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LEGAL AND ECONOMIC IMPACT OF GEORGIAN COMPETITION LAW

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Summary conclusion/recommendations

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Preface

The Alexander von Humboldt Foundation is one of the largest organizations in the world that promotes academic cooperation. I have been the recipient of the Foundation's support for several times. The same thing happened in the autumn of 2021, when the Foundation decided to support scientific research amidst the pandemic, where the opportunity of online contacts would be used to its utmost.

A cooperation with German academic circles was important for the implementation of the project. I did not think for a long time and offered Moritz Jakobs, Doctor of Law, to cooperate. I met Moritz in the summer of 2019 while working at the German Federal Cartel Office. His doctoral degree in competition law, practice of law and remarkable experience in the public sector have proven to be the essential components that have made our joint application interesting for the Foundation.

Competition law is gaining ground in Georgia. Compliance with European standards at the legislative level seems to have been more or less achieved. However, the number of unanswered questions still looks impressive. These questions are mainly related to the practical impact of legal norms enacted in the field of competition. Therefore, our aim was to find out what effect the rules of competition law do have or may have on the daily life of business.

The objective looked rather ambitious and it would have been almost impossible to perform it alone. The Foundation enabled me to gather a very efficient team of young researchers who have done a tremendous amount of research in an incredibly short period of time and have accomplished the task at hand.

The team sought to actively involve business associations and stakeholders in the work process so that the study would reflect the actual challenges that exist in practice as much as possible. It is now up to the reader to assess how well we were able to achieve the goal we set. Nevertheless, the outcome of the study cannot be immune from shortcomings. Both the authors and the editors welcome any comments, suggestions or initiatives that may be received from the interested public.

Giorgi Tsertsvadze

Tbilisi, April 2022.

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Chapter I. Regulatory Framework of Georgian Competition Law

1. Georgian Legislation

The first regulation regarding competition law was adopted by the National Council a few months after Georgia's declaration of independence on September 17, 1918, under the title of the law of Georgia on “Combating Speculation”. In the first months of the existence of an independent state, supervision for the existence of such a legislative regulation, shows its special importance for the development of the state.

The history of legislative regulation in this area continues four years after the restoration of Georgia's independence, when the Parliament of Georgia, on June 25, 1996, adopted the Law on “Monopoly Activities and Competition”.[1] The adoption of this law may be considered as a result of the Partnership and Cooperation Agreement (PCA)[2] between Georgia and the European Union, signed on 22 April 1996 in Luxembourg, as Article 43 of the Agreement obligated Georgia to comply its legislation, including competition law with the relevant legislation of European Union.[3] The Law on “Monopoly Activities and Competition” was in force until July 11, 2005, and it was replaced by the Law of Georgia on “Free Trade and Competition”[4] adopted on June 3, 2005. This law was in force until 2012 and was replaced by a new law with the same name.

1.1 The law of Georgia on Competition

In 2012, the transition to a new stage of negotiations with the European Union and the work on the Association Agreement and the Deep and Comprehensive Free Trade Agreement (DCFTA)[5], led Georgia to the necessity to establish effective mechanisms to protect competition and the Law on “Free Trade and Competition”, adopted in the same year (May 8, 2012), focused on "promoting competition."[6] The adoption of the new law was preceded by the preparation of a “Comprehensive

[1] Available in Georgian language at: <https://matsne.gov.ge/ka/document/view/31462?publication=3> [last accessed: 21.12.2021]
[2] Available in Georgian language at: <https://mfa.gov.ge/ევროპული-და-ევრო-ატლანტიკური-ინტეგრაცია/საქართველო-ევროკავშირი.aspx> [Last accessed 15.12.2021]
[3] ***Menabdishvili S.***, The essence of the cartel and modern trends in its development (especially on the example of competition law), Tbilisi, 2016, p. 5
[4] Available in Georgian language at: <https://matsne.gov.ge/ka/document/view/29644?publication=6> [Last accessed: 21.12.2021]
[5] Available in Georgian language at: <https://matsne.gov.ge/ka/document/view/2496959> [Last accessed: 21.12.2021]
[6] ***Tsertsvadze G.***, Competition Law: The European Model for Georgia, Volume I, World of Lawyers Publishing House, Tbilisi, 2020, p. 35
Available in Georgian language at: <https://jtconsulting-geo.com/uploads/files/publications/11/samartali-giorgi-tsertsvadze.pdf> [last accessed: 14.12.2021]

Competition Policy Strategy"[7] in 2010, which is also connected to the Deep and Comprehensive Free Trade Agreement (DCFTA) between Georgia and the European Union.

The law, adopted in 2012, has undergone significant changes to bring it into line with existing competition approaches in the EU. The current law[8] operates in the name of the law of Georgia on Competition and differs significantly from its original version. Significant amendments in the law during the period from 2012 to 2021 will be discussed in the next subsections.

1.1.1 The Amendments of 2014:

It can be said that on March 21, 2014, the draft law adopted by the Parliament of Georgia in the third hearing on amendments to the Law of Georgia on "Free Trade and Competition" was one of the most important and fundamental changes in this area.

To be more specific, these amendments were fundamental and crucial since they brought Georgian competition law much closer to EU norms than earlier amendments, and in reality, these amendments precisely set Georgian competition law's direction. Furthermore, the legislation's scope was specified, new terms and chapters were added to the law, and most importantly, a new legal entity was formed to investigate any section of the business if it believed there were signs of competition limitation, increasing the entity's independence.

With this amendment, the title of the Law on "Free Trade and Competition" was changed to the following title - the Law of Georgia on Competition.

Paragraph 3 of Article 1 of the law, which sets out the scope of the law, was formed in a completely different way. If the original version of the law focused on actions, the new version focuses on subjects. The circle to which the law does not apply was also restricted.

With the same amendments, in the definition of "dominant position", reservations were made, which define the circumstances under which each of the two or more undertakings will be considered to have a dominant position.

With the same amendments, the percentage of market share that determined the restriction of competition of the contracts between undertakings was significantly reduced.

[7] Available in Georgian language at: <https://matsne.gov.ge/ka/document/view/2267631?publication=0> Last accessed: 21.12.2021]

[8] Available in Georgian language at: <https://matsne.gov.ge/ka/document/view/1659450?publication=11>, [Last accessed:21.12.2021]

Following the amendments, Articles 11[1] and 11[2] on the notification regarding competition and exemption from obligation of notification appeared in the law.

Chapter II[1] - "Unfair Competition" was also added to the law.

The most important innovation brought by these amendments is the establishment of an independent legal entity under public law - the "Competition Agency", which is accountable to the Parliament and the Prime Minister of Georgia. This change increased the independence of the Competition Agency compared to the previous “Competition and State Procurement Agency”.

Prior to the amendments, the Agency reviewed complaints only in accordance with the priorities of the Agency's activities approved by the Government, and it did not have the chance to review non-priority sector complaints. In addition, the Agency could have initiated an investigation only on the basis of an application / complaint submitted by an undertaking. Following the 2014 amendments, the Agency was empowered to make an independent decision to investigate any segment of the business if it considered that there were signs of competition restriction in that segment and this situation required the intervention of the Agency. The functions of the agency were also supplemented by the function of monitoring the carrying out of the rendered decisions.

The Chairman of the Agency was authorized to issue normative and individual legal acts (orders, instructions and methodological instructions) within the scope of his competence, in accordance with the rules established by the legislation of Georgia.

After the amendments, the criteria were written in the law, according to which a person should be selected for the position of the Chairman of the Agency.

The rules for the abuse of a dominant position and for concluding a competition restrictive contract, or for making such a decision or the amount of the fine imposed on the undertaking for the agreed action and the calculation rule have changed.

The main norms of the amendments to the law in 2014, discussed in this subsection shed light on why these changes should be considered as one of the important steps that brought the existing legislation in this area relatively close to the EU regulation.

1.1.2 The Amendments of 2020

a. The Amendments of July 2020

Following the adoption of the Law of Georgia on “Introduction of Anti-Dumping Measures in Trade”[9] by the Parliament of Georgia on July 13, 2020, amendments were made to the Law of Georgia on Competition. The amendments came into force on January 1, 2021. A new term appeared in the law, “dumping” and if before the mentioned amendments, the goals, tasks, powers and organizational issues of the Agency were defined by the Law of Georgia on Competition and the Statute of the Agency, after the changes, the norms of the Law of Georgia on Introduction of Anti-Dumping Measures in Trade were added to the regulatory norms. Reference to this law appeared in all the articles of the law that were included in the list of regulatory legislation.

The functions of the Agency were also increased and it was instructed to perform the functions defined by the Law of Georgia on Introduction of Anti-Dumping Measures in Trade under Article 17^1 d^1 of the law.

b. The Amendments of July 2020

In September 2020, the Parliament of Georgia introduced the most important amendments in the Law of Georgia on Competition since 2014. With these changes, the name of the authorized body was amended and instead of "Competition Agency" the official name of the agency was changed to "Georgian National Competition Agency" (**Hereinafter referred to as the "Agency", "Competition Agency"** in Georgian: საქართველოს კონკურენციის ეროვნული სააგენტო/სააგენტო)[10].

The deadlines for the investigation of the case have been increased, after the mentioned changes, the Agency starts the investigation of the case after making a decision on starting the investigation and renders the relevant decision within 6 months instead of 3 months. The maximum period for which the case can be investigated may also be extended by six months, depending on its importance and complexity, at the discretion of the Agency.[11]

The rule of determining the statute of limitations for a dispute over a violation of this law has been changed and it has been set at 3 years after the completion of the action, instead of counting from the time of committing the violation.[12]

[9] Available in Georgian language at: <https://matsne.gov.ge/ka/document/view/4923585?publication=0> [Last accessed: 21.12.2021]
[10] Refer to official website of the Competition Agency: <https://competition.ge/> [Last accessed:21.12.2021]
[11] The law of Georgia on Competition, Article 25
[12] The law of Georgia on Competition, Article 27

The rule for appealing the decision of the Agency has become clearer and more specific[13], according to which the court (Tbilisi City Court) where the decision of the Agency should be appealed has been specifically defined. Also, under the second part of the same article, the court is for the first time authorized to fully adjudicate the decision of the Agency, including the part of the amount of the fine.

With this amendment, a two-phase system for controlling concentrations established in the EU was created.[14] Which means that the agency evaluates within 25 working days whether the concentration is compatible with a competitive environment. If it deems necessary to further study the issue, then the duration is a maximum of 90 calendar days. If, despite the negative conclusion of the Agency, the concentration is still carried out, a fine shall be imposed, the amount of which shall not exceed 5% of the average daily turnover of the undertaking during the previous financial year of the relevant decision.[15]

Cases of unfair competition have become sanctioned, the amount of the fine should not exceed 1% of the annual turnover of the undertaking.

Sanctions on not passing of information have also turned stringent and after the changes, the provision of information became mandatory during the monitoring process, and in case of non-passing, individuals will be fined with 3000 GEL (Approx. 885 €) and legal entities 5,000 GEL (Approx. 1470 €).

The law also includes provisions (Articles 17^1 and 18^1) to be implemented in the institutional direction, namely the formation of a 5-member Board, which will have the authority to manage the Agency together with the executive director of the agency. It can be said that the level of independence of the Agency increased and the managing system became more flexible compared to the previous situation. If previously, only the chairperson of the Agency could have made decisions independently on the issues falling under the authority of the Agency, with these amendments the Board also can make decisions on issues within the competence of the Agency, also contrary to the previous situation now the Board upon the recommendation of the Chairperson of the Board, can adopt individual administrative legal acts in accordance with the procedures established by the legislation of Georgia. The same regulations set out the criteria for selecting both the Board and the Executive Director, their functions and responsibilities, and their terms of office. These regulations will come into force on January 1, 2023.

[13] The law of Georgia on Competition, Article 28
[14] The law of Georgia on Competition, Article 11^1
[15] The law of Georgia on Competition, Article 33, para. 4

Work on the 2020 amendments has been going on for 3 years and as we have already mentioned above, it is the second major change in the law since the amendments to the law in 2014. In the process of drafting it, the Working Committee made every effort to take into account European best practices in order to approximate the law further with the requirements of the DCFTA and to reflect the basic principles of EU competition law. Consequently, the next edition of the law amendments allows us to make competition policy and its enforcement more effective in our country.

1.2 Other legal acts regulating the field of competition

In addition to the international agreements[16] which were already mentioned and they will be discussed in more details below, the special law and the ordinance of the Government of Georgia[17], the Law on Public Procurement and the Law on Introduction of Anti-Dumping in Trade should be considered as an important part of Competition Law.

The Law on Public Procurement, for its purposes or functional significance, is significantly related to the Law of Georgia on Competition and the enforcement of competition policy. This connection will become even tighter, including in the structural / functional part of the management of the Public Procurement Agency, after the 2020 year's amendments to the Law of Georgia on Public Procurement will come in force on January 1, 2023, Which was conditioned by the amendments to the Law of Georgia on Competition in September 2020, a significant part of which, concerning the structural and functional establishment of the governing body of the National Competition Agency, will also enter into force on January 1, 2023.

As for the Law of Georgia on Introduction of Anti-Dumping Measures in Trade, due to its novelty, it will be discussed in more detail in the next subsection.

1.2.1 Law of Georgia on Introduction of Anti-Dumping Measures in Trade

As we have already mentioned, the Law of Georgia on Introduction of Anti-Dumping Measures in Trade was adopted on July 13, 2020. Besides Article 20, the law came into force on January 1, 2021. And Article 20 came into force on June 1, 2021. The adoption of this law is also linked to the Deep and Comprehensive Free Trade Agreement (DCFTA) and, consequently, the Association Agreement, and its adoption should be considered one of the most important steps towards improving the legal framework promoting efficient competition and fair trade in the country.

[16] Implied: Association Agreement, Deep and Comprehensive Free Trade Agreement (DCFTA)
[17] Implied: Ordinance of the Government of Georgia on the Approval of a Comprehensive Competition Policy Strategy

The purpose of the law is to protect local industry from import dumping. To achieve this goal, the law combines various mechanisms and it covers the customs territory of Georgia in full, except for free industrial zones.

According to the law, in case of import dumping of a product, the introduction of a special anti-dumping tariff should be preceded by a study conducted by the Georgian National Competition Agency. The basis for initiating the study by the agency is an application made by or on behalf of the local industry.[18] The body investigating the introduction of a special anti-dumping measure shall submit a preliminary report to the Government of Georgia if it is established that the dumping industry has incurred damages or that there is a risk of damages. The Government of Georgia shall, within 30 days of the submission of the report, decide to introduce, revise or cancel the measure requested / recommended by the report. Article 15 of the law explains in detail the form of the preliminary anti-dumping measure, the term of its imposition and the duration of its validity. Articles 18 and 19 describe the procedure for the introduction and application of a special anti-dumping tariff, as well as the period of validity of the tariff and the possibility of its revision.

The law establishes the maximum[19] percentage of sales of the object in the customs territory of Georgia, which is considered to be sufficient to determine the normal value. It also allows such a price to be set even in the case of smaller volumes if the volume allows a comparable price to be determined.

The law also regulates such cases when:

- Under normal terms of trade, no such product is sold in the exporting country;
- It is sold in insufficient amount;
- Due to the special market situation, sales of such a product do not allow accurate comparisons;
- The object of study is exported from a country that does not have a market economy.

The law explains in detail what is meant by total costs[20] and expert prices[21] and how they should be calculated.

It also explains how[22] and by what means[23] a fair comparison of prices should be made and the determination of the damages or threat of damages caused to the industry by dumped imports.[24]

[18] Law of Georgia on Introduction of Anti-Dumping Measures in Trade, Article 20
[19] Law of Georgia on Introduction of Anti-Dumping Measures in Trade, Articles 8, 9
[20] Law of Georgia on Introduction of Anti-Dumping Measures in Trade, Article 10
[21] Law of Georgia on Introduction of Anti-Dumping Measures in Trade, Article 11
[22] Law of Georgia on Introduction of Anti-Dumping Measures in Trade, Article 12
[23] Law of Georgia on Introduction of Anti-Dumping Measures in Trade, Article 13
[24] Law of Georgia on Introduction of Anti-Dumping Measures in Trade, Article 14

The law also provides for an insignificant volume of import and minimum dumping margin,[25] in which case the investigating authority will not initiate the investigation, or will decide to terminate the investigation immediately. Within the framework of this law, the Government of Georgia is also authorized to make a decision not to use anti-dumping measures, if there are grounds for doing so which are established by law.[26] The Law also sets out the procedure for appealing a decision of the Government of Georgia on the introduction, non-application, revision or revocation of a preliminary / special anti-dumping tariff[27] and the terms and conditions for sending notice (notification) to the World Trade Organization[28] (WTO).[29]

2. EU's influence on the competition policy of Georgia

2.1 Association Agreement, Deep and Comprehensive Free Trade Agreement (DCFTA):

The Association Agreement between Georgia and the European Union was signed on June 27, 2014 and it replaced the Partnership and Cooperation Agreement (PCA) signed in 1996. The signing of the agreement created a new legal framework for cooperation between Georgia and the European Union. Compared to the PCA, the Association Agreement envisages further deepening of cooperation in all priority areas of cooperation between Georgia and the European Union.

The Association Agreement is a kind of action plan for Georgia's approximation with the European Union, which covers almost all areas of the country's political, social and economic life. It is an innovative, "new generation" agreement, which, unlike previous similar agreements, includes the Deep and Comprehensive Free Trade Area (DCFTA) component and provides important specific mechanisms for approximation with the EU. The integration of trade issues into the Association Agreement creates a real mechanism for Georgia's gradual economic integration into the EU internal market. It involves Georgia's level of approximation with the EU and its legislation to such an extent that its effective implementation will, in fact, make the country's Europeanization process predestined.

Chapter Ten of this agreement, which also includes the DCFTA, deals with competition. Article 203 of the Agreement states that the parties recognize the importance of free and unrestricted competition in their trade relations and also recognize the detrimental effect of unconstitutional business activities and state interference with the normal and beneficial functioning of the market.

By signing the Association Agreement, Georgia has undertaken the obligation to develop effective competition law that takes into account all the important provisions of European law. In addition,

[25] Law of Georgia on Introduction of Anti-Dumping Measures in Trade, Article 21
[26] Law of Georgia on Introduction of Anti-Dumping Measures in Trade, Article 23
[27] Law of Georgia on Introduction of Anti-Dumping Measures in Trade, Article 24
[28] Law of Georgia on Introduction of Anti-Dumping Measures in Trade, Article 25
[29] Refer to the official web-site: <https://www.wto.org> [Last accessed:21.12.2021]

Georgia has taken responsibility to create a body responsible for the effective enforcement of this legislation and with the relevant authority (204 (2)).

These agreements should be considered as one of the main determinants of the formation of competition legislation in Georgia after 2014 and its existence in the form in which it exists today.

Chapter II. Restrictive Agreements

1. Article 7 of the Law of Georgia on Competition

The Association Agreement stipulates the approximation of Georgian law to EU law, through which the harmonization process is transferred to the so-called de iure format and deals with the areas of competition law between different areas of private law.[30] According to Article 204 of the Association Agreement, Georgia must have legislation regulating competition, Which will effectively address to anti-competitive actions, including anti-competitive agreements and concerted practices.[31] It is noteworthy, that the obligation of legal approximation also includes taking EU case law into consideration, [32] which is particularly relevant in competition law.

Similarly, Article 101 of the Treaty on the Functioning of the European Union, which (formerly Article 81) defines any agreement between undertakings incompatible with the internal market and therefore prohibited, the decision of the associations of undertakings and agreed practices that may affect trade between Member States; Whose purpose or result is to restrict, inadmissible and / or prohibit competition in the internal market.[33] According to Article 7 of the Georgian Law on Competition, restrictive agreements between independent economic agents are prohibited, regardless of whether they carry out economic activities at one or different levels of the market.This type of violation of competition is known in legal doctrine as a cartel and is considered as metastasis of an open market economy.[34] More broadly, a cartel is an organization of independent enterprises that carry out the same or similar economic activities and which unite to protect common economic interests and to control competition between each other.[35]

Article 7. Restrictive agreement, decision and concerted practice

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[30] ***Maisuradze D., Sulkhanishvili E., Vashakidze G.,*** EU Private Law Decisions and Materials, Tbilisi. 2018, p. 15 Available at: <http://lawlibrary.info/ge/books/giz2018_ge_eu_private_law_partI.pdf> [last accessed: 17.12.2021]

[31] Article 204 (1) of the Georgia-EU Association Agreement. Available in Georgian on the official website, See. <https://matsne.gov.ge/ka/document/view/2496959?publication=0>_[last accessed: 28.11.2021]

[32] ***Maisuradze D., Sulkhanishvili E., Vashakidze G.,*** EU Private Law Decisions and Materials, Tbilisi. 2018, p. 15 Available at: <http://lawlibrary.info/ge/books/giz2018_ge_eu_private_law_partI.pdf> [last accessed: 17.12.2021]

[33] 101 Article of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007. Available in Georgian language at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT > [last accessed: 17.12.2021]

[34] ***Tsertsvadze G.,*** Competition Law: The European Model for Georgia, Volume I, World of Lawyers Publishing House, Tbilisi, 2020, p. 96. Available at: <https://jtconsulting-geo.com/uploads/files/publications/11/samartali-giorgi-tsertsvadze.pdf> [last accessed: 17.12.2021]

[35] ***Menabdishvili S.,*** The essence of the cartel and modern trends in its development, dissertation, Tbilisi, 2016, p.14. Available at: <https://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/solomon_menabdishvili.pdf> [last accessed: 20.12.2021]

1. Any agreement, decision or concerted practice ('the agreement') of undertakings that have as their object or effect the prevention, restriction and/or distortion of competition within the relevant market, shall be prohibited, in particular those which:
a) directly or indirectly fix purchase or selling prices or any other trading conditions (fixing);
b) limit production, markets, technical development, or investment;
c) share markets or sources of supply by consumers, location or other characteristics;
d) apply dissimilar conditions to equivalent transactions with the particular trade parties, thereby placing them at a competitive disadvantage;
e) entering into contracts subject to acceptance by other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.
2. Any agreement prohibited under this article shall be void, unless the exceptions provided for by this Law are applicable. [36]

For understanding this article, it is important to consider all the constituent elements of Article 7, in the presence of which a restrictive agreement, decision and concerted practice is considered anti-competitive.

1.1 Undertakings or Associations of Undertakings

1.1.1 Undertaking

An entity implementing a restrictive agreement may be an economic agent or an association of economic agents. According to the law, the following are considered as economic agents:

- Natural person
- Legal entity
- Any other union
- Association

Which carry out an economic activities, regardless of residence and legal form of a legal entity.[37]

It is noteworthy that until November 4, 2020, an undertaking was considered to be an N(N)LE, any other union or person, which was a market participant and engaged in entrepreneurial activities, which were narrowly defined by the Law on Entrepreneurs and meant only legitimate and multiple activities that were carried out for profit, independently and in an organized manner.[38]

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[36] Article 7 of the Law of Georgia on Competition
[37] Article 3 (a) of the law of Georgia on Competition
[38] Article 1(2) of the Law of Georgia on Entrepreneurs.
Available at: <https://matsne.gov.ge/ka/document/view/1155567?publication=21> [last accessed: 21.12.2021]

Thus, it was problematical to consider people of free profession as undertakings, including lawyers, accountants, architects and etc.[39] However, with the legislative change of September 16, 2020, the circle of undertakings was expanded and undertaking was defined as - a natural person, legal entity, other union or association which carries out economic activities.[40]

According to ECJ case law, in competition law, the concept of an enterprise (undertakings) includes any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.[41][42] While, normally, economic activity is carried out directly on the market, it may be in the case of an operator that is directly related to the market, or, indirectly, in the case of another entity that controls that operator as part of the economic association they form together.[43] According to the case law and the prevailing opinion, involvement in economic activity is an essential precondition for considering an entity as an undertaking.[44] In addition, according to the case law, any activity that includes the supply of goods and services in the market, is considered as economic activity.[45]

Noteworthy is the explanation given by the agency, that the concept of undertaking used in competition law has no analogue in other areas of law.[46] After the amendments, Georgian National Competition Agency in its decisions defines activities carried out by an undertaking broadly than entrepreneurial activity.[47]

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[39] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 180. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

[40] Law of Georgia of September 16, 2020 №7126

[41] &21, Case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH,* ECLI:EU:C:1991:161, 23 April 1991, ECJ. Available in English language at:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61990CJ0041> [last accessed: 30.11.2021]

[42] &17, Joined Cases C-159/91 and C-160/91, *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon*, ECLI:EU:C:1993:63, 17 February 1993, ECJ.
Available in English language at:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61991CJ0159> [last accessed: 30.11.2021]

[43] &109, Case C-222/04, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*, 10 January 2006, ECJ.
Available in English language at:
<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=57282&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=447308 > [last accessed: 30.11.2021]

[44] ***Adamia G.,*** The Term of Undertaking in Georgian Competition Law, Ivane Javakhishvili Tbilisi State University Faculty of , Journal of Law No1, 2020, p. 76. Available in English language at:
<https://jlaw.tsu.ge/index.php/JLaw/article/view/2949/3111 > [last accessed: 30.11.2021]

[45] &37, Case C-35/96, *Commission of the European Communities v Italian Republic*, ECLI:EU:C:1998:303
18 June 1998, ECJ. Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61996CJ0035> [last accessed: 13.12.2021]

[46] See Decision of the National Competition Agency of Georgia of February 26, 2020, The case of “G and Audit Service Group” LLC case, p.27. Available at:
<https://admin.competition.ge/uploads/bb38f3b7e4b94bcdbc783b3f144d8c8c.pdf> [last accessed: 13.02.2022]

[47] *Ibid. p.* 28

1.1.2 Association of Undertakings

An association is an economic entity that directly or indirectly provides anti-competitive mechanisms.[48] It is noteworthy that until November 4, 2020, the Association was not considered to be in violation of the prohibited action set forth in Article 7.[49] However, after legislative changes based on the Association Agreement, Article 7, such as Article 101 of TFEU[50], directly states that in addition to the undertaking, perpetrator of the violation can be an association of undertakings as well. However, although the Association of Undertaking was not formally mentioned in the article in formal terms, it did not consitute an obstacle for the Agency to consider one of the case, where investigation was conducted to asses the market behaviourof Georgian Association of Wheat and Bread Producers "Globalagro". The subject of the investigation was whether there was an anti-competition agreement between the members of the association.[51]

It is important to consider the association as a subject, as within the association the information is often exchanged between undertakings, which is a horizontal exchange of information and may strenthen competition or vice versa. For example, competition can be enhanced by exchanging information about new technologies or market opportunities. Including the collection and publication of statistics which are the legitimate functions of associations. According to the Guidelines on horizontal cooperation agreements, information exchange takes various forms, such as data shared directly between competitors, data shared indirectly through a common agency or a third party, or data shared through the companies' suppliers or retailers. Information exchange can be beneficial for companies, for example by helping companies save costs by reducing their inventories, as well as directly for consumers, for example by reducing their search costs and improving choice. However, in certain situations it can also lead to restrictions of competition when it enables companies to be aware of their competitors' market strategies. Communication of information among competitors may constitute an agreement, a concerted practice or a decision with the object of fixing prices or quantities. Such types of information exchange will normally be considered and fined as cartels.[52] It is noteworthy that the horizontal exchange of information

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[48] ***Spencer W. W.,*** Trade Associations, Information Exchange, and Cartels, 30 Loy. Consumer L. Rev. p. 203 [Link]
[49] Law of Georgia of September 16, 2020 №7126 - website, 21.09.2020.
[50] 101 Article of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007. Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT > [last accessed: 17.12.2021]
[51] See Decision of the National Competition Agency of Georgia of January 25, 2016, The case of Globalagro II. Available atL <https://admin.competition.ge/uploads/c8594e574e664238ad7474bd5563a965.pdf> [last accessed: 13.01.2022]
[52] Paragraph 56, Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011XC0114%2804%29>[last accessed: 17.12.2021]

(through association) carries more risk than the vertical exchange of information[53], while one of the main charasteristics of the cartel is the exchange of information between its participants. [54]

The exchange of information, in addition to the positive, may have a negative impact on the competition, depending on the circumstances of each case, namely: On the characteristics of the market, the type of information and the way of its exchange. It is noteworthy that the exchange of horizontal information carries more risk than the vertical exchange of information. The smaller the amount of enterprises operating in the market, the more intensive, vulnerable, detailed and confidential the exchange of information is, which may have a negative impact on competition. Such information may be: 1) the exchange of information about prices, in particular, elements of the pricing policy, discounts, costs, tariffs and the dates of its change, which may lead to price coordination.[55] 2) Exchange of non-pricing information - depends on the type of information exchanged and the market to which it relates. The exchange of historical statistics, market research, and industry research in general is unlikely to have a significant impact on competition, as the exchange of such information is less likely to impede the commercial and competitive independence of individual enterprises.

However, in one of the cases, the ECJ found a violation of Article 101 (1) despite the exchange of non-pricing information, in particular, on the UK Agricultural Tractor Registration Exchange, information was exchanged between members of the trade association on sales, market shares, which were divided according to area, product line and time. The court found that the details of the information exchanged and the fact that the market was concentrated were important. The exchange of information will create transparency, possibly threatening competition and strengthening barriers to market entry.[56]

The agency has discussed one of the cases, where the investigation of the factual circumstances revealed that the reason for the companies to leave the association was the constant demand from the association to increase prices. In its assessment, the agency focused on one of the goals of the charter, which was to "coordinate the supply of wheat and flour to entrepreneurs who were

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[53] ***Gibson D., Dunn & Crutcher LLP ,*** Dunn & Crutcher LLP , INFORMATION EXCHANGE 2019 KNOW HOW, European Union, JUNE 2019. Available in English language at: <https://www.gibsondunn.com/wp-content/uploads/2019/07/Wood-Information-Exchange-2019-Eurorpean-Union-GCR-June-2019.pdf > [last accessed: 20.11.2021]

[54] ***Tsertsvadze G.,*** Competition Law: The European Model for Georgia, Volume I, World of Lawyers Publishing House, Tbilisi, 2020, p. 93. Available at: <https://jtconsulting-geo.com/uploads/files/publications/11/samartali-giorgi-tsertsvadze.pdf> [last accessed: 20.11.2021]

[55]***Menabdishvili S.,*** The essence of the cartel and modern trends in its development, dissertation, Tbilisi, 2016, pp.55-57. Available at: <https://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/solomon_menabdishvili.pdf> [last accessed: 20.12.2021]

[56] 92/157/EEC: Commission Decision of 17 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty IV/31.370 and 31.446 - (UK Agricultural Tractor Registration Exchange) (Only the English text is authentic) *Official Journal L 068 , 13/03/1992 P. 0019 - 0033.* Available in English language at:<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31992D0157 > [last accessed: 17.12.2021]

members of the association."[57] However, the Agency considered that in addition to a verbal (written) agreement, there should be an action aimed at achieving the objective of restricting competition. Thus, the presented evidences addressing to enforcement process of the Charter was not considered as evidence of reasonable doubt[58] and the activities of the members of the Association were not considered to carry the content of a "cartel" union. [59] The agency further explained that despite the decision, such actions carried out by the members of the association are not appropriate and the scope of information disclosure is a measure that allows a competing undertakings to predict further market behavior, increases the risk of cartel agreement and will always give the competition authorities grounds for doubting.[60]

First Interim conclusion

Following the legislative changes:

- The subjects carrying out restrictive action were specified and the Association of undertakings was defined as the subject, together with the undertaking.
- The circle of undertakings was expanded, in which people of free profession got included as well.
- The broader definition of economic activity have been suggested and according to the definitions of the Court of Justice, economic activity is any activity that involves the supplying of goods and services in the market under consideration.[61]
- Following the legislative amendments, in line with EU regulation, the Georgian Competition Law also considers the association that carries out economic activities as an undertaking.

1.2 Agreement, decision and concerted practices

In order to apply the prohibition on the agreement, as provided in Article 7, it is sufficient for the intention expressed by at least two undertaking to act in concert. Thus, the agreement focuses on the concurrence of desires between the parties and not on its form.[62] The law distinguishes the combination of such desires as an agreement, a decision and a concerted practice.

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[57] See Decision of the National Competition Agency of Georgia of January 25, 2016, The case of Globalagro II, p. 47. Available at: <https://admin.competition.ge/uploads/c8594e574e664238ad7474bd5563a965.pdf> last accessed: 09.01.2022]

[58] *Ibid. p.* 94

[59] *Ibid. p.* 98

[60] *Ibid. p.* 100

[61] &37, Case C-35/96, *Commission of the European Communities v Italian Republic*, ECLI:EU:C:1998:303, 18 June 1998, ECJ. Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61996CJ0035> [last accessed: 17.11.2021]

[62] ***Menabdishvili S.,*** The essence of the cartel and modern trends in its development, dissertation, Tbilisi, 2016, p.27 Available at: <https://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/solomon_menabdishvili.pdf> [last accessed: 20.11.2021]

1.2.1 Agreement

The law does not provide the definiton of an agreement. According to the Civil Code of Georgia, an agreement is one of the types of transaction for which the agreement of two or more persons is required.[63] Subjects of private law shall be free to enter into contracts and determine their contents within the scope of the law.[64] However, for the purposes of competition law, the agreement is interpreted more broadly and its existence requires the will of at least two independent undertakings to act in the common interest. Separate actions do not fall within the scope of the law.[65]

1.2.2 Decision

The broad definition of a decision may include the constitution of the enterprise association, rules, recommendations or other activities by which coordination may be achieved between undertakings. In the day-to-day business of the Association, resolutions of the Committee or full member of the General Assembly, binding decisions of the Management or Executive Committee of the Association or resolutions of its Executive Director. Regulations that may include the goals, activities, management rules, requirements for members, criteria for termination of membership. Which despite its form qualifies as a decision, including non-imperative recommendations.[66]

According to the agency, although the decision for the purposes of Article 101 of the TFEU is addressed only to the agreement reached within the association, however, as a result of changes in the law, the decision may be made both between undertakings and within the association.[67]

1.2.3 Concerted practices

For the purposes of defining a concerted practice, the Agency uses the definition provided by the European Court of Justice, according to which a practice, despite the absence of a formal agreement, is an action which still deliberately replaces competitive risks with practical

[63] ***Akhvlediani Z.,*** Law of obligations, Tbilisi, 1999, p. 10
[64] Article 319 of the Georgian Civil Code 24/07/1997 .
<https://www.matsne.gov.ge/ka/document/view/31702?publication=115> [last accessed: 20.12.2021]
[65] See Decision of the National Competition Agency of Georgia of February 26, 2020, The case of "G and Audit Service Group" LLC, p.38. Available at:
<https://admin.competition.ge/uploads/bb38f3b7e4b94bcdbc783b3f144d8c8c.pdf> [last accessed: 13.02.2022]
[66] ***Menabdishvili S.,*** The essence of the cartel and modern trends in its development, dissertation, Tbilisi, 2016, p.32 Available at: <https://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/solomon_menabdishvili.pdf> [last accessed: 20.12.2021]
[67] See Decision of the National Competition Agency of Georgia of February 26, 2020, The case of "G and Audit Service Group" LLC, p.38. Available at:
<https://admin.competition.ge/uploads/bb38f3b7e4b94bcdbc783b3f144d8c8c.pdf> [last accessed: 13.01.2022]

cooperation.[68][69] As for the standard for proving restrictive competition agreements, the Agency refers to the definition of a concerted practice provided by EU, according to which the concerted practice requires bilateral cooperation, through direct or indirect contacts, which may affect an existing or potential competitor, or clarify their future market strategy. However, when evidence of such cooperation is not avaliable, parallel action may play the role of evidence that should not have taken place in the market in question.[70] For the purposes of one of the cases, the Agency used the concerted practice test named by the Court of Justice of the European Union, which considers the existane of an agreed action, if there are three components to that action: 1) Agreement 2) Concomitant behaviouron the market 3) Causal relationship of the first two components. [71] According to established practice, even one meeting between undertakings is enough to determine the concerted practice.[72]

In this regard, one of the analysis of the Court of Justice is noteworthy. The AC-Treuhand case that raised the issue whether a consultancy firm may be held liable for infringement of Article 101(1) TFEU where it actively contributes, in full knowledge of the relevant facts, to the implementation and continuation of a cartel among producers active on a market that is separate from that on which the consultancy itself operates. In finding that such a consultancy can be liable, the ECJ noted that Article 101(1) is not directed only at parties to restrictive agreements or concerted practices who are active on the markets affected by those agreements or practices. For there to be an "agreement," there must be an expression of the concurrence of wills of at least two parties, but the form in which that concurrence is expressed is not decisive. As regards the term "concerted practice," the distinction between that term and the terms "agreement" and "decision by an association of undertakings" is intended precisely to catch forms of collusion that have the same nature but are distinguishable by their intensity and the forms in which they manifest themselves.[73]

Moreover, Georgian Competition Agency's indicates that the EU Competition Commission uses a dual classification in the event of serious infringements. If the infringement contains elements of both agreement and concerted practice, the Commission should not thoroughly assert which one

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[68] See Decision of the National Competition Agency of Georgia of February 26, 2020, The case of "G and Audit Service Group" LLC, p.38. Available at:
<https://admin.competition.ge/uploads/bb38f3b7e4b94bcdbc783b3f144d8c8c.pdf> [last accessed: 13.01.2022]

[69] See Decision of the National Competition Agency of Georgia of January 23, 2018: The case of "Citroen Georgia", p. 9. Available at: <https://admin.competition.ge/uploads/f6a4a459d4244ce5a53ddcda3c7cb321.pdf> [last accessed: 13.01.2022]

[70] *Ibid. p.* 9

[71] See Decision of the National Competition Agency of Georgia of February 26, 2020, The case of "G and Audit Service Group" LLC, p.37. Available at:
<https://admin.competition.ge/uploads/bb38f3b7e4b94bcdbc783b3f144d8c8c.pdf> [last accessed: 13.01.2022]

[72] *Ibid. p.* 94

[73] Case C-194/14 P, *AC-Treuhand AG v European Commission*, ECLI:EU:C:2015:717, 22 October 2015, ECJ Available in English language at:<https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-194/14_P> [last accessed: 20.12.2021]

existed, agreement or concerted practice, but should state that there is "the agreement and/or concerted practice." According to the Court of Justice of the European Union, the purpose of the article is to prohibit various forms of coordination and collusion between undertakings, therefore the exact characterization of cooperation can not change the legal analysis derived from an Article 101.[74]

Second Interim conclusion

Although the law distinguishes between agreement, decision and concerted practice, in order for the prohibition provided for in Article 7 of the Law to apply to the agreement, it is sufficient for the intention expressed by at least two undertaking to act in concert and the form of the agreement does not matter.[75]

1.3 Object or effect the prevention, restriction and/or distortion of competition

In order for the agreement of undertakings to be considered as anti-competitive, it is important to have one of the elements - the object and / or effect of the restriction of competition, which may be simultaneously and / or separatly. According to the agency, if the anti-competition object is on the face it is no longer necessary to define a specific effect.[76]

1.3.1 Object

According to the guideline of the Agency, for identifying an anti-competitive objective, should be specified the essence of the objectives, the scope, the assessing criteria, as well as the relation between the object and the effect.[77]

In national law, for the purposes of determining the objective, the Agency has analyzed the case law of the European Union, according to which, if the anti-competitive objective of the agreement is obvious, regulator is no longer obliged to assess its economic consequences. In determining the objective of the agreement, two components are taken into account: the content of the agreement and the legal/economic environment in which it was entered. A party should not be given the right to use a trademark for the purpose that is considered anti-competitive; If there is a similar objective,

[74]***Menabdishvili S.,*** The essence of the cartel and modern trends in its development, dissertation, Tbilisi, 2016, p.29 Available at: <https://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/solomon_menabdishvili.pdf> [last accessed: 20.12.2021]

[75]*Ibid.* p.27

[76] See Decision of the National Competition Agency of Georgia of February 26, 2020, The case of "G and Audit Service Group" LLC, p.39. Available at: <https://admin.competition.ge/uploads/bb38f3b7e4b94bcdbc783b3f144d8c8c.pdf> [last accessed: 13.01.2022]

[77] Guideline of the Georgian Competition Agency, Explanation of a number of provisions of Article 7 of the Georgian Law on Competition on the basis of EU executive and case law, p. 38 . Available at: <https://admin.competition.ge/uploads/1c5b8828bc6948689535c33d6428d5e0.PDF> [last accessed: 05.12.2021]

the expected positive effects of the agreement will no longer be taken into account - the agreement from then on is considered to be contrary to Article TFEU 101.[78] The Agency made a summary explanation in this regard, that the action has an anti-competitive objective if it has the potential to prevent, restrict and/or distort competition. However, in determining the mentioned objective, no attention is paid to the fact of realization of this potential in practice. in addition, object can be derived from one or more provisions, as well as a combination of all provisions. In such cases, the provisions should be analyzed in the legal/economic context in which the specific agreement was reached. For instance, price fixing, market sharing agreements, quota cartels etc. are the most known hardcore prima facie restrictions by object under EU law.

In one of the cases, the Agency did not take into account the tenders where the winning company was not one of the defendants, as it considered that the purpose of the agreement between the defendants was to receive benefits, while the tender was won by a completely different company, whose participation in the agreement was not considered by the agency in the scope the ongoing investigation.[79] According to the Competition Agency, in order to determine the objectives of restricting competition, it is important to determine the will/purposes of the parties. If the agreement includes restrictions that are highly likely to inflict damage to the competition rules, it is sufficient to consider them as having a restrictiv objectives of competition.[80]

1.3.2 Effect

According to the guideline of the Agency, the anti-competitive effect is always determined in relation to the relevant market to which the action is directed.[81] Therefore, the correct definition of the relevant market is a great importance - Comparison of condition in this market before and after the action has taken place thereby determines the existence of the outcome. Unlike the restrictive objective of competition, determining the restrictive effect of competition requires much more complex economic analysis and knowledge of specific issues.[82] The competition agency have started assessing competition restrictive objectives and/or effects as a separate structural element only since 2018.

[78] See Decision of the National Competition Agency of Georgia of February 26, 2020, The case of "G and Audit Service Group" LLC, p.37. Available at: <https://admin.competition.ge/uploads/bb38f3b7e4b94bcdbc783b3f144d8c8c.pdf> [last accessed: 13.01.2022]

[79] See Decision of the National Competition Agency of Georgia of January 23, 2018: The case of "Citroen Georgia", p. 42. Available at: <https://admin.competition.ge/uploads/f6a4a459d4244ce5a53ddcda3c7cb321.pdf> [last accessed: 13.01.2022]

[80] ***Japaridze L.***, ***Zukakishvili K.***, ***Sergia N.***, ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M.***, ***Gvelesiani Z.***, ***Kobadze N.***, Competition Law of Georgia, Tbilisi, 2019, p. 203. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

[81] Guideline of the Georgian Competition Agency, Explanation of a number of provisions of Article 7 of the Georgian Law on Competition on the basis of EU executive and case law, p. 44. Available at: <https://admin.competition.ge/uploads/1c5b8828bc6948689535c33d6428d5e0.PDF> [last accessed: 05.12.2021]

[82] *Ibid. p.* 41

Third interim conclusion

The restrictive object and effect of competition are alternative forms of causal relation. Only one of them requires the proof of detrimental effects for the competitive landscape while for the other is assumed based on long-standing experience. In practice, the existence of an anti-competitive objectives is always checked first, and the effect is checked only in the absence of an object.[83]

2. Competition Restrictive Agreement Categories

The Law of Georgia on Competition defines the categories of restrictive agreements of competition, which, like Article 101 of the Treaty on the Functioning of the European Union, [84] includes: a) directly or indirectly fix purchase or selling prices or any other trading conditions (fixing); b) limit production, markets, technical development, or investment; c) share markets or sources of supply by consumers, location or other characteristics; d) apply dissimilar conditions to equivalent transactions with the particular trade parties, thereby placing them at a competitive disadvantage; e) entering into contracts subject to acceptance by other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

It is noteworthy that until November 4, 2020, these categories included setting terms of a tender proposal agreed with undertakings or other parties participating in public procurement, with the objective of ensuring material gain or advantage, which substantially prejudices the legal interests of the purchasing organisation.[85] However, after the amendments, only the above-mentioned categories of violations are regulated, of which the most common in national practice is directly or indirectly fix purchase or selling prices or any other trading conditions (fixing) and sharing markets or sources of supply by consumers, location or other characteristics.

