THE RIGHT TO ACCESS THE FILE IN COMPETITION PROCEEDINGS: ALBANIAN AND WESTERN BALKANS CHALLENGES IN THEIR EUROPEAN PATH

Mirela BOGDANI
Lecturer, Faculty of Law, University of Tirana
E-mail: mirela.bogdani@klp.al

Monika CANCO
Lecturer, Faculty of Law, University of Tirana
E-mail: monika.canco@fdut.edu.al

Abstract

The purpose of this paper is to examine the right to access one's file in competition proceedings, as part of the right to fair trial provided by European legal instruments, in relation to limitations of this access imposed by competition legislation in the European Union (EU) and Western Balkan (WB) countries. Pursuant to their aspirations to become Member States in the EU, they must align their legislation with the EU's *Acquis* while ensuring the protection of rights, as established by the ECHR. The methodology used to answer the research question combines desk review and two-level comparative study methodologies. The desk review is applied in this paper to answer the research question, focusing on a careful examination of the EU legal framework, while comparative approach, seeks to identify similarities and differences in the provisions related to the right to access the competition file in the EU, Albania, and other WB countries such as Kosovo, North Macedonia and Montenegro. Additionally, the study presents the interpretations of the right to access the file, as part of the administrative and/or trial proceedings in the case law of the European Court of Justice and the European Court of Human Rights from a human rights perspective. The findings of this study indicate that the right to access the file is restricted by public enforcement of competition law, only in specific cases where limitation pursues a legitimate aim, is proportionate and does not jeopardise the party's situation. The European human rights instruments mandate that the EU institutions, Member States and Candidate Member States must carefully regulate the clash between human rights and competition law. The WB countries have adopted the EU standards regulating access to the competition file. However, each jurisdiction has its own

specifications, challenges and domestic factors shaping the national rules.

Keywords: *EU competition law, fair trial, Western Balkan countries, public enforcement of competition law, NCAs, access to files*

1. Introduction

This paper will examine the potential clashes between two important, though very distinct, areas of law: fundamental rights and competition law. Being a private law discipline mainly involving legal persons, competition law has only recently been seen under the lens of fundamental rights, especially the right to due process and fair trial. This article focuses on an important component of the right to a fair trial: the parties' right to access the proceedings file.

An important chapter of this study is dedicated to the analysis of EU primary, secondary legislation and soft law concerning competition law, focusing on recent EU secondary legislation, such as the recent Directive to Empower National Competition Authorities (known as ECN+ Directive). In addition, the two major legal instruments regulating *inter alia* the right to access a file in Europe, such as those of the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFREU), are reviewed.

The analysis will shift to the Albanian legal provisions concerning access to the file in competition proceedings. The main focus will be a comparative analysis between the Albanian Constitution, the law 'On protection of competition' or other national normative acts, and the EU's respective competition law provisions.

Finally, this paper will discuss the competition law provisions of three Western Balkans countries, Kosovo, North Macedonia and Montenegro, regarding the right to access a file. The above provisions are analysed and compared with Albanian legislation and EU standards.

2. EU Competition Law and Fundamental Rights: Do They Clash?

Competition law and fundamental rights are distinct areas of law, each pursuing separate objectives. In practice, conflicts arise between the two. The right to a fair trial as a fundamental right, being not absolute, can be subject to limitations as prescribed by law and only where necessary.

EU competition law is primarily enforced by the European Commission (the Commission) at the EU level. The Commission has several important competencies in this field, including administrative, investigative and

sanctioning ones, as well as drafting competition enforcement policies throughout the EU. Unlike in other areas, the EU, in particular the European Commission, wields considerable powers and supranational authority when it comes to the protection of undistorted competition in the internal market (Wouters and Ovádek, 2021). On the other hand, each Member State domestically enforces competition law via the National Competition Authorities (NCAs), which apply the domestic competition laws and Commission's guidelines to achieve optimal competitiveness in their national market. Similarly, the Member States' NCAs have administrative powers to investigate and sanction anticompetitive behaviour nationally.

However, this extended role of the Commission and the NCAs has sometimes raised scepticism among law scholars and practitioners regarding the need to guarantee some fundamental rights of the undertakings. In most cases, the question is whether there is a clash between the EU public enforcement policies of the Commission and NCAs and the States' positive obligations concerning the ECHR, especially Articles 6 and 8, which respectively address the right to a fair trial and the right to privacy.

Some of the possible conflicts between the rights guaranteed by the ECHR and the European and national competition practices are related to the impartiality of NCAs in their capacity of adjudicative bodies. EU competition regulation is seen in the light of Article 6(1) of the convention. Some authors have argued that the Commission, holding both prosecutorial and adjudicative functions, cannot be regarded as an entirely impartial body (see also: Zingales, 2010; Galev, 2019). Even though the decisions of the Commission and the NCAs can be challenged before the European Court of Justice (ECJ) and national courts respectively, they can be considered *de facto* tribunals, as will be discussed below, and their decisions and sanctions are binding to the parties.

Concerning the right to a fair trial guaranteed by ECHR, another potential conflict can arise between the right to access the file as a component of Article 6(1), and the need to keep important information undisclosed. Some authors emphasize that the right to access one's file is corollary to the right to be heard (Jourdan, 2018, p. 1). Others consider it with related to the notion of equality of arms (Beumer, 2014, p. 24) Due to the secrecy of the investigation procedure, the parties under investigation for breaches of competition law cannot consult their file in the early stages of the investigation of Competition Authorities. In addition, the involved undertakings are not allowed to disclose any part of the file, even in the later stages. This issue will be analysed in more detail below.

Other issues concern the unannounced on-site inspections. These practices have frequently been contested by the parties involved. Since Article 8 of the ECHR has proven to apply even to legal persons (Société Colas Est and Others v. France, 2002), these entities rely on Article 8 guarantees to appeal unannounced

on-site inspections of the Commission or the NCAs (Looijestijn-Clearie & Rusu, 2017, p. 52).

