



## **Sofia Competition Forum**

***Comparative overview  
of the Balkan competition regimes  
in the field of***

**INSPECTIONS ON SPOT**

# CONTENTS

Introduction .....	6
I. Legal requirements .....	7
1. Substantive legal requirements.....	7
2. Procedural legal requirements .....	7
3. Conclusion .....	9
II. Preparation of inspections.....	9
1. Availability of internal rules and guidelines regarding the preparation of the inspections on spot .....	9
2. Designation of inspection team, incl. team leader.....	10
3. Coordination of the preparation of the inspection with the police.....	11
4. Gathering of preliminary information about the addressees and objects of the inspection .....	11
5. Internal briefing and instruction of the team of inspectors before the inspection .....	11
6. Measures for preserving the secrecy and surprising effect of the inspection and conflict of interests .....	12
7. Coordination in case of simultaneous inspections – designation and functions of the coordinator .....	12
8. Preparation of the documents to be presented at the beginning of the inspection .....	12
9. Practical difficulties connected with the preparation of the inspections .....	13
10. Conclusion.....	13
III. Powers during inspections .....	13
1. Entrance of premises – specificities of the cases of entry in the absence of managers or representatives of the undertaking .....	13
2. Seizure of original documents – legal requirements and specificities .....	13
3. Seizure of paper copies of documents – legal requirements and specificities .....	14
4. Seizure of electronic, digital and forensic evidence – legal requirements and specificities .....	14
5. Collection of evidence pointing to an infringement which is not subject to proceedings - legal requirements and specificities .....	14
6. Sealing of premises - legal requirements and specificities .....	14
7. Asking questions (interviews) during inspections - legal requirements and specificities .....	15
8. Specificities and possible limitations of the powers to inspect non-business premises .....	15
9. Powers in case of opposition or non-compliance with the inspection; .....	15

10. Practical difficulties in exercising the powers during inspection.....	16
11. Conclusion.....	16
IV. Assistance by the police or other public enforcement authorities.....	16
1. Availability of cooperation agreements or statutory rules regarding the assistance by the police or other public enforcement authorities .....	16
2. Practical cooperation with police authorities.....	17
3. Powers of the police or other public authorities .....	17
4. Practical difficulties in cooperation with the police or other public enforcement authorities .....	18
5. Conclusion .....	18
V. Applicable limitations in inspections on spot .....	18
1. Time limits for executing the decision for inspection .....	18
2. Start and duration of the inspection .....	19
3. Objects that cannot be inspected .....	19
4. Protection of privacy.....	20
5. Data protection before, during and after the inspection.....	20
6. Legal professional privilege .....	21
7. Privilege against self-incrimination .....	21
8. Conclusion .....	21
VI. Treatment of evidence.....	22
1. Collection of original documents.....	22
2. Making copies of documents.....	22
3. Taking oral statements (interviews) .....	22
4. Drafting protocols .....	23
5. Collection of evidence, claimed to be subject of LPP or privacy or data protection or other legal limitations.....	23
6. Treatment of evidence subject to commercial or business secret or other secret protected by the law.....	24
7. Guarantees for the authenticity of the evidence gathered during the inspection .....	24
8. Conclusion .....	25
VII. Treatment of digital/ forensic/ electronic evidence .....	25
1. Forensic equipment.....	25
2. Forensic experts .....	26
3. Treatment of forensic evidence.....	26
4. Conclusion .....	27
VIII. Sanctions for non-compliance with the inspection .....	27
1. Types of non-compliance .....	27

2. Subjects that can be sanctioned.....	28
3. Types of sanctions for non-compliance with the inspection .....	28
4. Procedure for imposition of sanctions for non-compliance.....	29
5. Conclusion .....	30
IX. Judicial control .....	30
1. Judicial review of the decision authorizing an inspection on spot .....	30
2. Judicial control of the actions carried out during inspections .....	31
3. Possibility for judicial control on claims for LPP and privacy .....	32
4. Judicial control of sanctions for non-compliance .....	32
5. Liability of the authority for damages caused as a result of inspections on spot .....	33
6. Conclusion .....	34
X. International cooperation in the field of inspections .....	34
Conclusion .....	35

**Abbreviations used for SCF members in this report:**

**ALB:** Albania



**BIH:** Bosnia and Herzegovina



**BUL:** Bulgaria



**CRO:** Croatia



**KOS:** Kosovo



**MKD:** Macedonia



**MNE:** Montenegro



**SRB:** Serbia



## **Introduction**

The Sofia Competition Forum (SCF) is a joint initiative of the United Nations conference on trade and development (UNCTAD) and the Bulgarian Commission on Protection of Competition (CPC). The founding document by which the Forum was established was the Memorandum of Understanding signed by the UNCTAD and the CPC on 11 July 2012 in Geneva.

The SCF aims to assist the Balkan competition authorities in adopting and enforcing competition law in compliance with the best European and international practices and to maximize the benefits for their countries of well-functioning markets. The main beneficiary competition authorities are those of Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Kosovo, Montenegro, the Republic of Macedonia and Serbia. The beneficiaries have signed the Sofia Statement of 12 November 2012 by which they have committed to deepen the cooperation among themselves and to contribute to the activities and initiatives of the SCF. In view of the fact that most countries in the Balkan region face similar challenges in their transition to market economy, the problems in competition law enforcement are also of the same kind. This created the need to establish an informal platform for technical assistance, capacity building and exchange of experience on areas of interest for the countries in the region.

This report aims to provide a comparative overview of the Balkan legislations and practice of the competition authorities in the field of inspections. The European competition *acquis* serves as a benchmark for comparison of the reviewed competition regimes. The document can also serve as a basis for well-informed discussions on the need for further convergence and how this can be best achieved.

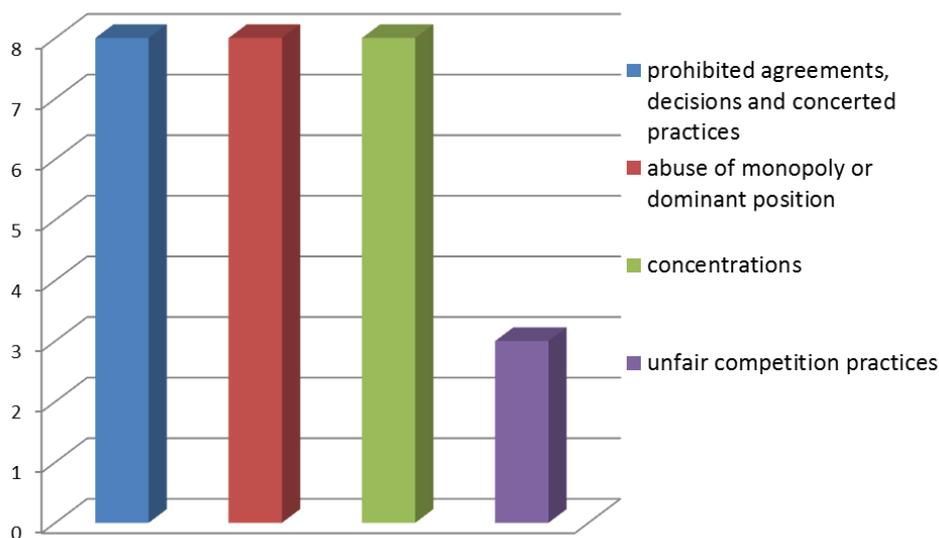
The report is based on the information provided by **8 jurisdictions** members of the SCF (**ALB, BIH, BUL, CRO, KOS, MKD, MNE, and SRB**).

## I. Legal requirements

### 1. Substantive legal requirements

The legal systems of the Balkan competition authorities provide for inspections on spot for all types of misconduct defined by the particular Laws as infringements of competition law. In half of the members of the Sofia Competition Forum (SCF) these are prohibited agreements, decisions and concerted practices, abuse of monopoly or dominant positions, concentrations, as well as unfair competition practices. In **BUL**, **CRO**, **ALB**, **MKD** and **SRB** the Competition Authorities are not empowered to carry out inspections on spot in case of unfair competition practices.

**Figure 1.1. Types of infringements subject to inspections**



The Balkan competition authorities are authorized to carry out inspections at the premises of any legal entities and natural persons performing economic activities. Objects of the inspection can be the premises or any other property (means of transport, land and other facilities) *used* by the inspected undertaking or association of undertakings to perform business activities, especially if there is a potential risk to distract or destroy evidence. Only in **MKD** the inspected premises have to *belong* to the investigated undertaking or association of undertakings.

Furthermore, it is required under all Balkan competition regimes with the exception of the **ALB** and **CRO** regimes that the addressee of the inspection is suspected of an alleged infringement of competition law in order to search its premises.

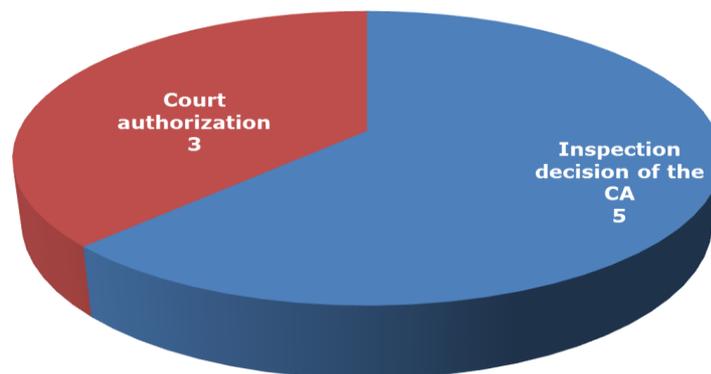
In **ALB**, **CRO**, **BIH**, **KOS**, **MNE** and **SRB** also non-business premises can be inspected, if a reasonable suspicion exists that books or other records related to the proceedings are being kept there. The Competition Authorities of **BUL** and **MKD** are not empowered to inspect non-business premises.

### 2. Procedural legal requirements

In order to conduct an inspection, all Balkan competition authorities need a formal authorization (either a court authorization or a decision/procedural order of the

Competition Authority). Whereas in **BUL, CRO** and **KOS** a court authorization is required to conduct an unannounced inspection, in **SRB, MNE, MKD, BIH** and **ALB** an inspection decision of the Competition Authority is generally sufficient. In **KOS** it is also possible to conduct a scheduled inspection in business and non-business premises, where no court authorization is required. However, in **SRB, BIH** and **ALB** a court warrant is necessary for inspections in non-business premises. Only in **KOS** it is possible to conduct an unannounced inspection in urgent cases, when a risk of irreparable damage to the market exists, without a court warrant to be issued.

