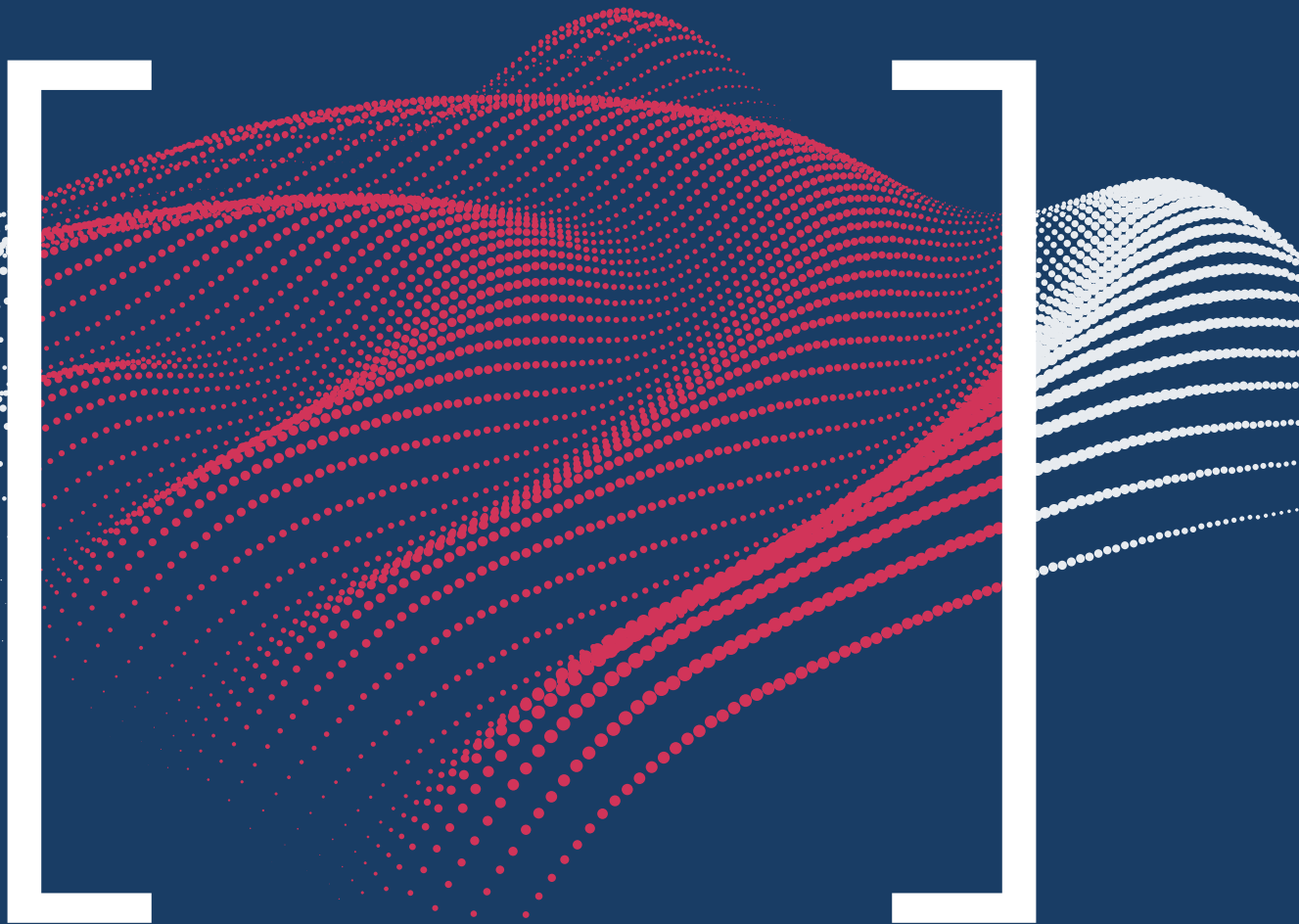


COMPETITION POLICY IN EASTERN EUROPE AND CENTRAL ASIA

Competition and regulation



OECD-GVH Regional Centre
for Competition in Budapest (Hungary)
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Inside a competition authority: **GEORGIA**

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Foreword

I am proud to present the latest issue of our RCC Newsletter that I hope will be of interest to you.

The main topic of this edition is **Regulation and Competition**. As you may remember, the RCC held an outside seminar this year on this very complicated and challenging topic in Chisinau, Moldova, with the invaluable cooperation of the Moldovan competition authority. I would like to start by thanking them for their hospitality and professionalism and our speakers for their time and effort that made us reflect and grow in our thinking.

As you will see, four agencies from the Region have sent articles on this topic. Our colleagues from Armenia sent a very interesting article on the powers of competition agencies in relation to State Authorities; our colleagues from Georgia a piece on the implications of gun jumping; our colleagues from Montenegro an article on the role of courts; and our colleagues from Serbia a reference to cases in relation to postal services.

Also, a number of experts from outside the Region were kind enough to share with us ideas and approaches on different key issues on regulation. Our friends of the Turkish competition authority shared ideas concerning pharma issues, and professors Antonio Mino, Daniel Neira, Juanita Pedraza and Adrian Sanchez commented on very interesting experiences for their jurisdictions.

Following past experiences, we have included some reference to our RCC seminars recalling the good times we spent together learning from each other and sharing knowledge and experience. We have also covered the main contents developed in the workshops so those who were unable to attend can check if they would like to ask about some issues in particular.

We also continue with the good tradition of presenting in this issue one of our agencies. This time Georgia was so generous to share with us the work they do in a crucial moment for the agency because of some key changes in their competition legislation. You will find a very interesting interview with their President, Mr. Irakli Lekvinazde and an overview of their work, challenges and successes.

I would like this Newsletter to be a useful and interesting tool for us to share information and keep in contact.

Therefore, I invite you to think of new ideas we can develop together and to send us articles for the first issue of the next year. Considering the topics that we included in our programme and the interest you showed in our seminar in Budapest, we have decided that the next issue will be devoted to **Bid Rigging and Competition** where I guess we all have ideas, cases and concerns that we can share.