3. The Right to access the file in competition proceedings- the European standards

The right to access one's file is a fundamental procedural right, related to the principle of fair trial. Access to the file is a right of the parties which guarantees the principle of equality of arms, based on the idea that every person is entitled to equal interest and respect by an authority, and the effective exercise of the right of defence through access to data and documents related to the procedure, also known as "the file" (Gutinieki, 2022). Some of the most relevant legal instruments regulating the right to access the file will be discussed below.

3.1 The ECHR standards on the right to access the file

ECHR is an international human rights agreement establishing fundamental rights for persons residing in the signing states, members of the Council of Europe (CoE). Since all Member States of the EU are also Members of the CoE, the Convention is binding to each of them. The Western Balkans countries are also signing members of this convention. Even though each EU Member State has already signed and ratified the ECHR, the EU as a *sui generis* international organisation has not done so yet. Negotiations for the EU's accession to the ECHR started in 2010. However, this process has not yet been finalised. Accession to the ECHR will ensure that the EU is subject to the scrutiny of the European Court of Human Rights and to the same system of international human rights oversight as its Member States (Delegation of the European Union to the Council of Europe, 2023). The Member States of the EU can be held accountable before the European Court of Human Rights (ECtHR) for breaches of the Convention, not on the grounds of being a Member State of the EU, but a Member of the CoE. Consequently, The NCAs need to provide the minimum guarantees of the freedoms established by the ECHR.

The ECHR does not include an article dedicated specifically to the right to access files. However, this right is part of the guarantees enshrined in Article 6 ECHR (Right to a fair trial). This article applies to civil, administrative and criminal proceedings. The civil arm of Article 6 is provided in its first paragraph, stipulating

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order

> or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. ...

3.1.a. Are NCAs tribunals?

ECtHR has been careful to broadly interpret the word tribunal. As outlined in the CoE Guide on Article 6 (2022), the Court has established three cumulative requirements for a national body to be classified as a tribunal. After applying these criteria to the NCAs, we have concluded that they are classified as a tribunal within the meaning of Article 6(1) ECHR, as follows.

First, a 'tribunal' is characterised in the substantive sense of the term by its judicial function *(Guðmundur Andri Ástráðsson v. Iceland*, 2020). Its decisions must be binding, as the power to issue advisory opinions without binding force is not sufficient (*Benthem v. the Netherlands*, 1985, para 40). These decisions may not be altered by a non-judicial authority (*Van de Hurk v. the Netherlands*, 1994, para 45). Importantly, the Court emphasized that a tribunal need not be a court of law integrated within the standard judicial machinery of the country concerned (*Xhoxhaj v Albania*, 2021, para 285). This paper concludes that the NCAs comply with the first requirement on their judicial function. Even though they do not necessarily pertain to the national judicial arm, their decisions are binding as they have investigative and sanctioning powers, as Regulation 1/2003 establishes under Article 5. In addition, the NCAs are designed to be independent bodies (as emphasized by the ECN+ Directive) and their decisions cannot be altered by administrative or other non-judicial bodies.

Second, the Court has provided that a tribunal must be independent, in particular from the executive; impartial, and needs to guarantee the procedural principles, several of which appear in the text of Article 6 (*Le Compte, Van Leuven and De Meyere v. Belgium*, 1981, para 55). In this regard, we can easily deduce that NCAs satisfy the second criterion as well: the ECN+ Directive establishes under Article 4 that they have to be independent and impartial. On the other hand, according to the ECJ case *Heintz van Landewyck SARL and others v Commission*, the EU Commission cannot be considered a tribunal in the meaning of Article 6(1) ECHR, as it does not satisfy the independence criteria since it holds executive powers (paragraphs 80 and 81). However, scholars remain sceptical of this decision (see also: Galev, 2019, p. 31).

Third, the notion of a tribunal implies that the body should be composed of judges selected based on merit, that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of them in a State governed by the rule of law (*Guðmundur Andri Ástráðsson v. Iceland*, 2020, para 221). Consequently, as in the two other

requirements, we conclude that the NCAs also comply with this third requirement as well, as the ECN+ Directive provides in Article 4(2) for specific professional criteria for the selection of the NCAs' decision-makers.

After analysing the above three-step test, it can be determined that the NCAs satisfy all three conditions/requirements to be classified as tribunals within the scope of Article 6(1) ECHR – the right to a fair trial. Therefore, under the positive obligations arising from it, the NCAs must guarantee and respect the parties' right to a free trial, including the right to access their competition file.

3.1.b. ECtHR case law on the right to access one's file

The ECtHR has recognised the right to access one's file as a procedural right guaranteed by Article 6 ECHR. The term 'file' refers to trial files and also administrative files, especially if their disclosure is important for the party's case. If the national legislation conditions the disclosure of the file with prerequisites concerning later stages of the proceedings or whether the file is referred for trial, it is limiting the right to access the file. However, this right can be limited under certain circumstances, provided that the limitation pursues a legitimate aim, is proportionate and does not jeopardise the party's situation, as will be elaborated below.

ECtHR case law interpretations on the Convention have become an essential source of reference for the domestic courts of the signing states. Through the interpretation of the ECHR, the Court's jurisprudence gradually generated a new form of law which has developed into an evolving concept of Convention law (Stefanovska, 2022, p.35). The Court has elaborated important standards regarding the right to access one's file. Below, we have analysed the Court's decisions of our choosing, that best exemplify the Court's standing on the right to access a file and its limitations.

The right to access the file, as part of the guarantees provided under Article 6 ECHR, is related to the principle of fairness, effectiveness, and the equality of arms. It applies not only to trial files but also to administrative documents (*Savitskyy v Ukraine*, 2012, para 143). Importantly, the Court has asserted that the notion of an effective remedy with respect to an allegation of ill-treatment also entails adequate access by the complainant to the investigation procedure (*Assenov and Others v Bulgaria*, 1997, para 122). In analysing the right to access the file, the ECtHR has concluded that if [the national legislation] does not duly address the issue of access to the file by the victim or other interested parties at the earlier stages of the proceedings or in the events the case file is not referred for trial, it does not provide appropriate access to the case file and that significantly undermines the effectiveness of the procedure (*Savitskyy v Ukraine*, 2012, para 114).

