

## POLICY PAPER ON COMPETITION

### 1. Summary of EU *Acquis*

European competition policy is based on a Community legislative framework essentially provided by the EC Treaty (Articles 81-89). Competition law, regulates the exercise of market power by large companies, governments or other economic entities and includes:

- Cartels, or control of collusion and other anti-competitive practices which has an effect on the EU (or, since 1994, the European Economic Area) covered by Articles 81 of the Treaty of the European Community (TEC).
- Monopolies, or preventing the abuse of dominant market positions governed by Article 82 TEC.
- Mergers, control of proposed mergers, acquisitions and joint ventures involving companies which meet the defined criteria governed by the article 82 TEC and Council Regulation 139/2004 EC (the Merger Regulation)<sup>1</sup>.
- State aid, control of direct and indirect aid given by EU Member States to companies covered by Article 87 EC.

Primary competence for applying EU competition law rests with European Commission and its Directorate General for Competition, although state aids in some sectors, such as transport, are handled by other Directorates General. On 1 May 2004 a decentralized regime for antitrust (established by the Council Regulation No 1/2003) came into force which is intended to increase the application of EU competition law by national competition authorities and national courts.

#### 1.1 Anti-trust regulation

European Community Competition Legislation is contained in articles 81 and 82 of the Treaty of Amsterdam (the articles 85 and 86 of the treaty of Rome), together with a number of implementing regulations. The European rules apply in cases where there is in effect on trade between member states. Undertakings who infringe these rules can be subjected to fines by the European Commission or national competition authorities. Some countries within the European Union have laws that impose criminal sanctions, including prison, for participation in anti-competitive agreements or practices.

The Article 81 EC deals with cartels and restrictive vertical agreements and prohibits: "(1) ...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 common market..." and gives examples of "hard core" restrictive practices such as (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 81(2) EC confirms that any such agreement is automatically void unless granted exemptions by the Commission. Under Article 81(3) EC the exemption is granted if the collusion is for distributional or technological innovation, gives consumers a "fair share" of the benefit and does not include unreasonable restraints (or disproportionate, in ECJ terminology) that risk

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<sup>1</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). Official Journal L 24, 29.01.2004, p. 1-22

eliminating competition anywhere. Exemptions to Article 81 behavior fall into three categories: firstly, Article 81(3) which creates an exemption where the practice is beneficial to consumers e.g. by facilitating technological advances (efficiencies), but without restricting all competition in the area. Secondly, the Commission has agreed to exclude from the scope of Article 81 'agreements of minor importance' (except those fixing sale prices). This exemption applies to small companies, together holding no more than 10% of the relevant market in the case of horizontal agreements and 15% in the case of vertical agreements (the *de minimis* condition). In this situation as with Article 82 (see below), market definition is a crucial, but often highly difficult, matter to resolve. Thirdly, the Commission has also introduced a collection of block exemptions for different types of contract and in particular in the case of vertical agreements.

Article 82 of the Treaty<sup>2</sup> prohibits the abuse of dominant position and is aimed at preventing undertakings that hold a dominant position in a market from abusing that position to the detriment of consumers. It provides that, "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States". The next Para of this article provides list of practices and conducts which might be considered as abuse of dominant position. Namely, it stipulates that abusive conduct in particular consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Price exploitation limiting production, price discrimination, tying, and predatory pricing are typical examples of abusive conduct.

## 1.2 Procedural rules

The principal procedural rules governing the enforcement of Community Competition Law are contained in Council Regulation (EC) No 1/2003<sup>3</sup> of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

The regulation provides for more decentralized enforcement of article 81 and 82 of the EC Treaty and consequently requires increased cooperation between the Commission and Member State's authorities. It grants national authorities and national courts the competence for direct application of the provisions of the EU legislation. According to the rules National authorities apply articles 81 and 82 of EC Treaty along with the provision of national legislation in cases related to violation of the national rules of competition in the internal market. The European Commission was deprived of the monopoly for granting exemptions from the prohibition of concluding competition restricting agreements. In addition, at present, undertakings examine independently and at their own risk whether their actions infringe the rules of European antimonopoly law. So, under the new regulation agreements that fulfill the conditions of article 81/3 are legally valid and enforceable without the intervention of an administrative decision.

In order to ensure effective cooperation European Competition Network (ECN) has been created. The leading role of the ECN is played by European Commission, which receives all information concerning the application of the EU competition Law by the antimonopoly offices of all Member States. Some of the most important tasks of the Commission in the ECN are: coordination of the actions of the competition offices to ensure compliance with the EU Legislation, monitoring of the application of articles 81 and 82 of the EC Treaty by the national

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<sup>2</sup> Treaty establishing the European Community (Consolidated version)

<sup>3</sup> 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; Official Journal L 1, 04.01.2003, p.1-25.

antimonopoly offices of the EU countries, Interventions and taking over of cases in situations when the commission decides that it is the appropriate entity for a case whose scope covers the Community market”.

