prices of domestic railroad transport proposed by the state-owned railroad company.

Prices are controlled in the pharmaceutical sector of several SEE countries. In Bulgaria the government sets maximum prices for medicines, and in Albania the government sets the reference price for 308 pharmaceutical products. In FR Yugoslavia (Serbia and Montenegro) the Federal government sets the maximum price of pharmaceuticals as well as the method of calculating the price of medical products.

The price of drinking water is also controlled in several SEE countries. Maximum prices are set for the drinking water in Albania, while in FYR of Macedonia the prices of producing and distributing water are regulated.

In the telecommunications sector, Albania applies tariff regulation based on a price cap mechanism to basic telephone services. The price cap ensures that the price for basic telephone service remains affordable while being gradually adjusted to reflect costs more accurately. Bulgaria and FYR of Macedonia also regulate the price of telephony services, while in FR Yugoslavia (Serbia and Montenegro) the Federal government has the power to reject or approve the prices of all services (in post, fixed and mobile telephony) proposed by telecommunications companies.

The price of postal services is regulated in Bulgaria and FYR of Macedonia.

In the agri-food sector FYR of Macedonia applies safeguard prices for wheat and certain types of tobacco. In FR Yugoslavia (Serbia and Montenegro) the price of milk and bread have been liberalised; however, bakers are obliged to produce 20% of bread at prices defined by the government.

Apart from price regulation, output regulation is the most typical control of market behaviour in South East Europe. There are two main types of output regulation. On the one hand, output regulation involves the limitation of quantities sold on the market. For instance, Bulgaria mentions bilateral and multilateral agreements that set export quotas for steel, agricultural products, wine, textile and clothes.

On the other hand, output regulation entails the regulation of minimum production quantities. For instance, in FR Yugoslavia (Serbia and Montenegro) the law prescribes the minimum energy production to provide stable supplies. Each year the government sets the minimum quantities for the generation, transmission and distribution of electricity, as well as for coal and heat supplies with the sectoral public companies.

Finally, the control of market behaviour might involve quality control. For instance, in FR Yugoslavia (Serbia and Montenegro) agricultural and dietary products are subject to quality control according to the Law on Standardisation.

v) **Competitive sectors.** Trade and price liberalisation as well as structural reforms have established the conditions for competition in several sectors in South East Europe.

In Albania, competitive sectors include the manufacturing of food and beverages, leather and shoes, garments, wood processing, road transport, domestic and foreign trade and services sector, *i.e.,* tourism, health services, education, banking, insurance, construction, telecommunication (except for fixed telephony that will be liberalised on 1 January 2003), consulting, accountancy and all business services, computer and distribution services.

In Bulgaria, competitive sectors include the manufacturing of food and beverages, the leather and footwear industry, knitwear and clothing, the printing industry, the manufacturing of wood and wooden products, road and air transport, domestic foreign trade, tourism, health services, the retail distribution of pharmaceuticals, banking and insurance. New legislation will introduce the possibility of competition for designated major electricity consumers as well as for carrying out railway services on the railway infrastructure, which is to be operated by an independent state-owned company.

FYR of Macedonia notes that substantial foreign investment has led to increasing competition in the retail sector of consumer goods and food products, the production of bread, pastry products and refined table oil.

Romania states that access to its national transport infrastructure, such as railway, road, air and naval ports is free and non-discriminatory.

FR Yugoslavia (Serbia and Montenegro) mentions as competitive sectors in particular the textile and food processing industry, the household appliances, the chemicals, such as personal and home cleaning products, and the consumer goods in general.

3.2. Problems identified by participants

Participants in the first thematic meeting of the Competition Initiative identified four main problems of opening South East European markets to competition. Some problems, such as the informal economy and the general shortcomings of the legal system, relate to the entire economy. Some other problems involve opening to competition of parts of specific network industries, which provide input for the whole economy. Finally, the privatisation and the underdeveloped financial system raise special competition problems in several SEE countries.

3.2.1. Economy-wide competition problems

Informal economy. Although the informal economy is not a competition issue, a pervasive informal economy impedes the efficient functioning of the economy as a whole. It also raises serious competition problems, such as *i)* (unfair) competitive advantages; *ii)* distrust in the operation of the market and market institutions; and *iii)* limitations of the efficiency of the competition office's work (*e.g.*, by making market definition difficult or impossible because market data are completely unreliable).

Further, as Albania points out, the informal economy:

- hampers innovation;
- fosters corruption;
- distorts the market;
- hampers institutional reform; and
- reduces growth and development.

Although the informal economy creates some competitive pressures on the formal economy, it is certainly a second best to lawful competitive pressures. Most importantly, the black economy is a potential symptom of serious competition-related problems, *e.g.,* burdensome licensing procedures, unnecessary legal monopolies, etc.

In addition to Albania, other SEE countries, in particular in FYR of Macedonia and FR Yugoslavia (Serbia and Montenegro) mentioned the informal economy as a source of serious problems to competitive reform.

Shortcomings of the legal system. General shortcomings of the legal system also pose a competition problem in that they prevent or slow down investments and entry by competitors.

Romania mentions its unclear and frequently changing rules, in particular financial and tax rules, as an impediment to new investments. Ineffective rules on property rights – mentioned by Albania – reduce the security of property transactions and prevent investments.

Although equal treatment of foreign investors and companies is a declared principle in several SEE countries, in practice SEE legal systems make the entry or operation in the market difficult for foreigners in several ways. For instance, in Bulgaria there is a restricted number of residence permits for foreign directors, the process of obtaining a work permit for foreign nationals is burdensome, and there are considerable limits to foreign ownership of real estate in Bulgaria. Similarly, Croatia mentions the difficulty of obtaining work permits, visas, construction permits and discriminatory or burdensome regulations on the municipal level.

The legal system might also create a specific burden for small and medium-sized enterprises. This is the case, for instance, in Romania where long and costly registration procedures based on not sufficiently clear rules disadvantage entry by smaller companies with minimal capital.

Ineffective law enforcement also contributes to a non-transparent and often discriminatory legal system. Albania mentions the limited legal and administrative infrastructure of enforcing competition-related legislation as a serious problem. More generally, FYR of Macedonia points out that slow court procedures reduce the willingness to invest in the country, and Romania complains about excessive bureaucracy and corruption as a general obstacle to investment, business transactions, and ultimately to competition.

3.2.2. Network industries

Network industries provide input for the entire economy; however, they are often managed in a less efficient way than they could be. For instance, in FR Yugoslavia (Serbia and Montenegro) the electricity industry is operated by a vertically integrated, state-owned monopoly, which has the exclusive right to import, generate, transmit and distribute electricity. There is a similar arrangement with regard to oil, oil derivatives and utility services (water and heating) in FR Yugoslavia (Serbia and Montenegro).

Several South East European countries have started to reform their network industries, or are contemplating such reform. Most importantly, Romania is in the process of reforming its telecommunications, oil and gas, and electricity industry; moreover, Bulgaria is reforming its electricity sector. An important issue beyond the success of reforms is to what extent reform will manage to introduce competition and enhance efficiency in the industries involved. Competition authorities have a key role in ensuring that reform brings about these latter benefits.

3.2.3. Privatisation

Privatisation is an important element of economic transition, because it leads to the transfer of state property to private investors, who might have the interest and capacity to manage the company more efficiently and might contribute precious capital and know-how to the privatised entity. Privatisation is also an important source of funding for the state and an opportunity for influencing the competition conditions in the relevant sectors.

Unfortunately, this latter opportunity is often missed, and privatisation ends up by transforming a state-owned monopoly into a private one. The privatisation of JP Telekom Srbije, the former state-owned telephony operator in FR Yugoslavia (Serbia and Montenegro) is a case at point. In 1997, 49% of the former state-owned monopoly was sold to an Italian-Greek consortium, and the government retained the remaining majority of the shares. The potential competition aspects of the case were not seriously considered; in fact, the foreign consortium invested on the condition that the company retained its legal monopoly in the fixed telephony services until 2005. The legal monopoly of JP Telekom Srbije was for an indefinite period, and consumers were dissatisfied with the unfulfilled increase in service quality and decrease in prices.

The deal was absolutely non-transparent. There is a suspicion of corruption, which is being scrutinised in Italy. Further, there has been a public debate about the transaction in FR Yugoslavia (Serbia and Montenegro) and its potential harms for the country's economy.

Discriminatory privatisation rules might hamper the most efficient sale of companies, in particular certain potentially more efficient types of privatisation or groups of investors. For instance, in Bulgaria the privatisation law requires a former consent by the privatisation agency to an increase in capital by private cash or in-kind contributions to companies owned at least 30% by the state. Further, irrespective of the size of the state ownership in the company being privatised, the state insists on including clauses in all share-purchasing agreements prohibiting a reduction of the state's stake.

Further, in Bulgaria the current privatisation rules favour transactions where state-owned companies are sold to its employees and managers, instead of outside domestic or foreign financial or strategic investors.

The efficiency of investments into privatised companies might also be reduced by requirements that reduce the efficiency of the privatised firm. For instance, in Bulgaria there is special requirement to keep the number of employees of larger privatised firms intact following privatisation. Although this measure increases job security, it increases overhead and reduces the efficiency and competitiveness of large Bulgarian privatised companies.

3.2.4. Underdeveloped financial systems

The underdeveloped financial system, in particular in the banking sector, poses serious competition-related problems in several SEE countries. Inflation, devaluation, the freezing of foreign currency accounts upon the dissolution of the former Yugoslavia, and bank crises have severely hit clients' trust throughout the region, in particular in Albania, Bulgaria, FYR of Macedonia and FR Yugoslavia (Serbia and Montenegro). Limited trust by residential clients reduces deposits and thus available capital for banks, ultimately leading to a reduced base for credits and loans. As a result, investments that could lead to innovation and new entry are hampered potential competition and economic development are reduced.

Access to capital for investments is further limited by the cautious lending policy of banks following earlier banking crises. Moreover, owing to economic crises, old clients lose their creditworthiness, while new clients do not yet have a sufficiently long and convincing credit history.

Additional problems in individual SEE countries aggravate the shortage of capital for investments. For instance, in FR Yugoslavia (Serbia and Montenegro) there were unresolved difficulties with international payment transactions. Currently, these difficulties are resolved and international payment transactions function normally. In FYR of Macedonia slow and complex lending procedures and the lack of available securities, such as mortgage, result in banks' preference for state payment guarantees and the ensuing competitive advantage of borrowers with access to such guarantees.

3.3. Activities planned by participants

Following the first thematic meeting of the Competition Initiative, Albania, FYR of Macedonia, Romania and FR Yugoslavia have produced Activity Plans, in which they described the actions planned by competition authorities to address the most pertinent problems relating to opening markets for competition. The following analysis summarises the most relevant activities outlined by these four SEE countries.

3.3.1. Albania

Albania plans four main activities to address the most pertinent problems relating to opening its markets for competition. Two of those will be implemented within a shorter period, while two others are continuous activities.

Strengthening of competition law enforcement and advocacy capacity. Recognising that competition authorities are key advocates of pro-competitive market opening, Albania's most important shorter-term activity involves the strengthening of its competition enforcement and advocacy capacity and the clarification of its organisational and procedural rules. The strengthening of institutional capacity was addressed directly in the Third thematic meeting; accordingly, the activities planned by Albania in this context are analysed in more detail below.

Minimising the informal economy. As a second medium- or long-term activity, the Albanian competition authority plans to work together with respective authorities for minimising the informal economy. For that purpose, the competition authority is to support the Labour Inspectorate within the Ministry of Labour and Social Affairs and the General Directory of Taxation and Control, which should take the lead in fighting the informal economy.

Opening the financial sector for competition. As more continuous activities, the Albanian competition authority plans to engage in the pro-competitive opening of the financial sector, and to monitor privatisation and liberalisation in key sectors of the economy, along with sector regulators, which have the primary role in the respective fields.

As regards the financial sector, the competition authority plans to support the Bank of Albania monitoring the implementation of the sectoral strategy, and prepare a detailed plan of introducing competition in that sector. The government's plans in the financial sector include:

- the privatisation of the Savings Bank, the country's largest bank with a dominant position on the banking market;
- the privatisation of the State Insurance Institute;
- the promotion of the savings-credit schemes;
- the expansion of the country's banking network;
- the lowering of the cost of banking mediation by encouraging competition and other mechanisms of monetary policies, whenever the market allows for that;

- the strengthening of the supervision system and the rules of the banking system in accordance with international standards;
- the development and strengthening of the mechanism of risk guarantees for investors;
- the establishment of an office providing credit information;
- the establishment of the Agency for Deposit Guarantees; and
- the general improvement and completion of the legal and institutional framework for the development of the capital market.

Monitoring privatisation and liberalisation in key industries. Further, the competition authority plans to monitor privatisation and liberalisation in the energy, water, telecommunications and mining sectors in co-operation with the Ministry of Public Economy and Privatisation, the Energy Regulatory Entity and the Telecommunications Regulatory Entity.

3.3.2. Bulgaria

The Bulgarian competition authority plans to engage in two kinds of activities to open its markets to competition.