María Pilar Canedo

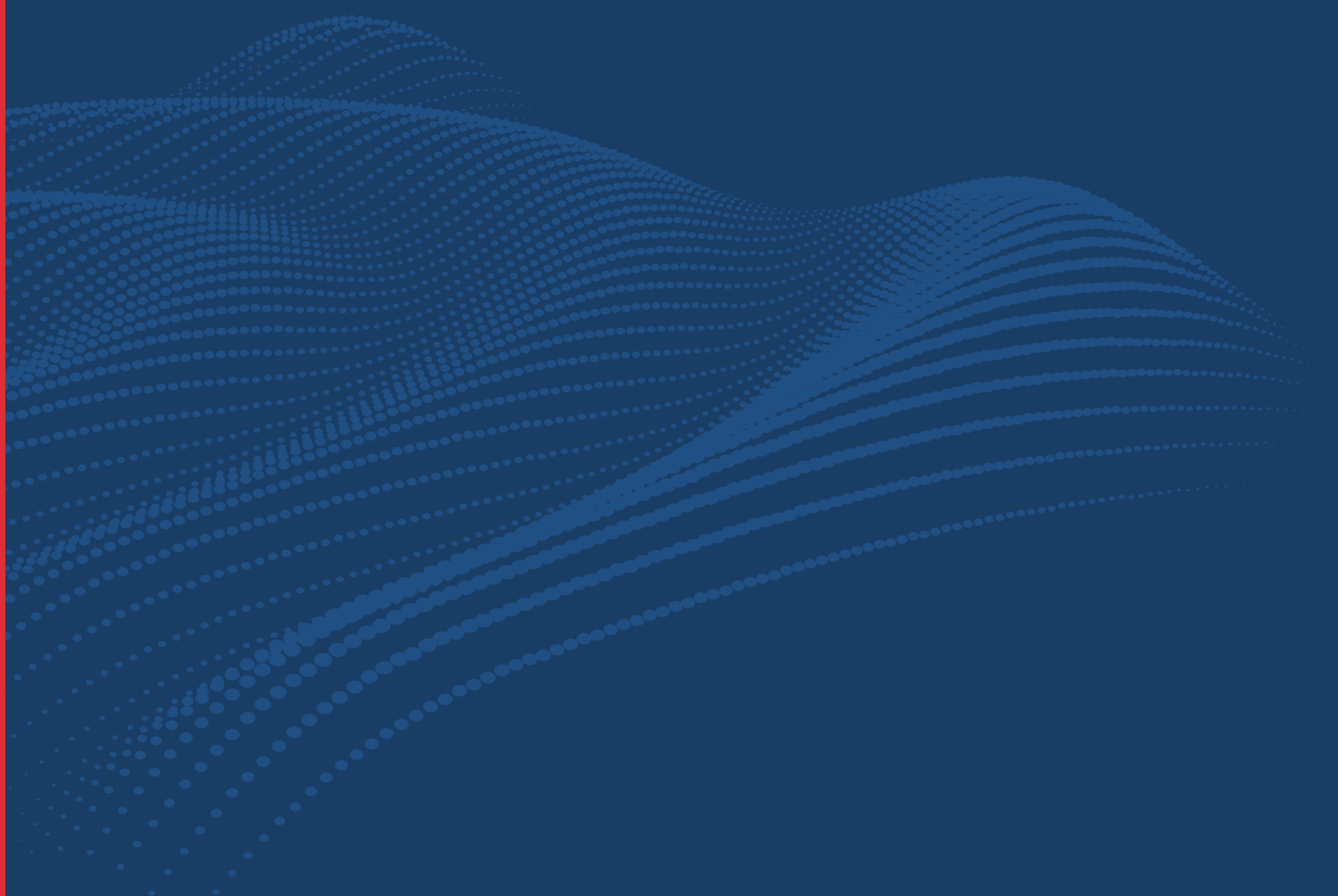
Programme 2024

A. Seminars on competition law			
5-8 February Bilbao	New Staff Seminar	Introduction to competition law	Participants
4 days		This seminar is intended to cover the most relevant topics of competition law and economics and to provide the conditions for new staff to meet and create a community of enforcers of the partner authorities. We will deal with the most relevant features of anticompetitive agreements, abuse of dominance, mergers, advocacy, and economic and procedural issues. The seminar will include a doctrinal introduction to the topics and workshops with a practical approach.	New staff of the beneficiary agencies
26 March Budapest	Meeting of the Heads	Judicial review of enforcement decisions	Participants
1 day		Once a year the heads of agencies of the RCC members meet and discuss topics of common interest. This year, the meeting will focus on the development of initiatives that could strengthen cooperation with the courts in order to increase the efficiency of the agencies and their impact in society.	Heads of the agencies
15-17 April Moldova	Outside Seminar	Regulation and competition	Participants
2.5 days		The relationship between competition and regulation has always created tensions and opportunities. The existence in certain markets of network effects, market failures or imperious reasons of general interest make regulation crucial in certain cases. Energy, telecommunications, pharma, postal services or transport are clear examples of this. Nevertheless, the influence of lobbies and regulated industries in those sectors can affect regulation in a way that is not coherent with competition law principles and the protection of general interest. The seminar will deal with the principles that govern the relationship between competition and regulation and the different possibilities to address the problems that the agencies usually face.	Staff of the agencies that deal with antitrust, mergers or advocacy in regulated markets
14-16 May Budapest	Core seminar	Detecting bid rigging	Participants
2.5 days		Bid rigging is one of the worst infringements of competition law as it implies a cartel related to public procurement. This has quantitative and qualitative implications, as it affects a specific percentage of the GDP of the countries and affects relevant services for the citizens. Those practices are mostly hidden and very difficult to detect for the agencies. When detected, they are not easy to prove. Therefore, the seminar will focus on the different concepts and practices that fall under the concept of bid rigging, the tools for detection and the different means for creating strong cases. Experts from OECD countries will present case studies, and the participants will practice their skills in hypothetical exercises.	Staff of the agencies that deal with cartel or bid rigging cases
24-26 September Montenegro	Joint Seminar	Effective antitrust investigations	Participants
2.5 days		Competition agencies struggle sometimes when looking for evidence of relevant antitrust infringements. The development of different tools such as informant channels of leniency programs can be a good help for them. Once indicia are found, the collection of evidence is also key. Dawn raids, the use of open data and other IT tools are also a relevant element in the work of the agencies. Also, the use of indirect evidence implies some relevant legal and economic issues that require deep attention when creating a file. This seminar will focus on all those topics.	Staff of the enforcement units in charge of investigations

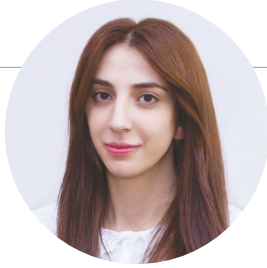
A. Seminars on competition law			
6-7 November Budapest	GVH Staff Training	How to become more efficient	Participants
2 days		<p>Competition and consumer authorities provide an extremely useful service to society by enabling access to more and better products and services, with greater variety and accessibility for all. The efficiency of the agencies is therefore crucial. Many elements contribute to achieving efficiency and this seminar will focus on some of the most important ones, such as institutional aspects, deterrence or judicial review.</p> <p>Breakout sessions: In separate sessions, we will provide dedicated trainings and lectures for the merger section, the antitrust section, the economics section, the consumer protection section, and the Competition Council of the GVH.</p>	Staff of the GVH
November Budapest	Competition Lab for Judges	Stepping up with substantive and procedural standards under competition law (subject to EU funding confirmation)	Participants
2 days		<p>Competition and regulation. Key developments in network and regulated industries. Offline and online vertical restrictions and rebates, and refusals to deal.</p>	Judges from the EU or beneficiary countries (subject to EU/other funding confirmation)
B. Training video project "Key Competition Topics explained in a few minutes"			
<p>Three additional videos Two special videos for Judges</p>			
C. RCC Review "Competition Policy in Eastern Europe and Central Asia"			
Two issues of the review (January and July), both in English and in Russian			
D. RCC Annual Activity Report 2023, both in English and in Russian			



ARTICLES ON COMPETITION AND REGULATION



Powers of the Competition Protection Commission of the Republic of Armenia in Relation to State Authorities



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Within the competence of competition authorities, the enforcement of competition laws involving state authorities and public officials is particularly important.

The purpose of the Law of the Republic of Armenia “On Protection of Economic Competition” (hereinafter referred to as the Law) is to protect and encourage the freedom of economic activity and free economic competition, to ensure an appropriate environment for fair competition, and to promote the development of entrepreneurship and protection of consumer interests in the Republic of Armenia. The Law clearly defines the entities included in the concept of state authority.

More specifically, according to Article 3 of the Law, a state authority is defined as a:

1. state or local self-government authority,
2. state or community non-commercial organisation,
3. state or community institution,
4. Central Bank,
5. legal person or other organisation acting on behalf of the Republic of Armenia or a community of the Republic of Armenia, or exercising a function or power of a state authority or local self-government authority, an organisation of the Republic of Armenia or a community of the Republic of Armenia holding 50 per cent or more unit shares.

A separate chapter of the Law defines the general characteristics of anti-competitive actions and behaviours by state authorities and their officials, as well as their most predictable, specific forms. Any action or conduct by a state authority or its officials that may lead to the prevention, restriction or prohibition of economic competition, or that may harm consumer interests, are prohibited.

- Some of the most predictable forms of anti-competitive actions by a state authority or its officials include:
- Defining and/or applying discriminatory terms,

- Restricting or prohibiting entrepreneurial activity,
- Imposing duties on buyers or sellers that restrict their right to freely choose goods or contractors,
- Making agreements with other state authorities, undertakings or their officials that may lead to the prevention, restriction, or prohibition of competition, as well as harm consumer interests.

Additionally, the Law clearly defines the powers of the Competition Protection Commission of the RA (hereinafter referred to as the Commission) in cases of competition offence by a state authority.

Specifically, according to Article 37(1(3)) of the Law, the Commission shall initiate proceedings on the occasion of offence in the field of economic competition and subject economic entities, state bodies and their officials to liability for violating the Law, by ordering to correct the violation within the time limits prescribed thereby and avoid such conduct in the future.

In accordance with the Law, if state authorities engage in anti-competitive actions, the Commission has the authority to hold them accountable and issue orders to eliminate the violations.

The Commission has the authority, as outlined by Law, to issue warnings as a measure of liability to state authorities and officials. However, when providing instructions to these entities, the Commission does not prescribe a specific method for rectifying the identified offence. Instead, it documents instances of competition restriction or potential restriction resulting from an act, action or behaviour, emphasizing the necessity to address and eliminate the violation.

The Commission has notable practices regarding the imposition of liability on public authorities. In the past three years, the Commission has identified competition law violations by several state authorities, primarily con-

cerning the creation of unequal competitive conditions for undertakings.

In one instance, the Commission identified anti-competitive behaviour by a state authority within the procurement process. The conditions set by the state authority were structured in such a manner that they could only be fulfilled by a specific undertaking¹.

Furthermore, in another case, the Commission observed anti-competitive behaviour by a state authority where individuals from an undertaking responsible for submitting documents for assessment were included in the commission responsible for providing an opinion on those materials. This scenario was identified as creating unfair conditions for other undertakings providing similar services.

The accountability of state authorities and their officials is also a subject of discussion regarding the potential judicial review of the Commission's decisions concerning their liability².

The legislation of the Republic of Armenia specifies a restricted group of individuals permitted to lodge appeals via the administrative court. State authorities are only permitted to approach the administrative court under specific circumstances, which do not encompass appeals against Commission decisions.

From the point of view of the Commission's assessment of the behaviour of state authorities, the institution of state aid is of particular importance. In particular, according to Article 25(1) of the Law, state aid shall be deemed to be any aid directly or indirectly provided by a body providing state aid to an economic entity or a certain group of economic entities, or for certain goods or to a certain field (including subsidy or grant, aid, credit, loan, property, privileges, other financial means or other conditions), resulting in such advantages for the economic entities which they otherwise would not have had under the conditions of economic competition, in the absence of the aid granted.

According to the mentioned regulation, assistance is not considered state aid under competition legislation. State aid is identified if the conditions defined by the Law are simultaneously met.

According to Article 25(2) of the Law, State Aid, which directly or indirectly leads or may lead to prevention,

restriction or blocking of competition in a goods market, or harms or may harm consumer interests, shall be prohibited except for the cases where the mentioned aid is provided for by law or is aimed at protection of the environment, mitigation of the climate change impact and adaptation thereto, solution of problems of social nature, compensation for damages caused due to natural disasters or other exceptional cases, development of border communities, balanced territorial development, protection of cultural heritage, fulfilment of obligations provided for by law or an international treaty.

Based on a comprehensive analysis of the mentioned legal provisions, the presence of state aid does not automatically imply that such aid is prohibited. State aid is considered prohibited only in cases where its provision creates, effectively eliminates, limits or prohibits opportunities in any product market, or harms consumer interests.

The legislation also defines a set of exceptions, in which case the provision of state aid is not deemed prohibited.

The Commission's Decision No. 270-N of July 26, 2022 "On Determining the Procedure for State Aid Assessment and Repealing Decision No. 393-N of December 28, 2021 of the Competition Protection Commission" (hereinafter also referred to as the Order) established the procedure for assessing state aid.

It should be emphasized that the Commission maintains a unified register of State Aid.

In one of the Commission's cases on prohibited state aid, it was deemed that the state authority's provision of examinations for only one company, within the framework of issuing certificates of country of origin for a product, constituted prohibited state aid.

To ensure effective coordination between state authorities and their officials, it is essential to emphasize the institution of the adoption of conclusions on issues related to economic competition of the Commission. Specifically, state authorities and their officials have the right to apply for the Commission's conclusion before taking actions, concluding transactions, or adopting legal acts that may hinder, limit, or prohibit economic competition, or harm consumer interests. Additionally, they can request the Commission's conclusion on other matters related to the protection of economic competition.

¹ <https://ef.competition.am/api/decision/8E8E9C06-E94A-48A0-B479-4E57DB49B75C/download>

² <https://ef.competition.am/api/decision/2E891E1E-3386-4856-B2FD-D7EE520EA94B/download>

Mechanisms for Controlling Non-Submitted Concentrations to Prevent Gun Jumping: Insights from the Georgian Competition and Consumer Agency



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Introduction

Mergers and acquisitions play a crucial role in the business landscape, often changing industries and impacting competitive environments. However, failing to implement such transactions in advance, referred to as „Gun-Jumping,” raises major concerns regarding market competition.

This article explores „Gun-Jumping” in mergers and acquisitions. Focusing on the context of Georgia, it examines the legal framework and control mechanisms established by the Georgian Competition and Consumer Agency.