Moreover, the ECtHR has established in *Kerojärvi v Finland* that proper participation of the appellant party in the proceedings requires the court, of its own motion, to communicate the documents at its disposal (1995, para 42). In the same case, the court decided that it is not material that the applicant did not complain about the non-communication of the relevant documents nor took the initiative to access the case file (para 43).

However, the right to access one's file can be subject to limitations. The latter must pursue a legitimate aim, be proportionate and not restrict or reduce the access left to the individual to such an extent that the very essence of the right is impaired (CoE, Guidance on Article 6, 2022). In *Loiseau v France*, the Court held that whilst it is difficult to derive from the ECHR a general right of access to administrative data and documents, the Court's case law takes into account the importance, where appropriate, of the disclosure of such data and documents for the applicant's situation (1992).

3.2 The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union (CFREU) is a primary legal instrument with the same value as the EU treaties (EU Commission, 2023). Even though the EU is not a signing member of the ECHR, the Charter is consistent with this document. In the above publication, the Commission provided that when the Charter contains rights that stem from this convention, their meaning and scope are the same (2023).

Article 41 CFREU establishes the *right to good administration* as an essential procedural right in the EU. It provides that *"*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union". Such provision, under paragraph 2(b), includes "...the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy". The right to access one's file complements the other rights to defence in that it places that person in a position to determine what information the administration holds about them (Kellerbauer, Klamert and Tomkin, 2019, p. 2206). Article 41 establishes two legitimate limitations to the right to access the file: *confidentiality and professional and business secrecy*; both are elaborated further by the EU competition legislation. The right of a party to access their file differs from the right of the public to access documents of the institutions, bodies, offices and agencies of the Union. The latter is provided under Article 42 CFREU.

The right to good administration provided by the CFREU, including the right to access one's file, applies to the EU agencies, institutions and bodies, but not to the EU Member States. Article 41(1) CFREU clarifies that its scope is not extended to the Member States, not even when they apply the EU law.

However, this does not preclude the Member States from guaranteeing the above rights. In addition, each Member State is a signing member of the ECHR with the European Courts being the driving force for constant approximation of the concept of good administration as well as a general principle of European Union Law, thus allowing those general principles of EU law to be invoked by the Member States when acting in application of EU law (Cuculoska, 2018).

3.3 The European Code of Good Administrative Behaviour

The European Code of Good Administrative Behaviour (ECGAB) is an instrument adopted in 2001 that elaborates further on the provisions of Article 41 CFREU. It lays down the essential public service principles applying to EU institutions. This Code provides that it is not legally binding (page 6). However, the principle of good administration is enshrined in the ECJ case law and the CFREU.

The ECGAB addresses the Member States' role in applying Article 41 CFREU. This Code confirms once more that the above article applies to European institutions and civil servants of the EU (page 11). However, it emphasizes that the right to good administration is based on the case law of the Court of Justice concerning good administration as a general principle of EU law, which also binds the Member States when they are acting within the scope of EU law (page 11).

In conclusion, even though the ECGAB is a soft law, it provides general principles established by the ECJ case law and elaborates further the principles of the CFREU. From this perspective, good administrative behaviour is a general principle to be followed not only by the EU institutions but also by Member States, including the NCAs.

3.4 Regulation 1/2003 on the right to access the competition file

Regulation 1/2003 is the cornerstone of the actual public enforcement of competition law. It was the first to decentralise the powers of the Commission and introduce the NCAs' role in enforcing the competition law nationally. This regulation mentions the importance of guaranteeing the right to access one's file. However, its Recital 32 stipulates that this right needs to be balanced by the need to protect business secrecy.

The procedural principle of the right to access the file is enshrined in Article 27 of the above Regulation, addressing the hearing and complaints of the parties. Article 27(2) provides that the parties shall be entitled to access the Commission's file, subject to the legitimate interest of undertakings in protecting their business secrets. The procedural timing of the disclosure of the competition file is before the Commission takes a decision on termination of

the infringement, interim measures, fines or periodic penalty payments, as provided in Article 27(1). However, according to the EU Regulation on Competition Proceedings (EU Commission, 2004), access to the file is provided only after the notification of the Statement of Objections (Article 16). File disclosure is not granted automatically but needs to be requested by the parties. According to the above Regulation on Competition Proceedings, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections if so requested (Article 15). On this matter, the ECJ has ruled that the Commission cannot withhold certain documents because it considers them of no interest to the undertakings concerned (*Solvay SA v Commission*, 1995, para 81).

However, Regulation 1/2003 restricts access to the competition file not only by timing, but also by the specific type of document being sought. As established by Article 27 of Regulation 1/2003, the right of access to the file shall not extend to:

- confidential information (like business secrets); and
- internal documents of the Commission or the NCAs, especially correspondence between the Commission and the NCAs.

However, Article 27 leaves the final say to the Commission to disclose any information necessary to prove an infringement. Thus, even if a document is part of the list above, the Commission has the discretion to decide on the balance between the right to access the file and the right to protect competition policies.

In addition to the above provision, the Commission's Notice on Access to File (EU Commission, 2004) provides examples and details concerning the two non-disclosable categories above. According to Section II.3 of this Notice, internal documents of the Commission include meeting minutes, and correspondence with other Member or non-Member States' public authorities. In addition, confidential information includes business secrets such as technical and/or financial information or other confidential information, including data provided by third parties (complaints of consumers).