**Figure 1.2. Inspection authorization**

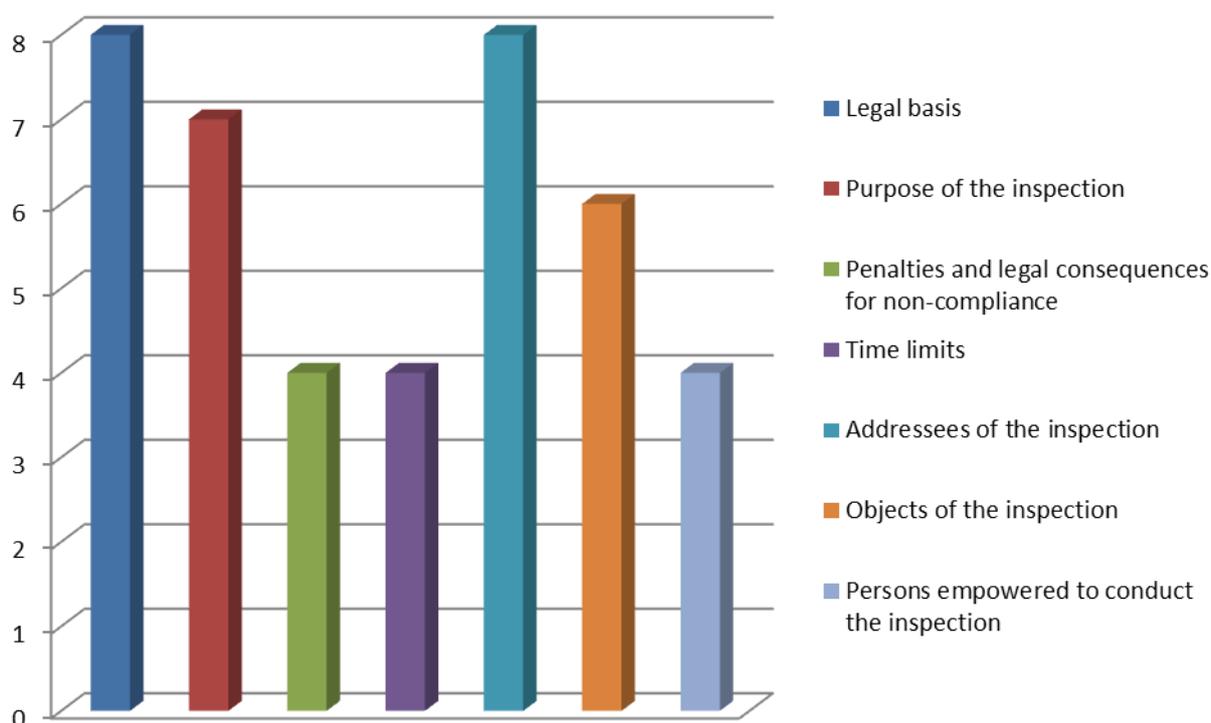


Under all Balkan competition regimes the formal authorization has to specify the legal basis and the purpose of the inspection. Only in **ALB** it is not necessary to indicate the purpose of the inspection. In **BIH, MKD, ALB** and **MNE** the inspection decision of the Competition Authority also indicates the penalties and legal consequences in case of non-compliance.

Almost all Balkan competition regimes provide that the addressees and objects of the inspection have to be indicated in the decision authorizing the inspection, but in **CRO** the objects of the inspection are not specified. In **BUL** the court authorization of the inspection applies to all premises, means of transport and other locations used by the addressee of the inspection. None of the Competition Laws of the SCF members requires that the evidence to be collected have to be identified in the authorization decision. In **CRO** and **KOS** the timeframe for inspections is determined by the competent court, in **MKD** and **BIH** the inspection must be undertaken on the exact date set in the inspection decision of the Competition Authority. In **SRB, ALB, MNE** and **BUL** time limits for conducting an inspection are not determined by the Law.

In **BIH, ALB, MNE** and **MKD** the persons empowered to conduct the inspection are designated in the decision of the Competition Authority authorizing the inspection.

**Figure 1.3. Content of the decision authorizing the inspection**



### **3. Conclusion**

The legal requirements under the surveyed Balkan competition regimes concerning inspections on spot converge in many aspects. All Balkan competition authorities are authorized to carry out inspections at the premises of any legal entities and natural persons performing economic activities. Under almost all Balkan competition regimes the formal authorization has to specify the legal basis and the purpose of the inspection as well as the addressees and objects of the inspection. Only under half of the Balkan competition regimes the timeframe to carry out an inspection on spot is determined in the authorization decision and the persons empowered to conduct the inspection are specifically designated. The main differences are related to the power to inspect non-business premises as well as to the art of the inspection authorization.

## **II. Preparation of inspections**

### **1. Availability of internal rules and guidelines regarding the preparation of the inspections on spot**

Some of the authorities from the Balkan region (**BUL**, **CRO** and **MNE**) have adopted internal rules and guidelines regarding the preparation of the inspections. These documents are confidential. Currently **ALB** is preparing such internal rules and guidelines and **KOS** is considering drawing up specific guidelines addressing these issues. At the moment the **KOS** inspectors carry out on-the-spot inspections in compliance with the LOC regulatory framework for inspections and following Customs inspections rules.

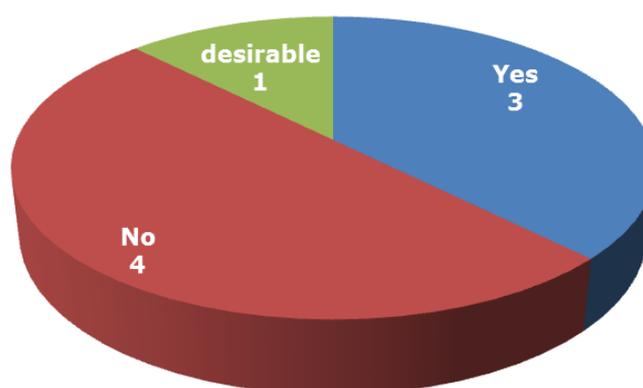
**Table 2.1. Internal rules for inspections**

INSPECTIONS	AUTHORITY							
	ALB	BIH	BUL	CRO	KOS	MKD	MNE	SRB
Internal rules and guidelines regarding the preparation of inspections on spot and their confidentiality	In process	-	Yes, Confidential	Yes, Confidential	In process	-	Yes, Confidential	-

## 2. Designation of inspection team, incl. team leader

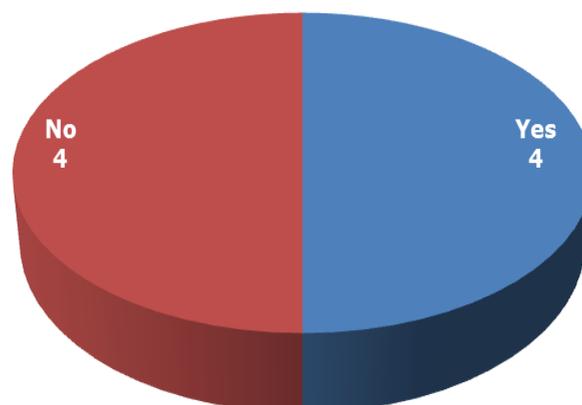
In some cases (**ALB, BIH, BUL**) the members of the inspection teams are appointed by the commission or by the head of the authority, while in **CRO** they have to be designated in the court warrant. In general the members of the inspection team are experts from the competition authority. However, in **MNE**, members of the team may as well be IT court experts for forensic purposes. In **ALB, BUL** and **CRO** the presence of a Forensic IT expert in the inspection team is usually required. In **MNE** the presence of a Forensic IT expert is necessary. However, due to limited capacities of the competition authority, it may engage court experts in information technology and forensic, for the purpose of collection of documents in electronic format. In order to avoid leak of information in **ALB** and **BUL** the members of the inspection team are informed of their involvement in the inspection shortly before the day when the inspection should take place.

**Figure 2.1. Presence of a Forensic IT expert**



**ALB, BUL, CRO** and **MNE**, report that they appoint a team leader, who usually is the most experienced member of the team. In **ALB** and **BUL** the team leader is responsible for communicating with undertakings, preparing the inspection, organization of the actions to be accomplished and the practical guidance of the running inspection.

**Figure 2.2. Appointment of a team leader**



In case of replacement of a member of the team of inspection in the following countries **ALB, BIH, MNE** a change in the authorization of inspection is also needed.

### **3. Coordination of the preparation of the inspection with the police**

Usually, the police officers who are appointed to participate in the inspection take part in the preparation phase of the dawn raid. The police officers are informed of the planned inspection one day before conducting the inspection. In **ALB** the authority has appointed a contact point that informs the police in every case. Usually the authorities provide to the police general information of the undertakings, which will be inspected, the place and time of the inspection.

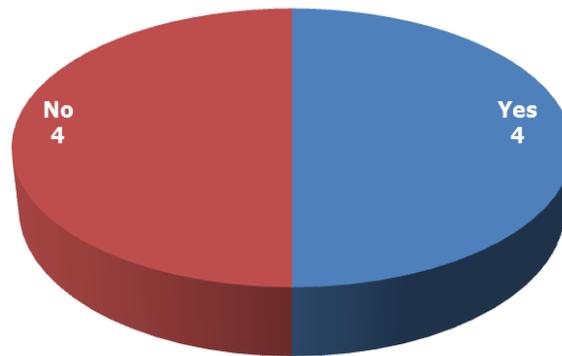
### **4. Gathering of preliminary information about the addressees and objects of the inspection**

In half of the SCF jurisdictions the members of the inspection team usually gather preliminary information of the addresses and objects of the inspection. In performing this task they are using many different sources of information, like court and other official registrars, web sites, media, the police and other public authority. On some occasions the members of the inspection team are able to visit the premises of the inspected undertakings. In half of the SCF jurisdictions the members of the inspection team are usually informed through internal briefings.

### **5. Internal briefing and instruction of the team of inspectors before the inspection**

The competition authorities of four SCF members carry out internal briefings at which the members of the inspection team are given all the necessary information of the forthcoming inspection, location of undertakings, addresses and security plan. In one SCF member the internal briefing is held a day before the inspection, while in **ALB** it is held one hour before the inspection. Usually the internal briefing is attended by all the members of the inspection team.