By analyzing recent legislative amendments, this study highlights the Agency’s efforts to enforce compliance and uphold market integrity. The findings emphasize the importance of proactive monitoring and inter-agency cooperation in preventing unreported deals and promoting a competitive marketplace that benefits competition.

Legal framework

On a global scale, competition regulations mandate that mergers and acquisitions exceeding certain financial thresholds must be reported. Georgia’s competition laws align with international standards and the European Union directives, which require transactions to be notified when the total annual revenues of the entities involved are over 20 million Georgian Lari (GEL). Additionally, at least two parties must each have an annual turnover of more than 5 million Georgian Lari (GEL).

Article 112 of the Law also outlines conditions under which companies are exempt from the obligation to report merger or acquisition activities to the Agency. This exemption applies under several defined circumstances:

1. There is a merger/concentration of undertakings whose market power is less than the limit defined by the Law.

2. The concentration is caused by 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.
3. 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.
4. The concentration involves participants of related parties.
5. A financial institution, within the scope of its statutory activities, acquires through its own or client funds an interest or shares in another undertaking and gains control over it temporarily or acquires assets for their further disposal, provided that this transaction is made not later than one calendar year after their purchase/gaining control over them. In addition:
 - a. Such an institution has no rights with respect to the ownership of shares or participation interest except for the right to receive dividends.
 - b. Such an institution uses the rights solely to prepare the undertaking, its assets or shares, and interest for full or partial sale. Failure to notify or engaging in premature integration can result in severe penalties.

These exceptions illustrate a balanced approach to regulating mergers and acquisitions. They recognize the importance of both economic adaptability and protecting market competition.

Significant progress was achieved with the chairman’s order on October 26, 2020. That order changed the procedures for filing and reviewing concentration notifications. Those revisions have expanded the Agency’s ability to effectively track and regulate deals that avoid legal mandates. This ensures a more comprehensive oversight of market concentrations.

The importance of integrated advanced technological solutions

However, legislative measures alone are not enough to tackle the complex issues surrounding gun-jumping. Success also depends significantly on cooperation with various relevant public agencies that have capabilities in advanced digital technologies. Automated systems can dramatically improve the data collection processes, enabling the authorities to detect early integration and take timely action.

In particular, to effectively monitor concentrations and share information, a memorandum of understanding has been signed between the Georgian Competition and Con-

sumer Agency and the Ministry of Finance of Georgia. The Agency also actively cooperates with the Ministry of Justice of Georgia including exchange of information. Moreover, the Agency is pursuing collaborative engagements with other institutions tasked with the systematic and timely acquisition of data.

Current preventive mechanisms

The Agency’s structured approach, provided below (*Illustration 1*), monitors and prevents unreported concentrations, utilizing a variety of detection sources, including media monitoring and third-party reports.

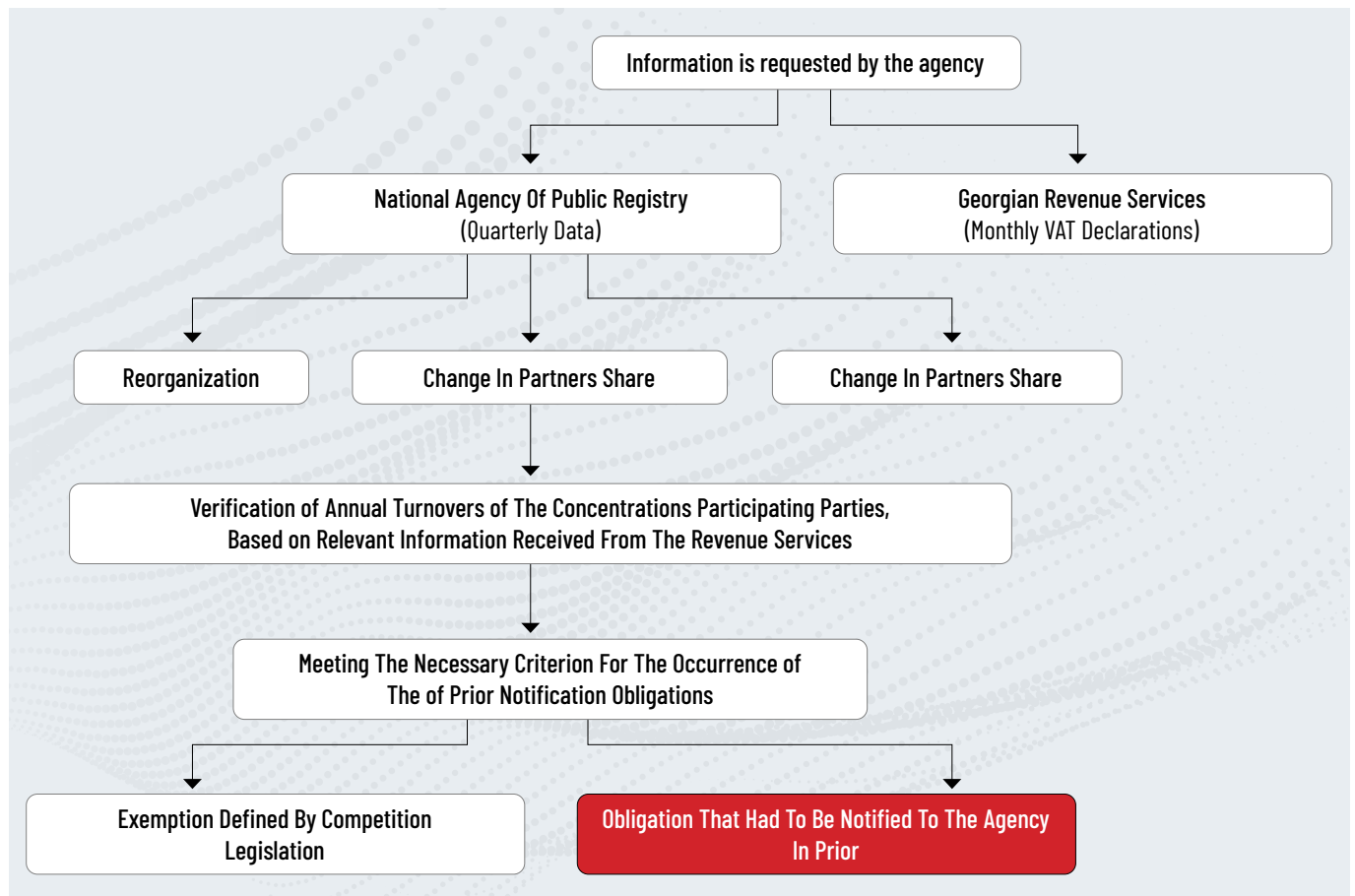


Illustration 1

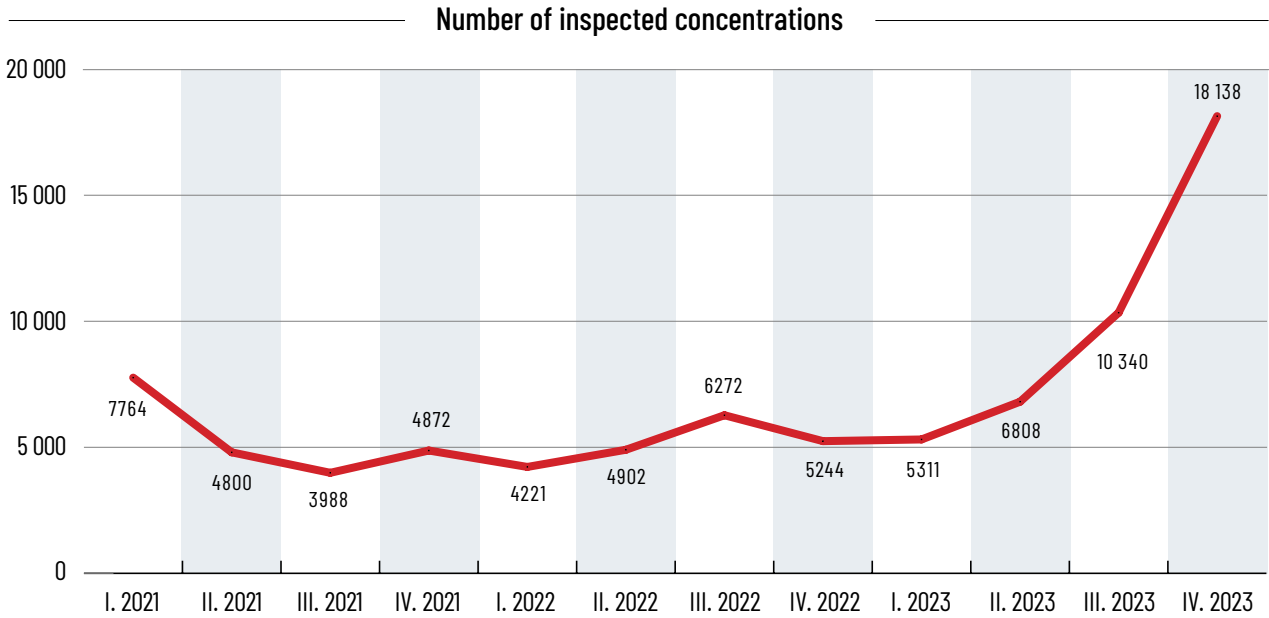
Economic entities will be penalized if they do not fulfil the requirement to inform about mergers. The penalty amount cannot be more than 5% of the organization’s total income for the fiscal year before the Agency’s deci-

sion. Furthermore, as of January 2024, individuals will be fined a fixed amount of GEL 10,000 for not providing notification.