Pursuant to Regulation No 1/2003 cooperation between Commission and competition protection offices of Member States consists, among others, of the following procedures: the competition authorities of the other Member States when acting under article 81 and or 82 of the EC Treaty; a) shall inform the commission without delay after commencing the first investigative measure, this information may also be available to the competition authorities of the other Member States; b) before adoption of decision, they shall provide the commission with a summary of the case; c) on the request of the Commission the national office shall make available materials necessary for assessing case; d) may exchange information necessary for the assessment of the cases regarding violation article 81 and 82 of the EC Treaty and consult with the commission on every case related to application of the community law; the Commission is obliged to transmit the authorities of the member states the copies of the most important documents related to application of the article 81 and 82 and other materials required for the assessment of the case.

More decentralized and more effective enforcement and direct application is a central feature of the Council Regulation No 1/2003. To be ready to take increased responsibility Member States were obliged (article 35 of the Regulation) to set up competition authorities and equip them with the necessary power. Regulation No 1/2003 also applies fully to the competition authorities of the future member states<sup>4</sup>. Regulation opens the way for greater involvement of the national authorities in application of Articles 81 and 82 and also introduces enhanced means for these authorities to cooperate with each other and with the Commission.

### 1.3 Merger regulation

Council Regulation (EC) No 139/2004 - contains the main rules for the assessment of concentrations<sup>5</sup>, whereas the Implementing Regulation<sup>6</sup> concerns procedural issues (notification, deadlines, right to be heard etc.). The official forms for standard merger notifications (Form CO), simplified merger notifications (Short Form CO) and referral requests (Form RS) are attached to the implementing Regulation. Under EC law, a concentration exists when a..."change of control on a lasting basis results from (a) the merger of two or more previously independent undertakings... (b) the acquisition... if direct or indirect control of the whole or parts of one or more other undertakings."<sup>7</sup> Competition law requires that firms proposing to merge gain authorization from the relevant government authority, or simply go ahead but face the prospect of demerger if it lessens competition. The present Regulation is applicable to all "concentrations" with a "Community dimension". This is defined as those mergers where the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 billion and where the aggregate turnover in the EU of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned generates more than two thirds of its aggregate EU-wide turnover within a single Member State. If the above-mentioned thresholds are not reached, a concentration nevertheless has a Community dimension if: the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2.5 billion; in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; in each of at least three Member States, the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

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<sup>4</sup> Cooperation between the competition authorities in the EU: new challenges for central and eastern European Countries, 2004 Law in Transition, EBRD.

<sup>5</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) Official Journal L 24, 29.01.2004, p. 1-22.

<sup>6</sup> Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No. 139/2004 (The "Implementing Regulation") and its annexes (Form CO, Short Form CO and Form RS).

<sup>7</sup> Council Regulation (EC) No 139/2004 , Art. 3(1).

unless each of the undertakings concerned generates more than two thirds of its aggregate EU-wide turnover in one and the same Member State.

To provide better guidance on jurisdictional questions in merger control, the Commission adopted the Commission consolidated jurisdictional notice under the merger regulation (the 'jurisdictional notice' or the 'notice').<sup>8</sup> With the exception of referrals, the new notice therefore covers, in one document, all issues of jurisdiction which are relevant for establishing the Commission's competence under the merger regulation.

#### 1.4 Liberalisation and state monopolies

The EU liberalization programme entails a broadening of sector regulation, and extending Competition law to previously state monopolized industries, such as railways, electricity or gas. Articles 86 and 87 EC regulate the state's role in the market. Article 86(3) of the EU Treaty entrusts the Commission with a specific surveillance duty "in the case of public undertakings and undertakings to which Member States grant special or exclusive rights". The Commission must "where necessary, address appropriate directives or decisions to Member States. The Commission may adopt directives or individual decisions under Article 86(3)." Article 86(2) of the Treaty introduces an exception to the application of the rules of the Treaty when the latter would obstruct the provision of "services of general economic interest". However, even where this exception applies, special rights must not go beyond what is necessary for the performance of that service. Article 86(2) EC states clearly that nothing in the rules can be used to obstruct a member state's right to deliver public services, but that otherwise public enterprises must play by the same rules on collusion and abuse of dominance as everyone else.