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[83] Guideline of the Georgian Competition Agency, Explanation of a number of provisions of Article 7 of the Georgian Law on Competition on the basis of EU executive and case law, p. 44 . Available at: <https://admin.competition.ge/uploads/1c5b8828bc6948689535c33d6428d5e0.PDF> [last accessed: 05.12.2021]

[84] 101 Article of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007. Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT > [last accessed: 17.12.2021]

[85] Law of Georgia on Competition, Article 7(e)

2.1 directly or indirectly fix purchase or selling prices or any other trading conditions (fixing)

Price fixing is one of the most common forms of collusion not only in Georgia but also in the European Union and is considered as substantial violation of free competition.[86] It is frequent when undertakings, in conjunction with price fixation, cooperate on various terms of trade.[87]

Price fixing is an agreement (in writing, verbal or behavioural) between competitors that increases or decreases prices and / or competitive conditions. In such a case, the economic prosperity is deprived from customer and is transferred to the members of the cartel.[88] In general, antitrust laws requires from each company to set prices and other terms independently, without agreement with competitor(s). When consumers make a choice between purchasing different products and services, they expect that the price was determined freely based on supply and demand and not by the agreement between competitors. When competitors agree to restrict competition, the price is often higher, which comes against the interests of consumers.[89] It is important to have a broad definition of the prohibition on price fixing, which should include any kind of price-related contact or agreement on price-setting criterias that make it possible for undertakings to anticipate pricing policies.[90] Moreover, secret purchasing cartels to the detriment of a supplier is also caught and part of Directorate-General for Competition's [DG'Comp] enforcement practice

In one of the cases, in scope of the investigation of the natural gas market for automobile consumption. The agency discussed whether there was an agreement on retail sales prices by market participants. The applicant cited the fact of a parallel increase in prices and Public Statement of the Chairman of the Georgian Natural Gas Consumer's Union on price generation communication between the companies as an argument. In the scope of the investigation, the agency reviewed media statements, requested information from union members and candidate companies, and examined cases of parallel increases in retail prices by individual market players in August 2014 and December, which preceded by increase in the retail price by a single natural gas supplier and media statement. However, this was not considered sufficient evidence to establish the concerted practice as: 1) the days of price increases were different in some cases. Some companies had not raise prices at all and their selling prices were different; 2) the content of the agreement included only an equal definition of the wholesale / purchase price of natural gas;

[86] ***Tsertsvadze G.,*** Competition Law: The European Model for Georgia, Volume I, World of Lawyers Publishing House, Tbilisi, 2020, p. 108. Available at: <https://jtconsulting-geo.com/uploads/files/publications/11/samartali-giorgi-tsertsvadze.pdf> [last accessed: 20.12.2021]

[87] ***Menabdishvili S.,*** The essence of the cartel and modern trends in its development, dissertation, Tbilisi, 2016, p.43 Available at: <https://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/solomon_menabdishvili.pdf> [last accessed: 20.12.2021]

[88] *Ibid.* p.43

[89] ***Middleton, K.,*** Blackstone's UK & EU Competition Documents, Blackstone's Statute Series, 8th edition, 2015, p. 85

[90] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 220. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

3) The decision on price change is made not at the level of representatives of the gas station, but at the level of management; 4) the confession of one of the companies about the price increase agreement was not shared, as the decision-makers on the price increase did not participate in the meeting with the competing companies;[91]

It should be noted that after the approval of price fixation in European practice, the investigation of the economic consequences of the action is irrelevant and a sanction should be applied.[92] In contrary, the agency conducted a case investigation on one of the petroleum commodity markets and assessed the relevant labeling commodity markets for petrol and diesel in 2008-2014. processed relevant economic indicators in the form of tables and graphs.[93] It should be noted that the price can be fixed both in horizontal relations (between competitors) and in vertical agreements (fixing the selling price). Both cases are considered as violations.

2.2 Share markets or sources of supply by consumers, location or other characteristics

In national practice, the violation provided in Article 7 (c) of the Law, which involves the sharing markets or sources of supply by consumers, location or other characteristic is frequent. In the case of this type of infringament, the undertakings agree on the sharing of the market by territory on the principle of the so-called "domestic" market, and each undertaking sells only in the territory "belonging" to it. In addition to the geographical indication, such a division may be made by the buyer types.[94]

This form of restriction is considered essential in the EU given ist market integration rationale and it is not advisable to release the infringer from liability.[95] For example, in one of the cases, the ECJ considered transfer of rights to broadcast Premier League match only in a certain area as a restrictive competition agreement, as it excluded competition in this area.[96] Under EU practice, the market segmentation in the framework of horizontal cooperation between small retailers, who plan

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[91] See Decision of the National Competition Agency of Georgia of July 14, 2015: The case of Motor Gas Resellers, p. 50. Available at: <https://admin.competition.ge/uploads/12ecff74000a47a3bbbbb755d78a7983.pdf> [last accessed: 13.01.2022]

[92] ***Tsertsvadze G.,*** Competition Law: The European Model for Georgia, Volume I, World of Lawyers Publishing House, Tbilisi, 2020, p. 109. Available at: <https://jtconsulting-geo.com/uploads/files/publications/11/samartali-giorgi-tsertsvadze.pdf> [last accessed: 20.12.2021]

[93] See Decision of the National Competition Agency of Georgia of July 14, 2015: The case of Motor Gas Resellers, p. 184. Available at: <https://admin.competition.ge/uploads/12ecff74000a47a3bbbbb755d78a7983.pdf> [last accessed: 13.01.2022]

[94] ***Menabdishvili S.,*** The essence of the cartel and modern trends in its development, dissertation, Tbilisi, 2016, p. 47 Available at: <https://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/solomon_menabdishvili.pdf> [last accessed: 20.12.2021]

[95] ***Tsertsvadze G.,*** Competition Law: The European Model for Georgia, Volume I, World of Lawyers Publishing House, Tbilisi, 2020, p. 155. Available at: <https://jtconsulting-geo.com/uploads/files/publications/11/samartali-giorgi-tsertsvadze.pdf> [last accessed: 20.12.2021]

[96] *Ibid. p.* 154

to place products under general advertising in order to compete with relatively large retailers, can be considered as an exception.[97]

Interestingly, the approach of the national regulator, when the agency, despite the fact that the law in force at the time of the action of undertakings did not provide for the special composition of the norm, regarding market quotations and sharing. The Agency did not leave out any action aimed at market segmentation beyond regulation and it explained it in the context of restricting the activities of an undertakings not participating in the other alleged agreement and mutually beneficial self-restraint of the agents participating in the agreement.[98] Therefore, the investigation and legal assessment revealed a violation of competition by the 5 largest oil companies operating in the country, which was reflected in the sharing of the market.[99][100] Companies with market power should not increase the volume of retail network and fuel sold in the network, companies with superior market power should not seek to supply fuel to other foreign companies, import fuel and buy it from companies with dominant market power in both imports, respectively. [101]

According to the agency, the violation is even more serious when it is carried out within the framework of public procurement procedures, as a healthy competitive environment is a precondition for low prices, high quality and innovation. Such an agreement neglects the advantages of a competitive market. Business secretly agrees to share market, increase the price of the product/service to be supplied and/or reduce its quality.[102] In one of the cases, the agency determined the distribution of markets and, as a result, restriction of almost non-existent competition on the "free canteen service" market,[103] Which was due to the collegial relations between undertakings and the disclosure of strategic information during direct communication.[104]

It should be noted that Article 8 of the Law of Georgia on Competition provides for legal exceptions to agreements of minor importance, which do not apply to the categories of prohibited

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[97] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 239. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]
[98] See Decision of the National Competition Agency of Georgia of January 17, 2013: The case of Oil Commodity II, p.108. Available at: <https://admin.competition.ge/uploads/a87be650e7d64307afda293742f7ad25.pdf> [last accessed: 07.12.2021]
[99] *Ibid.*
[100] See Decision of the National Competition Agency of Georgia of January 17, 2013: The case of Oil Commodity II, p.116. Available at: <https://admin.competition.ge/uploads/a87be650e7d64307afda293742f7ad25.pdf> [last accessed: 07.12.2021]
[101] *Ibid. p.* 94
[102] See Decision of the National Competition Agency of Georgia of February 26, 2020, The case of "G and Audit Service Group" LLC, p.40.
Available at: <https://admin.competition.ge/uploads/bb38f3b7e4b94bcdbc783b3f144d8c8c.pdf> [last accessed: 13.01.2022]
[103] *Ibid. p.* 101
[104] *Ibid. p.* 104

actions provided in Article 7 (a) and (c), which puts these conditions in the category of so-called severe restrictive competition agreements.

Fourth Interim conclusion

- In practice, the most common types of violations referred to in Article 7 are directly or indirectly fix purchase or selling prices or any other trading conditions (fixing) and sharing markets or sources of supply by consumers, location or other characteristics.
- After the determination of the price fixation, the investigation of the economic consequences of the action is irrelevant.
- while determining the fact of market sharing, the form of the agreement containing the fact of the mentioned sharing is insignificant. The sharing can also be done on the basis of a gentlemen‘s agreement.
- The legal exceptions to the restriction do not apply to the categories of prohibited actions provided in Article 7 (a) and (c). Which puts these conditions in the category of so-called severe restrictive competition agreements.[105]

3. The burden of proof and the standard of proof

Under EU Regulation No 1/2003, the burden of proof falls on the party or body that argues a breach of Article 81 (1) and Article 82 of the Treaty in accordance to required legal standard.[106]

Similarly to EU regulation, the burden of proving[107] a violation of Article 7 of the Competition law varies depending on whether the agency initiated an investigation or the complaint was submitted. In case the Agency has initiated an investigation on its own initiative, the burden of proof falls on it, and if there is a complaint , then it falls on the complainant.[108] In one of the cases where the undertaking filed a complaint, the agency indicated that the burden of proving the undertaking's involvement in the anti-competition agreement was on the agency and the

[105] See Decision of the National Competition Agency of Georgia of February 26, 2020, The case of "G and Audit Service Group" LLC, p.94.
Available at: <https://admin.competition.ge/uploads/bb38f3b7e4b94bcdbc783b3f144d8c8c.pdf> [last accessed: 13.01.2022]

[106] Article 2 of the Consolidated text: Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance)Text with EEA relevance. Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02003R0001-20090701 > [last accessed: 17.12.2021]

[107] Article 22 (2) of the law of Georgia on Competition

[108] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 304. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

complainant, and if there is no evidence to disprove the argument made by the company, the agency will not be able to confirm its participation in the agreement due to insufficient evidence.[109]

As for the burden of proof on defencing any sort of efficiency defenses, for the Commission to take account of efficiency claims, the efficiencies have to (1) benefit consumers; (2) be mergerspecific; and (3) be verifiable. The burden of demonstrating this is on the parties asserting the efficiencies and they must present sufficient evidence to show that the likely effect of the efficiencies will be procompetitive. Thus, it seems reasonably clear that in article 101 cases there should be a clear counterfactual analysis carried out to determine what the competitive situation would be in the absence of the agreement. The burden of doing this fall on the party asserting the (significant) anticompetitive effects and needs to take into account not only negative effects, but also positive ones. The standard of proof is reasonable likelihood, which is higher than balance of probabilities but below beyond reasonable doubt.[110]

With regard to the standard of proof, the Agency clarified that in the absence of direct evidence of the agreement, parallel conduct, restraint, or other similar action would be considered evidence of the concerted practice only if there was no convincing alternative explanation and it could not logically take place without agreement between the parties. [111] In addition, In the case of "motor fuel" (II), the Agency cites the practice of the European Union, in which the burden of proof is realized if "sufficiently accurate and consistent evidence is presented, which is the basis for a strong belief in the existence of an alleged breach." [112]

4. Exceptions under the law

The purpose of Article 101 is to protect competition in the market as a means of increasing the welfare of consumers and ensuring the efficient allocation of resources. Competition and market integration serve this purpose, as the creation and maintenance of an open integrated market promotes the efficient distribution of resources in society for the benefit of consumers.[113] According to Article 101, whether there is a competition agreement the assessment consists of two parts. The first step is to assess whether the agreement between the companies is such that it can affect trade between Member States, in addition, whether it has an anti-competitive object or a real

[109] See Decision of the National Competition Agency of Georgia of January 23, 2018: The case of "Citroen Georgia," p. 41. Available at: <https://admin.competition.ge/uploads/f6a4a459d4244ce5a53ddcda3c7cb321.pdf> [last accessed: 13.01.2022]

[110] ***Wood D.,*** The standard and burdon of proof in article 82 cases, Competition Law Insight, 2008, p. 3

[111] *Ibid. p.* 12

[112] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 305. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

[113] Article 2 of the Consolidated text: Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance)Text with EEA relevance. Available in English language at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02003R0001-20090701 > [last accessed: 17.12.2021]

or potential anti-competitive effect. The second step becomes relevant only when the first step determines that the agreement restricts competition. Therein, on the second step is determined the pro-competitive benefits produced by the agreement and is assessed whether these pro-competitive effects outweigh the anti-competitive effects.[114] Balancing of anti-competitive and pro-competitive effects is carried out exclusively within the scopes of Article 81.

In accordance with Article 101, the prohibitions laid down in Article 7 is not absolute and in certain cases exceptions are imposed where the action is not considered anti-competitive. Such exceptions are regulated by Articles 8 and 9 of the Law and Resolution 526[115] of September 1, 2014 of the Government of Georgia on the Exemption from Prohibition of Restrictive Agreements.

According to Article 101 of the Treaty on the Functioning of the European Union, competition is not considered to be restricted if any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.[116]

Legal exceptions shall not apply directly or indirectly fix purchase or selling prices or any other trading conditions (fixing) and sharing markets or sources of supply by consumers, location or other characteristics, which are provided for in Article 7 (a) and (c). In other cases, after all the above components it should be assessed whether the violation is subject of such legal exceptions, namely:

- the aggregate share of the parties to a horizontal agreement in the relevant market does not exceed 10%;
- the market share of each party to a vertical agreement in the relevant market does not exceed 15%;
- the agreement concluded between undertakings contains characteristics of a horizontal as well as vertical agreements, making it is difficult to classify it as a horizontal or a vertical agreement, and the market share of each party to the agreement in the relevant market does not exceed 10%.[117]

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[114] 11 Paragraph of the Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance), Official Journal C 101 , 27/04/2004 P. 0097 - 011813. Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52004XC0427%2807%29 > [last accessed: 17.12.2021]

[115] Resolution of the Government of Georgia of September 1, 2014 № 526 on Exemptions from the Prohibition of Competition Restrictions.

[116] Article 101 (3) of the Treaty on the Functioning of the European Union. Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT > [last accessed: 17.12.2021]

[117] Law of Georgia on Competition, Article 8

o concerted practices contribute to the improvement of the production and/or supply of goods, to technical or economic progress, while allowing consumers a fair share of the resulting benefits.[118] The burden of proving the existence of this exception lies with the undertaking, that complies with EU law, as according to an article 3 of Regulation N1/2003 burden of proof of this exception falls on undertaking, who indicates that requirements for exceptionare applies.

it has to be mentioned that no legal exceptions have yet been applied in national practice. However, the agency in its decision where it established the existence of a prohibited action, defined the legal exceptions and assessed it with the type of prohibition.[119][120]

Fifth Interim conclusion

- If an investigation related to a violation of Article 7 of the Competition Law is initiated by the Competition Agency, the burden of proof rests with it, and if the complaint is filed by another undertaking, the burden of proof lies with the agency together with the complaining undertaking.
- Competition shall not be deemed to be restricted if an agreement, decision, or agreed practice contributes to an improvement in the production or delivery of goods, technical or economic advancement. In such a case, the burden of proof rests with the party indicating the pro-competitive effectiveness of the agreement, decision, or concerted practice.

[118] Law of Georgia on Competition, Article 9
[119] See Decision of the National Competition Agency of Georgia of February 26, 2020, The case of "G and Audit Service Group" LLC, p.40. Available at:
<https://admin.competition.ge/uploads/bb38f3b7e4b94bcdbc783b3f144d8c8c.pdf> [last accessed: 07.12.2021]
[120] See Decision of the National Competition Agency of Georgia of January 17, 2018: The case of Oil Commodity II, p.110. Available at: <https://admin.competition.ge/uploads/a87be650e7d64307afda293742f7ad25.pdf> [last accessed: 07.12.2021]

5. Statistics and a brief overview of the practice

Since its establishment, the Georgian Competition Agency has received a total of 11 complaints regarding the violation of the prohibition provided for in Article 7, of which 7 cases were considered after formal admissibility and only in 2 cases were found violation.

Totally	Decisions on inadmissibility	Decisions based on investigation	Violation
11 cases	**4 cases**	**7 cases**	**2 cases**

A brief of the cases on which the agency confirmed a violation:

1st case - Case of "G and Audit Service Group" Ltd (15.03.2021)[121]

On March 9, 2021, the Georgian National Competition Agency has completed the investigation into the alleged violation of Article 7 of the Law of Georgia on Competition (Restrictive Competition Agreement, Decision, and Concerted Action) based on the application submitted by the "G & Audit Service Group" Ltd to the Agency.

According to the complaint, the market for free canteen services for people in difficult social situation is monopolized by a group of individuals (named respondent economic agents) who are linked to each other by perpetual contracts, are subcontractors to each other or are linked by a single director and 100% of share. The economic agents have shared the districts of Tbilisi in such a way that only one and the same entity has won the tenders announced by the boards of all ten districts over the years. To illustrate this, the complaint names the relevant facts.

The Competition Agency conducted an investigation about actions of the companies participating in the tenders announced by the district administrations of Tbilisi for the purchase of free canteen services for citizens in difficult social situation in 2017-2019 (investigation period). This means that within the investigation, the Competition Agency analyzed/evaluated the actions taken by the respondent economic agents only in the named years.

Ruling: Based on the investigation, the violation of Article 7 of the Law of Georgia "On Competition" by the respondent undertakings- "Aladashvili & Co." Ltd., "Nili" Ltd., "Tari 08"

[121] See Decision of the National Competition Agency of Georgia of February 26, 2020, The case of "G and Audit Service Group" LLC, p. 40. Available at: <https://admin.competition.ge/uploads/bb38f3b7e4b94bcdbc783b3f144d8c8c.pdf> [last accessed: 07.12.2021]

Ltd. and "Elf" Ltd., was confirmed. In particular, redistribution of the market in specific public procurements announced to provide free canteen services was revealed. The research analyzed the relevant market and its nuances. Appropriate sanctions were imposed on the undertakings following the law.

Sanction: In this case, "Aladashvili & Co." LLC, "Tari" LLC, "Elfi" LLC and "Nili" LLC violated Article 7 of the law (restrictive competition agreement, decision or concerted action). Georgian competition law provides for a fine as a sanction for this violation.

In particular, according to Article 33 (1) of the Law, in cases provided for by Articles 7 of this Law, undertakings (except for undertakings of a regulated sector of the economy) shall be subject to a fine, which must not exceed 5% of the annual turnover for the previous financial year.

Thus, Article 33 of the law sets the maximum amount of the fine to be imposed on the offender. In particular, the upper limit of the fine is 5 percent of the annual turnover of the economic agent in the previous financial year. However, the minimum amount of the fine is not determined by law. In a particular case, within 5 per cent of the annual turnover of the economic agent in the previous financial year, the determination of the amount of the fine is at the discretion of the Competition Agency.

Due to the violation of the competition law, the process of imposing the sanction is carried out in two stages: In the first stage, the general limits of the fine are set, which means the calculation of the minimum and maximum amount of the fine in each specific case, and in the next stage, the proportional amount of the fine is determined. It is important that the amount of the fine should not jeopardize the existence of the economic agent. Its amount should therefore be commensurate with the economic and financial capabilities of the economic agent.

2nd case - Case I of oil commodity (14.07.2015)[122] Case II of oil commodity (10/05/2018)[123]

Competition Agency of Georgia started an investigation on oil commodity market on its own initiative. As a result of investigation, it has been determined that oil companies were involved in an anti-competitive agreement that included price fixing, market sharing and market restriction.

Sanction: The companies were imposed fines up to total of 55 000 000 GEL. However, the court annulled the decision and in accordance with the order of the Georgian courts, Competition

[122] See Decision of the National Competition Agency of Georgia of July 14 2015: The case of Oil Commodity I. Available at: <https://admin.competition.ge/uploads/12ecff74000a47a3bbbbb755d78a7983.pdf > [last accessed: 07.12.2021]
[123] See Decision of the National Competition Agency of Georgia of January 17, 2018: The case of Oil Commodity II. Available at: <https://admin.competition.ge/uploads/a87be650e7d64307afda293742f7ad25.pdf> [last accessed: 07.12.2021]

Agency has begun to re-investigate the oil commodity market. Accordingly, the Agency has made a new decision on the case.

In accordance with the order of the Georgian courts, Competition Agency has begun to re-investigate the oil commodity market. As the result of investigation, five largest oil companies operating in the country were found to be in breach of market distribution. The fact of price fixing in the subcontracting and partnership agreement signed by individual companies was also reestablished. The enterprises were fined up to 3 million GEL for violating the competition legislation, which was paid to the state budget.

	Outcome
Sub-paragraphs a) b) c) of the Article 7[124]	**Recognized as inadmissible**
Sub-paragraph f) of the Article 7[125]	**Recognized as inadmissible**
Article 7 [126][127]	**Recognized as inadmissible**
Sub-paragraphs b and c of the Article 7[128]	**Violation was established**
Sub-paragraph a of the Article 7[129][130]	**Violation was not established**
Sub-paragraph c of the Article 7[131]	**Violation was not established**
Sub-paragraphs a) b) f) of the Article 7[132]	**Violation was not established**

[124] See Decision of the National Competition Agency of Georgia February 25, 2016: The case of Pharmaceutical Companies. Available at: <https://admin.competition.ge/uploads/ccfa9579d622410ab28f44ae69848836.pdf> [last accessed: 13.01.2022]

[125] See Decision of the National Competition Agency of Georgia of January 23, 2018: The case of "Citroen Georgia." Available at: <https://admin.competition.ge/uploads/97cdb520dfa341d18976d28997515c8b.pdf> [last accessed: 13.01.2022]

[126] See Decision of the National Competition Agency of Georgia of December 28, 2016: The case of Creditinfo. Available at: <https://admin.competition.ge/uploads/d91d495f95a543149ce9cbc20cce3945.pdf > [last accessed: 13.01.2022]

[127] See Decision of the National Competition Agency of Georgia of January 9, 2017: The case of Booking.com. Available at: <https://admin.competition.ge/uploads/bab070eafe7a4cfb824dddeaaa0d1b81.pdf> [last accessed: 13.01.2022]

[128] See Decision of the National Competition Agency of Georgia of July 14, 2015: The case of Motor Gas Resellers. Available at: <https://admin.competition.ge/uploads/12ecff74000a47a3bbbbb755d78a7983.pdf> [last accessed: 13.01.2022]

[129] See Decision of the National Competition Agency of Georgia of January 17, 2018: The case of Oil Commodity I. Available at: <https://admin.competition.ge/uploads/e659e7c86b0844a2a510125dc36d8306.pdf> [last accessed: 13.01.2022]

[130] See Decision of the National Competition Agency of Georgia of January 25, 2016: The case of Globalagro II. Available at: <https://admin.competition.ge/uploads/c8594e574e664238ad7474bd5563a965.pdf> [last accessed: 13.01.2022]

[131] See Decision of the National Competition Agency of Georgia of August 23, 2016: The case of School Buses Case. Available at: <https://admin.competition.ge/uploads/8d80c73514b344f897aa5ae5f06e6596.pdf> [last accessed: 13.01.2022]

[132] See Decision of the National Competition Agency of Georgia of January 23, 2018: The case of "Citroen Georgia," <https://admin.competition.ge/uploads/f6a4a459d4244ce5a53ddcda3c7cb321.pdf> [last accessed: 13.01.2022]

Sub-paragraph c of the Article 7[133]	**Violation was established**

Moreover, in one of the cases where the Agency did not formally admit a complaint, it referred to the practice of the European Commission, according to which the European Commission is not obliged to investigate all complaints and may reject a complaint which does not sufficiently substantiate the allegations made against it.[134]

To be outlined, in practice complaints are mostly indicated to a) directly or indirectly fix purchase or selling prices or any other trading conditions (fixing) and b) limit production, markets, technical development, or investment. it has to be mentioned that no complaints have been filed with the agency to date about applying dissimilar conditions to equivalent transactions with the particular trade parties, thereby placing them at a competitive disadvantage.

[133] See Decision of the National Competition Agency of Georgia of February 26, 2020, The case of "G and Audit Service Group" LLC case. Available at: <https://admin.competition.ge/uploads/bb38f3b7e4b94bcdbc783b3f144d8c8c.pdf> [last accessed: 13.01.2022]

[134] See Decision of the National Competition Agency of Georgia of January 9, 2017: The case of Booking.com, p. 23. Available at: <https://admin.competition.ge/uploads/bab070eafe7a4cfb824dddeaaa0d1b81.pdf> [last accessed: 13.01.2022]

Chapter III. Abuse of Dominant Position

1. Article 6 of the Law of Georgia on Competition

Similar to Article 102 of the Agreement on the Functioning of the European Union,[135] Georgian Competition Law prohibits the abuse of a dominant position. Simultaneously, the legislation regulating the abuse of a dominant position is identical to the cases provided in Article 102. In particular, in accordance with Article 6 of the Competition Law: [136] Similar to Article 102 the Georgian equivalent is a completely self-executing provision.

1. Any abuse of a dominant position by one or more undertakings (in case of joint dominance) is prohibited.
2. The following may be regarded as the abuse of dominant position:
a) imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;
b) limiting production, market or technical development to the prejudice of consumers;
c) applying dissimilar conditions to equivalent transactions forspecific trade parties, thereby placing them at a competitive disadvantage;
d) establishing an additional condition/imposing an obligation for a party to enter into a transaction that is neither materially nor commercially related to the subject of the transaction, etc.

It shall be emphasized that in the explanatory publication for citizens by the European Commission cites examples of abuse of a dominant position, such as:

- Artificially lowering prices to drive competitors out of the market;
- Selling any product together with a high demand product, making it difficult for competitors to offer alternative products;
- Refusal to serve a number of consumers;
- Special discounts for consumers who use mainly or only the services of this company;
- Sell a product only to a consumer who buys another product;
- Imposition of unreasonably high prices.[137]

[135] 101 Article of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007. Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT > [last accessed: 19.12.2021]
[136] Article 6 of the Law of Georgia on Competition
[137]> https://www.asocireba.ge/show_article.php?id=212< [last accessed: 26.12.2021]

1.2 One or more undertakings

Georgian legislation distinguishes between individual and group dominant position. In case of an individual dominant position, there is significant market power concentrated in one undertaking, while a group dominant position assumes the collective market power of several interconnected udertakings. [138]

The European Court of Justice has defined a three-component general definition. That is not the definition of undertaking which is identical in Art. 101 and Art. 101. That is the three-step so called Airtours-test for the finding of joint dominance which is a different analytical step after the boxes for undertaking and the definition of the relevant market have been ticked.[139] Possible limitations for decreased competition among the members of joint dominance: limitations for internal competition: agreements, joint distribution networks, common infrastructure, cross-licenses, minority shareholdings (under increasing scrutiny of competition law). In particular , each member of the group of udertakings should be able to accurately understand and monitor the behaviourof other members to see if all members of the group are pursuing a common market policy; it should be possible to maintain a similar situation for a long time, i.e. group members should not have the motivation to deviate from a common market policy; the expected consequences of the overall policy shall not be affected by the expected reaction of existing and potential competitors (as well as consumers). [140] Dominance is evident even if udertakings combine certain economic ties that give them a dominant position over other operators in the relevant market.[141]

Each out of two or more udertakings shall be considered to be in a dominant position if it does not encounter any significant competition from udertakings within and without the group under consideration while taking into consideration the limited access to raw materials and the sales markets, market entry barriers and other factors, [142] and at the same time:

- the joint share of not more than 3 udertakings exceeds 50%, and, at the same time, the market share of each of them is at least 15%;[143]

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[138] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 399. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 27.12.2021]

[139] Case T-342/99, *Airtours plc v Commission of the European Communities,* 6 June 2002, ECJ. Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61999TJ0342_SUM&from=EN > [last accessed: 27.12.2021]

[140] &57, Case T-193/02, *Laurent Piau v Commission of the European Communities.Fédération Internationale de Football Association (FIFA) Players' Agents Regulations*, ECLI:EU:T:2005:22, 26 January 2005,ECJ Available in English language at: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62002TJ0193 > [last accessed: 27.12.2021]

[141] &35, Joined cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities,* ECLI:EU:T:1992:38, 10 March 1992, ECJ Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61989TJ0068 > [last accessed: 27.12.2021]

[142] Article 3 (i) of the Law of Georgia on Competition

[143] *Ibid.*, Article 3 (i.a)

- the joint share of not more than 5 udertakings holding the most significant market share exceeds 80%, and, at the same time, the market share of each of them is at least 15%;[144]

First interim conclusion

Georgian legislation distinguishes between individual and group dominant position. In case of an individual dominant position, there is significant market power concentrated in one udertaking, while a group dominant position assumes the collective market power of several interconnected udertakings.

1.3 Dominant position

Article 102 of the Treaty on the Functioning of the European Union does not contain a definition of a dominant position. [145] However, in accordance with the case law, an udertaking is in a dominant position if it has the ability to act independently of competitors, employer, supplier and final consumer.[146] The dominant position does not preclude the existence of some competition. It does, however, allow it to have at least a noticeable impact on the conditions in which this competition takes place, and the dominant udertaking in all cases acts largely ignoring the competition until such action acts to its detriment. [147] A dominant udertaking with market power can set high prices at a competitive level, sell relatively low-quality products, and hinder innovation that would exist under normal competition. [148]

In accordance with the law, the dominant position is the position of the udertaking/ udertakings operating in the relevant market:

- which allows it/them to act independently from competing operators, suppliers, clients and final consumers;
- Substantially influence the general conditions of circulation of goods on the market and restrict competition.

[144] Article 3 (i.b) of the Law of Georgia on Competition
[145] 101 Article of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007. Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT > [last accessed: 28.12.2021]
[146] Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities,* ECLI:EU:C:1978:22, 14 February 1978, ECJ. Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61976CJ0027 > [last accessed: 28.12.2021]
[147] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, ECLI:EU:C:1979:36, 13 February 1979, ECJ. Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61976CJ0085 > [last accessed: 28.12.2021]
[148] OECD's Report on Abuse of Dominance and Monopolisation, Paris, 1996, p. 38

Unlike EU legislation, Georgian legislation defines the minimum market share below which an udertaking shall not be considered to be dominant. In particular, in accordance with the legislation, unless there is any other evidence, an operator/operators shall not be deemed to hold a dominant position if their share of the relevant market does not exceed 40%.[149] In the EU, the higher a company's market share, the most likely it is that this udertaking will dominate the market. The so-called rebuttable presumption has been developed by the Court of Justice of the European Union, according to which an udertaking with a market share of 50% or higher will be considered to have a dominant position. [150]

In one case, the agency considered an udertaking with a market share of less than 40% to be dominant. The Agency considered three udertaking: Agrosystems LLC., Carmen LLC. and Carmen K LLC as a single economic entity, as they were interdependent and in assessing the market power of each of them, the Agency also took into consideration the market power of the udertakings associated with it. The combined share of udertakings was 39%.[151] According to the Agency, since the interdependents act in the market in the interests of the common financial (business) group, it is considered that the market power of each of them should take into consideration the market power of the related udertakings. [152]

Moreover, in one of the cases, Agency pointed out that there was no dominant position of the udertakings, as its share did not exceed the limit stipulated by law. Consequently, it was impossible for the dominant position to be abused by an udertaking who did not have a dominant position in the market. [153] Also noteworthy is the decision when it was not found to have a dominant position, although the agency still carried out an analysis and evaluation of the actions presented in the complaint. [154]

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[149] Article 3 (i) of the Law of Georgia on Competition

[150] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 407. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 19.12.2021]

[151] See Decision of the National Competition Agency of Georgia of October 12, 2015: The case of "Globalagro" , p. 27. Available at: <https://admin.competition.ge/uploads/aa4fd2e0a9da45be8c105ff2da2f4eee.pdf > [last accessed: 13.01.2022]

[152] *Ibid.*, p. 26

[153] See Decision of the National Competition Agency of Georgia of March 28, 2016: The case of "Duti Free Georgia LLC", p. 53. Available at: <https://admin.competition.ge/uploads/94ef680a4d304982948ac27d00a1063b.pdf> [last accessed: 14.01.2022]

[154] See Decision of the National Competition Agency of Georgia of October 21, 2015: The case of “Georgian Trans Expedition” LLC, p.60.
Available at: <https://admin.competition.ge/uploads/ec44004ddbf94ec280a383c5e63d222d.pdf > [last accessed: 14.02.2022]

1.3.1 Determining the dominant position

The dominant position is determined on the basis of the share of an undertaking on the relevant market, the share of competing undertakings, barriers to market entry or to production expansion, buyer market power, availability of raw material sources, degree of vertical integration, network effects and other factors determining market power. [155] In certain cases, official statistics on an observable economy alone cannot be considered sufficient evidence to determine a dominant position, therefore various available criteria and sources shall be used. [156]

It is worth mentioning that market share and market power are determined by the Agency using market analysis methodological guidelines.[157] The most common method of assessing market power involves: first identifying the relevant market, then the power of a defined udertaking in the market is measured by market share and market entry barriers. [158]

In practice, a two-step approach is used to determine the dominant position:

- A prerequisite for the application of Article 102 is the establishment of a relevant market. The SSNIP test should be used to determine the market, during which a hypothetically short-term price change occurs and, as a consequence of the price increase, consumer reactions are observed. [159][160]

- For the application of Article 102, after determining the relevant market, it must be determined whether the udertaking holds a dominant position in a given market, the determination of which is not permissible by reference only to market shares, and various factors shall be taken into consideration. [161] According to EU practice, not excluded but unlikely to find dominant position below market share of 40% and since the AKZO judgement presumed at a market share higher than 50%. In line the court analysis, save in exceptional circumstances, very large market

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[155] Article 5 (1) of the Law of Georgia on Competition

[156] ***Menabdishvili, S.*** "Compliance of Georgian Competition Law with EU Competition Law Provisions (in accordance with the obligations under the Association Agreement)", Georgian Center for Strategic Research and Development, Tbilisi, 2018, p. 28.

[157] Order N37 of the Chairman of the Competition Agency dated October 23, 2020 on the approval of methodological guidelines for market analysis.
Available at: <https://admin.competition.ge/uploads/f378cc39831d4686878cb52e7b84e4ad.pdf > [last accessed: 14.02.2022]

[158] *Ibid.*, p. 23

[159] ***Amelio A., Donath D.,*** Market definition in recent EC merger investigations: The role of empirical analysis, Law & Economics | Concurrences N° 3-2009, p. 1.

[160] >https://www.cci.gov.in/sites/default/files/presentation_document/SSNIPTestKKSharma260711.pdf< [last accessed: 26.12.2021]

[161] ***Menabdishvili, S.*** "Compliance of Georgian Competition Law with EU Competition Law Provisions (in accordance with the obligations under the Association Agreement)", Georgian Center for Strategic Research and Development, Tbilisi, 2018, p. 23.

shares are in themselves evidence of the existence of a dominant position. That is the case where there is a market share of 50%.[162]

In order to determine dominance, it is necessary to take into consideration at least the three factors set out in paragraph 12 of the Commission Manual: the pressure from suppliers and the market positions of the dominant udertaking and his competitors; The pressure due to the real threat of future expansion of real competitors or the entry of potential competitors, the pressure due to the strength of the udertaking client's negotiation also needs to be assessed.[163] In this regard, it may be noted that the Agency has taken the above into account in latest practice.

1.3.1.1 Identify the relevant market

In practice, the relevant market is identified by the Agency through the following three parameters: the productive and geographical boundaries of the goods / services market and the time frame.[164]

- Productive boundaries of the goods / services market

In one of the cases, the Agency, while evaluating the interchangeable products for Tskaltubo thermal-mineral water, explained that Tskaltubo is a different product, which does not have a substantial substitute in the territory of Georgia. However, Tskaltubo is a resort of international importance, while Skur, located in the same resort area, will not have the same status. Tskaltubo water is chloride sulphate and radion according to the type of water, while Skuri is only chloride sulphate.[165]

- Geographical boundaries of the goods / services market

In one of the cases, the Agency found out that wheat flour produced and imported in Georgia is practically not exported / re-exported and it is fully used in the Georgian market. Consequently,

[162] Case C-62/86, Judgment of the Court (Fifth Chamber) of 3 July 1991. - AKZO Chemie BV v Commission of the European Communities. Case C-62/86, *AKZO Chemie BV v Commission of the European Communities*,ECLI:EU:C:1991:286, 3 July 1991, ECJ.
Available in English language at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61986CJ0062> [last accessed: 14.01.2022]
[163] ***Menabdishvili, S.*** "Compliance of Georgian Competition Law with EU Competition Law Provisions (in accordance with the obligations under the Association Agreement)", Georgian Center for Strategic Research and Development, Tbilisi, 2018, p. 24
[164] See Decision of the National Competition Agency of Georgia of March 4, 2015: The case of Tskaltubo Balneological Resort Case, p.25. <https://admin.competition.ge/uploads/d9429a5fd57f4a058d2ca3532b576ec8.pdf> [last accessed: 25.11.2021]
[165] Ibid., p. 25

the relevant geographical market for wheat flour was the entire territory of Georgia, where it was possible to move freely and the buyer had the opportunity to buy wheat flour. [166]

o Time frames of the goods / services market

In one of the cases, the Agency pointed out that the Tskaltubo thermal-mineral water market has a seasonal time frame. Whereas, the thermal-mineral water of Tskaltubo flows from the natural cracks in a continuous mode, although its yield is not unchanged during the year. More in winter and less in summer. [167] It is noteworthy the agency's explanation regarding the wheat flour market. By definition, the wheat flour market is not a seasonal market, as it operates all year round. However, the product is inelastic and despite the price change, the demand for it is practically unchanged throughout the year. [168]

1.3.1.2 Barriers to entry into the market

When determining the dominant position, the following issues are considered in EU practice a) Sources of competitive pressure: Actual competitors, Potential competitors, Countervailing buyer power b) Market structure: Entry barriers, Bidding markets, Network effects, Access to key inputs (unavoidable business partner), Distribution and aftersales networks, Innovation c) Previous market conduct: Former abuse (evidence of actual foreclosure)

It is noteworthy that among the above-stated, the Georgian Competition Agency in practice has assessed the entry threshold in decisions entry barriers that are essential to determining market power, as it is mainly the latter that allows a company already operating in the market to make a monopoly profit without allowing other companies to enter the market. [169] Regardless of the market structure, an udertaking that experiences significant competitive pressure will not be able to act independently and to the detriment of the interests of the consumer from existing or potential competitors. Even if the udertaking's market share is high, it will not be able to increase price,

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[166] See Decision of the National Competition Agency of Georgia of 12, 2015: The case of "Globalagro", p. 25. Available at: <https://admin.competition.ge/uploads/aa4fd2e0a9da45be8c105ff2da2f4eee.pdf > [last accessed: 25.11.2021]

[167] See Decision of the National Competition Agency of Georgia of March 4, 2015: The case of Tskaltubo Balneological Resort Case, p.27.
Available at: <https://admin.competition.ge/uploads/d9429a5fd57f4a058d2ca3532b576ec8.pdf > [last accessed: 30.12.2021]

[168] See Decision of the National Competition Agency of Georgia of October 12, 2015: The case of "Globalagro", p. 25. Available at:
<https://admin.competition.ge/uploads/aa4fd2e0a9da45be8c105ff2da2f4eee.pdf > [last accessed: 25.11.2021]

[169] ***Menabdishvili, S.*** "Compliance of Georgian Competition Law with EU Competition Law Provisions (in accordance with the obligations under the Association Agreement)", Georgian Center for Strategic Research and Development, Tbilisi, 2018, p. 23.

reduce quality or consumer choice, or worsen other parameters of competition if it is easy to enter the market and there are no barriers to entry. [170]

According to the Agency, competition is a dynamic process, so an analysis of market expansion opportunities and ease of market entry is important to assess the market power of a dominant udertaking. In particular, the scope of free action of the dominant udertaking may be limited if the opportunity to enter the market and expand the market is not associated with or is associated with minimal barriers, making it easier for potential udertakings to enter the market. Barriers may be of a legal nature or reflected in the advantages of a dominant udertaking, such as privileged access to essential raw materials or natural resources, significant technologies, ownership of a developed distribution and sales network, etc. [171]

To be emphasized, in one of the cases, the Agency clarified that Outdoor.ge LLC has the exclusive right to provide outdoor advertising permitting services on the right bank of the Mtkvari River in the territory owned by the state or local self-government for a period of 12 years. This deprives other udertakings of the opportunity to enter the market. Consequently, there are barriers to entry into the relevant market arising from the current legislation and the auction. The existence of such barriers is one of the proofs of the large-scale market power of Outdoor.ge Ltd. The inability of udertakings to enter this market enables it to operate independently of competing udertakings, suppliers, clients and final consumers. [172] In the case of the Tskaltubo balneological resort, the funds needed to overcome administrative and technical barriers, such as obtaining a license and rebuilding infrastructure were considered a financial barrier. [173] In addition, the permit required for the operation of the free trade point, which was issued by the Revenue Service of the LEPL, in accordance with the rules stipulated by law, was assessed as an institutional barrier in the case of Duty Free Georgia LLC. [174]

To be outlined, if the Agency in its early practice, in determining the dominant position, assessed market power only through institutional, technical and financial barriers. This recent practice has changed and the Agency assesses the market power of the udertaking in addition to the barriers, taking into consideration competitive pressure, buyer balancing market power and the necessary trading partner.