Key results and statistical indicators

Since the implementation of the new control mechanisms, there has been a significant increase in the detec-

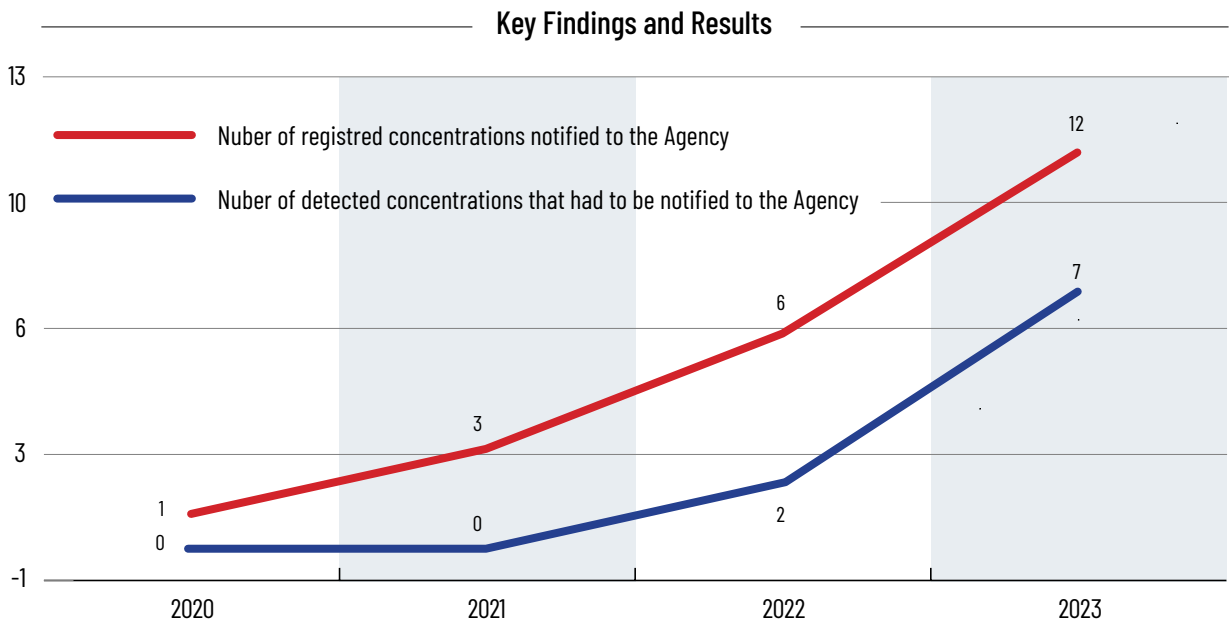
tion of concentrations. The Agency reviewed an average of 6,888 cases quarterly, with a notable spike in the last quarter of 2023 (*Graph 1*).



Graph 1

Additionally, over the three years under review, there was a significant rise in both the number of reported and non-reported concentrations. As illustrated in *Graph 2*, while the Agency handled only 3 cases in 2021, by 2023,

this figure quadrupled. More notably, while there were no cases of non-notification in 2021, by the end of the observed period, the number of cases reached 7.



Graph 2

Between January 2021 and December 2023, the Georgian Competition and Consumer Agency reviewed 82,660 business mergers and acquisitions in total. Out of these, 64

cases were flagged for the obligation of prior notification, leading to the initiation of administrative proceedings. Also, 55 cases were exempt under Georgian Law. How-

ever, 9 cases were found problematic, and the companies involved were fined. This pattern shows increasing understanding and adherence to the rules among businesses, indicating the effectiveness of the Agency's strategies.

Challenges

Despite the significant progress made, the Agency continues to face certain obstacles, particularly in sectors such as banking, education and pharmaceuticals that are excluded from VAT registration. Banking is not under the Agency's jurisdiction because a different public body regulates it. However, the Agency actively uses a variety of media platforms and tools to monitor the pharmaceutical and education industries. By taking a proactive stance, the Agency is guaranteed to be aware of any developments that may impact competition in these sectors.

Another significant challenge the Agency faces is the failure to notify joint venture instances. The Agency is currently developing guidelines that will set indications for reporting mergers of joint ventures in order to address this issue. In order to make sure that joint venture enti-

ties are aware of their legal obligations, these rules seek to make clear the duties associated with joint venture notifications.

Furthermore, the Agency is actively cooperating with the Ministry of Justice, particularly the National Agency of Public Registry, to access the updated company registration database. This collaboration provides access to current registration data, allowing more effective monitoring and enforcement of notification requirements.

Conclusion

The Georgian Competition and Consumer Agency has made essential advancements in regulating unnotified mergers and stopping gun-jumping. By utilizing a combination of legal systems, technological solutions and cooperation between public agencies, the Agency is striving to guarantee compliance and encourage a competitive market setting. While there are still challenges to overcome, the Agency's constant endeavours and adaptability exhibit a solid responsibility for market integrity, competition and consumer rights protection.

The role of courts in Montenegro in the field of protection of competition



Nebojša Jovović, PhD
Director
Agency for Protection of Competition of
Montenegro

Since the introduction of regulations related to protection of competition in Montenegro, which entered into force in 2006, the Montenegrin law on protection of competition has undergone significant changes that have affected the competences of the Agency for the Protection of Competition (hereinafter: MCA) and competent courts, especially in relation to fining policy. Also, the reform of the misdemeanor system in Montenegro affected the jurisdiction to fine undertakings for infringement of competition.

Regarding the foregoing, this article provides a general overview of the role of the courts in the application of the rules on protection of competition in Montenegro. A wide range of courts has jurisdiction in the enforcement of competition law in Montenegro: administrative enforcement, sanctioning enforcement and private enforcement.

As for administrative enforcement, the Act on Protection of Competition stipulates that an administrative dispute can be initiated against a decision made by the MCA in proceedings conducted under this Act. This primarily refers to the decisions that the MCA issues in the field of concentration assessment, individual exemptions and determination of restrictive agreements, and abuse of a dominant position. Administrative disputes in Montenegro are conducted before the Administrative Court of Montenegro (hereinafter: Administrative Court), which controls the legality of decisions made by the MCA in the field of competition protection. If the Administrative Court approves the lawsuit, the MCA is bound by the legal understanding of this court, as well as the objections regarding the procedure. If the Administrative Court rejects the lawsuit, the dissatisfied party, i.e. the plaintiff, has the means at its disposal (a request

for examination of the court decision and a request for a repeat procedure), which can be submitted to the Supreme Court of Montenegro.

In regard to sanctioning enforcement, according to the Act on Protection of Competition, a penalty of 1% to 10% of the total annual income in the financial year prior to the year when the misdemeanor was committed, will be imposed for infringement of competition (restrictive agreement, forbidden concentration and abuse of dominance). Also, the Act on Protection of Competition describes as misdemeanor the untimely submission of a request for approval for the implementation of a concentration, as well as non-compliance with the measures ordered by the MCA to market participants. Given that the MCA does not have full fining jurisdiction, because competition infringements are defined as misdemeanors in the legal system of Montenegro, misdemeanor courts, i.e. the Misdemeanor Court of Montenegro and the Higher Misdemeanor Court of Montenegro are competent to impose penalties for committed misdemeanors in the field of protection of competition. The Misdemeanor Court of Montenegro conducts procedures upon requests for initiation of misdemeanor proceedings filed by the MCA or requests for adjudication filed by defendants against misdemeanor orders that may be issued by the MCA. The Higher Misdemeanor Court of Montenegro delivers second instance judgements in proceedings on appeals against the decisions of the Misdemeanor Court of Montenegro.

Finally, when it comes to private enforcement, compensations for damages caused by acts and actions that represent infringement of competition, which is determined by the decision of the MCA in accordance with the Act on Protection of Competition, are realized in civil proceedings before the competent court. In accordance with the regulations governing the organization and jurisdiction of the courts of Montenegro, the Commercial Court of Montenegro decides on the claims of persons who have suffered damage as a result of infringement of competition and the procedure is conducted according to the general rules on compensation for damages.

In order to further harmonize the national legislation of Montenegro in the field of competition protection with the EU acquis, changes are made to the existing act on competition protection in such a way that the MCA has full fining jurisdiction in cases of competition infringement so that the MCA can independently impose fines in administrative proceedings, and the undertakings in those proceedings retain the right to sue and initiate an

administrative dispute. In this way, the jurisdiction of the misdemeanor courts in this area would be abolished.

Also, efforts are being made to introduce an act on compensation for damages caused by competition infringements, which would regulate the private enforcement procedure in more detail, i.e. establish special rules in these procedures.

Competition law and regulatory framework in the postal services sector in Serbia



Marija Antić
Adviser
Commission for Protection of
Competition

The rapid growth of e-commerce has led to new opportunities and chances for the development of the retail sector through various channels and the disappearance of clear boundaries between classic sales in stores and sales via the Internet. The development of e-commerce promotes competition and encourages innovation in the entire retail sector. The development of electronic commerce in the Republic of Serbia resulted in an increase in the volume (number) of postal items, especially in the packages segment, as well as express items.

The Commission for Protection of Competition recognized the need to analyse the new conditions in this market, therefore it conducted a sectoral analysis of the state of competition in the market of other postal services in the territory of the Republic of Serbia. In the analysis, certain recommendations were presented that will be found in the provisions of the new Law on Postal Services.

The Commission conducted a sectoral analysis of the market of other postal services in order to gain a better insight into the state of competition, but also to eliminate potential problems that may accompany the development of this market. The analysis covered the period from 2019 to 2021.

The current Law on Postal Services entered into force in November 2019. In accordance with the need for dynamic development in the postal services market, the Government of the Republic of Serbia adopted the Strategy for the Development of Postal Services in the Republic of Serbia for the period 2021-2025. The strategy envisages the adoption of the new Law on Postal Services by the end of 2024, pointing out that the promotion of competition is one of the main goals. The recommendations presented by the Commission's sectoral analysis will be implemented in the new Law on Postal Services.

Analysis of the Commission for Protection of Competition

Conducting sectoral analyses is a competence provided for in Article 47 of the Law on the Protection of Competition. This article points out that the Commission may analyse the state of competition in a certain market if the movement of prices or other circumstances indicate the restriction, distortion or prevention of competition. In accordance with the Law, the Commission has the right to obtain all necessary information for analysis from the market participants.

The subject of the study concerned the determination of the relationship between competitors in the market of other postal services and courier services, the assessment of their market shares and relative strength, as well as the analysis of contractual relations between users and service providers, the commercial policy of service providers, and the relevant regulatory framework in the period from 2019 until 2021.

The study consisted of two phases. The first phase included a survey of 42 companies that are leading representatives in 9 different commercial areas, such as sales of consumer electronics, sales of sports shoes and clothing, sales of children's equipment, sales of clothing, etc.

In the second phase of the investigation, the Commission first sent a letter to the Regulatory Body for Electronic Media and Postal Services (RATEL), asking it to provide data related to the total volume and income from express and courier services, especially for documents, and for goods. Based on the data of RATEL, as well as based on the submitted responses of users of postal services included in the first phase of the study, the most important postal operators in the market of other postal services were identified.