#### 1.5 State aid

Article 87 of the Treaty lays down a general rule of state aid. The EC Treaty prohibits any aid that distorts or threatens to distort competition in the common market (Article 87(1)). State aid may lead to distortion of competition by favouring certain firms or the production of certain goods. Controlling state aid therefore guarantees a level playing field for all firms operating within the internal market. At the same time the Treaty allows some exceptions where the proposed aid may have a beneficial impact in overall Union terms and can sometimes be effective tools for achieving objectives of common interest (services of general economic interest, social and regional cohesion, employment, research and development, sustainable development, promotion of cultural diversity, etc.) and for correcting "market failures". For various reasons (externalities, market power, coordination problems between market operators), market sometimes do not function efficiently from an economic point of view. Member States may then intervene by granting state aid.

State aid may therefore be compatible with the Treaty provided that it fulfils clearly defined objectives of common interest and does not distort competition to an extent contrary to the common interest. Complex rules on state aid and enlargement of the European Union of 2004 have underscored a need to streamline state aid policy and clarify its fundamental principles. The EC State Aid Action Plan is considered as a roadmap for the reform of state aid policy that covers a five-year period (2005-2009). The aim of the reform is to encourage Member States to help achieve the Lisbon Strategy objectives. The new policy on state aid will thus help them to target state aid towards improving the competitiveness of European industry and creating sustainable jobs. The reform will also rationalize and simplify procedures to guarantee Member States a clear and predictable framework in the area of state aid.

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<sup>8</sup> Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. The jurisdictional notice can be found on the Competition DG's website at: [http://ec.europa.eu/comm/competition/mergers/legislation/draft\\_jn.html](http://ec.europa.eu/comm/competition/mergers/legislation/draft_jn.html)

## **2. Progress of Approximation of Georgian Competition Legislation with that of the EU**

The Georgian competition legislative and institutional framework underwent the substantial reform in June 2005. This new Law on Free Trade and Competition derogated all previous laws, regulations and decrees adopted in more than one decade with extensive international support. The scope of the Law has been limited mainly to state aids and deregulation of monopolies, thus leaving aside the main areas of competition law:

- restrictive agreements;
- concerted practices;
- abuses of dominant positions;
- mergers; and
- publicly owned enterprises and, to a large extent, monopolies.

The new Agency for Free Trade and Competition was granted the authority to issue recommendations; however, the governmental and local authorities setting up the state aid scheme were entitled to choose whether to comply with the recommendation, or not. The Agency has been given very limited investigative powers. For the time being, it could be concluded that the Agency exists only nominally as a structural unit of the Ministry of Economic Development with a staff of only 5 persons. Due to deteriorated institutional capacities this authority is practically inactive.

Since the reform of 2005 no legislative or administrative initiatives have been implemented, except for the introduction of rather strict provisions to the laws of sectoral regulation aimed at restriction of the rights of the Competition Agency and fragmentation of the competition policy according to sectoral principle (without any kind of efficient coordination mechanisms for ensuring the cooperation between and joint activities of sectoral regulators and the Competition Agency). As a result the competition policy is being fragmented according to sectoral principle being in contradiction with the logical development of these two key regimes of economic regulation. Such an approach may jeopardise the integrity of the competition policy to the extent of country economy and generate the risks of such uncompetitive actions, as cartels, anticompetitive mergers, abuse of position, etc.

Under this legislative and institutional framework and practice, the rationale of harmonisation with the EU pursuant to Art. 43 and 44 PCA has been neglected, as a result:

- companies will seek dominant positions on the market and, under a loose legal framework, inevitably abuse them for profit reasons, which would result in less variety of products (services) and higher (economically unjustifiable) prices;
- in the provision of public services (e.g. modernisation of road infrastructure), economic rents for certain players will emerge, unless there is a clear legislative regulation; the absence of such regulation will nourish rent seeking on the side of companies and corruption on the side of the state

Summarizing, we may say that the competition legislation of Georgia needs significant changes and amendments. In our opinion it would be better to elaborate a new competition law reflecting the universal competition principles and rules laid down by the relevant provisions of EC Treaty and Council Regulations.