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[170] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 410. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

[171] See Decision of the National Competition Agency of Georgia of February 19, 2020: The case of “Geverse Development LLC”, p. 57-58 [Link]

[172] Ibid., p. 48

[173] See Decision of the National Competition Agency of Georgia of March 4, 2015: The case of Tskaltubo Balneological Resort Case, p.25,[Link]

[174] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 412. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 19.12.2021]

1.3.1.3 Competitive pressure

According to the Agency, the existence of strong competitors reduces the ability of the udertaking to act independently of them, without any economic risk, significant reduction in the number of consumers and various economic losses, and maximize profits through price increases or other actions, which ultimately have a negative impact on consumers. Consequently, it is essential to consider competitive pressure when assessing a dominant position. [175]

Noteworthy is the explanation of the agency, according to which, since "Outdoor.ge" LLC operates independently in the relevant market and has the exclusive authority to carry out entrepreneurial activities. It does not face any competitive pressure from other udertakings, which confirms the scale of its market power, its steadfastness and resilience over a long period of time. [176]

1.3.1.4 Buyer market power

In the process of determining market power, it is significant to assess the economic strength of the buyer, because if the buyer has the appropriate market power, he has the ability to influence the seller's pricing policy and the nature of the trading conditions offered by him.[177] According to the Agency, a buyer's balancer exists in the face of a particular consumer of a product or service on which the supplier is so economically dependent that it is impossible for another consumer to switch to delivering his or her own product or service or has a variety of significant difficulties. [178]

In the case under review, the agency indicated that the degree of balancing power of the buyer was diminishing. This was due to the fact that Outdoor.ge LLC operated both in the outdoor advertising licensing services market and directly in the outdoor advertising services market. Consequently, if the revenues of Outdoor.ge LLC were to be reduced through the provision of outdoor advertising permitting services, it would have had the opportunity to operate in a lower-level market and thus offset the financial losses caused by the possible reduction in the volume of permitting services provided. Consequently, it was not economically at all dependent on the behaviourof entities operating in the lower tier market. Therefore, the Agency considered that there was no buyer

[175] See Decision of the National Competition Agency of Georgia of February 19, 2020: The case of “Geverse Development LLC”, p. 59. Available at: <https://admin.competition.ge/uploads/0b4afbc9dce04b369695993034bf2251.pdf > [last accessed: 15.12.2021]
[176] *Ibid.,* p. 61
[177] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 412. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]
[178] See Decision of the National Competition Agency of Georgia of February 19, 2020: The case of “Geverse Development LLC”, p. 62. Available at: <https://admin.competition.ge/uploads/0b4afbc9dce04b369695993034bf2251.pdf > [last accessed: 15.01.2021]

balancing power that would in any way influence the conduct of Outdoor.ge LLC or weaken its market power in the outdoor advertising licensing market. [179]

1.3.1.5 An essential trading partner

An udertaking is an essential trading partner, while the degree of economic dependence on it by udertakings is high. Which implies that the potential counterpart to udertakings is the free conduct of economic activities, market entry, the acquisition of raw materials, etc., and the establishment of a contractual relationship with a competing entity and the procurement of relevant products or services. [180]

For the objectives of assessing a necessary trading partner, the Agency shared the European Commission's practice that an udertaking is considered to be a dominant udertaking if it is a "essential trading partner" in the relevant market[181] and considered that a similar economic attitude existed in the case of Outdoor.ge LLC, when the applicant udertaking stated that it needed to enter into a deal with Outdoor.ge LLC. in the advertising services market and obtain a permit service. Which confirmed that the dominant position of Outdoor.ge LLC is unquestionable, as it is an alternative counterpart to other udertakings and a "essential trading partner." [182]

Second interim conclusion

- In order to determine the dominant position, it is essential to identify the relevant product and geographical market on which the dominant position of the economic agent is assessed. In practice, the Agency identifies the relevant market by establishing the productive, geographical boundaries and time frame of the goods / services market.
- To be outlined, if the agency in its early practice, in determining the dominant position, assessed market power only through institutional, technical and financial barriers. This recent practice has developed and the agency assesses the market power of the udertaking in addition to the barriers, taking into consideration competitive pressure, buyer balancing market power and the essential trading partner.

[179] See Decision of the National Competition Agency of Georgia of February 19, 2020: The case of "Geverse Development LLC", p. 62.
Available at: <https://admin.competition.ge/uploads/0b4afbc9dce04b369695993034bf2251.pdf > [last accessed: 15.01.2022]
[180] *Ibid.,* p. 63
[181] *Ibid.,* p. 63
[182] *Ibid.,* p.64

2. Abuse of a dominant position

Maintaining a dominant position is not an anti-competitive action, but incorrect interference in the competition process, including: Unreasonable refusal to trade or sell is an abuse of a dominant position. For instance, if a dominant udertaking refuses to sell a raw material or other product to a competing company, thereby preventing the company from entering the market.[183]

According to the Court of Justice, the concept of abuse is an objective concept related to the behaviourof a dominant udertaking, which allows it to influence the market structure in which the presence of an udertaking reduces competition and which, in the case of a dominant udertaking, different from the conditions of normal competition for the product and service due to the transactions of commercial operators, can hinder the maintenance or development of the level of competition that still exists in the market. [184] In this regard, it should be noted, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, which provides for specific forms of abuse, in particular:

- Exclusive dealing - a dominant undertaking may try to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates, together referred to as exclusive dealing.
- Tying and bundling - a dominant undertaking may try to foreclose its competitors by tying or bundling.
- Predation - the Commission will generally intervene where there is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (referred to hereafter as 'sacrifice'), so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm.
- Refusal to supply and margin squeeze - any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property. Typically, competition problems arise when the dominant undertaking competes on the 'downstream' market with the buyer whom it refuses to supply. The term 'downstream market' is used to refer to the market for which the refused input is needed in order to manufacture a product or provide a service. This section deals only with this type of refusal.[185]

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[183]***Asanidze N.,*** The Negative Impact of Dominance Abuse on Competition Policy, Competition Policy: Contemporary Trends and Challenges, 2017, Tbilisi, p. 27

[184]***Menabdishvili, S.*** "Compliance of Georgian Competition Law with EU Competition Law Provisions (in accordance with the obligations under the Association Agreement)", Georgian Center for Strategic Research and Development, Tbilisi, 2018, p. 22.

[185] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. Available at English language: <https://admin.competition.ge/uploads/94ef680a4d304982948ac27d00a1063b.pdf> [last accessed: 05.01.2022]

Discussion document drafted by the Commissioner on the application of Article 102 in the European Union. The main types of abuse of a dominant position are behaviors aimed at exploitation and expulsion from the market. Consumer behaviouris exploited by consumers, for example by imposing unfairly high prices on them. Market-driven behaviour involves harassing competing undertakings by a dominant undertaking, barring them from the market, and removing them from the market. [186] According to the European Commission, these cases of expulsion from the market deserve special attention of the Commission, because at this time the elimination of competing udertakings will no longer be a competitive environment in the market and will threaten both effective competition and consumer protection. [187]

According to the Agency, unless there is a dominant market position by the udertaking, it is impossible for the dominant position to be abused. [188] After confirming the dominant position, the agency assesses the compliance of the action under consideration with the competition law. The review process is based on both the adversarial nature of the parties and the inquisitorial principles inherent in the administrative proceedings. [189] Establishing a dominant position over a particular undertaking does not constitute a breach of competition law, but implies an obligation on the part of the udertaking not to take any action that would endanger a healthy competitive environment in a relevant market. [190] Moreover, still, there remains an area of legal exploitation of that dominant position that does not constitute yes an abuse.

It is noteworthy that following the legislative changes the Agency shares the uniform practice established by the Court of Justice of the European Union with respect to the obligations of the dominant udertaking. According to it, the udertaking has an increased responsibility in the relevant market due to market power, the scope of which must be determined in each case.[191] In one case, during the investigation period, it was determined that there had been, depending on what kind of products, how much was being loaded from the wagon to the ship and vice versa. However, as a consequence of the comparison of the tariffs offered by the Agency to different udertakings, no restrictive competition action was revealed, which would confirm the fact of abuse of the dominant

[186] ***Menabdishvili, S.*** "Compliance of Georgian Competition Law with EU Competition Law Provisions (in accordance with the obligations under the Association Agreement)", Georgian Center for Strategic Research and Development, Tbilisi, 2018, p. 30
[187] *Ibid.,* p. 31
[188] See Decision of the National Competition Agency of Georgia of March 28, 2016: The case of "Duti Free Georgia LLC", p. 53. Available at:
<https://admin.competition.ge/uploads/94ef680a4d304982948ac27d00a1063b.pdf> [last accessed: 23.12.2021]
[189] See Decision of the National Competition Agency of Georgia of December 30, 2015: The case of Batumi Oil Terminal, p. 71. Available at:
<https://admin.competition.ge/uploads/6f7984d84dde44b2b09a58092880d9c8.pdf> [last accessed: 23.12.2021]
[190] See Decision of the National Competition Agency of Georgia of February 19, 2020: The case of "Geverse Development LLC", p. 67. Available at:
<https://admin.competition.ge/uploads/0b4afbc9dce04b369695993034bf2251.pdf > [last accessed: 23.12.2021]
[191] *Ibid.,* p. 66

position. However, the agency also took into consideration the fact that none of the udertakings who could have been harmed approached him in the course of the investigation. [192]

International practice proves that the abuse of a dominant position directly impedes and weakens competitive policies. At this time, it becomes impossible to increase the competitiveness of the country's economy, because it is free competition that improves the quality of goods and services. At the same time, the abuse of the dominant position hinders and negatively affects issues such as price regulation (or price reduction) and the promotion of innovations (innovations) and it becomes impossible to achieve the ultimate goal - to increase the economic well-being of society. [193]

2.1 Objective justification and burden of proof

The Georgian Law on Competition, like Article 102 of the TFEU, does not regulate objective justification. It should be noted, however, that objective justification differs from Article 9 of the Law and paragraph TFEU 101 (3), according to which certain acts within the scope of the prohibition are not considered a violation. The case law of the European Court of Justice sets the standard for examining the criteria for objective justification in cases of abuse of a dominant position. [194] As for the burden of proof, in line with the EU practice, once a likely market-distorting foreclosure effect is established, the burden of proof should shift to the dominant company to prove the existence of efficiencies that outweigh the likely negative effects of the alleged abusive exclusionary conduct on competition.[195]

In one of the cases, the Agency shared the explanation of the European Court of Justice, according to which, although the European Commission bears the burden of proving the existence of an act that constitutes abuse of a dominant position, albeit, udertaking who is obliged to present the circumstances proving the objective justification, together with the arguments and evidence, before the completion of the administrative procedure. After that, the commission is obliged to evaluate the submitted arguments and determine whether the disputed action is objectively justified in each specific case. Objective justification is assessed by an efficiency and objective need test. [196]

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[192] See Decision of the National Competition Agency of Georgia of December 30, 2015: The case of Batumi Oil Terminal. p. 72. Available at:<https://admin.competition.ge/uploads/6f7984d84dde44b2b09a58092880d9c8.pdf> [last accessed: 23.12.2021]

[193]***Asanidze N.,*** The Negative Impact of Dominance Abuse on Competition Policy, Competition Policy: Contemporary Trends and Challenges, 2017, Tbilisi, p. 28

[194] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 420. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 20.12.2021]

[195] ***Wood D.,*** The standard and burdon of proof in article 82 cases, Competition Law Insight, 2008

[196] See Decision of the National Competition Agency of Georgia of February 19, 2020: The case of "Geverse Development LLC", p. 82.
Available at: <https://admin.competition.ge/uploads/0b4afbc9dce04b369695993034bf2251.pdf > [last accessed: 23.12.2021]

Third interim conclusion

- Maintaining a dominant position is not an anti-competitive action, but implies the obligation of the undertaking not to take an action that would endanger a healthy competitive environment in the relevant market and not to interfere in the competition process, for instance unreasonable refusal to trade or sell is an abuse of a dominant position.
- The economic agent is obliged to present arguments and evidence that can objectively justify its action before the end of the investigation carried out by the agency.

3. Categories of abuse of a dominant position[197]

As aforementioned, actions prohibited by competition law are identical to those contained in Article 102 of the Treaty on the Functioning of the European Union. [198] In one case, the European Commission found that an udertaking had abused its dominant position by acquiring a metalworking company through its subsidiary and restricted competition in the market through a transaction. Although the Company's conduct did not fall within the scope of Article 102, it was deemed to be an abuse of a dominant position. In light of the practice of the Georgian Competition Agency and the court, the comprehensiveness of the list of Article 6 has not yet been considered. [199]

3.1 Imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;

Imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions is the so-called an example of a costly restrictive practice. Which includes, predatory pricing, overpricing and some types of price discrimination. [200] It should be noted that the goal of each udertaking is to strengthen its market position. Thus, it is difficult to determine whether the behaviourof a dominant udertaking is part of its equitable business strategy or an action that restricts competition. [201] Depends on the finding/identification of a concrete threat for an anticompetitive leverage or potential for market foreclosure.

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[197] Broadly under the EU Law these categories fall into the following: Exclusionary: Discrimination, Predatory pricing, Loyalty rebates, Tying and bundling Refusal to deal, Margin squeeze, Vexatious litigation, Buying off emerging competition, Limitation of parallel imports. Exploitative (Reemergence in the digital wold): Excessive pricing, Unfair conditions

[198] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 414 . Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 23.12.2021]

[199] *Ibid., p*. 415

[200] *Ibid., p* 423

[201] *Ibid., p*. 428

In one case, the Georgian Competition Agency assessed the defendant's pricing policy and analyzed the alleged unfairness of the prices it offered to its consumers. The Agency investigated the possible abuse of the dominant position in the relevant wheat flour market, however, in assessing the dominant position, it took into consideration the positions of udertakings operating in the flour market, as these markets are closely related upper and lower level markets - one market for wheat It is an area of supply of resources for the flour market and the situation in the supplier market has had a significant impact. [202] According to the agency, udertakings were able to produce flour at a lower cost than other udertakings on the market and sell it at a lower price, although the study did not reveal a clear competitive advantage over other udertakings in terms of import prices or wheat prices. [203]

In light of the European practice, an exclusive agreement can be treated both in competition restrictive agreements and in the form of abuse of a dominant position, which must be assessed in the circumstances of a particular case. [204] Exclusive transactions are mainly concluded between entities operating in two levels of the market, namely, the supplier and the consumer. It can be oral as well as written and its exclusive character can be manifested in the exclusive purchase of products as well as in the exclusive delivery. [205] In order to determine whether an exclusive contract is contrary to competition law, it is significant to analyze the provisions of the specific contract, the market share and / or the power of udertakings, the impact of the agreement on the relevant market, etc. [206]

3.2 limiting production, markets or technical development to the prejudice of consumers

Refusal-to-deliver-based abuse of a dominant position can occur in both vertical and horizontal relationships. [207] Refusal to supply is arguable.On the one hand, the company should be able to select its own contractors, and, on the other hand, it should not abuse its contractual freedom and

[202] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 425 . Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 23.12.2021]

[203] See Decision of the National Competition Agency of Georgia of October 12, 2015: The case of "Globalagro", p. 56. Available at: <https://admin.competition.ge/uploads/aa4fd2e0a9da45be8c105ff2da2f4eee.pdf > [last accessed: 24.12.2021]

[204] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 433. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

[205] Ibid., p. 432

[206] See Decision of the National Competition Agency of Georgia of March 28, 2016: The case of "Duti Free Georgia LLC", p. 54. Available at: <https://admin.competition.ge/uploads/94ef680a4d304982948ac27d00a1063b.pdf> [last accessed: 24.12.2021]

[207] See Decision of the National Competition Agency of Georgia of February 19, 2020: The case of “Geverse Development LLC”, p. 72.
Available at: <https://admin.competition.ge/uploads/0b4afbc9dce04b369695993034bf2251.pdf > [last accessed: 24.12.2021]

its unilateral conduct should not restrict competition in the market. [208] In accordance with the recent practice of the Agency, in order for a refusal to supply to be considered an abuse of a dominant position, the following preconditions shall be met: a) the need to deliver the goods / services b) the refusal to supply c) the damage d) the possibility of objective justification. [209]

In one case, the agency considered all four preconditions satisfactory. In particular:

- Necessity of service - Outdoor.ge LLC had a 12-year advertising license and during that time no legal entity had the legal leverage to replace the service and the ability to provide outdoor advertising licenses.
- Refusal to supply - The udertaking applied for the permit of Outdoor.ge Ltd on November 26, 2018, December 21, 2018 and March 21, 2019 and received no response.
- Damage - thus causing damage to the udertaking.
- Possibility of objective justification - Outdoor.ge LLC did not indicate objectively justifying circumstances of refusal. [210]

Based on the above-stated, the agency has established restrictive action to the detriment of the interests of the production, market or technological development consumer.

In one case, the agency explained that when appropriate development depends on the rational use of resources in the hands of one udertaking, it can affect the competitive environment in the market for the development of these resources. The existence of competition in the medical-rehabilitation market depends on the udertaking who holds the license to obtain and use the relevant resources. However, in the case under consideration, the restriction of production in the market can be exercised only by an agent operating in that market or a potential udertaking.[211] In the present case, the udertaking refused to supply the udertaking who did not have the land, building or building rights in the Balneozone or its surrounding area. Accordingly, the Agency did not consider the applicant udertaking to be a competing or potentially competing udertaking.[212]

The agency also discussed the effect of the planned tariff and service changes and considered that the implementation of the "new scheme" would restrict the markets for container shipping and

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[208] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 442. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

[208] *Ibid.,* p. 432

[209] See Decision of the National Competition Agency of Georgia of February 19, 2020: The case of "Geverse Development LLC", p. 72.
Available at: <https://admin.competition.ge/uploads/0b4afbc9dce04b369695993034bf2251.pdf > [last accessed: 24.12.2021]

[210] *Ibid.,* p. 77

[211] See Decision of the National Competition Agency of Georgia of March 4, 2015: The case of Tskaltubo Balneological Resort Case, p.32. Available at:
<https://admin.competition.ge/uploads/d9429a5fd57f4a058d2ca3532b576ec8.pdf > [last accessed: 25.12.2021]

[212] *Ibid.,* p. 33

terminal services from port to external terminals, which would be detrimental to consumers. It is true that as a consequence of the agency investigation, the new scheme planned by the port was considered to be an abuse of the dominant position, however, since the scheme was not enacted, the port was not found to have violated the law and no sanction was imposed.[213]

3.3 Applying dissimilar conditions to equivalent transactions with specific trade parties

The abuse of a dominant position is considered to impose different conditions on certain identical transactions for certain trading partners, thus putting them in a non-competitive position. Which, according to the Agency, includes a case where 1. the infringer has at least two trading partners and imposes different conditions on him or her or 2. offers to an indefinite circle of persons and offers the same terms to one contractor and not to the other regardless of the possibility of concluding the contract.[214] In one case, the agency did not consider the applicant udertaking to be a trading partner and did not establish any abuse of a dominant position.[215] Regarding price discrimination, the EU test is noteworthy, twofold impetus: different trading conditions for the sale or the purchase of similar products/services, similar trading conditions for the sale or the purchase of different products/services

Applying dissimilar conditions to equivalent transactions with specific trade parties, thereby placing them at a competitive disadvantage includes cases of price discrimination. The EU test for discrimination is as follows: Identification of concrete discrimination (equivalence of the transactions), Distortion of competitive relationship towards other business partners (disadvantage).

Price discrimination is a case of abuse of a dominant position where an udertaking with a dominant position imposes different prices on different categories of clients. For example, discrimination can manifest itself in a geographical context when different prices are set in different regions. However, price discrimination is not in all cases considered an abuse of a dominant position.[216] In light of the the Court's explanation in one of the cases, the imposition of different tariffs on consumers in the presence of similar costs for the provision of the same service, or the imposition of the same tariff in the presence of different costs does not explicitly prove a violation of Article

[213] See Decision of the National Competition Agency of Georgia of April 21, 2017: The case of Poti Port, p.116. Available at: <https://admin.competition.ge/uploads/def47d73b32b4cf0a9538ce94addd593.pdf> [last accessed: 25.12.2021]

[214] See Decision of the National Competition Agency of Georgia of March 4, 2015: The case of Tskaltubo Balneological Resort Case, p.33. Available at: <https://admin.competition.ge/uploads/d9429a5fd57f4a058d2ca3532b576ec8.pdf > [last accessed: 25.12.2021]

[215] *Ibid.,* p. 35

[216] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 453. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

[216] *Ibid.,* p. 432

102 TFEU. In order to establish price discrimination, it is necessary that the imposition of a different price directly restrict competition in the market. [217][218]

In one case, the agency evaluated the market behaviourof a dominant company in the markets for the download-reloading of oil products by comparing the service tariffs it offered to various udertakings. [219] As a consequence, no action was taken to substantiate the abuse of a dominant position. Also noteworthy was the fact that none of the udertakings who might have been affected applied to the agency. [220]

3.4 Entering into contracts subject to acceptance by other parties of supplementary obligations, that is not related to the subject of the transaction.

The imposition of an additional condition / obligation on a party to enter into a transaction that is neither materially nor commercially related to the subject of the transaction is binding and grouping. Binding is a form of non-price discrimination and implies the action of a dominant entity when it obliges the buyer to purchase another product related to the first product. [221] An action similar to binding is a grouping that also contains a price element. At this time the products belonging to two different relevant markets are sold together, at one price. [222] The EU test for tying and bundling is as follows: 1. Tying and tied products are two separate products; 2. Dominant position on the market for the tying product; 3. No choice to customer to source the tying product without the tied product; 4. Foreclosure/restriction of competition on the market for the tied product

In one of the cases, the Agency shared the European Commission's approach, according to which there is no connection between the subject of the contract and the additional terms, while the services specified in the additional terms belong to other markets. Whereas, a) the markets in question operate independently, namely, there are companies that offer transport services to

[217] Case C-209/10, *Post Danmark A/S v Konkurrencerådet,* ECLI:EU:C:2012:172, 27 March 2012, ECJ Available in English language at: <https://curia.europa.eu/juris/liste.jsf?num=C-209/10&language=EN > [last accessed: 20.12.2021]

[218] ***Komninos A., Killick J., MacLennan J., Schulz A., Jourdan J., Sakellariou S., Jeram J.,*** New era dawning in EU competition law? CJEU endorses an effectsbased assessment of rebates and sets aside lower court's judgment in Intel, white&case p. 2

[219] See Decision of the National Competition Agency of Georgia of December 30, 2015: The case of Batumi Oil Terminal, p. 70. Available at: <https://admin.competition.ge/uploads/6f7984d84dde44b2b09a58092880d9c8.pdf> [last accessed: 25.12.2021]

[220] *Ibid.,* p. 72

[221] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, pp. 455-456. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

[221] *Ibid.,* p. 432

[222] *Ibid.,* p. 457

consumers from any port yard to any terminal, and there are also companies that offer services to store or otherwise process containers (so-called terminal services). b) The port itself offers terminal services to consumers, which, among other services, includes placing the container in the terminal and storing it at an agreed time.[223] Consequently, the Agency considered it obligatory for the Port to enforce the new scheme and set the combined tariffs, in particular, to enter into an agreement that would impose additional conditions on the other party that were not related to the subject of the transaction. [224]

Fourth interim conclusion

- In the practice of the Georgian Competition Agency and the court, the comprehensiveness of the list of Article 6 has not yet been considered. However, the agency has reviewed allegations of abuse of a dominant position in all categories.
- In accordance with the recent practice of the Agency, in order for a refusal to supply to be considered an abuse of a dominant position, the following preconditions shall be met: a) the need to deliver the goods / services b) the refusal to supply c) the damage d) the possibility of objective justification.
- In the practice of the Agency, the abuse of a dominant position is considered to impose different conditions on certain identical transactions for certain trading partners, thus putting them in a non-competitive position, including a case where 1. the infringer has at least two trading partners and imposes different conditions or 2. offers to an indefinite circle of persons and offers the same terms to one contractor and not to the other regardless of the possibility of concluding the contract.

4. Statistics and a brief overview of practice

Since its inception, the Georgian Competition Agency has received a total of 17 complaints regarding the violation of the prohibition established by Article 6, of which 7 cases were considered after formal admissibility and only 1 was found to be in violation of Article 6 2 (b) of the Law on Competition. In particular, to the detriment of the interests of the consumer in production, market or technological development.

[223] See Decision of the National Competition Agency of Georgia of April 21, 2017: The case of Poti Port Case, p.115. Available at: <https://admin.competition.ge/uploads/def47d73b32b4cf0a9538ce94addd593.pdf> [last accessed: 30.12.2021]
[224] *Ibid.,* p. 116

Totally	Decisions on inadmissibility	Decisions based on investigation	Violation
17 cases	**10 cases**	**7 cases**	**1 case**

complaint basis	outcome
Sub-paragraph a of the Article 6[225/226]	**Violation was not established**
Sub-paragraph b of the Article 6[227]	**Violation was established**
Sub-paragraph c of the Article 6[228/229]	**Violation was not established**
Sub-paragraphs b and c of the Article 6[230]	**Violation was not established**
Sub-paragraph b and d of the Article 6	**Violation was not established**

It is obvious that in practice most complaints are directed at directly or indirectly fixing the purchase or sale price or other trading conditions, restricting production, market, technological development or investment, and imposing different terms on identical transactions for certain trading partners.

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[225] See Decision of the National Competition Agency of Georgia of October 12, 2015: The case of "Globalagro." Available at: <https://admin.competition.ge/uploads/aa4fd2e0a9da45be8c105ff2da2f4eee.pdf > [last accessed: 26.12.2021]

[226] See Decision of the National Competition Agency of Georgia of October 21, 2015: The case of "Georgian Trans Expedition" LLC. Available at: <https://admin.competition.ge/uploads/ec44004ddbf94ec280a383c5e63d222d.pdf> [last accessed: 26.12.2021]

[227] See Decision of the National Competition Agency of Georgia of February 19, 2020: The case of "Geverse Development LLC" case. Available at: <https://admin.competition.ge/uploads/0b4afbc9dce04b369695993034bf2251.pdf > [last accessed: 26.12.2021]

[228] Order N202 of the Chairman of the Georgian Competition Agency dated December 30, 2015, Batumi Oil Terminal case. Available at: <https://admin.competition.ge/uploads/6f7984d84dde44b2b09a58092880d9c8.pdf> [last accessed: 27.12.2021]

[229] See Decision of the National Competition Agency of Georgia of March 28, 2016: The case of "Duti Free Georgia LLC." Available at: <https://admin.competition.ge/uploads/94ef680a4d304982948ac27d00a1063b.pdf> [last accessed: 27.12.2021]

[230] See Decision of the National Competition Agency of Georgia of March 4, 2015: The case of Tskaltubo Balneological Resort Case. Available at: <https://admin.competition.ge/uploads/d9429a5fd57f4a058d2ca3532b576ec8.pdf > [last accessed: 27.12.2021]

A brief of the case on which the agency confirmed a violation:

Ltd "Geverse Development" Case[231]- 03.02.2020

The Georgian Competition Agency, by order №04 / 44 of February 19, 2020, completed the investigation on the basis of a complaint submitted by "Geverse Development" Ltd on February 26, 2019. The investigation concerned the compliance of the actions taken by Outdoor.ge Ltd in the market of outdoor advertising permitting services on the right bank of the Mtkvari River in Tbilisi, with the competition law.

Ruling: As a result of investigation the violation of Article 6 of the law of competition of Georgia was established, which implies abuse of dominant position by limiting production, markets or technical development to the prejudice of consumers. The company was imposed a financial sanction of GEL 32,358 under the law and in order to improve the competitive environment in the relevant market, appropriate recommendations have been made.

Recommendation. According to the research, Outdoor.ge Ltd does not have a unified approach to providing outdoor advertising licensing services to economic agents who have a well-founded intention to carry out entrepreneurial activities in the outdoor advertising services market. Therefore, Outdoor.ge should provide a unified, non-discriminatory, licensing policy for economic agents wishing to obtain outdoor advertising licensing services, which guarantees equal economic opportunity and non-discriminatory conditions for all stakeholders to participate in the proceedings.

[231] See Decision of the National Competition Agency of Georgia of February 19, 2020: The case of "Geverse Development LLC" case. Available at: <https://admin.competition.ge/uploads/0b4afbc9dce04b369695993034bf2251.pdf > [last accessed: 26.12.2021]

Chapter IV. Merger Control

1. Georgian Regulation

A significant reform of merger control was implemented in 2020, which was based on the Association Agreement between Georgia and the European Union. According to the reform, the following amendments have been introduced: [232]

1. The law defines a two-phase merger control system approved in the EU. Pursuant to the amendment, the agency shall assess within 25 working days whether the concentration is compatible with the normal competitive environment. If the issue requires further investigation or if there is a suspicion that the concentration may be incompatible, a second phase shall begin, lasting 90 calendar days.[233]

2. The undertaking was obliged to provide the information requested by the agency during the investigation, concentration and monitoring notifications. In case of failure to fulfil this obligation, the amendment provides for a fine of 1000/5000 GEL for a natural person and 3000 GEL for a legal entity/5000 GEL if action is to be repeated. Additionally, imposition of a fine does not exempt an undertaking from providing information. [234]

3. A fine is imposed for violation of the rules governing concentration. To be more specific, a fine not exceeding 5 percent of the annual turnover of the undertaking shall be imposed in case of failure to notify the Agency about the concentration subject to mandatory notification, prior to due review of the notification by the Agency, or in case of executing concentration despite a negative finding by the Agency.[235]

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[232] Annual Report, National Competition Agency of Georgia, 2020

[233] There was a short time limit for consideration of the notification before the amendment was implemented. The Agency was obliged to review the notification within 1 month and inform the representatives of the decision.

[234] Prior to the amendments, undertakings were not required to provide the requested information to the agency during the concentration notification and market monitoring process.

[235] Before this amendment, undertakings were required to submit a notification to the Agency, although there were no sanctions for non-compliance.

1.2. Definition of concentration

One of the principal objectives of the Competition Law is to establish a competition authority to ensure effective control over the merger of undertakings. [236] It is noteworthy that Article 11 of the Competition Law of Georgia does not define the concept of concentration, but only stipulates the ways of its implementation. [237] Particularly, pursuant to the first paragraph of Article 11 of the Competition Law of Georgia, concentration shall mean: [238]

a) merger of two or more independent undertakings resulting in the formation of a single undertaking;

b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings;

c) establishment of a joint venture that performs all the functions of an autonomous economic on a lasting basis entity shall constitute a concentration;

Thus, under Georgian legislation, concentration is defined as: (a) merger; (b) concentration by acquiring control; (c) concentration by establishing a joint venture; (d) participation in governing bodies;

It should be emphasized that the law does not define "merger" in this instance either. Generally, a merger is a concentration of undertakings, the execution of which reduces the number of undertakings on the market. Consequently, the consumer's freedom of choice is limited.[239] In 2016 the Competition Agency reviewed a case, where the merger of JSC GPC and JSC ABC Pharmacy, which was implemented by reorganizing the merged parties into a joint company, was deemed to be a concentration.[240]

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[236] ***Menabdishvili S.,*** Compliance of Georgian Competition Law with Competition Laws (in accordance with the obligations under the Association Agreement), Georgian Center for Strategic Research and Development, 2018, p. 5

[237] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p.502. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

[237] Ibid., p. 432

[238] Law of Georgia on Competition,
Available at:
<https://matsne.gov.ge/ka/document/view/1659450?publication=11> [Last accessed: 14.12.2021]

[239] ***Menabdishvili S.,*** Compliance of Georgian Competition Law with Competition Laws (in accordance with the obligations under the Association Agreement), Georgian Center for Strategic Research and Development, 2018, p. 5

[240] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 503. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

[240] Ibid., p. 432

According to Article 11(1)(b) of the law, acquiring control is also considered as concentration. Control may be manifested directly or indirectly, however, the form of its implementation is not defined in the law. Control is achieved through the acquisition of securities or assets, contracts or any other means that enable one undertaking to exert significant influence on the strategic decisions of another. Furthermore, it should be outlined that the concept of control for the purposes of competition law is much broader than in corporate law. For instance, in competition law to establish that the control has been obtained it is not necessary for an undertaking to own a controlling stake in another entity. Even in circumstances where a minority shareholder may block strategic decisions, it is deemed to have gained control. Accordingly, such a transaction would be considered a concentration. However, it should be noted that to qualify as a concentration it is essential that the transaction in question changes the market structure over a long period of time. A temporary obtaining of control (e.g. gaining control over an undertaking's shares by a financial institution to resell them over a short period of time) shall not in itself be considered a concentration.[241] In Georgian reality it is most common to obtain control through acquisition of shares/assets.[242] The Competition Agency's practice with respect to acquisition of assets includes, for example, the case of Heidelbergbeton Georgia/ Tbilcement Cement Group, in which the Agency deemed as a concentration the acquisition of fixed assets (operating assets) related to the production of foam concrete.[243] In all cases, it is undisputed that the acquisition of 100% of the shares is considered as obtaining control. For example, in the case of JSC GPC and JSC ABC Pharmacy, the Competition Agency regarded the agreement as a concentration, which involved the acquisition of 100% of the shares of ABC Pharmacy LLC.[244] At the same time, it should be considered that acquiring control through share acquisition may involve various numbers of shares, and the determining factor here is precisely the number required to make strategic decisions.

The risky nature of the commercial project and the amount of investment is often cited to justify the establishment of a joint venture. However, a joint venture carries competitive risks, especially if it is set up by competing undertakings.[245] According to the law on competition, the establishment of a joint venture shall only be considered a concentration if it has performed all the functions of an autonomous economic on a lasting basis.[246]

Independent economic activity implies the autonomy of relevant operations, which in turn must be equipped with appropriate financial, human and other resources. Moreover, long-term market

[241] Glossary of competition terms, 2019, pp. 92-93

[242] Explanatory report to the draft Law of Georgia on Amendments to the Law of Georgia on Competition, p. 8

[243] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 508. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

[244] Decision of the National Competition Agency of Georgia of December 28, 2016: Case of JSC GPC Available at: <https://admin.competition.ge/uploads/2038d90677404c3bb81047b7223ab5d2.pdf> [Last accessed: 15.12.2021]

[245] Glossary of competition terms, 2019, p. 56

[246] Article 11(1)(c) of the Competition Law of Georgia

participation is an additional criterion for qualifying an undertaking as a joint venture. In this respect, it is noteworthy that a joint venture set up through a specific short-term project would not be considered a concentration.[247] With regard to previously mentioned, the Competition Guidelines explain that a joint venture must be able to perform the functions normally performed by the same competing undertakings in the relevant market. [248]

In 2016, for the first time the Competition Protection Agency examined the concept of a joint venture in the case of Alta and Eurotechnic Georgia. Interestingly, during the concentration assessment process, the legal form of the joint venture created as a result of the concentration changed. Specifically, instead of a joint venture (partnership) agreement under the Civil Code, the parties agreed to establish a new joint venture - a limited liability company. The principal activity of the subsidiary established as a result of the concentration was retail sale of electrical equipment and services related to installation of electrical equipment. [249]

In the case of Amiritek and Smiley the rationale of the concentration was to create a subsidiary joint venture by independent undertakings, which would carry out all the functions of an independent undertaking for an extended period of time. The purpose of the planned concentration was to establish a retail enterprise by the participating entities that would retail various brands of electrical goods and household appliances on the electrical goods market. [250]

In addition to the three forms outlined by EU legislation, Georgian legislation further defines another type of concentration - participation of the same person in the management bodies of different undertakings.[251] Notably, the Competition Agency has not yet reviewed this form of concentration. Pursuant to the Agency's guidelines, in practice it can manifest itself in the ability to control more than one undertaking. [252]

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[247] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 512. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

[248] Key Responsibilities of Economic Agents under the Competition Law of Georgia, Guidance Document, Competition Agency of Georgia, 2017, p. 30

[249] Decision of the Georgian National Competition Agency of March 7, 2016: The case of Alta Ltd. Available at: <https://admin.competition.ge/uploads/3961725277754613b260dd7ce794ab6e.pdf> [Last accessed: 15.12.2021]

[250] Decision of the Georgian National Competition Agency of July 6, 2018: The case of Ameritech Ltd. Available at: <https://admin.competition.ge/uploads/b1b2252624284e05a713f545566d16b6.pdf> [Last accessed: 15.12.2021]

[251] Glossary of competition terms, 2019, p. 93

[252] Key Responsibilities of Economic Agents under the Competition Law of Georgia, Guidance Document, Competition Agency of Georgia, 2017, p. 29

1.3. The definition of control

An important part of the concept of concentration is the possibility of exercising "control”. This notion is defined in the second paragraph of Article 11, as rights, contracts or other means which, separately or together, create the possibility of substantially influencing an undertaking, in particular:

a) ownership of an undertaking and/or the right to use its assets, fully or partially;

b) the right (including contractual rights) that allows for substantial influence over the composition of the management boards, voting rights, and decisions of an undertaking.

1.4. Concentration assessment procedure

Obligation of notification

To effectively regulate concentration, undertakings must notify the Competition Agency of the planned concentration in advance. The latter in turn must examine and determine the expected effects of the concentration.[253] The first paragraph of Article 11^1 of the Competition Law of Georgia contains an important reference to the "Rules for Submission and Review of Concentration Notification", which explains in detail the procedure related to notification.[254]

Pursuant to the fourth paragraph of Article 11^1 of the Law, the Agency shall, no later than 5 working days after receipt of the notification of concentration, verify whether the planned concentration complies with the scope of legal regulation and notify the person(s) who submitted the notification. [255]

Paragraph 6 of the same article sets a time limit for the relevant decision, which must be taken no later than 25 working days after the submission of the proof of payment of the notification fee. Furthermore, one of the following decisions must be rendered within that period: (a) the compatibility of the planned concentration with the competitive environment; (b) an extension of the concentration notification period if there is reasonable suspicion that the planned concentration may be incompatible with the competitive environment or if further review is required because of the complexity of the case. [256]

[253] ***Menabdishvili S.,*** Compliance of Georgian Competition Law with Competition Laws (in accordance with the obligations under the Association Agreement), Georgian Center for Strategic Research and Development, 2018, p. 5
[254] Paragraph 1 of Article 11^1 of the Competition Law of Georgia
[255] *Ibid.,* paragraph 4 of Article 11^1]
[256] *Ibid.,* paragraph 6 of Article 11^1

The eleventh paragraph of Article 11[1] contains an important provision, which prohibits concentrations before the expiry of the time limits stipulated or the relevant decision of the Agency is rendered. [257] Notably, in addition to the EU's prior notification obligation, undertakings are required to wait for the Agency's final decision and only then proceed with the concentration. This principle, referred to as the "stand-still obligation" and it protects the market from the detrimental effects of concentration until a final decision is made. [258]

Imposing a fine on the undertaking for a failure to submit a notification does not exempt the undertaking from obligation to notify the Agency.[259] Moreover, it should be emphasized that, notwithstanding a negative decision by the Agency, the Agency shall impose a fine on the undertaking in the event of implementing concentration by the undertaking or in cases provided in paragraphs eleven or thirteen of Article 11[1] in the event of a negative decision rendered by the Agency after consideration of the notification of concentration, the Agency shall, in addition to imposing a fine on the undertaking, file a motion on cancellation of the concentration to restore the original state. [260]

With respect to the notification obligation, the content of Article 11[2] of the Law should also be outlined, which defines an exemption from the such obligation. To be more specific, in the case of a concentration, the relevant undertaking shall not be required to submit a notification of concentration to the Agency if:

(a) the concentration is caused by an insolvency and is carried out under the procedures prescribed by the Law of Georgia on Insolvency Proceedings, also in the process of liquidation, except where control is acquired by a competing undertaking or by a group of competitors of the insolvent undertaking;

(b) control is gained temporarily, to secure a loan, provided that the rights gained through the ownership of the assets are not exercised, except for the right to sell; control is gained on a temporarily, provided that no shareholding rights (including voting rights) are exercised other than the right to receive information, the right to sell shares and dividends and the right to receive property if the loan is secured;

(c) concentration refers to an interdependent person.[261]

[257] *Ibid,. paragraph* 11 of Article 11[1]
[258] ***Chaduneli G. Farulava G. Maisuradze L. Ramazashvili N. Sulkhanishvili G. Bantsuri K. Shakarashvili G.*** Competition Control in Georgia, Impact of Legal and Economic Criteria on Competition and Consumers Welfare, 2021, p. 72
[259] Paragraph 13 of Article 11[1] of the Law of Georgia on Competition
[260] *Ibid.,* Paragraph 11 of Article 11[1]
[261] *Ibid.,* Article 11[2]

Under the "Rules for Submission and Review of Concentration Notification" the concentration shall be subject to notification, if the total annual turnover of its participants on the territory of Georgia as of the previous fiscal year of the commencement of obligation to notify, exceeds 20 million GEL, and at the same time, the annual turnover of each of the two participants in the concentration exceeds 5 million GEL. [262]

Pursuant to Article 5 of the rules the obligation to notify is imposed on: (a) in the case of an acquisition, whether by contract or otherwise, the buyer and/or the person acquiring the right of control; (b) in the event of a merger, all parties to the transaction by joint notification; (C) in the case of a joint venture, by joint notification to all parties to the transaction. [263]

With respect to the notice period, Article 6 clarifies that parties to a concentration must give notice before the relevant agreement enters into force and/or the concentration is actually implemented.[264]

Article 13 imposes a fine of 3,000 GEL if a legal entity submits incorrect, incomplete or incomplete information requested by the Agency within the prescribed timeframe, while a natural person will be fined with the amount of 1,000 GEL. Failure to submit the information within the timeframe set by the Agency, despite the imposition of a fine, shall result in a fine of 5,000 GEL for a legal entity and GEL 3,000 for a natural person. Moreover, imposition of a fine does not exempt an undertaking from the obligation to provide information. [265]

If the Agency has a reasonable suspicion that a planned concentration may be incompatible with the competitive environment and, as a consequence, it is expected to substantially restrict effective competition, it must notify the Parties in writing. The Agency allows undertakings to use structural or behavioural measures to dispel reasonable doubts. It is up to the Concentration Party to decide on the application of such measures and, at the same time, it has the right to choose a specific measure. In reviewing the submitted measures, the Agency shall, inter alia, analyze whether the proposed measures are proportionate and sufficient to avoid effective restriction of competition in the market for goods or services in Georgia or parts thereof. [266]

Failure to notify the Agency in accordance with Article 15(4) shall subject the responsible person to a fine if the it executes the concentration despite a negative opinion of the Agency and/or before the expiry of the notification period or before the Agency renders a conclusion. This paragraph

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[262] Article 3 of "Rules for Submission and Review of Concentration Notification,
Available at:
<https://matsne.gov.ge/ka/document/view/5022364?publication=0> [Last accessed: 15.12.2021]
[263] Article 5 of "Rules for Submission and Review of Concentration Notification,
Available at:
<https://matsne.gov.ge/ka/document/view/5022364?publication=0> [Last accessed: 15.12.2021]
[264] *Ibid,*. Article 6
[265] *Ibid,*. Article 13
[266] *Ibid,*. Article 14

additionally stipulates the amount of the fine, which may not exceed 5 percent of the annual turnover for the previous financial year of the decision.[267] It should be noted that, under EU law, undertakings are obliged to obey a negative decision and to comply with the conditions set out. If these obligations are breached, the regulation provides for the cancellation of the concentration and the imposition of fines on undertakings of up to 10 percent of their annual turnover.[268]

Dominant position and effective competition

Under the fifth paragraph of Article 11, if a concentration causes or enhances a dominant position, it is presumed that such a concentration substantially restricts effective competition in a market for goods or services in Georgia or part thereof, unless the undertaking proves otherwise.