Opening the electricity market to competition. The Bulgarian competition authority plans to address the opening of the electricity market for competition. For that purpose, it will submit an opinion on:

- the draft amendments and supplements to Energy and Energy Efficiency Act (by the end of 2001);
- the draft Ordinance on the Procedure of Opening the Market and the conditions to be met by customers eligible for negotiating directly the supply of electricity with producers at their choice; and
- the draft update of the National Strategy for the Energy Sector Development until 2010 and a Forecast until 2015 to be adopted by the National Assembly (first half of 2002).

Ultimately, the Bulgarian competition authority will see to ensuring the development and gradual extension of a parallel electricity market where independent producers might sell electricity on a competitive basis directly to an increasing number of eligible customers. Further, the Bulgarian competition authority will contribute to preparing the access conditions to foreign markets and the foreign access to the Bulgarian market as soon as a regional electricity market is established. In achieving those goals, the Bulgarian competition authority will be guided by the relevant liberalisation efforts of the European Communities.

Opening markets to competition through privatisation. On the other hand, the Bulgarian competition authority plans to contribute to opening markets to competition through privatisation. The objective of the competition authority is to improve the investment climate in Bulgaria and to create equal conditions for all investors. For that purpose, in 2002 the Bulgarian competition authority plans to submit an opinion on the draft privatisation law. By issuing its opinion, the Bulgarian competition authority plans to:

- ensure the equal treatment of commercial partnerships with and without state ownership;
- eliminate the requirement of having a prior approval of private cash and in-kind contributions to companies where the state holds at least 30% if the contribution would lead to the reduction of the state's stake;
- eliminate the requirement of having a prior approval of any transaction that might reduce the state's stake in Bulgarian companies; and
- abolish the preference for privatisation through selling to the employees and the managers of the company being privatised.

3.3.3. Romania

In the context of the market opening, the Romanian competition authorities focus on three sectors: *i)* telecommunications; *ii)* oil and gas; and *iii)* electricity.

Opening the telecommunications market to competition. In preparation of the full integration of the Romanian telecommunications market into the European Single Market upon the country's EU accession, the Romanian competition authorities plan to make sure that:

- the steps undertaken will not hamper competition on different markets (some of them already liberalised) by creating dominant positions or giving exclusive rights to some actors; and
- the new regulatory agency will comply with the requirements referring to transparency, credibility and accountability which will enable that issues like access fees and access discrimination are appropriately monitored.

In their efforts the Romanian competition authorities will be guided by the relevant *acquis communautaire* of the European Communities.

Further, to effectively open the telecommunications market to competition, the Romanian competition authorities will monitor the activities of other institutions and issue two monitoring reports annually on:

- the establishment of the sectoral regulator;
- the preparation of draft rules and procedures for the regulator;
- the continued privatisation of the state-owned monopolist;

- the privatisation of other market players; and
- the preparation of the regime regulating the provision of universal service.

Opening the oil and gas markets to competition. In the longer run, Romania plans to open its oil and gas market for competition, and make its sectoral regulations compatible with the EU legislation. For that purpose, Romania envisages to:

- introduce competition in the sector;
- attract private investment;
- open 30-35% of the gas market by 2006;
- start the privatisation of the gas sector;
- start the privatisation of the state-owned vertically integrated oil company; and
- privatise the oil refining sector.

To guarantee the achievement of those goals, the Romanian competition authorities plan to:

- monitor the behaviour of the vertically-integrated state-owned oil monopoly in the competitive market of gas stations;
- address the issue of the internal prices charged by the integrated monopoly to itself for the use of pipelines;
- address the issues – access to network, access prices – relating to the alternative privatisation of the vertically integrated oil company "Petrom" or of the oil storage company Oil Terminal; and
- ensure adequate competition between refineries and in the downstream product market.

Further, the Romanian competition authorities plan to monitor, and prepare two monitoring reports each year on, the necessary actions to be taken by other institutions, including:

- the necessity of vertically separating the integrated oil monopoly by separating its transmission and storage activities;
- the privatisation strategy for the oil refining sector;
- the status of pipelines, in particular whether they are to remain in the public domain and what would be the case of new pipelines;
- review relationships between the government and the regulators; and
- address the non-payment problems (either by disconnecting non-playing clients or by accelerating privatisation).

Opening the electricity market to competition. In order to open the Romanian electricity market to competition, the Romanian competition authorities plan to advocate for an independent, skilled sectoral regulator with sufficient institutional capacity to facilitate third-party access. Further, the Romanian competition authorities plan to monitor the commitments made for the transposition of the relevant *acquis communautaire* into the Romanian law, and to prepare progress reports on market opening twice a year.

In order to achieve those goals, the Romanian electricity system needs to be interconnected with the EU system, and the national electricity market needs to be ultimately integrated into the EU's Single Market. Further, Romania should continue the liberalisation of its electricity market by extending the liberalised 15% of the market to 25% and 33% by the beginning of 2002 and the beginning of February 2003, respectively. Romania would also need to:

- corporatise the subsidiaries of the "Electrica" company, which is the single electricity distribution company and one of the 24 companies involved in the supply of electricity;
- privatise Electrica (to start in 2002 with two subsidiaries out of eight in the West and South East parts of Romania and to finalise the privatisation of electricity distribution by 2004);
- address the non-payment problems by disconnecting non-paying clients or by accelerating privatisation; and
- create competition in generation.

3.3.4. FR Yugoslavia (Serbia and Montenegro)

In FR Yugoslavia (Serbia and Montenegro) the primary obstacle to opening markets to competition seems to be the limited competition culture, in particular among business and policy-makers. Nevertheless, paradoxically, the competition authority has very limited powers to advocate for competition.

Accordingly, all activities planned by the Yugoslavian competition authority relate to building competition culture in some way or to obtaining the power of advocating for competition, which is generally envisaged through the amendment of the current competition law.

Advocating for government solutions to reduce ineffective competition law enforcement. A stronger competition culture would not only promote competition but save sufficient resources for the competition authority. For instance, the competition authority needed to prohibit an agreement among soy and sunflower oil producers that established the minimum purchase prices of soy and sunflower below the price guaranteed by the government. This decision hit soy and sunflower growers and violated the government's rules. However, the

government decided not to intervene, and asked the competition authority to resolve the situation. The competition authority prohibited the agreement but recognised that its intervention would ultimately undermine its status, in the absence of effective powers to enforce its decision.

In fact, oil producers were unable to pay the guaranteed prices for soy and sunflower, and the problems in the market continued. Therefore, the Government agreed on a uniform price with oil producers and soy and sunflower growers. The uniform price was above the purchase price formerly agreed upon by oil producers, but it did not reach the level of the guaranteed price.

The competition authority was very critical of this step, which – in its words – has led to a "situation in which the [competition authority] adopted a decision… prohibit[ing the] agreement [of the oil producers' association] on the… purchase price, while another price has been determined in agreement with the… government, which is uniform for all oil producers…" As the competition authority pointed out,

> the Commission has no means of checking whether the decision has been enforced, because the oil producers' price list for the buy out of industrial herbs has been made uniform again in agreement with the Republic Government. Therefore, other state authorities have to support the Commission instead of interfering after the Commission has adopted a decision and resolving the issue in another way.[10]

Moreover, in the competition authority's opinion,

> [t]he problem could have been resolved in a different way. Namely, exports of soy and sunflower as well as imports of oil should have been freed from barriers. Of course, this could have been done by the Government at the initiative of the Anti-Monopoly Commission, and in reference to this specific case, the Law on Foreign Trade could have been amended. The latest Law on Customs Tariffs has reduced customs rates, thus reducing the barriers of course, but this is not sufficient yet. By lifting the majority of customs barriers, consumers could obtain the products under more favourable conditions.[11]

Advocating for the liberalisation of infrastructure industries. In addition to advocating for more effective and long-term solutions by the government than competition law enforcement, the competition authority plans to advocate for the opening of infrastructure markets for competition. In fact, the electricity, railroad, air transport, water management, heating and other utilities are still dominated by inefficient state-owned, vertically integrated monopolies.

The competition authority plans to advocate for competition in particular in the electricity and telecommunications sectors. As to electricity, the competition authority plans to advocate for the introduction of competition in the generation and retail distribution market, which could be achieved by vertical separation, privatisation, liberalisation and granting concessions.

As regards telecommunications, the competition authority plans to advocate for the separation of the current vertically integrated privatised monopoly. To advocate for that and other steps necessary to introduce competition in the sector, the competition authority is determined to express its views on the draft amendment to the telecommunications law. For that purpose, it has requested the government to provide it with the draft amendment for comments as soon as available.

Vertically-integrated state-owned monopolies further reduce competition in neighbouring markets by concluding unnecessarily long-term exclusive contracts. For instance, a part of the vertically-integrated state-owned exclusive oil company, which has the exclusive right to exploit raw minerals and other natural resources, concluded a 20-year exclusive supply contract with a company processing raw materials into liquid gas.

As the competition authority summarised, "the lack of knowledge on the part of the entities involved in the market about the competition culture brings them into a situation in which they perpetuate the longstanding practice of discrimination on the market, excluding third parties".[12] The competition authority might try to intervene by competition law enforcement; however, pro-competitive government behaviour – in particular the introduction of competition in the sector – could more effectively prevent the problem.

Advocating for the opportunity to provide comments on draft legislation and privatisation. To advocate more effectively for competition, the competition authority also needs to obtain the right to comment on draft laws. Thus, the "tradition" of the competition authority not being consulted by the government on key pieces of economic legislation, such as the privatisation law, should be changed.

Obtaining the right to express preliminary views in individual privatisation transactions. Another serious shortcoming of the competition authority's current situation is that it does not have the right to present its views before individual privatisation transactions are decided upon. Similarly to the above, this situation should be changed because otherwise the opening of the FR Yugoslavia (Serbia and Montenegro) markets to competition will be jeopardised.

3.4. Conclusions and policy recommendations

3.4.1. The advocacy role of competition authorities

Traditional anti-trust enforcement undoubtedly plays an important role also in transition economies. However, in comparison with more advanced market economies, there are also specific competition problems directly related to the transition process. Examples of such problems are the existing rules in other policy areas having anti-competitive effects, the lack of a pro-market approach regulation, an inappropriate design of regulatory or structural reform, the absence of a competition culture, etc.

Addressing such problems is a crucial part of creating competition where there is none or strengthening competition in the emerging markets. Most of these issues call for formal decisions that fall outside the competence of the competition authorities. However, the competition authorities in many countries have an important task in identifying such problems, analysing them, and proposing solutions. This is the so-called advocacy role of competition authorities. In other countries, the importance of the advocacy role is not recognised.

In the discussions on the opening of markets to competition, several SEE participants expressed concerns about the role of their competition authorities in relation to other policy areas. These difficulties may arise from the formal competence of the authority, as laid down in legislation, or from the government's reluctance to accept competition authority initiatives outside the traditional enforcement of the competition law. As a result, some competition authorities find that they have not been consulted on reform issues that may have an impact on competition. Other difficulties may originate from a general lack of resources or insufficient expertise in economic analysis.

OECD experts explained that the advocacy role of the competition authorities assumes that these bodies be authorised to advocate pro-competitive solutions in the design, the development and the implementation of government policy and legislation. They would further have to be independent from political interference, not only in carrying out enforcement actions but also in connection with advocacy activities. "If the competition authority does not make the competition voice clearly heard, there is no one else that will."

Recognise the advocacy role of the competition authorities by assigning to them formal competence to engage in such work, and by ensuring that competition authorities have the necessary resources and capacity to take advocacy initiatives.

3.4.2. Privatisation and competition

Privatisation of former state monopolies has in several cases been combined with the encouragement of foreign investment. There are a number of valid motives for this approach. One is the scarcity of capital in the country, making it difficult or impossible to raise domestic funding for necessary investment. Another one is the desire to get access to more advanced techniques and modern management, in order to improve the efficiency of companies.

However, in order to attract investors, such privatisation has often been combined with exclusive rights to the new owners for a limited period of time, for instance five years. Thus, privatisation has preceded liberalisation.

If this would only imply a delay in timing of introducing competition in this market, the exclusive rights to the new owners might be seen as a reasonable "price" to pay for modernising an economic sector, vital for the country's economy as a whole. On the other hand, the OECD competition experts pointed out in the first thematic meeting of the initiative that the long-run effects could be more serious. Experience shows that an incumbent operator in a market recently opened for new entry may in practice find various ways to exclude competition. Having a monopoly position for a sufficiently long period allows a company to build relations with customers, suppliers and regulatory agencies that new entrants may find hard to overcome.

In addition, several of these former state monopolies have a dual role, both providing services and controlling infrastructure. After the period of exclusive rights, control of the necessary infrastructure gives the incumbent operator wide opportunities to put new entrants in the services market at a disadvantage. And once the company has been privatised, a structural separation of the infrastructure from the operations would be most unlikely.

Problems related to privatisation and liberalisation of different sectors have been highlighted as high-priority issues in many Activity Plans prepared by the participants in the competition initiative.