**Figure 2.3. Internal briefings**



### **6. Measures for preserving the secrecy and surprising effect of the inspection and conflict of interests**

In 3 SCF members all the data and information are clearly marked as confidential and team members are obliged to keep the professional secret. As a measure for preserving the secrecy of the inspection in most of the jurisdictions the members of the inspection team are informed of the inspection and provided the necessary information shortly before the inspection itself.

In most of the competition authorities, there is a possibility for recall of an expert in case of a conflict of interests. In **ALB** the team members sign a conflict of interest declaration before the inspections. The decision on the recall in **BUL** and **MNE** is taken by the director of the directorate, conducting the inspection.

### **7. Coordination in case of simultaneous inspections – designation and functions of the coordinator**

In case of simultaneous inspections in **ALB** and **BUL**, a coordinator is appointed as well. He/she coordinates the inspection teams, but doesn't attend the inspections himself/herself. As the coordinator is an expert of the competition authority, whose functions are to coordinate the actions of the investigative teams, to inform the directors at the commission, to render material, technical and any other type of support to the investigative teams he/she usually doesn't attend the inspections himself/herself. One SCF member does not have any experience in the field, but in case of simultaneous inspections the authority would appoint a coordinator.

### **8. Preparation of the documents to be presented at the beginning of the inspection**

In general, all the competition authorities present at the beginning of the inspection the authorization/court warrant for the inspection. In **ALB, BIH** and **CRO** originals of the authorization/ court warrant are presented, while in **BUL** the team leader presents only the copy of the document. In **ALB, CRO** and **MNE** the decision for initiation of the procedure needs to be served to the authorized representative of the company or other employee in charge. In **BUL** the team leader as well presents the order of the chairperson of the commission, appointing the members of the inspection team and the relevant provisions of the LPC. In general the responsible person for preparation and presentation of the required documents is the team leader.

## **9. Practical difficulties connected with the preparation of the inspections**

In general competition authorities don't have specific problems with the preparation of the inspections. Only **BUL** states that had faced problems with simultaneous inspections in undertakings not located in the capital city; problems using FIT equipment and experts in more than two different spots simultaneously; small number of trained staff that could be possibly involved in the inspections, which may distort the ordinary workload in case of inspections that require more people in different teams; difficulties to locate premises of the undertakings and so on.

## **10. Conclusion**

Some of the competition authorities of the region have adopted internal rules regarding the preparation of the inspections and they are confidential. In every case an inspection team is designated, which consists of a team leader and team members, experts at the authority. Although there are no special requirements regarding the team members, the presence of a Forensic IT expert is usual in most of the jurisdictions. Usually the preparatory process of the inspection includes designation of an inspection team, gathering of information, preparation of the required documents, internal briefings. The police officials, who assist the experts during the inspection, are given general information of the undertakings, the place and time of the inspection. As a general measure for preserving the secrecy of the inspection in most of the jurisdictions the members of the inspection team are informed of the inspection and provided the necessary information shortly before the inspection itself.

## **III. Powers during inspections**

### **1. Entrance of premises – specificities of the cases of entry in the absence of managers or representatives of the undertaking**

During the inspections on spot some authorities are allowed to enter premises in the absence of managers or representatives of the undertaking (**ALB, MKD, and MNE**). However in such cases the inspection team asks an employee to inform the manager (**ALB**) or requests the presence of another employee or an attorney (**MNE**). In other authorities collection of evidence in the course of inspections shall be conducted in the presence of representatives of the undertaking or association of undertakings, so it is not allowed to enter premises in the absence of managers, representatives or at least staff of the undertaking (**BUL, CRO and KOS**).

### **2. Seizure of original documents – legal requirements and specificities**

All Balkan competition authorities are empowered to seize original documents during the inspections on spot. The seizure of original documents is usually done with the purpose to make copies where due to technical reasons it is not possible to make copies during the inspection (**BUL, CRO, KOS, MKD, MNE, and SRB**). Some authorities can keep the documents as long as they need during the proceedings or until there is a decision on the case (**BIH, BUL, CRO, MKD, and SRB**). In **BUL** on request by the undertakings or association of undertakings from which original documents are seized, the same can be returned to them also before entry into force of the decision of the Commission. The competition authority in **ALB** can seize the original documents for not more than 72 hours. This time limit may be extended for

up to 6 months on request of the authority by the District Court where the seizure takes place.

### **3. Seizure of paper copies of documents – legal requirements and specificities**

All SCF members have the power to make paper copies of business books and documents. In **BUL** the copies of the documents seized shall be certified by the authority officials and by the representatives of the undertakings.

### **4. Seizure of electronic, digital and forensic evidence – legal requirements and specificities**

During the inspection all Balkan competition authorities have power to seize electronic, digital and forensic evidence. This power comes from a provision that the competition authority can seize or copy documents irrespective of the medium they are stored. This power is envisaged in details only in **BUL**. According to the Bulgarian competition law the competition authority has powers to seize electronic, digital and forensic evidence, copies in electronic medium, as well as traffic data from all types of computer data media, computer systems and other information media. The competition authority can also seize the devices for transmission of information. It can also receive access to all types of information media, including servers, accessible by computer systems or other means, located in the inspected premises. The explicit regulation of this power would prevent different interpretations on what is included in it. The competition authority can either make digital copies incl. forensic images or seize the storage media. Specific legal definitions of what is 'digital', 'electronic' and 'forensic' evidence are provided for in the competition law of **BUL**.

The power to seize evidence stored on mobile phones is not explicitly envisaged in the Balkan competition laws but it comes from the clarification that the competition authority can seize electronic evidence irrespective of the medium they are stored (**ALB, BIH, BUL, CRO, MKD, MNE**). However, in one of these countries it is not sure whether this clarification gives such power as regards the mobile phones (**ALB**). In **BIH** a court warrant is needed in this regard while in **MKD** this power applies only to business phones. In **KOS** and **SRB** the availability of this power is questionable. Taking into account that evidence can be stored in smart phones the availability of this power can be critical at least as regards phones provided by the company.

### **5. Collection of evidence pointing to an infringement which is not subject to proceedings - legal requirements and specificities**

In most SCF members evidence pointing to an infringement of the competition law which is not subject to proceedings can be seized if it's accidentally found (**ALB, BIH, BUL, CRO, MKD, MNE**) and, with the exception of **MNE**, all of them do not need new court authorization or decision of the authority in order to seize it. This issue is not explicitly regulated in **KOS** and **SRB**. In **KOS** there is procedure envisaged in case there is evidence pointing to an infringement of other laws.

### **6. Sealing of premises - legal requirements and specificities**

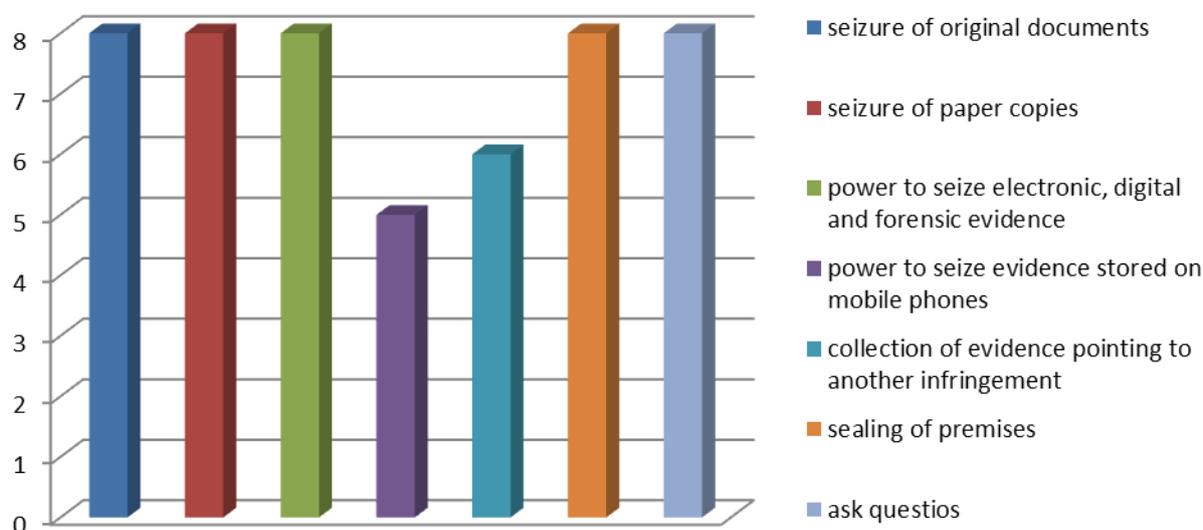
All SCF members have the power to seal premises for the purposes of inspection. Only in **BIH** a court warrant is needed. Usually the competition authorities can seal the premises for the period necessary for the completion of the inspection.

There is specific maximum time limit fixed only in **ALB** (72 hours) and **MKD** (7 days). In **MNE** the time limit should be defined in each proceedings.

## 7. Asking questions (interviews) during inspections - legal requirements and specificities

All SCF members are empowered to ask questions to any representative or member staff of the undertaking with regard to the allegations during inspection, for explanation concerning the subject-matter of facts and documents regarding the object and the purpose of the inspection. The undertaking can be assisted by an attorney, but the presence of an attorney is not a requirement to make an interview.

**Figure 3.1. Powers during inspections**



## 8. Specificities and possible limitations of the powers to inspect non-business premises

Most of SCF members according to their laws have the same powers during inspections in non-business premises as during inspections in business premises (**ALB, BIH, CRO, KOS, MNE, and SRB**). However in **ALB** and **SRB** a court warrant is needed for inspections in non-business premises in comparison with inspections in business premises. In **CRO, KOS** and **SRB** the inspection of non-business premises shall be conducted in the presence of two adult witnesses.

The competition authorities in **BUL** and **MKD** are not empowered to inspect non-business premises.

## 9. Powers in case of opposition or non-compliance with the inspection;

In accordance with laws by most of the SCF members (**ALB, BIH, BUL, CRO, KOS, MKD**) all natural persons and legal entities shall be obliged to render assistance to the authority in exercising its powers. However, in case of opposition or non-compliance with the inspection the authorities shall be assisted by the police. The representatives of the police can provide access to the inspected premises and objects.

## **10. Practical difficulties in exercising the powers during inspection.**

Some authorities of SCF members have no experience in inspections on spot (**BIH, MKD, and SRB**).

