



**REPUBLIC OF ALBANIA
COMPETITION AUTHORITY
-COMPETITION COMMISSION-**

**DECISION
No. 319 of 13 June 2014**

Recommendations in relation to the concessionary agreement on funding, establishing and operating the service of scanning containers and other vehicles in the Republic of Albania and the scanning service fee

The Competition Commission, composed of

• Lindita Milo (Lati)	Chair
• Rezana Konomi	Deputy Chair
• Servete Gruda	Member
• Koço Broka	Member
• Iva Zajmi	Member

in its meeting of 16 January 2014, with the participation of Ms. Lindita Milo, Ms. Servete Gruda, Ms. Iva Zajmi, Mr. Koço Broka, reviewed the Case with:

Subject-matter: Review of the monitoring Report on the concessionary agreement on funding, establishing and operating the service of scanning containers and other vehicles in the Republic of Albania and the scanning service fee, pursuant to Law No. 9121 of 28 July 2003 “On Competition Protection”, as amended;

Legal basis: Law No. 9121 of 28 July 2003 “On Competition Protection,” as amended. Articles 24 (f) and 70 (2).

After reviewing

- The monitoring Report on the concessionary agreement on funding, establishing and operating the service of scanning containers and other vehicles in the Republic of Albania and the scanning service fee, and the attached report of the Secretary-General,

THE COMPETITION COMMISSION NOTES THAT:

1. Article 2 (1) (c) of Law No. 9121 of 28 July 2003 “On Competition Protection”, as amended, (hereinafter the “Law”) also applies to “*public undertakings and to undertakings which have been granted special and exclusive rights by the State.*” Article 69 of the Law requires that “*central and local government bodies have the obligation to request an assessment from the Competition Authority of each draft regulation that is related, inter alia, to (a) the quantitative*

restrictions to market access and (b) the granting of exclusive or special rights in specific areas for specific undertakings or products.”

2. In the concession granting procedure the Ministry of Finance and the Council of Ministers did not observe the requirement of Articles 2 (1) (c) and 69 (1) (b) of Law No. 9121/2003 “On Competition Protection”, because the Ministry of Finance did not observe the obligation to take the Authority’s evaluation of this act which point (b) includes in the exclusive rights granted to Rapiscan for the service of scanning containers and other vehicles.
3. The Competition Authority began an ex-post evaluation of the concessionary agreement pursuant to Article 2 (1) (c) of Law No. 9121 of 28 July 2003 “On Competition Protection”, as amended, following a public concern expressed by the business community in relation to the cost increase by about EUR 20 million a year of the scanning of containers at the Customs, and the Parliament Resolution on the evaluation of the Competition Authority activity in 2013, whereby it assigned the task of addressing the issues related to concessionary services, including the container scanning services.
4. Law No. 123/2013 “Approving the concessionary agreement between the Ministry of Finance as the Contracting Authority and Rapiscan Security Inc. as the Concessionary, on funding, establishing and operating the service of scanning containers and other vehicles in the Republic of Albania and the scanning service fee” granted the concession on scanning containers and other vehicles. The duration of the Agreement starts on its effective date and ends on the fifteenth anniversary of the Rapiscan certificate. The concessionary agreement was signed on 10 April 2013, but it is still not effective.
5. The container and other vehicle scanning fee is EUR 39 (exclusive of VAT). The container and other vehicle scanning service is treated as VAT-taxable at a zero tax rate. Rapiscan Security Inc will pay the Authority a concession fee that is calculated as 2% of the revenues from the defined services.
6. According to the Ministry of Finance Letter No. 4404/3 of 30 April 2014, the concession on this service was granted in order to ensure full support for the customs and border systems by applying modern methods, while enabling: (i) detection of revenue evasion, including underreporting of tariffs; detection of contraband goods and products; (ii) detection of narcotics; detection of hazardous radioactive products, illegal movement of weapons and ammunitions; in particular, detection of evasion in relation to excise goods (tobacco, alcohol, oil, etc.); (iii) rapid and efficient action in customs procedures, making it easier of businesses; (iv) detection of all other goods that will be considered illegal and prohibited to enter the territory of the Republic of Albania in accordance with its legislation in force. The Contracting Authority aimed at improving the scanning service through a private operator having good designing and planning skills, taking into account the technical design and project management including the provision of data on all individuals and institutions interested in the international transportation of goods.
7. The Concessionary Agreement indicates that the concessionary will not provide the service at all customs points, but only in five: three fixed ones and two mobile ones, while the number of customs checkpoints is higher, resulting in incomplete coverage.