Leniency statements do not make it to the Regulation 1/2003 list of undisclosable information. They are self-incriminating statements made by former cartel member(s) (also called whistle-blowers) levitating information to the Commission/NCA in exchange for full or partial immunity from the fines. On the other hand, these crucial statements are not left unprotected from disclosure. The Commission's Notice on Immunity from Fines under paragraph 34 establishes that access to the file is only granted to the addressees of a statement of objections on the condition that the information obtained may only be used for the purposes of judicial or administrative proceedings for the application of the competition rules in the related administrative proceedings.

In addition, the same Notice provides in paragraph 33 that other parties such as complainants will not be granted access to corporate statements.

3.5 ECN+ Directive

The ECN+ Directive (European Parliament and Council, 2019) aims to strengthen the role of NCAs in enforcing competition law effectively, complementing Regulation 1/2003. The primary purpose of the directive is to ensure that consumers and businesses are not disadvantaged by national laws and measures that prevent NCAs from being effective enforcers of competition law. This directive harmonises to a large extent the investigative, decision-making and sanctioning powers of the NCAs without intruding into the competencies of the European Commission as provided by Regulation 1/2003 (Cappai and Colangelo, 2023).

Concerning the right to access a party's file, the ECN+ Directive re-establishes the standing of Regulation 1/2003 indicating that the right to access the file is attributed to any parties in the proceedings. It stipulates that the right to access a relevant case file is essential to exercise the right of proper defence, pursuant to the limitations mentioned previously (Recital 14).

One of the essential questions regarding the right to access a party's file in competition proceedings is the right to access leniency statements. Disclosing crucial but delicate information like leniency statements to other cartel members could discourage the leniency applicants from coming forward. Consequently, the Commission's and the NCAs' leniency policy could be jeopardised. Concerning this issue, the ECN+ Directive follows the path paved by Regulation 1/2003. Under Recital 72, it provides that regardless of the form in which leniency statements are submitted, information in leniency statements that has been obtained through access to the file should be used only where necessary for the exercise of rights of defence in proceedings before national courts in certain very limited cases which are directly related to the case for which access has been granted. Moreover, Member States shall ensure that access to leniency statements or settlement submissions is only granted to parties subject to the relevant proceedings and only for the purposes of exercising their rights of defence in cases that are directly related to the case for which access has been granted, and only where such proceedings concern specific scenarios provided by the Directive (Articles 31(3) and (4) of the Directive). It is important to emphasize in this regard, that even though access to the leniency statements can be provided in limited cases to the subjects of public enforcement, i.e., the undertakings concerned, the EU Damages Directive clearly states that third parties claiming compensation cannot request the disclosure of these statements (Article 6).

4. The right to access documents in competition proceedings in Albania

Being a former communist state for about five decades, Albania does not have a well-established tradition regarding competition legislation and fair trial proceedings. However, in the last thirty years, Albania has ratified important international agreements concerning human rights and other statements concerning building a competition-prone market. The following will discuss the main legal instruments in Albania dealing with the right to access files in competition proceedings.

4.1 The Albanian Constitution provisions on the right to access the competition file

Under Article 11, the Albanian Constitution provides that the economic system of the Republic of Albania is based on private and public property, as well as the market economy and the freedom of economic activity... restrictions on the freedom of economic activity can be set only by law and only for important public reasons. Economic freedom belongs to the basic values also protected by a system of fundamental rights (Zimmer, 2012, p. 352). Competition rules are the foundation on which a functional market economy can be built. Therefore, they serve to protect this constitutional principle.

The Albanian Constitution dedicates an integral part to the right to a fair trial. In particular, the right to a due process and fair trial is established in Article 42, which provides *inter alia* that the freedom...and rights recognized in the Constitution and by law may not be infringed without due process...Everyone, for the protection of his constitutional and legal rights, freedoms, and interests, or in the case of an accusation raised against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law. In a similar fashion to Article 6(1) ECHR, Article 42 of the Albanian Constitution does not specifically address the right to access the file. However, it is a component of the right to free trial, as established by the ECHR case law, discussed above.

Are the rights guaranteed under Article 42 of the Albanian Constitution subject to limitations? The Albanian Constitution refers to the ECHR when regulating the restriction of the rights it affords. Consequently, the ECHR holds a special significance within the hierarchy of domestic normative acts. It provides in Article 17(2) that limitations to constitutional rights cannot violate the essence of freedoms and rights and in no case can exceed the limitations provided for in the ECHR. By referencing the limitations established in the ECHR, the Albanian Constitution grants the ECHR a constitutional standing. As such, while the right to access files may be subject to legal constraints, these restrictions must not go beyond the minimum safeguards established by the ECHR and the case law of the ECtHR, particularly with regard to Article 6(1).

Thus, we conclude that the tests elaborated by the ECtHR on fair trial are directly applicable also by the Albanian courts or other administrative bodies established by Albanian laws.

4.2 The right to access the file and the role of the Albanian Competition Authority

The Albanian law 'On Protection of Competition' *(ALPC*) is the cornerstone national legal instrument which regulates the material and some procedural aspects of competition law. It regulates the cases of disclosure of files, as well as limitations to this right. First, the above law provides in Article 30 that Members of the Albanian Competition Authority (ACA)'s Commission and all persons authorised for the implementation of this law keep professional secrecy and do not disclose confidential information provided during the performance of their duties to any person or institution, except for cases where they have to testify before the court. In addition, Article 42 establishes that the preliminary investigation procedure and the economic sector investigation do not necessarily include the right to consult files. The Article 30 ALPC provision goes hand-in-hand with EU Regulation 1/2003 concerning the protection of business secrecy. In addition, ACA's Regulation on Investigative Procedures of the Competition Authority (2011) provides that parties will be able to access their file only after the issuance of the Investigation Report.

Access to the file is not automatic: according to the ACA's Guideline On Confidentiality and Access to the File, the parties need to request such access in writing from the authority which will evaluate and offer feedback to the party within thirty days (Article II.1.1.14). The latter can be considered as an extended timeframe, as compared to other legislations, such as Kosovo, North Macedonia and Montenegro.