In **BUL** the lawyers or the representatives of the undertakings have usually raise the following objections:

1. The paper copies and/or electronic evidence seized during inspection are not related to the subject matter of the case;
2. The paper copies and/or electronic evidence seized during inspection contain personal information and confidential trade information;
3. Electronic evidence seized during inspection is stored on a server located outside the premises or even outside the national territory.

In **MNE** the authorized officials of the competition authority encountered practical difficulties regarding absence of legal representatives and attorneys of the party, non-compliance, denying access to particular office/documentation.

## **11. Conclusion**

The SCF members are generally well equipped with the necessary powers during inspections. The main differences concern the power to seize evidence stored on mobile phones and the collection of evidence pointing to another infringement. In some of the SCF members these powers are missing, not explicitly envisaged or questionable. Some of the authorities do not have the power to enter non-business premises.

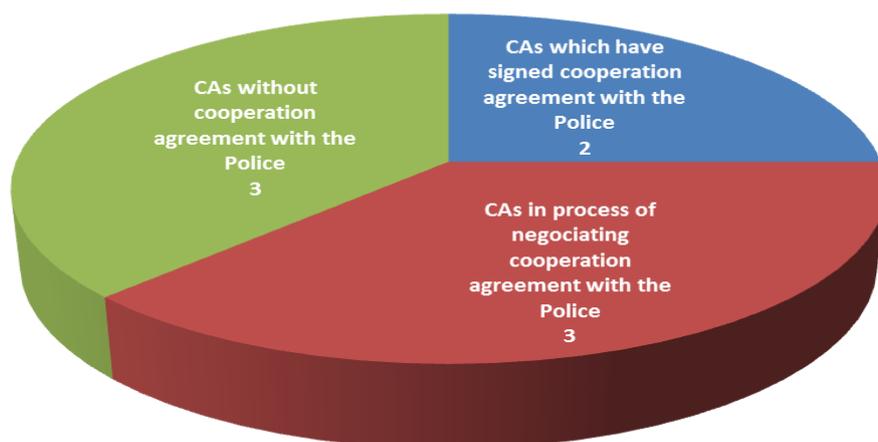
## **IV. Assistance by the police or other public enforcement authorities**

### **1. Availability of cooperation agreements or statutory rules regarding the assistance by the police or other public enforcement authorities**

Out of all SCF members, only **ALB** and **BUL** have signed cooperation agreements with the Police authority. **ALB** competition authority has signed a *Memorandum of understanding with the State Police*, according to which the coordinator of the inspection has to contact and inform the State Police one day before conducting dawn raid. The Chairman of the **BUL** competition authority and the Minister of Interior have issued a *Joint Instruction on the cooperation between staff members of the CPC and the ministry* during inspections. The legal basis of the instruction is Article 50 (3) of the Bulgarian competition law. The Instruction contains a template form of a request for assistance by the police. The request should be notified to the police authority at minimum two days before the inspection.

Other SCF members such as **CRO, MNE** and **SRB** are in a process of negotiating, preparing or signing such agreements. Nevertheless, the legislative framework in **BIH, MKD, MNE** and **KOS** provides the competition authorities with the ability to request police assistance. For instance, **BIH** competition law provides the possibility for obtaining a written order by the competent court, which means that the inspections on spot would be conducted with police assistance.

**Figure 4.1. Availability of cooperation agreements with the police**



## **2. Practical cooperation with police authorities**

With regard to practical cooperation with the police, **BIH**, **MKD** and **SRB** have not practically cooperated with the police yet, as they did not carry out inspections on spot. In previous inspections, **CRO** had no need for police assistance and the competition authority does not have much practical experience about coordination with the police during and after the inspection. **BIH** competition authority does not have any statutory rules about practical cooperation with the police, but hypothetically, it should be full coordination. Provisions of **BIH** competition law provide that in the proceedings before the competition authority, the Law on Administrative Procedure shall be applied, unless regulated differently by the competition law. Administrative Procedure Law provides for conducting inspections with police assistance, if „the owner or holder of property” opposes the inspection. In addition to that, it is possible for the Court to define the role of the police in accordance with other laws.

## **3. Powers of the police or other public authorities**

Powers of the police or other public enforcement authorities during inspections are used to providing assistance to competition authorities in conducting inspection.

In **ALB** State Police has the power to make possible the entrance at the premises of the undertaking in case of refusal, and for concluding the inspection. During inspections in **BUL** and **SRB** police officers have the powers provided for in the Law on the Ministry of Interior. The limitations of these powers in **BUL** are provided for in the competition law. The **MKD** competition authority shall seek assistance from police for and while performing the inspection, if during the inspection there is a danger from concealment, modification or destruction of documents or objects, which may be relevant for determining the existence of an infringement. If the undertaking does not allow the authorized persons from the competition authority to perform the inspection, then the authorized persons from the authority shall perform the necessary actions even against the willingness of the undertaking and with the

assistance of the police. It is worthy to note that the competition law of **CRO** provides that if in the course of an inspection the investigation team finds evidence pointing to a criminal offence, which is prosecuted *ex officio*, then this evidence has to be seized and described in a separate police report. This finding of evidence should immediately be reported to the Public prosecutor. In **MNE** there are no limitations for enforcing the collection of evidence.

#### **4. Practical difficulties in cooperation with the police or other public enforcement authorities**

**BUL** faces practical difficulties related to cooperation with the police in respect of requesting police assistance two days before the inspection simultaneously to the time they request the Court authorization. This is a very short time limit for the police to deal with their request and usually they have to contact police previously to insure its positive outcome.

#### **5. Conclusion**

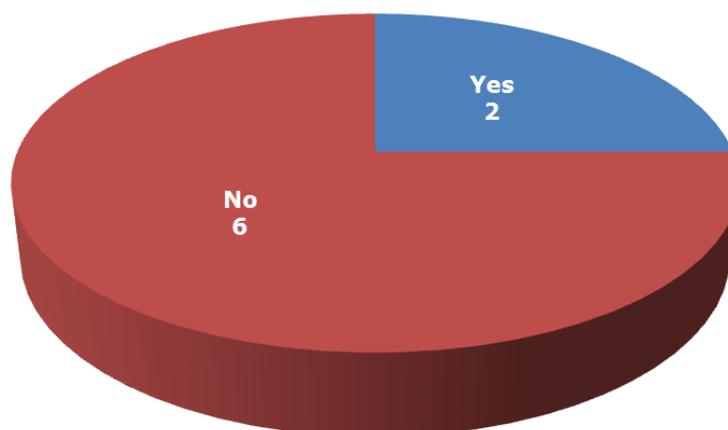
It appears from the above that although only two Balkan competition authorities have signed cooperation agreements with the police so far, it is feasible that in near future the rest SCF members will also enforce such agreements for intensified cooperation with the Police.

### **V. Applicable limitations in inspections on spot**

#### **1. Time limits for executing the decision for inspection**

The legal framework in **ALB, BIH, BUL, MKD, MNE** and **SRB** does not provide for special time limits for executing the decision for inspection. In **CRO** however the Court warrant contains mandatory time limits for conducting the inspection. In **KOS** the timeframe for inspections is defined by the District Court. In **BIH** time limits are set only with regard to the duration of the whole procedure before the competition authority and not specifically for the execution of the decision for inspection. In **MKD** the decision of the competition authority specifies the exact date and time of conducting the inspection and such inspection along with sealing of business premises and books/other documentation cannot go longer than 7 days. In **BUL** the Court ruling authorizing an inspection is notified to the undertaking, which is going to be inspected. Therefore, in order to preserve the secrecy and the surprising effect of the inspection, the **BUL** competition authority has to start the inspection before the undertaking has been notified of the Court ruling for authorization of the inspection. In practice, it is not in the interest of the **BUL** competition authority to delay the implementation of the authorization for inspection.

**Figure 5.1. Time limits for executing the decision for inspection**



## **2. Start and duration of the inspection**

The competition law of most jurisdictions does not contain explicit provisions on working hours/working days for conduction the inspections. Nevertheless, in **ALB, BUL, CRO, MKD, MNE** inspections usually take place only during working hours of inspected premise. In **SRB** once the inspection begins, it may take longer than the working hours of the undertaking under inspection. Legislation of **BIH** does not provide for rule on time/day of inspections.

The competition legislation of **ALB, BIH, BUL, MNE and SRB** does not specify for limitations with regard to the duration of the inspection. In **CRO** the inspection should be done within the timeframes of the Court warrant and preferably finished within one day. If this were not possible, then the inspection would start few days before expiration of time limits set in the court warrant. In **KOS** the timeframe for inspections is defined by the District Court. In **MKD** inspections cannot go longer than 7 days. If an inspection were not done within the time limits, then a new court warrant will be needed in **CRO**, while in **MKD** – a new decision of the competition authority.

## **3. Objects that cannot be inspected**

The legal framework of most jurisdictions does not provide for objects or premises that cannot be inspected except in **MKD** where only business premises, land and means of transport may be subject to inspection, not private ones. In **MKD** private ones may be subject to inspection only in criminal proceedings/cases upon prior authorization of the court (procedure under competence of the Public Prosecutor and based on Article 283<sup>1</sup> of the Criminal Code). The competition law of **CRO** provides that unopened letters and consignment cannot be opened if the addressee of those letters and consignment could not be present or would not give his approval to open them. In **ALB** a Court warrant in case of inspection of non-business premises is needed, unlikely for business premises. The **ALB** competition authority has the right to inspect every premise that is foreseen in its commission decision or court warrant.

---

<sup>1</sup> Article 283 of the **MKD** Criminal Code prescribes criminal sanction – imprisonment from 1-10 years for the responsible person (i.e. manager) in the legal entity that had entered into prohibited agreement, decision of association of undertakings and/or concerted practice aiming to prevent, limit or distort competition resulting in obtaining property benefit of greater extent by the legal entity or causing damage of greater extent (more than 250 average monthly salaries in the country).

In **SRB** a court warrant is compulsory only in case of inspection in non-business premises when the owner/holder of such premises objects to the inspection. Therefore, the inspection in non-business premises is done based on an issued court warrant and in presence of the owner/holder of the non-business premises (or his legal representative) and two adult witnesses.