> Involve competition authorities in the design of privatisation schemes in order to find solutions that minimise the restraints of competition and facilitate new entry after a limited period of time.

3.4.3. Eliminating unjustified institutional barriers to entry and growth

Legal rules and other institutional barriers created by central and local governments and parliaments are the most serious impediments to competition in South East Europe, both in SEE economies in general and in individual economic sectors.

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Unnecessary administrative rules and procedures create obstacles to entry into markets and growth. While reducing competition and the efficiency of the entire economy, such institutional barriers directly interfere with the two most innovative and pro-competitive types of economic activity in the transition economies: entry by and growth of foreign investors and local entrepreneurs. With the involvement of SEE competition authorities, the SEE countries should therefore consider following the example of the Bulgarian Commission on Protection of Competition, which systematically assessed the entire domestic legal and regulatory system for unnecessarily anti-competitive administrative rules and procedures, and advocated for their abolition.

In addition to creating impediments to competition in general, the institutional barriers create unnecessary obstacles to entry and growth in specific key economic sectors. There are many parts of key sectors where competition would not be possible and/or desirable because it would not lead to efficiency and would not bring other benefits to society more than economic efficiency. However, the first thematic meeting of the Competition Initiative showed that there are other parts of such sectors where competition would be both possible and desirable, although impeded by unnecessarily restrictive sectoral economic regulation.

Assign to competition authorities the task of systematically mapping and analysing impediments to competition and market entry in all economic sectors, and propose concrete steps to eliminate or attenuate the distorting effect of those impediments on competition.

4. Tools for fighting competitive restraints

The second thematic meeting of the Competition Initiative addressed the issue of taking action against anti-competitive behaviour. Focusing on competition law enforcement as a tool to fight attempts to eliminate competition, the meeting addressed three issues:

1. the substantive rules the SEE competition authorities have and need;
2. the procedural rules the SEE competition authorities have and need; and
3. distinguishing situations where competition law enforcement is the right tool and where it is not.

There are approximately 80 competition jurisdictions around the world. Although the individual competition laws show considerable differences, they all address attempts to eliminate competition, and for that purpose most of them include substantive prohibitions of *i)* the anti-competitive agreements; *ii)* the abuse of market power; and *iii)* the anti-competitive concentrations.

To enforce such rules efficiently and effectively, competition laws need at least two kinds of procedural tools: *i)* powers to investigate attempts to eliminate or restrict competition; and *ii)* powers to penalise and deter such attempts. Furthermore, a growing number of competition jurisdictions have recently been adopting leniency programmes to increase the efficiency and the effectiveness of uncovering the most egregious anti-competitive practices.

Although an optimal competition law providing for effective tools might successfully address attempts to eliminate or restrict competition, the competition law enforcement is not enough to fight against all types of anti-competitive practices. In transition economies market players often allegedly harm consumers or eliminate competition. However, despite the possibility of competition law enforcement, alternative tools might be more effective and efficient. For instance, although many competition laws include a prohibition of the allegedly "excessive" prices, apart from some exceptional cases, regulation is more effective than competition law enforcement to the extent there are substantive reasons to intervene. Similarly, the transition economies' regulatory failure, such as the lack or ineffectiveness of regulation and/or its enforcement, might allow market players to harm consumers or to eliminate competition. Nevertheless, even if competition law enforcement is formally possible in such situations, correcting the regulatory failure should be a more effective and efficient solution. In such cases, the competition authorities might wish to advocate for correcting the regulatory failure, instead of stretching the competition rules.

The following analysis deals with taking action against anti-competitive behaviour in the SEE markets. Based on the Status and Problem Inventory Reports submitted by the SEE countries for the second thematic meeting, the analysis describes the current situation in South East Europe focusing on competition laws and their coverage, competition law enforcers and competition law enforcement tools. (Part 5.1) This is followed by the analysis of the major region-wide problems of taking action against anti-competitive behaviour based on the problems identified by the SEE participants in their Status and Problem Inventory Reports and Activity Plans relating to the second thematic meeting. (Part 5.2) Drawing on the Activity Plans on taking action against anti-competitive behaviour, Part 5.3 addresses the activities planned by the SEE countries to resolve those problems. Finally, Part 5.4 provides conclusions and regional policy recommendations by the OECD.

The factual descriptions are in general based upon the situation in the SEE countries at the time of the submission of the Status and Problem Inventory Reports and Activity Plans. However, to the extent more recent information was available, updates have been made in this Final Report.[13]

4.1. Present situation in the countries of South East Europe

Except for Bosnia-Herzegovina, all SEE countries have competition laws in force and enforce such laws to fight against attempts to eliminate competition. To assess the current situation of competition laws and their enforcement in South East Europe, based on the Status and Problem Inventory Reports submitted for the second thematic meeting by Albania, Bulgaria, FYR of Macedonia, Romania and Yugoslavia, the following analysis addresses three issues in a region-wide perspective:

1. competition laws and their coverage;
2. competition law enforcers; and
3. competition law enforcement tools.

As mentioned above, in certain cases, advocacy for correcting regulatory failure might be a more effective and efficient tool in competition authorities' fight against attempts to eliminate competition than competition law enforcement. Nevertheless, such advocacy relates to regulation, and therefore it is very similar, often identical, to advocating for pro-competitive market opening. Accordingly, although advocacy was also raised in the second thematic meeting, it is covered under the part dealing with the first thematic meeting above.[14]

4.1.1. Competition laws and their coverage

In the second half of the 1990's, six of the seven SEE countries adopted or significantly updated their competition laws,[15] whereas Bosnia-Herzegovina started to prepare its competition legislation.

To a diverging extent, the SEE competition legislation follows the EC law. The EC model is most recognisable in the competition laws of Bulgaria and Romania, the two countries with the longest experience in law approximation under their Europe Agreements concluded with the European Union. The importance of the EC model is expected to increase as a growing number of the SEE countries conclude Stabilisation and Association Agreements and receive technical assistance from the EC.

Owing to German technical assistance and the traditional influence of German legal thinking in some SEE countries, the German competition law has also served as a model. For instance, the competition rules of FYR of Macedonia and, to a certain extent, the Croatian competition law follow the German model.

Given the above models, one would expect the SEE competition laws to cover anti-competitive agreements, abuses of dominance and mergers. The majority of SEE competition jurisdictions indeed do so; however, there are some exceptions. Albanian competition law deals with dominant position as *per se*, and the competition law of FR Yugoslavia (Serbia and Montenegro) does

not cover mergers. In FYR of Macedonia, it is unclear to what extent the competition rules cover all the three fields, in particular anti-competitive agreements.

Following the EC model, in several SEE countries, such as Bulgaria and Romania, the prohibition of anti-competitive agreements results in such agreements being null and void. Bulgarian, Croatian and Romanian legislation also provides for the individual and block exemption[16] of certain types of agreements, with an obligation to notify agreements for individual exemption.[17] Further, the Bulgarian and Romanian legislation exempt agreements that do not have an appreciable effect on competition (*de minimis* principle). Bulgaria and Romania have also adopted a number of guidelines based on the EC law. Once adopted, the currently discussed modernisation of the EC rules will require further adjustment in the region.

In general, SEE competition laws apply to the whole economy, albeit there are some exempted sectors in almost each SEE country. In Albania, by existing law, agriculture (except the cases when there is price fixing not approved by the state), the Bank of Albania, transport and utilities do not fall under the competition rules. Recently there has been a proposal to exempt the dominant Savings Bank from all competition rules as part of its privatisation process; however, the Albanian Parliament eventually exempted the Savings Bank only from the outdated prohibition of dominance due to the successful advocacy efforts of the competition authority and the National Bank. FYR of Macedonia mentions, as exempted, special cases of public transport, agricultural producers except for price-fixing and exclusion of competition, credit institutions, insurance companies, authors' associations, public goods, national bank, special public legal persons and funds. In Romania, the labour, the financial and securities markets do not fall under the competition rules. However the competition rules do not apply to financial and securities markets only to the extent that competition in these markets is subject to special rules. In contrast to the above Bulgaria mentions that its competition law covers all sectors without any exception whatsoever.

SEE competition legislation often extends to fields beyond the merger law and the prohibition of cartels and abuse of dominance. Albanian and Bulgarian legislation also cover aspects of "unfair" competition. Both laws assign the task of assessing issues of unfair competition to the competition authority. In Albania, the competition authority deals with consumer protection as well, although it plans to separate the competition law enforcement and the consumer protection functions in the short term. Albanian competition law even prohibits corruption for gaining advantages in competition.

Another major field covered by certain SEE competition laws is the activities of the public enterprises and the state.

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Bulgaria mentions that its competition law covers all companies, including the public ones and those entrusted with special and exclusive rights. Further, under the Bulgarian law, the state and local governments are obliged to submit a notification before consolidating public companies in their ownership. In Romania, *régies autonomes*, that is special public companies, are subject of the competition rules; however, before directly enforcing the competition rules, the Romanian Competition Council is first to ask the competent central and local government to find an adequate solution to the relevant competition problem.

Based on the requirements of their Europe Agreements, the Bulgarian[18] and the Romanian competition authorities have also the competence to address state aids that distort or restrict competition. Other SEE countries are expected to have such rules as a result of their Stabilisation and Association Agreements concluded or to be concluded with the EC and their current or future obligations to approximate their competition rules to the EC law in the field.

Within certain limits, the competition authorities of Bulgaria, FYR of Macedonia and Romania have the powers to address state behaviour that is detrimental to competition. In Bulgaria the competition law applies to the administrative authorities and the local governments if they tacitly or expressly, actually or potentially prevent, distort or restrict competition. In FYR of Macedonia the competition authority may indicate to the central and the local government acts that distort competition, and may request the amendment of such acts. Under the Romanian law, central and local authorities are exempted from the competition rules insofar as they enforce other laws or protect public interest.

4.1.2. Law enforcers[19]

The six SEE countries with competition legislation have all established a specialised body for enforcing the competition laws. Such bodies have various levels of organisational independence from the government. In Albania the Department of Competition and Consumer Protection is part of the Ministry of Economy. In FYR of Macedonia the Monopoly Authority is placed under the Ministry of Economy. In Romania, the Competition Council and the Competition Office are responsible for enforcing competition law, although the Competition Council has a primary role. The Competition Office has only investigative powers in cartel and abuse of dominance cases, it represents the government in the Council's deliberations, monitors compliance with Council's decisions and surveys price trends. Bulgaria's Commission on Protection of Competition and Croatia's Agency for the Protection of Market Competition are organisationally distinct from the Government. The Antimonopoly Commission of FR Yugoslavia (Serbia and Montenegro) was constituted by the Decree of the

Federal Government as a collegiate federal administration body within the Federal Ministry of Economy and Internal Trade.

Some competition authorities have advisory bodies, as for instance the Monopoly Committee in FYR of Macedonia composed of academics and businesspersons appointed by the Government. Except in Bulgaria and Romania, competition authorities are small, and only in Romania there are offices at the regional level. As regards enforcement record, Bulgaria, Croatia and Romania have had a considerable number of competition cases for years, while Albania, FYR of Macedonia and FR Yugoslavia (Serbia and Montenegro) have had only a few competition cases per year.

In some SEE countries, some other authorities also have a role in part of the competition procedure. For instance, in FR Yugoslavia (Serbia and Montenegro) investigation is carried out both by agents of the Federal Market Inspectorate and by the inspectors from Antimonopoly Commission. Similarly, in Bulgaria it is the task of the Public Prosecution and the Ministry of Interior to investigate in certain competition cases.

With the exception of FYR of Macedonia,[20] all SEE competition laws provide for the possibility of judicial appeal, so adjudicating appeals against competition authorities' administrative decisions is the primary role of courts in competition procedures throughout the region. In Bulgaria, there are two instances of appeal before the Supreme Administrative Court, and in Romania, there are equally two instances of appeal before the Bucharest Court of Appeal and the Romanian Supreme Court of Justice respectively.

Nevertheless, in some SEE countries, courts have further roles in competition procedures. In Croatia, local misdemeanour courts have the role of ordering fines against the violation of the competition rules. In Romania, the Appeal Court has the power to impose divestiture of assets, to break-up firms and to annul contracts.

4.1.3. Law enforcement tools

All SEE competition authorities enforce the competition law in the administrative procedure, although their procedures are often covered by rules other than the relevant country's administrative code. For instance, the Bulgarian Commission on Protection of Competition enforces the competition law under its procedural rules, the administrative code and the civil procedure code.

In order to be effective, the competition law enforcement is to be based on two main enforcement powers: the power to investigate attempts to exclude competition and the power to sanction proven attempts to exclude competition. As mentioned above, in some SEE countries the competition authorities share one or the other power with some other institutions.

The following parts give a brief overview on the investigation and the sanctioning powers of the SEE competition authorities, and discuss the possibility of introducing leniency programmes in South East Europe.