In addition to the above provisions, the ACA's Guideline sets a list of documents that are not made accessible to the parties even after the issuance of the Investigation Report, including:

- internal documents: notes, preliminary documents, or correspondence between NCAs or other international organisations (Article II.2.2);
- confidential information: information that is held by a limited number of persons and could cause damage to the legitimate interests of a party, like business secrets (for instance, cost-evaluation methods, produced and sold quantities, trade and sales strategies, etc.) (Article II.2.2);
- leniency statements: not only the statements themselves but also the identity of the whistle-blower is kept undisclosed until the end of the investigation (Article II.2.2). According to the Guideline, under no circumstances will a leniency statement be disclosed. Only the information prepared for the ACA procedures and the information prepared and sent to the parties by the ACA will be disclosed. This

standing differs from Regulation 1/2003, which allows access to leniency statements under certain circumstances.

The subjects that can make requests for the disclosure of file documents according to Article II.1.1 of ACA's Guideline include all the undertakings involved, as well as other persons that have a direct and immediate interest in the investigation and that have filed data and/or have filed a complaint regarding the initiation of the investigation. Even though the ACA's Guideline does not explicitly address private enforcement of Albanian competition law, the above provision allows the damaged private parties to have access to investigation data in order to build their damages claim.

Regulation 1/2003, the ALPC and ACA's Guidelines follow similar (even though not identical) principles regarding the non-disclosure of correspondence between the NCAs, business secrets or leniency statements. On the other hand, the moment of the disclosure of other evidence may be a subject of controversy. The ACA's guideline does not allow access to the file before issuing of Investigation Report. This limitation to the right to access the file has been similarly used in other Western Balkans countries.

The final decisions of ACA are often contested in domestic courts. According to ACA's 2023 Annual Report, during 2023 there were fourteen cases of challenged ACA decisions that had been sent to the courts of the first instance, appeal or the High Court (p. 47). However, these challenges primarily focused on substantive law rather than procedural law.

5. The right to access the competition proceedings file in some Western Balkans countries

The domestic legislation of WB countries recognises the right to access the file only after the end of investigations, or the issuing of a decision. As actual/future candidate EU countries, they have to transpose and implement the *acquis* on, *inter alia*, competition law. However, the progress in the competition policy area has been generally slower compared to other transition indicators (Tosheva & Dimeski, 2019, p. 39).

Even though some of the WB competition authorities' decisions are challenged in the courts, the full specifics are not regularly published on the NCAs' official website. Additionally, there are occurrences where the most recent Annual Reports are not readily accessible on their websites, making it difficult to obtain information.

Below are the main highlights regarding the parties' right to access the competition file in Kosovo, North Macedonia and Montenegro.

5.1 The right to access competition proceedings file in the Republic of Kosovo

The Constitution of the Republic of Kosovo does not explicitly mention the right to access the file. However, in Article 3(2) it establishes that the exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members. The same approach is confirmed under Article 31, establishing the right to a fair and impartial trial. In addition, under Article 7(1), the Constitution of the Republic of Kosovo stipulates that 'The constitutional order of the Republic of Kosovo is based on the principles of freedom...equality, respect for human rights and freedoms and the rule of law...and a market economy.' The right to access the file is a fundamental human right, and hence a value on which this constitution is based. On the other hand, another value mentioned in this provision is the market economy, which is closely related to a functioning competition legislation. Moreover, this constitution establishes that a market economy with free competition is the basis of the economic order of the Republic of Kosovo (Article 10). How would a potential conflict between the above two constitutional values be managed? Kosovo's law on Protection of Competition tries to provide an answer to that. Adopted in 2022, this law has addressed some of the common issues or legislative gaps that older EU legislation has shown. This law regulates the competition rules and procedures, and the functions of Kosovo's Competition Authority (KCA).

Among other standards introduced, this law tries to balance the need to keep the investigation secret and the parties' right to access the file. Kosovo's competition law dedicates its Article 45 to the right to access a subject's file. In its first paragraph, it provides that the party involved in the procedure may request access to the file in writing after the notification of preliminary findings is delivered. This provision allows for access to the file before a final verdict of the KCA. However, the investigations carried out before the notification of the preliminary findings are discrete, and no access to the file is permitted. The authority must set the actual date for the disclosure of the requested information within at least five days, which is significantly shorter than the Albanian legislation's 30 days. However, Kosovo's competition law does not explicitly mention a maximum time period within which the disclosure will take place.

Similar to Regulation 1/2003 and the Albanian Competition Law provisions, Kosovo's competition law in Article 45(5) limits the right to access a KCA file. The above article lists some undisclosable documents:

- decisions of the Authority;
- minutes or audio recordings of Commission meetings;

- internal instructions and subject notes;
- correspondence between the Authority and other NCAs;
- other documents which are considered commercial secrets.

The above list is similar to the provisions of Regulation 1/2003 as regards the protection of internal and confidential information. Unlike the Albanian case, neither this law nor KCA's Regulation on Investigation Procedures (2023) mention leniency statements as a nondisclosure document.

It remains ambiguous as to which decisions of the Authority, as provided by Article 45(5.1) of Kosovo's Competition Law, remain undisclosed. Generally, it is an essential right to information of any party in a procedure to access a decision that affects their judicial rights and duties. Kosovo's competition law does not elaborate further on this matter or whether this provision refers only to the internal or draft decisions of the Authority.

In this regard, pursuant to the above legal analysis we believe that more detailed provisions to Kosovo's competition law are needed in the near future. More specifically, concerning access to the file, two amendments are needed: first, a clear timeframe for the Competition Authority to disclose information needs to be set; and second, the specific documents protected against disclosure need to be clearly distinguished from the others. This amendment would contribute to guaranteeing parties' right to a fair trial and to stronger judicial certainty.