#### **4. Protection of privacy**

As regards protection of privacy and applicable legal standards, the national legislations of **BUL, CRO, MNE** and **KOS** contain provisions on protection of privacy. In **BUL** employees of the undertaking, which is subject to an inspection, are entitled to claim right to privacy when documents or correspondence discovered in the undertaking's premises contain private information related to their private lives (e.g. health status, family lives and private communications). The legal standards for assessing the character of such information are drawn by the judicial practice of the Constitutional Court, the Court of the European Union and European Court on Human Rights. Information that is considered as private cannot in principle be considered as relevant to the investigation and should be treated in accordance with the Law on Protection of Personal Data. In **CRO** all documents that contain personal data should be excluded from the inspection, if possible. In **MNE** personal documentation cannot be copied and employees of the undertaking may provide information to the case handlers which documents are of personal nature. Although the current legislation in **MKD** does not provide for the right to privacy in competition matters, the Law on Personal Data Protection applies. In **KOS** inspectors are obligated to adhere to the Law on Personal Data Protection.

#### **5. Data protection before, during and after the inspection**

Almost all jurisdictions contain rules on data protection before, during and after the inspection. In **BIH** the Law on Preserving Data Secrecy applies as well as provisions on preserving business secrets. Business secret represents: a) everything defined as such by law or other regulation; b) regulated by the general or other act of the parties to the proceedings or other persons; c) all that is, by the parties to the proceeding or other persons, specifically marked as business secret. In **BUL** the Law on Protection of Personal Information sets the applicable legal standards for data protection and any natural person can claim that his or her personal information seized during the inspection be treated in accordance with this law. In **KOS** the Law on Personal Data Protection is applied. In **CRO** all documents that contain personal data should be excluded from the inspection, if possible. If documents contain data significant for the investigation of the infringement concerned as well as personal data, the document will be returned to the owner who will be asked to make copy of the document without the personal data immediately. If the owner of personal data could not be found, then the document containing these data will be put in a sealed envelope. Other documents containing some personal data, but not protected by the Personal Data Protection Act, could be seized or copied (confidential). In **MKD** if some data or documentation seized or kept by the CA is business or professional secret, then the undertaking subject to inspection has the right, within 8 days as of the day of the inspection, to inspect the taken or kept data and documentation, clearly mark the data and documentation which are business secret and indicate the legal basis for their classification as such. If the undertaking does not take any action in this respect within the deadline of 8 days as of the day of the inspection, then it shall be considered that the collected data and documentation does not contain information, which is business secret. In addition, the Law on Personal Data Protection applies. In

**MNE** the owner of private data claims the rights provided for in the Council Directive on Personal Data Protection. In **SRB** measures on protecting the source of information or specific data (protected data) may be determined if it is assessed that the interest of the applicant is justified and substantially more important than the public interest in terms of the subject of the request. In his request, the applicant has to explain the probability of substantial damage, which would occur due to the disclosure of the information. The President of the competition authority is competent to rule on the request. The ruling of the President that rejects or dismisses the request may be subject to an appeal brought before the Council of the competition authority. Protected information in **SRB** does not have a status of information of public importance in terms of the Law on Free Access to Information of Public Importance.

## 6. Legal professional privilege

Almost all jurisdictions provide for legal professional privilege (LPP). In **BUL, CRO, MKD, MNE and SRB** communication between the undertaking under investigation and its attorney (as external legal aid) is privileged. However, LLP in **BUL** is applicable only when it concerns communications exchanged for ensuring undertaking's defence in the proceedings before the competition authority. Therefore, any other communication exchanged between an attorney and his client is not covered by LPP, as its purpose is not to ensure the right of defence in the antitrust proceedings. In **CRO** if the undertaking or its lawyer refuses access to file and documentation pleading confidential or privileged information, the authorized person of the competition authority has the right of access to the files concerned. Should in the view of the authorized person of the competition authority appears that the information concerned should not be regarded as confidential or privileged, the authorized person of the competition authority shall in the presence of the undertaking and its lawyer, if the latter is present, file the document concerned or its photocopy in a separate envelope, properly dated, sealed by the competition authority and signed by all the parties and lawyers concerned. In **MKD** communication between the undertaking and its lawyers that are employees of the undertaking is not regarded as privileged. The **MNE** legislation provides for LPP. Nevertheless, if there is suspicion of abuse of privileged communication the competition authority of **MNE** is authorized to examine its content and/or adopt a conclusion on lifting-off the labelling of „privileged“.

## 7. Privilege against self-incrimination

Privilege against self-incrimination is provided for in almost all jurisdictions except for **BUL** where it is applicable only in criminal matters. Since the antitrust proceedings are of administrative nature the privilege against self-incrimination is not applicable in the proceedings before the competition authority. In **BIH, CRO MNE, MKD, SRB** the privilege against self-incrimination is not provided by the competition law but in other laws (such as laws on administrative or criminal proceedings) that are also applicable in the proceedings before the competition authorities.

## 8. Conclusion

The majority of SCF members have various limitations applicable in inspections on spot. The large majority of the competition authorities are making efforts to protect the privacy of the undertaking's employees, to preserve the secrecy of the lawyer-client communications under the LPP and to avoid procedures that can lead to self-incrimination.

## **VI. Treatment of evidence**

### **1. Collection of original documents**

Most of competition authorities are empowered to seize original documents during inspection. Some of them have to justify it by pointing out in the protocol why it is not possible to take copies. In **BUL** and **CRO** the competition authority can seize original documents when it is not possible to make photocopies during the inspection. The **ALB** competition authority may seize original documents as evidence and detain it for not more than 72 hours. The person affected by the seizure shall be informed thereof without undue delay. The investigators must draft minutes, a copy of which shall be presented to the person affected by the seizure. The person affected shall be informed of the right to request judicial review of the seizure. The **CRO** competition authority is entitled to retain the seized evidence until the end of the proceedings. The owner of the seized document shall be informed without undue delay. The **BIH** competition authority can collect original documents or certified copies. The **MNE** competition authority has the right to copy or scan business documentation, and if that is not possible for technical reasons, to temporarily seize business documentation for the period necessary to make copies thereof.

In **BUL** the reasons justifying the seizure of originals should be stated in the protocol. The seized originals are placed in non-transparent bags on which are posed the seal of the CA. The original documents should be collected in a way that preserves their initial condition. In **CRO** the competition authority should without delay issue a certificate of the seizure of objects and documentation concerned. The objects, books and documentation, which have been seized, shall be retained as long as the facts and circumstances contained in the evidence concerned are established. However, this period may not be extended after the day on which the competition authority closes the proceedings in the case concerned.

### **2. Making copies of documents**

Competition authorities in **ALB, BIH, BUL, CRO, KOS, MNE, and SRB** can make copies of documents during inspection. In **ALB** the inspectors can make hard or electronic copy of all the relevant documents important for the proceedings. In **BUL** the inspection team leader and the undertaking's representative should certify the veracity of each copy. If the company's representative refuses to certify the copies, this has to be noted in the protocol. In such case the inspection team leader does the certification of the copies. In **CRO** documents are copied in two copies - one copy for the competition authority, and one for the undertaking or the owner of the document.

### **3. Taking oral statements (interviews)**

The competition authorities of **ALB, BIH, BUL, CRO, KOS, MKD, MNE, and SRB** are empowered to take oral statements.

In **ALB** the competition authority should authorize the Secretariat to take oral statements from natural or legal persons who consent to be interviewed. In these instances, the Secretariat should inform those persons of the legal basis of the interview and its voluntary nature. The persons interviewed should also be informed of the purpose of the interview and of any record, which may be made. In order to enhance the accuracy of the statements, the persons interviewed should also be given an opportunity to correct the recorded statement. It is necessary to provide the undertaking concerned with a record of any given explanations and to establish a

procedure enabling it to add any rectification, amendment or supplement to the explanations given by the employee who is not or was not authorized to provide explanations on behalf of the undertaking. The explanations given by a staff member should remain in the Secretariat file as recorded during the inspection. In **BUL** at least two inspection team members should conduct the taking of oral statement. The statement is given orally and is written down in the protocol by the team members under the grammatical form of a first person singular. In **CRO** oral statements are taken as a part of the protocol or as attachment to it.

#### 4. Drafting protocols

Most CAs drafts protocols at the end of the inspection. Nevertheless, the **BIH** competition law does not contain an explicit requirement to draft a protocol after an inspection. In such case, the **BIH** competition authority applies the Administrative Procedure Act, which provides that any person subjected to an inspection needs to sign a draft protocol at the end of the inspection. If the person refuses to sign, then the inspector need to write "he refused to sign" and make explanation about that. Similarly, in **ALB** if the representative of the undertaking refuses to sign, only the team and state police sign the protocol. In **BUL** the protocol is drafted in the inspected premise immediately after the end of the inspection and can serve as a proof for the procedural actions brought for collecting the evidence. The protocol is drafted in two identical copies, signed by the inspection team members and the officers of the Ministry of Interior on one side, and the company's representatives on the other. The protocol is stamped with the seal of the competition authority. Upon refusal of the representatives of the undertaking or association of undertakings to sign the protocol, that fact must be stated in the protocol, which is then signed only by members of the inspection team and representatives of the Ministry of Interior and stamped with the seal of the competition authority. One copy of the protocol is given to the representative of the undertaking or association of undertakings under inspection. In **CRO, KOS** and **MNE** the representative of the undertaking needs to sign the protocol and if there is a refusal to sign this should be noted in the protocol.

#### 5. Collection of evidence, claimed to be subject of LPP or privacy or data protection or other legal limitations

With regard to limitations on the power to collect evidence, it is worthy to note that this matter is not explicitly regulated in most jurisdictions<sup>2</sup>. Under the jurisdiction of **BUL** the undertaking's representatives can claim that a given document or information is covered by LPP, protection of privacy or personal data protection during the inspection or later when the collected evidence is unsealed in the premises of the competition authority. The inspection team place these documents in non-transparent bags stamped with the seal of the competition authority. Typically, after the collected evidence has been transported to the authority's premises, the parties are invited to designate the documents or kind of information, which is covered and protected by law. In **BUL**, therefore, claims related to LPP, privacy or personal data protection could be raised during or after the inspection. These claims can be raised before the **CRO** competition authority at the time when the documents are found and would be examined. In **MNE** these claims can be raised at the moment of the collection of the evidence or later.