8. Albania has undertaken specific trade-related commitments vis-à-vis EU Member States. Under Article 33 of the SAA, *“From the date of entry into force of this Agreement, no new customs duties on imports or exports or charges having equivalent effect shall be introduced, nor shall those already applied be increased, in trade between the Community and Albania.”* The Stabilisation and Association Agreement—a significant achievement in the context of integration into the EU—provides for the establishment of a free trade area between Albania and the EU. Being a party to the SAA, Albania is committed under its Title IV “Free Movement of Goods” to comply with the provisions of this Agreement.
9. In particular SAA Article 33 “Suspension” provides for refraining from imposing new customs duties on imports or exports. On the other hand, the concessionary agreement sets additional tariffs, at EUR 39, which will be payable against the provision of the service of scanning containers and vehicles.
10. The Law approving the concessionary agreement also includes a provision under which: *“Upon Albania’s accession into the European Union or at any other moment following such accession, the Authority (the Ministry of Finance) shall have the right to requesting a revision of this Agreement so as to ensure its full compliance with the requirements that are mandatory for EU membership. If, based on the above, the Authority decides to change this Agreement, Rapiscan shall, without prejudice to any other rights provided for by the Law, have the right to terminating this Agreement without incurring any penalties or being subjected to any other legal consequences vis-à-vis the Authority.”*
11. With regard to the trade regime, Albania has a full free trade agreement with the European Union, and because of this we think that it is the right time to deal with the revision of this Agreement now rather than wait for full membership in the European Union.
12. From the economic efficiency point of view, regardless the justification put forward by the Ministry of Finance at the granting of the concession, the installation of scanners in only five points, of which three fixed ones and two mobile ones (depending on the flow of clearance of goods through customs), does not justify the purpose of the concession granting, which is elimination of smuggling and tax evasion.
13. The Stabilisation and Association Agreement entered into force in 2009, while the concessionary agreement was adopted by Law in 2013, i.e. about four years after the entry into force of the SAA. Thus the concessionary agreement is in conflict with Article 33 of the SAA, which is an international agreement having prevalence over the domestic laws and regulations pursuant to Article 116 of the Constitution.
14. In conclusion:
 1. The concessionary agreement is in conflict with Article 33 of the SAA, which is an international agreement having prevalence over the domestic laws and regulations pursuant to Article 116 of the Constitution.
 2. The concession granting procedure did not observe the requirement of Articles 2 (1) (c) and 69 (1) (b) of Law No. 9121 of 28 July 2003 “On Competition Protection”, as amended, which requires an assessment is to be requested from the Competition Authority of each

draft regulation that is related, inter alia, to the granting of exclusive or special rights in specific areas for specific undertakings or products.

3. Pursuant to Article 2 (1) (c) of Law No. 9121 of 28 July 2003 “On Competition Protection”, as amended, the Competition Authority made an evaluation of the concessionary agreement following a public concern expressed by the business community in relation to the cost increase of the scanning of containers at the Customs.
4. The concession was granted after an unsolicited proposal, without going through an open tender procedure that would put all the potential bidders in equal competition conditions.
5. The installation of scanners in only five points, of which three fixed ones and two mobile ones (depending on the flow of clearance of goods through customs), does not cover all customs points to fully justify the purpose of the concession granting.

FOR THESE REASONS

The Competition Commission, pursuant to Articles 24 (f), 69 (1) and Article 70 (2) of Law no. 9121 of 28 July 2003 “On Competition Protection”, as amended, with the proposal of the Secretariat,

HAS DECIDED TO:

1. Recommend the Ministry of Finance and the Council of Ministers to revise the concessionary agreement on funding, establishing and operating the service of scanning containers and other vehicles in the Republic of Albania and the scanning service fee.
2. Public institutions should observe the provisions of Law No. 9121 “On Competition Protection” and ask in advance the Competition Authority to make a legal assessment of the adoption of acts having as their purpose or consequence the granting of exclusive rights or quantitative restrictions in various markets or industries.
3. The revision of Law No. 125/2013 “On Concessions and Public Private Partnerships” should take into consideration the new EU Directive (32014L0023; *Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; OJ L 94, 28/03/2014, p. 1–64*) in order to clearly separate markets from public services, with the latter being left to the state as obligations that cannot be transferred from the state to the private sector since they would have additional costs for businesses and consumers and eliminate the possibilities of choice for businesses and consumers since the provide is a single (exclusive) provider.
4. The legal instrument for revising the concessionary agreement is the process of revising the Customs Code, as well as the process under Article 18.2.1 of Law 123/2013 “On Approving the concessionary agreement”.
5. The following wording of the agreement is recommended: *“The Ministry of Finance may, in view of the specifics of the customs service in the context of fighting contraband and tax evasion, contract the single concessionary only for the purchase of equipment, with the services being rendered by the customs authorities”*.
6. The Competition Authority Secretary-General shall monitor the implementation of this Decision and notify this Decision to the Council of Ministers and the Ministry of Finance.

This Decision shall enter into force immediately.

COMPETITION COMMISSION

Servete Gruda
(_____)
Member

Koço Broka
(_____)
Member

Iva Zajmi
(_____)
Member

Rezana Konomi
(_____)
Deputy Chair

Lindita MILO(LATI)

CHAIRPERSON