Thereby, the concentration compatibility test consists of the following steps: (1) the planned concentration causes or enhances a dominant position; (2) such concentration restricts effective competition; (3) the restriction takes place in the market for goods or services in Georgia or in parts of it;

Dominant position is the position of an undertaking operating in the relevant market that allows it to act independently of competing undertakings, suppliers, customers and end-users to exert a significant influence on the general conditions of circulation of goods in the relevant market and restrict competition. Generally, under Georgian competition law unless there is other evidence, an undertaking shall not be considered to have a dominant position if its market share does not exceed 40 percent.[269]

Notably, in cases of abuse of dominant position, the Competition Agency evaluates actions ex post. Thus, the issue of dominance of the relevant undertakings is considered and decided as a result of an analysis of the existing circumstances. In contrast, in cases of concentration, the agency must delineate the expected competitive environment (ex ante assessment).[270] Furthermore, the notion of a group's dominant position in relation to competition law arises if: (a) the aggregate share of not more than three undertakings exceeds 50 percent and the market share of each is at least 15 percent; (b) The aggregate share of undertakings with no more than five of the most important shares is more than 80 percent, with a market share of at least 15 percent each. It is noteworthy that the practice of the Competition Agency has not yet recorded any cases of

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[267] *Ibid,.* paragraph 4, Article 15

[268] ***Menabdishvili S.,*** Compliance of Georgian Competition Law with Competition Laws (in accordance with the obligations under the Association Agreement), Georgian Center for Strategic Research and Development, 2018, p. 5

[269] Article 3 (i) of the Competition Law of Georgia

[270] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 534. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

concentration formation using a group's dominant position. At the same time, cross-participation is not considered an independent form of concentration in EU practice. However, if several persons participate in the governing bodies of several undertakings, this may qualify as concentration by obtaining control. [271]

Article 2 (1) (a) of the "Methodological guidelines for market analysis" defines effective competition as the optimal combination of market structure and market behaviourof undertakings, within which market efficiency equals the highest possible performance. Additionally, the methods defined in the guidelines are used to identify material constraints.[272]

Types of concentration

"Methodological Guidelines for Market Analysis" distinguishes the following types of concentration: horizontal concentration or non-horizontal concentration; the latter is divided into vertical and conglomerate concentrations. [273]

Horizontal concentration refers to the concentration of undertakings operating in the same relevant market. According to the Competition Agency Guidelines, this type of concentration is the most problematic in practice, as it leads to a smaller number of competitors in the relevant market and an increase in market shares (increasing the risk of oligopolistic position).[274]

Non-horizontal concentrations, in turn, are concentrations of undertakings operating in different relevant markets, which can be vertical or conglomerate. Vertical concentrations occur between undertakings at different stages of production and distribution. Usually, this type of concentration is considered problematic if at least one of the undertakings involved in concentration holds a dominant position in the relevant market.[275] On the other hand, conglomerate concentration occurs between undertakings operating in non-related markets. These types of concentrations can be problematic if they cause the so-called "Portfolio effect". One example of this effect is when the undertaking creating the concentration owns several products that can be used together in a particular activity. [276]

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[271] *Ibid,*. p 514
[272] Article 2(1)(a) of "Methodological guidelines for market analysis"
Available at:
<https://matsne.gov.ge/ka/document/view/5021329?publication=0#DOCUMENT:1%3E> [Last accessed: 17.12.2021]
[273] Ibid., paragraph 1 of Article 2
[274] Key Responsibilities of Economic Agents under the Competition Law of Georgia, Guidance Document, Competition Agency of Georgia, 2017, p. 27
[275] *Ibid.*
[276] *Ibid.,* p. 28

Assessing the competitive effect

"Methodological Guidelines for Market Analysis" may be used in concentration notifications, case investigations, market monitoring and other proceedings.[277] The Competition Agency of Georgia conducts market analysis taking into account the following two stages:
(1) identification of the relevant market; (2) assessment of the competitive environment in the relevant market; [278]

The relevant market should be defined pursuant to the guidelines by defining the production, geographical and temporal scope of the product/consumer market.

In defining the boundaries of a product market, the Agency takes into account all goods or services that can be considered interchangeable in the nature of the relevant goods/services, their prices and the purposes for which they are used.[279] According to the "Methodological Guidelines for Market Analysis," the criterion for interchangeability from the purchaser's point of view is the production characteristics that determine consumer's choice, which include consumer characteristics, novelty, conditions of use of the product, purpose of sale, conditions of sale, the relative price level and any other relevant characteristics, which may be essential and significant in determining consumer's choice.[280] From the producer/supplier perspective, the criterion for interchangeability is the degree of ease of transition from one product to another, where both existing and spare production capacity must be taken into account.[281] In the case of the Georgian Capital and the Tbilisi Green School, the Agency considered general education services as the production boundary of the relevant market. The Agency drew on the experience of the European Commission regarding the need for a narrower market segmentation in such cases. At the same time, the agency noted that in this relevant market, general education services offered by public schools could be distinguished as a separate market segment, as public schools differ significantly from public schools. In particular, the services of public schools are available free of charge (at the state's expense). On the other hand, private schools offer additional services to clients - in the form of extended hours, student clubs, as well as meals. All of the above makes it possible to separate

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[277] Paragraph 2, Article 5 of "Methodological guidelines for market analysis"
Available at:
<https://matsne.gov.ge/ka/document/view/5021329?publication=0#DOCUMENT:1%3E> [Last accessed: 17.12.2021]
[278] *Ibid.* Article 5
[279] Decision of the Georgian National Competition Agency of December 7, 2021: Case of Georgian Distribution Marketing Company Ltd.
Available online:
<https://admin.competition.ge/uploads/8fe839e64f284c7a90dae7d232c76b5c.pdf> [Last accessed: 17.12.2021]
[280] Paragraphs 1 and 2 of Article 9, of "Methodological guidelines for market analysis"
Available at:
<https://matsne.gov.ge/ka/document/view/5021329?publication=0#DOCUMENT:1%3E> [Last accessed: 17.12.2021]
[281] *Ibid,.* paragraph 1 of Article 10

private schools into at least one separate market segment.[282] In the case of Alta and Eurotechnics Georgia the Agency determined that in light of the consumer specificity and therefore, the consumer's choice, computer/mobile phone and home appliances/household products were not interchangeable. Furthermore, while defining the production boundaries of the market, the Agency took into consideration international practices. Particularly, the case of the concentration of large companies in the electrical equipment business in the EU should be outlined, where it was determined that the market for electrical equipment is a single market and it is not appropriate to divide it into many categories [Case No. M4226, 29.06.2006].[283]

When defining geographical boundaries, the Agency considers the territory in which a selected group of buyers acquire or have the economic, technical and other capabilities to acquire the goods/services in question.[284] When determining geographical boundaries, it is important to consider the following factors: (a) the ability to move and require the free movement of goods; (b) the specificity and characteristics of the territory; (c) the uniformity of product prices in the territories of the relevant geographical market;[285]

Furthermore, it is essential to establish a time frame for the relevant market, which is the criterion for differentiation in the case of overlapping production and geographical boundaries of services of comparable goods. The time frame of the relevant market refers to the period of time during which the market operates within specific production and geographical boundaries.[286]

The concentration assessment procedure is followed by an evaluation of the competitive environment, the analysis of which takes into account the following parameters: (a) actors operating in the relevant market; (b) market volume and share distribution to undertakings (c) appropriate level of market concentration; (d) barriers to market entry; (e) market power of undertakings; (f) additional parameters to be considered by the Agency depending on the specifics of the market in question;[287]

The entity operating in the relevant market is the supplier and the consumer. The identification of the entities relates to the identification of their group. Customer group identification refers to the

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[282] Decision of the Georgian National Competition Agency of August 16, 2019: JSC Georgian Capital Case
Available online:
<https://admin.competition.ge/uploads/7d40dda3e6ed48a49de599a85906d837.pdf> [Last accessed: 17.12.2021]
[283] Decision of the Georgian National Competition Agency of March 7, 2016: The case of Alta Ltd.
Available online:
<https://admin.competition.ge/uploads/3961725277754613b260dd7ce794ab6e.pdf> [Last accessed: 17.12.2021]
[284] Article 11 of "Methodological guidelines for market analysis"
Available at:
<https://matsne.gov.ge/ka/document/view/5021329?publication=0#DOCUMENT:1%3E> [Last accessed: 17.12.2021]
[285] *Ibid,.* paragraph 1 of Article 12
[286] *Ibid.,* paragraphs 1 and 2 of Article 13
[287] *Ibid,.* paragraph 2 of Article 5

identification of all customers operating in the relevant market, each of which may receive goods or services in question from any supplier operating in the relevant market. Supplier group identification refers to the identification of all suppliers operating in the relevant market who can deliver goods to customers on an interchangeable basis.[288] In case of concentration, the parties themselves are required to provide similar information in the notification. Relevant market entities are identified on the basis of statistical or fiscal data, surveys or other means. [289]

According to the "Methodological Guidelines for Market Analysis"" market volume is the volume of sales of goods/services supplied to a market in a given period of time. The volume of the relevant market is calculated as the sum of the volumes of goods/services sold by the undertakings operating on that market. Re-registration of the same goods/services is not allowed. In the case of the medical sector, the Agency determines the volume of the market according to the income received by medical facilities from inpatient and outpatient services that may only be obtained from the undertakings operating on the market. [290]

Pursuant to Article 17 of the Guidelines, the share of the undertaking (supplier) in the relevant market is calculated as a percentage of the size of the product market. [291] According to Article 16 (3) of the Guidelines, the following formula is used to determine the market volume: volume is determined by adding the volume of goods/services produced within the same borders to the volume of goods/services produced within the geographical boundaries of the relevant market and subtracting the volume of goods/services exported. [292]

The level of market concentration is a qualitative characteristic of the market and assesses the correlation between the shares of undertakings and the density of their distribution in the market. In determining the share, the Agency evaluates the individual characteristics of a particular market and consults with undertakings and, if necessary, industry regulators. For instance, the Agency elaborates that the share of undertakings operating in the market of health insurance services can

[288] Article 15 of "Methodological guidelines for market analysis"
Available at:
<https://matsne.gov.ge/ka/document/view/5021329?publication=0#DOCUMENT:1%3E> [Last accessed: 17.12.2021]
[289] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 534. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]
[290] Decision of the National Competition Agency of Georgia of August 24, 2020: Case of Tbilisi State Medical University
Available at:
<https://admin.competition.ge/uploads/932de840af6e4c4db6c43e52454bc23b.pdf> [Last accessed: 17.12.2021]
[291] Decision of the Georgian National Competition Agency of July 28, 2015: JSC Medical Corporation Evex
Available online:
<https://admin.competition.ge/uploads/13b288e681a749ffa66241515cf7d27b.pdf> [Last accessed: 17.12.2021]
[292] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 545. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

be calculated by two methods, namely, the method of premiums accumulated and reimbursed losses. Considering that not all companies have submitted information, after consulting with the representatives of the State Insurance Supervision Service of LEPL Georgia and based on their official information, the data were processed according to the amount of insurance premiums attracted.[293]

The Herfindahl-Hirschman Index is used to calculate the appropriate level of market concentration, on the basis of which, according to the calculated level of concentration, the relevant market can be - low concentrated, moderately concentrated or highly concentrated. Specifically, a) Low concentrated - HHI < 1250; b) Moderately concentrated - 1250 <HHI <2250; c) High concentrated - HHI> 2250. [294]

It is noteworthy that in practice the agency's conclusions on the compatibility of concentrations with the competitive environment are structured differently. The agency determines the relevant market in any case and assesses the effect of the planned concentration. However, not all of the above criteria are taken into consideration.[295]

2. Compliance with European Regulations

Merger control is the third important component of EU competition law. The Commission plays a central role in controlling concentrations. In most jurisdictions, including the European Union, this mechanism is seen as an instrument of ex ante control that prevents the strengthening of merged undertakings or gaining dominant position or abuse of market power.[296]

It should be emphasized that the Treaty on the Functioning of the European Union did not provide for provisions governing the control of concentrations. It could be argued that concentrations are

[293] Decision of the Georgian National Competition Agency of April 28, 2016: JSC Georgian Health Group Available online: <https://admin.competition.ge/uploads/f80983e930f54d2989e2888bea7ae7ad.pdf> [Last accessed: 17.12.2021]

[294] Article 19 of "Methodological guidelines for market analysis" Available at: <https://matsne.gov.ge/ka/document/view/5021329?publication=0#DOCUMENT:1%3E> [Last accessed: 17.12.2021]

[295] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 543. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

[296] ***Lorenz M.,*** An Introduction to EU Competition Law, Cambridge University Press, 2013, p. 242

generally prohibited by Articles 101[297] and 102[298], although these clauses do not define a mechanism for regular and systematic control. Moreover, additional prerequisites set for the conduct-related conditions renders the effective control more complicated. [299]

The Council actually enacted a merger control regime for the first time in 1990. In this context, to create a single internal market and provide an effective mechanism for merger control, preference was given to regulating the issue at EU level rather than at national level. Accordingly, the Merger Act No. 4064/89 entered into force on 21 September 1990.[300]

The practice of the European Court of Justice put forth the need for reform on the agenda. A green paper published in December 2001 presented the problematic issues and exactly one year later specific directions for reform and a draft project for horizontal merger assessment were published. Consultations ended in 2004 with the adoption of a new version of the Regulation. It should be noted that the new initiative was rather complex and included: (a) the new merger regulation itself; (b) the principles of horizontal concentration; (c) the best practices of the Competition Directorate; and (d) the rules for enactment of merger regulations. Furthermore, the 2004 regulation reinforced the so-called one stop shop principle, which granted full competence to one specific European agency.[301]

2.2. Definition of concentration

Under Article 3(1) of the Merger Regulation[302], A concentration shall be deemed to arise where a change of control on a lasting basis result from:

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[297] Pursuant to Article 101 The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. According to paragraph 2 of Article 101 such agreements or decisions shall be automatically void. –The Treaty on the Functioning of the European Union
Available at:
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> [Last accessed: 14.12.2021]

[298] Article 102 regulates the individual conduct of companies with significant market power. In particular, any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Article 101 is an ex post merger control against acts that restrict competition. - The Treaty on the Functioning of the European Union
Available at:
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> [Last accessed: 14.12.2021]

[299] ***Frenz W.,*** Handbook of EU Competition Law, Springer-Verlag, 2016, p. 1093

[300] *Ibid.,* pp. 1093-1094

[301] ***Tsertsvadze G.,*** Competition Law, Volume I, Legal World, 2020, p. 300

[302] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentration between undertakings (the EC Merger Regulation)
Available at:

(a) the merger of two or more previously independent undertakings or parts of undertakings. This merger is often referred to as a 'merger of equals'. In this instance, two or more companies merge, creating an entirely new undertaking, while the previous companies cease to exist.[303] Furthermore, a merger for the purposes of this subparagraph is also considered a case where, as a result of the merger, one undertaking ceases to exist and the other continues to operate independently.[304]

The Regulation also applies to de facto mergers, i.e., cases where no legal merger takes place but two or more undertakings combine their activities in such a way as to create economic unity. In particular, such a merger is represented by two or more companies having an individual (independent) legal status, managed by the same management. [305]

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

It is evident that the most common method of obtaining control is through the acquisition of shares. Moreover, it should be noted that such an acquisition only equates to concentration if the shares of the undertaking have been acquired in full or in a strategically significant part of it. [306]

Obtaining the right to control management and resources on a contractual basis in accordance with the objectives of the Regulation qualifies as the acquisition of control. An example of such an agreement is a franchise agreement. Moreover, control may be established de facto. In particular, such a case arises where a long-term supply agreement gives the supplier the opportunity to exercise significant influence over the actions of the consumer.[307]

It should be outlined that the difference between the definitions mentioned previously does not affect the assessment of concentration and is only important where a party is required to notify the Commission pursuant to Article 4 paragraph 2 of the Regulation. [308]

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN> [Last accessed: 09.12.2021]

[303] ***Chaduneli G., Farulava G., Maisuradze L., Ramazashvili N., Sulkhanishvili G., Bantsuri K., Shakarashvili G.,*** Competition Control in Georgia, Impact of Legal and Economic Criteria on Competition and Consumers Welfare, 2021, pp. 31

[304] ***Lorenz M.,*** An Introduction to EU Competition Law, Cambridge University Press, 2013, p. 245

[305] *Ibid.*

[306] This includes the necessary part for making decisions of strategic importance.

[307] ***Lorenz M.,*** An Introduction to EU Competition Law, Cambridge University Press, 2013, p. 245

[308] *Ibid.* p. 244

2.3. Definition of control

Pursuant to the second paragraph of Article 3 of the Regulation, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an under- taking;

An undertaking gains control over another when it holds sufficient shares to make strategically important decisions. Moreover, it should be emphasized that this definition may refer to de facto control, in particular where a minority shareholder has the necessary number of votes to suspend decisions. Control obtained through veto is often referred to as "negative control".[309]

2.4. Joint venture

Under Article 3(4) of the Regulation, the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration.

In this case, the criterion of autonomous functioning is important for qualifying the establishment of a joint venture. Additionally, it does not matter if a joint venture is created on the basis of a so-called "Greenfield Operation"[310] where the parties have formed a joint venture by merging individual and independent undertakings. As already mentioned above, compliance with the criterion of independent functioning is relevant for the creation of concentration. At the same time, however, it should be noted that the criterion of independent functioning of an undertaking and the consequent economic autonomy for operational actions does not imply the need for autonomy in strategic decision-making. Otherwise, the jointly administered undertaking would fail to comply with the provisions of Article 3 (4) of the Regulation. Thus, the precondition for autonomous operation requires only the autonomy to carry out operational actions.[311]

[309] ***Middleton K.,*** Blackstone's UK & EU Competition Documents, Blackstone's Statute Series. 8th edition, 2015, p. 548

[310] In a greenfield investment, parent company opens a subsidiary in another country. Instead of buying an existing facility in that country, the company begins a new venture by constructing new facilities in that country.

[311] ***Middleton K.,*** Blackstone's UK & EU Competition Documents, Blackstone's Statute Series, 8th edition, 2015, p. 550

2.5. Exceptions

Under Article 3(5) of the Rules, a concentration shall not be deemed to arise where:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviourof that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

(b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;

(c) the operations referred to in paragraph 1(b) are carried out by the financial holding companies referred to in Article 5(3) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies(1) provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

It is clear that the exceptions set out in this Article apply only in limited cases. The action in question falls within the scope of Article 3 (5) where it could otherwise be regarded as an independent concentration. However, not when it is only part of a much larger concentration, the factual circumstances of which do not satisfy the prerequisites of this Article. On the other hand, the exceptions provided for in Article 3(5)(a) and (c) apply only to the purchase of securities. [312]

An interesting question is whether an operation to rescue and undertaking before or from insolvency proceedings constitutes a concentration. Such an action, in its standard form, involves the transfer of existing liabilities to another company through which banks may gain joint control over the undertaking in question. If the actual circumstances meet the given criteria of joint venture, concentration is deemed to have occurred. Although the primary intention of banks is to

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[312] ***Middleton K.,*** Blackstone's UK & EU Competition Documents, Blackstone's Statute Series. 8th edition, 2015, p. 550

restructure the financing of the undertaking concerned for its subsequent resale, the exceptions set out in Article 3(5)(a) do not normally apply in such an operation. A restructuring programme requires the determining of strategic commercial behavior. At the same time, building the capacity for effective commercial activity in a company that has been on the verge of insolvency and reselling it within permitted one-year-period is not a realistic proposition. Moreover, the anticipated time frame for achieving this goal is so uncertain that it would be difficult to grant an extension of disposal period.[313]

2.6. Obligation to notify

Due to the control system established by the Merger Regulation, the obligation to notify the concentrations is essential. This obligation is imposed on those undertakings whose aggregate turnover exceeds the regulatory threshold set worldwide or in the EU. According to the second part of Article 1 of the Regulation, concentration has an EU dimension and, consequently, the obligation to notify about planned merger arises where - the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.[314] Pursuant to paragraph 3 of the same article a concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:
(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;
(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million;[315]

[313] *Ibid.,* p. 554
[314] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentration between undertakings (the EC Merger Regulation)
Available at:
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN> [Last accessed: 15.12.2021]
[315] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentration between undertakings (the EC Merger Regulation)
Available at:
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN> [Last accessed: 15.12.2021]

According to the regulation, all concentrations falling within the competence of the Commission must be notified to the European Commission. The Regulation defines the period of time at which this obligation arises and also names the person who must notify about the planned concentration. In particular, according to Article 4 (1) of the Regulation concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. [316]

The previous version of the regulation provided for a one week notice obligation from the "trigger factor" of concentration, which has been amended in the current version. Notably, in practice, the European Commission has largely ignored the requirement for a one-week period.
Furthermore, a significant addition to the paragragh 1 of Article 4 of the Regulation provides for the possibility of notification even before the imposition of a binding obligation, thus bringing the European Merger Regulation closer to the US regime. However, notification at this early stage depends on the "good faith intention" of the parties involved in the concentration. This requires that the concentration plan be "sufficiently specific" and be principally based on an agreement, a memorandum of understanding, a letter of intent or the public announcement of the intention to make a bid.[317]

A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be affected by the person or undertaking acquiring control of the whole or parts of one or more undertakings. [318]

It is noteworthy that Georgian legislation, unlike the EU, does not stipulate detailed rules in case the parties reconsider the implementation of the concentration after notification and withdraw the notification. However, it is clear that in such circumstances there would no longer be a fact of concentration, which in itself is a prerequisite for a substantive assessment. Accordingly, based on a logical assumption, the Competition Agency of Georgia is expected terminate the administrative proceedings. [319]

[316] *Ibid.*
[317] ***Bretz O., Leppard M.,*** EU Merger Control, Eucid Law, 2019, p. 64.
[318] ***Lorenz M.,*** An Introduction to EU Competition Law, Cambridge University Press, 2013, p. 245
[319] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 512. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

2.7. Assessment of concentration

Brief overview of the procedure

Upon receipt of a notification of concentration, under Article 6 the Commission shall assess whether the planned concentration falls within the scope of the Regulation. Consequently, it must decide on compatibility (Article 6 paragraph 1 (b)). In determining this issue, it is important to speficy the compatibility component with the internal market. The evaluation procedure must be initiated in accordance with paragraph 1 (c) of Article 6, for which the European Commission's powers are set out in Article 8 of the Regulation.

Pursuant to Article 9, the Commission may refer the competent authority of a Member State to examine a notified concentration. Following paragraph 4 Article 4 of the Regulation, undertakings may file an application for the aforementioned referral. In practice, a much larger number of applications are recorded under the paragraph 5 of the same Article. Pursuant to this Article, the Commission may conduct an assessment concentration in accordance with the competition law of at least three Member States.

Under Article 13, the Commission has the following powers: examine the territory of the undertakings concerned (Article 13(2)(a)), request information (Article 13(2)(e)), assess accounting and other records (Article 13(2)(b)) and make copies (Article 13(2)(c)). Pursuant to Articles 14 and 15 of the Regulation, the Commission may use fines and periodic penalty payment mechanisms to enforce its powers. [320]

Following a notification of a planned concentration, the Commission may render three different types of decision. In particular, the Commission may conclude that the transaction in question does not fall within the scope of the Merger Regulation if there is no EU dimension. [321]On the other hand, the Commission may find that the concentration concerned does not constitute a serious

[320] ***Frenz W.,*** Handbook of EU Competition Law, Springer-Verlag, 2016, pp. 1251-1253

[321] Article 6(1) (a) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentration between undertakings (the EC Merger Regulation)
Available at:
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN> [Last accessed: 15.12.2021]

threat.[322] In the third case, the Commission may conclude that the transaction poses a threat to competition and initiate the second stage of the concentration assessment. [323]

The Commission has a maximum of 125 working days to implement the second stage of assessment and render a decision.[324] Finally, pursuant to Article 8 of the Regulation, the Commission shall take one of the following decisions: (a) consider the concentration compatible with the common market; (b) consider the concentration compatible with the common market if the undertaking meets certain obligations; (c) consider the concentration incompatible with the common market; [325]

Significant impediment to effective competition (SIEC)

The most significant amendment in merger regulation in 2004 was the inclusion of the SIEC (significant impediment to effective competition) test. Obtaining or strengthening a dominant position is a serious obstacle to effective competition under this test.[326]

It is noteworthy that in most cases the Commission assessed the anti-competitive effects (uncoordinated effects) of competition resulting from the merging of two undertakings operating in a single market without coordinated behaviourwith other competitors.Commission studies examining the potential increase in merger risk between the merging entity and other firms (coordinated effects) or the corresponding analysis of vertical merger risk or expected decrease in competition from closely related markets (vertical and conglomerate effects). An assessment examining the potential increase in the merger risk of the merger entity and other companies (coordinated effects) or the corresponding analysis of the risk of vertical merger or the expected reduction in competition by closely related markets (vertical effects and conglomerate effects), was especially rare. [327]

In this respect, the purpose of the SIEC test was to fill the enforcement "vacuum", as the test outlined in the previous version of the Regulation did not detect anti-competitive mergers that resulted from the merger of two companies in an oligopolistic market and did not create a dominant position.[328] Inclusion of the test has eliminated this vacuum and allowed the Commission to

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[322] Article 6(1) (b) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentration between undertakings (the EC Merger Regulation)
Available at:
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN> [Last accessed: 15.12.2021]
[323] *Ibid.,* Article 6(1) (c)
[324] *Ibid.,* Article 10(3)
[325] *Ibid.,* Article 8(3)
[326] White Paper, Towards more effective EU merger control, European Commission, Brussels, 2014, p. 5-6
[327] *Ibid.*
[328] White Paper, Towards more effective EU merger control, European Commission, Brussels, 2014, p. 5-6

strengthen the economic analysis of concentrations with a complex structure. The current approach uses qualitative and, where relevant, quantitative/empirical data. However, the assessment still considers the restrictive effect of the planned concentration in the domestic market. [329]

Since 2004, the Commission has dealt with quite a few cases using the SIAC test. In the Western Digital/Hitachi case, for instance, the Commission assessed concentration in the hard disk drive market. The test showed that the agreement would reduce the number of competitors in the 3.5-inch hard disk drive market from four to three and from three to two. In assessing the qualitative and quantitative data, the Commission delineated that the disappearance of the Hitachi from the market would significantly impede the competition.[330]

Thus, according to the current version of the Regulation, while assessing concentration, the Commission has to take into consideration the need to maintain and develop effective competition on the common market. This requires evaluation of the relevant market structure, existing and potential competition of undertakings within or outside the EU. Moreover, the position of undertakings in the relevant market, their economic and financial strength and the alternatives available to suppliers and consumers, legal or other barriers to market entry, interests of intermediate and end-users, and more should also be borne in mind. [331]

Horizontal mergers

According to the Horizontal Merger Guidelines, a merger with an actual or potential competitor may result in restricting competition. To have a restricting effect on competition: (a) the potential competitor must already have significant influence or must have a potential to obtain such influence. (b) there must not be a sufficient number of other potential competitors.[332] One example of a horizontal merger is that of the Boeing Company and McDonnell Douglas Corporation. Both were in the same market and operated in the aerospace sector.

In the guidelines, the Commission identifies important evaluation factors, including proximity to competitors that could lead to the elimination of a significant competitor, consumer choice, the possibility of competitors raising prices, or the ability of an undertaking to reduce competitor expansion by gaining control over decisions through the merger. [333]

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[329] *Ibid.,* p. 5

[330] *Ibid.,* p. 6

[331] ***Chaduneli G., Farulava G., Maisuradze L., Ramazashvili N., Sulkhanishvili G., Bantsuri K., Shakarashvili G.,*** Competition Control in Georgia, Impact of Legal and Economic Criteria on Competition and Consumers Welfare, 2021, p. 40

[332] Start-ups, killer acquisitions and merger control – Note by the European Union, Directorate for Financial and Enterprise Affairs Competition Committee, OECD, 2020, p. 8

[333] ***Colomo I. O.,*** The Shaping of EU Competition Law, Cambridge University Press, 2018, p. 223

Non-horizontal mergers

Unlike horizontal mergers, non-horizontal mergers occur when the respective undertakings operate in different markets. Non-horizontal mergers can be divided into vertical and conglomerate mergers.[334]

An example of a vertical merger is if the manufacturer acquires one of its distributor firms. At such times, the manufacturer does not operate in the relevant market due to the distributor being at another level of the supply chain. An example of such a merger would be when a merger occurs between companies that are active in closely related markets. More specifically, mergers may involve undertakings supplying complementary products or products in the same range. For instance, a merger between the supplier/manufacturer of the photocopies and the suppliers/ manufacturers of the ink. In practice, conglomerate-type mergers are rare, since the movement to specialization, focusing on a main business, seems more profitable for firms. [335]

Non-horizontal concentrations are in most cases less problematic. For example, vertical integration can reduce costs and improve efficiency. However, there is a significant threat of restricting access to competitors at any level of the supply chain. In EU practice, this means impeding or denying access to raw materials or markets to actual or potential competitors as a result of a concentration, which would reduce their ability or interest to compete with an undertaking created by the concentration.[336]

Two types of potential anti-competitive effects are assessed at non-horizontal concentrations: non-coordinated and coordinated effects.[337] Non-coordinated effects may principally arise when non-horizontal mergers give rise to foreclosure. In Commission's guidelines on the assessment of non-horizontal mergers the term "foreclosure" is used to describe any instance where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete. As a result of such foreclosure, the merging companies – and, possibly, some of its competitors as well – may be able to profitably increase the price charged to consumers. These instances give rise to a significant impediment to effective competition and are therefore referred to hereafter as "anticompetitive foreclosure".

[334] ***Maydell P.,*** Non-horizontal Mergers under the EC Merger Regulation, Stanford-Vienna European Union Law Working Paper, No. 3, 2012, p. 4
[335] *Ibid.*
[336] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 541. Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]
[337] *Ibid.,* p. 540

Coordinated effects arise where the merger changes the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate to raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger.[338]

In the case of non-horizontal mergers, the possibility standard is insufficient to determine whether a transaction is incompatible with the internal market. In other words, a mere threat of harm does not justify intervention. The Commission and the EU courts have examined various vertical and conglomerate transactions in which the parties have a dominant position in their respective markets. Eliminating a competitor in these cases was observed as a real possibility in a closely related market. In Tetra Laval/Sidel, the acquirer had a dominant position in the relevant market. Moreover, there was a particular proximity between the different markets. The assessment showed that the influence and elimination possibility was substantial. The Commission made a similar decision in the Microsoft/Skype case. It elaborated that after the acquisition, Microsoft, which has a dominant position in the computer operating system market, would have the opportunity to eliminate competition if the concentration was to be realized. [339]

Additionally, it should be outlined that in the context of conglomerate mergers the main concern is that of foreclosure. The combination of products in related markets may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices. In assessing the likelihood of such a scenario, the Commission examines, first, whether the merged firm would have the ability to foreclose its rivals, second, whether it would have the economic incentive to do so and, third, whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers. In practice, these factors are often examined together as they are closely intertwined.[340]

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[338] COMMISSION NOTICE, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings
Available at:
<https://ec.europa.eu/competition/mergers/legislation/nonhorizontalguidelines.pdf> [Last accessed: 30.01.2022]

[339] ***Colomo I. O.,*** The Shaping of EU Competition Law, Cambridge University Press, 2018, pp. 223-224

[340] COMMISSION NOTICE, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings
Available at:
<https://ec.europa.eu/competition/mergers/legislation/nonhorizontalguidelines.pdf> [Last accessed: 30.01.2022]

3. Statistics and a brief overview of practice

N	Case	Date	Decision
1	Heidelbergbeton Georgia and Tbilcement Cement Group	09/06/2015	Compatible with a competitive environment
2	Medical Corporation Evex and GN Ko	28/07/2015	Compatible with a competitive environment
3	Alta and Eurotechnics Georgia	07/03/2016	Compatible with a competitive environment
4	Healthcare Group and GPC	28/04/2016	Compatible with a competitive environment
5	GPC and ABC Pharmacy	28/12/2016	Compatible with a competitive environment
6	Cement Invest BV and Heidelberg Cement	06/10/2017	Compatible with a competitive environment
7	Alta and Metromart	04/12/2017	Compatible with a competitive environment
8	Medcapital and Madison Holding	08/06/2018	Compatible with a competitive environment
9	Ameritech and Smiley	06/07/2018	Compatible with a competitive environment

10	Georgian Capital and Motor Star	13/06/2019	Compatible with a competitive environment
11	Georgian Capital, British-Georgian Academy and British International School	19/06/2019	Compatible with a competitive environment
12	Georgian Capital and Buckswood School	25/07/2019	Compatible with a competitive environment
13	Georgian Capital and Tbilisi Green School	16/08/2019	Compatible with a competitive environment
14	Tbilisi State Medical University and GN Ko LLC	24/08/2020	Compatible with a competitive environment
15	"Modeling Netherlands Service B.B" and "Chipita Industrial Commercial Company S.A"	10/08/2021	Compatible with a competitive environment
16	Georgian Distribution Marketing Company and Levor	07/12/2021	Compatible with a competitive environment

4. Interim Conclusion

Concentration is an important institution for the development of a market economy that may create the potential for business growth and effective competition. Clearly, ensuring effective laws and control practices is one of the most crucial issues in competition law.

Merger control is the third pillar of the EU Competition Law. The Treaties contained no independent provisions on merger control. Such mergers were considered to be prohibited on the basis of Art. 101 and 102 TFEU, however, these provisions did not enable merger control on

systematic basis. The Council enacted Regulation No. 4064/89 on the control of concentrations between undertakings to specifically regulate the issues regarding the merger control. The Commission has been granted comprehensive and exclusive jurisdiction to examine concentrations with a Community dimension (one-stop-shop principle). In most jurisdictions, including the EU, merger control is designed as an *ex-ante* control that strives to prevent merging undertakings from reinforcing or establishing a dominant position.

The reform implemented in 2020 introduced significant amendments to the previous version of the Georgian merger control, which correspond to the relevant legislative framework of the European Union. Among essential changes are the following: (1) pursuant to the amendment, the agency shall assess within 25 working days whether the concentration is compatible with the normal competitive environment. If the issue requires further investigation or if there is a suspicion that the concentration may be incompatible, a second phase shall begin, lasting 90 calendar days. (2) The undertakings was obliged to provide the information requested by the agency during the investigation, concentration and monitoring notifications. (3) A fine is imposed for violation of the rules governing concentration. To be more specific, a fine not exceeding 5 percent of the annual turnover of the undertaking shall be imposed in case of failure to notify the Agency about the concentration subject to mandatory notification, prior to due review of the notification by the Agency, or in case of executing concentration despite a negative finding by the Agency.[341]

While implemented reform is crucial for further strengthening of merger control, the practical implications of the amended rules are crucial to demonstrate the effectiveness of the current regulation.

However, it should be emphasized that the Competition Agency examined 7,764 concentrations registered in the country between 4 November 2020 and 31 March 2021. According to the information provided by the Revenue Service, the annual turnover of the parties involved did not meet the criteria required for the creation of a prior notification obligation. Accordingly, pursuant to the Competition Agency, during the period under review, taking into account the information received from the National Agency of Public Registry, the concentration - which required prior notification to the Agency following the requirements of the law - did not take place.[342] Moreover, only two cases have been assessed by the Agency since the amendments were implemented.

As it already mentioned previously, according to the "Rules for Submission and Review of Concentration Notification", the concentration is subject to notification to the Agency where the

[341] Before this amendment, undertakings were required to submit a notification to the Agency, although there were no sanctions for non-compliance.
[342] National Agency for Competition checks compliance of 7,764 units of economic agents with the concentration law, 27.05.2021
Available at:
<https://competition.ge/media/press-releases/175> [Last accessed: 17.12.2021]

total annual turnover of its participants on the territory of Georgia as of the previous fiscal year of the commencement of obligation to notify, exceeds 20 million GEL, and at the same time, the annual turnover of each of the two participants in the concentration exceeds 5 million GEL. Therefore, the circumstances outlined above raise an interesting question as to whether the figure specified in the article corresponds to Georgian reality.

Chapter V. Unfair Competition

The issue of unfair competition occupies an important place in competition law legislation, both the consumer and the conscientious competitor must be protected from unfair competition.[343] Taking measures against unfair actions is an important task for any country[344], there are American and European models of competition law, norms on unfair competition are separated in the European model as a separate field of law regulation.[345] Unfair competition is prohibited by law wherever there is competition law.

1. Regulation of unfair competition in Georgia

1.1 The Content of the Article 11^3 of the Law of Georgia on Competition

According to Article 11^3, paragraph 1 of the Law of Georgia on Competition No 2159 of March 2014 "unfair competition is prohibited". And according to paragraph 2 of the same Article, For the purposes of this article, any action of undertakings that contradicts the norms of business ethics and infringes the interests of consumers shall be regarded as unfair competition.[346] The same article defines the cases of unfair competition, in particular:[347]

a) provision of information about goods by any means of communication (including, through improper, unfair, unreliable or clearly false advertising), which misleads consumers and encourages them to perform certain economic actions;

b) concealment by an undertaking of the actual purpose of a transaction for the purpose of misleading a party (to the transaction), and thereby gaining advantage in the competition;

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[343] ***Vanishvili M., Vanishvili N.,*** Legislative and Institutional Support of Banking Competition in Georgia, Competition Policy: Contemporary Trends and Challenges, Proceedings, Tbilisi, 2017, p.66
Available in Georgian at:
<https://admin.competition.ge/uploads/81b623d91dd94bd2955643d88ccae8a7.pdf> [Last accessed: 14.12.2021]

[344] ***Gugeshashvili G.***, Protecting Goodwill in Competition Law, Law Journal # 1, Tbilisi University Press, Tbilisi, 2011, p..52

[345] ***Grigolia N.,*** The American Model of Competition Policy, Competition Policy: Trends and Challenges, Proceedings, Tbilisi, 2018, pp. 163-164
Available in Georgian at:
<http://www.library.court.ge/upload/33712018-11-13.pdf> [Last accessed: 09.12.2021]

[346] ***Vanishvili M., Vanishvili N.,*** Legislative and Institutional Support of Banking Competition in Georgia, Competition Policy: Contemporary Trends and Challenges, Proceedings, Tbilisi, 2017, p.66
Available in Georgian at:
<https://admin.competition.ge/uploads/81b623d91dd94bd2955643d88ccae8a7.pdf> [Last accessed: 14.12.2021]; Law of Georgia on Competition, Article 11^3

[347] Law of Georgia on Competition, Article 11^3

c) undermining by an undertaking of a competitor's business reputation (by creating an incorrect impression regarding the undertaking, products, entrepreneurial or trade activities), its unreasonable criticism or discrediting;

d) misappropriation of a competitor's or a third person's form of goods, their packaging or appearance;

e) receipt, use or dissemination of scientific-technological, production or trade information or commercial secrets without the consent of their owner;

f) bribing of a buyer, supplier, its employee or a person authorized to make decisions-in order for him/her to act against the interests of their employer or neglect consumers' interests;

g) call for a boycott.

1.2 The Role of Unfair Competition in Legislation and Identifying the Fact of Unfair Competition

In terms of content, for the purposes of unfair competition, the contradiction to the norms of business ethics and infringement of the interests of competitors and consumers are important. Consequently, the existence of a comprehensive list in the law is not preferable. A particular action may be unfair in essence (e.g., contrary to business ethics); however, unless otherwise provided as a specific action, the agency will not be able to investigate the matter. Therefore, it is important that the list of actions is not comprehensive - it will help to improve the practical enforcement of this norm.[348]

The economic consequences of unfair competition are often not as expressed as those of monopolies, hence this can lead to a deterioration in the "quality" of competition and a reduction in the efficiency of economic activity.[349] Moreover, social policy towards inequality in Georgia is quite tolerant, and therefore inequality may be considered as a factor that has significant impact on competition.[350]

[348] Explanatory Note to the Draft Law of Georgia on Amendments to the Law of Georgia on Competition, p.15
[349] ***Kvirkaia M., Kikutadze V.***, Approaches to anti-dumping regulation in Georgia, Competition Policy: Contemporary Trends and Challenges, Proceedings, Tbilisi, 2017, p.114;
Available in Georgian at:
<https://admin.competition.ge/uploads/81b623d91dd94bd2955643d88ccae8a7.pdf> [Last accessed: 14.12.2021]
Gogiashvili Sh., Economic Competition Policy and Legislative Practice in Georgia, Innovation Publishing House, Tbilisi 2009, p. 53
[350] ***Kharaishvili E.,*** Competition in the wine market and price behaviourcharacteristics, Competition Policy: Contemporary Trends and Challenges, Proceedings, Tbilisi, 2017, p. 322
Available in Georgian at:
<https://admin.competition.ge/uploads/81b623d91dd94bd2955643d88ccae8a7.pdf> [Last accessed: 14.12.2021]

In order to uncover the facts of unfair competition, it is important to determine the relevant market, a proper assessment of market characteristics aids to determine whether there is a basis for initiating an investigation regarding alleged infringements in a particular market.[351] Restricting competition in the market means expelling small entrepreneurs from the markets, violating the rights of consumers, in particular in this regard, it is noteworthy that unconscientious advertising has a strong psychological impact on consumers and in fact weakens the quality control mechanisms that damages consumers.[352] There is still no system of specific indicators that reflect the facts of unfair competition.[353]

The current legislation in Georgia can identify the fact of unfair competition, however, until recently sanctions were not provided, which did not allow the Competition Agency to take efficient measures and enforce the law effectively. However, according to recent amendments in the legislation, in case of the confirmation of unfair competition, an undertaking shall be fined, the amount of which shall not exceed 1% of the annual turnover of the undertaking during the financial year prior to the relevant financial decision, and in case of non-elimination of the legal basis of the said violation, or repeated violation, the amount of fine shall be 3%.[354]

The role of prohibition of unfair competition in intellectual property law is quite important, as it helps to protect intellectual property objects such as patents for inventions, unregistered trademarks in cases where their protection is impossible in terms of protection of special rights.[355]

According to the legislation of different countries, the action of an undertaking is considered as unfair competition if this action:[356]

- is aimed at gaining an advantage in entrepreneurial activities

[351] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 124
Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

[352] ***Makatsaria N., Narsia L.,*** Competition policy and general trends in its development in Georgia, Competition Policy: Contemporary Trends and Challenges, Proceedings, Tbilisi, 2017, pp.154-155
Available in Georgian at:
<https://admin.competition.ge/uploads/81b623d91dd94bd2955643d88ccae8a7.pdf> [Last accessed: 14.12.2021]

[353] ***Chikovani E.,*** Competition Policy: Contemporary Trends and Challenges, Proceedings, Tbilisi, 2017, p. 285
Available in Georgian at:
<https://admin.competition.ge/uploads/81b623d91dd94bd2955643d88ccae8a7.pdf> [Last accessed: 10.12.2021]

[354] Georgia National Competition Agency 2020 Activity Report; Law of Georgia on Competition, Article 33.5

[355] ***Gugeshashvili G.,*** Protecting Goodwill in Competition Law, Law Journal # 1, Tbilisi University Press, Tbilisi, 2011, pp. 54-55

[356] ***Vanishvili M., Vanishvili N.,*** Legislative and Institutional Support of Banking Competition in Georgia, Competition Policy: Contemporary Trends and Challenges, Proceedings, Tbilisi, 2017, p. 66
Available in Georgian at:
<https://admin.competition.ge/uploads/81b623d91dd94bd2955643d88ccae8a7.pdf> [Last accessed: 14.12.2021]

- contradicts the legislation in force in the country regarding the law on business turnover, rule of law, reasonableness and fairness;
- damages (or can cause damage) other undertakings or overshadows their business reputation.

It should be noted that based on the decisions of the Georgian Competition Agency, we can say that the Georgian competition law more or less shares this definition, which we will discuss in more details below.

1.3 Practice of identifying unfair competition in Georgia

Since its establishment, the Georgian Competition Agency has received a total of 16 complaints regarding the violation of the prohibition established by Article 11^3, of which 9 cases were considered after formal admissibility and 8 were found to be violations.