5.2 The right to access competition proceedings file in North Macedonia

The right to access one's file is not directly mentioned in the Constitution of North Macedonia. However, it provides in Article 15 that the right to appeal against individual legal acts issued in first-instance proceedings by a court, administrative body, organization or other institution carrying out public mandates is guaranteed. In addition, this Constitution establishes the essential principles of competition law, like the freedom of the market and entrepreneurship. Under Article 55, it ensures an equal legal position to all parties in the market and calls for measures against monopolistic positions and conduct in the market.

North Macedonia adopted its actual law on Protection of Competition in 2010. Since then, this law has been amended four times, the last amendment taking place in 2018. This law regulates the material rules protecting competition and procedural aspects of public enforcement of competition law.

The above law provides in Article 32(5) that the procedural order for the initiation of a procedure shall be submitted to the person against whom the procedure has been initiated and to the party submitting the request if the procedure was initiated at the request of a natural or legal person having a

legitimate interest in determining the existence of a misdemeanour. However, the above paragraph does not address whether the party under investigation will be granted access to their file in a reasonable timing. In Article 41(4), the law stipulates that if some of the data or documents owned by the company which are taken or kept by the authorized persons of the Commission are a business or professional secret, the undertaking may, within eight days, inspect the taken or kept data and documentation, clearly mark the data and documentation which are a business secret and indicate the legal basis for their classification as such. The right to access the above documents is limited to the documents provided by the undertaking itself and not other interested parties and is bound by the condition that the undertaking claims they contain trade secrets.

Similar to the Albanian and Kosovo legislation, the disclosure of file documents is granted by Article 56(2) of the Macedonian competition law after receiving the preliminary statement of objections, i.e., after the initial investigation by the authority. Article 56(4) stipulates that permission to disclose the file documents is given within 15 days of the day of accepting the request for access to files. The above law does not provide a maximum time for the Authority to accept this request. However, in reference also to other legislations, we believe that the shortened timeframe implemented by the legal framework in North Macedonia provides a stronger assurance of the right to access the file.

The North Macedonian competition law in its Article 56(7) provides a list of undisclosable information (in a similar fashion to the EU, Albanian and Kosovo's competition law). The above article stipulates that the parties in the procedure shall not be entitled to inspect, transcribe or copy:

- the draft decisions of the Commission;
- the minutes of the sessions;
- the audio and audio-visual recordings of the sessions;
- the internal instructions and notes of the case or the correspondence and letters with the European Commission or any other EU institution;
- business or professional secrets.

In addition to the above reservations, the interested parties are not allowed to appeal or take legal action against the procedural order for refusing the request for access to files, according to Article 56(8) of the law. Unlike Kosovo's legislation, the legislation of North Macedonian is more precise regarding the kind of decisions of the authority that are not given access: only the drafts. Interestingly, the law does not protect correspondence with other competition authorities from disclosure, only correspondence with EU institutions.

5.3 The right to access competition proceedings file in Montenegro

The legal framework of the Republic of Montenegro is governed by its Constitution, which is divided into six parts and establishes the main principles and values that govern the functioning of the state and its laws. In relation to the right to a fair trial and specifically the principle of equality of arms, the Montenegrin Constitution provides under Article 17 that everyone is entitled to equal protection of their freedoms and rights in accordance with the law. Further, it establishes that every person should be guaranteed the right to defend themselves and the right to engage in defence counsel before the court of law or before some other body authorised to conduct proceedings (Article 35). On the other hand, the above constitution recognises the importance of entrepreneurship rights, stipulating in Article 47 that freedom of earning and freedom of entrepreneurship shall be guaranteed- all acts and activities creating or instigating monopoly and preventing market-oriented economic activities shall be prohibited.

Montenegro adopted the actual competition law in 2012, which superseded the former law, adopted in 2006. The actual competition law has undergone an amendment in 2018. The above law establishes the main rules governing competition and the functioning of the Montenegrin Competition Authority (known domestically as the Competition Agency). This law does not explicitly address the right of the parties to access the competition file. However, it provides under Article 35(1) that before making a final decision, the Authority shall be obliged to deliver to all the parties against whom the proceedings have been initiated a written notice of:

- established facts;
- circumstances; and
- conclusions in the proceedings.

Differently from the previously discussed legislation, the Montenegrin competition law does not require a prior request from the parties, as outlined in Article 35 of the law.

In contrast with other Western Balkan countries, Montenegro's competition law provides that the Competition Authority may impose a measure of protection of the source of information or the specific information if it assesses that the request of the party who provided the information is justified and more important than the need to inform the public of the subject of such request (Article 28). This provision grants the Montenegrin Competition Authority wider discretion compared to its counterparts in other Western Balkan countries. In this regard, we conclude that this generalized provision may potentially undermine the standard of judicial certainty, as it lacks clarity regarding which documents would be considered justified for protection.

6. Conclusions

This paper conducted a comparative analysis on two key levels. The first level involved examining potential conflicts between competition law and fundamental freedoms, which are distinct areas of law. The second level focused on comparing different legislations, including EU, Albanian, Kosovo, North Macedonian and Montenegrin legislation, in terms of how they strike a balance between the varied interests pursued by these legal domains.

This study has examined some important competition provisions that may limit the parties' fundamental rights. Concerning the right to access the file documents, it is not considered an absolute fundamental right, leaving room for potential limitations, if they are well-founded in a legitimate interest and proportionate.

The EU institutions and its Member States have positive obligations to guarantee the right to access a party's file. These obligations arise from different international legal instruments. EU Member States having signed and ratified the ECHR, have positive obligations under Article 6 ECHR to guarantee the right to fair trial. This study reached the conclusion that NCAs are tribunals in the meaning of Article 6(1) ECHR. Consequently, they need to abide by the procedural obligations as regards the right to a fair trial, including access to the file. The EU Commission and other EU institutions must comply with CFREU's Article 41 on (among others) the right to access the file.