Investigation powers. Several competition authorities in the region, in particular those with legislation more approximated to the EC law and extensive enforcement experience, have wide-ranging investigation powers. The *Bulgarian Commission on Protection of Competition* has the right to request oral and written explanations from persons, companies, state and local authorities. Similarly, the *Romanian Competition Council* and *Competition Office* may request companies to provide them with detailed information. Further, in its investigations, the Bulgarian Commission on Protection of Competition may request copies of private and official documents from persons, companies, state and local authorities.

The Bulgarian and the Romanian competition authorities also have the power to oblige entities subject to the competition rules to provide them with information. Under Bulgarian law public officials or company managers have the obligation to provide access to premises, to provide oral and written explanations as well as documents and other forms of information, including ones containing industrial and trade secrets. Similarly, in Romania central and local authorities as well as companies have the obligation to provide information and documents to the Competition Council and the Competition Office, including confidential information.

In line with EC law, the Bulgarian Commission on Protection of Competition and the Romanian Competition Council and the Competition Office also have the power to conduct dawn raids.

In contrast to the Bulgarian and the Romanian competition authorities, competition authorities with a more limited decisional practice seem to have more limited powers.

Sanctions. Sanctions for violating the competition law or hampering investigation are generally ineffective in all SEE jurisdictions.

For instance, in *Bulgaria*, the competition authority can levy a fine of up to BGL 2 500 (€ 1 300) on private persons for not co-operating with the authority's investigation. In FR Yugoslavia (Serbia and Montenegro) the same practices are sanctioned by a fine of EUR 50-150 for responsible persons and EUR 500-2 500 for companies, as well as 1-3 years in prison.

Fines for violating the competition rules are also limited. In Bulgaria fines on legal persons range from BGL 5 000 (€ 2 60) to BGL 300 000 (€ 155 000). and from BGL 100 000 (€ 51.000) to BGL 500 000 (€ 260 000) for repeated offences. Fines for natural persons range from BGL 1 000 (€ 510) to BGL 10.000 (€ 5 100)

for offences. and BGL 2 000 (€ 1 000) to BGL 20 000 (€ 10.000) for repeated offences. Under Bulgarian law, there is a special fine for non-compliance with a competition decision: the fine ranges from BGL 5.000 (€ 2 600) to BGL 300 000 (€ 155 000), and BGL 100 000 (€ 51 000) to BGL 500 000 (€ 260 000) for repeated non-compliance.

In *FR Yugoslavia (Serbia and Montenegro),* companies and legal entities are liable to pay fines between € 1 500-7 500 for violating the competition rules, whereas fines for natural persons range from € 250-500. Nevertheless, sanctions are not directly ordered in FR Yugoslavia (Serbia and Montenegro). The Antimonopoly Commission needs first to establish the offence and order the company to eliminate the violation, and may order the above-noted fines only if companies do not comply with its original order.

In *Romania*, there is a fine of € 180-9 000 for companies violating the competition rules; however, exceptionally in the region there is the possibility to levy a more effective fine amounting to 10% of the turnover of companies with a turnover exceeding ROL 2.5bn (€ 83 000).

Penal sanctions are exceptional in the region. Only two SEE countries, Romania and FR Yugoslavia (Serbia and Montenegro) mention imprisonment for violating the prohibition of anti-competitive agreements and abuses of dominance. In Romania prison terms between 6 months and 1 year may be imposed on the competent and responsible managers of companies engaging in anti-competitive practices. In FR Yugoslavia (Serbia and Montenegro), imprisonment for violating the competition rules ranges from 6 months to five years, and there is a 1-3 year prison term for hampering competition investigations.

In addition to fines and penal sanctions, SEE competition enforcers can order other types of sanctions for violating the competition rules. Apart from cease and desist orders, for instance *the Monopoly Authority of FYR of Macedonia* has the power to annul anti-competitive agreements. In Romania, the Competition Council can request the Court of Appeal to annul anti-competitive agreements, and in Bulgaria the nullity of anti-competitive agreements may be invoked before courts.

Further, the Monopoly Authority of FYR of Macedonia and the Romanian Competition Council have the power to confiscate the unjustified profit gained by violating the competition rules.

Divestiture of assets is an exceptional sanction in the South East European competition jurisdictions. Romania mentions that its Competition Council may ask the Court of Appeal to impose such sanction.

Finally, Bulgaria mentions that the Commission on Protection of Competition has the power to impose interim measures in situations where the violation of competition and harm is imminent and irreversible, and it has had recourse to such power in various types of competition procedures.

Leniency programmes. None of the SEE countries has a leniency programmes, whereby they would provide amnesty for whistle-blowers of the most egregious, so-called hard-core cartels. In some countries, the introduction of a leniency programmes is hampered by a constitutional rule that requires equality before the law, and in the context of administrative procedures, equal punishment for violations of the same gravity. Some other competition jurisdictions face procedural obstacles, in that they are obliged to fine all violators and cannot reduce fines below a minimum threshold set by the law. Finally, some countries could perhaps introduce leniency by law or in practice, but most probably, leniency would not be effective. Indeed, in all SEE countries the probability of cartels being discovered is too low and sanctions for violating the competition law are too light and too slow to induce whistleblowers coming forward with evidence against the cartel that they are members of. Moreover, the SEE legal systems might not provide sufficient protection for whistleblowers.

Perhaps a leniency programme is not necessary in the very first phase of competition law enforcement, say the first few years, when competition culture is so limited that "naïve cartels" can be uncovered by reading the newspapers. Nevertheless, as competition culture develops, uncovering cartels with the traditional investigation tools might become extremely difficult for competition authorities, especially those with so limited resources as SEE competition authorities.

4.2 Problems identified by participants

Drawing on the Status and Problem Inventory Reports submitted by SEE participants of the second thematic meeting, this part elaborates on region-wide problems in competition law enforcement.

4.2.1. Insufficient resources available to competition authorities

The number one problem in the region, as with most other transition economy competition authorities, is the lack of sufficient resources – human, but most importantly financial. This problem has very serious repercussions on almost every field of competition law enforcement in the entire SEE region. Just to mention one example, Bulgaria reports not having used its effective investigative powers to conduct dawn raids absent sufficient resources.

Lack of human resources is also a serious problem both in terms of the quantity and quality of enforcement for many SEE competition authorities.[21] On the one hand, many competition authorities in the region, with Albania, FYR of Macedonia and FR Yugoslavia (Serbia and Montenegro) being in the worst situation, have only a few employees, which is clearly insufficient. On the other hand, given the unattractive salaries the SEE competition authorities can offer, it is difficult to lure sufficiently skilled competition law enforcers, and it is difficult to keep them for a longer period. In such a situation, investment into training staff and thereby improving the skills of the authority might be easily lost.

Limited human resources and limited understanding of the goals of competition law and policy cause further problems. Several SEE competition authorities complained about the slow court procedures that result in too low fines for violating the competition rules.

4.2.2. Wasting resources

The problem that the SEE competition authorities have limited resources is often aggravated by wasting those scarce resources on enforcing competition law where it is not appropriate, or less effective and efficient than alternative methods, such as regulation or no intervention at all.

Examples can be cited from various countries and various fields of competition law enforcement. Romania has followed the EC rules in adopting its block exemptions; however, the block exemptions cannot fulfil their original function of reducing the workload of the competition authority because notification is obligatory not only for individual but also for block exemptions. Obligatory notification for block exemptions might be perceived as a tool to disseminate competition culture; however, there are certainly more direct and more effective tools for that purpose. Furthermore, in its proposed plans to modernise the EC antitrust rules, the European Commission plans to abandon mandatory notification for all kinds of exemptions from the prohibition of anti-competitive agreements whatsoever.

Another problem is that economic efficiency considerations are marginal in case handling. Instead, competition law enforcement is often dominated by fairness considerations or by the wish to protect individual market players. As mentioned above, Bulgaria has a number of competition cases; however, the number of cases dealing with the fairness of competition is double the number of cases dealing with anti-competitive agreements, abuse of dominance and mergers jointly. Further, as the following passage from one of the Status and Problem Inventory Reports suggests, the wish to protect individual market players and fairness often overshadows efficiency considerations:

> When an application of an enterprise to be accepted into some trade or professional association has been rejected, the Monopoly Authority, upon

request of the interested enterprise, may order acceptance in the association when the rejection in fact represents unjustified, unequal treatment and if that relevant enterprise has been put in an unfavourable competitive position in a dishonest way.[22]

Price control is another field where the competition law enforcement is less effective and efficient than alternative tools. Nevertheless, perhaps following the EC model,[23] many competition laws in the region[24] explicitly allow for prohibiting allegedly excessive or "unfair" prices as an abuse of dominance. Some competition authorities[25] still have powers to survey prices and engage in such activities regularly.

A general problem throughout the region is the relatively low proportion of cases against anti-competitive agreements, in particular against hard-core cartels in comparison to cases dealing with abuse of dominance. Several countries, for instance Bulgaria and Romania, that have a more robust experience in competition law enforcement, recognise the existence of this problem.

4.2.3. Ineffective tools to fight against attempts to exclude competition

There are various aspects of the ineffectiveness of tools to fight against attempts to exclude competition.

As regards competition laws and their coverage, several competition authorities do not have the power to enforce competition law against all types of attempts to eliminate competition, or do not have the same enforcement rights against all types of companies or in all sectors. For instance, the competition law of FR Yugoslavia (Serbia and Montenegro) has been adopted without the necessary secondary rules, and it does not provide for merger control. Even when law enforcement is possible, the rules are not sufficiently sophisticated. For instance, the definition of dominance in the competition law of FR Yugoslavia (Serbia and Montenegro) is limited to identifying as dominant all companies who do not face "significant competition". It is not by accident, as discussed below, that almost all SEE competition authorities plan to amend or update their legislation.

As demonstrated above, the investigative and sanctioning powers are also insufficient and ineffective. Indeed, several SEE countries admit having "weak"[26] or too "moderate"[27] sanctions. Although separating the various tasks of the competition law enforcement enhances procedural rights, too complex organisational separation of investigative and sanctioning powers result in those powers being ineffective. For instance the Antimonopoly Commission of

FR Yugoslavia (Serbia and Montenegro) reports that its decisions are not final administrative decisions, but

> [the competition] provisions are not applied by the Commission itself but by other authorities upon notification or request by the Commission. Namely, the Commission submits a request for instituting transgression proceedings to the appellate authority, or to the Federal Ministry of Economy and Internal Trade, while the request for instituting proceedings because of a business offence is submitted to the prosecutor's office itself which then institutes proceedings regarding the business offence, at the court. This is the result of the fact that the Anti-Monopoly Commission applies the administrative procedure that provides for two levels of settling the case. Namely, an appeal to the decision rendered by the Commission has to be filed with the Federal Ministry of Economy and Internal Trade whose decision is considered final in the administrative procedure, after which the party concerned may institute administrative proceedings before the Federal Court. The solution to the problem is in seeing to it that the amendments to the Law provide for the decisions rendered by the Commission to be final in the administrative procedure and that appeals relating to them are lodged directly with the court.[28]

4.3. Activities planned by participants

Following the second thematic meeting, Albania, Bulgaria, FYR of Macedonia, Romania and FR Yugoslavia (Serbia and Montenegro) prepared plans concerning their planned activities to fight against attempts to exclude competition. The following analysis summarises the key planned activities of each of those five countries.

4.3.1. Albania

Modernising legislation. Albania plans to focus on modernising its legislation and to draft a new competition law by June 2003, in which antitrust rules have a key role, and its enforcement is assigned to an independent Competition Authority and an independent Commission of Competition, which have to be established by the end of 2004. The new law should respond to the recent economic changes and serve to approximate the Albanian competition legislation to the EC law.

In order to prepare the law, joint working groups of the Department of Competition and Consumer Protection, the Ministry of Justice, and the Ministry of Integration will compile chapters on mergers, abuse of dominance, block exemptions, sanctions and the organisation of the competition authority. In preparing those chapters, the Department of Competition and Consumer Protection plans to draw on the experience of countries in the region, in

particular Slovenia and Croatia, as well as on expertise offered by the German GTZ foundation and the international organisations. Before being adopted, the draft will be discussed in roundtables.

4.3.2. Bulgaria

Approximation. Although the Bulgarian competition rules have been extensively approximated to the EC law, Bulgaria plans to make efforts for further approximation, in particular as regards state monopolies of a commercial character and companies with special and exclusive rights. Further, the Bulgarian Commission on Protection of Competition plans to adopt a block exemption on agreements in the insurance sector based on the EC model.

Sanctioning hard-core cartels. Bulgaria identifies as a major problem the ineffective implementation of the prohibition of hard-core cartels and other anti-competitive agreements. To make its approach more effective, in 2002 the Commission on Protection of Competition will develop a sanctioning policy for the most serious distortions of competition.

Monitoring companies with special and exclusive rights. To make its enforcement more effective, the Commission on Protection of Competition will also develop a special monitoring programmes for controlling companies with special or exclusive rights and companies with a significant market power.