---

<sup>2</sup> In contrast, the investigative powers of the ECN members are limited for various reasons; see ECN working group cooperation issues and due process Investigative Powers Report available on [http://ec.europa.eu/competition/ecn/investigative\\_powers\\_report\\_en.pdf](http://ec.europa.eu/competition/ecn/investigative_powers_report_en.pdf)

## **6. Treatment of evidence subject to commercial or business secret or other secret protected by the law**

Protection of commercial or business secrets is guaranteed in all jurisdictions within the SCF. In most countries, the competition authority officers are obliged by law not to divulge to any person or authority whatsoever confidential information acquired during the inspection.

In **BUL** after collecting and attaching the gathered evidence to the case file, the investigation team invites the parties to designate the documents and materials containing commercial, business or other secret protected by the law. This evidence is attached to a separate case folder containing only sensitive and protected by the law information. Parties are not given access to this case folder unless the **BUL** competition authority rules that the disclosure of this information is essential for proving the infringement or for the effective implementation of the right of defence of the responding party. In **CRO** if the undertaking or its lawyer refuses access to file and documentation claiming that the information is confidential or privileged, the authorized person of the competition authority has the right of access to the files concerned. Should in the view of the authorized person of the competition authority the information concerned appears that the information should not be regarded as confidential or privileged, the authorized person of the competition authority shall in the presence of the undertaking and its lawyer, if the latter is present, file the document concerned or its photocopy in a separate envelope, properly dated, sealed by the competition authority and signed by all the parties and lawyers concerned. In **KOS** when data and documentation contain trade secrets parties to the procedure and other natural and legal entities, are obliged to submit a note to the competition authority, explaining clearly, what is considered a trade secret. The **KOS** competition law reserves the faculty for inspectors to assess the necessity to further extend the collection of evidence to confidential documents. In such case, it is expected that the Administrative Department District Court judge will extend the warrant as to include in it those documents. In **MKD** in case that evidence gathered during inspection contains commercial or business secret, the undertaking subject to inspection has the right within 8 days as of the day of the inspection to check the seized or kept evidence (data and documentation), clearly mark the data and documentation that are business secret and indicate the legal basis for their classification as such.

## **7. Guarantees for the authenticity of the evidence gathered during the inspection**

With regard to the question of guaranteeing the authenticity of the evidence, it appears that all SCF members have adopted appropriate measures for that. In **ALB** the inspectors make copies of the evidences and the representative of the undertaking and the inspection team members sign all of the hard and electronic copies. All the evidence in **ALB** and **CRO** is saved in two copies, one for the undertaking, and the other copy by the inspectors. In administrative proceedings in **BIH** is possible to request that an expert verify the authenticity of the evidence. In **BUL** the authenticity of the evidence gathered during the inspection is guaranteed by:

- The presence of company's representatives during the inspection;
- The requirement for certification of each copy of document by the company's representative and the inspection team leader;
- The detailed information contained in the protocol and that a copy of the protocol is given to the company's representatives;

- The obligation imposed on the inspection team members and the assisting police officers to sign the protocol;
- The possibility for the company's representatives to raise objections during the inspection and the obligation to write them in the protocol.

In **KOS** the inspection on spot involves judicial officials (District Judge, Court administrators) as well as representatives of the Ministry of Internal Affairs who will vouch for the authenticity of evidence. In addition, evidence will be sealed off in a manner ensuring its integrity. In **MNE** evidence is preserved by using IT forensic methods.

With regard to practical difficulties, the **ALB** competition authority states that in some cases the representative of undertakings refuse the inspectors to collect evidences and in the other cases refuse to sign the protocol of inspections. In **KOS** the difficulties are related to the inefficiency of the Court and judicial Officers who are not always available to issue a court warrant or to carry out an inspection.

## 8. Conclusion

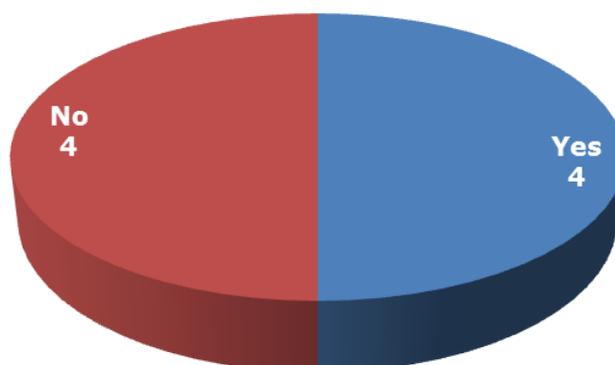
The large majority of the Balkan competition authorities have adopted appropriate measures for treating evidence in such a way as to preserve its authenticity and veracity. For collecting evidence, most authorities can seize originals and make copies. In some jurisdictions, it is required to justify the reasons to seize the originals while in others the original documents cannot be detained beyond certain period.

## VII. Treatment of digital/ forensic/ electronic evidence

### 1. Forensic equipment

Only half of the SCF members (**ALB, BUL, CRO, and SRB**) have the necessary equipment to seize forensic evidence.

**Figure 7.1. Availability of forensic equipment**



## 2. Forensic experts

Some of the mentioned SCF members have trained IT experts (**ALB**- 1, **BUL**- 2, and **CRO**- 2). In **SRB** 10 case handlers have passed trainings for usage of forensic equipment.

IT experts have undergone special trainings with regard to the forensic, but they don't have a different status from that of the other members of the inspections team. During inspections, forensic IT experts are in charge of collection and examination of all electronic evidence, to ensure the technical aspects with regard to the seizure of digital, forensic and electronic evidence. Members of inspection team are empowered to receive access to all types of information media, including servers, accessible by computer systems of other means, located in the inspected premises. Members of the inspection team can seize all digital information that is accessible to the undertaking even the one that is located on external servers or on a cloud service.

## 3. Treatment of forensic evidence

Named competition authorities have the possibility to take a digital copy/forensic image of the evidence for sifting at its offices, but they can also carry out partial sifting at the investigated premises.

**ALB, BUL, CRO** and **SRB** jurisdictions don't have any time limits to perform the sifting of the digital evidence.

In **BUL** investigation practice the sifting of the digital evidence is performed at the computer stations at the laboratory. The representatives of the undertaking are present during sifting. At this stage, the only objective is to indicate the personal information and put it aside from the working copies. The relevant assessment is done afterwards by the case-handlers and it covers all the data contained within the respective device.

Representatives of the undertaking get the copy of documents the **CRO** competition authority took or copied, but all documentation taken away during the inspection gets sifted afterwards in the offices of the competition authority.

In mentioned jurisdictions, there is possibility to access digital information that is located on external servers or on a cloud service, or even if the server is abroad, but according to **ALB** and **BUL** experience certain practical difficulties occurred in relation to the different data location.

If the undertaking claims that certain evidence is subject of LPP, in **ALB** practice, that certain evidence is presented to the lawyer if present or to the representative of the undertaking, though the decision on what is considered LPP or privacy or data protection is made solely by the head of the working group and if considered so is surrendered to the undertaking representative.

In **CRO** jurisdiction, any data exchanged between the undertaking and its lawyer shall be considered as LPP. Where the undertaking or its lawyer refuse the access to file pleading LPP, the authorised person of the Agency has the right of access to the files concerned. Should in the view of the authorised person of the Agency the information concerned not be regarded as confidential or privileged, the authorised person of the Agency shall in the presence of the undertaking and its lawyers, if the latter is present, file the document concerned or its photocopy in a separate envelope, properly dated and sealed and signed by all the parties and lawyers concerned.

According to **ALB**, **BUL** and **CRO** practice, authenticity of the copied data files is ensured with the hash value. The individual hash value of every forensic image or archive file that is taken is written in the protocol. If there are changes in the information the hash value will be different.

#### **4. Conclusion**

Despite the availability of legal possibility to seize digital/ forensic/ electronic evidence only half of the SCF members have the necessary equipment to do this in practice. The importance of this type of evidence is growing and ensuring possibilities to actually seize forensic evidence can be crucial for a successful inspection on spot and hence for the effective enforcement of competition rules.

### **VIII. Sanctions for non-compliance with the inspection**

#### **1. Types of non-compliance**

The types of non-compliance with inspection that may be sanctioned are various among the SCF members.

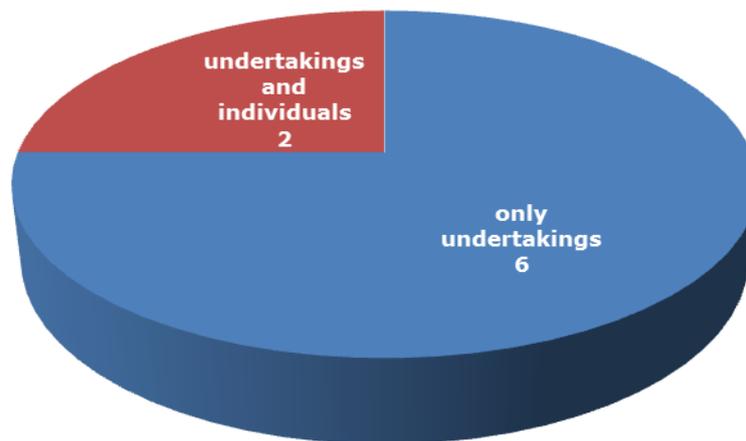
In **ALB** the type of non-compliance include *obstruction to the inspections, refusal to answer any questions on facts, provision of inaccurate, incomplete or fraudulent answers and breaking of seals*. In **KOS** the *prevention of the execution of court order authorizing the inspection* is sanctioned. It is expected that parties prosecuted under competition law will behave in a similar manner as persons subject to criminal investigation i.e. parties subject to inspection shall be sanctioned for obstructing justice in case they fail to provide inspectors with required objects/records/books as listed in the court warrant for inspection. In **BIH** *all kind of non-compliance during inspection* may be sanctioned. In **BUL** *failure to comply with the obligation to cooperate under Article 46 of LPC and damaging the integrity or destroying the seals which have been placed during the inspections* are two main types of non-compliance with inspection that may be sanctioned. In **CRO** types of non-compliance are set in Article 62(4) of the Competition Act namely *obstruction of enforcement of the injunction of the Administrative Court of the Republic of Croatia as referred to in Articles 42 to 46 of the Competition Act*. In **MKD** the types of non-compliance range from not providing unhindered access to refusal for supply of oral or written explanations. More precisely, not providing/enabling: *unhindered access to any business premises, land or means of transport of the undertaking under inspection; unhindered examination of the books and other documentation relevant for determining the existence of a misdemeanour, irrelevant of the medium where these are stored; taking or keeping in any form copies or extracts from the books or documentation; temporarily taking and keeping books or other documentation relevant for determining the existence of a misdemeanour for the period necessary for copying them if they cannot be copied on the spot; temporarily taking and keeping objects, books or other documentation relevant for determining the existence of a misdemeanour for the period necessary for determining the relevant facts and evidence arising from such objects, books and documentation, but not longer than the effective completion of the procedure; unhindered sealing of business premises and books or other documentation or breaking the seal as well as refusal of authorized person or other employee in the undertaking to provide explanation of the facts or documents relevant for determining the existence of a misdemeanour or to submit written explanation regarding facts or documents relevant for determining the*

existence of a misdemeanour within a determined deadline including unhindered performance of other actions besides the above mentioned that are relevant for determining the existence of a misdemeanour (Article 61 of LPC). In **SRB** such types of non-compliance include: acting in contrary to the orders of the competition authority, non-compliance to orders in view of Article 57 of the Law, non-compliance with the request of the competition authority for submission, disclosure, making available or providing access to requested information, preventing an entry into its premises or otherwise preventing the investigation.