The analysis showed that the structure of the express services market in the Republic of Serbia is oligopolistic, with 5 large operators controlling 99% of the market, without a dominant market participant. In the observed period, the market evolved from a moderately concentrated to a highly concentrated market. In the analysis in question, the Commission did not see barriers to market entry.

What are the recommendations from the sectoral analysis of the Commission for Protection of Competition to be found in the draft of the new Law?

The analysis showed several important facts that were presented in the form of the Commission's recommendations, and which were then implemented by the Ministry of Information and Technologies, RATEL and other experts in this field in the draft proposals of the new Law on Postal Services.

The first recommendation concerned the provision of identical conditions of competition for all participants. Namely, the fact is that the Public Company Post of Serbia (Post Express) is exempted from the obligation to pay VAT, which represents a significant competitive advantage compared to other participants in the market. By applying this recommendation, all operators in the market of other postal services would calculate an identical tax rate on the added value for providing their services.

The second recommendation was related to ensuring transparency and non-selectivity regarding price and rebate policy for all market participants, so that there would be no agreement on the alignment of price policies or other forms of competition violations. Given that postal operators who provide express services can discriminate against users of their services with the existing rebate policy, applying this recommendation would create equal conditions for all users of postal services when choosing a postal operator. This recommendation also concerned the public inspection of postal operators' price lists. According to the current Law on Postal Services, an operator is not obliged to publish the applied service rates on its website, that is, they should be displayed in a visible place on the premises and delivered to the users upon request. The Commission believes that all postal operators should provide the availability and reliability of all information about prices, types of services and conditions for the provision of postal services on their official websites. This recommendation would impose a new obligation on operators, who in the future would have to have a website, an email for contacting users, a contact phone number, and publicly displayed prices and general business conditions.

The third recommendation concerned the drafting of relevant regulations that would regulate delivery via digital platforms. In the analysis, it was observed that digital platforms are not entities that directly deliver, but

they mostly deliver goods through the so-called third-party providers who are not registered for the activity of providing postal services. Although providers in certain segments represent competition to postal operators, they are not obliged to meet the conditions prescribed by legal solutions that apply exclusively to postal operators. Applying this recommendation would create equal shipping conditions for all participants in the market of other postal services.

The fourth recommendation concerns the importance of complete liberalization of the market, especially when it comes to the provision of universal postal service, which is assigned exclusively to "JP Pošta Srbije" by the current law.

The most important goals of the new law are to adapt the legislative framework to the accelerated changes and the needs of modern society, new technologies and business trends, but also to redefine the universal postal service.

Improving the regulatory framework through cooperation between state institutions and the European Union

Inter-institutional cooperation and exchange of knowledge and information is the key to establishing an effective regulatory framework. Competition law is a complex area of law, and it is necessary for colleagues from other state institutions to be familiar with the most important segments of competition protection, as well as to have the ability to understand this branch of law which *de facto* affects many social and economic spheres.

Recognizing the importance of inter-institutional cooperation, the Commission and RATEL signed a Memorandum of Cooperation, which further encouraged the cooperation of the two institutions in the areas of competition law and development of the regulatory framework in this field.

Also, through numerous education projects and exchange of opinions, ideas and knowledge, the Commission achieved significant cooperation with the competent ministry, the Ministry of Information and Technology.

In accordance with the above, a joint workshop of MIT, KPC and RATEL was held, which additionally encouraged dialogue regarding the drafting of the New Law and harmonization with the provisions of competition protection.

The workshop was supported by the European Union Policy and Legal Advice Centre (PLAC III) project with the aim to further harmonize regulations with EU law. During the workshop, experts in the field of postal services, competition law and stakeholders discussed proposals for improving the legislative framework concerning postal services.

The adoption of the new Law on Postal Services is expected by the end of 2024, and it is emphasized that the members of the Commission for Protection of Competi-

tion will participate in the Working Group for the drafting of the new regulation.

The cooperation of the Commission and other state institutions is of great importance for the improvement of competition rights, but also for the establishment of a market that supports the best conditions for all market participants, as well as for end consumers.

You can find the full analysis on the Commission's website³.

³ <https://kzk.gov.rs/en/izvestaj-o-sprovedenij-sektorskoj-an-3>

The role of NCAs under the scope of the DMA: special reference to the Spanish Agency



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Introduction

It is well known that the Digital Markets Act (DMA)²⁴ establishes a series of harmonised rules for the European Union (EU) that guarantee fair and contestable markets for all companies in the digital sector where there are large digital platforms. To this end, the DMA establishes a series of mechanisms to control the exercise of market power by these platforms that act as intermediaries called *gatekeepers*, ensuring that digital markets are contestable and that the behaviours that take place in them are fair. Therefore, the European Commission intends, based on the extensive experience of the national competition authorities (NCAs), to address the previous imbalance by imposing on large platforms a number of obligations for one or more „*core platform services*” which are referred to in Article 2(2) of the DMA.

The DMA coexists with the Competition law, as it is not intended to replace it, but to complement it. It does not focus on the actual, potential or presumed effects of a conduct adopted by a number of undertakings in a particular case to assess its possible anti-competitive character *ex post*, but establishes a set of *ex ante* obligations that must be complied with regardless of whether the actual breach distorted competition or not. Thus, the „*traditional*” competition rules, i.e. Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and the corresponding national provisions, as well as the rules on

merger control, will continue to apply to anti-competitive practices also in digital markets. In fact, this new regulation is already being effectively applied and showing its first effects²⁵, and is a key instrument to improve the functioning of digital markets at European level.

Cooperation between the European Commission and National Authorities

Recital 9 of the DMA states that “*Fragmentation of the internal market can only effectively be averted if Member States are prevented from applying national rules which are within the scope of and pursue the same objectives as this Regulation. That does not preclude the possibility of applying to gatekeepers within the meaning of this Regulation other national rules which pursue other legitimate public interest objectives as set out in the TFEU or which pursue overriding reasons of public interest as recognised by the case law of the Court of Justice of the European Union.*”

However, although the European Commission is in charge of implementing the DMA, the NCAs also play a fundamental role in its application. Specifically, in Spain, the National Markets and Competition Commission (CNMC) is well aware of the fact that the DMA will coexist with the national competition law. This fact requires and imposes the challenge of strengthening collaboration and coordination of actions within the European Commission in the framework of the European Competition Network (ECN).

In Spain, thanks to the recent legislative reform approved by Royal Decree-Law 5/2023 of 28 June²⁶, which included some of the reforms pending since the transposition of the ECN+ Directive²⁷ in 2021²⁸, it is now possible for the CNMC to carry out investigations into cases of possible non-compliance by gatekeepers in Spain with the obligations set out in Articles 5, 6 and 7 of the DMA.

²⁴ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

²⁵ See the Report from the Commission to the Council and the European Parliament’s annual report on Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

²⁶ Royal Decree-Law 5/2023, of June 28, which adopts and extends certain measures in response to the economic and social consequences of the War in Ukraine, to support the reconstruction of the island of La Palma and others situations of vulnerability; transposition of European Union Directives on structural modifications of commercial companies and reconciliation of family life and professional life of parents and caregivers; and execution and compliance with European Union Law.

²⁷ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Text with EEA relevance).

²⁸ Royal Decree-Law 7/2021, of April 27, transposing European Union directives on competition, prevention of money laundering, credit institutions, telecommunications, tax measures, prevention and repair of environmental damage, displacement of workers in the provision of transnational services and consumer defence.

Specifically, the new section 3 of article 18 of Law 15/2007 of 3 July on Defence of Competition (LDC in Spanish)²⁹ includes the possibility for the CNMC to collaborate with the European Commission in the investigation of breaches of the DMA. Specifically, it provides that the CNMC may investigate conduct contrary to the DMA by means of confidential information procedures, informing the European Commission. For this purpose, the CNMC may send requests for information, but also carry out inspections to ensure compliance with the obligations set out in the DMA. However, if the European Commission were to initiate an investigation into the same facts, the CNMC would be deprived of continuing the investigation and would inform the Commission of its conclusions. In any case, although the CNMC does not have the power to impose sanctions under the DMA, it may use the information gathered for the purposes of investigating breaches of national competition law and TFEU.

Recent CNMC decisions in the digital markets area

Although the CNMC has not yet made use of its new legal powers to ensure the application of the DMA in Spain, there has been an increase in the number of decisions and/or the investigation of sanctioning procedures for anti-competitive practices in digital markets by companies that have recently been designated as gatekeepers³⁰ under the DMA or are in the process of being designated³¹ and that affect one or more „*core platform services*”.

For example, on 12 July 2023, the CNMC fined Apple and Amazon 194 million euros for restricting competition on Amazon’s website in Spain in Case S/0013/21 AMAZON/APPLE BRANDGATING³². The CNMC has found that both companies agreed that only a number of resellers designated by Apple could sell Apple-branded products on Amazon’s website in Spain (known as „*brand gating*” clauses). The CNMC also found that Amazon and Apple agreed to limit the ability of competing brands to

purchase advertising space on Amazon’s website in Spain to advertise their products in certain searches for Apple products, as well as during the purchase process for those products, and that Amazon could not, without Apple’s consent, conduct marketing and advertising campaigns specifically targeting customers who had purchased Apple products on Amazon’s website in Spain and encourage those consumers to switch from an Apple product to a competing product. Therefore, the CNMC has found that these practices constitute an infringement of Articles 101 of the TFEU and 1 of the LDC.

On the other hand, the CNMC is currently investigating two other sanctioning procedures developed within the framework of digital markets and which could affect parties designated or in the process of being designated as gatekeepers by the DMA: the first one against Booking (Case S/0005/21: BOOKING)³³ for possible anti-competitive practices affecting hotels and online travel agencies and the other against Google (Case S/0013/22: GOOGLE DERECHOS CONEXOS)³⁴, for possible anti-competitive practices affecting Spanish publishers of press publications and news agencies. Both investigations have been initiated for restrictive practices prohibited by Articles 2 and 3 of the LDC and Article 102 of the TFEU.

Conclusion

The new challenges of competition law in digital markets are particularly relevant in today’s world. Proof of this is not only the EU’s approval of the DMA, which in itself reflects the existence of a European consensus and interest in the importance of regulating large platforms, but also the fact that the NCAs and the European Commission itself are focusing their resources on the effective application of antitrust law to those digital platforms that breach competition law. This is also reflected in Spain, with the decisions adopted and the sanctioning procedures that are being developed against large technology companies that may have infringed Competition Law.