Raising the quantity and enhancing the quality of the competition cases. Ultimately, the Commission on Protection of Competition would like to see an improvement in the quality and quantity of its competition cases. As regards the quantity of its cases, in particular, the Commission on Protection of Competition plans to raise the number of *ex officio* cases concerning hard-core cartels. Further, to enhance the quality of its analysis, the Commission on Protection of Competition plans to enhance the theoretical knowledge and practical experience of its officials focusing on the experience of the EC law.

4.3.3. FYR of Macedonia

Improving and approximating competition rules. Similarly to Albania, FYR of Macedonia plans to focus on improving its competition rules and approximating them to the EC law. In preparation of a wide-ranging amendment of its current competition law by spring 2003, by the end of 2002 the Monopoly Authority plans to assess the relevant EC rules, in particular the basic principles, exceptions and procedures under EC law. The analysis of the relevant EC rules will be linked to the assessment of the corresponding rules of FYR of Macedonia.

To prepare the amendment of the current legislation, the Monopoly Authority will prepare an Inception Report outlining the priority and, if possible, the drafting schedule of the new rules. Once the Inception Report is adopted, the Monopoly Authority will prepare a proposal for the amendments and draft them in detail, The Monopoly Authority will rely on the EU assistance for these preparations.

Monitoring companies with special and exclusive rights. With the objective of enhancing competition advocacy, FYR of Macedonia has started an analysis of particular regulated sectors. Funeral services and telecommunications are among sectors of special interest. Later in 2002, a follow-up of the privatisation process relating to the Electricity Power Company is to be made.

4.3.4. Romania

Approximation. Similarly to the other SEE countries, Romania plans to further approximate its legislation to the EC law – despite its previous progress in approximation. For that purpose, the Romanian competition authorities plan to prepare an activity plan for adapting the legislation to the latest developments of the EC competition law. In particular, the Competition Council will assess the recent development of the EC competition law in the field of horizontal and vertical agreements, and by April 2002 it is to prepare the following guidelines and regulations:

- regulation on the application of the article 5 of the Competition Law No. 21/1996 to vertical restraints;
- guidelines on vertical restraints;
- regulation on granting the exemption for specialisation agreements concluded between rival undertakings from the application of the interdiction stipulated in art. 5 (1) of the Competition Law No. 21/1996;
- regulation on granting the exemption for research and development agreements from the application of the interdiction stipulated in art. 5 (1) of the Competition Law No. 21/1996; and
- guidelines on the application of the article 5 of Competition Law No. 21/1996 to horizontal co-operation agreements.

The approximation of the Romanian competition rules will continue by transposing the EC block exemption of agreements among maritime liner companies and in the air transport sector by the end of August 2002, and the competition rules in the telecommunications sector by the end of September 2002.

Approximation will draw upon assistance from the Italian resident advisors financed by the EC twinning programme. The Competition Council will prepare quarterly monitoring reports on the developments in the area of approximation.

Cartels and leniency. In the context of approximating the Romanian competition rules to the EC law, the Romanian competition authorities will devote special attention to the tools to fight cartels, in particular to adopting a leniency programme. For that purpose, the Romanian competition authorities will analyse the recently amended EC rules on leniency.

Competition advocacy amongst judges. Since the Romanian competition authorities believe that the shortcomings of court procedures reduces the effectiveness of competition law enforcement, they will advocate for competition and raise awareness of competition issues in the judiciary. The Romanian competition authorities will prepare regular monitoring reports on the developments in this field.

4.3.5. FR Yugoslavia (Serbia and Montenegro)

Extending the competition rules to the merger control. By amending its competition rules, FR Yugoslavia (Serbia and Montenegro) would like to remedy the lack of merger control in its current competition legislation and to generally modernise its competition law. The Antimonopoly Commission will collaborate with a team of domestic and foreign experts to prepare a draft amendment to the current competition law drawing on the experience of other transition economies. The team of experts will submit the draft amendment to the Federal Ministry of Economy and Domestic Trade, which is the formal initiator of the legislative amendment process in the Federal Government. The Antimonopoly Commission will organise training for its staff to prepare effective merger control.

4.4. Conclusions and policy recommendations

4.4.1. Fighting against most harmful competitive restraints

Hard core cartels are generally seen as the most detrimental anti-competitive conduct, causing severe harm to consumers, other enterprises, and economic efficiency at large. Many countries of the world now put extra emphasis on fighting cartels, adopting more effective legal tools for uncovering, sanctioning and deterring such behaviour. Another major focus in mainstream competition law enforcement is unilateral or oligopolistic exclusionary behaviour, where companies having market power abuse their position in order to eliminate existing competition and deter new entry.

In the SEE region, however, such anti-trust enforcement does not yet play a major role. On the other hand the SEE competition authorities, unlike those in many CIS countries, do not waste resources on price control, regulatory evasion or unimportant bureaucratic procedures with no or little relation to competition. The behaviour of monopolies and competition problems related to the liberalisation and privatisation process are often seen as most important concerns, although inadequate resources may limit what can be achieved. The differences between EU accession countries and the other participants are considerable.

In the discussions on the need for new or more effective legal tools, several participants expressed a need for stronger investigative and remedial tools – both for getting necessary information on harmful anti-competitive practices, and for deterring such behaviour through stronger sanctions. OECD experts explained the use of leniency or amnesty programmes in order to encourage participants in cartels to offer full co-operation with the competition authority. However, experts also pointed out that a first prerequisite for leniency programmes to be effective is that cartel participants face a high risk of discovery and that the sanctions are severe.

Make the fight against harmful competitive restraints more effective by *a)* giving political support for this part of competition policy, *b)* providing effective legal rules for securing information and deterring anti-competitive conduct, and *c)* giving courts and competition authorities necessary resources and the power to impose strong sanctions that serve both a punishment and a deterrence function.

4.4.2. The resources of competition authorities

Limited competition culture and economic development prevent many transition economies from allocating sufficient resources to competition law enforcement, in particular to competition authorities. Many SEE competition authorities share that problem, and try to enforce competition law and advocate for competition culture with minimal personnel and financial resources.

At the same time, the resource problems of SEE competition authorities might also flow from the non-optimal use of resources. For some SEE competition authorities the major problem does not seem to be the total volume of resources; nevertheless, as described above, they still spend much of their resources on cases that only indirectly affect competition. Competition authorities with minimal resources would ideally be under an even stronger pressure to clearly prioritise their enforcement and advocacy activities and to spend their scarce

resources effectively and efficiently. However, similarly to their more “affluent” peers, “under-financed” SEE competition authorities show little sign of trying to focus on the most egregious attempts to eliminate competition and to attack those in the least resource-intensive way.

Increase resources of competition authorities where they are clearly insufficient in comparison with counterparts in developed economies, and review priorities for the use of existing resources.

4.4.3. Enhancing the knowledge and skills of competition law enforcers and adjudicators

The understanding, knowledge and skills of persons enforcing competition rules have a strong influence on the effectiveness of competition law enforcement. For instance, competition officials investigating cases have a key role in deciding which cases to analyse in detail and how to analyse them. Moreover, in some SEE countries the competition authorities rely on support by other government officials in investigating potential violations of the competition rules. Further, judges are key in adjudicating appeals against competition decisions, and in some SEE countries they have the exclusive power to impose sanctions on companies violating the competition rules.

Given the role of these actors, it is important to provide them with the know-how to enforce competition rules more effectively and efficiently. Training is an investment, and in that respect effective training also involves devising tools to keep trained staff. Longer-term career opportunities and attractive benefits might be necessary to achieve that goal. SEE competition authorities are well aware of the needs for training their staff and considerable efforts have been made to this end. However, existing needs are still far from being met, in particular as regards the officials outside the competition authorities, for instance judges, having a role in the competition policy area.

Support continued training of all individuals of competition institutions – in the competition authorities, the courts, as well as other bodies.

5. Competition policy institutions and their external relations

The third thematic meeting of the Competition Initiative was dealing with three topics:

1. SEE competition policy institutions and their enforcement capacity;

2. the relations of the SEE competition authorities with other institutions influencing competition in the market; and
3. the international relations of the SEE competition authorities, in particular as regards international law enforcement co-operation.

Based on the Status and Problem Inventory Reports submitted by the SEE countries for the third thematic meeting, the following analysis describes the current situation in South East Europe focusing on the above three topics. (Part 6.1) This is followed by the analysis of the major region-wide problems based on the ones identified by SEE participants in their Status and Problem Inventory Reports. (Part 6.2) Unlike following the first and second thematic meetings, participants were not required to submit Activity Plans after the third thematic meeting. Therefore, the following analysis does not cover the activities planned by SEE countries to resolve the above problems. Nevertheless, Part 6.3 provides conclusions and regional policy recommendations by the OECD.

The factual descriptions are in general based upon the situation in the SEE countries at the time of the submission of the Status and Problem Inventory Reports. However, to the extent more recent information was available, updates have been made in this Final Report.[29]

5.1. *Present situation in the SEE countries*

Based on the Status and Problem Inventory Reports submitted by the SEE countries for the third thematic meeting, the following analysis elaborates on the present situation on law enforcement capacity and international co-operation:

- SEE institutions involved in competition law enforcement and policy;
- other institutions with competence in policy areas having a bearing on competition; and
- international co-operation.

5.1.1. *Competition law enforcement and policy institutions*

SEE competition authorities. Except for Bosnia-Herzegovina, all SEE countries have adopted a competition law and assigned the task of enforcing that law to a specialised body.

In *Albania*, this is carried out by the Competition and Consumer Protection Department of the Ministry of Economy.

In *Bulgaria*, the Commission on Protection of Competition is responsible for enforcing the competition law.

In *FYR of Macedonia*, the Monopoly Authority within the Ministry of Economy adopts most competition decisions, and the Minister of Economy has the special competence to approve public interest cartels, take measures on export cartels

and approve mergers which are justified by prevailing public interest. The work of the Monopoly Authority is supported by the Monopoly Commission, which is an advisory body with the task of providing opinions on concentrations and general economic trends in the economy of FYR of Macedonia.

In *Romania*, the task of enforcing the competition rules is shared by the Competition Office, a government body, and the independent Competition Council.

In *FR Yugoslavia (Serbia and Montenegro)* the Antimonopoly Commission within the Federal Ministry of Economy and Domestic Trade has the task to enforce the competition rules, with the Federal Minister of Economy and Domestic Trade having the right to instruct the head of the Antimonopoly Commission.

The competencies of SEE competition authorities. SEE competition authorities have different competencies in enforcing the competition rules.

The *Albanian Competition and Consumer Protection Department* has the power to investigate, decide upon and eventually sanction anti-competitive agreements and mergers, as well as abuses of dominance. Further, it has the explicit power and to advocate for competition in various ways.

Similarly, the *Bulgarian Commission on Protection of Competition* has the power to investigate – with assistance by the public prosecution and the police – potential violations of the competition rules, to issue decisions and to order sanctions. The Commission on Protection of Competition also has advocacy powers.

As mentioned above, the competence of the *Monopoly Authority of FYR of Macedonia* is limited by the special powers of the Minister of Economy to decide on certain special kinds of potentially anti-competitive practices. Further, although the Monopoly Authority can establish the violation of the competition rules, it cannot order sanctions, but needs to initiate an infraction procedure before primary courts.

In *Romania*, the *Competition Office and the Competition Council* share the competence of enforcing the competition rules. The Competition Office has the power to investigate potentially anti-competitive agreements and abuses of dominance, to survey the enforcement of decisions made by the Competition Council and to survey price trends. The Competition Council has the power to investigate potentially anti-competitive agreements, mergers, and abuses of dominance, to decide upon such practices and to order sanctions. It also has advocacy powers.

In *FR Yugoslavia (Serbia and Montenegro)*, the competition law does not include detailed rules on mergers, and the *Antimonopoly Commission* enforces competition law only against anti-competitive agreements and abuses of dominance.

The organisational structure of SEE competition authorities. Although there are significant differences in the number of staff of the various SEE competition authorities, and some have only a few employees, all SEE competition authorities have some kind of internal specialisation reflecting the division of tasks related to competition law enforcement.

The *Albanian Competition and Consumer Protection Department* has two sections, one dealing with competition issues and the other with consumer protection. The competition section of the Department has an administrative-technical unit and a decision-making unit. This latter is the Commission of Competition, which comprises the Director of the Competition and Consumer Protection Department and five other members nominated by the Minister of Economic Co-operation and Trade on the proposal of the Director of the Department. Eventually, the Competition and Consumer Protection Department plans to be separated into a body dealing with consumer protection and another one enforcing the competition rules.

The Bulgarian Commission on Protection of Competition has eleven members: a chairman, two deputies, and eight members elected by the National Assembly for five years. Other senior officials of the Commission include a chief secretary and a legal adviser. The Commission has departments dealing with:

- legal and economic analysis;
- information technologies, communications and capital markets;
- industry and transport;
- European integration and international affairs;
- state aids; and
- administrative and technical maintenance.

The *Romanian Competition Office* has its headquarters in Bucharest and 42 inspectorates in the various counties of Romania. The Bucharest Headquarters of the Competition Office has two general directorates within which there are departments on methodology, investigations and control, state aids, international affairs and European integration.