See Figure.

Received	Regarded as inadmissible	Made a decision based on the investigation	Found a violation
16 cases	**7 cases**	**9 cases**	**8 cases**

The Competition Agency has rendered quite many decisions regarding unfair competition. The Competition Agency has made important clarifications regarding unfair competition, both in terms of the substantive legal aspects of the application of the article, which implies the criteria for unfair competition qualification, and in terms of the admissibility of procedural complaints.

1.3.1 Substantive part - qualification criteria

According to the established practice of the Competition Agency, "for the purposes of Article 11^3 of the Law, in order to qualify an undertaking's action as unfair competition, the following preconditions must be met: a) the action must be contrary to the norms of business ethics; b) the action must infringe the interests of competitors; c) the action must infringe the interests of the consumer; and d) the action prescribed in Article 11^3 must be present."[357]

[357] Decisions are available in Georgian at:
Decision of the National Competition Agency of Georgia of July 22, 2021: "Algorithm" Ltd. Case <https://admin.competition.ge/uploads/565c0b3130d147e79f9347cd99f8d636.pdf> [Last accessed:30.01.2022]
Decision of the National Competition Agency of Georgia of April 29, 2021: The case of "Free spirit tours" Ltd <https://admin.competition.ge/uploads/534c5aa3f0a2400dab48ff98193e39b1.pdf> [Last accessed:30.01.2022]
Decision of the National Competition Agency of Georgia of October 7, 2020: The Case of "Insurance Company Unison" <https://admin.competition.ge/uploads/5e586ce99531467d9b4cf7f7f9c9c19a.pdf> [Last accessed:10.01.2022]

a) the action must be contrary to the norms of business ethics – Law of Georgia on Competition, as well as the Georgian legislation in general, does not specify what is meant by "business ethics norms". It should be noted that private legal relations in Georgia are based on the principle of good faith. Thus, the Agency considers that the norms of business ethics are violated when the action of an undertaking is contrary to the principle of good faith. In particular, the participants in the legal relationship must perform their rights and obligations in good faith.

b) the action must infringe the interests of competitors – In the event that an alleged infringement is displayed in a competition restrictive agreement, abuse of a dominant position or unfair competition action, on the initial stage of legal qualification it must be determined whether the entity carrying out the said action is an undertaking. Consequently, the enactment of the main prohibitive norms necessary for the enforcement of competition law depends, first of all, on the consideration of a particular entity as an undertaking.[358] According to Article 3 (c) of the Law, competing undertaking is considered to be an actual or potential undertaking operating in the relevant market and according to Article 3 (d) potential competing undertaking is considered to be an interested undertaking who has a substantiated intention to enter the relevant market. Therefore, any action that in any way causes damage to a current or potential undertaking operating in the same relevant market will be considered as infringement of interests of a competitor undertaking.

c) the action must infringe the interests of the consumer - Law of Georgia on Competition does not recognize the special term "consumer". However, its definition is given in Article 2 (f) of the Competition Agency Chairperson's Order No. 37 of October 23, 2020 (hereinafter "Market Analysis Methodological Guidelines"), according to which the consumer is a person who buys a product / service for personal use or business purposes. Hence, for the purposes of the investigation conducted by the Agency, the consumer is considered to be both a natural person and a legal entity, in whose favor there is purchase of products or services for personal or business purposes. In contrast to Georgian law, EU law, namely Directive 2005/29 / EC of the European Parliament and Council of 11 May 2005 on concerning unfair business-to-consumer commercial practices, defines

Decision of the National Competition Agency of Georgia of September 15, 2020: The case of “GT Motors” Ltd <https://admin.competition.ge/uploads/cadbcdd79e884ad7a52dabbf9812a58f.pdf> [Last accessed:15.01.2022]
Decision of the National Competition Agency of Georgia of October 18, 2018: CASE OF LTD “DAZGA” <https://admin.competition.ge/uploads/6ab629a88e91485fbe212f131deeab03.pdf> [Last accessed:30.01.2022]
Decision of the National Competition Agency of Georgia of May 30, 2018: CASE OF LTD “DESIGN HOUSE” <https://admin.competition.ge/uploads/338c58ca9dca4499953a4175a8d97584.pdf> [Last accessed:30.01.2022]
Decision of the National Competition Agency of Georgia of July 19, 2017: Case of ITECHNICS <https://admin.competition.ge/uploads/558d09388bf64de78446e681f928dd62.pdf> [Last accessed:30.01.2022]
Decision of the National Competition Agency of Georgia of September 15, 2016: CASE OF PARASITOLOGICAL INSTITUTE <https://admin.competition.ge/uploads/7ff474e39c874d1a859636e3a7b004a1.pdf> [Last accessed:30.01.2022]

[358] ***Adamia G.,*** The concept of economic agent in Georgian competition law, Law Journal # 1, University Press, Tbilisi, 2021, p.84

the consumer as "any natural person", which operates in the commercial practice provided in this Directive outside its commercial, business, workshop or professional interests” (Article 2 (a)).

d) the action prescribed in Article 11^3 must be present - Finally, to qualify as unfair competition, the action must comply with the statutory composition.

According to the definition from the agency the action, the receipt, use or dissemination of scientific-technological, production or trade information or commercial secrets without the consent of their owner - In the present case, it must be assessed by the Agency whether the information named by the complainant undertaking (Which, according to him, is used by the respondent undertaking) constitutes trade information and commercial secret for the purposes of Article 11^3 – para. 2 subparagraph (e), after which it will be possible to assess whether the action of the respondent undertaking constitutes unfair competition.

The agency also made important clarifications such as that “the existence of two companies with the same name and business profile, the registration of a domain by a respondent undertaking and the registration of a trade name do not contain elements of illegality. The activities of companies / undertakings with the same name, operating in the same market and often targeting a similar segment of consumers, cause confusion and especially increase the risk of misleading the consumer. Moreover, this circumstance contributes to the establishment of unfair competition practices. The Agency believes that appropriate legislative amendments will be welcomed, based on which the registering body will control the brand names at the stage of registration of entrepreneurial entities (except individual entrepreneurs) in order to avoid duplication of names and brand. The name is no different from the name of a registered entrepreneur. Especially when undertakings carry out the same kind of economic activity. The Agency considers that the norms of business ethics are violated when the behavior of an undertaking is contrary to the principle of good faith. Conscientious entrepreneurial behavior towards a competitor also means refraining from actions that harm the competitor's interests. Using a well-established and famous brand name of a competitor in the market in the activities carried out by an undertaking for advertising on various electronic platforms infringes the interests of a competitor company. Advertising in this way also harms the interests of the consumer, as the consumers must uniquely have complete control over their choice and separate individual companies if they want to purchase certain services or goods. In this case the consumers are given information that misleads them and leads to certain economic actions. According to the agency, given that the complainant and the respondent operate in the same market and the goods and services offered by the companies are similar, there is a reasonable assumption that the average statistical consumer who sees an advertisement under one company name may have the impression that it is related to another company. The average statistical consumer is not required to research such detailed information about companies as their identification code, founding details, etc., which is the only way to

differentiate in their practice. Therefore, the company is obliged to adhere to a much higher standard, which will serve the interests of both the consumer and its competitor company. "[359]

The agency also defines that "when the names of companies are slightly different and they operate in the same market, consumers may have the impression that the market activity of one company (in this case advertising) is related to the actions of another." The danger of incorrect associations between companies is not excluded by the fact that the legal names of the companies are somewhat different from each other. Such a distinction also does not guarantee that the consumer will not encounter any association with the direct activities of the companies, any other corporate association or even G-T Motors LLC. during the above advertising activities carried out by G.T Motors LLC. This circumstance in itself leads to the distribution of companies' reputations (positive or negative). The agency considers that the norms of business ethics are violated when the behavior of the undertaking is contrary to the principle of good faith. "Conscientious entrepreneurial behavior towards a competitor also means refraining from actions that infringes its interests."[360]

The Agency's clarification regarding the domain is interesting. The agency preferably considered the issue of actual similarity between the domain names. It is notable that all Internet servers interpret the domain name the same way. Each domain name is unique, so it is technically impossible for two institutions to have two identical domains. In the case under consideration, since it is impossible for two exactly identical domain names to exist, the agency discussed only the similarity of the domains and its consequences. The agency considered the established factual circumstances to be that the domain addresses are homonymous and they only have a linguistic difference, namely, the user needs to press exactly the same keys on the computer keyboard in the same sequence to access both websites. Accordingly, the Agency considers that in the conditions when most users use Georgian and English (Latin) fonts alternately as the input language of the computer, it is especially probable that on the one hand they mistype the web address in Georgian font instead of Latin, and on the other hand during when the web address of the same name among the search results is seen, the consumers may have the expectation that they will go to a web page with a similar sound composition domain (dazga.ge).[361]

[359] Decision of the National Competition Agency of Georgia of July 22, 2021: "Algorithm" Ltd. Case Decisions is available in Georgian at: <https://admin.competition.ge/uploads/565c0b3130d147e79f9347cd99f8d636.pdf> [Last accessed:30.01.2022]

[360] Decision of the National Competition Agency of Georgia of September 15, 2020: The case of "GT Motors" Ltd Decision is available in Georgian at: <https://admin.competition.ge/uploads/cadbcdd79e884ad7a52dabbf9812a58f.pdf> [Last accessed:15.01.2022]

[361] Decision of the National Competition Agency of Georgia of October 18, 2018: CASE OF LTD "DAZGA" Decision is available in Georgian at: <https://admin.competition.ge/uploads/6ab629a88e91485fbe212f131deeab03.pdf> [Last accessed:30.01.2022]

Regarding Article 11^3, para. 2 (e), "according to the position of the Agency, for the purposes of correctly assessing the disputed action, provided for in this article - trade information and commercial secrets the following should be taken into consideration. The position of the Agency is due to the fact that the content of the information provided by the complainant in the complaint, as well as the additional written positions and the explanatory as well as the summary hearing, may in essence correspond to the legal categories named in the law the most. The Agency considered the alleged use of the applicant's tourism programs and advertising strategies, as well as the respondent's cooperation and communication with its client companies, which may include acquisition, receiving, using, or disseminating trade information or trade secrets without the consent of its owner. When discussing the receipt, acquisition, use or dissemination of trade information or trade secrets without the consent of its owner, it is important to clarify the concepts of trade information and trade secrets. The Agency considers that the standard for the examination of facts / evidence within administrative proceedings differs substantially from the same standard used in civil proceedings. This is due to the existence of legal principles on which civil (adversarial principle) and administrative (inquisitorial principle) proceedings are based. Accordingly, facts established in civil proceedings have a damaging effect on administrative proceedings when they can be established only in civil proceedings or can be equally established in civil and administrative proceedings.

The Agency investigated whether the complainant's tourist routes, time management and advertising strategy constituted trade information and / or commercial secrets belonging to the company. The agency notes that the tourist route itself is a set of interesting, visitable locations for tourists, depending on the interests and characteristics of the service recipients, as well as the duration of the tour and the appropriate time of year. While planning tourist routes, the tourist zones in the country, the relevant infrastructure and services that allow the implementation of this activity are taken into consideration. Thus, not only in Georgia but also around the world, travel agencies offer similar or identical routes to different target groups, taking into account the existing tourist areas and other listed circumstances, which is also due to the availability of infrastructure and services in tourist areas. Based on international practice, the Agency clarifies, that commercial secrets and trade information belonging to the company do not include the well-known information and the experience and skills acquired by the employee in the normal course of the job. The Agency also clarifies that commercial secrets may not include information that is generally known or easily accessible to persons whose activities are related to the relevant information. Tourism programs (routes and time management) and advertising strategies, by their nature, may not constitute commercial secrets and trade information, as the program includes information that is publicly known and easily accessible and the consumer information is allocated to employee's experience and obtained skills. Therefore, the information used by the respondent may not be considered for the purposes of receipt, use or dissemination of trade information or commercial secrets without the consent of its owner prescribed in of Article 11^3 – para. 2 subparagraph (e) of the Law."[362]

[362] Decision of the National Competition Agency of Georgia of April 29, 2021: The case of "Free spirit tours" Ltd

The Agency also defined Article 11^3 paragraph (2) (c), namely, "undermining by an undertaking of a competitor's business reputation (by creating an incorrect impression regarding the undertaking, products, entrepreneurial or trade activities), its unreasonable criticism or discrediting" -, the qualification of this Article does not automatically provide for the necessity of the result. Consequently, the agency does not assess whether the disseminating information has actually influenced the consumer's decision - undermining by an undertaking of a competitor company's business reputation and attempt to influence the consumer's decision is essential. However, the reputation of "Insurance Company Unison" JSC was damaged as a result of the ongoing investigation due to the fact that "Caucasian Metals Terminal" LLC, in order to cooperate with the company Unison in the future, needed to verify the information disseminated by N.B."[363]

The agency noted that "The agency points out that discrediting, as an act of damaging a company's reputation, can be reflected in the dissemination of incorrect, unsubstantiated information about the company as well as the products it offers to its consumers. The Competition Agency may also consider an interest worth of protection, which, although is not registered as any intellectual property right, however, its commercial nature is obvious. Discrediting a company or its product and damaging its reputation can be done in several ways, including by spreading false and negative information about the company's products or damaging the image of the company."[364]

1.3.2 Procedural part - admissibility of the complaint

It is notable that in the Competition Agency's decisions we also find decisions on inadmissibility where it is clear that the agency shares an international approach when discussing the standard of reasonable doubt.

In particular, it should be emphasized that "the issue of admissibility of a complaint is studied in two stages: first, it is checked whether the Agency has the authority granted by law, to conduct an investigation of a specific issue, then it is analyzed whether the Agency is authorized to investigate the complaint, including, from the perspective of meeting the standard of reasonable doubt. In the event that the agency is not authorized to consider the matter, a substantive analysis of the matter is no longer carried out and inadmissibility is established on a procedural basis. Accordingly, in

Decision is available in Georgian at: <https://admin.competition.ge/uploads/534c5aa3f0a2400dab48ff98193e39b1.pdf> [Last accessed:30.01.2022]

[363] Decision of the National Competition Agency of Georgia of October 7, 2020: The Case of "Insurance Company Unison"
Decision is available in Georgian at: <https://admin.competition.ge/uploads/5e586ce99531467d9b4cf7f7f9c9c19a.pdf> [Last accessed:30.01.2022]

[364] Decision of the National Competition Agency of Georgia of July 19, 2017: Case of ITECHNICS
Decision is available in Georgian at: <https://admin.competition.ge/uploads/558d09388bf64de78446e681f928dd62.pdf> [Last accessed:30.01.2022]

order for a complaint to be declared admissible and to begin an investigation, it is necessary that: a) the conditions established by Article 11^3 of the Law should exist simultaneously; and b) the standard of reasonable doubt should be met."[365]

"At the admissibility stage of the complaint, the Agency shall verify whether the factual circumstances and evidence set forth in the complaint to initiate an investigation meet the legal standard of reasonable doubt of a violation of Georgian competition law. The Agency is also guided by Article 24 (b) of the Law, according to which the Agency shall refuse to initiate an investigation of a case on the basis of an application and/or complaint, if there is no legal basis provided for by this Law. Therefore, in order to start the investigation on the basis of the submitted complaint, it is necessary to have a relevant legal basis. The Agency clarifies that this refers, first of all, to the existence of material norms that may be violated as a result of the action indicated in the complaint."[366]

First Interim conclusion

- In Georgia, there are many facts of unfair competition, which is indicated by the number of decisions made by the Competition Agency.
- For the purposes of unfair competition, the contradiction to the norms of business ethics and infringement the interests of competitors and consumers are important. The existence of a comprehensive list in the law is not preferable.
- Current legislation provides means for the identification of the fact of unfair competition.
- According to recent amendments in the legislation, confirmation of the fact of unfair competition, an undertaking shall be fined, the amount of which shall not exceed 1% of the annual turnover of the undertaking during the financial year prior to the relevant financial decision, and in case of non-elimination of the legal basis of the said violation, or repeated violation, the amount of fine shall be 3%. That allows the Competition Agency to take efficient actions and enforce the law effectively.
- This amendment has a preventive effect, which should help eliminate unfair competition.

[365] Decision of the National Competition Agency of Georgia of February 22, 2021: Case of "Information Communications Systems" Ltd
Decision is available in Georgian at: <https://admin.competition.ge/uploads/9c9b2844e1be4d75abc16d8598e31917.pdf> [Last accessed:12.12.2021]
[366] *Ibid.*

2. International approach

The interdiction of unfair competition as an integral part of the protection of industrial property was recognized as early as 1900 at the Diplomatic Conference in Brussels.[367] The World Intellectual Property Organization considers any action taken by a competitor or other market participant with the intent to directly use another person's industrial or commercial achievement for its own business without substantially separating it from its own achievements. For instance, using someone else's reputation is considered to fall under the scope of this definition.[368]

Article 6 of Regulation II of Rome specifically deals with the infringements of competition law and provides the applicable law in cases of unfair competition: In circumstances of unfair competition, the law that applies to a non-contractual obligation is the law of the country in which competitive relations or consumer interests are likely to be harmed.[369]

It is important for companies to have an "equal playing field" guarantee, which prevents market participants from gaining an unfair competitive supremacy over competitors because they are not subject to the identical (harsh) legal rules. States may wish to outdo each other by competing liberal law enforcement to attract businesses to their jurisdiction. However, the state will win the battle to attract business only by choosing looseness when other states do not, although it may be better for all jurisdictions to have appropriate and effective competition law enforcement, this can lead to an inefficient balance with deficient levels of the protection of competition.[370]

In some EU Member States, unfair competition laws contain rules that do not comply with an effective competition policy.[371] Member States are responsible for countering unfair competition.[372] The exception is allowed only when it is in accordance with the regulations laid down in EU law.[373]

In different European countries, as well as in the US, two types of policies are implemented under the same branding. One targets to ensure that companies do not impede the functioning of markets by acquiring obvious market power and exercising that power by unduly restricting the freedom of other markets (competition rules). The second pursues to regulate behavior directed at

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[367] ***Gugeshashvili G.***, Protecting Goodwill in Competition Law, Law Journal # 1, Tbilisi University Press, Tbilisi, 2011, p.54
[368] *Ibid.* p.55
[369] ***Ezrachi*, *A.,*** EU COMPETITION LAW, An Analytical Guide to the Leading Cases, 6th Edition, Hart Publishing, 2018, p.1239
[370] ***Van Den Bergh, R., Camesasca, P., Giannaccari, A.,*** Comparative Competition Law and Economics, Edward Elgar Publishing, 2017, pp. 441-442
[371] *Ibid.* p.115
[372] ***Molestina, J.,*** Regional Competition Law Enforcement in Developing Countries, Springer, 2019, p.124; ***Frenz, W.,*** Handbook of EU Competition Law, Springer, 2016, p. 334
[373] ***Frenz, W.,*** Handbook of EU Competition Law, Springer, 2016, p.334

businesses competing against each other. In different countries, competition rules are linked to other rules, including those aimed at protecting consumers, namely unfair competition rules, which in many cases also provide for the protection of consumers.[374]

It should be noted that the content of Article 11^3 of the Competition Law of Georgia also emphasizes the acquisition of commercial secrets, so it is advisable to mention the EU approach to this issue.

There are many approximations and contrasts between the definitions of confidential information in the EU, the US and China. Although there are some similarities between the definitions of "trade secrets" as section of the definition of confidential information between the US and the EU, differences remain within the scope of the term "confidential information" between Chinese, US and EU laws. For example, China's "trade secret" definition is ambiguous, as its true meaning must be evaluated by a court. Another distinction between China and the EU is the level of trade secret protection: in China, trade secrets must be protected under unfair competition law, whereas in the EU, trade secrets are governed differently in each EU member state. Trade secrets, for example, are protected under intellectual property law in Italy. They are protected by unfair competition legislation in France and Germany, tort law in the Netherlands, and so on.[375]

At the EU level, the trade secret regime varies greatly, with member states adopting diverse legal protection methods. Indeed, trade secrets are governed by ad hoc legislation (Sweden); types of intellectual property rights (Italy, Portugal, and only partially France); relying on unfair competition rules (Austria, Germany, Poland and Spain); and on tort law (the Netherlands and Luxembourg). [376]

In the United States, state laws and the Uniform Trade Secrets Act (UTSA), which codifies the core concepts of common law trade secret protection and has been accepted by the majority of states, protect trade secrets primarily from misappropriation.[377]

In 1889-1892, British judges applied the theory of tortious business acts to achieve the same result as their colleagues on the continent of Europe. As in the laws of unfair competition in continental Europe, the object of consideration was a business act of a decidedly non-meritorious nature,

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[374] ***Nihoul***, ***P.,*** Consumer protection: An overview of EU and national case law, Competition Case Law Digest: A synthesis of EU and national leading cases, Institute of Competition Law, UK, 2015, p.24

[375] ***Horna, P.,*** Fighting Cross-Border Cartels, The Perspective of the Young and Small Competition Authorities, Hart Publishing, Great Britain, 2020, p.98

[376] ***Banterle***, ***F.,*** The Interface Between Data Protection and IP Law: The Case of Trade Secrets and the Database sui generis Right in Marketing Operations, and the Ownership of Raw Data in Big Data Analysis, Personal Data in Competition, Consumer Protection and Intellectual Property Law Towards a Holistic Approach?, Springer, 2018, p.416

[377] ***Horna***, ***P.,*** Fighting Cross-Border Cartels, The Perspective of the Young and Small Competition Authorities, Hart Publishing, Great Britain, 2020, p.98

which was an unacceptable advance in comparison with competitors or related business partners. Unfair trade activities are considered illegal and are punishable by law. If a commercial act fits the requirements of a nomination tort or falls outside the scope of prima-facie-tort liability, it is considered unlawful (from which innominate torts may arise).[378] In contrast to the "enumeration principle" underlying the restricted number of nomination torts, continental European lawyers speak of a "general clause" rather than an "accounting provision."

Nonetheless, the majority view in Anglo-American law and equity is that there is no such thing as "unfair competition," because there is no room for such a concept between the basic torts and the freedom of trade and commerce, and there is no need to fill such a gap.[379]

The outlawing of cartels does not prevent unfair and consequently dishonest competition. Of course, fair competition is not defined in European Union law. Competition fairness is only established as a rationale for national constraints, as well as based on the Cassis ruling's principles. As a result, it is evident that competition fairness under European Union law is based on Member State definitions. As a result, their legislation is authoritative when it comes to assessing which forms of competition are fair and which are not. Nevertheless, the legislation of the Member States must remain within the limits of what is permissible under EU law. Consequently, only to the extent that it is compatible with European freedoms in particular, can competition be classified as unfair and hence prohibited. In particular, it is consistent with the practice of the courts and the Commission not to treat fundamental freedom-seeking behaviouras unfair competition. There can be no unfair competition in cases where there are rights under fundamental freedoms.[380]

2.1 EU Directive

The directives are not intended for individuals or enterprises, but for Member States. They ask the Member States to transpose the directive in order to achieve the result laid down in the directive.[381]

EU Directive 2005/29/EC regarding unfair business-to-consumer commercial practices regulates unfair competition, which then requires the adoption of relevant laws by Member States. The directive mainly deals with standards of conduct for traders.

As long as consumer protection controls are implemented, economists should wait until EU member states harmonize all of their national rules on unfair competition acts under the EU Treaty's Unfair Commercial Practices Directive (UCPD) (unfair business-to-consumer acts). This Directive establishes universal rules to govern all marketing methods intended to persuade

[378] ***Fikentscher, W., Hacker, P., Podszun, R.,*** Fair Economy Crises, Culture, Competition and the Role of Law, Springer, 2013, p.31
[379] *Ibid.* p. 32
[380] ***Frenz, W.,*** Handbook of EU Competition Law, Springer, 2016, pp. 330-334
[381] ***Lorenz, M.,*** An Introduction to EU COMPETITION LAW, Cambridge University Press, USA, 2013, p.32

customers to buy goods and services; it also regulates deceptive advertising, fraudulent product and service claims, deceptive pricing, high-pressure sales techniques, and other egregious behaviors. [382]

EU rules on unfair commercial practices allow national executive bodies to prevent a wide range of unfair business practices. Examples of unfair business practices include spreading false information to consumers or using aggressive marketing techniques to influence their choices.[383] Prohibited conduct includes a general prohibition on unfair commercial practices in Articles 3 and 5, and then more specific restrictions are already stated. Additional directives, which also relate to "unfair competition", are also noteworthy. This is Directive 93/13 / EEC of 5 April 1993 unfair terms in consumer contracts, and it is also worth noting Directive 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules.

EU Directive 2005/29/EC[384]

- outlines the unfair business-to-consumer commercial activities that are prohibited in the EU
- applies to any conduct or omission directly related to a trader's marketing, sale, or supply of a product to consumers. As a result, it safeguards consumers' economic interests before, during, and after a commercial transaction.
- ensures that all consumers are protected equally regardless of the place of purchase or sale in the EU.

Unfair commercial practices, according to the Directive, are those that are in violation of professional diligence requirements and are likely to materially alter the economic behavior of the average consumer.

There are 2 categories of commercial tactics that are unfair if they cause the average consumer to make a transactional decision that they would not have made otherwise are classified as deceptive/misleading commercial practices (by action or omission) and aggressive commercial practices, according to Directive 2005/29/EC.

In addition, Annex I of Directive 2005/29/EC includes a "blacklist" of behaviors that are prohibited in all circumstances.

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[382] ***Chirița**, **A. D.,*** Legal interpretation and practice versus legal theory: a reconciliation of competition goals – comment on Andriychuk, Goals of competition law, Edward Elgar Publishing Limited, UK, USA, 2012, p.122

[383]Refer to: <https://ec.europa.eu/info/law/law-topic/consumer-protection-law/unfair-commercial-practices-law/unfair-commercial-practices-directive_en> [Last accessed 21.12.2021]

[384]Refer to: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32005L0029#ntr1-L_2005149EN.01003501-E0001> [Last accessed 21.12.2021]

Misleading commercial practices

If a practice contains inaccurate or misleading information or is likely to deceive the ordinary consumer, it is considered misleading [385], even if the information is correct, they will make a transactional decision they would not have made otherwise. It's worth noting that Amending Directive (EU) 2019/2161 establishes a particular provision addressing misleading marketing of goods as similar when their composition of features differs (commonly referred to as "dual quality" items).

Advertising is a prime example of a commercial practice.[386] Material information required by the ordinary consumer to make an informed transactional decision is omitted or presented in an unclear, unintelligible, ambiguous, or untimely manner, and is likely to lead them to make a purchase decision they would not have made otherwise. The Directive 2005/29/EC establishes a general list of information that should be considered material, such as the price and the product's key attributes. Additional criteria for online sales are included in Amending Directive (EU) 2019/2161, such as: obligations for online marketplaces to educate consumers about the major factors used to rank the offers returned in response to a search query, as well as the responsibility to notify consumers about whether and how the validity of user reviews is verified.

Aggressive commercial practices

Consumers must be able to freely make transactional decisions. A behavior is aggressive and unfair if it severely restricts the ordinary consumer's freedom of choice and causes them to make a transactional decision they would not have made otherwise through harassment, coercion, or undue influence. In order to decide if a commercial practice is aggressive or not, several factors must be considered. These factors include the nature, location, and duration of the practice; the possibility of threatening or abusive language or behavior; and the nature, location, and duration of the exercise any disproportionate non-contractual condition imposed on the consumer wishing to exercise their contractual rights; any exploitation by the trader of any specific circumstance of such seriousness (e.g., a death or a serious illness) as to impair the consumer's judgment in order to influence their decision with regard to the product (such as terminating or switching a contract).

It is critical to understand what sources of information influence the consumer's view of the advertised product from both the advertiser's and the consumer's perspectives. When it comes to the currency conversion clause, the CJUE has a broad definition of "transparency." The conversion clause's transparency should be judged in light of all relevant information, including promotional materials as well as information provided by the lender during the loan agreement negotiation.

[385] ***Golecki M. J., Tereszkiewicz, P.,*** Taking the Prohibition of Unfair Commercial Practices Seriously, New Developments in Competition Law and Economics, Springer, 2019, p.91

[386] *Ibid.*

Because the Kásler Judgment addresses the Unfair Terms Directive 93/13/EEC, the CJUE's view is justified. From the standpoint of unfair competition legislation, such a broad definition of openness is unworkable. The basis of the consumer's decision-making process is the lender's marketing communication, which is directed at potential customers. Only pre-contract marketing statements can be considered for determining whether advertising is deceptive. What is notable, however, is that the Court establishes a transparency threshold for consumer assessments conducted at the pre-contractual stage, with the benefit of hindsight. The ability to "consider all relevant facts" about the transaction in question is normally provided through a retrospective evaluation process, which is often available to adjudicative bodies such as courts.[387]

Most cases concern restrictions on the sale or marketing of a product for the purpose to protect consumers from unfair advertising. Usually, the concept has been construed in the light of the objectives that a specific field of law has attempted to achieve. This is consistent with the principle that consumer protection which is understood as a form of social protection is generally the responsibility of Member States within the framework of minimum harmonization measures.[388]

In addition, Annex I of Directive 2005/29/EC includes a list of commercial practices that are considered unfair under all conditions.

For instance, misleading commercial practices are: when a trader claims to be a signatory to a code of conduct but isn't, displaying a trust mark, quality mark, or equivalent without first obtaining the required approval, making the claim that a code of behavior has the approval of a public or other entity when it does not, falsely claiming that a product will only be accessible for a limited period, or that it will only be available on specific terms for a limited time, in order to elicit a quick decision and deny consumers the opportunity or time to make an informed decision. And etc.

Aggressive commercial practices are: when the trader creates the impression that the consumer cannot leave the premises until a contract is formed, directly advising a consumer that if he does not purchase the product or service, the merchant's job or livelihood will be jeopardized, creating the false impression that the consumer has already won, will win, or will win a prize or other equivalent benefit as a result of performing a specific act, when there is no prize or other equivalent benefit, or taking any action related to claiming the prize or other equivalent benefit requires the consumer to pay money or incur a cost, and so on.

[387] *Ibid.* p.95
[388] *Ibid.* p.97

Second interim conclusion

- Unjust and thus unfair competition is not protected by a prohibition on cartels.
- EU rules on unfair competition allow national executive bodies to prevent a wide range of unfair business practices. Georgian legislation more or less shares this direction and effectively contradicts unfair competition
- EU legislation does not provide definition fair competition. Even more importantly there is no economic definition of it as well. It is a purely legal concept based on normative judgement. Fairness of competition is established only as a justification for national restrictions.
- Fair competition under EU law is based on definitions by member states. Their legislation is authoritative in determining which forms of competition are unfair.

Chapter VI. State and Competition

According to Article 6 (2) of the Constitution of Georgia, “The State shall take care of developing a free and open economy, and free enterprise and competition”. The state shall provide legal guarantees for the existence and development of competition, which implies the creation of legal norms and institutions by the state that will promote the development of entrepreneurial freedom.[389] When drafting national competition law, the state should also consider international best practices.

It should be noted that, in some cases, it may appear that the state itself distorts free competition. Distortion of competition by the state refers to decisions or actions taken by the state that contradicts the basic principles of free competition.[390] Similar practices are particularly common in countries with economies in transition, and it is in developing countries that competition law provides for provisions prohibiting anti-competitive actions by state authorities.[391]

1. Distortion of Competition by State Authorities: Legal Regulation

In order to ensure free and fair competition, the Constitution of Georgia protects undertakings from unjustified interference by the state and the creation of obstructive circumstances, including the preference of any undertaking on a selective basis.[392]

The Law of Georgia on Competition considers a distortion of competition by state authorities inadmissible. In particular, Article 10 of the Law provides a list of actions that are prohibited to be carried out by state authorities, as well as authorities of Autonomous Republic, municipal authorities and other administrative authorities. The state is obliged to create equal circumstances for undertakings and to take measures to establish and maintain a competitive economic environment and free market structure.[393]

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[389] Judgment №1/2/411 of the Constitutional Court of Georgia of December 19, 2008 in the case “LTD “Russenergoservice”, LTD “Patara Kakhi”, JSC “Gorgota”, Givi Abalaki’s Individual Company “Farmer” and LTD “Energia” v. the Parliament of Georgia and the Ministry of Energy of Georgia”, II, §5

[390] ***Ramazashvili N***., Enforcement of Competition Law in Relation to State Authorities, Competition Policy: Contemporary Trends and Challenges, Proceedings, Tbilisi, 2017, p. 208
Available in Georgian language at: <https://admin.competition.ge/uploads/81b623d91dd94bd2955643d88ccae8a7.pdf> [last accessed: 14.12.2021]

[391] *Ibid.*

[392] See Judgment №2/11/747 of the Constitutional Court of Georgia of December 14, 2018 in the case “Ltd “Giganti Security” and Ltd “Security Company Tigonis” v. the Parliament of Georgia and the Minister of Internal Affairs of Georgia”, II, §6-7

[393] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, p. 588
Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

1.1. Purpose of the Law

According to the Law of Georgia on Competition, "the purpose of this Law is to support the liberalisation of the Georgian market, free trade and competition".[394]

The above includes "to prevent the imposition of administrative, legal and discriminative barriers to entry into the market by state authorities, authorities of the Autonomous Republics and/or municipal authorities".[395]

Also, "to prevent state authorities, authorities of the Autonomous Republics, municipal authorities and other administrative authorities from granting to an undertaking such exclusive powers and selective economic advantage that unlawfully restrict competition".[396]

1.2. Subjects of Article 10 of the Law of Georgia on Competition

The subjects of the violation provided for in Article 10 of the Law of Georgia on Competition are:
1) State Authorities;
2) Authorities of Autonomous Republic;
3) Municipal Authorities;
4) other Administrative Authorities.

As a result of the amendments to the Law of Georgia on Competition in 2020, Article 10 of the Law was modified. According to the old version of the Law, Article 10 provided for the inadmissibility of distortion of competition by state authorities, authorities of Autonomous Republic and municipal authorities. According to the new edition, "other administrative authorities" has been added to the list. As stated in the Explanatory Note, the purpose of such a change is to prevent the distortion of competition while exercising public legal authority.[397] The old wording left the actions of regulators and other entities outside the scope of regulation, creating a number of practical problems. Therefore, in order to prevent such a distortion of the market by an entity that exercises public legal authority and enters into a relationship not as a private law entity but as an administrative authority, a relevant amendment was made to the provision.[398]

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[394] Article 2 of the Law of Georgia on Competition
[395] Article 2 (d) of the Law of Georgia on Competition
[396] Article 2 (e) of the Law of Georgia on Competition
[397] See Explanatory Note to the Draft Law of Georgia on Amendments to the Law of Georgia on Competition, pp. 6-7
Available in Georgian language at: <https://info.parliament.ge/file/1/BillReviewContent/224612?fbclid=IwAR07liyQvmCxIb8Bnmyp84fk8nC3DkcQuZzoj5VuvMK5kmw40ZY_gK38JXg> [last accessed: 23.12.2021]
[398] *Ibid.*

Considering the practice before the amendments to the Law, while organizing the procurement process, state-owned enterprises, where 100% of shares were held by the state, were creating similar artificial barriers and restrictive circumstances as state authorities, significantly distorting competition in relevant markets.[399] However, the Competition Agency was not able to directly establish a violation of competition law on the action of such enterprises, as they were not the subjects of Article 10 of the Law of Georgia on Competition.[400] Article 10 did not apply to state-owned companies that were legal entities under private law.[401]

The approach of the old version of the Law on this issue was quite formalistic. According to the implemented amendment, such an approach has changed. According to the current version of the Law, a private law entity participating in such relations is considered as "other administrative authority" since although it is a private law entity it exercises authority under public law and therefore for the purposes of the Law is considered an administrative authority.

According to the decision of the Georgian National Competition Agency of December 27, 2021, a legal entity under private law was considered an administrative authority. It was a state-owned enterprise with the state holding 100% of shares which announced an electronic tender for the procurement of civil liability, property, employees' health and life insurance services without an auction, according to the mandatory requirements prescribed by the Law of Georgia on Public Procurement. According to the Competition Agency, it was established that the procurement of these services was a public procurement and for the purposes of this legal relationship, the legal entity under private law was recognized as one of the special subjects of the Law of Georgia on Competition - an administrative authority.[402]

When private companies in which the state does not own shares/stocks and does not participate in the management carry out activities of high public interest, it is the state who grants them the authority to conduct these activities.[403] The state grants private companies an exclusive right to

[399] ***Ramazashvili N.***, Enforcement of Competition Law in Relation to State Authorities, Competition Policy: Contemporary Trends and Challenges, Proceedings, Tbilisi, 2017, p. 210
Available in Georgian language at: <https://admin.competition.ge/uploads/81b623d91dd94bd2955643d88ccae8a7.pdf> [last accessed: 14.12.2021]
[400] *Ibid.*
[401] In this regard, see the decision of the Georgian Competition Agency, where the Competition Agency decided to refuse to initiate an investigation, precisely because the violator was not the subject under Article 10 of the Law.
Decision of the Georgian Competition Agency of November 13, 2017 is available in Georgian language at: <https://admin.competition.ge/uploads/4bfeff2a455344c0901592d1bb93d08c.pdf> [last accessed: 09.12.2021]
[402] See Decision of the National Competition Agency of Georgia of December 27, 2021: The case of GPI Holding
Available in Georgian language at: <https://admin.competition.ge/uploads/fd9b801cff1649d39e367f7603a44af1.pdf> [last accessed: 13.02.2022]
[403] ***Chaduneli G., Kavtaradze S.***, Administrative Monopoly: A New Threat for Competition Neutrality? in: Competition Policy in Eastern Europe and Central Asia, Focus on Competitive Neutrality, OECD-GVH Regional Centre for Competition in Budapest (Hungary), Newsletter no. 15, July 2020, p. 18
Available at: <https://admin.competition.ge/uploads/f49a4cb976454913849e2c6f78ffb218.pdf> [last accessed: 09.12.2021]

carry out certain activities of high public interest (which may be related to the protection of human life and health, the safety of the living and cultural environment or the protection of state and public interests), usually for a number of legitimate reasons, e.g. to save administrative resources or to reduce the workload of administrative authorities.[404]

A public procurement is announced and the issuer of a permit or license through administrative proceedings sets a mandatory criteria and additional conditions that shall be met by selected candidate (company) in order to be able to protect public interest in the event of selection.[405] A company that will be awarded a license or permit after winning a tender is selected with extreme caution, given that the state entrusts this company with the pursuit of extremely important public goals in a particular field, for a certain period of time or indefinitely.[406]

According to the legal definition of an administrative body, "an administrative body is all state or local self-government bodies or institutions, legal entities under public law (other than political and religious associations), ***and any other person exercising authority under public law in accordance with the legislation of Georgia.***" [407]

Therefore, according to the new wording, the scope of Article 10 has been expanded. It is no longer of formalistic content and serves to identify the violator of competition law, as well as to eliminate a distortion in a timely manner.

1.3. Unjustified Interference

Intervention by the state does not mean *a priori* distortion of competition. Only unjustified interference by the state is prohibited by the Law. State intervention, in some cases, may also serve to restore healthy competition in the market. That is why an institution such as state aid can be found in the Law.[408]

In addition, Article 10 of the Law of Georgia on Competition provides exceptions – cases in which the action of the state will not be considered as a distortion of competition. For the purposes of Article 10, all actions under legislative acts are considered exceptional, which means that state authorities are not responsible for such actions, despite their possible negative impact on market competition.[409]

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[404] *Ibid.*
[405] *Ibid.*
[406] *Ibid.*
[407] Article 2 (1.a) of the General Administrative Code of Georgia
[408] See Articles 12-15 of the Law of Georgia on Competition, which provide the types of state aid.
[409] ***Japaridze L.***, ***Zukakishvili K.***, ***Sergia N.***, ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M.***, ***Gvelesiani Z.***, ***Kobadze N.***, Competition Law of Georgia, Tbilisi, 2019, p. 595
Available in Georgian language at: <https://newvision.ge/wp-content/uploads/2020/12/comp_book_color_final.pdf> [last accessed: 09.12.2021]

In order for there to be the violation provided for in Article 10 of the Law of Georgia on Competition, it is not necessary to have an intent.[410] The negligent action of a state authority, which resulted in an unjustified restriction of competition, will also be considered a violation.[411]

Unjustified interference of a state in economic processes may have a negative impact on the development of an open market economy and free competition.[412] That is why it is important to provide control and protection mechanisms by law.

2. Public Procurement

Two main types of restrictions can lead to a violation of free and fair competition in procurement markets:[413]

- Private and quasi-private restrictions of competition in procurement in the form of collusion or bid rigging, as well as abuse of market power;
- Public restrictions of competition arising from anticompetitive procurement regulation.

Any action taken by the state that puts any undertaking in an advantageous position and therefore creates unequal conditions for other market participants threatens free competition and market structure.[414]

In 2020 amendments were made to the Law on Public Procurement. According to the current version of the Law, the Competition Agency shall ensure the organizational activities of the Public Procurement Dispute Resolution Board.

Competition plays a special role in the transparent and efficient management of the public procurement system. Public procurement in Georgia is regulated by the Law of Georgia on State

[410] *Ibid.* p. 593
[411] *Ibid.*
[412] *Ibid.* p. 596, cited: Whish, Richard and Bailey, David, Competition Law, 7th ed, Oxford University Press, 2012, pp. 215-216
[413] ***Sanchez-Graells A.**,* Distortions of Competition by Contracting Authorities — Bringing Some of the Pieces Together (June 22, 2018). Presented at the conference 'Competition law and public procurement – two sides of the same coin' organised by the Polish Public Procurement Law Association in Warsaw on 12 June 2018, p.4 Available at: <https://ssrn.com/abstract=3201198> [last accessed: 14.12.2021]
[414] Judgment №2/11/747 of the Constitutional Court of Georgia of December 14, 2018 in the case "Ltd "Giganti Security" and Ltd "Security Company Tigonis" v. the Parliament of Georgia and the Minister of Internal Affairs of Georgia", II, §4

Procurement adopted on April 20, 2005 and relevant normative acts. The regulatory body is a legal entity under public law - the State Procurement Agency.

According to Article 18 (1) (II) of the European Directive, “the design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.”[415]

Factors hindering competition in public procurement are:[416]

- Overly detailed and strict tender requirements;
- Problem of qualification and retraining of the procuring entity’s staff, as well as imperfection of the testing system;
- The State Procurement Agency does not have sufficient human, financial or other resources to consider more tenders;
- Excessively strict qualification requirements – Although, according to Article 13 of the Law of Georgia on Public Procurement, “... in order to participate in procurement ... the requirements for qualification data shall be fair and non-discriminatory and must promote healthy competition.”;
- Existence of monopolies/duopolies in pharmaceutical, fuel, internet services and other markets;
- Incomplete management of the preparatory stage of the procurement.