Regarding the public enforcement of EU competition law, the applicable EU legislation recognises the need to restrict the right to access the competition file. Regulation 1/2003 and the more recent ECN+ Directive provide a list of documents that should not be disclosed. The limitation on the right to access the file in this context is justified on the grounds of safeguarding internal communications between institutions, protecting business secrets, and ensuring the effectiveness of the leniency procedure.

The Albanian law on Protection of Competition establishes the rules for the disclosure of competition files. This law prohibits the right to access the file before issuing the Investigation Report. After this stage, the Competition Authority can provide the parties with access to the file within 30 days from the request, a more extended period than other Western Balkan countries. Even after this moment, not all the data in the file is accessible to the parties. Specific documents like internal documents, business secrets and leniency statements are not disclosed even after the preliminary investigation. Although similar to the EU provisions, the Albanian competition legislation is more rigid when dealing with leniency statements, prohibiting any form of leniency statement disclosure. This can potentially damage the private enforcement of competition law in Albania.

The paper concluded with a comparative analysis of legislation in three other Western Balkan countries: Kosovo, North Macedonia, and Montenegro. The aforementioned analysis revealed that similar to EU and Albanian legislation, access to the file in Kosovo, North Macedonia, and Montenegro is only guaranteed after the completion of preliminary investigations. Following this stage, access to the file is still limited when dealing with internal communication and business secrets. Differently from the Albanian case, the competition legislation in Kosovo and North Macedonia does not exclude the disclosure of leniency statements by the parties. Additionally, the legal framework in Kosovo features some ambiguities regarding the types of NCA decisions that are exempt from disclosure, for which we have suggested legal amendments. Furthermore, the North Macedonian competition legal framework tends to provide a shorter disclosure timeframe, even though it does not precisely regulate the maximum time within which a file should be disclosed. On the other hand, Montenegrin competition law grants the competition authority more discretionary power concerning the disclosure of competition files. However, the lack of precise regulation in this regard poses a risk to judicial certainty.

Reference List

Legal Instruments

EU and CoE legal framework

The European Convention on Human Rights (1950)

The Charter of Fundamental Rights of the European Union (2009)

Council of Europe Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003)

Directive (EU) 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Damages Directive) (2014)

Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive) (2019)

Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (2004)

The European Code of Good Administrative Behaviour by the European Ombudsman (2001)

Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (2004)

Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006)

Western Balkans legal framework

Albania. (1998). The Constitution of the Republic of Albania. Retrieved from: https://qbz.gov.al/preview/635d44bd-96ee-4bc5-8d93-d928cf6f2abd

Kosovo. (2008). The Constitution of the Republic of Kosovo. Retrieved from: https://mapl.rks-gov.net/wp-content/uploads/2017/10/1.CONSTITUTION_OF_THE_REPUBLIC_OF_KOSOVO.pdf

North Macedonia. (1991). The Constitution of the Republic of North Macedonia. Retrieved from: https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nspx

Montenegro. (1992). The Constitution of the Republic of Montenegro. Retrieved from: https://www.venice.coe.int/webforms/documents/?pdf=CDL(2005)096-e

Albania. (2003). Law On Protection of Competition (9121)

Kosovo. (2022). Law On protection of competition (08/L-056)

North Macedonia. (2010). Law on Protection of competition
Montenegro. (2012). Law on Protection of competition
Albania. (2011). ACA's Guideline 'On Confidentiality and access to the file' content/uploads/2023/05/Udhezues_Mbi_Konfidencialitetin_dhe_Aksesin_n_Dosje.pdf
Albania. (2011) ACA's Regulation 'On Investigative procedures of the Competition Authority, https://caa.gov.al/wp-content/uploads/2023/05/Rregullorja-per-rregullat-e-hetimit-finale.pdf
Kosovo. Regulation on the investigation procedures of Kosovo's Competition Authority, (2023)

Court decisions

European Court of Human Rights. (2020). *Guðmundur Andri Ástráðsson v. Iceland*, Application no. 26374/18 Retrieved from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-206582%22]}(accessed in March 2024)
European Court of Human Rights. (1985). *Benthem v. the Netherlands*, Application no. 8848/80. Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57436%22]}]}(accessed in March 2024)
European Court of Human Rights. (1994). *Van de Hurk v. the Netherlands*, Application no. 16034/90. Retrieved from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57878%22]},]}(accessed in March 2024)
European Court of Human Rights. (2021). *Xhoxhaj v Albania*, Application no. 15227/19. Retrieved from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-208053%22]} (accessed in March 2024)
European Court of Human Rights. (1981). *Le Compte, Van Leuven and De Meyere v. Belgium*, Application no. 6878/75. Retrieved from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57522%22]} (accessed in March 2024)
European Court of Human Rights. (2012). *Savitskyy v Ukraine*, Application no. 38773/05. Retrieved from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-112417%22] (accessed in March 2024)
European Court of Human Rights. (1997). *Assenov and Others*, Application no. 24760/94. Retrieved from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-3208%22]} (accessed in March 2024)
European Court of Human Rights. (1995). *Kerojärvi v Finland*, Application no. 17506/90. Retrieved from: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57941%22]} (accessed in March 2024)

European Court of Human Rights. (1992). *Loiseau v France*, Retrieved from: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-68066&filename=001-68066.pdf&TID=ihgdqbxnfi,

European Court of Justice. (1980) *Heintz van Landewyck SARL and others v Commission*. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0209

European Court of Justice. (1995) *Solvay SA v Commission*. retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61991TJ0030

Books, Articles, Reports

Beumer, E. (2014) The Interaction between EU Competition Law Procedures and Fundamental Rights Protection: the Case of the Right to Be Heard, *Yearbook of Antitrust and Regulatory Studies*, Vol. 7(10)

Cappai, M. and Colangelo, G. (2023) 'Applying ne bis in idem in the Aftermath of post and Nordzucker: The Case of EU Competition Policy in Digital Markets', *Common Market Law Review*, 60

Cuculoska, I., (2018) The scope of application of the charter's right to good administration of the European Union, *Journal of Liberty and International Affairs*, Retrieved from: https://nbn-resolving.org/urn:nbn:de:0168-ssoar-56106-3

Galev, G. (2019) Institutional system of European Community Antitrust law, *Balkan Social Science Review*, 13, 25-43.