The *Romanian Competition Council* has specialised and functional departments. Specialised departments include consumer goods, industrial goods and services, which pursue investigations, as well as research, international affairs and legal issues. Investigation departments are co-ordinated by a vice-president and two competition counsellors. Functional departments form the Secretariat General, managed by a Secretary General. A newly-established state aid department complete the organisational chart of the Competition Council.

The *Antimonopoly Commission of FR Yugoslavia (Serbia and Montenegro)* has two parts: a decision-making body responsible for making decisions, and an expert service, which has the task of investigating and preparing decisions.

The human and financial resources of SEE competition authorities. There are huge differences in the human and financial resources of various SEE competition authorities, in particular as regards the number of employees. The competition authorities of Albania, FYR of Macedonia and FR Yugoslavia (Serbia and Montenegro) have only a few employees, whereas the Bulgarian and Romanian competition authorities have several hundreds of employees. In particular, Romania has two bodies enforcing competition rules, with the Romanian Competition Office having 42 territorial offices in the counties.

As mentioned above, the *Albanian Competition and Consumer Protection Department* has two sections, one of which deals with competition issues and has two expert employees. Competition decisions are made by the Competition Commission, which comprises five members beyond the Director of the Competition and Consumer Protection Department. The Department is now in the process of separating its competition and consumer protection sections into two separate departments, and to increase the number of experts from four to six for competition and from two to four for consumer protection. Mainly lawyers and/or economists are recruited.

The *Monopoly Authority of Macedonia* has ten employees including the director. Among these employees, six are lawyers, three are economists, and there is also a technical secretary.

The *Antimonopoly Commission of FR Yugoslavia (Serbia and Montenegro)* has one chairman and six members, all of whom are economists and/or lawyers. Members of the Commission are not employed on a full-time basis. The expert service of the Commission employs three economists, three lawyers and two engineers.

The *Bulgarian Commission on Protection of Competition* has eleven members including a chairman, two deputies and eight members. Further, the various departments of the Commission include:

- 20 employees in the legal and economic analysis department;
- 10 employees in the information technologies, communications and capital markets department;
- 10 employees in the industry and transport department;
- 10 employees in the European integration and international affairs department;
- 10 employees in the state aids department; and
- 11 employees in the administrative and technical maintenance department.

In *Romania* the *Competition Office* has 300 employees, while the *Competition Council* has 107. According to a recent decision, the staff of the Competition Council is to be increased to 205.

As described above, the staff of the SEE competition authorities is composed predominantly of lawyers and economists. Lack of specific experience in competition-related issues poses a problem especially in competition authorities with fewer staff. FYR of Macedonia mentions the general problem that the employees of the Monopoly Authority lack experience. The Antimonopoly Commission of FR Yugoslavia (Serbia and Montenegro) notes that its staff is "insufficient" and does not have "sufficient professional training", in particular in theoretical issues and investigation skills.

As to financing, only a few SEE competition authorities have provided details, and most of the respondents disclosed the method of financing, without specifying whether resources were sufficient. FYR of Macedonia mentioned that its Monopoly Authority was financed from the state budget through the Ministry of Economy. In Romania, the Competition Office and the Competition Council are financed in different ways – reflecting their different level of independence from government. The Competition Office is financed from the state budget by the government, while the Competition Council can draw up its own budget, which is financed from a distinct chapter of the state budget. FR Yugoslavia (Serbia and Montenegro) mentions that its Antimonopoly Commission is financed by the federal budget. More importantly, the Antimonopoly Commission points out that its funds are too scarce. For instance, "no funds for travel abroad are planned so that the members co-finance their participation at workshops or seminars by personal funds".[30]

The independence of SEE competition authorities

For a competition authority, independence is defined in relation to political and economic influence, and it has various aspects: most importantly, organisational, functional, financial, and personal. In one or the other respects, the independence of most SEE competition authorities, in particular smaller ones, is limited. At the same time, almost all SEE competition show some important aspects of independence.

The *Albanian Competition and Consumer Protection Department* is organisationally part of the Ministry of Economy. Further, the Minister covering Trade has the power to overturn the merger decisions of the Department.

In *Bulgaria*, the *Commission on Protection of Competition* is financed from the state budget. It is independent from the executive, and its eleven members are elected for five years and dismissed by the National Assembly.

The *Monopoly Authority of FYR of Macedonia* recognises that by being part of the Ministry of Economy, its organisational independence is limited. However, it stresses that so far it has not suffered any limitations on its operational

independence. Nevertheless, the Minister of Economy has the role of deciding upon appeals against the decisions of the Monopoly Authority. Further, the Minister has exclusive competence to make first instance decisions on specific competition issues involving public interest.

In *Romania*, the *Competition Office* is a government body and its work is co-ordinated by the Ministry of Public Finance. Moreover, the Competition Office is directly financed by the government. In contrast, the *Competition Council* is independent of the executive both organisationally and financially. Further, members of the Competition Council are subject to strict limitations on external economic and political activities.

The *Antimonopoly Commission of FR Yugoslavia (Serbia and Montenegro)* is part of the Federal Ministry of Economy and Domestic Trade. It receives limited resources from the federal budget. Further, as the Antimonopoly Commission points out, its independence is limited in various respects:

> It is still not completely independent in decision-making. This is primarily influenced by the fact that the decision making body is composed of the members regularly employed in other services and most of them in the Federal Government, *i.e.* in the Federal Ministry of Finance and Federal Ministry of Foreign Economic Relations. They are not politically independent either, since they are elected on the function according to their political orientation, *i.e.* in the capacity of members of certain political parties. This job requires full time engagement so that it remains questionable whether someone who is not in permanent contact with the issue of competition can make a proper decision.
>
> The Commission is only formally independent in decision-making since the complaints against decisions of the Commission are dealt with by the body in the second instance – Federal Ministry of Economy and Domestic Trade, where the Commission is the part of this very Ministry. Nevertheless, the relationship between the Ministry and the body that is its part is regulated by a Decree of the Federal Government. This Decree entitles the Minister to instruct the chairman of the body on the line of action and request reports on activities and performance. If the Minister is the signatory of the decision in the second instance, it is clear enough that he can influence decision making of the Commission instructing it with guidelines and requesting reports.[31]

Finally, the Federal Ministry of Economy and Domestic Trade is the second instance decision-maker in competition issues. It is also a formal promoter of amendments, and its other activities have so far prevented it from submitting the amendments advocated for by the Antimonopoly Commission.

Other institutions with competence to enforce the competition rules. In addition to SEE competition authorities, other SEE institutions have the power to enforce competition rules. On the one hand, in some SEE competition jurisdictions, institutions other than competition authorities have some kind of partial role in enforcing the competition rules already at the first instance.

For instance, the Bulgarian Commission on Protection of Competition may rely on the assistance of the public prosecution and the police in its investigations. The Monopoly Authority of Macedonia is not entitled to order sanctions, as that competence lies with primary courts in the framework of infraction procedures.

On the other hand, all SEE competition laws provide for some kind of legal remedy against the first instance competition decisions of the competition authority. Such legal remedy is naturally provided outside the competition authority.

In *Albania*, the Minister covering Trade has the power to overturn the merger decisions of the Competition and Consumer Protection Department. Further, appeals to courts are available against decisions of the Competition and Consumer Protection Department. Such appeals are governed by Albanian civil procedure rules.

In *Bulgaria*, two instances of appeal are available against the decisions of the Commission on Protection of Competition. Both appeals are adjudicated upon by the Supreme Administrative Court, but the first appeal is assessed by a council of three judges and involves issues of law or fact, while the second appeal is limited to points of law, and it is adjudicated upon by a five-member council.

In *FYR of Macedonia*, the decisions of the Monopoly Authority can be appealed before the Minister of Economy. Judicial appeal is available before the Supreme Court.

In *Romania*, there are two instances of appeal against the decisions of the Competition Council. The first instance is before the Court of Appeal, while second instance appeals are adjudicated upon by the Supreme Court.

In *FR Yugoslavia (Serbia and Montenegro)* the Federal Ministry of Economy and Domestic Trade is the second instance decision-maker in competition issues. Further, judicial appeal is available before the Federal Court against competition decisions, although no appeals have yet been lodged in practice.

5.1.2. Institutions in adjacent policy areas

Institutions in adjacent policy areas include institutions which

- enforce special rules relating indirectly to competition, such as consumer protection, unfair competition and state aid rules;

- are involved in policies relating to the whole economy in general, such as privatisation or the approximation of domestic law to EC rules; and
- have competence in sectoral regulatory policies, such as telecommunications, energy, etc.

Before briefly analysing the relations of the SEE competition areas with such authorities, the analysis identifies the relevant authorities and their key characteristics.

Consumer protection. In *Albania*, the competition authority shares the task of enforcing consumer protection rules. The Albanian Competition and Consumer Protection Department in the Ministry of Economy has a special section dealing with consumer protection. Further institutions involved in Albanian consumer protection include the Food Inspectorate and the Veterinary Inspectorate of the Ministry of Agriculture and Food, the Sanitary Inspectorate and the National Centre for Medicament Control in the Ministry of Public Health, the Electric Equipment Inspectorate and the Inspectorate of Pressurised Equipment within the Ministry of Public Economy and Privatisation, the Public Inspectorate for Oil, Gas and Derivatives in the Council of Ministers and the General Standards Directorate. Finally, the Competition and Consumer Protection Department is in the process of separating its competition and consumer protection sections into two distinct bodies.

In most other SEE countries, consumer protection is the task of a body separate from the competition authority.

In *Bulgaria*, consumer protection is the task of the Ministry of Economy.

In *FYR of Macedonia*, the Ministry of Economy, the Market Control State Inspectorate, the Sanitary Control State Inspectorate, and the Environment Control State Inspectorate share the task of consumer protection.

In *Romania*, there is a special Office of Consumer Protection.

In *FR Yugoslavia (Serbia and Montenegro)* the Federal Market Inspectorate within the Federal Ministry of Economy and Domestic Trade is engaged in consumer protection.

Unfair competition. In *Albania, Bulgaria* and *Romania*, the competition authorities are involved in fighting against unfair competition. In Albania, the Competition and Consumer Protection Department has the task of enforcing the rules on unfair competition. In Bulgaria, the Commission on Protection of Competition is engaged in fighting against unfair competition. In Romania, one of the two competition authorities, the Competition Office applies the unfair competition rules.

Conversely, in *FYR of Macedonia* and *FR Yugoslavia (Serbia and Montenegro)*, distinct institutions carry out the same tasks. In FYR of Macedonia, it is the

task of primary courts to fight against unfair competition. In FR Yugoslavia (Serbia and Montenegro) the Federal Market Inspectorate within the Federal Ministry of Economy and Domestic Trade has the same task.

State aids. *Albania, FYR of Macedonia* and *FR Yugoslavia (Serbia and Montenegro)* do not have rules on state aid, although they are or probably will be required to introduce such rules as part of law approximation to the EC law. FYR of Macedonia has a draft state aid law, and plans to assign the task of enforcing those rules to an independent Commission for State Aid. The Albanian competition authority points out that it would prefer not having the task of enforcing state aid rules because they might expose the authority's competition law enforcement to unnecessary political influence.

In *Bulgaria* and *Romania*, the two SEE countries with state aid rules in force, the competition authorities are involved in the enforcement of such rules. For that purpose, the Bulgarian Commission on Protection of Competition has signed a memorandum of co-operation with the Ministry of Finance. In Romania, the Competition Office is responsible for drafting the state aids inventory and updating it annually, elaborating the annual report on state aids, and monitoring all existing aids, while the Competition Council provides advisory opinions on state aid issues.

Privatisation. Most SEE countries have a privatisation agency and some other bodies involved in formulating the country's privatisation policy.

In *Albania*, the People's Assembly decides on the national privatisation strategy, the Council of Ministers takes final decisions on the privatisation of enterprises, companies and sectors of strategic importance. The Ministry of Public Economy and Privatisation decides on inclusion of companies in privatisation programmes and forwards each case to the Council of Ministers, while the National Privatisation Agency is responsible for the technical implementation of the privatisation process.

In *Bulgaria*, the Privatisation Agency is responsible for companies with a book value of fixed assets above BGL 1 000 000 (€ 510 000), while respective ministries deal with the small-scale privatisation of state-owned enterprises, and municipalities have the competence to privatise municipally-owned companies.

In *FYR of Macedonia*, the Privatisation Agency deals with privatisation.

In *Romania*, the Authority for Privatisation and Administration of State Ownership is engaged in privatisation.

The privatisation institutions of *FR Yugoslavia (Serbia and Montenegro)* are the Privatisation Agency, the Tender Commission, the Bidding Commission, the Auction Fund and the Board for Restructuring Public Enterprises.