²⁹ <https://www.boe.es/eli/es/l/2007/07/03/15/con>

³⁰ https://digital-markets-act.ec.europa.eu/gatekeepers_en

³¹ https://digital-markets-act.ec.europa.eu/gatekeepers_en

³² https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2023/20230718_NP_Sancionador_Amazon_Apple-BrandGating_en_GB.pdf

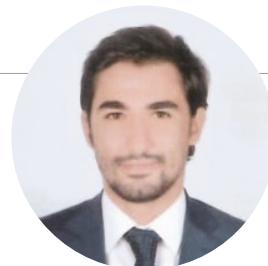
³³ https://www.cnmc.es/sites/default/files/4482208_0.pdf

³⁴ https://www.cnmc.es/sites/default/files/4613807_0.pdf

Interaction between Regulation and Competition in the Pharmaceutical Industry – Examples from Turkey



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The pharmaceutical industry, which holds critical importance for public health, is subject to stringent regulations in many parts of the world. These regulations encompass standards and criteria necessary for production, approval by regulatory authorities regarding the health and safety compliance of medicines, their market authorization, pricing, and reimbursement matters.

Some regulations in the sector directly impact the competitive structure of the market and shape its dynamics. For instance, the discovery and patenting of a new molecule can result in the originator company having exclusive authority over production and sales. Regulations regarding pricing or profit margins directly affect the pricing dimension of competition. While competitive and intervention-free market conditions are generally assumed to yield optimal results for consumer and societal welfare, the close relevance of the pharmaceutical sector to public health, the potentially irreparable consequences of even short-term disruptions in medicine supply and the importance of ensuring the accessibility and regular supply of medicines are the cited reasons for regulations in the pharmaceutical industry. Moreover, the high cost and uncertainty associated with drug development create the need to provide incentives for drug manufacturers. Therefore, it can be said that regulations generally focus on innovation and accessibility of pharmaceutical materials.

In general, both competition law and regulation can be considered as tools for regulating economic activities. However, it is observed that the timing of implementation

(*ex post* or *ex ante*), the objectives (economic efficiency or distributive justice), and the obligations imposed on the parties differ. Regulations are also sometimes viewed as complementary and sometimes as an alternative to addressing certain market failures.⁴

In sectors with intensive regulations, such as the pharmaceutical industry, where most firm behaviors are subject to regulation, it can be generally accepted that the role of competition law leans more towards complementarity. Put simply, while businesses may compete in unregulated areas where antitrust violations may occur, regulations also have the power to influence and mold the competitive landscape of the market.

The pharmaceutical sector, despite being subject to intensive regulations, is closely monitored by competition authorities. To provide a quantitative example, between 2009 and 2017, the European Commission conducted 29 investigations in Member States, resulting in administrative fines exceeding €1 billion.⁵ Similarly, between 2018 and 2022, Member States and the Commission collectively imposed fines totaling €780 million, indicating a highly active enforcement stance within the sector.⁶

According to the Turkish Competition Authority's 2022 activity report, the pharmaceutical sector is among the top 5 sectors with the highest number of cases. In an investigation conducted against Roche and Novartis, the Authority imposed fines totaling approximately €90 million on these pharmaceutical companies.⁷ However, it is noted that many of the Competition Authority's decisions in the pharmaceutical sector primarily concern

⁴ Dunne N. (2015) "Competition Law and Economic Regulation", Cambridge University Press

⁵ Commission (2019), "Competition Enforcement In The Pharmaceutical Sector (2009-2017)" <https://op.europa.eu/en/publication-detail/-/publication/9cb466c8-7b71-11e9-9f05-01aa75ed71a1> Accessed: 16.04.2024.

⁶ Commission (2024) "Update On Competition Enforcement In The Pharmaceutical Sector (2018-2022)" https://competition-policy.ec.europa.eu/system/files/2024-01/kd0223117enn_pharma_report_2018-2022_e-version_en.pdf, Accessed: 15.04.2024.

⁷ Turkish Competition Authority, Roche / Norvatis, Case 21-04/52-21, 22.01.2021.

the concept of exemption mentioned in Article 5 of the Law.⁸ These decisions often pertain to applications made by pharmaceutical companies seeking exemption from the application of Law No. 4054⁹ for horizontal or vertical agreements they enter into.

Various countries have compiled sector inquiries detailing the pharmaceutical sector's structure, sector-specific information, and the presence of regulatory or practice-related issues that could potentially give rise to anti-competitive concerns in the markets. Sector reports prepared in countries such as Austria, Bulgaria, Denmark, Latvia, and Poland generally examine topics such as regulations aimed at parallel trade, pharmaceutical production capacity and availability, concentration of market at the wholesale level, pricing regulations and recommendations, and barriers to entry for generic medicines.¹⁰

The Turkish Competition Board's ongoing pharmaceutical sector inquiry initiated in 2022 also focuses on the pharmaceutical sector, examining patents, licensing, pricing, reimbursement processes, sector-specific information, and the structural changes the sector has undergone from the past to the present. Based on the information obtained, recommendations aimed at enhancing the competitive structure of the market are planned to be shared with the public after the completion of the report.

In general, when examining the relationship between regulations and competition law, the entry of generic medicines in the context of patents stands out as one of the key issues. While patent law is not a sector-specific regulation, it has an important role in the pharmaceutical industry in terms of competition. Allegations about patent infringements and how the firms resolve such claims can affect market entry and can be a matter of antitrust law as well. Parties may have legitimate interests in settling these disputes amicably, taking into account the uncertain, lengthy and costly nature of the litigation process. However, such agreements also create an environment conducive to anti-competitive practices. Indeed, in certain cases, the

interests of both generic and originator drug manufacturers may align in seeking to maximize profits that would be otherwise diminished by lower prices.¹¹ The European Commission has deemed various agreements involving reverse payments as antitrust violations and imposed fines accordingly.¹²

In Turkey, while a formal decision termed 'pay for delay' has not been made, the competition authority has investigated various agreements for whether they have a similar effect on market entry as such agreements. For instance, in some of Competition Board decisions¹³, it was explicitly stated that while companies may have apparent intentions related to the promotion and marketing of a specific drug, the primary objective could be to restrict competition between originator and generic drug manufacturers. In such cases, competition authorities may scrutinize agreements between originator drug manufacturers and generic manufacturers, questioning the presence of a developing or pending application for a drug containing the same active ingredient as the reference drug in contracts related to the sale, promotion, and marketing of specific medicines.

One significant aspect of competition law enforcement in the pharmaceutical sector involves cases of excessive pricing. In recent times, there has been an increase in decisions regarding excessive pricing in various EU countries.¹⁴ These decisions, made in respective countries, have mostly focused on behaviors in areas where pricing is freely determined or in pricing negotiations with health authorities. Various perspectives in the literature suggest that excessive pricing cases can highlight deficiencies in price regulations and whether there is a need to reform or amend the sector-specific rules.¹⁵

Changes made in both competition and health regulations can have an impact on the competitive environment of the industry. One such change relates to amendments in the regulation concerning merger control. According to one amendment made in Turkish merger con-

⁸ Article 5 of the Turkish Competition Act provides that the prohibition contained in Article 4 may be declared inapplicable if the four conditions are met cumulatively. It is closely modelled on Article 101(3) of the TFEU.

⁹ Act No. 4054, short for the Act for Protection of Competition is a primary antitrust legislation in Türkiye.

¹⁰ <https://www.vbb.com/insights/corporate-commercial-regulatory/pharmaceuticals-czech-competition-law-sector-inquiry-how-can-innovative-pharmaceutical-companies-best-prepare>, Accessed: 25.04.2024.

¹¹ Colino Marco, S. Dunne N. Fournier K. Pais S. Ritzmann D. (2017) "The Lundbeck case and the Concept of Potential Competition", Concurrences n° 2-2017

¹² Case COMP/AT 39226, Lundbeck [2013, Case COMP/AT 39685, Fentanyl [2013], Case COMP/AT 39612, Servier [2014] etc.

¹³ Turkish Competition Authority GSK/Bilim İlaç, Case 17-10/119-54., 13.03.2017., Turkish Competition Authority GSK/Bilim İlaç, Case 18-17/299-149., 31.05.2018, Available only in Turkish.

¹⁴ Case AT.40394 – Aspen [2017] etc.

¹⁵ Ayata, Z. (2020). *A comparative analysis of the control of excessive pricing by competition authorities in Europe*. <https://journals.tulane.edu/teclf/article/view/2957/2770>, Accessed: 17.04.2024

trol regulation in 2022, in cases where the turnover of the acquiring entity exceeds a certain threshold¹⁶, their acquisition must be notified to the Competition Authority for approval regardless of the turnover of the acquired entity, provided that the acquired undertakings operate in the pharmacology and health technology market.¹⁷ In one decision¹⁸, considering that the acquired undertaking produces APIs and finished pharmaceutical products on behalf of pharmaceutical companies, the Board deemed that such acquisition is subject to notification regardless of the turnover of the acquired undertaking. Such regulations aim to prevent the acquisition of innovative firms by established competitors before they become effective competitive forces.

Recent legislative changes in Turkey are also considered to potentially affect the competitive structure of the pharmaceutical sector. A recent change in Turkey includes a facilitative regulation concerning the pharmaceutical marketing authorization process. According to this amendment, mandatory testing by the Ministry of Health following the marketing authorization has been abolished. Aimed at preventing duplicative testing for drug efficacy and safety, this legislative change could potentially facilitate the entry of generic medicines into the market.

Additionally, in early 2024, a regulation issued by the Turkey Pharmaceuticals and Medical Devices Agency (TİTCK), the competent public authority for authorizing medicines, aimed to prevent unauthorized uncontrolled drug exports and subject the export of medicines to the approval of the Agency. This regulation is also significant as it could have an impact on both drug availability and domestic competition in pharmaceuticals.

The legislation¹⁹ is planned to be amended with the aim of creating a single pharmaceutical market on an EU scale where all patients can access medications safely, effectively, and at a more affordable price in a timely and fair manner. Accordingly, it is observed that the provisions of the relevant directive aim to expand the scope of the Bolar exemption.²⁰ In the previous version of the legislation “Conducting the necessary studies and trials” cited an exemption from the patent protection of the originator firm. However, in the draft amendment, marketing authorization, pricing and reimbursement are also added to the examples that do not violate patent protection, therefore falls within the scope of the Bolar exemption. As understood from the proposed regulatory change, it is anticipated that the licensing and reimbursement processes could be included in the scope of the Bolar exemption. However, there are debates regarding whether this regulation could weaken the protection granted by intellectual property rights. In Turkey, marketing authorization application is clearly stipulated in the law and falls within the scope of the Bolar exemption.²¹ Legislative differences may stem from different interpretations of patent protection or the significance of generic competition across countries.