## 2. Subjects that can be sanctioned

In **BUL, CRO, KOS, MKD, MNE** and **SRB** only undertakings may be fined for non-compliance with an inspection. In **ALB** and **BIH** both undertakings and individuals may be fined for non-compliance with an inspection. However, in **BIH** only the responsible persons of the undertakings are listed under such individuals.

**Figure 8.1. Subjects that can be sanctioned**

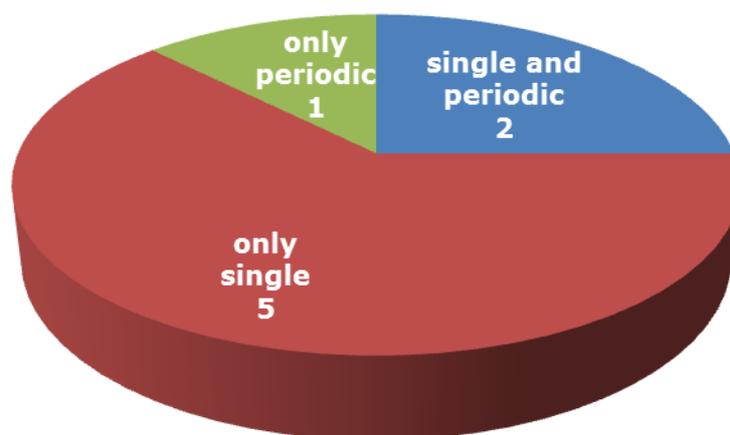


## 3. Types of sanctions for non-compliance with the inspection

Only in **ALB, BUL** and **MNE** the competition authorities have the possibility to impose periodic penalty payments in order to ensure compliance of undertakings with the inspection. In **ALB** and **BUL** the competition authorities can impose also single sanctions while in **MNE** only periodic penalty payments can be imposed.

Competition authorities in **BIH, CRO** and **MKD** on the other hand may apply only single sanction that is calculated on the basis of the annual turnover and the amount of such fine cannot exceed 1% of their aggregate turnover in the last year for which financial statements have been completed. In **KOS** the maximum amount of the single sanction is 2% of the turnover for the preceding year. In **SRB** the amount of the single sanction may range from €500 to €5000 and the turnover of the undertaking is not taken into consideration when determining its amount.

**Figure 8.2. Types of sanctions for non-compliance with the inspection**



The single sanction for individuals in **ALB** may amount to max 5 million lek (€35 500), while in **BIH** it may range from 5 000 KM to 15 000 KM (€2550 - €7660).

#### **4. Procedure for imposition of sanctions for non-compliance**

As regards the procedure for imposition of sanctions for non-compliance and the method on individualization of sanctions, most jurisdictions have a separate procedure except for **BIH**. In **BIH** sanctions for non-compliance during inspections are imposed only in the final decision, not before. The maximum amount of fine is set in the law (1% of total income) and the competition authority has a discretionary right to decide the amount of the sanction depending on the particular violation.

In **ALB** the competition authority may impose fines on individuals that do not exceed 5 million lek, while the periodic penalty payments imposed to undertakings in case of their recidivist behaviour may amount up to 5% of the average daily turnover in the preceding financial year for each working day of failure to comply. There is also detailed regulation on fines and leniency.

The competition authority in **BUL** imposes sanctions for non-compliance by means of a decision. The maximum amount of such sanction is 1% of the total turnover of the undertaking or association of undertakings in the preceding financial year. The periodic penalty payments may be up to 1% of the average daily turnover for the preceding financial year for each day of failure to comply with the obligation to cooperate under Article 46 of LPC. The amount of sanction is calculated taking into account the nature, significance and necessity of information for the investigation, the gravity of the infringement and mitigating and aggravating circumstances.

Imposition of sanctions for non-compliance in **CRO** is done in administrative proceedings before the competition authority (Article 52 of the Competition Act). When determining the amount of fine, the competition authority shall take fully into account all mitigating and aggravating circumstances, such as the degree of gravity of the infringement, the duration of the infringement and the damage caused for competing undertakings and consumers.

Imposition of sanctions for non-compliance in **MKD** is done in misdemeanour proceedings before the competition authority which is initiated ex-officio by adoption of procedural order against which no appeal or legal action on instituting an

administrative dispute shall be allowed. Same rules that apply for the general misdemeanour procedure under LPC shall apply in this case as well. Namely, following delivery of the answer and requested data by the undertaking, the competition authority shall deliver preliminary statement of objections (Article 42 of LPC) and the undertaking shall have the right to state its view in writing regarding the allegations from statement of objections, provide its remarks and propose evidence available to it, which are, in its opinion, relevant for the correct determination of the actual state of affairs within 15 days as of the day of receiving the statement of objections. Prior to adoption of final decision for imposition of sanctions for non-compliance, the competition authority shall submit final statement of objections to the party in the procedure. When determining the amount of fine, the competition authority shall take into account the seriousness of the misdemeanour, duration of the misdemeanour, extent of distortion of competition and the effects caused by the misdemeanour (Article 64 of LPC) and shall also apply the Guidelines for Determining the Fine that are in line with the relevant EU *acquis*.

The competition authority of **MNE** imposes sanctions for non-compliance by means of conclusion that determines the amount of fine and of periodic penalty payment including the deadline for payment (may not be longer than 15 days from the day of receipt of the conclusion). The amount of the periodic penalty payment may range from €500 to €5 000 for each day of non-compliance with the imposed obligations and up to 3% of aggregate turnover achieved in the preceding financial year.

## **5. Conclusion**

All SCF members have possibility to impose sanctions for non-compliance with an inspection defined in their competition laws. The main difference appears to be with regard to the types of sanctions that can be imposed. Only in **BUL**, **ALB** and **MNE** the competition authorities have the possibility to use periodic penalty payments in order to ensure compliance with the inspection. Taking into account that sometimes this type of sanction could ensure compliance with the inspection more quickly it is essential for the competition authorities to have possibility to impose also periodic penalty payments in case of non-compliance with the inspection.

## **IX. Judicial control**

### **1. Judicial review of the decision authorizing an inspection on spot**

With regard to the judicial control in the field of inspections it has to be pointed out that in most Balkan competition jurisdictions only the final decision of the Competition Authority can be appealed, but not the authorization to conduct an inspection. Only in **MNE**, **BUL** and **ALB** the decision authorizing the inspection (decision of the Competition Authority or the court authorization) can be appealed before the administrative court.

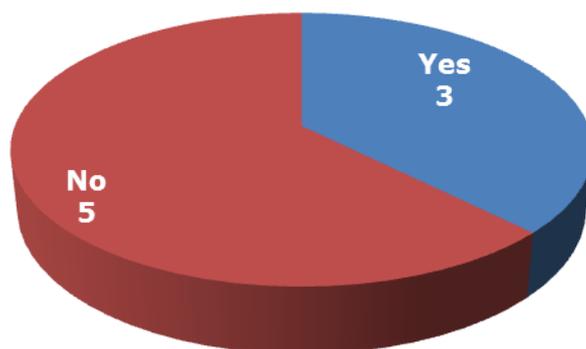
In **MNE** the party can appeal against the authority decision (conclusion) before the Administrative court within 30 days. In **BUL** the court authorization of the inspection as well as the refusal to issue such authorization can be appealed before a three-member panel of the Supreme Administrative Court. The court rulings can be appealed within three days, where the three-day period shall commence as of the day the CPC and, respectively, the undertaking or association of undertakings are notified

of the court ruling. In **ALB** Tirana District Court has the competence to review the decision of the Competition Authority for opening the procedure of investigation within 30 days from the date of the notification of the Authority decision, whereas the conditions for appealing against the court decision are foreseen in the Code of Civil Procedure and the Code of Administrative Procedure.

In **MKD** it is regulated that no separate appeal or legal action on instituting an administrative dispute shall be allowed against the procedural order authorizing inspection. However, the undertaking may attack the decision of the Competition Authority that has determined an existence of misdemeanour and imposed a fine by instituting an administrative dispute before the Administrative Court, on the grounds of incorrect application of the substantive law, incorrect or incompletely determined factual situation in the procedure or breach of the rules of the procedure, therefore, indirectly attacking the procedural order authorizing the inspection.

In **KOS** the parties to the proceedings can object to the report drawn up by the inspectors of the Competition Authority further to the inspection. The decisions of the Competition Authority shall not be based on inspections which were objected by the parties.

**Figure 9.1. Judicial review of the decision authorizing the inspection on spot**

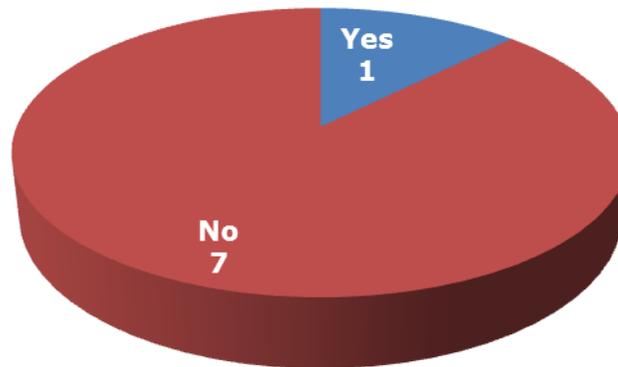


## **2. Judicial control of the actions carried out during inspections**

Most of the jurisdictions of the SCF members do not provide for legal remedies against the actions carried out during inspections. For instance, the **ALB** Competition Law does not regulate legal remedies against the actions carried out during the inspections, but the undertaking can appeal against these actions when it appeals the final decision. In **BUL** it is not possible to attack directly the actions carried out during inspections too; only the **BUL** authority's final decision can be appealed before the Supreme Administrative Court, claiming that the actions carried out during the inspection are unlawful and the authority shall be prevented to use the evidence gathered in the course of these actions.