Law approximation. All SEE countries, even those that have not yet concluded a free trade agreement with the EC are in the process of approximating their rules with the EC law – or at least are preparing for that exercise. The following institutions are co-ordinating law approximation in the various SEE countries:

- in *Albania*, the Department for Legal Approximation in the Ministry of Justice, and in the field of competition law, the working group including the representatives of the Competition and Consumer Protection Department and the Legal Department in the Ministry of Economy, as well as the Department for Legal Approximation in the Ministry of Justice;
- in *Bulgaria*, the Council of Ministers co-ordinates law approximation on the national level, and in the context of competition law, the Commission on Protection of Competition prepares draft legislation;
- in *Romania*, the Ministry of European Integration; and
- in *FR Yugoslavia (Serbia and Montenegro)*, the Ministry of Economy and Domestic Trade and the Federal Ministry of Foreign Relations.

Financial services. The regulation of economic sectors is outside the competence of competition authorities in all SEE countries. As regards the financial sector, in *Albania*, the Bank of Albania is the key policy-maker. *In FYR of Macedonia*, the Ministry of Finance and the National Bank have the competence to regulate the financial sector. In *Romania*, the Ministry of Public Finance has the same task.

Telecommunications. Sectoral economic regulators are distinct from the competition authorities in all SEE countries; however, in some countries and certain sectors independent sectoral economic regulators have not yet been established.

For instance, in the telecommunications sector of *FR Yugoslavia*, there is no independent economic regulator, although there are plans to establish an independent regulator, the Telecommunications Board. In *FYR of Macedonia*, the Direction of Telecommunications and the Telecommunications Inspectorate have the task to regulate telecommunications. In *Romania*, the Ministry of Communication and Public Information is the sectoral regulator.

In *Albania* and *Bulgaria* there are independent sectoral regulators, while the governments determine the broader policy and legal framework. In Albania, the independent Telecommunications Regulatory Entity is the independent telecommunications regulator and the General Post and Telecommunication Directorate in the Ministry of Public Economy and Privatisation determines the broader policy framework. In Bulgaria, the Council of Ministers determines the broader telecommunications policy, the Minister of Transport and

Communications is the policy-maker, and the Commission on Communication Regulation is the independent telecommunications regulator. This latter submits annual reports to the Parliament and the Council of Ministers.

Post. In the postal sector, in *Bulgaria* the Council of Ministers defines the broader policy framework, the Minister of Transport and Communications is the policy-maker, and the Commission on Postal Services Regulation is the independent sector regulator, which submits annual reports to the Parliament and the Council of Ministers. In *FYR of Macedonia*, there is no independent regulatory agency, the Ministry of Transport and Communication is the sole policy-maker in the postal sector.

Energy. Several SEE countries have an independent regulator in the energy sector. In the *Albanian* electricity sector, it is the Electricity Regulatory Entity, and in the *Bulgarian* energy sector, the State Commission on Energy Regulation. In *Romania*, the National Regulatory Authority on Electric Energy and the National Regulatory Authority on Gas are the independent regulators in the relevant sectors.

In contrast, in *FYR of Macedonia*, the Ministry of Economy and the Technical Inspectorate regulate the energy sector. In *FR Yugoslavia (Serbia and Montenegro),* there is no independent sectoral regulator, but there are plans to set up the independent Serbian Regulatory Energy Board.

Utilities. In the utility sector, *FYR of Macedonia* mentions that the Ministry of Transport and Communication and the State Utility Inspectorate have the power to regulate.

Transport. In the transport sector, *FYR of Macedonia* mentions that the Ministry of Transport and Communication has the supervision task.

In their Status and Problem Inventory Reports prepared for the third thematic meeting of the Competition Initiative, the SEE countries have elaborated briefly on their experience with institutions in adjacent policy areas.

FYR of Macedonia and Romania mention that their competition authorities have very good relations with other institutions. The Albanian Competition and Consumer Protection Department elaborated more on its positive and negative experiences by providing the following examples.

On the positive side, the Albanian Competition and Consumer Protection Department has successfully co-operated with the National Bank, the economic regulator in the financial sector, to avoid an unnecessarily broad exemption of the Savings Bank from the competition rules. The Savings Bank, the country's biggest bank is in the process of being privatised, and its

potential buyers did not want to be subject to the outdated prohibition of dominance based on a 40% market share threshold. The Albanian government proposed exempting the Savings Bank from the competition rules altogether, which is certainly unnecessary. Eventually, the Albanian Parliament has adopted the narrower exemption jointly advocated for by the Competition and Consumer Protection Department and the National Bank.

On the negative side, Albania mentions that although it has independent sectoral regulators in the telecommunications and electricity sectors, the regulators "do not always exercise their competencies"[32] when they could prevent outcomes that are more detrimental to competition than others.

The Antimonopoly Commission of FR Yugoslavia (Serbia and Montenegro) elaborates on its negative experience in its relations with other institutions, and opines that the problem originates in the lack of competition culture:

> Collaboration of the bodies dealing with competition protection and other governmental institutions has not been realised to a larger extent. This results from insufficient promotion of the competition concept in public, the Antimonopoly Law itself, as well as the body for implementation of the law. Namely, participating in the Regional Initiative we came to realise the importance of raising awareness on competition and, accordingly, the initial steps have been taken towards the media and after that the information on Regional Initiative has been sent to Ministries of Privatisation, Energy and Mining, Traffic and Telecommunications, National Bank and Chamber of Commerce.
>
> The best collaboration has been developed with the Federal Ministry of Economy and Domestic Trade and Federal Ministry of Foreign Economic Relations. In the process of stabilisation and association with the European Union a Consultative Task Force was set up for competition issues so that when the European Commission inquires about competition, the Federal Ministry of Foreign Economic Relations co-ordinates the operation of this one and the Antimonopoly Commission.
>
> However, collaboration with the Republican Ministries of Energy and Mining and Traffic and Telecommunications has not been established so far. Circulation of Information on our participation in the Regional Initiative was aimed at initiating this collaboration particularly having in mind the specific sectors that are under the jurisdiction of these ministries where there is no competition, but market for competition has to be provided as well.[33]

5.1.3. International co-operation

Several SEE competition authorities have been established rather recently. Several have very limited law enforcement experience and limited knowledge

about competition law. Most importantly, many of them have decided upon only a limited number of cases so far. In that situation, it is natural that most of their international contacts are established when receiving technical assistance, and for the moment international law enforcement co-operation plays a secondary role. Nevertheless, the importance of that latter should increase over time.

SEE competition authorities also engage in general co-operation focussing on international policy dialogue. In a global context, such policy dialogue is carried out in the framework of formalised international organisations, such as the WTO or UNCTAD, or in more informal fora, such as the OECD Global Forum on Competition or the International Competition Network. Policy dialogue also has a regional aspect. Indeed, it has been one of the declared goals of the Competition Initiative to foster policy dialogue among high-level South East European competition officials, which would allow them to establish informal contacts and exchange experience about broader law enforcement and policy issues. Several SEE countries opined that the Competition Initiative has achieved that goal, in particular it has established the "South East European competition family," it provided a forum for regional policy dialogue, and hopefully it created sufficient momentum for enhanced regional co-operation in the future.

For instance, FR Yugoslavia mentions that

> Collaboration has been realised in the form of informal contacts with representatives of the bodies for competition protection in Southern Eastern Europe, participants at the Regional Initiative, but no individual cases have been realised. In an attempt to learn more about de-monopolisation of telecommunications in Southern Eastern Europe we inquired in the countries in the region, but only some participants of the Regional Initiative replied. Nevertheless, participation in the Regional Initiative resulted in our meeting the representatives of the bodies in charge of competition protection and the information were exchanged enabling easy communication, mostly focusing exchange of experience in implementation of the competition protection legislation.[34]

A more developed international co-operation involves law enforcement co-operation in individual competition cases. As in any other part of the world, international law enforcement co-operation in South East Europe has been of a formal and informal type, although in practice, informal co-operation seems to be more frequent than co-operation based on formal instruments. There are two types of formal instruments providing for international law enforcement co-operation with the SEE competition authorities. On the one hand, some SEE countries have concluded bilateral and regional free trade agreements on the country level, and often those agreements – such as the Europe Agreements and the Stabilisation and

Association Agreements with the EC and its Member States, or the agreement on the Central European Free Trade Area – include provisions on competition law enforcement co-operation. On the other hand, less political instruments include co-operation agreements relating exclusively to co-operation in the competition law enforcement, and sometimes concluded directly by the competition authorities.

Policy dialogue and law enforcement co-operation – whether bilateral, regional or global – are the most pertinent of the above three types of broad international co-operation. The table provides a brief overview of the role of the SEE competition authorities in policy dialogue and law enforcement co-operation.

5.2. Problems identified by participants

5.2.1. Lack of competition culture

As the Competition Initiative has confirmed, the lack of competition culture is the most pervasive competition problem in most SEE countries. Almost all the competition problems identified below and in other parts of this report are related to it in some way.

Indeed, if there were competition culture, the general public, the policy-makers and the business community would likely support the work of competition authorities and help to advocate pro-competitive refinements to regulatory regimes. The public would better understand the long-term beneficial effects of competition, and would support competition, competition law enforcement and pro-competitive reform even if it involves short-term sacrifices. Further, there would be effective pro-competitive reform and policy-makers would regularly and seriously consult the competition authority on how to further such reform. Competition authorities would enjoy greater independence and resources to effectively advocate for competition and to vigorously enforce the competition rules. Finally, instead of asking for protection from competition, business would compete more vigorously, would take risks and innovate more, and would comply more with the competition rules.

The Antimonopoly Commission of FR Yugoslavia (Serbia and Montenegro) provides an instructive testimony about the way in which it realised the importance of the competition culture:

> Collaboration of the bodies for competition protection and other governmental institutions has not been realised to a larger extent. This results from insufficient promotion of the competition concept in public, the Antimonopoly Law itself, as well as the body for implementation of the law. Namely, participating in the Regional Initiative we came to realise the importance of raising awareness on competition and, accordingly, the initial

steps have been taken towards the media and after that the information on Regional Initiative has been sent to Ministries of Privatisation, Energy and Mining, Traffic and Telecommunications, National Bank and Chamber of Commerce.[35]

5.2.2. Lack of resources available to competition authorities

Resource problems have been mentioned under the problems relating to taking action against anti-competitive behaviour above. It is repeated here because it has been a recurrent complaint of the SEE competition authorities throughout the series of thematic meetings. Overall and in the context of capacity building, the lack of resources has been highlighted as one of the most serious problems of most SEE competition authorities.

5.2.3. Lack of independence of competition authorities

A general experience of the SEE competition authorities has been that they might sometimes rely on outside support, but often they are the only potential advocates of competition and competition culture. They also realise that contacts to the government might be useful in competition advocacy, and contacts to the business community might serve to better understand market trends. However, many of them believe that they could fulfil their role more effectively if they were more independent from business and government.

Many SEE competition authorities see that their lack of independence prevents them from building a competition culture effectively, and enforcing the competition rules vigorously. Indeed, countries where the competition authority is captured by stakeholders of the historic and often anti-competitive economic regime and by constituencies interested in anti-competitive arrangements will lack an important voice for pro-competitive reform and will ultimately have less effective reforms.

5.2.4. Lack of independent sectoral regulators

SEE competition authorities confirm the general experience that pro-competitive reform and regulatory policies are hampered by the lack of independent regulators. For instance, as described above, FR Yugoslavia (Serbia and Montenegro) notes the serious consequences of not having independent and pro-competitive regulatory agencies.

5.2.5. Lack of constructive relations between competition authorities and other institutions

Although only a few SEE competition authorities admit having problems establishing a constructive relationship with institutions in adjacent policy areas, the relatively limited stage of pro-competitive reform in most countries

		Albania	Bosnia-Herzegovina	Bulgaria	Croatia	FYR of Macedonia	Romania	FR Yugoslavia (Serbia and Montenegro)
South East Europe	SEE countries	RPD	RPD	RPD	RPD	RPD	RPD	RPD
	Albania					PD		
	Bulgaria				BFTA	BFTA, BCA, IBC, PD	BPD, BCA, IBC	
	Croatia	BPD		BFTA		PD		
	FYR of Macedonia	PD		BFTA, BCA, IBC, PD	PD		PD	
	Romania			BPD, BCA, IBC		PD		
Former planned economies of Central and East Europe	CEECs			RPD			RPD	
	CEFTA			RFTA			RFTA	
	Belarus						BCA	
	Czech Republic						BCA, IBC	
	Estonia			BFTA				
	Georgia						BCA	
	Hungary				BPD	PD	IBC	
	Lithuania			BFTA				
	Poland						IBC	
	Russian Federation			BCA, IBC			BCA	
	Slovenia					PD		
West Europe and other countries	European Commu-nities			FTA	FTA	FTA	FTA	
	Belgium						IBC	
	Germany			IBC		PD	IBC	
	Greece						PD	
	Israel		BFTA					
	Italy					IBC		
	Netherlands					IBC		
	Norway					IBC		
	Turkey		BFTA			PD		
	United Kingdom					IBC		

		Albania	Bosnia-Herzegovina	Bulgaria	Croatia	FYR of Macedonia	Romania	FR Yugoslavia (Serbia and Montenegro)
Global	ICN			IPD		IPD	IPD	IPD
	OECD Global Forum on Competition			IPD			IPD	
	UNCTAD			IPD			IPD	IPD
	WTO			IPD			IPD	IPD

1. Abbreviations: BCA = Bilateral Co-operation Agreement; BFTA = Bilateral Free Trade Agreement; BPD = Bilateral Policy Dialogue; FTA = Free Trade Agreement; IBC = Informal Bilateral Co-operation in Competition Cases; IPD = International Policy Dialogue; PD = Policy Dialogue; RFTA = Regional Free Trade Agreement; RPD = Regional Policy Dialogue.

would suggest that several SEE competition authorities share this problem. Indeed, in the absence of a competition culture, relations are necessarily limited and often not sufficiently constructive. As mentioned above, the Albanian competition authority reports that there are independent regulators in the electricity and telecommunications sector, but they are sometimes reluctant to intervene, even when regulatory solutions would be more effective than competition law enforcement in fighting attempts to eliminate competition.