In conclusion, among the important sectors where the dynamic relationship between competition and regulation is evident, the pharmaceutical sector stands out. While regulations in the pharmaceutical sector provide the basic framework, competition law plays a complementary role. It would be appropriate to consider the relationship between competition law and regulation as complementary instruments for the emergence of accessible, more affordable, and innovative medicines.

¹⁶ Required threshold levels differ according to the type of the concentration (merger, acquisition) and the geographical extent of the turnover, and spans between TRY 250 million (approximately \$ 7.5 million) and TRY 3 billion (approximately \$ 90 million)

¹⁷ Other economic areas in which no threshold requirement is necessary for the acquired firm are: “digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, and health technologies, or assets related to these undertakings”

¹⁸ Turkish Competition Authority, Case 22-25/398-164, 02.06.2022 available only in Turkish.

¹⁹ Directive 2001/83/EC and Directive 2009/35/EC

²⁰ The Bolar exemption generally refers to that generic drug manufacturers have the right to conduct studies on original drug manufacturer’s products and carry out certain pre-sale operations before the patent or other additional protection certificate expires.

²¹ Intellectual Property Act No. 6769. Art. 85/c

Cloud computing in the EU: everything but a fair and contestable market?



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Cloud computing is possibly one of the technological developments of the new digital economy that in recent years has most facilitated business growth and market competitiveness in the European Union and the rest of the world. Indeed, these services have played a key role in the digitization of the economy, enabling huge cost savings for companies, efficiency gains, improved work organization based on shared resources that can be accessed remotely, etc.

However, the rapid development of this sector also raises serious concerns from the point of view of competition law, which has a challenge in this area: to ensure that markets remain open and competitive – *contestable* – and that consumers are free to choose their cloud provider, to change it, and at reasonable levels of tariffs, prices, and commercial conditions – *equitable*.

In this respect, the intense activity of the competition authorities in Europe over the past year is very telling. In October 2023, the CMA (*Competition and Markets Authority*) launched a market investigation into cloud services in the UK, following a report prepared by OFCOM, called *Cloud Services Markets study*. A few months earlier, in June 2023, the *Autorité de la Concurrence* had issued an extensive report analysing the cloud services market in France. The Spanish competition authority, the *Comisión Nacional de los Mercados y la Competencia* (CNMC), published in November 2023 that it had launched a study on cloud services in Spain.

The need to adapt regulations to these new business models has been reflected in complementing the traditional prohibitions on competition (mainly the abuse of dominant position, by Art. 102 TFEU), operating *ex post* once the anticompetitive practice has taken place, with a sectoral regulation that operates *ex ante*. The result of this is the recently approved *Digital Markets Act* (DMA).

Both are intended to protect different, but certainly complementary, legal interests, and it does not seem that, so far, the interaction between them has been properly structured.

The DMA is rather vague regarding the cloud sector: Article 2.2 establishes, in paragraph i), “cloud computing services” in the list of *core platform services* (CPS). On September 6, 2023, the first designation of *gatekeepers* under the DMA was published, and of the entire list of CPSs in Art. 2.2, only two were left “orphaned”: virtual assistants and cloud computing services. For this reason, and because it would be necessary to amend Art. 12 DMA to include specific obligations for these operators to avoid the business practices described below, at least in the immediate future, the only way to deal with these problems is to observe the prohibition of abuse of dominant position contained in Art. 102 TFEU.

There are currently three main players in the cloud services industry in the EU, the so-called “hyperscalers”: Amazon, Microsoft, and Google. However, in terms of antitrust analysis, Amazon and Microsoft have greater market power (according to the OFCOM report cited above, in 2022 their combined share ranged between 70 and 80%), while Google ranks alongside the other cloud service providers, with a market share of no more than 10%. Moreover, their strong presence in other areas of the digital economy gives them a competitive advantage over their rivals in the cloud sector, as they have large customer databases (allowing them to benefit from significant network effects) and can take advantage of economies of scale and scope linked to the various services they already offer within their own ecosystems. Additionally, their practically unlimited financial possibilities allow them to afford the huge investments needed to provide cloud services, such as data centres, server farms and, in general, all types of information technology (IT) infrastructures.

This scenario and the existing dynamics in the industry seem to be taking us towards an even greater degree of market concentration in the coming years, with the risks this entails for maintaining competitiveness in the sector. In this context, the entry of new operators into the cloud services market with the potential to grow and gain a share is not easy. This lack of contestability is reinforced

by the fact that hyperscalers have developed their service offerings as a complete ecosystem, which gives them a competitive advantage, equivalent to a barrier to entry, over rivals that can only offer a limited range of services. In this sense, some speak of competition *for* the market rather than competition *in* the market.

As we have already noted, in this market there is a striking imbalance in the relationship between customers and hyperscalers, which can make it difficult to negotiate contractual clauses even for customers with a certain degree of market power. Combined with the high degree of concentration on the supply side and the obvious barriers to market entry, two types of risk can be identified from a competition standpoint.

First, the “structural” features of the market, mainly exit barriers due to former “egress fees”, obstacles to migration of cloud services, privileged access to data and lack of interoperability, all of which create or reinforce the abovementioned lock-in effect. Most of these are properly addressed, at least theoretically, by the recently enacted Regulation 2023/2854, the *EU Data Act*. We will have to wait until some time has passed and its enforcement has been put into practice.

Second, the anticompetitive practices that may jeopardise the existence of free and contestable cloud services markets. There are many obstacles that the current provider can place in the way of cloud service users to retain them, such as restrictive clauses, *bundling*, price advantages favouring their products, most-favoured-nation clauses, etc. If applied by an operator in a dominant position, these practices could constitute abusive practices contrary to Art. 102 TFEU. Thanks to their ecosystem structure, hyperscalers can develop rebate schemes, tariff advantages or cross-subsidies, thus using their market power in related markets to accelerate the development of their cloud service provider activities.

As the French Authority’s Report rightly points out (p. 131), this is the starting point for much of the anti-competitive practices taking place in this sector: “In a context of unbalanced commercial relationships between cloud service providers and customers, characterized by the absence of negotiated contractual clauses, certain practices of cloud service providers that are also software vendors are likely to limit the choice of their customers. Software vendors, such as Microsoft and Oracle, may take advantage of their historical positions to launch and

develop their respective cloud offerings and restrict the use of their software in a competing cloud”.

But the main concern nowadays regards abusive software licenses. As recent studies point out, despite the willingness to switch cloud infrastructure (*IaaS*) providers, 40% of respondents said that existing licensing terms prevented their companies from moving on-premises licenses to another provider, and another 40% were concerned about the loss of discounts, another possible cause of the lock-in effect of cloud services. Allegedly, one of the main reasons why 42% of *IaaS* customers originally chose their cloud service providers was the discounts granted through pre-existing software licenses. In another study published last year, Professor F. JENNY quantified the “extra cost” that cloud service users are paying in the European Union due to the existence of this type of abusive practice at more than 1,000 million euros.

On November 9, 2022, the Cloud Infrastructure Service Providers of Europe (CISPE) association raised a formal complaint before the European Commission concerning business practices relating to software licensing by Microsoft, which in its view were abusive under Art. 102 TFEU and requested the opening of a formal investigation. OFCOM’s report, which is the genesis for the CMA market investigation referred to above, devotes a chapter to Microsoft’s software licensing policy. According to this report, which includes both Prof. Jenny’s study and CISPE’s complaint, Microsoft is using its dominance in the productivity software market (Windows OS for group servers, Office 365, etc.) to alter, to its own advantage, competition in the related cloud services market.

Indeed, as noted in section 9.5 of the OFCOM’s report, these types of practices in the cloud services arena make it less attractive for customers to use Microsoft licensed software products on the cloud infrastructure of a provider other than Microsoft’s own Azure service. In addition to the fact that it is more expensive for them to use Microsoft-licensed products in third-party clouds, they suffer from other disadvantages such as the inability to access certain functionalities and the lower availability of security updates compared to running the same software in the Azure cloud.

The result of the structural conditions previously described and the existence of this type of practice is no other than a *foreclosure* effect: a lack of contestability that prevents companies from offering cloud services and a

lock-in effect on consumers, who are “captive” and cannot freely choose to change provider.

So, among this wide range of practices that have been detected in the market by numerous reports from public competition authorities as well as private consulting firms, abusive software licensing practices stand out for their

harmfulness. It is now up to the competition authorities to address the situation we have described, and to decide whether such conduct is worthy of antitrust sanctions, and thus contribute to maintaining competition in the cloud services market.



Private Regulations, (Regulatory) Ancillary Restraints & Restrictions by Object



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In 2017, mass media reported that FIFA had warned the Spanish government to leave the national team out of the 2018 World Cup due to the latter's alleged interference in the functioning of the Spanish Football Federation (FEF). The issue concerned a discrepancy between the Secretary of State for Sports and FEF over the date of the latter's elections. FIFA's Statutes ensure national federations' independence regarding the interference of state rules and public entities. Accordingly, FIFA warned about the suspension of the FEF as a member and its exclusion from all its competitions. For similar reasons, FIFA had issued the same warning already in 2007 regarding the 2008 Euro Cup. In both cases, the team ended up competing in the championships (and winning the 2008 Euro Cup).

FIFA's case shows that a supranational private body with jurisdiction to organize and set the rules of a widely followed and practiced activity can relentlessly enforce its independence from and force states - supposedly the predominant international agents - to refrain from the legitimate exercise of their powers. To achieve this goal, the body must place its own rules above any state law. Given the risk that such self-styled prevalence be overlooked by states, the private regulation must include the threat of an evil that the State cannot overcome. In the example above, the certain probability of exclusion of the national team is too big a danger for any government in terms of public opinion pressure and loss of electoral support.

Since the governments of most states seem powerless in the face of such behemoths, perhaps other institutions are more appropriate to establish the scope and limits of international private regulations. Such is the case with the European Union, where the European Court of Justice (ECJ) has been applying Competition Law in cases in which international sports federations had been sued

for restrictive agreements and exclusionary conducts (Judgements of the Court, December 21, 2023: “*International Skating Union*” (ISU), C-124/21 P; “*European Super league*” (ES), C-333/21; “*Royal Antwerp Football Club*”, C-680/21. Afterwards, C-650/22, “*FIFA vs. BZ*” and Case C-209/23, *RRC Sports (aka FIFA vs. agents)*).