### 3. Recommendations for Further Approximation of Georgian Competition Legislation with that of EU

EU respective normative act, other international acts/standards	The Normative act of Georgia to be amended/adopted	Content of the Proposed Measure	Comments
1	2	3	5
<p>UNCTAD Recommendations</p> <p>OECD Recommendations</p>	<p>Laws on Free Trade and Competition, on National Independent Regulatory Bodies and sectoral laws</p>	<p>The mechanisms for cooperation with the sectoral regulatory bodies should be elaborated commensurate with the model law of UNCTAD "On relationship between competition authorities and sectoral regulators"</p>	<p>This measure is necessary to prevent risks of such anticompetitive actions as cartels, anticompetitive mergers and abuse of dominant position in regulated sectors</p>
<p>The Set of Multilaterally Agreed Equitable Principles and Rules for Control of Restrictive Business Practice (The Resolution of 22 April, 1980 of UN Conference on restrictive business practice)</p> <p>Conclusions of the Copenhagen European Council, 1993</p> <p>Notice on cooperation within the European Competition Network</p> <p>Council Regulation No 1/2003</p>	<p>The Georgian Law "On Free Trade and Competition",</p> <p>Georgian law on Government Structure and Responsibility</p> <p>Georgian Administrative Code and appropriate regulations</p>	<p>To strengthen the supervisory functions of the Georgia's Free Trade Agency and equip it with necessary power. Legal and institutional reforms are required in order to ensure the independence and effective investigative power of the Agency in both areas - state aid and antitrust.</p> <p>The power of the Agency should be extended to cover any anticompetitive practice</p>	<p>This measure will increase power and institutional capacity of competition agency to ensure efficient state supervision on the implementation of the law and reliable and transparent enforcement practice.</p> <p>It should be noted that to set up of independent competition agencies and their equipment with necessary powers is one of the requirements of the Council Regulation 1/2003 that also applies to the competition authorities of the future member states.</p>
<p>OECD, UNCTAD, EU recommendations and international best practice</p>		<p>To train intensively both the persons employed in regulatory fields and judges in the area of competition law and well-probed mechanisms of their enforcement</p>	<p>This measure is necessary to order to ensure effective enforcement of the law</p>

EU,WTO, OECD, UNCTAD Recommendations and Recommended best practice		To increase the degree of transparency of the investigative and enforcement processes. To develop a broader societal understanding of the legal aspects of competition including both the rights and obligations of market participants	This measure will help to develop a broader societal understanding of the aims, and legal and practical aspects of competition including both the rights and obligations of market participants.
Treaty of EC, Articles 81 and 82 Council Regulation (EC) No 1/2003 Council Regulation (EC) No 139/2004 Conclusions of the Copenhagen European Council, 1993 The United Nations Set of Principles and Cules on Competition	The Law of Georgia on Free Trade and Competition	To introduce in the law the basic competition principles laid down in articles Article 81 and 82 of EC treaty.	This measure will increase the degree of compatibility of the Georgian Competition law with that of EU and make possible to protect market participants from any kind of unfair competition and abuses of monopolistic position.
Treaty of EC, Articles 81 and 82 Council Regulation (EC) No 1/2003 Council Regulation (EC) No 139/2004 EU and OECD procedural rules and guidelines	A set of new procedural rules and guidelines is required	The secondary legislation and special procedural rules (clear and predictable) and guidelines for different aspects of enforcement should be developed	This measure will help to developed clear, predictable and transparent rues and enforcement practice and assure investors and consumers that they will be safeguarded against anticompetitive practices.
UNCTAD Recommendations  OECD Recommendations	Laws on Free Trade and Competition, on National Independent Regulatory Bodies and sectoral laws	The mechanisms for cooperation with the sectoral regulatory bodies should be elaborated commensurate with the model law of UNCTAD "On relationship between competition authorities and sectoral regulators"	This measure is necessary to prevent risks of such anticompetitive actions as cartels, anticompetitive mergers and abuse of dominant position in regulated sectors
The Set of Multilaterally Agreed Equitable Principles and Rules for Control of Restrictive Business Practice (The Resolution of 22 April, 1980 of UN Conference	The Georgian Law "On Free Trade and Competition",  Georgian law on Government Structure and Responsibility	To strengthen the supervisory functions of the Georgia's Free Trade Agency and equip it with necessary power. Legal and institutional reforms are required in order to ensure the independence and effective investigative power of the Agency in both areas - state aid and antitrust.	This measure will increase power and institutional capacity of competition agency to ensure efficient state supervision on the implementation of the law and reliable and transparent enforcement practice.  It should be noted that to set up of independent competition agencies and their equipment with

<p>on restrictive business practice)</p> <p>Conclusions of the Copenhagen European Council, 1993</p> <p>Notice on cooperation within the European Competition Network</p> <p>Council Regulation No 1/2003</p>	<p>Georgian Administrative Code and appropriate regulations</p>	<p>The power of the Agency should be extended to cover any anticompetitive practice</p>	<p>necessary powers is one of the requirements of the Council Regulation 1/2003 that also applies to the competition authorities of the future member states.</p>
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