Further, in the absence of independent regulators, the competition authorities are constrained to establish relations with entities that might be less supportive to competition.

5.3. Conclusions and policy recommendations

5.3.1. Lack of competition culture

As several SEE participants have indicated, lack of a competition culture is the most pervasive competition problem throughout South East Europe. As indicated above,[36] creating a competition culture should result in the general public, policy-makers and the business community supporting the work of competition authorities and helping to advocate pro-competitive refinement of existing regulatory regimes. The public would better understand the long-term beneficial effects of competition, and would better support competition, competition law enforcement and pro-competitive reform even if it involves short-term sacrifices. Further, there would be more effective pro-competitive reform and policy-makers would regularly and seriously consult the competition authority on how to continue such reform. Competition authorities would enjoy greater independence and resources to advocate for competition effectively and to enforce the competition rules vigorously. Finally, instead of asking for protection

from competition, business would compete more vigorously, would take risks and innovate more, and would comply more with the competition rules.

It has been an important achievement of the Competition Initiative that the SEE participants have recognised the utmost importance of creating competition culture. Building competition culture involves various types of activities addressed to various constituencies, and in their Activity Plans, many SEE countries decided to address one or the other aspect of building a competition culture. Nevertheless, the SEE competition authorities have limited resources, and therefore need to address the problem of limited competition culture in a way adapted to their economy and society.

One of the ways to enhance competition culture is to involve international experts who can authoritatively demonstrate examples of the benefits of market opening and competition law enforcement. The half-day open session during the third thematic meeting of the Competition Initiative illustrated that point.

> Develop strategies for enhanced understanding of the benefits of competition among key stakeholders, including the general public, the business community and the political level. Involve the international competition community and the international organisations in activities aiming to build a competition culture.

5.3.2. The independence of competition authorities and sectoral regulators

Limited competition culture entails limited knowledge and understanding of the usefulness of competition and limited support for competition, competition law enforcement and competition advocacy. As a result, the competition authorities and other institutions in the competition policy area may find that limited independence or no independence at all affects their work negatively.

Although independence might reduce the effectiveness of competition authorities in influencing policy-makers, a certain level of independence is imperative in the enforcement of competition rules and advocacy for competition. Several SEE competition authorities show significant shortcomings in this respect both *vis-à-vis* politicians and the business community.

Lack of a competition culture also results in several SEE countries not having independent sectoral regulators in key sectors. The absence of the independent regulators reduces the possibility of a neutral regulator setting rules that provide an optimal playing field for competition. The lack of independent regulators also results in competition authorities having to lobby interlocutors that have limited understanding of and support for competition.

Ensure that competition and regulatory authorities are able to carry out their duties without questionable influence or undue interference from other branches of Government or interest groups.

5.3.3. International co-operation with peers

Transition economies may benefit from the experiences of developed market economies when adapting their economies and laws to the best models and practices. At the same time, transition economies often find it equally useful to learn from their peers who might be facing very similar problems and might have accumulated positive and negative experience in economic transition.

SEE competition authorities recognise the importance of a balanced approach to co-operation, and, within the limits of their financial and technical possibilities, are doing a lot to exchange views also with their peers. Nevertheless, more intense sharing of experiences among SEE competition authorities would be useful and possible even with the resources available. Further, given the geographical vicinity and the increasing openness of the SEE economies, competition problems are increasingly having a regional dimension. International law enforcement co-operation should keep pace with those developments.

Many SEE participants praised the Competition Initiative for establishing the basis of lasting relations among high-level SEE competition experts, and believed that it made enhanced co-operation in the region possible.

Establish a regular low-budget format for meetings among SEE competition officials that may develop into more developed co-operation between SEE competition authorities

6. Concluding remarks

6.1. Achievements and lessons from the Competition Law and Policy Initiative

6.1.1. Initiating a process for enhanced capacity

As set out above (section 2.2.1) two of the key strategies of the Initiative were to produce deliverables and to develop participants' capacity to deal with competition problems in their economies in effective ways. In order to observe both of these strategies, the major emphasis of the Initiative was on participants' own written contributions. Before meetings, Status and Problem Inventory Reports on the theme of the meeting were produced by each country, and

distributed to all participants. These contributions were the basis for discussions at the meetings with colleagues from other countries and with OECD Member experts in the panel. After the two first meetings, based upon the previous discussions, Activity Plans were produced by participants, to be discussed in the following meeting.

In the final meeting participants discussed the achievements and the lessons from the Initiative and commented upon the approach and the organisation of the programme. The model of inviting participating competition authorities to produce comprehensive contributions between meetings had been seen as very ambitious at the time of the launching of the programme. There had even been doubts that this approach would in the end prove viable. However, in the concluding discussions several participants expressed strong satisfaction – and even surprise – that this model in reality had worked above expectations.

Participants also commented upon the quality of the reports. There was a broad recognition of the usefulness of the reports, both as regards learning about problems and solutions in neighbouring countries, and concerning the benefits of training to identify, analyse and describe competition problems. Several participants claimed that the quality of the reports had significantly improved from the first to the third meeting. It was evident that the reports demonstrated an enhanced ability to identify not only competition problems in the respective economies, but also existing needs for continued capacity building. This implies that an enhancement of participants' capacities had in reality taken place.

Another key strategy was to encourage co-operation leading to the establishment of networks between competition authorities and competition officials in the region. To this end, the programme aimed at actively involving the Heads and other leading officials of the SEE competition authorities, and to keep this group permanent, to the extent possible, in all three meetings.

Although there were inevitably some differences in participation in the three meetings – as regards both persons representing the SEE competition authorities and countries being able to send representatives – the ambition to establish a permanent group of participants largely succeeded. The representation level was overall high – mostly heads, deputy heads or commission members from the national agencies or ministerial bodies responsible for competition policy.

In the final discussion on the achievements, participants claimed that although nothing had previously prevented the establishment of a SEE competition policy network, the Competition Initiative had in reality triggered the tying of closer links between the participating competition authorities. There were several examples of bilateral informal consultations between the

meetings (as well as seeking informal advice from the OECD Secretariat), and on different occasions reference was made to the emerging "SEE competition family". As demonstrated by experiences from other parts of the world, the building of a successively closer and more formalised co-operation on competition law enforcement often starts with a process of building confidence and person-to-person relations. This process evidently started through the approach taken in the Competition Initiative and could – provided other driving forces take over – continue into a more established intra-regional co-operation on competition law and policy.

6.1.2. Outputs of the Initiative

- The participating countries[37] have prepared Status and Problem Inventory reports on *the opening of markets for competition***.** They have also submitted Activity Plans on how to deal with high priority problems in this area.
- The participating countries have prepared Status and Problem Inventory Reports *on tools needed to effectively fight anti-competitive behaviour*. They have also submitted Activity Plans on how to deal with high priority problems in this area.
- The participating countries have prepared Status and Problem Inventory Reports on *institutional issues and international co-operation*.
- In addition to materials for the three thematic meetings and reports on those meetings, the OECD Secretariat has prepared an *Interim Report*, with some preliminary conclusions from the programme thus far. This report was used as a background material at the meeting with representatives for the private sector, different Ministries and media in Belgrade on 26 March 2002.
- A highly important if intangible result has been the *change in participant's mindset* resulting from the work to date. One example is the attitude to competition advocacy, where few participants saw this as an important – or even legitimate – activity of competition authorities. In the final thematic meeting there was general strong support for strengthening the advocacy role of competition authorities.
- Another salient result is the remarkable improvement in *participants' abilities* to identify competition problems in their submitted reports, and to draft relevant action plans.

Notes

1. The Commission on Protection of Competition.
2. The Monopoly Authority.
3. The Competition Protection Office.

4. At this take-off meeting, also the competition authority of Bulgaria joined as organising partner.
5. The Final Report reflects the conclusions and the proposals of the participants in the Initiative, which do not necessarily concur with those of the respective authorities.
6. For instance, the Albanian political instability in the wake of the pyramid schemes.
7. Croatia Status and Problem Inventory Report on Opening Markets to Competition (see *www.investmentcompact.org*).
8. Albania, Bulgaria.
9. FYR of Macedonia.
10. FR Yugoslavia (Serbia and Montenegro) Activity Plan on Opening Markets for Competition (see *www.investmentcompact.org*).
11. *Id*.
12. *Id*.
13. The Final Report reflects the conclusions and the proposals of the participants in the Initiative, which do not necessarily concur with those of the respective authorities.
14. See the part on Opening Markets to Competition above.
15. Bulgaria adopted the original competition rules in 1991, and updated them in 1998. The competition laws of Albania and Croatia both date from 1995. FR Yugoslavia (Serbia and Montenegro) passed its competition law in 1996, and this law entered into force in 1999. In Romania, competition rules entered into force in 1997, and the competition law of FYR of Macedonia was adopted in 1999.
16. So far, Bulgaria has transposed the recently adopted EC block exemption on vertical agreements, and Romania has adopted a number of block exemptions modelled on the EC rules.
17. Strikingly, under Romanian law, notification for block exemption is also mandatory.
18. Under Bulgarian state aid rules, state aids affecting trade between Bulgaria and other markets with state aid rules, in particular the EC, shall be notified to the competition authority.
19. The third thematic meeting included a detailed discussion of institutional capacity. Part 6 of this report summarises the topics of that meeting, and provides a more detailed account on the SEE competition authorities.
20. Ministry of Economy.
21. Bulgaria and Romania seem to have that problem less, since their competition authorities have several hundreds of staff. In particular, the Romanian Competition Office has regional offices, as well, and the Romanian Competition Council has recently obtained the approval to significantly increase its numerous staff.
22. SPIR on Taking Action against Anti-competitive Behaviour, FYR of Macedonia (see *www.investmentcompact.org*).
23. Exploitative abuses, such as excessive prices, may seem to be important by the wording of Article 82, EC Treaty; however, in reality those provisions play no significant role in the enforcement practice of the European Commission and the European Courts nowadays.

24. For instance, the Romanian competition law has such a provision, although Romania points out that it has not been applying that provision.
25. For instance, the Romanian Competition Office.
26. Status and Problem Inventory Report on Taking Action against Anti-competitive Behaviour, FR Yugoslavia (Serbia and Montenegro) (*see www.investmentcompact.org*).
27. Bulgarian Status and Problem Inventory Report on Taking Action against Anti-competitive Behaviour.
28. Status and Problem Inventory Report on Taking Action against Anti-competitive Behaviour, FR Yugoslavia (Serbia and Montenegro) (*see www.investmentcompact.org*).
29. The Final Report reflects the conclusions and proposals of the participants in the Initiative, which do not necessarily concur with those of the respective authorities.
30. Status and Problem Inventory Report on Building Institutions and Laying Foundations for International Co-operation, FR Yugoslavia (Serbia and Montenegro) *(see www.investmentcompact.org)*.
31. Status and Problem Inventory Report on Building Institutions and Laying Foundations for International Co-operation, FR Yugoslavia (Serbia and Montenegro) *(see www.investmentcompact.org)*.
32. Status and Problem Inventory Report on Building Institutions and Laying Foundations for International Co-operation, Albania (see *www.investmentcompact.org*).
33. Status and Problem Inventory Report on Building Institutions and Laying Foundations for International Co-operation, FR Yugoslavia (Serbia and Montenegro) *(see www.investmentcompact.org)*.
34. Status and Problem Inventory Report on Building Institutions and Laying Foundations for International Co-operation, FR Yugoslavia (Serbia and Montenegro) *(see www.investmentcompact.org)*.
35. Status and Problem Inventory Report on Building Institutions and Laying Foundations for International Co-operation, FR Yugoslavia (Serbia and Montenegro) *(see www.investmentcompact.org)*.
36. See Part 5.2.1.
37. Albania, Bulgaria, FYR of Macedonia, Romania, and FR Yugoslavia participated in all activities of the programme, whereas Bosnia-Herzegovina and Croatia took part in some activities. Special representatives for Montenegro participated in some activities.

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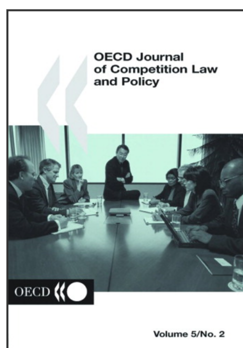

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