The public procurement market is one of the largest, approximately 10% of the country’s gross domestic product.[417] Thus, ensuring free and fair competition in the public procurement market

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[415] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing, Article 18 (1)(II)
Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024> [last accessed: 09.12.2021]

[416] ***Chagelishvili A***., ***Sisoshvili G***., Assessing the level of competition by electronic means of public procurement and procurement categories, in: The Second International Competition Conference, Competition Policy: Trends and Challenges, Proceedings, Tbilisi, 2018, pp. 19-20
Available in Georgian language at: <http://www.library.court.ge/upload/33712018-11-13.pdf> [last accessed: 09.12.2021]

[417] ***Mgeladze L***., Problems of Competition in the Public Procurement System, Second International Conference on Competition Policy Competition Policy: Trends and Challenges, Proceedings, Tbilisi, 2018, p. 109
Available in Georgian language at: <http://www.library.court.ge/upload/33712018-11-13.pdf> [last accessed: 09.12.2021]

and monitoring of market competition is one of the most important factors and any decision made in the public procurement market will have a direct impact on the development of both the market and the country's economy.[418]

Bid Rigging - one of the obstacles to free and fair competition. Undertakings participating in public procurement, which should normally compete with each other, agree in advance on various conditions (price, quality of product or service) and participate in public procurement in agreement. [419] Bid rigging in public procurement is a prohibited action almost all over the world and also in Georgia such action is considered a distortion of competition law.[420]

According to the scholarly opinion, the relationship between public procurement and market competition is complex and, at the same time, bidirectional.[421] Thus, competition law enforcement should be more closely linked to public procurement.[422] Strengthening this connection should be based on a thorough understanding of many interactions between competition and procurement regulation.[423]

Interactions between competition and public procurement rules in the fight against bid rigging - it is interesting to see how the recent reform of the EU Public Procurement Rules has been implemented in order to create the necessary environment for converging enforcement.[424] One way in which a stimulus to a collusion can be partially offset or offset by high transparency in public procurement is to increase potential sanctions for violators of competition.[425] In this regard, in the field of public procurement, the imposition of specific sanctions for bid riggers increases the cost of participating in the collusion, which may contribute to the prevention of the spread of similar practices.[426] This is what the general procurement suspension and prohibition system is all about, which allows contracting authorities to exclude bidders who have previously been convicted

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[418] *Ibid.*

[419] ***Kavtaradze S***., ***Gaprindashvili G***., Agreement on Public Procurement, Challenge for Modern Competition Law, Second International Conference on Competition Policy Competition Policy: Trends and Challenges, Proceedings, Tbilisi, 2018, p. 205
Cited: Jones, Surfin, EU Competition Law, Fifth Edition, Oxford University Press, p. 689
Available in Georgian language at: <http://www.library.court.ge/upload/33712018-11-13.pdf> [last accessed: 09.12.2021]

[420] *Ibid.*

[421] ***Sanchez-Graells A***., Distortions of Competition by Contracting Authorities — Bringing Some of the Pieces Together (June 22, 2018). Presented at the conference 'Competition law and public procurement – two sides of the same coin' organised by the Polish Public Procurement Law Association in Warsaw on 12 June 2018, p.2
Available at: <https://ssrn.com/abstract=3201198> [last accessed: 14.12.2021]

[422] *Ibid.*

[423] *Ibid.*

[424] ***Sanchez-Graells A***., Competition Law and Public Procurement (August 13, 2015). Forthcoming in JA Moreno Molina & E Diaz Bravo (eds), Contratación Pública Global: visiones comparadas (Valencia, Tirant lo Blanch, 2020), p. 3
Available at: <https://ssrn.com/abstract=2643763> [last accessed: 14.12.2021]

[425] *Ibid.*

[426] *Ibid.*

of bid rigging or who were parties of a collusion in a specific tender.[427] The possibility of excluding violators of competition law from public procurement tenders was finally confirmed in one of the decisions[428] of the CJEU and, most importantly, it was also explicitly recognized in the 2014/24 European Directive[429].[430]

Developing rules and approving laws and regulations on public procurement is an expression of the legislative and administrative regulatory powers of the state.[431] It is the prerogative of the legislature or the executive. Nevertheless, the balance between competing economic and non-economic goals must be properly maintained and remain within the framework of strict proportionality analysis.[432]

3. State Aid

Miek Van der Wee[433] spoke at the conference in December 2011 about state aid and competition law:[434] In his speech, he referred to the importance of monitoring state aid in the EU. According to *Miek Van der Wee*, in addition to a state subsidy being provided by state funds (hence the funds of taxpayers), state aid is being monitored in the EU for the following main reason: subsidies have the potential to be economically very harmful. The company that receives a subsidy will be able to occupy a larger market share than it would have in the absence of that subsidy. Thus, this company will do quite well in this market, even if it is much less efficient than its competitors who have received no assistance. Subsidies, on the other hand, may weaken the incentive of a subsidiary company to be competitive and improve its operations or invest in product or process innovations. Markets can sometimes fail, which is best manifested in the failure of market prices to cope with external factors. The existence of a market failure justifies state intervention. A state can intervene

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427 *Ibid.*

428 *Ibid.*

Cited: Generali-Providencia Biztosító, C-470/13, EU:C:2014:2469, paras 34 to 39

429 Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on public procurement / COM/2011/0896 final - 2011/0438 (COD)

Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011PC0896> [last accessed: 10.12.2021]

430 ***Sanchez-Graells A.***, Competition Law and Public Procurement (August 13, 2015). Forthcoming in JA Moreno Molina & E Diaz Bravo (eds), Contratación Pública Global: visiones comparadas (Valencia, Tirant lo Blanch, 2020), p. 3

Available at: <https://ssrn.com/abstract=2643763> [last accessed: 14.12.2021]

431 ***Sanchez-Graells A.***, Distortions of Competition Generated by the Public (Power) Buyer: A Perceived Gap in EC Competition Law and Proposals to Bridge It (August 21, 2009). University of Oxford, Center for Competition Law and Policy, CCLP (L). 23, p.68

Available at: <https://ssrn.com/abstract=1458949> [last accessed: 14.12.2021]

432 *Ibid.*

433 Head of International Relations Unit of DG Competition from 2008 to 2013

434 See ***Van der Wee M.***, State aid and distortion of competition, Speech at Conference on "Competition Enforcement Challenges & Consumer Welfare", Islamabad, 2 December 2011

Available at: <https://ec.europa.eu/competition/speeches/text/sp2011_17_en.pdf> [last accessed: 23.12.2021]

in many ways. This is why subsidizing companies can, in some cases, be an efficient way to overcome such market failures.

Although this speech by *Miek van der Wee* has been around for more than a decade, in the context of the importance of state aid control, it is still relevant today.

According to the legal definition, state aid is a decision made with respect to an undertaking stipulating tax exemption, tax reductions or tax deferrals, debt relief, debt restructuring, granting loans on favourable terms, transfer of operating assets, monetary assistance, granting of profit guarantees, privileges, or other exclusive rights.[435]

The Georgian model of state aid was created under the influence of the European one.[436] The Law prohibits state aid that hinders competition or creates the danger of its suspension, except for the exceptions provided by the same Law. The list of exceptions is exhaustively given in the Law. State aid shall be permissible with the consent of the Competition Agency if it does not significantly distort competition or does not create a threat of its significant distortion and shall be granted: a) for the economic development of certain regions; b) to promote the preservation of culture and cultural heritage.[437]

The provider of a state aid is a state authority, an authority of an Autonomous Republic and/or a municipal authority, a non-entrepreneurial (non-commercial) legal entity, a legal entity under public law, an undertaking in which the State holds more than 50% interest or an intermediary undertaking acting on behalf of the State, which directly or indirectly exercises the authority to grant state aid.[438]

State aid refers to e.g. exemption from taxes, direct subsidies, favorable credit guarantees, transfer of land and buildings, etc.[439]

Both state and local budget funds are considered to be state resources. However, the mere fact that an aid was provided by a state-owned enterprise is not sufficient and in order for an aid to be

[435] Article 3 (r) of the Law of Georgia on Competition
[436] ***Tsertsvadze G.***, Competition Law: The European Model for Georgia, Volume I, World of Lawyers Publishing House, Tbilisi, 2020, p. 346
Available in Georgian language at: <https://jtconsulting-geo.com/uploads/files/publications/11/samartali-giorgi-tsertsvadze.pdf> [last accessed: 14.12.2021]
[437] Article 12 (3) of the law of Georgia on Competition
[438] Article 3 (s) of the Law of Georgia on Competition
[439] ***Devidze A.***, ***Mirianashvili G.***, Textbook of EU Law, GIZ, Tbilisi, 2019, p. 107
Available in Georgian language at: <http://lawlibrary.info/ge/books/2020giz-ge-EU-Law-textbook.pdf> [last accessed: 14.12.2021]

considered a state resource, it is necessary to establish that a state has control over that enterprise and therefore a measure taken by it is a measure taken by a state.[440]

Giving a subsidy to any enterprise means putting its recipient in an advantageous position. In order to assess a negative impact of an aid on competition, an economic situation of a recipient enterprise should be analyzed before and after receiving an aid and if a company's condition improves after receiving an aid, an aid is considered to have a negative impact on competition.[441]

4. Statistics and A Brief Overview of Practice

Compliance with the decisions, instructions and other legal acts of the Competition Agency shall be binding upon state authorities, authorities of the Autonomous Republics, municipal authorities and other administrative authorities, and undertakings.[442]

In relation to state authorities, authorities of the Autonomous Republics, municipal authorities, or other administrative authorities, the Competition Agency shall be authorized to, in case of violation of this Law, submit a reasoned decision and relevant recommendation to the said body on the illegal decision made, or the illegal action taken by this body, including request to revoke this decision or prohibit the action, and in case of the non-fulfilment of this request to raise the issue with the superior body or official.[443]

The practice of the Georgian Competition Agency is rich in the study of competition-restrictive actions by state authorities. In practice, quite often there are investigations conducted in connection with Article 10 of the law. According to the latest data, the Competition Agency, from 2015 to date, has conducted 11 investigations into competition violations by state authorities and in 9 cases established the fact of violation. In one case, no violation was found, because the respondents were not the subjects of Article 10 of the Law of Georgia on Competition and, consequently, no violation of the law was found against them. However, as a result of the investigation, the disputed terms were considered to be restrictive for competition.[444] In the other case, no violation was found, because the tender conditions developed by the administrative body did not lead to violation of competition law, in particular, it did not hinder the entrepreneurial activities and independence of undertakings and these tender conditions did not create a monopolistic position for a particular undertaking, which would substantially restrict free pricing and competition.[445]

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[440] *Ibid.*
[441] *Ibid.* p. 108
[442] Article 16 (5) of the Law of Georgia on Competition
[443] Article 18 (2.c) of the Law of Georgia on Competition
[444] Decision of the Georgian National Competition Agency of December 28, 2016: Insurance Case N1 (Tender Requirements for Insurance Products)
Available in Georgian language at: <https://admin.competition.ge/uploads/ef8e48c555ad455584ba84d0fd8741db.pdf> [last accessed: 23.12.2021]
[445] Decision of the National Competition Agency of Georgia of December 27, 2021: The case of GPI Holding

And in 12 cases no investigation was initiated because the cases under consideration did not meet the admissibility requirements. The grounds for refusing to initiate an investigation by the Competition Agency were as follows: there was no relevant legal basis and reasonable suspicion of alleged violation, the complaint was not submitted by an authorized person, the complaint was the subject of review by other bodies (not Competition Agency) or the court, etc.

Table №1

Became pending with the Competition Agency	Decisions on inadmissibility	Decisions based on Investigation	Established the fact of violation
23 cases	12 cases	11 cases	9 cases

In the nine cases considered, the Competition Agency identified unlawful restrictions on competition by the state and established violations. Most of the violations by the state were revealed during the public procurements. In particular, the imposition of artificial barriers by state authorities and hence the distortion of a competitive environment. In public procurements, state authorities imposed such tender requirements/conditions that reduced the number of bidders and, consequently, prevented the creation of a healthy competitive environment.

This is related to the violation of Article 10 (c) of the Law of Georgia on Competition, which prohibits state authorities, authorities of Autonomous Republic, municipal authorities and other administrative authorities to ban, suspend and/or otherwise hinder the entrepreneurial activities and independence of undertakings.

In the case of insurance companies, the terms of the public tender announced for the procurement of insurance services (in particular, setting a requirement for high margin of attracted/generated premium and a requirement for experience for insurance companies) were discriminatory, which had a restrictive effect on the market and consequently significantly reduced the number of potential competitors.[446]

A similar case was detected, and the tender requirement was qualified as a violation of the competition law by the Competition Agency. There was an imperative requirement to submit bank

Available in Georgian language at: <https://admin.competition.ge/uploads/fd9b801cff1649d39e367f7603a44af1.pdf> [last accessed: 13.02.2022]

[446] *Ibid.*

guarantees issued only by commercial banks during a pre-payment. In addition to creating an artificial barrier to entry into the market with bank guarantees, it also restricted the right of insurance companies to offer bank guarantee services to their customers which was provided for in Article 879 of the Civil Code of Georgia.[447]

In 9 cases considered by the Competition Agency, there were also cases where the violation was related to Article 10 (e) of the Law of Georgia on Competition i.e. the decisions by state authorities that result in the monopolistic position of undertakings, thereby substantially restricting free pricing and competition. For the procurement of design/construction/engineering works, most of the Procuring Entities insisted in the tender documents that they would accept/acknowledge the compliance document prepared only by one specific organization. The Competition Agency considered the mentioned tender requirement inconsistent with the competition legislation and established a violation.[448]

The practice of the Competition Agency reveals that restriction of market competition by the state can be implemented in various ways. In each case, determining the presence or absence of a restriction of competition requires a comprehensive analysis, which includes a study of the legal basis, as well as an assessment of relevant market.

With regard to state aid, there are two cases in the practice of the Competition Agency.

According to the factual circumstances of one of the cases, state aid was planned to be provided to a particular organization to promote the economic development (namely, viticulture, fruit growing, etc.) of Ozurgeti Municipality. Ozurgeti Municipality submitted an application to the Competition Agency for it to determine the compliance of the state aid to be granted to the organization with the requirements of the competition law. The Competition Agency studied the issue and by its decision of 22 March 2016 determined that the state aid to be provided complied with the requirements of the competition law and prepared a relevant legal conclusion.[449]

According to the factual circumstances of the second case, the state aid was planned to be granted to the same organization as represented in the first case, in order to promote the economic development (building a greenhouse, etc.) of Ozurgeti Municipality. Ozurgeti Municipality also submitted an application on this issue to the Competition Agency for it to determine the

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[447] Decision of the Georgian Competition Agency of August 7, 2018: Insurance Case N3 (Advance Payment Guarantees)
Available in Georgian language at: <https://admin.competition.ge/uploads/e2c1d4347c3247db9c9cfe3627f4cd8f.pdf> [last accessed: 26.01.2022]

[448] Decision of the Georgian Competition Agency of April 22, 2015: Case of Optimal Group+
Available in Georgian language at: <https://admin.competition.ge/uploads/721e7589f36f46febbf347a81847fb2d.pdf> [last accessed: 26.01.2022]

[449] Decision of the Georgian Competition Agency of March 22, 2016: Ozurgeti Case №1
Available in Georgian language.

compliance of the state aid to be granted to the organization with the requirements of the competition law. The form of state aid was financial assistance in the amount of GEL 90,000. Due to the fact that the state aid to be provided by Ozurgeti Municipality exceeded an insignificant amount of individual state aid, its issuance required the consent of the Competition Agency.[450] That is why the Municipality applied to the Agency.

In order to determine the compliance of the state aid to be granted with the requirements of the legislation, the Competition Agency assesses the already existing competitive situation in the market, for which it takes into account such parameters as: [451]

a) entities operating in the relevant market;
b) determination of the relevant market volume;
c) determination of the share of an undertaking operating in the relevant market;
d) the level of relevant market concentration;
e) barriers to entry into the relevant market;
f) assessing the market power of undertakings.

After studying the issue, the Competition Agency found that the state aid to be provided complied with the requirements of the competition law and prepared a relevant legal conclusion.[452] The Competition Agency, in assessing the market power of the state aid recipient organization, explained that its limited resources (namely, 4.5 ha of the land) were used for various purposes: the use of the land served to support the activities of farmers living in the territory of the Municipality, to cultivate different types of crops, etc. Therefore, through the activities of the organization, the results obtained in each field could not restrict competition. The activities of the organization would not have been so large as to have competed with other enterprises or farmers. At the same time, the organization, in particular cases, carried out and planned to give away the received products free of charge in the future. Therefore, the Competition Agency found that the organization did not compete with local farmers.

Other, more detailed factual circumstances regarding the first case (Ozurgeti case №1) as well as the full text of the decision is not available at the official website of the Competition Agency. However, it should be noted that the subjects of the first and the second (Ozurgeti case №2) cases are the same (Ozurgeti Municipality as the provider of state aid and a specific organization as the recipient of state aid) and according to the above factual circumstances, state aid is granted for the same purpose (for the economic development of the region: in one case it was related to viticulture,

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[450] See Article 12 (2.e) of the Law of Georgia on Competition
[451] See Decision of the Georgian Competition Agency of May 3, 2017: Ozurgeti Case №2, p. 30 Available in Georgian language at: <https://admin.competition.ge/uploads/3150e146d1414dc0831c5db2de52bac9.pdf?fbclid=IwAR1kPrTugAkeSA57xHnQlhB-oikTiONXXBJqVOL17Ntb-3_M05nq-_2Sj1w> [last accessed: 26.01.2022]
[452] For more details, see *Ibid.*

fruit growing, etc. and in the other case - the building of a greenhouse, etc.). However, in the decision made on the second case, a reference on the first case can be found, according to which the full amount of state aid received in 2016 could not be used. It is also mentioned that Order № 37 of 22 March 2016 was accompanied by a recommendation. The Competition Agency recommended the relevant authorities to draw out a development plan that would have outlined the consequences of state aid to specific sectors and when they would be able to develop without state aid. According to the Competition Agency, state aid should not be of a permanent nature and should be used as a temporary measure for the development of the relevant sector or region.[453] Despite the recommendation, in 2017 there was still a need to provide state aid.

5. Interim Conclusion

State authorities should not create a monopoly position by favoring any undertaking and should not impede the functioning of a healthy competitive environment.

Unjustified interference by the state harms not only the undertaking but also the consumer. Competition in the relevant market is not efficient enough and therefore consumers are restricted in their choice.

The activity of the German Competition Authority (*Bundeskartellamt*) in the field of consumer protection is noteworthy. Amendment 9 of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*, *GWB*), which entered into force in early June 2017, gave the German Competition Authority its competence in the field of consumer protection for the first time, which includes the Anti-Competition Act and general business terms and conditions.[454]

The German Competition Authority (*Bundeskartellamt*) is authorized to conduct sector inquiries into consumer law issues. In particular, when there is a reasonable suspicion that provisions of consumer law, such as the Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb (UWG)*), have been severely violated. However, the Authority has not yet been given executive powers in this regard (i.e. it cannot intervene and take appropriate action). The Authority can issue reports, act as *amicus curiae* - "friend of the court" in civil consumer protection actions. Accordingly, it has more of a consulting function.[455]

Thus, unjustified interference by a state should be strictly controlled by a competition authority.

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[453] *Ibid.,* p.37

[454] Read more on the official website of the German Competition Authority: <https://www.bundeskartellamt.de/EN/Consumer_Protection/Consumer_Protection_node.html> [last accessed: 23.12.2021]

[455] *Ibid.*

State aid should be a temporary event for the development of the relevant sector or region and it cannot be given a systematic character, which may eventually lead to the distortion of competition. Thus, it is subject to the efficient control performed by the Competition Agency.

VII. Regulation of Fair-Trade Practices in Georgia

1. Current Situation

At present, the current legislation of Georgia does not regulate fair trade conditions between retailers and suppliers. This is in a context where there are significant problems in the legal relationship between suppliers and retailers, which in turn has a significant impact on the one hand, the consumer, and on the other hand, the competitive environment in the sector.

Accordingly, undertakings, suppliers who think they are operating in unfair trading conditions, seek the existing legal framework, general norms of the Civil Code of Georgia (e.g. Articles 54 and 342-350 of the Civil Code) and the Law on Competition (e.g. Article 6) on the basis of achieving the desired result. The law firm "J&T Consulting" is representing the interests of suppliers against large supermarkets in a number of disputes.

In view of the problems in the practice of trade between suppliers and retailers, the Competition Agency's April 2020 Market Monitoring Report on "Sector Monitoring of the Retail Market Facility" is important and interesting.[456] In this report, the Agency found that there are problems in this sector, however, the existing legal framework does not allow it to respond properly and hence recommended the development of appropriate legislation.

In September 2021, the Alliances Caucasus Programme (ALCP) conducted a survey to identify problems in trade practices between entrepreneurs and supermarkets in order to identify problems between dairies and supermarkets.[457] This survey, once again, clearly confirms the problems that exist. The research revealed the following main problems:

- Terms and conditions of payment for delivered products;
- Entrance fee;
- Transparency, access to information on the balance of products submitted by the entrepreneur in the supermarket
- The so-called Retro bonus;
- Return of products;
- Marketing costs;

To address these issues, the Alliances Caucasus Programme (ALCP) has set up a working group to draft a law (**hereinafter referred to** as " the draft law") to ensure fair trade conditions. The

[456] LEPL Georgian Competition Agency April 2020 Market Monitoring Report, Available in Georgian language at: <https://admin.competition.ge/uploads/35b875d2cc6e449a9661cb48596bb4c5.pdf> [Last accessed 25.12.2021]

[457] Investigating an Unlevel Playing Field Experiences of Dairies Supplying Supermarkets in Georgia, Market Research, Marneuli, September 2021, ALCP, Mercy Corps

legal expert of the working group is the law firm "J&T Consulting" leaded by Giorgi Tsertsvadze and Otar Machaidze.

Meetings with milk, meat, honey, tea, fruit, spices, dried fruits, berries, bread producers were planned and conducted within the project in order to identify the existing problems. Also, with the Georgian Farmers 'Association, the Georgian Distributors' Business Association, the Georgian Producers 'Association, the Georgian Beekeepers' Association, the Georgian Dairy Association, the Berries Association, the Georgian Stores Association.

In addition to the Entrepreneurs Project, meetings were held with donor organizations and government agencies to address and solve existing issues, including the Food and Agriculture Organization (FAO), the United Nations Development Program (UNDP), the United States Agency for International Development (USAID), and the Competition Agency, Chairman of the Committee on Agrarian Affairs, Committee on Sectoral Economics and Economic Policy, National Food Agency.

The law is being drafted for this stage, in the upcoming months it is planned to introduce the draft law to all stakeholders to develop the draft law in the interest of all parties and to ensure a fair balance between undertakings.

2. The main goals and objectives of the draft law

The stated position of the Georgian state is the policy of approximation with Europe, including in terms of the legislative framework. For this purpose, the EU Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain of 17 April 2019, was selected by the working group as the basic document for drafting the law.[458]

The draft law is fully based on and shares the regulation of the directive. The draft law, as a directive, will be aimed at combating practices that are coarsely contrary to good commercial practices, good faith, fair relations and which are unilaterally imposed by one trading partner on another.[459]

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[458] DIRECTIVE (EU) 2019/633 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX%3A32019L0633&from=en&fbclid=IwAR1jM5nU7Q06bzVxyaJM56z88X8MHje24puVOvMBC5pQVq4cVZZ3afxRZhI> [Last accessed 25.12.2021]

[459] DIRECTIVE (EU) 2019/633 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, Article 1, Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX%3A32019L0633&from=en&fbclid=IwAR1jM5nU7Q06bzVxyaJM56z88X8MHje24puVOvMBC5pQVq4cVZZ3afxRZhI> [Last accessed 25.12.2021]

The draft law, like the directive, establishes the so-called Black and Gray lists. Blacklisted practices are unconditionally excluded and considered unlawful (e.g. payment terms and conditions), while gray listed practices are permitted provided that they are mutually agreed ('in clear and unambiguous terms') between potential or existing counterparties (Such as marketing costs).[460]

In order for the draft law to be efficient and have a real effect, it is important to have efficient enforcement mechanisms. Therefore, according to the draft law, the executive and controlling body of the law will be the Georgian Competition Agency.

As for the amount of the sanction, taking into account the European experience, the draft law may provide the rule of calculation of the sanction, which will be tied to the turnover of the undertaking of the previous year and / or a fixed amount. The aim of the working group is to determine the amount of the sanction to the extent that it has the appropriate preventive effect and for the offender it should not be "worth" paying this sanction.

3. Interim Conclusion

- The current legislation of Georgia does not recognize the regulation of fair conditions of trade between retailers (traders) and suppliers.
- A draft law is being drafted, which should take into account the interests of all parties and ensure a fair balance between undertakings.
- The draft law is fully based and shares the regulation of the directive. The draft law will be aimed at combating practices that are coarsely contrary to good commercial practices.

[460] Refer to: <https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/market-measures/agri-food-supply-chain/unfair-trading-practices_en> [Last accessed 25.12.2021]

Chapter VIII. Dumping

1. Dumping - A threat to local industry

When the state actively promotes imports and allows imported goods to be placed on the local market, in order to avoid the accompanying challenges, it must have an effective mechanism by which it can maintain a competitive environment for the local industry. Such a challenge for the local industry is dumping. In the presence of dumping, goods imported into the country are placed on the local market relatively cheaper then similar goods of local production. As a result, the detrimental effect of dumping prices is reflected on the local market and it loses competitiveness under dumping conditions, which hinders the development of local production and reduces the number of employees.

Companies use dumping to expulse local competitors from the local market, in particular, importers with low prices are trying to eliminate competitors, which further poses an even greater threat to the local industry, namely: monopoly prices appear on the market as the importer is freely allowed to increase the price in the conditions of weakened competition on the market. Importers, using the practice of dumping pricing, on the one hand, are trying to gain a dominant position on the local market, which puts local production in unfair competition.

Dumping can be attractive and beneficial to the consumer only for a short time, namely, in the period when the importer keeps low prices on his/her own products after expelling competitors from the market. However, the ultimate goal of dumping, in the absence of competition and after gaining market power, is to increase prices. Thus, consumers are left with more expensive products and it will be difficult for them to replace in the absence of a competitive market.
Economists believe that anti-dumping legislation is an important mechanism to protect against such threats.[461]

Dumping is a challenge for countries with both small and large market economies, which pushes states to take appropriate anti-dumping measures and implement them into the legislation.

First interim conclusion

Dumping prices and practices are meant as placing imported products on the market at a lower price than like products of local production, which is detrimental to local industry as it serves to drive local producers out of the market and strengthen the market power of importers. This challenge creates the need for states to adopt anti-dumping legislation.

[461] See Interview of Georgian economic expert – ***Soso Archvadze***, April 23, 2019
Available at: < http://businesspost.ge/geo/page/interview/4858 > [last accessed: 25.11.2021]

2. The need of legislative regulation in Georgia

2.1 Brief Overview

There has been an active discussion over the years within the Georgian state institutions about the need of adopting anti-dumping legislation.

The need to adopt anti-dumping legislation for Georgia, as a country with an open economic trade policy, is also recorded in the explanatory note of the bill. The reason for the adoption of the bill is (1) the problem itself and (2) the inevitability of the adoption of the law to solve the existing problem, which stems from the obligations assumed as a result of joining the World Trade Organization (WTO),[462] in particular, for applying protective measures in trade, which the WTO offers, it first became necessary to develop a legislative and normative framework.

2.1.1 Current situation on the Georgian market

In Georgia, where the production of any product costs expensive, placing the imported product on the market at a lower price is equivalent to weakening and losing positions on the market for local producers.

Nowadays the problem of dumping in Georgia is relevant in the construction sector, namely, for local companies producing cement. Cement import by Turkish and Azerbaijan companies in Georgia have been carrying out at prices much lower than production cost, which led to the narrowing of local industry and the creation of a non-competitive environment. The price difference between locally produced cement and imported cement is estimated up to 25 Gel, which, as the Georgian company states, brings great damages to the local enterprise and hinders their functioning on the market.[463]

Georgian economic experts assess the existence of dumping prices on the local market as having a devastating effect on the economy and according to them, these results are primarily reflected in the reduction of local production, which is followed by an increase in unemployment.[464]

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[462] Explanatory Note to the Bill of Georgia on the introduction of anti-dumping measures in trade
[463] See Report of Business Partner on "Cement Manufacturers Complain about Dumping Prices", June 24, 2021
Available at: <https://1tv.ge/video/cementis-mwarmoeblebi-dempingur-fasebze-chivian/> [last accessed: 26.11.2021]
[464] See Interview of Georgian economic expert – ***Soso Archvadze***, April 23, 2019,
Available at: < http://businesspost.ge/geo/page/interview/4858 > [last accessed: 25.11.2021]

2.1.2 Obligations under international agreements

Georgia has been a member of the World Trade Organization (WTO) since June 14, 2000. The WTO has actively started the fight against dumping and by General Agreement on Tariffs and Trade (GATT), along with other important issues, defined anti-dumping measures in trade,[465]and drawn up an agreement for their implementation,[466] where it defined the norms and principles on which basis the anti-dumping mechanism should be developed. At the same time, the agreement states the obligation of the member states, according to which the application of the protection measures provided by the agreement is not allowed by the member states until the existence of the relevant legal framework at the national level. Thus, it was important for Georgia to take effective steps to use the protections offered by the WTO.

In addition, Georgia's Association Agreement with the EU sets out trade-related issues, including anti-dumping and compensation measures, which indicates that the parties to the Association Agreement assert their rights and obligations under the GATT regarding anti-dumping measures.[467] herein, the Deep and Comprehensive Free Trade Agreement (DCFTA) with the European Union, which is an important part of the Association Agreement and promotes Georgia's European integration, provides anti-dumping measures based on the GATT Agreement.[468]

The basis for the adoption of the bill are the Association Agreement and the fulfillment of the obligations under the WTO membership.[469] Although, the Association Agreement does not stipulate the obligation of Georgia to comply with EU anti-dumping regulations, bill was harmonized with EU law and does not contradict it.[470]

As explained at the discussion stage of the bill, it was prepared in accordance with the principles of the World Trade Organization.[471] Thus, the provisions of the Law of Georgia "on the introduction of Anti-Dumping measures in trade" is harmonized with the anti-dumping regulations established under the WTO.

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[465] Article 6 of The General Agreement on Tariffs and Trade 1994
[466] The Agreement on the Implementation of Article VI of The General Agreement on Tariffs and Trade 1994
[467] Article 40 of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part
[468] ***Emerson M., Kovziridze T.,*** "Deepening relations between the EU and Georgia - what, why and how?", 2018, p. 53
[469] Explanatory Note to the Bill of Georgia on the introduction of anti-dumping measures in trade, sub-paragraph (c.c)
[470] *Ibid.* Sub-paragraph (c.a)
[471] See Meeting for discussion of the Bill on Anti-dumping Measures
Available at: <http://www.economy.ge/index.php?page=news&nw=1145&s=genadi-arveladzem-antidempinguri-kanonmdeblobis-proeqtis-ganxilvashi-miigo-monawileoba&fbclid=IwAR318tjwINa10EzV2FiSJ_dTO_CPNJcfmmrIsbMHGaVLVD56xxVWvPAJ-lA>
[last accessed: 29.11.2021]

Second interim conclusion

The need to adopt anti-dumping law was due to the use of trade protection measures offered by the World Trade Organization to the member states of the Agreement. At the same time, it was necessary to respond to the problems within the law, the existence of which is indicated by the local industry.

3. Review of national legislation

3.1 Introduction

The bill was submitted to the Parliament of Georgia at the initiative of the Ministry of Economy and Sustainable Development of Georgia. According to the Department of Foreign Trade, each detail of the bill was actively discussed with NGOs and business associations, on the basis of which the bill was revised and finalized.[472]

The Law of Georgia on the Introduction of Anti-Dumping Measures in Trade has been in force since January 1, 2021 and the Competition Agency has started accepting applications to investigate alleged dumping cases from June 1, 2021. Thus, anti-dumping legislation is still new for Georgia and there is no Competition Agency practice on this issue yet.

In addition to the adopted law, there were enacted by-laws, which describe a number of procedures for the introduction and enforcement of anti-dumping measures in more detail. In particular, three by-laws have been enacted:[473]

1. Resolution for the purpose of Introduction on Anti-dumping Measures in Trade on approving the rules and procedures for conducting the investigation;
2. Resolution on the Rule of Decision on the Introduction of Anti-Dumping Measures by the Government of Georgia;
3. Resolution on the Rule of Administration of Preliminary Anti-dumping Measures and Special Anti-dumping Duty.

3.2 The Law on the Introduction of Anti-Dumping Measures in Trade

[472] See Interview with "Business Imedi"
Available at: <https://imedinews.ge/ge/ekonomika/149367/mariam-gabunia-antidempinguri-kanoni-chvens-partnior-qveknebtan-tavisupal-vachrobas-khels-ar-sheushlis?fbclid=IwAR2FZYhmLZRnhdcHK-PZigg17yJuq-OUPNBk146LoSExJUyRxXKugPWzfOQ > [last accessed: 29.11.2021]

[473] Read more on the official website of the Georgian Competition Agency:
< https://competition.ge/antidamping/legislation > [last accessed: 06.12.2021]

The Law of Georgia on the Introduction of Anti-Dumping Measures in Trade is the main legal instrument, establishing measures to protect local trade from dumping. The main purpose of the law is to protect local industry from dumped imports, which is defined as the practice of pricing in international trade, when a product is exported at a value less than its production cost or selling cost in exporting country.[474]

Anti-dumping measures are preceded by investigation of imported product. An authorized body for investigation is Competition Agency, which has established the Anti-Dumping Measures Department to ensure coordination for the enforcement of anti-dumping legislation.

The basis for initiating the investigation is a written application submitted to the Competition Agency. In this case, the applicant may be a local industry producing a product similar to the object of investigation, i.e. an imported product, or any natural, legal person or non-legal entity acting on behalf of the local industry.[475] However, the application submitted by the local industry is not sufficient to initiate the investigation and the applicant's authority to submit the application should be further verified on the basis of a two-folded test, namely: (1) an application shall be submitted by or on behalf of a local industry which produces the like product making up more than 50 percent of the total like product jointly produced by local industry and (2) on the basis of opinions expressed in support of or contrary to an application, determines that the part of local industry which supports the application do not produce less than 25 percent of the total like product produced by local industry.[476]

Competition Agency at the stage of reviewing the submitted applications and its admissibility assess *prima facie* evidence of (1) alleged dumping imports; (2) damage inflicted on local industry by dumped imports or the risk of such damages and (3) causal relationship between the alleged dumping and the damage or risk of such damage.[477] If the application and the evidence contained therein give the Competition Agency *prima facie* grounds for suspecting that dumping imports may have taken place, Competition Agency shall decide whether to initiate the investigation. The periodicity of the evidence shall be determined, in particular, the evidence of the existence of alleged dumping should correspond to a period of at least 6 months prior to the commencement of the investigation and evidence indicating the existence of damage should correspond to a period of 3 years prior to the commencement of the investigation.

The object of the investigation is an imported product, whose export price, under normal conditions of trade, is below the normal value of a like product in the local market of the exporting

[474] Explanatory Note to the Bill of Georgia on the introduction of anti-dumping measures in trade
[475] Georgian National Competition Agency, Guidelines for filling in the application for authorized body of investigation for the introduction of anti-dumping measures in trade, p. 9
[476] *Ibid.*
[477] *Ibid.,* p. 5

country. As part of the investigation, the Competition Agency assesses the cumulative existence of 3 components,[478]namely:

(1) Object of investigation is imported through dumping import;
(2) That inflicts damage, or threatens to inflict damage, on local industry;
(3) Causal relationship between the damage and the import dumping.

Therefore, for the use of Anti-Dumping Measures, the Competition Agency first establishes the existence of dumping, then examines the damage to the local industry and finally the causal relationship. It is important to consider all the above components that form the basis for the use of anti-dumping measures.

3.2.1 Dumping import

According to the law, dumping - is the placement of the object of investigation in the local market at a price below normal value, which means that the export price of an imported product under normal trading conditions is less than the comparable price of a like product for the local market of the exporting country.[479] Thus, within the presence of dumping, goods imported into the country are placed on the local market at a relatively low price compared to the similar goods of local production.

For the purposes of establishing the fact of dumping, the object of investigation is compared with a like product of local production which the law defines[480] as a product that is identical to the object of investigation or has characteristics that are very similar to the characteristics of the object of investigation.

It is noteworthy, that the difference between prices does not *a priori* indicate the presence of dumping on the market and it is important to analyze these differences, in particular, once the object of investigation and a like product is identifiable, it becomes necessary to establish dumping margin based on comparable prices. A comparison is made between the export price and the normal value.

Normal value

The sales volume of a like product is important for determining normal value, in particular, the sales volume of a like product shall be deemed to be a sufficient volume for determining a normal value if the sales volume of the like product makes up 5 percent or more of the sales of the object

[478] Article 6 of Law of Georgia on the Introduction of Anti-Dumping Measures in Trade
[479] Article 2 (j) of Law of Georgia on the Introduction of Anti-Dumping Measures in Trade
[480] Article 2 (m) of Law of Georgia on the Introduction of Anti-Dumping Measures in Trade

of an investigation. In addition, the law considers a volume of sales below the 5 percent to be sufficient if it allows for a comparable price to be determined.

Ultimately, normal value is defined as the price of a like product intended for the local market of the exporting country under normal conditions of trade or in the absence of such a price, a comparable price of a like product in the ordinary course of trade during export into a corresponding third country.[481]

Export price

According to the law, "an export price is the price paid, or to be paid, during the sale of an object of investigation from an exporting country".[482] More specifically, it is the price imposed on the product by the exporter to the importers. However, the same article defines different methods for calculating the export price, in case there is no information about the export price of the object of investigation.[483]

Comparison of prices and a dumping margin

During comparison and determining the differences between export price and the normal value, the differences which affect price comparison shall be taken into account, including the difference between the physical characteristics of comparable products, quantity, terms of sale, and etc. Thereto, the comparison is made at the same stage of the trading operation.

The dumping margin assumes the difference between the normal value and the export price. The law provides for the different rules[484] for determining the dumping margin in cases where (1) No similar product is sold in the exporting country; (2) It is sold in insufficient volume or; (3) Due to the special market situation, sales of a similar product do not allow for a fair comparison. In this case, the law prescribes two methods of determining the dumping margin, namely the dumping margin must be determined: a) The comparable price of a like product when the product is exported in a third country provided that the procedure for calculating the price is apparent both in terms of the type of product and the number of transactions; b) The cost of production in the country of origin which shall be added to administrative, sales and other expenses, as well as profit.

3.2.2 Determination of damage

[481] Article 2 (j) of Law of Georgia on the Introduction of Anti-Dumping Measures in Trade
[482] Article 11 of Law of Georgia on the Introduction of Anti-Dumping Measures in Trade
[483] Article 11 of Law of Georgia on the Introduction of Anti-Dumping Measures in Trade
[484] Article 7(2) of Law of Georgia on the Introduction of Anti-Dumping Measures in Trade

As already mentioned, the existence of dumping is not in itself a violation of law. In order to take anti-dumping measures, it is necessary for the importing state to prove the existence of damage inflicted or the threat of inflicting damage on the local industry.

According to the Anti-Dumping Department of the Competition Agency, an important mechanism for determining the damage inflicted on the local industry in the presence of dumping is dynamic monitoring of the industry, through which the Competition Agency assesses the market situation, before and after dumping. Ensuring the objective assessment is the reason why applicants are required to submit the information indicating the existence of damage which corresponds to a period of last 3 years.[485]

The volume of import dumping and the impact of the dumped imports on a similar product of local production and on the local producers themselves are the main factor that shall be taken into consideration for determining the damages. When it comes to identifying a threat of damage, it is not enough to just assume such a threat, but it is necessary to exist a clearly expressed threat that is inevitable for the local industry.

3.2.3 Causal relationship

For establishing a causal relationship, it is necessary to analyze the factors being independent of dumping imports, which additionally affect the occurrence of such a result. It is therefore important to distinguish between these factors and their consequences from damages or threat of damages caused by dumped imports. Thus, in addition to the volume of dumped imports and the price of a like product, the Competition Agency is investigating the existence of other circumstances that could be detrimental to local industry.

3.2.4 The burden of proof

The law does not provide specific guidance on the burden of proof, However, given the specifics of the application to be submitted to the Competition Agency, burden of proof mainly falls on the local industry. In addition, the investigation is based on the information and evidence provided by the party.

According to the Competition agency, the burden of proof falls on both importers and local entrepreneurs, and this legal mechanism ensures the involvement of both importers and local industry in the process of investigation, namely, the Competition Agency makes decisions based

[485] See Online Discussion "Dumping and Foreign Trade Policy of Georgia", 2021
Available at: < https://fb.watch/9RUMXd8Cv7/ > [last accessed: 04.12.2021]

on the information provided to them and therefore, it is in both parties interests to cooperate with the Competition Agency and provide them with as detailed information as possible.[486]

3.2.5 Anti-dumping measures

The purpose of introducing anti-dumping measures provided by law is first and foremost to compensate for the damages inflicted on the local industry in terms of dumping prices. For compensating such damage, the law provides for a special anti-dumping tariff, which imposes a lower tariff on dumping products.

Based on the carried out investigation, the Competition Agency submits its opinion to the Government of Georgia on the expediency of on the introduction, revision or elimination of anti-dumping measures and the Government of Georgia based on the submitted opinion, within 30 calendar days, makes a decision on the introduction, revision or elimination of anti-dumping measures, which is approved by a resolution.[487] In making the above decision, the government takes into account the interests of both local industry and the public. Therefore, before making a decision, it is important to assess how such a tariff will affect local entrepreneurs and consumers. However, in each case, the amount and term of the tariff should be determined individually, which is important to ensure compensation for a local industry. However, the law sets an anti-dumping tariff limit, in particular the introduction of a special anti-dumping tariff should not exceed 5 years. The law also provides for the exceptional case when, on the basis of a re-investigation, the termination of the tariff in the opinion of the Competition Agency will cause damage to the local industry. In such a case, the special anti-dumping tariff may remain in force until the end of the investigation, which should not exceed 12 months.[488]

3.3 Effectiveness of anti-dumping law

It should be noted that the anti-dumping law has a preventive nature, as the Georgian market, as a country with a small market economy, does not have a severe dumping problem, although local businesses have been indicating the existence of dumping practices over the years.

The question, as how effectively the Competition Agency will apply the norms in practice, remains open until an application-based investigation is initiated, which involves quite complex procedures. However, in the context of Georgia, it is important to assess both the positive and the expected negative consequences of the anti-dumping legislation. The positive aspect lies in the implementation of the objectives of the anti-dumping law, namely, in maintaining and protecting the competitiveness of the local industry by imposing anti-dumping tariffs on dumping prices.

[486] *Ibid.*
[487] Article 5 of the Law of Georgia on the Introduction of Anti-Dumping Measures in Trade
[488] Article 18 of Law of Georgia on the Introduction of Anti-Dumping Measures in Trade

though, to protect against the risks that may arise from anti-dumping measures and anti-dumping law in general, it is important for the Competition Agency to take precautionary measures. In terms of imposing anti-dumping tariffs on imported products there is need to monitor the pricing practices of local producers in order to avoid increased market prices, which will affect consumers.

Third interim conclusion

The main stages for the application of anti-dumping measures in Georgia can be divided as follows: 1. Submission of applications; 2. Investigation; 3. Introduction of anti-dumping measures. The Competition Agency, which is the authorized body to investigate, shall initiate an investigation on the basis of an application duly submitted. In case the application meets the eligibility stages, the Competition Agency makes a decision to start the investigation. At the stage of review, the Competition Agency assesses the cumulative presence of 3 elements: (1) Dumped imports, (2) Damages and (3) Causal relationship between dumped imports and damages. The involvement of the parties in the process of investigation is important, as the Competition Agency starts the investigation on the basis of the evidence provided by the parties, although the competition agency itself has the authority to request additional information from both individuals and legal entities.