Only in **MNE** it is possible to appeal immediately against the conclusion on conducting an inspection and all activities of the Competition Authority carried out during the inspection, as well as against the final decision before the Administrative court.

**Figure 9.2. Judicial control of the actions carried out during inspections**



### **3. Possibility for judicial control on claims for LPP and privacy**

The legal systems of almost all SCF members provide for judicial control on the ground of LPP and/or privacy infringement against the final decision of the Competition Authority, but not the actions carried out during inspections.

Under the **BUL** law it is only possible to appeal against the final decision of the authority, but not against the actions carried out during inspections, before the Supreme Administrative Court, claiming that the collected evidence is protected by LPP and/or privacy. The final decision of the authority can be appealed on the ground that the evidence has been gathered in the course of the inspection, although it is protected by LPP and/or privacy. The final decision of the authority can be appealed within 14 days from the day of the notification of the decision. In **MKD** it is possible to appeal against the decision of the Competition Authority that has determined an existence of infringement of competition law and imposed a fine on the grounds of incorrect application of the substantive law, incorrect or incompletely determined factual situation in the procedure or breach of the rules of the procedure. Also in **BIH** only the final decision of the Competition Authority can be appealed on the ground of LPP and/or privacy infringement before the Court of BIH. The Competition law of **CRO** provides for the same. **MNE** is the only exception, as its Competition Law provides for the possibility to appeal against the actions carried out during inspections as well as against the final decision of the Competition Authority before the Administrative court under the condition that LPP/privacy rights have been violated or not observed in full.

### **4. Judicial control of sanctions for non-compliance**

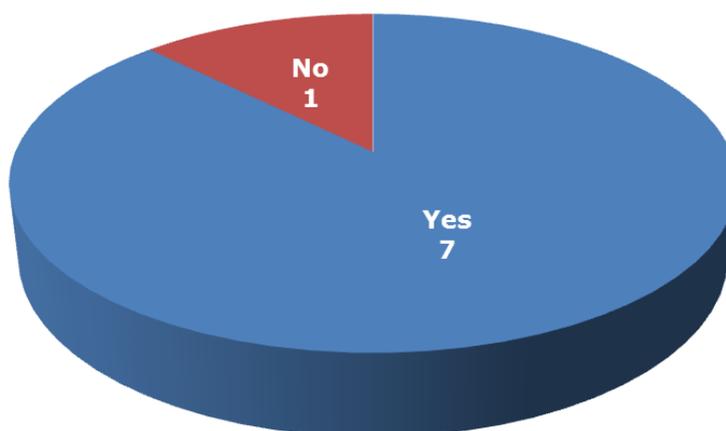
In **ALB, BUL, CRO, KOS, MKD, MNE** and **SRB** there are legal remedies against the sanctions imposed for non-compliance.

In **CRO** a complaint for an administrative dispute at the High Administrative Court may be brought within 30 days from the receipt of the decision of the Competition Authority imposing the fine for non-compliance. In **ALB** the party can appeal against the sanctions imposed by the Competition Authority for non-compliance before the District Court of Tirana within 30 days from the date of the notification of the Authority's decision. In **BUL** the pecuniary sanctions and fines under the LPC are imposed by a decision of the competition authority which shall be subject to appeal under the procedure set forth in the Code of Administrative

Procedure. The decision of the authority can be appealed within 14 days, where this time period shall commence as of the day of the notification of the decision. In **KOS** the parties may challenge the decision to impose sanctions in Basic Court through an “administrative conflict”. It is understood that parties may request judicial review of the punitive decisions of the Competition Authority with respect restrictedly to procedural requirements. In **MKD** there are legal remedies against the sanctions imposed for non-compliance available to the parties of the misdemeanour procedure. Legal action on instituting an administrative dispute (by means of lawsuit) may be brought against such decisions before the competent court (i.e. Administrative Court) within 8 days as of the day of receiving the decision of the Competition Authority. Also in **MNE** there are legal remedies against the sanctions imposed for non-compliance, and it is possible to appeal before the Administrative Court within 30 days from the day of receiving the conclusion imposing the fine.

In **BIH** there are no legal remedies against the sanctions imposed for non-compliance during inspections, only a complaint against the final decision to the Court of BIH is possible, where the time limit is 30 days from receiving or publishing the decision.

**Figure 9.3. Judicial control of sanctions for non-compliance with inspections**



### **5. Liability of the authority for damages caused as a result of inspections on spot**

None of the SCF members’ competition laws provides for claiming damages caused as a result of an inspection, but some of them regulate claiming damages caused by act or actions that violate competition law, e.g. **MNE, BUL** and **CRO**, or claiming damages is regulated in other legal acts, like this is the case in **BIH**. For instance, in the **ALB** competition law claiming damages caused as a result of an inspection is not foreseen, but according to their Civil Code, in case of damages every undertaking may claim for compensation before the competent court.

In **BUL**, according to the Act on the liability for damages incurred by the state and the municipalities the state shall be liable for damages inflicted on citizens and legal persons from unlawful acts, deeds or omissions of their bodies or officials upon or on the occasion of the implementation of their administrative activity. The actions on claiming damages shall be considered according to the order provided by the Code of Administrative Procedure. The claim for damages shall be extinguished upon the expiration of a five-year limitation period, which shall begin to run upon discovering

the offender, i.e. the competition authority. According to the legal system of **MKD**, there is a possibility for claiming damages caused as a result of an inspection, but the Competition Law does not contain separate provisions that regulate this issue.

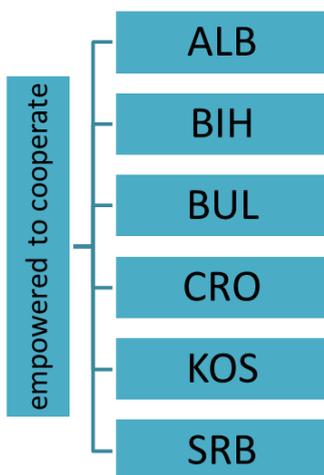
## 6. Conclusion

There is a high degree of convergence between the Balkan competition jurisdictions with regard to the judicial control of the actions carried out during inspections, as only the final decisions of the Competition Authorities, but not their separate inspection actions can be challenged before the competent administrative courts, also on the ground of LPP and/or privacy infringement. This does not apply only to one competition regime. Another similarity is that almost all Balkan competition laws provide for legal remedies against the sanctions imposed for non-compliance during inspections. Furthermore, none of the SCF members' competition laws provides for claiming damages caused as a result of an inspection, as this matter is often regulated in other legal acts. The main difference between the surveyed competition regimes concerns the judicial review of the decision authorizing an inspection.

## X. International cooperation in the field of inspections

Most of the competition authorities of the Balkan region (**ALB**, **BIH**, **BUL**, **CRO**, **KOS**, and **SRB**) are empowered to cooperate with competition authorities from other countries.

**Figure 10.1. Competition authorities with powers for international cooperation**



In some cases the possibility for such cooperation is envisaged in the national law on protection of competition as in **BIH** and **KOS** or in cooperation agreements as in **ALB** for example. In **BIH** the law envisages that the national competition authority is empowered to cooperate with international and national organizations and institutions in the field of competition. The legal framework in **KOS** empowers the authority to cooperate with the European Commission (EC) and/ or further regional

competition authorities wherever facts submitted are likely to have impact outside **KOS** market or conversely. Further, **KOS** is bound by the terms of the SAA between the European Union and **KOS** which provides for a common approach to competition issues. The competition authority of **ALB** is as well empowered to cooperate with the EC or the authorities of other states exercising similar functions. **BUL** and **CRO** as members of the European Union are empowered to cooperate with the competition authorities of the other member states within the meaning of Council Regulation (EC) No 1/2003.

In **ALB** the competition authority may refuse rendering assistance requested by a foreign authority if the acceptance of the request can undermine the sovereignty, security, essential economic interests or public order of **ALB**.

The jurisdictions of **BIH**, **BUL** and **CRO** report that they may cooperate with another authority at any stage of the inspection process. The competition authorities of **ALB**, **BIH**, **BUL** and **CRO** have the power to conduct inspections on behalf of other competition jurisdiction. When being asked to carry out an inspection on its territory, the authority of **BUL** shall follow its internal rules for conduct of an inspection. During the inspection the experts of the jurisdictions of **ALB**, **BIH**, **BUL** and **CRO** may be assisted by experts from the authority, requesting the conduct of the inspection. However, **ALB** specifies in its reply that the expert may assist the case handler, but he/ she cannot take part in the inspection.

All four of the abovementioned jurisdictions are empowered to exchange evidence with other competition authorities. In **ALB** the legal framework specifies that the jurisdiction may communicate information or the documents it holds or receives as part of its duties on the conditions that the competent foreign jurisdiction is subject to the same guarantees applied in **ALB** concerning confidentiality and business secrets. In **BIH** the national legal framework envisages that in the exchange of confidential data, legitimate business interests of the economic entities in question must be protected. **BUL** and **CRO** are as well empowered to exchange any matter of fact and law, including confidential information.

In **ALB**, **BIH** and **BUL** the evidence exchanged by the competition authorities has the same probative value as the other evidence. In addition, in **BUL** the national legislation foresees that the information exchanged can only be used in evidence to impose sanctions on natural persons where the law of the transmitting authority foresees sanctions of a similar kind in relation to the infringement of Art. 101 and 102 of the TFEU; the information is collected in a way which respects the same level of protection of the rights of defense of natural persons as provided for in national rules of the receiving authority.

## **Conclusion**

Most of the competition authorities of the region are empowered to cooperate with other competition jurisdictions in the field of inspections on the basis of their national legislation on protection of competition or cooperation agreements. All of them may conduct inspections on behalf of other competition jurisdiction and may be assisted by experts from the authority, requesting the inspection. The jurisdictions have different powers as for example to exchange evidence with other competition authorities. However, although there are legal grounds for international cooperation in the field of inspections, this tool has not yet been used by the competition authorities from the Balkan region.