Gutinieki, J. (2022). Access to the file, Global Dictionary of Competition Law, *Concurrences*, N 20100

Jourdan, J. (2018). Competition Law and Fundamental Rights, *Journal of European Competition Law and Practice*, Vol. 9, Issue 10

Kellerbauer, M., Klamert, M., and Tomkin, J. (2019) 'The EU Treaties and The Charter of Fundamental Rights: A Commentary', Oxford University Press, United Kingdom

Looijestijn-Clearie, A. and Rusu, C. S., (2017) Boosting the Enforcement of EU Competition Law at the Domestic Level, Marc Veenbrink Publisher, Cambridge Scholars Publishing, ISBN: 9781443891493, 9781443852012

Zingales, N., (2010), The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to Be Heard? *Competition Law Review*, Vol. 7, No. 1, Retrieved from: https://ssrn.com/abstract=1879924

Stefanovska, A. (2022) The constitutional character of the ECHR: Overview, challenges in implementation and Limitations, *Balkan Social Science Review*, 20, 27-43. doi: https://doi.org/10.46763/10.46763/BSSR2220027s

Tosheva, E. and Dimeski, B. (2019) The competition policy in Western Balkan Countries: How far they have come on the EU accession "road?", *Balkan Social Science Review*, 14, 31-55.

Wouters, J. and Ovádek, M. (2021) The European Union and Human Rights: Analysis, Cases, and Materials, Oxford University Press, United Kingdom, ISBN: 9780191923838

Tichy, L. (2012), Goals of union competition law on regulated markets: the pharmaceutical industry and parallel trade – comment on Negrinotti- *The Goals of Competition Law*, edited by Zimmer, D., Edward Elgar Publishing, United Kingdom, ISBN 9780857936608

Council of Europe, (2022) Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil arm). Retrieved from: https://www.echr.coe.int/documents/d/echr/guide_art_6_eng (accessed in March 2024)

The European Union Commission, (2023) Why do we need the Charter? The Charter of Fundamental Rights, what it covers and how it relates to the European Convention on Human Rights. Retrieved from: https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_en (accessed in March 2024)

Albanian Competition Authority, (2024) Annual Report for 2023, https://caa.gov.al/wp-content/uploads/2024/03/Raporti-Vjetor-2023.pdf (accessed in March 2024)

Other Links

Delegation of the European Union to the Council of Europe, (2023), Major progress on the path to EU accession to the ECHR: Negotiations concluded at technical level in Strasbourg. Retrieved from: https://www.eeas.europa.eu/delegations/council-europe/major-progress-path-eu-accession-echr-negotiations-
https://www.concurrences.com/en/dictionary/Access-to-the-Commission-s-file (accessed in March 2024)

European Court of Human Rights, (2012), Retrieved from: https://www.article19.org/resources/european-court-right-to-access-court-documents-must-be-upheld/ (accessed in March 2024)

Albanian Competition Authority Official Website: https://caa.gov.al/

Kosovo Competition Authority Official Website: https://ak.rks-gov.net/

North Macedonian Competition Authority Official Website: http://kzk.gov.mk/en/

Montenegrin Agency for Protection of Competition Official Website: https://azzk.me/en/

Annex 1

Comparative table on procedural rules governing the disclosure of competition files in EU and some Western Balkans countries

No.	State/Entity	Timing when competition file can be disclosed	Subjects eligible to access competition file	Time limit to disclose the competition file after submission of request	List of non-disclosable documents
1	EU	Before the Commission takes a decision on termination of the infringement, interim measures, fines or periodic penalty payments (Art. 27(1) of Regulation 1/2003), after the notification of the Statement of Objections (Art. 15(1) of Regulation 773/2004)	• Addressees of the statement of objections • Partial access to third parties with legitimate aims (Damages Directive)	Not specified in secondary legislation	• confidential information (like business secrets) • internal documents of the Commission or the NCAs, especially correspondence between the Commission and the NCAs (Art 27(2) of Reg 1/2003) • Leniency statements (only in the case of third parties disclosure)
2	Albania	After the issuing of Investigation Report	• Undertakings Involved • Third parties with direct and immediate interest (ACAs Guideline II.1.1)	30 days from the request (if accepted) (Art. II.1.1 ACA Guideline)	• internal documents (notes, preliminary documents, or correspondence between NCAs or other international organisations) • confidential information (information that could cause damage to the legitimate interests of a party, like business secrets • Leniency statements
3	Kosovo	After the notification of the preliminary findings (Art. 45(1) of the law)	• Parties in the proceeding • The person who proposed the initiation of the procedure (Art. 45(1) and (2) of the law)	The date of disclosure is set within 5 days from the request (Art. 45(4) of the law)	• decisions of the Authority • minutes or audio recordings of Commission meetings • internal instructions and subject notes • correspondence between the Authority and other NCAs • other documents which are considered commercial secrets

4	North Macedonia	After receiving the preliminary statement of objections (Art.56(2) of the law)	• The person against whom the procedure has been initiated • The party with legitimate interest submitting the request (Art. 32(5) of the law)	15 days from the acceptance of the request to access the file (Art. 56(4) of the law)	• the draft decisions of the Commission; • the minutes of the sessions; • the audio and audio-visual recordings of the sessions; • the internal instructions and notes of the case or the correspondence and letters with the European Commission or any other EU institution; • business or professional secrets
5	Montenegro	Before the final decision of the Competition Authority (Art.35 of the law)	• The parties against whom the proceedings have been initiated (Art.35 of the law)	Not specified in Montenegrin competition law	• data which may constitute business secret, • other confidential data (Art. 37(1) of the law)

Source: EU and Western Balkan Countries' competition legal framework