The Competition Agency does not have a practice of investigating alleged dumping cases yet, as Anti-dumping legislation is new for Georgia and receipt of applications under its scope has begun on June 1, 2021. It is therefore, unknown how effectively the norms provided by law will be reflected in practice, which will enable us to assess both the positive and negative consequences of Anti-dumping legislation.

4. EU regulation

It is noteworthy that the Competition Agency often relies on the EU practice in formulating its own decisions or guiding principles. Thus, in terms of application of anti-dumping legislation in practice, we can consider that the EU approaches and regulating the issues mentioned above will be important for the Competition Agency.

The EU first adopted anti-dumping legislation in 1968 to protect local industry. Nowadays, the EU for implementing its anti-dumping policy, relies on the 2016 codified regulation,[489] which aimed at protecting the EU local market from dumped imports from non-EU countries.

[489] Regulation (EU) 2016/1036 of the European Parliament and of the Council on protection against dumped imports from countries not members of the European Union
Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1036&from=en> [last accessed: 24.12.2021]

First of all, it was important to identify the problem in the market and respond to it accordingly. For ensuring that, the European Union has designated the European Commission as Investigation authority, which initiates investigation in two cases:[490](1) On the basis of an application submitted to the European Commission by any natural, legal or non-legal entity acting on behalf of the European Union in the European market, or (2) On its own initiative, if it has sufficient evidence that there is dumped imports which can cause damage to the EU market.

Prior to the European Commission's decision to initiate an investigation, the burden of proof falls on the applicants, in particular, it is important that the application must be accompanied by evidence of dumping, damage and causal relationship between them.[491] If the submitted application and the evidences gives a reasonable assumption that dumping may indeed have taken place, which will have a negative impact on local industry, the European Commission is starting an anti-dumping investigation.

The European Commission for investigation purposes assesses 4 components cumulatively[492], namely:
(1) Whether dumped imports have taken place;
(2) Whether there is material damage inflicted to producers in the European market;
(3) The causal relationship between dumped imports and damage;
(4) Whether the adoption of appropriate anti-dumping measures is contrary to the interests of the European Union.

The EU defines three main forms of anti-dumping measures[493]:
a) The so-called Ad Valorem duty - A tax that is expressed as a percentage of the selling price.
b) Specific duty – a fixed cost for a certain amount of goods.
c) Variable duty – a minimum import price.

Fourth interim conclusion

It should be noted that at the legislative level, Georgia's approaches are mostly in line with EU regulation, which, on the one hand, is due to the fact that the Anti-dumping legislation of both the

[490] *Ibid.* Article 5(1) and 5(6)
[491] *Ibid.* Article 5(2)
[492] Read more on the official website of the European Commission: <https://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping/?fbclid=IwAR2OsNCb2OG4rxBpqzwH08mvmv08j-R9bBHGMROFLZNviEAV5haebN9dMeI> [last accessed: 24.12.2021]
[493] See Types of trade defense measures on the official website of the European Commission: <https://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping/?fbclid=IwAR2OsNCb2OG4rxBpqzwH08mvmv08j-R9bBHGMROFLZNviEAV5haebN9dMeI> [last accessed: 24.12.2021]

EU and Georgia has been developed on the basis of the principles established by the World Trade Organization.

However, there are some differences: 1. The basis of the investigation under the Georgian Anti-Dumping Law is the statement of the local industry, while in the case of the EU it is possible to start the investigation at the initiative of the European Commission, though this should be a special exception; 2. Law of Georgia on anti-dumping measures provides for the introduction of a specific duty, while the EU has three forms of anti-dumping measures. Nonetheless, it is likely that the EU's approaches will be one of the most important guidelines for the Competition Agency for establishing its practice.

Chapter IX. Competition Agency

Free and fair competition contributes to the development of a market economy. Competition leads to the vigilance of undertakings and their will to always strive for development, which is a healthy process and ultimately has a positive impact on the country's economy. That is why it is important for the state to ensure a competitive environment. Competition Agency - the executive authority of competition, the main postulate of which is to safeguard competition, to enforce the norms of competition law, to detect and prevent anti-competition activities. Efficient performance of the Competition Agency is a prerequisite for fair and healthy competition in the state.

History of Competition Law in Georgia dates back to 1996, when the Georgian Parliament passed the Law on Monopoly Activities and Competition. At the same time, on the basis of a presidential decree, the Georgian Antimonopoly Service was initially established, which was responsible for ensuring enforcement of the Law. Later, in 2003, this body was abolished. In 2005, parliament repealed the existing antitrust law and passed a new law on free trade and competition. The Agency of Free Trade and Competition was also established. In 2010, it was established as a legal entity under public law by a government ordinance. In 2012, this body was merged with the State Procurement Agency, and in 2014, as a result of an amendment to the Law of Georgia on Free Trade and Competition, the Competition Agency was established as an independent body. One of the reasons for the separation is the Association Agreement with the European Union, which considers the protection of competition as one of the priority tasks. The amendment split the pre-existing Competition and State Procurement Agency and re-established two independent legal entities under public law: The State Procurement Agency and the Competition Agency.[494]

The authority of the Competition Agency is defined by the Law of Georgia on Competition and the Statute of the Competition Agency. In addition, the Competition Agency is guided in its activities by the Constitution of Georgia, international agreements and other legal acts.

1. The Function of the Competition Agency

By concluding the Association Agreement with the European Union and the Deep and Comprehensive Free Trade Area (DCFTA), Georgia has undertaken to bring its legal system as close as possible to the European one. Pursuant to Article 204 (2) of the Association Agreement

[494] For a more detailed history of the Georgian National Competition Agency, see ***Menabdishvili S.***, The essence of the cartel and modern trends in its development (especially on the example of competition law), dissertation, Tbilisi, 2016, pp. 5-6
Available in Georgian language at: <http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/solomon_menabdishvili.pdf> [last accessed: 14.12.2021]

with the European Union[495], Georgia is obliged to establish a special body with executive and relevant authority regarding the enforcement of competition law.

According to Article 4 (1) of the Law of Georgia on Competition, a body authorized to ensure compliance with and fulfilment of the provisions of this Law is an independent legal entity under public law – Competition Agency, established under this Law.

According to Article 16 (1) of the Law of Georgia on Competition, the Competition Agency shall be established to implement the competition policy. The main task of the Competition Agency is to create and protect conditions for the promotion of competition in Georgia, as well as to identify, eliminate and render inadmissible all types of anti-competitive agreements and actions for this purpose. In addition, the Competition Agency implements the policy of protection of local industry from dumped imports on the customs territory of Georgia, in particular, in accordance with the Law of Georgia on The Introduction of Anti-Dumping Measures in Trade, in order to avoid harm to the local industry by dumping imports on the customs territory of Georgia, the Competition Agency conducts a study and submits a relevant report to the Government of Georgia.[496]

The Competition Agency is accountable to the Parliament of Georgia and the Prime Minister of Georgia[497] and is independent in the implementation of its activities and decision-making.

The Georgian National Competition Agency is the executive body of competition law in Georgia, which is equipped with appropriate authorities. It is a decision-making body and is independent in its activities. According to Article 16 (5) of the Law of Georgia on Competition, Compliance with the decisions, instructions and other legal acts of the Competition Agency shall be binding upon state authorities, authorities of the Autonomous Republics, municipal authorities and other administrative authorities, and undertakings.

The German Competition Authority (called the *Bundeskartellamt*) is an independent competition authority whose task is to protect fair competition in Germany. [498] The *Bundeskartellamt* is an

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[495] The Association Agreement between Georgia and the European Union is available in Georgian language at the official website of the Legislative Herald of Georgia.
See <https://matsne.gov.ge/ka/document/view/2496959?publication=0> [last accessed: 14.12.2021]
In English language it is available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014A0830%2802%29-20210901> [last accessed: 14.12.2021]
Information on the Deep and Comprehensive Free Trade Area Agreement between Georgia and the European Union, as well as the Georgian and English texts of the Agreement are available at the official website of the Ministry of Economy and Sustainable Development of Georgia.
See <http://www.economy.ge/index.php?page=economy&s=7> [last accessed: 14.12.2021]

[496] Article 16 (4) of the Law of Georgia on Competition

[497] Article 16 (3) of the Law of Georgia on Competition

[498] See the official website of the Bundeskartellamt: <https://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt_node.html;jsessionid=EB46773F78EAAC3027F1E1485C841FB3.2_cid362> [last accessed: 14.12.2021]

independent higher federal authority and is assigned to the Federal Ministry for Economic Affairs and Energy. The *Bundeskartellamt* bases its decisions solely on competitive criteria. It is independent in its decision-making, i.e., in its handling of cases and its decisions it is not bound by external instructions. The decisions on cartels, mergers and abusive practices are taken by the separate Decision Divisions autonomously. There is a total of twelve Decision Divisions. The Decision Divisions are autonomous and not subject to instructions in their decision-making. Not even the President of the *Bundeskartellamt* has a vote in those decisions.[499]

The composition and arrangement of the French competition authority (called the *Autorité de la Concurrence*) ensures its independence and impartiality.[500] Although the body acts on behalf of the state and exercises public authority, it is not subject to the government in the performance of its functions. Cases are investigated completely independently by the Investigative Service, headed by the *Rapporteur Général*. At the end of *inter partes* proceedings, cases are reviewed by the *Autorité*'s Board (*Collège*) consisting of seventeen members of the French Supreme Administrative Court (*Conseil d'État*), the Supreme Court (*Cour de cassation*), the Court of Auditors (*Cour des comptes*) or other members or former members of the Administrative or Ordinary Court. They are selected based on their knowledge and experience in the field of economics.[501]

Pursuant to Article 17[1] (1) of the Law of Georgia on Competition, the Chairman of the Competition Agency is both appointed and dismissed by the Prime Minister of Georgia. The Chairman of the Competition Agency independently makes decisions on matters within the competence of the Competition Agency, acts on behalf of the Competition Agency, represents it in relations with other bodies and organizations, decides on issues defined by the tasks, functions and powers of the Competition Agency.[502] The Chairman of the Competition Agency determines the powers of the Deputy Chairmen of the Competition Agency, structural subdivisions of the Central Office of the Competition Agency and representatives in the regions.[503]

As for the general procedure of investigating, in case the Chairman of the Competition Agency decides to initiate an investigation, the Chairman shall appoint an investigation team with at least 2 persons, which may include at least two employees of the Competition Agency, as well as an invited expert. By the decision of the Chairman of the Competition Agency, the relevant employee of the Competition Agency is appointed as the head of the group.[504] The investigation team is authorized to carry out any action permitted by the legislation of Georgia in the investigation

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[499] *Ibid.*
[500] See the official website of the Autorité de la Concurrence: <https://www.autoritedelaconcurrence.fr/fr/missions> [last accessed: 14.12.2021]
[501] *Ibid.*
[502] Article 17[1] (2) of the Law of Georgia on Competition
[503] Article 17[1] (3) of the Law of Georgia on Competition
[504] Order of the Chairman of the Georgian National Competition Agency of September 30, 2014 № 30 / 09-5 on the approval of the rules and procedure of the case – "Rules and Procedure of the Case", Article 14 (1)

process on its own initiative in accordance with the Law and this rule. The decision shall be taken by a majority of votes. In the absence of a majority, the voice of the group leader is crucial.[505] The chairperson of the Competition Agency is authorized, in the relevant case, on the basis of the proposal of the investigative group, to apply to the court for a temporary suspension of the activity of the undertaking.[506]

The main function of antitrust authorities is to advise the state on the consequences of anticompetitive legislation.[507]

The functions of the Georgian Competition Agency are prescribed by the law, in particular given in Article 17^{2}, according to which the functions of the Competition Agency are:

- Implement the policy provided for by the legislation of Georgia on competition and for this purpose, draft proposals for the development and application of the relevant normative acts;

- Monitor the goods and services markets of Georgia with an aim to examine the situation and evaluate the competitive environment;

- If there is concentration as provided for by Article 11 and 11^{1} of this Law, make obligatory assessment of its competitive impact, and prepare and adopt a relevant decision;

- Monitor compliance with the legislation of Georgia on competition, detect violations of this legislation, examine them and make relevant decisions within its authority;

- Performing the functions defined by the Law of Georgia on Introduction of Anti-Dumping Measures in Trade;

- Monitor the implementation of the adopted decisions and given recommendations;

- Cooperate with international organizations and bodies authorized to implement the competition policies of other countries.

- Cooperate with the legislative and executive bodies of Georgia, international organizations for the purpose of improving the competition legislation of Georgia and the competition policy, as well as resolve organizational-legal, technical and funding issues;

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[505] *Ibid.* Article 14 (2)
[506] *Ibid.* Article 14 (3)
[507] ***Schrepel Th**.,* Antitrust Without Romance (May 28, 2019). NYU Journal of Law & Liberty - 13 N.Y.U. J.L. & Liberty 326 (2020), p. 347
Available at: <https://ssrn.com/abstract=3395001> [last accessed: 23.12.2021]

- Raise public awareness regarding the legislation of Georgia on competition and the aims and purposes of the competition policy and ensure publicity of the Competition Agency's activities.

- Perform other functions provided for by the Statute of the Competition Agency.

According to the Law on Competition, the Competition Agency is responsible for protecting the confidentiality of information regarding undertakings that includes commercial and/or tax secrets, namely:

- Any disclosure and dissemination of confidential information shall be inadmissible, except where otherwise provided for by the legislation of Georgia.[508]

- Use and disclosure of confidential information by employees of the Competition Agency, including for personal, academic, scientific purposes or for other activities shall be inadmissible.[509]

2. Powers of the Competition Agency

The powers of the Competition Agency are set out in Article 18 of the Competition Law. In addition to the fact that the Competition Agency is authorized to initiate an investigation on the basis of a complaint filed by an undertaking, it can also do so on its own initiative, if there are appropriate signs of distortion of competition in a particular segment and the competition authority needs to act. In this case, the basis for initiating an investigation is a reasonable suspicion that a specific article(s) of the Competition Law has been violated. The Competition Agency should carry out the necessary procedures within the framework of the investigation, be it requesting information, on-site inspection of the undertaking, etc. The Competition Agency may also decide on the liability of undertakings (e.g., impose a fine).

There is a one-tier (i.e., "integrated") system for dealing with violations of competition law and a two-tier (i.e., "separate") system. [510]

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[508] Article 20 (2) of the Law of Georgia on Competition
[509] Article 20 (3) of the Law of Georgia on Competition
[510] №1551 Decree of the Government of Georgia of December 3, 2010 on the Approval of a Comprehensive Competition Policy Strategy
In 2010, the Government of Georgia, by developing a "Comprehensive Competition Policy Strategy", aimed to create an institutional and legal environment that would facilitate the development of a market economy, free entrepreneurial activity and competition in line with EU and international standards.
Available in Georgian language at: <https://matsne.gov.ge/ka/document/view/2267631?publication=0> [last accessed: 28.01.2022]

A separate (two-tier) system involves the division of case study and decision-making/executive powers between different bodies: The competition authority has the power to investigate the case, while it is the power of the court to make decisions and impose sanctions.[511]

In the case of an integrated (one-tier) system, the court may delegate the power to impose a sanction to the competition authority.[512]

There is a one-tier system in Georgia, which involves the following: The Competition Agency initiates its own investigation and makes its own decisions.[513] Pursuant to Article 18 (1.h) of the Law of Georgia on Competition, the Competition Agency is authorized to impose a fine on an undertaking in case of violation of the requirements of this Law in accordance with Article 33 of this Law. The Competition Agency declares its decision by issuing an individual legal act.

The specifics of the two-tier system are as follows: e.g. In the USA, when the relevant department of the Ministry of Justice finds out that there is a violation of antitrust law, it takes the case to court for a final decision, while the Ministry itself is in the role of the prosecutor.[514]

Under the Law on Competition, the Competition Agency has a number of powers dealing with both undertakings, as well as state authorities, authorities of Autonomous Republic, municipal authorities and other administrative authorities. This is prescribed by Article 16 (5) of the Law, according to which compliance with the decisions, instructions and other legal acts of the Competition Agency shall be binding upon state authorities, authorities of the Autonomous Republics, municipal authorities and other administrative authorities, and undertakings.

The rules and procedure for conducting a case investigation by the Competition Agency, the rights and obligations of the persons participating in the case investigation process are defined by the Order № 30/09-5 of the Chairman of the Competition Agency of September 30, 2014.[515]

The Competition Agency of Georgia is authorized to submit binding proposals, recommendations to state authorities, authorities of an autonomous republic, municipal body or other administrative body in order to improve the competitive environment in the market. In case of violation of the

[511] *Ibid.*
[512] *Ibid.*
[513] ***Menabdishvili S.***, The Legal Nature of Violations of Competition Law Norms and Peculiarities of Its Production, Justice and Law, Tbilisi, 2015, p. 125
Available in Georgian language at: <https://www.supremecourt.ge/files/upload-file/pdf/martlmsajuleba-da-kanoni-2015w-n5.pdf> [last accessed: 20.12.2021]
[514] *Ibid.*
[515] Order № 30 / 09-5 of the Chairman of the Georgian National Competition Agency of September 30, 2014 on the approval of the rules and procedure of the case – "Rules and Procedure of the Case"
Available in Georgian language at: <https://matsne.gov.ge/ka/document/view/2523165?publication=0> [last accessed: 23.12.2021]

law, the Competition Agency has the right to submit a reasoned decision to the said body and a relevant recommendation on the illegal decision made by this body or the action taken against the law, including requesting the annulment of this decision or the prohibition of the action, and in case of non-fulfillment of the mentioned request to raise the relevant issue for consideration before a higher body or official.[516] The Competition Agency is also authorized to issue a recommendatory explanation within its scope and to advise the interested person on the application of the Georgian competition legislation.[517]

3. Applying the Competence of the Competition Agency in Practice

Before examining and investigating a complaint, the Competition Agency checks its admissibility: whether the complaint has been submitted by an authorized person, whether there is a legal basis provided by law, etc.

The application shall be submitted to the Competition Agency by the applicant. The applicant is a person who has information or evidence of gross violations of the Georgian legislation on competition, although this does not cause direct property damage to him/her, and based on this information, submits a relevant application to the Competition Agency.[518]

The applicant shall not be considered as a party to the case. The Competition Agency shall take the notice of the application on the alleged violation of the Law and, in case of reasonable doubt, the Competition Agency may use it to initiate an investigation on its own initiative.[519]

Complaints may be submitted to the Competition Agency by a complainant. Together with the complaint, a complainant shall submit evidence to the Competition Agency. Complainants shall be regarded as a party to the case and shall bear the burden of proof.[520]

The complainant is an undertaking that believes that the violations of the Georgian legislation cause direct property damage to him/her and submits a relevant application to the Competition Agency.[521]

After making a decision to initiate a case investigation, the Competition Agency shall start the investigation and make a decision not later than 3 months.[522] An investigation, depending on its

[516] Article 18 (2.c) of the Law of Georgia on Competition
[517] Article 18 (3) of the Law of Georgia on Competition
[518] Article 3 (m) of the Law of Georgia on Competition
[519] Article 22 (1) of the Law of Georgia on Competition
[520] Article 22 (2) of the Law of Georgia on Competition
[521] Article 3 (n) of the Law of Georgia on Competition
[522] Article 25 (1) of the Law of Georgia on Competition

significance and complexity, may be extended for a period determined by the Competition Agency, but not longer than 10 months.[523]

The Law establishes the rules and procedure of the investigation of a case, regulates such issues as: the terms of the investigation and decision-making, the conditions of termination of a case, the rights of the Competition Agency in the investigation process, etc.

In the Competition Agency, violations of competition law norms are investigated in accordance with the rules of simple administrative proceedings established by the General Administrative Code of Georgia, and after being declared admissible, a review is initiated, which is usually carried out in accordance with the rules of formal administrative proceedings.[524]

It is important to note that in 2020, by the decision of the Parliament of Georgia, the apparatus of the Public Procurement Dispute Resolution Council started operating within the structure of the Competition Agency. On January 1, 2021, the anti-dumping legislation came into force and the relevant department started functioning in the Competition Agency.[525]

In order to ensure the efficient enforcement of competition law, it is necessary to have an independent body with relevant powers and status which will be granted an executive power. Its subdivisions will have relevant departments to ensure proper circumstances for the development and protection of fair competition.

4. Evaluation of the Efficiency of the Performance of the Competition Agency

In addition to the importance of regulating the legal framework of competition, prescribing the powers or functions of the executive body of competition law, it is also important to implement all this efficiently. Efficiency means that the Competition Agency's actions are timely and constructive and serve to promote fair and open competition in the country.

First of all, it is important to note that with the support of the EU project, the Competition Agency has created a new website where full information about the activities carried out by the

[523] Article 25 (2) of the Law of Georgia on Competition
[524] ***Menabdishvili S.***, The Legal Nature of Violations of Competition Law Norms and Peculiarities of Its Production, Justice and Law, Tbilisi, 2015, p. 132
Available in Georgian language at: <https://www.supremecourt.ge/files/upload-file/pdf/martlmsajuleba-da-kanoni-2015w-n5.pdf> [last accessed: 20.12.2021]
[525] Georgia National Competition Agency 2020 Activity Report, p. 5
Available in Georgian Language at: <https://admin.competition.ge/uploads/f2b9ca8ab3cc475282092dedd4fceefe.pdf> [last accessed: 20.12.2021]

Competition Agency is posted.[526] Publicity and access to information through such a platform contributes to the development of competition.

It should also be noted that in 2020, a representative of the Competition Agency started working in the Autonomous Republic of Adjara. A Memorandum of Collaboration was signed between the Georgian National Competition Agency and the Government of the Autonomous Republic of Adjara.[527] This will further contribute to the efficient conduct of competition policy and the protection of free competition.

The existence of a Competition Agency guarantees the protection and enforcement of competition law. Its efficient functioning helps to improve both the production and delivery of goods. Does not allow undertakings to be inert, which ultimately affects the welfare of consumers.

In addition to investigations based on applications or complaints, it is important to monitor the market conducted by the Competition Agency, which involves assessing the risks of possible anti-competitive actions in several markets by adhering to pre-defined criteria to further identify markets in need of in-depth study. The monitoring assesses the competitive environment in the relevant market(s). If, as a result of the monitoring report, there is a reasonable suspicion of a possible violation of the law, the Competition Agency will initiate an investigation on its own initiative.

Up until the present time, the Competition Agency has conducted 9 monitoring (which are the completed ones):

1. Wheat and Bread Market Monitoring[528]
2. Auto Insurance Market Monitoring[529]
3. Monitoring of Baby Food Market[530]
4. Monitoring of Retail Chain Stores Market[531]
5. Monitoring of Filter and Unfiltered Cigarette Market[532]

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[526] The Official website of the Georgian National Competition Agency: <https://competition.ge/> [last accessed: 23.12.2021]

[527] Georgia National Competition Agency 2020 Activity Report, p. 26
Available in Georgian language at: <https://admin.competition.ge/uploads/f2b9ca8ab3cc475282092dedd4fceefe.pdf> [last accessed: 20.12.2021]

[528] The full document is available in Georgian language at: <https://admin.competition.ge/uploads/a6a1a29f29514086aa79eef04ef1a104.pdf> [last accessed: 23.12.2021]

[529] The full document is available in Georgian language at: <https://admin.competition.ge/uploads/8754c719bba74d16a275538725c24fc3.pdf> [last accessed: 23.12.2021]

[530] The full document is available in Georgian language at: <https://admin.competition.ge/uploads/04517823aa19402e8f5a7d90805b8bc7.pdf> [last accessed: 23.12.2021]

[531] The full document is available in Georgian language at: <https://admin.competition.ge/uploads/35b875d2cc6e449a9661cb48596bb4c5.pdf> [last accessed: 23.12.2021]

[532] The full document is available in Georgian language at: <https://admin.competition.ge/uploads/ef3ec21d88ab4024b218bdc8f34fd7b8.pdf> [last accessed: 23.12.2021]

6. Online Hotel Booking Monitoring[533]
7. Passenger air transportation market Monitoring[534]
8. Coffee Market Monitoring[535]
9. Pharmaceutical Market Monitoring[536]

And, in the current mode is:
1. Automotive Fuel Market Monitoring[537]

One of the important activities of the Georgian National Competition Agency is the assessment of the impact of the decisions already made on the environment.

In 2020, the Georgian Competition Agency prepared a report on the impact of decisions on the competitive environment approved by the orders №404/248 of September 5, 2017 and №404/216 of August 7, 2018 (on violations of Article 10 of the Law of Georgia on Competition by Procuring Organizations Participating in Public Procurement).[538] These decisions were based on the complaints by the insurance companies submitted to the Competition Agency. The case concerned a mandatory requirement imposed by public procurement organizations according to which companies participating in the public procurement had to submit bank guarantees issued only by the commercial banks licensed by the National Bank. The Competition Agency found that with this specific requirement, the insurance sector found itself in a non-competitive position compared to the banking sector, since the right to issue bank guarantees was also the prerogative of insurance companies, which was guaranteed by Article 879 of the Civil Code of Georgia. This tender requirement limited the possibility of carrying out the activities of the insurance industry as a whole in the direction of issuing bank guarantees. The report found that the decision made by the Competition Agency had a positive impact on the activities of the insurance sector and the competition also improved, which means the following: insurance companies were given the

[533] The full document is available in Georgian language at: <https://admin.competition.ge/uploads/ba93e69448d1440f806dd21c5a19edd9.pdf> [last accessed: 23.12.2021]

[534] The full document is available in Georgian language at: <https://admin.competition.ge/uploads/56f28e3ee4fb447da8ba57136ce5f7e5.pdf> [last accessed: 23.12.2021]

[535] The full document is available in Georgian language at: <https://admin.competition.ge/uploads/483946f07d6a480fbd9b7d77ef6fdc36.pdf> [last accessed: 23.12.2021]

[536] Within the framework of the mentioned monitoring, the object of observation of the Georgian National Competition Agency is the retail prices of medicines, the factors influencing the price change and the assessment of their impact on the formation of the retail price. The report covers the period of 2016-2020.
The full document is available in Georgian language at: <https://admin.competition.ge/uploads/85f45a35568c407d82c54e85f0949fba.pdf> [last accessed: 23.12.2021]

[537] The global pandemic has caused sharp fluctuations in the global oil market. The monitoring analyzed the causes and their impact on the local market. The interim evaluation revealed that local large network and small network companies were responding adequately to global prices.
Interim Report is available in Georgian language at: <https://admin.competition.ge/uploads/a7583ae6f2224d658a4c0198809b5ab3.pdf> [last accessed: 23.12.2021]

[538] The full document is available in Georgian language at: <https://admin.competition.ge/uploads/7da1da8f05c045ae8db8debdede28d8f.pdf> [last accessed: 23.12.2021]

freedom to continue their activities guaranteed by law and to issue bank guarantees that would be acknowledged as of mandatory nature in the public procurement process. As a result, insurance companies were not completely excluded from the relevant market and the competitive environment was improved significantly.

In 2021, the Competition Agency completed the Poti seaport port (stevedoring) services and ex-post monitoring of related markets. The monitoring covers the period 2016-2019. The Georgian Competition Agency, based on the complaint of the terminal companies related to Poti Seaport of June 8, 2016, conducted investigation regarding the violation of Article 6 of the Law of Georgia on Competition by JSC Poti Seaport Corporation (Decision N04/91, 21.04.2017). It was found that there was a competitive environment in the market. The total turnover of the entities operating in the mentioned market, the number of processed container cargoes, and the number of employees is increasing.

Statistics on the levels of fines, imposed sanctions and structural or behavioural measures (i.e. Remedies) to be implemented by undertakings are not available.

4.1. Amendments to the Law of Georgia on Competition

In July 2020, the Parliament adopted the Law of Georgia on the Introduction of Anti-Dumping Measures in Trade, which was prepared in accordance with the norms of the World Trade Organization and aims to protect both the principles of fair trade and local industry from import dumping in the customs territory of Georgia (except for free industrial zones). The study in accordance with this law is carried out by the LEPL Competition Agency.[539]

In 2020, a number of amendments were made to the Law of Georgia on Competition.[540] The powers and procedural issues of the Competition Agency, competition policy enforcement policy, efficient merger control mechanisms, the management structure of the Competition Agency have been regulated. Amendments were also made to the Law of Georgia on Public Procurement, according to which the apparatus of the Public Procurement Dispute Resolution Council has joined the Competition Agency.

Under the changes, the Competition Agency's obligations to protect the confidential information of undertakings have increased:[541] In particular, the Competition Agency is obliged to protect the confidential information (tax, personal, commercial, state information) of undertakings. As the

[539] Article 4 of Law of Georgia on The Introduction of Anti-Dumping Measures in Trade
[540] See Explanatory Note to the Draft Law of Georgia on Amendments to the Law of Georgia on Competition Available in Georgian language at: <https://info.parliament.ge/file/1/BillReviewContent/224612?fbclid=IwAR07liyQvmCxIb8Bnmyp84fk8nC3DkcQuZzoj5VuvMK5kmw40ZY_gK38JXg> [last accessed: 23.12.2021]
[541] *Ibid.* pp. 23-24

competition law does not provide for special norms regarding the recognition of information as a commercial secret, the provisions of the General Administrative Code of Georgia apply (in particular, Article 27^{2}). The law also declares that the Competition Agency is authorized to require a undertaking to submit a non-confidential version of a document and to set a timeframe, which, as it states in the Explanatory Note, serves to protect confidential information in the process of issuing public information.[542]

The technical flaws in the first and the second paragraphs of Article 21 have been rectified:[543] In particular, an authorized person of the Competition Agency is obliged to be independent not only from interested parties, but from parties in general. In addition, the grounds for avoidance were supplemented by the grounds provided for in Article 92 of the General Administrative Code of Georgia (in particular, when an authorized person of the Competition Agency is the interested party or a relative of the interested party or a representative of the interested party or when a representative of the interested party was an expert on the issue, etc.).

A significant change has been made in the initiation of an investigation by the Competition Agency:[544] In particular, under the old wording, the Competition Agency would initiate an investigation on the basis of a submitted application or a complaint, or on its own initiative. According to the current edition, the Competition Agency will launch an investigation only on the basis of a complaint or on its own initiative.

According to the Explanatory Note, the distinguishing factor between an applicant and a complainant is to determine whether a person suffers a direct property damage as a result of an anti-competitive action. In particular, an applicant (who can be both a natural person or a legal person) has information about an alleged violation, and a complainant is the aggrieved undertaking who suffers property damage and who, unlike an applicant, is a party to the administrative proceedings. Due to the fact that the Competition Agency was obliged to respond to all applications submitted in compliance with the form, this often led to inefficient allocation of the Competition Agency resources, given that a very small number of applications met the standard of reasonable suspicion. That is why a change became necessary. Under the new wording, an applicant still has the right to apply to the Competition Agency, this information will be considered and in case of reasonable suspicion will be used by the Competition Agency to initiate an investigation on its own initiative.[545]

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[542] Article 20 (2^{1}) of Law of Georgia on Competition
[543] Explanatory Note to the Draft Law of Georgia on Amendments to the Law of Georgia on Competition, p.24 Available in Georgian language at: <https://info.parliament.ge/file/1/BillReviewContent/224612?fbclid=IwAR07liyQvmCxIb8Bnmyp84fk8nC3DkcQuZzoj5VuvMK5kmw40ZY_gK38JXg> [last accessed: 23.12.2021]
[544] *Ibid.* pp. 24-25
[545] Article 22 of Law of Georgia on Competition

A significant change was made to the rules by which the Competition Agency forwarded a complaint to a respondent:[546] In particular, the Competition Agency will not forward a complaint to a respondent if a complaint concerns a violation of Article 7 of the Law. Article 7 deals with agreements distorting competition i.e. cartels that are covert transactions between undertakings. Since the standard of proof of a cartel is high, and the information that needs to be obtained by the Competition Agency is sensitive and there is a risk that it will be destroyed by undertakings, informing a person at the admissibility stage of a complaint will inevitably lead to the destruction of evidence.[547]

The following cases were added to the grounds for refusing to initiate an investigation:[548]

- The Competition Agency has made a decision to reject the admissibility of the complaint regarding the same dispute between the same parties when there are no newly discovered circumstances, except when the refusal to initiate an investigation was due to the failure of an undertaking to provide the requested information, as the decision to refuse to initiate an investigation on this ground should not be an obstacle for a party to file the same dispute with the Competition Agency;

- As a result of the investigation of the case, the Competition Agency has made a decision on the subject of the same dispute between the same parties and there are no new circumstances;

- The dispute is between the same parties on the same subject, or the court has made a decision on the same subject, or other decision to reject the claim by the plaintiff, to recognize the claim by the defendant, or to approve the settlement of the parties;

- While examining the admissibility of a complaint, the Agency agrees to accept contingent liabilities offered by the undertaking to take specific action to eliminate an alleged violation of the Law.

Changes were made to the rules of investigation:[549] In particular, according to the old version, the time limit for the investigation of the case was set up to 10 months, which was considered very

[546] Explanatory Note to the Draft Law of Georgia on Amendments to the Law of Georgia on Competition, p. 25 Available in Georgian language at: <https://info.parliament.ge/file/1/BillReviewContent/224612?fbclid=IwAR07liyQvmCxIb8Bnmyp84fk8nC3DkcQuZzoj5VuvMK5kmw40ZY_gK38JXg> [last accessed: 23.12.2021]
[547] Article 23 of Law of Georgia on Competition
[548] Explanatory Note to the Draft Law of Georgia on Amendments to the Law of Georgia on Competition, p. 26 Available in Georgian language at: <https://info.parliament.ge/file/1/BillReviewContent/224612?fbclid=IwAR07liyQvmCxIb8Bnmyp84fk8nC3DkcQuZzoj5VuvMK5kmw40ZY_gK38JXg> [last accessed: 23.12.2021]
Also, see Article 24 of Law of Georgia on Competition
[549] Explanatory Note to the Draft Law of Georgia on Amendments to the Law of Georgia on Competition, pp. 26-28

small as it created some practical difficulties. In order for the Competition Agency to conduct a large-scale investigation to ensure a thorough investigation of the matter, the investigation period has been extended to 6 months, which, depending on the complexity, can be extended to 18 months. It is stated in the Explanatory Note that the increase in timeframes was triggered by existing practice. The cases involving the abuse of a dominant position and agreements that distort competition require extensive analysis, and a large-scale market research was often conducted so that the studies of this type almost always ended 10 months later. In the initial three months, only those studies were completed that did not require market research - on issues of unfair competition and competition distortion by state authorities.

The new version specified the importance of an on-site inspection of an undertaking, which includes the removal of a document and not just the removal of a copy of it, as provided for in the old version of the law.

The old version of the Law did not provide for the obligation of the Competition Agency to send the draft decision rendered by the latter to the parties. According to the current version of the Law, the Competition Agency shall send a final draft decision and case materials to the applicant and the party in writing before the final session. In addition, the applicant and the party are explained that they have the right to present their positions and relevant additional information (evidence). However, the time limit set for submitting the positions of the applicant and the party should not be less than 25 business days. Information submitted after the expiration of this period may not be considered by the Competition Agency in making its final decision.

This provision of the current Law is in line with EU competition law. In particular, European law recognizes the institute of Statement of Objections.

Pursuant to Article 10 of Regulation № 773/2004 of the European Commission of 7 April 2004[550], in order to respect the rights of defense of undertakings, the European Commission should give the parties concerned[551] the right to present their position before a decision is taken.

Available in Georgian language at: <https://info.parliament.ge/file/1/BillReviewContent/224612?fbclid=IwAR07liyQvmCxIb8Bnmyp84fk8nC3DkcQuZzoj5VuvMK5kmw40ZY_gK38JXg> [last accessed: 23.12.2021]
Also, see Article 25 of Law of Georgia on Competition

[550] See Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty
Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004R0773> [last accessed: 28.01.2022]

[551] Refers to the parties directly affected by the decision. However, according to Article 11 of the same Regulation, consideration should be given to hearing the positions of persons who may not have submitted a complaint under Article 7 of Regulation (EC) № 1/2003 and therefore are not addressees of the Statement of Objections, but who can nevertheless show a sufficient interest.
See *Ibid.*

The Statement of Objections is a mandatory preparatory step before any final decision is made. It sets out the position of the European Commission and refers to the relevant legislation on the basis of which the European Commission will take a final decision. The Statement of Objections is addressed to all undertakings whose interests are substantially affected by the decision of the European Commission.[552]

The addressees of Statement of Objections may examine the documents contained in the European Commission investigation case, respond in writing and request a hearing to present their views on the case to representatives of the European Commission and national competition authorities.[553] Statement of Objections and the launch of a formal antitrust investigation do not predetermine the outcome of the investigations.[554]

As a result of the implemented changes, the institution of contingent liabilities was introduced. In particular, under Article 18 (1. g^1), the Competition Agency is authorized to agree or refuse to accept contingent liabilities, in order to take specific action to eliminate alleged violations of the law, suggested by an undertaking. According to the Explanatory Note, this mechanism will help the Competition Agency to efficiently prevent alleged breaches, creating fewer barriers for undertakings and by optimizing time and resources.

Contingent liabilities are specific liabilities offered by an undertaking to the Competition Agency which imply any action taken by it to eliminate an alleged violation of the Law.[555]

Contingent liabilities are offered by an undertaking at the admissibility stage of a complaint and also, during the investigation of the case, before the draft decision is made. If at the stage of admissibility of a complaint the Competition Agency accepts contingent liabilities, the latter does not start the investigation of the case and sets a deadline for an undertaking to fulfill these obligations. In the event of acceptance of contingent liabilities by the Competition Agency during the investigation of the case, the Competition Agency shall conduct the investigation of the case without assessing the violation and shall set a time limit for an undertaking to fulfill these obligations.[556]

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[552] See Statement of Objections – EU, Vogel & Vogel Law Firm
Available at: <https://www.vogel-vogel.com/faq-items/statement-of-objections-eu/?lang=en> [last accessed: 28.01.2022]

[553] See Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers, Press release, 30 April 2021, Brussels
Available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061> [last accessed: 28.01.2022]

[554] *Ibid.*

[555] Information is available at the official website of the Georgian National Competition Agency: <https://competition.ge/media/faq> [last accessed: 28.01.2022]

[556] *Ibid.*

If an undertaking does not fulfill the contingent liability within the period specified by the Competition Agency, the study of the issue of admissibility of a complaint will be resumed and the recount of the admissibility period will start again. At the stage of the investigation of the case, if an undertaking does not fulfill the contingent liability within the period determined by the Competition Agency, the investigation of the case will be resumed, and an undertaking will be fined.[557]

Contingent liabilities are known in EU competition law as the Commitment Decision.[558] This provision allows undertakings to offer commitments to the European Commission aimed at eliminating/fixing the competition concerns identified by the European Commission. If the European Commission accepts these commitments, it will adopt the appropriate decision, which is binding on the parties. At the same time, the European Commission does not establish an infringement.[559]

The amendments were made to the limitation period for an investigation:[560] In particular, the old version of the Law provided for a 3-year period of limitation for dispute, which was counted from the date of the action. Given that it was unclear what was meant by the period of limitation for dispute (whether the investigation conducted by the Competition Agency or the litigation). Also, it was problematic to calculate the time frame after the commission of the action considering the following circumstances - the action can be completed, current or continuous upon its implementation. That is why, according to the new version, the limitation period for investigation is 3 years from the completion of the relevant action. As for the issue of suspension of the statute of limitations, according to the new edition, the commencement of the investigation into the violation of this Law is the basis for the suspension of the statute of limitations for the investigation of this case. It is stated in the Explanatory Note that the need for this change was due to the fact that according to the old wording of the Law, the limitation period was not suspended in case of commencement of proceedings, while the limitation period for dispute was three years and the case was being investigated for up to 10 months (as a result of the changes, the period was increased to 24 months). Had it not been for this change, the limitation period might have expired before the investigation was completed.

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[557] *Ibid.*
[558] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 9
Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001> [last accessed: 28.01.2022]
[559] See Antitrust: commitment decisions – frequently asked questions, European Commission, MEMO, 8 March 2013, Brussels
Available at: <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_189> [last accessed: 28.01.2022]
[560] Explanatory Note to the Draft Law of Georgia on Amendments to the Law of Georgia on Competition, p. 29
Available in Georgian language at: <https://info.parliament.ge/file/1/BillReviewContent/224612?fbclid=IwAR07liyQvmCxIb8Bnmyp84fk8nC3DkcQuZzoj5VuvMK5kmw40ZY_gK38JXg> [last accessed: 23.12.2021]
Also, see Article 27 of Law of Georgia on Competition

4.2. Imposition of Sanctions by the Competition Agency

One of the most important mechanisms for the enforcement of competition law by the Competition Agency is the authority to impose appropriate sanctions in the event of a breach. The fine should serve as a sanction for the violation committed, as well as a prevention of such violation in the future and, most importantly, should be adequate for the violation committed.

Pursuant to Article 23 (2.a) of European Commission Regulation №1/2003[561], the Commission may impose fines on undertakings and associations of undertakings if they intentionally or negligently violate Articles 101 and 102 of the TFEU[562]. When calculating the amount of a fine, the Commission should consider the severity and duration of the violation. However, the amount of a fine should not exceed 10 percent of the revenues of the addressee in the preceding business year. In addition, the Commission has wide discretion in calculating the amount of a fine.[563]

To determine the fine to be imposed on undertaking, the 2006 guidelines[564] provide for a two-step methodology. On the first stage, the Commission determines the principal amount of a fine based on the severity of the breach, the duration and the amount of 15 to 25 % of the value of the sale (e.g. entry fee or additional amount) to which the principal amount is added. Once the principal amount has been determined, the Commission analyzes possible additional factors to consider, such as aggravating or mitigating circumstances and the means of restraining action. The first stage focuses on assessing the breach as a whole, while the second stage reflects more on all the possible elements that are specific to each undertaking in order to better fit the penalty to each case. The Commission often changes the methodology for calculating fines to suit the specific circumstances of certain cases.[565]

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[561] See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance)
Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001> [last accessed: 23.12.2021]

[562] See Treaty on the Functioning of the European Union (TFEU)
Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> [last accessed: 23.12.2021]

[563] ***Gentile F., Reims R., Petrov P.***, Setting Fines in Antitrust Cases — A Review of the Application of the 2006 Guidelines, CPI Columns, Europe, April 25, 2021
Available at: <https://www.competitionpolicyinternational.com/setting-fines-in-antitrust-cases-a-review-of-the-application-of-the-2006-guidelines/> [last accessed: 23.12.2021]

[564] See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02)
Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:en:PDF> [last accessed: 23.12.2021]

[565] ***Gentile F., Reims R., Petrov P.***, Setting Fines in Antitrust Cases — A Review of the Application of the 2006 Guidelines, CPI Columns, Europe, April 25, 2021
Available at: <https://www.competitionpolicyinternational.com/setting-fines-in-antitrust-cases-a-review-of-the-application-of-the-2006-guidelines/> [last accessed: 23.12.2021]

Although a number of changes were made to the 2006 Guidelines on issues such as the legal maximum, the leniency program and the settlement, no changes were made either under Article 23 of Regulation №1/2003 nor other specific legislation. As for the legal maximum, paragraphs 32 and 33 of the 2006 Guidelines set a common limit on fines applied to enterprises, which should not exceed 10 percent of their total turnover in the previous business year. The guideline also emphasizes that for a breach by the Association of undertakings, 10 per cent must be calculated based on the total turnover of each member active on the market affected by this breach.[566]

Despite the development of a methodology consisting of the stages of imposing fines for antitrust breaches, the 2006 guidelines provide for a special reservation (called "a safety clause") that allows the Commission to deviate from these guidelines (including the limits set out in paragraph 21), which is justified by the "particularities of a given case or the need to achieve deterrence."[567] This possibility is recognized by EU courts, which allows the Commission to change penalties on a case-by-case basis in each case, in accordance with paragraph 37 of the 2006 Guidelines. Indeed, the lack of such a flexible approach can lead to disproportionate penalties.[568]

It can be said that ensuring compliance with antitrust prohibitions, as provided for in Articles 81 and 82 of the TEEC[569], involves three tasks:[570]
1) Clarification of the content of prohibitions;
2) To prevent violations of these prohibitions, and
3) Dealing with the consequences (eliminating the consequences) caused by a violation.

Fines that exceed the company's ability to pay will lead to bankruptcy, and even when a company is insolvent, imposing high fines can lead to significant social and economic costs. This potential problem may be exacerbated in the case of collective breaches, for which penalties are imposed simultaneously on all or most of the companies competing with each other in a particular market.[571]

In a decision of 19 July 2016, the European Commission found that truck manufacturers - MAN, Volvo/Renault, Daimler, Iveco, and DAF - had breached EU antitrust rules and imposed a record fine of € 2.93 billion.[572] The aforementioned truck manufacturers in 1997-2011 made deals with other European manufacturers regarding truck prices and gross price increases in the European

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[566] *Ibid.*
[567] *Ibid.*
[568] *Ibid.*
[569] See Treaty establishing the European Community (TEEC)
Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT> [last accessed: 23.12.2021]
[570] ***Wils Wouter P. J.***, Optimal Antitrust Fines: Theory and Practice. World Competition, Vol. 29, No. 2, June 2006, p. 5
Available at: <https://ssrn.com/abstract=883102> [last accessed: 23.12.2021]
[571] *Ibid.* p.27
[572] Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel 19.07.2016
Available at: <https://ec.europa.eu/commission/presscorner/detail/ro/IP_16_2582> [last accessed: 27.01.2022]

Economic Area.[573] Therefore, in the present case the cartel took place. It should be noted that one of the manufacturers - MAN - despite being identified as a violator, was not fined because the latter informed the European Commission about the existence of the cartel (*read about the Leniency Programme below*). Daimler was fined the highest amount - more than € 1 billion.

It is interesting to consider the right of the companies affected by this cartel to claim damages. In some cases, the amount of damages may be greater than the fine imposed. In this regard, private enforcement for damages may be an even more important issue. According to European practice, compensation for damages by a parent company for violating EU competition law can even be imposed on its subsidiary and vice versa. A comprehensive understanding of the concept of "undertaking" gives the European Commission broad discretion in identifying those responsible for violating competition law, allowing it to impose responsibility to all companies that form a single economic unit.[574] The European Commission also relies on "the principle of economic continuity" to establish responsibility for the corporate groups when reconstructing.[575]

With the rise of private enforcement in competition law, the question emerges as to whether individuals can rely on these concepts when determining liability in a private lawsuit. Recent cases of *Sumal* and *Skanska* have shown that EU Courts are in favour of extending the "undertaking" doctrine to private claims for damages.[576] *Advocate General Pitruzzella* in his opinion[577] of 15 April 2021 regarding *Sumal* case states that a national court may order a subsidiary to pay compensation for damages caused by its parent company's anti-competitive conduct and in March 2021 the Grand Chamber of the European Court of Justice (CJEU) in the *Skanska* case ruled[578] that "the principle of economic continuity" applies in the context of a claim for further damages.[579]

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[573] See Court of Justice of the European Union, PRESS RELEASE No 174/21, Luxembourg, 6 October 2021, Judgment in Case C-882/19, Sumal
Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-10/cp210174en.pdf> [last accessed: 27.01.2022]

[574] ***Sadrak K., Moore E., Cole M.***, EU Courts extend the doctrine of "undertaking" to private claims for damages, June 17, 2021
Available at: <https://www.globalpolicywatch.com/2021/06/eu-courts-extend-the-doctrine-of-undertaking-to-private-claims-for-damages/> [last accessed: 27.01.2022]

[575] *Ibid.*

[576] *Ibid.*

[577] See Opinion of Advocate General Pitruzzella delivered on 15 April 2021, Sumal, S.L. v Mercedes Benz Trucks España, S.L., ECLI:EU:C:2021:293
Available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CC0882> [last accessed: 27.01.2022]

[578] See Judgment of the Court (Second Chamber) of 14 March 2019, Vantaan kaupunki v Skanska Industrial Solutions Oy and Others, ECLI:EU:C:2019:204
Available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62017CJ0724> [last accessed: 27.01.2022]

[579] ***Sadrak K., Moore E., Cole M.***, EU Courts extend the doctrine of "undertaking" to private claims for damages, June 17, 2021
Available at: <https://www.globalpolicywatch.com/2021/06/eu-courts-extend-the-doctrine-of-undertaking-to-private-claims-for-damages/> [last accessed: 27.01.2022]

In order to avoid deteriorating market structure as a result of fines, all cases where high fines are imposed and there is a significant difference in the solvency of different cartel participants - the number of fines imposed on different companies shall be different to match their solvency. This can be done either by reducing the fines imposed on companies with low solvency, or by generally imposing lower fines, but then increasing the amounts of these fines as needed for companies with higher solvency.[580]

Also, Professor *Wouter P. J. Wils* writes in his paper that any system in which the determination of the amount of a fine is based on the revenue received by the infringer or the damage caused by the violation of antitrust rules should be avoided. In such cases, the burden of proof always rests with the competition authority or the prosecutor. Moreover, it is difficult to determine the exact amounts. Consequently, it is difficult to prove their legal standards. It is also expected that there will be an information deficit that will hinder the competition authority or the prosecutor.[581]

Chapter VII of the Law of Georgia on Competition is dedicated to sanctions. The changes made in 2020 also affected this part of the Law. In particular, Article 32 of the Law was modified. The fine for failure to provide information to the Competition Agency within the specified time limit, provision of incorrect or incomplete information has become fixed and is 3,000 GEL for a legal person and 1,000 GEL for a natural person. The old version did not provide for a fixed amount of the fine and the Competition Agency had discretionary power to determine the amount of the fine (it imposed fines from GEL 1,000 to GEL 3,000). In the Explanatory Note[582] it is stated that the failure to provide information does not constitute an offense whose amount depends on the financial condition of an undertaking. That is why the amount of the fine became fixed. In case of recurrence, the fine will be GEL 5,000 for a legal person and GEL 3,000 for a natural person. Imposition of a fine does not release a person from the obligation to provide information to the Competition Agency.

One of the biggest shortcomings of the old version of the Law was the lack of appropriate sanctions in the event of concentration bypassing competition law:[583] According to the old version,

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Also see ***Verhulst M.***, Private enforcement strikes again: liability of subsidiaries and sister companies, October 28, 2021
Available at: <https://corporatefinancelab.org/2021/10/28/private-enforcement-strikes-again-liability-of-subsidiaries-and-sister-companies/> [last accessed: 27.01.2022]

[580] ***Wils Wouter P. J.***, Optimal Antitrust Fines: Theory and Practice. World Competition, Vol. 29, No. 2, June 2006, p. 28
Available at: <https://ssrn.com/abstract=883102> [last accessed: 23.12.2021]

[581] *Ibid.* p.32

[582] Explanatory Note to the Draft Law of Georgia on Amendments to the Law of Georgia on Competition, p.32
Available in Georgian language at: <https://info.parliament.ge/file/1/BillReviewContent/224612?fbclid=IwAR07liyQvmCxIb8Bnmyp84fk8nC3DkcQuZzoj5VuvMK5kmw40ZY_gK38JXg> [last accessed: 23.12.2021]

[583] *Ibid.* pp. 32-34

undertakings were obliged to submit a concentration notice to the Competition Agency in certain cases (this obligation is also provided by the current legislation). However, in case of non-fulfillment of the obligation by undertakings to submit the notification on concentration to the Competition Agency, the Law did not provide for any sanctions. According to the Explanatory Note, there was a case in Competition Agency practice where a specific transaction was examined on the basis of an application submitted and it was established that the undertakings involved in the transaction, considering the turnover, were required to apply to the Competition Agency and request an evaluation of the transaction, however they did not do so. Even the Competition Agency had no leverage to respond appropriately to the concentration already implemented. It therefore became necessary to impose a fine by law. Sanctions were also imposed on a case when a concentration is carried out despite a negative decision by the Competition Agency (Article 33 (4) of the Law of Georgia on Competition). The amount of the fine shall not exceed 5% of a violator's annual turnover during the financial year prior to the relevant financial decision by the Competition Agency.

Sanctions were imposed on cases of unfair competition.[584] The amount of the fine shall not exceed 1% of the annual turnover of an undertaking during the previous financial year prior to the relevant decision of the Competition Agency, and in case of non-elimination of the legal basis of the said violation, or repeated violation, the amount of fine shall be 3%. The old version of the Law did not provide for a sanction in case of unfair competition and only the fact of violation was confirmed.

According to the new version of the Law, the Competition Agency is authorized to impose fines in the following cases:[585]

- If an appropriate report on concentration is prepared on the condition that undertakings implement the structural and behavioural measures, but this obligation is not fulfilled by them;

- If, in order to remedy the alleged breach, the parties offer the Competition Agency a performance of a contingent liability and then the Competition Agency will agree to their contingent liability and terminate the case without assessing the alleged breach, but the parties will not fulfill the contingent liabilities assumed by them.

Penalty is provided for each overdue day. Accordingly, the amount of the fine for each overdue day shall not exceed 5% of the average daily turnover of an undertaking during the financial year prior to the relevant financial decision.[586] In EU competition law, this mechanism is known as the "Periodic Penalty Payments".[587]

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[584] *Ibid.* p. 33
[585] *Ibid.*
[586] Article 33 (3) of the Law of Georgia on Competition
[587] See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 24

No special procedural rules have been established for imposing a fine and investigating a violation of the rules of notification on concentration.[588] The Competition Agency shall study the issue through a simple administrative proceeding established by the General Administrative Code of Georgia for the adoption of an administrative-legal act, for which it shall use the appropriate authority provided for in Article 18 of the Law.

A person/party shall be obliged to pay the fine imposed in accordance with this Article to the State Budget of Georgia within 1 month after the imposition.[589]

4.3. Leniency Programme

Leniency programme is a special procedure for full or partial release of a person from a fine for violating Article 7 of Law of Georgia on Competition (Agreement (Cartel), decision or agreed action that distorts competition) if the conditions established by the Law are met.[590]

Under a leniency programme, an undertaking is granted some form of immunity from fines, meaning that an undertaking may be exempt from fines or may be imposed of reduced fines for antitrust offenses in exchange for cooperation with antitrust authorities.[591]

Leniency programme can facilitate the optimal enforcement of antitrust policy in a number of ways, depending on the type of leniency programme (e.g. providing information and evidence of violations and/or acknowledging the violation and receiving a sanction) and whether the type of violation committed by the offender is individual or collective e.g. violations such as cartels.[592]

Competition authorities can obtain the necessary information and evidence from three possible sources: First, they can monitor the markets themselves, observe publicly available information and data, and possibly use economic analysis of this data to detect and confirm antitrust

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The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision.
Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001> [last accessed: 28.01.2022]

[588] Explanatory Note to the Draft Law of Georgia on Amendments to the Law of Georgia on Competition, p.34
Available in Georgian language at: <https://info.parliament.ge/file/1/BillReviewContent/224612?fbclid=IwAR07liyQvmCxIb8Bnmyp84fk8nC3DkcQuZzoj5VuvMK5kmw40ZY_gK38JXg> [last accessed: 23.12.2021]

[589] See Article 33 of Law of Georgia on Competition

[590] Article 3(n^1) of Law of Georgia on Competition

[591] ***Wils Wouter P. J.***, Leniency in Antitrust Enforcement: Theory and Practice. World Competition: Law and Economics Review, Vol. 30, No. 1, March 2007 (Last revised: 27 Nov 2013), p.4
Available at: <https://ssrn.com/abstract=939399> [last accessed: 24.12.2021]

[592] *Ibid.* p.19

breaches.[593] For cartels, this first method has not been very efficient in practice, as economic evidence is usually insufficient to establish the existence of an agreement in court, and in jurisdictions where there are no more stringent restrictions on cartels, it is difficult to establish cartels.[594] Despite the legal standard of proof on appeal, the existence of a cartel is often not detectable, even at the level of suspicion, as it is a transaction of a covert nature. The second way to obtain information is through third parties: consumers or competing undertakings who have been harmed by a breach of antitrust.[595] They can file a complaint with the competition authority or otherwise provide information. And, the third source, which is considered the best, are companies and individuals who themselves have violated antitrust rules.[596]

As a result of the amendments to the Law of Georgia on Competition in 2020, the scope of a leniency programme with the regulated sectors of the economy has changed fundamentally:[597] Under the old wording of the Law, the control of competition law enforcement in the regulated sectors of the economy, namely the banking, energy and water supply and electronic communications sectors was out of the scope of the Competition Agency's authority. The Competition Agency would send the correspondence on competition violations in these areas to the relevant regulatory authority and only at its request could the Competition Agency be involved in the review process at the consultation level. As it is stated in the Explanatory Note, due to the lack of legislative norms, enforcement of competition was also problematic. In order for the country to successfully fulfill its obligations under the Deep and Comprehensive Free Trade Agreement (DCFTA) with the European Union, the Competition Agency shall also extend its scope to the regulated sectors of the economy. The international practice is the same - there is no country where the competition authority has no right to investigate the violation of competition in the regulated sectors.

According to the new version of Article 31 (1) and (2) of the Law, a complaint/application about a possible violation of competition in the regulated sectors of the economy or a notification on a concentration will be submitted to the relevant regulatory authority or Competition Agency. If a complaint/application or notification on a concentration concerning a possible violation of competition in the regulated sectors of the economy is submitted to the Competition Agency, it

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[593] ***Wils Wouter P. J***., The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years (June 10, 2016). World Competition: Law and Economics Review, Vol. 39, No. 3, 2016, King's College London Law School Research Paper No. 2016-29 (Last revised: 6 Feb 2018), p.11
Available at: <https://ssrn.com/abstract=2793717> [last accessed: 24.12.2021]
[594] *Ibid.*
[595] *Ibid.*
[596] *Ibid.*
[597] Explanatory Note to the Draft Law of Georgia on Amendments to the Law of Georgia on Competition, pp. 29-32 Available in Georgian language at: <https://info.parliament.ge/file/1/BillReviewContent/224612?fbclid=IwAR07liyQvmCxIb8Bnmyp84fk8nC3DkcQuZzoj5VuvMK5kmw40ZY_gK38JXg> [last accessed: 23.12.2021]
Also, see Article 31 of Law of Georgia on Competition

shall send the complaint/application or the notification to the relevant regulatory authority within 5 business days, except in the following cases:

The Competition Agency shall consider the matter referred to in paragraph 1 of this Article if there is one of the following conditions:

- the alleged violator of the Law, or one of the parties to the concentration is not an undertaking in the regulated sector of the economy;

- the alleged violators of the Law and the parties to the concentration are the undertakings of various regulated sectors of the economy;

- the entity/entities allegedly violating the Law is/are the undertaking(s) of the regulated sector of the economy, but the said action (subject of dispute) has not been carried out in the regulated sector of the economy.

The new edition of Article 33^1 of the Law on Competition was formed, which deals with the use of a leniency programme:[598] According to the old version, an undertaking was entitled to benefit from a leniency programme and was fully or partially released from liability if an undertaking admitted its participation in price fixing, market redistribution and/or market restriction. These agreements are known as “the serious violations” to which no legislative exception applies. If the legislator gives an undertaking the right to use a leniency programme in case of the serious violations, the same person should have the right to use this programme even in case of minor violations. That is why, according to the new version of the Law, the leniency programme applies to all cases under Article 7 (both serious and minor violations).

A person shall be fully or partially exempted from the imposition of a fine for the violation of this Law if he/she meets all of the following conditions:[599]

- admits, in writing, participation in the agreements provided for by Article 7 of this Law;

- provides to the Competition Agency, orally or in writing, important information and evidence known to him/her on the agreement provided for by Article 7 of this Law, before the Competition Agency receives this information and evidence from other sources;

[598] Explanatory Note to the Draft Law of Georgia on Amendments to the Law of Georgia on Competition, p. 34 Available in Georgian language at: <https://info.parliament.ge/file/1/BillReviewContent/224612?fbclid=IwAR07liyQvmCxIb8Bnmyp84fk8nC3DkcQuZzoj5VuvMK5kmw40ZY_gK38JXg> [last accessed: 23.12.2021]

[599] Article 33^1 (1) of the Law of Georgia on Competition

- during an investigation process, continuously and unrestrictedly cooperates with the Competition Agency;

- terminate its participation in an agreement against the law, unless the Competition Agency considers that the continued participation of the person in the agreement will facilitate the investigation of the case;

- does not destroy documents and evidence relevant to the case;

- does not disclose information about the participation in the leniency programme.

5. Interim Conclusion

Free and fair market competition is the basis of economic development of any country. Georgia has legislation that protects competition from distortion, the enforcement of which is the responsibility of the Competition Agency. The efficient functioning of the Competition Agency is important in order to prevent the abuse of the position by a market-dominated undertaking, to promote small and medium-sized businesses and to respond promptly and appropriately in the event of a breach of free competition.

It should be noted that the amount of sanctions imposed by the Competition Agency on specific violations, given the existing Georgian market, is sufficient and serves its purpose to be a mechanism for preventing violations.[600] However, we believe that it is not the amount of sanction but the efficiency of enforcement that matters. It is important that a sanction imposed by the Competition Agency does not fail in terms of enforcement. Regulating the enforcement mechanism of a sanction, in turn, will help prevent lawlessness and give an undertaking an incentive to come forward to the leniency programme.

It is important to continue active work in this area in terms of improving the legislation and ensuring the efficiency of enforcement. It should be noted that currently four draft laws are being discussed in the Parliament of Georgia according to which the functions of the Competition Agency are being strengthened, as well as being equipped with new competencies.

The draft law on Consumer Protection authored by the Committee on European Integration is being prepared[601] in full compliance with the European directives and serves to improve the standard of consumer protection. The draft law on Amendments to the Law of Georgia on

[600] It is noteworthy that within the framework of the present research, a meeting was held with the representative of the Georgian Business Association, where the Association noted that the work of the Georgian Competition Agency is efficient and in line with the EU legislation - Meeting with the representative of the Georgian Business Association - Nika Nanuashvili [06.12.2021]

[601] See <https://parliament.ge/legislation/21833> [last accessed: 24.12.2021]

Competition is being prepared as well. Once the Law on Consumer Protection is enacted, the enforcement will be the responsibility of the Competition Agency.

Chapter X. Private Enforcement

1. Georgian Regulation

The previous version of the Law of Georgia on Competition contained only a single reference to the right to claim damages in case of violation of the law. In particular, Article 33^2 recognized the right of undertakings, or other interested parties, may apply to a court, relevant authorities or officials directly and request the elimination of a violation of the competition legislation of Georgia and compensation for damage caused by such violation.[602]

Date of consolidated version	
15.07.2020[603]	**28.05.2021[604]**
Article 33^2 Procedure for appealing a decision of the Agency	**Article 33^2** Procedure for appealing a decision of the Agency
Undertakings, or other interested parties, may apply to a court, relevant authorities or officials directly and request the elimination of a violation of the competition legislation of Georgia and compensation for damage caused by such violation, as well as appeal the decision of the Agency to a court.	1. A person has the right to appeal the decision of the Agency in the Tbilisi City Court. 2. The court is authorized to fully review the decision of the Agency, including the amount of the fine

1.1 Legislative vacuum

It is noteworthy that the previous version of Article 33^2 was not considered as a legal basis for a claim for damages caused by a breach. The clause had more of a procedural legal nature. The teleological basis of this provision guaranteed the right of a person, bypassing the Protection of Competition Agency, to go directly to court and thus, claim damages. [605] It should be emphasized

[602] ***Adamia G.,*** Perspectives on Private Enforcement of Competition Law on the Example of Abuse of Dominance in Georgia, Journal of Comparative Law, 2020, p. 23
[603] Law of Georgia on Competition, Consolidated Version of 15.07.2020
Available at:
<https://matsne.gov.ge/ka/document/view/1659450?publication=8> [Last accessed: 19.12.2021]
[604] *Ibid.*
[605] ***Adamia G.,*** Perspectives on Private Enforcement of Competition Law on the Example of Abuse of Dominance in Georgia, Journal of Comparative Law, 2020, p. 26

that this provision itself was a rather broad and general clause that did not provide any specific indication of the legal means of obtaining adequate compensation for damages.

The current version not only fails to provide relatively detailed guidance on claiming damages, but the provision no longer provides for a direct appeal to the court, which in turn makes the scope of the private enforcement mechanism even more obscure.

1.2 Practice

The first relevant Georgian case is a prominent dispute between the distributors of Apple Inc. products in Georgia, iTechnics LLC and iPlus LLC.[606] According to the subject matter of the case iPlus LLC committed three types of unlawful acts to the detriment of the claimant through electronic media and various online manipulations. These actions included the following:

1. Removal of the claimant's official Facebook page by knowingly and intensively reporting false information to the Facebook administration;

2. Creation of a fake Facebook page using the claimant company's trademark and dissemination of defamatory statements defaming iTechnics LLC's business reputation;

3. Using the claimant company's trademark, creating a fake website, and publishing defamatory material.

The relevant facts of the case indicated characteristics of unfair competition. However, the claimant decided to file a claim directly to the court and substantiated the merits of the case by using respective provisions of civil law, particularly, the tort law. The claim was partially satisfied by the Tbilisi City Court and the defendant was imposed a duty to compensate the claimant in the amount of 856,000 GEL.[607] [608]

The other case is an ongoing dispute between the distributors and a supermarket Carrefour (Majid Al Futai Hypermarket Georgia LLC).[609] The case itself is exceedingly crucial for the Georgian retail and distribution sector. Considering no specific regulations are governing this particular segment, supermarket chains have established unscrupulous and unfair practices that strive to

[606] It should be emphasized that I was intensively involved in the litigation against iPlus LLC as the one of the representatives of the claimant.
[607] It should be emphasized that the amount of compensation set by a court in this case presents a stark contrast to the maximum amount of fines that Agency may impose in administrative proceedings.
[608] The case was also reviewed by the Competition Agency of Georgia, which concluded the absence of infringement of Article 11^3 of Law of Georgia on Competition.
[609] This particular case is currently pending in the Tbilisi City Court, and the team of the law firm "J&T Consulting" under my lead represents the claimant in the legal proceedings against supermarket Carrefour.

violate and restrict the rights of distributors and producers by proposing transparently unfair terms in the agreement.
As it was already outlined previously, the current legislation of Georgia does not regulate fair trade conditions between retailers and distributors. Considering that the market power of some retailers is relatively significant as opposed to small businesses there is a standardized practice of abuse of such power by the relevant actors. Thus, it is obvious that the legislative vacuum precipitates significant issues regarding the fair condition and imbalance of power consequently causes substantial impact on the competitive environment.

In view of the above-mentioned, to uphold its interests against the defendant, the claimant applied directly to the court and based its claim on the applicable provisions of civil law (particularly, Articles 54 and 342-350 of the Civil Code).

In practice, the most high-profile litigation over damages for abuse of a dominant position was between JSC Tbilisi Tobacco and Philip Morris Georgia LLC. In this dispute, the court of first instance imposed an obligation to pay damages in the amount of GEL 93 million to Philip Morris Georgia LLC, but the court of higher instance overturned the decision. According to the dispute subject, Tbilisi Tobacco JSC elaborated that Philip Morris Georgia LLC started selling BOND STREET cigarettes at a lower price as of 1 September 2013. As a result, JSC Tbilisi Tobacco's sales dropped significantly and the company suffered significant losses. What is particularly noteworthy in this case is that the applicant filed a claim directly to court and the Competition Agency did not review the case. [610] [611]

[610] In the case of an appeal to the agency, it considered infringement of competition rules and the party seeking compensation still had to file a civil action for damages.
[611] ***Japaridze L***., ***Zukakishvili K***., ***Sergia N***., ***Zhvania N.***, ***Momtselidze S.***, ***Akolashvili M***., ***Gvelesiani Z***., ***Kobadze N***., Competition Law of Georgia, Tbilisi, 2019, pp. 474-475

2. Compliance with European legislation

The right to claim damages in a national court for breach of EU law was first established in 2001 in *Courage v Crehan*.[612] In that decision the Court explained that EU law, and more specifically the effectiveness of competition law, requires compensation for damages arising from a violation of Articles 101 and 102 if there is a causal link between the damage caused and the action that distorts or restricts competition. [613] According to the European Court of Justice, the existence of such a right strengthens EU competition law and prevents agreements or practices that are often obscure and have a potential to restrict competition. [614]

2.1 The concept of private enforcement

Generally, the private enforcement mechanism is characterized by the following advantages:

(a) the potential for prevention and improving compliance with the law;
(b) compensation to persons affected by the anticompetitive conduct;
(c) private enforcement is effective in hearing certain types of cases. For example, when in a dispute between the parties the claimant has access to evidence related to the defendant's business activities;
(d) the Commission and the national competition authorities do not have sufficient resources to review absolutely all anti-competitive conduct;
(e) courts allow for the imposition of interim measures relatively quickly;
(f) The courts have the power to reimburse the other party for the legal aid costs of the other party. Expenses for legal aid of an undertaking are not compensable in case of review of the complaint by a public body;
(g) private enforcement practices develop a culture of competition among market participants, including consumers, and raise awareness of competition rules.[615]

In principle, private enforcement fulfils two crucial functions: prevention and compensation. Moreover, private enforcement may take two forms: independent litigation or litigation after the competent authority has established anticompetitive conduct. In both cases, the claimant bears the

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[612] *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, Case C-453/99, ECLI:EU:C:2001:465, 20 September 2001, ECJ
[613] ***Dunne N.,*** The Role of Private Enforcement within EU Competition Law, Cambridge Yearbook of European Studies, Vol. 16, 2017, pp. 154-155
[614] *Courage v. Crehan*, იხ. *Dunne, N.,* The Role of Private Enforcement within EU Competition Law, Cambridge Yearbook of European Studies, Vol. 16, 2017, p. 155
[615] ***Woods D., Sinclair A., Ashton D.,*** Private enforcement of Community competition law: modernisation and the road ahead, Competition Policy Newsletter, 2004, p. 32

burden of proving a causal link between the action and the damage.[616] This mechanism thus entitles the person concerned to compensation for the damage caused by the violation established through public enforcement (*follow-up actions*), or enables independent litigation to challenge and identify infringements that are not covered by public enforcement (*stand-alone actions*). While the first option (*follow-up actions*) is a kind of extension of public enforcement, the stand-alone action mechanism that is separate from the public legal proceedings has a more significant prevention impact. This is due to the fact that such cases reveal abuses that would not otherwise have been detected. To be more specific, private enforcement, as opposed to public enforcement, provides individual market participants with the opportunity to protect rights violated by private conduct.[617]

The private enforcement compensation function serves to compensate the victim (other undertakings or consumers) for damages caused by anticompetitive actions.[618] In the *Manfredi*[619] case, the European Court of Justice explained that the right to claim damages extends not only to actual loss (*damnum emergens*), but also to gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interest. In this regard, the Court has pointed out that damages caused by a breach of EU law must be fully compensated. Furthermore, the right to compensation from the undertaking(s) also includes an "umbrella pricing", which, in turn, means the case where competitors operating outside the cartels take advantage from reduced competition in the market and increase the price of the relevant product/service.[620]

2.2 Directive 2014/104/EU

The relevance of damages for infringement of competition law has been emphasized by the European Court of Justice on several occasions. Judgments of 2001 and 2006 establish a general framework for the private application of EU competition law. In *Courage v. Crehan* the Court held that persons who have been harmed by infringement of competition in the EU law by an undertaking are entitled to claim compensation and that Member States should develop an effective procedural system for obtaining compensation. In its 2006 decision in the *Manfredi* case the Court clarified that the principle of invalidity can be applied by anyone and that it is not necessary to

[616] ***Demedts V.,*** The Future of International Competition Law Enforcement: An Assessment of the EU's Cooperation Efforts, Brill Nijhoff, 2019, p. 206
[617] ***Lorenz M.,*** An Introduction to EU Competition Law, Cambridge University Press, 2013, p. 361
[618] **Stephen A.,** Does the EU's Drive for Private Enforcement of Competition Law Have a Coherent Purpose, University of Queenslad Law Journal, 2018, pp. 153-154
[619] Joined Cases C-295/04, C-296/04, C-297/04 and C-298/04, V*incenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpAand Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA*., ECLI:EU:C:2006:461, 13 July 2006, ECJ
[620] ***Dunne N.,*** The Role of Private Enforcement within EU Competition Law, Cambridge Yearbook of European Studies, Vol. 16, 2017, p. 155

prove an interest in the invalidity of a contract or practice.[621] Therefore, the positive dynamic towards the mechanism in question is clearly and unambiguously expressed. Moreover, the obligation of Member States to provide effective legal instruments to protect the interests of victims is emphasized.

In this respect, it should be noted that in the 2005 Green Paper the Commission concluded that the system of compensation for damages caused by infringements of competition was underdeveloped in the legislations of Member States.[622] The number of private enforcement cases was increasing, notably from 54 cases in 1999 to 146 cases in 2011. However, in 2013 the Commission stipulated that "despite the progress made in several Member States, the majority of those affected by EU competition infringements does not file a claim for damages.[623] It should be outlined that between 2006 and 2012 less than a quarter of the Commission's decisions confirming anticompetitive behaviourwere accompanied by a claim for damages. In most of the claims filed, the claimants were large companies mainly from three member states, namely the UK, Germany and the Netherlands.[624] Thus, the Commission finally concluded that the damages mechanism needed to be strengthened and balanced with the public enforcement tool. The Commission explained that the new regulation would assist in overcoming obstacles and ensuring effective compensation for victims. [625]

Thereby, the purpose of EU Directive 2014/104/EU was to facilitate the filing of claims for damages. This Directive, which regulates general issues relating to damages under national law, was signed on 26 November 2014 and was due to be implemented by the Member States by 27 December 2016. Notably, the Directive establishes only a general framework and leaves the Member States broad powers to determine the details. In particular, it does not define the concept of causation, immediacy of the act causing the damage, adequacy and the possibility of limiting reparation, thereby, it gives Member States a wide discretion. [626]

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[621] ***Moodaliyar K., Reardon F. J., Theuerkauf S.,*** The Relationship between Public and Private Enforcement in Competition Law – A Comparative Analysis of South African, the European Union, and Swiss Law, South African Law Journal, Vol. 127, No. 1, 2010, pp.10-11

[622] Green Paper, N12, 1.2, - *See. Jones, A.,* Private Enforcement of EU Competition Law: A Comparison with, and lessons from, the US, in *Bergström, M., Iacovides, M., Strand, M.,* (eds), Harmonnising EU Competition Litigation: The New Directive and Beyond, Hart Publishing, 2016, p.12

[623] ***Jones A.,*** Private Enforcement of EU Competition Law: A Comparison with, and lessons from, the US, in *Bergström, M., Iacovides, M., Strand, M.,* (eds), Harmonnising EU Competition Litigation: The New Directive and Beyond, Hart Publishing, 2016, p.12

[624] ***Demedts V.,*** The Future of International Competition Law Enforcement: An Assessment of the EU's Cooperation Efforts, Brill Nijhoff, 2019, p. 206

[625] ***Jones A.,*** Private Enforcement of EU Competition Law: A Comparison with, and lessons from, the US, in *Bergström, M., Iacovides, M., Strand, M.,* (eds), Harmonnising EU Competition Litigation: The New Directive and Beyond, Hart Publishing, 2016, p.12

[626] ***Franck J.,*** Private Enforcement of EU Competition Law in Germany, Country Report (Chapter 5) in Wollenschläger, F., Wurmnest, W., Möller, s M., J., T., (eds.), Private Enforcement of European Competition and State Aid Law, Wolters Kluwer, 2020, p. 11

The first paragraph of Article 3 of the Directive sets out the principles provided in the *Crehan* case and establishes the obligation that Member States shall ensure that any natural or legal person who has suffered damage as a result of an infringement of competition law shall be entitled to seek and obtain full compensation. In line with the principles of equivalence and effectiveness set forth in Article 1, to remedy the current inequality in the EU this right applies to both EU law and national competition law. [627]

The Directive incorporates several important clauses that contribute to the harmonisation of Member States' competition law. These include the following: [628]

i. Courts should be entitled to require disclosure of specific evidence, provided that such facts are reasonably available to the claimant. [629]

ii. The decisions of the competent competition authorities shall be regarded as binding in the national courts. The binding nature of the European Commission's decisions for actions for damages derives from Article 16 of Regulation 1/2003 and the *Masterfoods* case of the European Court of Justice. [630] Accordingly, a decision rendered by a competition authority or court in one Member State for the purposes of a claim brought in any EU country must be considered at least as a *prima facie* evidence of infringement. [631]

iii. There must be a minimum limitation period that shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know: (a) of the behaviourand the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law caused harm to it; and (c) the identity of the infringer. [632]

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[627] ***Stephen A.,*** Does the EU's Drive for Private Enforcement of Competition Law Have a Coherent Purpose, University of Queenslad Law Journal, 2018, p. 163

[628] *Ibid.,* 163-164

[629] Article 5, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union
Available at:
<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32014L0104> [Last accessed: 25.12.2021]

[630] ***Wills P. J. W.,*** Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future, World Competition: Law and Economics Review, Vol. 40, No. 1, 2017, p. 31

[631] Article 9 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union
Available at:
<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32014L0104> [Last accessed: 25.12.2021]

[632] *Ibid.,* Article 10

iv. In accordance with the Article 11(1) undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law; [633]

v. Pursuant to Article 17 (2) it shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption. [634]

vi. Alternative dispute resolution mechanisms should be encouraged in order to reduce legal costs and create more opportunities for compensation.[635] Specifically, pursuant to paragraphs 1 and 2 of Article 18 limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process and national courts seized of an action for damages may suspend their proceedings for up to two years where the parties thereto are involved in consensual dispute resolution concerning the claim covered by that action for damages.[636]

Furthermore, it should be outlined that Article 5 of the Directive provides that upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control.[637]

Disclosure should be limited and proportionate. Disclosure of evidence containing confidential information should only be executed if it is relevant to a claim for damages and provided it is protected. Persons who have been instructed to disclose information should have the right to express their views in a national court.[638]

In the case of a claim for damages based on a violation established by the competition authority (constituting a follow-up actions) the relevant competition authority has an obvious addressee to obtain relevant evidence. Consequently, competition authorities often become the addressees of such information. At the same time, it should be noted that competition agencies have limited resources, and those resources must be used purposefully.[639] To this end, under paragraph 10 of Article 6 of the Directive, national courts may only require competition authorities to disclose

[633] Article 11 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union
Available at:
<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32014L0104> [Last accessed: 25/12/2021]
[634] *Ibid.,* Article 17
[635] *Ibid.,* Article 18
[636] *Ibid.,* Article 18
[637] *Ibid.,* Article 5
[638] ***Wills P. J. W.,*** Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future, World Competition: Law and Economics Review, Vol. 40, No. 1, 2017, p. 32
[639] *Ibid.*

relevant information if it is impracticable to obtain such evidence from one of the parties or a third party. [640]

In view of the above, the case of *Pfleiderer*[641] concerning the issue of access to the German Competition Agency's case file is noteworthy. In the case the court refused to elucidate the general restriction on disclosure of a document submitted under the leniency programme. However, it held that such a request should be considered in the light of the individual circumstances of the case, taking into account the proportionality of the interests of the parties and the protection of the leniency programme. [642]

3. Interim Conclusion

In accordance with the EU Directive:

- Any person who has suffered damage as a result of a breach of competition law by an undertaking(s) is entitled to full compensation from that undertaking(s);
- National courts should guarantee the right of any natural or legal person to claim and be compensated for damages caused by an infringement of competition law;
- The right to claim damages extends not only to actual loss, but also to gain of which that person has been deprived (loss of profit), plus interest. Additionally, full compensation shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.
- Upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control

Unlike EU law, Georgia's competition law does not provide for an effective mechanism to compensate for damages caused by infringements of competition.

Pursuant to the consolidated wording of Article 33^2 of the Law of Georgia on Competition of July 15 2020, undertakings, or other interested parties, may apply to a court, relevant authorities or officials directly and request the elimination of a violation of the competition legislation of Georgia

[640] Article 6 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union
Available at:
<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32014L0104> [Last accessed: 26.12.2021]
[641] *Pfleiderer AG v Bundeskartellamt*, C-360/09, ECLI:EU:C:2011:389, 14 June 2011, ECJ
[642] ***Wills P. J. W.,*** Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future, World Competition: Law and Economics Review, Vol. 40, No. 1, 2017, p. 32

and compensation for damage caused by such violation. Furthermore, a claim for damages in case of such violation usually leads to a civil dispute.

Additionally, the version of the act dated 28 May 2021 no longer mentions the above-mentioned provision and thus, the issue of damages becomes even more obscure. Consequently, the lack of proper regulation and legal framework complicates the perception of the matter and its practical applicability.

Summary Conclusion/Recommendations

1. As a consequence of the amendments to the Law of Georgia on Competition in 2020, the concepts of "undertaking" and "economic activity" have been expanded, which enables for broader enforcement of the law. It appears advisable for the competition agency to seize this opportunity and enforce the law extensively to improve the competitive environment.

2. The Law on Competition in relation to the "cartel" distinguishes between:: i. The agreement, ii. Decision and iii. Concerted practice, the objective or effect of which is to restrict competition on the relevant market. In the case of all three grounds, it is crucial to have two cumulative conditions: i. The demonstrated objective of the parties to restrict competition; and ii. Attempting to enforce this objective. In accordance with clarification of the Agency, it does not matter in what way of objective is expressed the core point is to prove the existence of such objective. Which is fully in line with European standards and eliminates the existing gaps in Georgian practice.

3. For the objective of competition law, an agreement, decision or concerted practice whose objective or effect is to restrict competition on the relevant market is against the law. Objective and effect are two alternative preconditions, the existence of one of which is sufficient to establish the existence of a cartel. As the practice of the Competition Agency demonstrates, in the first stage, the objective is established and if the objective is established, there is no need to establish the effect. And if the objective is not established, but the identifiable consequence of the agreement, decision, or concerted practice still restricts competition, this is already a sufficient legal basis for determining it the against the illegality. However, in the event of a restriction of competition competition, to comply with European best practice, the Agency should apply the sanction only in the case of hard-core violations, and in the rest of the violations, the Agency shall provide recommendations to the undertaking(s).

4. In practice, the most common types of violations laid down by Article 7 of the Competition Law are i. Direct or indirect determination (fixing) of the sale or purchase prices or any other trading conditions (fixing); and ii. Share of markets or supply sources by the customer, location, or other characteristics. It should be emphasized that after the approval of the price fixation, the study of the economic consequences of the action is irrelevant and it is already considered a violation, whereas, when determining the fact of market distribution, the form of the agreement containing the fact of the mentioned distribution is insignificant, the distribution might also undertake on the basis of a gentlemanly agreement. Which is in line with European practice and standards.

5. For an anti-competitive action under Article 6 of the Competition Law to be undertaken, two preconditions shall be met: i. Dominant position and ii. Its abuse. The dominant position itself is not a violation of the law. Competition law distinguishes individual and groups dominant positions. In the case of individual dominant positions, significant market power is held by one undertaking, whereas in the case of group dominant positions, collective economic power is held by several interconnected undertakings. However, in this case, there mustn't be such a close connection between the undertakings that a single economic formation is not formed, in which case the individual will be in a dominant position. It is noteworthy that Agency's clarifications in this regard are in compliance with European practice.

6. There is a perception in the Georgian business and legal community that a dominant position is established only if, individually or in groups, there are percentages laid down by law, which is incorrect. If the undertaking(s) has the potential to have a substantial impact on the overall conditions of circulation of the relevant market and to restrict competition this is a sufficient basis for establishing a dominant position. To eliminate this perception and to formulate a correct viewpoint, it is important for the Agency to be involved and to clarify the mentioned matter.

7. In 2020, significant amendments were implemented in rules of the Competition law of Georgia governing the concentration, both in terms of case investigation and enforcement mechanisms, enabling the Competition Agency to ensure effective enforcement in this area.

8. The Georgian Competition Agency often has to study the facts of unfair competition, which is confirmed by the number of decisions made by the Agency. The increased number in turn is due to the activity of undertakings, which is welcome. It is noteworthy that the law did not provide for an effective enforcement mechanism in this regard in the past. Recent changes, however, have introduced the sanctions on unfair competition, which on the one hand will have a preventive effect on undertakings, although, on the other hand, it is important that it does not have a somewhat refraining effect on the Agency at the stage of establishing the infringement.

9. State authorities should not create a monopoly position by favoring any undertaking and should not impede the functioning of a healthy competitive environment. Unjustified interference by the state harms not only the undertaking but also the consumer. Competition in the relevant market is not efficient enough and therefore consumers are restricted in their choice. In developing countries such as Georgia, the control of state aid is of particular importance, as it can have a significant impact on distorting the competition. For its part, the challenge for the Competition Agency as a state authority is to control another state

authority. Against this backdrop, efficient and high-level control by the Competition Agency is crucial, and the Competition Agency has a long way to go to move closer to European practice.

10. Nowadays, the current legislation of Georgia does not regulate fair trade conditions between retailers and suppliers. The problems in this sector are well known to the business community. The need for the law is indicated by both international experience and the Competition Agency market monitoring report. At the moment, a draft law is being drafted, which should take into account the interests of all parties and ensure a fair balance between undertakings. The draft law is fully based on and shares the regulation of the Directive. The draft law will be aimed at combating practices that are coarsely contrary to good commercial practice. If this is realized, then Georgian legislation will be able to approximate to the Directive (EU) 2019/633 of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

11. Anti-dumping law is a novelty in the Georgian reality, which, on the one hand, was dictated to approximate the legislative framework to EU law, and on the other hand, at the request of local business entities. However, although the demand in the business sector was pretty high, it is noteworthy to date the Competition Agency has no practice in investigating alleged dumping cases, which does not allow us to assess both the positive and negative impacts of anti-dumping legislation on the Georgian economy. Therefore, in this regard, the activity of both undertakings and the competition agency itself is of utmost importance.

12. In 2020, major amendments were made to the law regarding the powers of the Competition Agency. It can be said that the Competition Agency has been provided with all the necessary rights for a prompt and efficient response. However, it is not enough to have only a good legal framework. It is necessary for the Competition Agency to work actively, both in terms of raising awareness of the field, as well as efficient law enforcement which will help prevent law violations and give an undertaking an incentive to conduct business in accordance with competition law.

13. In contrast to the EU Directive 2014/104/EU of 26 November 2014, Georgian legislation on the private enforcement of competition law does not provide for effective mechanisms and requires further development. Private enforcement is a crucial issue that contributes to the promotion and protection of the competitive environment. Therefore, it is essential to establish an appropriate legal framework, which will be closer to the EU regulation and allow undertakings to carry out effective private enforcement.

14. To summarize, it shall be stated that the Georgian legislation is in principle in compliance and harmonized with the European law, nevertheless in certain aspects the matter of effective

implementation of this legislation is still a considerable challenge. In the enforcement of the competition law, both the competition agency and the court have a significant role to play, and it would be advisable if the agency at its initiative be involved in preventing and effectively eliminating anti-competitive actions on the market.

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