Broadly speaking, the questions submitted to the ECJ in those cases concern the accordance with Article 56 TFEU (freedom of movement) and with Articles 101 TFEU (restrictive agreements) and 102 TFEU (abuse of dominant position) of the rules of international sports associations that intend to govern the prior approval of certain international competitions and the participation therein of professional clubs and players, and also the exploitation of the various rights related to those competitions. Taking *ESL* as the leading case, the Opinion (Advocate General Rantos) and the ECJ's judgement came to opposite findings when deciding whether those rules were in breach of Articles 101 and 102 TFEU. The main reason is that the former built on the Regulatory Ancillary Restraints doctrine (RAR), whilst the latter does not even mention it (*ISU* does it).

The theory of ancillary restrictions was initially developed within the framework of purely commercial agreements. Thus, any restriction directly linked to the performance of a main and necessary operation that does not, in itself, have an anti-competitive character is classified as an „ancillary restriction”. The case law relating to *commercial ancillary restraints* was subsequently extended to restrictions deemed necessary for reasons of public interest (non-commercial objectives), thus giving rise to *regulatory ancillary restraints* (*ESL* Opinion, 87-88). However, the assimilation of these theories is not total since public interests are by nature much more abstract than those of commercial agreements. For that reason, the ECJ filters regulatory ancillary restraints through a restrictive interpretation.

Advocate General Rantos held that most of the objectives invoked by the UEFA and FIFA to justify the specific rules of prior authorization and participation at issue in the case derive from the „European sporting model” and, therefore, are expressly covered by primary Union law

and, in particular, by Article 165 TFEU; so, their legitimacy cannot be questioned. This is the case with the rules intended to guarantee the open nature of competitions and to protect the health and safety of players, as well as to guarantee solidarity and the redistribution of income in favor of grassroots football. Some of these objectives related to the specific nature of the sport have also been recognized by the jurisprudence of the Court of Justice, such as the objective related to maintaining the integrity of competitions and the balance between clubs to preserve a certain degree of equality and uncertainty regarding the results. Without an *ex-ante* control mechanism, it would be virtually impossible for the UEFA or FIFA to ensure that the objectives pursued are achieved (ESL Opinion, 93, 97).

On the contrary, the judgments hold that the agreements made within the international associations following their statutory regulations are restrictions by object. The rules “*make subject to the power of prior approval and the power to impose sanctions held by the entities that adopted them, in their capacity as associations of undertakings, the organization and marketing of any international football competition other than those organised in parallel by those two entities, as part of their pursuit of an economic activity. In so doing, those rules confer on those entities the power to authorize, control and set the conditions of access to the market concerned for any potentially competing undertaking, and to determine both the degree of competition that may exist on that market and the conditions in which that potential competition may be exercised*” (ESL, 176).

Those rules do not exclude from that market any competing undertaking, but make it possible, by their nature at least “*to restrict the creation and marketing of alternative or new competitions in terms of their format or content. In so doing, they also completely deprive professional football clubs and players of the opportunity to participate in those competitions, even though they could, for example, offer an innovative format whilst observing all the principles, values and rules of the game underpinning the sport. Ultimately, they completely deprive spectators and television viewers of the opportunity to attend those competitions or to watch the broadcast thereof*” (ESL, 176).

The judgement at stake neither mentions nor comments on the regulatory ancillary restraints theory. Some expressions scattered here and there seem to mirror the

ancillary restraints with the pursuit of legitimate objectives “*such as ensuring observance of the principles, values and rules of the game underpinning professional football (...)*” (ESL, 176). By avoiding every reference, the judgments tacitly acknowledge that the theory of ancillary restraints is only applicable to restrictions that have the ‘effect’ of restricting competition. The very same day, ISU clarified that the ancillary restraints doctrine does not apply to an agreement that has as its very ‘object’ the prevention, restriction, or distortion of competition (paragraph 113). This finding has been dubbed as ‘self-evident’, since the ancillary restraints doctrine presupposes that the overall agreement to which the clause relates is not restrictive by its very nature (Ibáñez Colomo, Chillin’Competition, December 21, 2023).

However, there are a good number of reasons allowing to apply the regulatory ancillary restraints’ theory to ‘by object’ restrictive agreements.

First, the identification of restrictions by object does not mean the automatic and indisputable presumption of anticompetitive behavior. That requires at least a cursory look at the legal and economic context of the agreement. The absence of any automatism in the application of restrictions by object means that, at least in the abstract, there could be a reason of entity sufficient to make the application of the accessory restraint prevail. This logic would closely resemble the doctrine of the rule of reason. On the contrary, it is the same logic that accounts for the ordinary application of ancillary restraints: this theory does not eliminate the anti-competitive nature of the practice but avoids its consideration as a restriction (by object or by effect).

Second, by their very nature, regulatory restraints derive from principles of European or national law, superior to the unique interests of each company or economic sector. Their ultimate objective is the benefit of citizens in general, not as consumers. Their development and achievement are sometimes an objective and other times a general duty of territorial public administrations. The entities that approve and apply private regulations that contain accessory regulatory restraints either have a quasi-administrative nature (professional associations) or develop sports competitions at a supra-state level that widely transcend the business nature. Although amateur and professional sports are not necessarily communicating vessels, it is indisputable that the second is seen as

the highest level and, sometimes, the culmination of the first. The traditional differentiation between one and the other in competitions such as the Olympic Games has disappeared in favor of professionalization. This has led, on the one hand, to a progressive application of professional structures to amateur sports; but also the application of the guiding principles of the “European sports model” to the professional one (*ES Opinion*).

Third, public interest justifications apply to restrictions of Free Movement. Both free movement and competition law are about creating an internal market, they should be interpreted in a similar way. Therefore, if there is a public interest that justifies interference with the internal

market, then the public interest defense should be available for competition law restrictions too (Giorgio Monti, *Kluwer Competition Law Blog*, May 8, 2024).

Fourth, the rationale behind the exclusion of object restrictions from the ancillary restraints theory is that the former are more harmful to competition than effect restrictions. This is usual but not necessarily true. They are, by their very nature, just ‘more obviously restrictive’ (Giorgio Monti, *Kluwer Competition Law Blog*, May 8, 2024).

In summary, there are convincing reasons to hold that the regulatory ancillary restraints theory must apply irrespective of the nature of the restrictive agreement.



Anti-competitive practices in tourist packages



Daniel Neira Barral

*Secretary General of the Galician
Competition Agency
Professor at the University of Santiago de
Compostela*

The Administrative Chamber of the Supreme Court has upheld the fines²² imposed on three companies for a serious abuse of dominance infringement by allowing pre-bookings at the island's campsite only to users who transferred using the transport company belonging to the same group and not the other competing companies that offered the same service.

In this way, the magistrates dismiss the appeal filed by the firms against the judgment of the Superior Court of Xustiza de Galicia (TSXG) that confirmed the agreement of the Galician Competition Commission (CGC) of December 3, 2019, by which these companies had been fined for said serious infringement of the regulations on the defense of competition.

The Resolution of the CGC makes it clear that the sanctioned conduct has a distinct exclusionary effect that lacks legitimate support in the merits themselves (quality of transport or travel agency services). What is established is an illegitimate reservation practice of highly competitive markets by taking advantage of the exclusivity in the management of a campsite.

This exclusionary effect has been clearly demonstrated as a case of abuse of dominant position in related markets, very similar to what is usually done in the funeral parlor business with respect to the management of a campsite.

This exclusionary effect has been clearly recognized as an abuse of dominant position in related markets, very similar to what is usually done in the case of funeral homes with respect to funeral services, for example, without it being necessary to precisely quantify its effects as the appellant intended, since it is not necessary to determine, in an undisputed manner, the abusive nature of such exclusion, which is not based on the illegality of the packaging of services but on the exclusion of all those who do not contract it in order to obtain prior reservations at the only campsite on the island before embarking on the trip.

There is no alternative for these potential clients, so it is not possible to establish any price comparison, simply because the integrated service is illegitimately designed as a monopoly. This situation is aggravated by the limitation of the maximum number of passengers per day foreseen by the regulations protecting the National Maritime Terrestrial Park.

Thus, it is argued that the company managed the only existing campsite on the island by virtue of an administrative concession, by which it held a dominant position with respect to the management of overnight stays on the island. At the same time, several companies were authorized to provide maritime transport services to the island.

The contested judgment stated that three companies acted in unison to adopt a "unity of action". Although each company had its own legal personality with different corporate purposes, they acted as a group with cross-shareholdings and a single administrator.

In this line, they offered a combined product of transport and accommodation at the campsite, in such a way that outside this combined package the campsite could not be booked in advance unless it was contracted with the campsite itself when it was already on the island.

The high court clarifies that the administrative resolution does not sanction the offer of this combined product, but "the extension of a dominant position in the market (exclusive management of places at the campsite on the island) to another related market (the transport of passengers to the island) taking advantage of its dominant position, as prior reservation at the campsite was conditional to the users who contracted with the transport company of the group, excluding from being able to offer this combined service (campsite reservation and transport to the island) the other companies that were authorized to carry out transport services to the island".

At this point, he stresses that the concession of operating the campsite is used to condition and limit the maritime transport market to the island, in which there is no exclusivity, and it is done in concert between the companies of the group that operate the campsite, that contract the trips and those that provide maritime transport to the island.

The magistrate maintains that "it is not that the offer of a combined product by the companies of the sector is

²² <https://www.poderjudicial.es/search/openDocument/23987484742b3d44a0a8778d75e36f0d>

prohibited, but that, with its concerted action, it prevents those who do not contract the transport and the trip with the carrier and travel agency linked to the concessionaire of the campsite from booking reservations at the campsite”.

At the same time, it concludes that “a practice of a company in a situation of dominance (quasi-monopolistic) in the market analyzed, which is projected onto a related market and which has as a consequence the inability of users to freely choose the company with which they wish to contract the transport service if they want to stay at the campsite facilities to spend the night on the island, has by

its own characteristics a clear anti-competitive effect on the market of transport to the island, placing competitors in a clear situation of disadvantage that practically expels them from the market”.

The court’s response to the question of interest raised in this appeal is that “the concerted practice of a group of companies that, holding a quasi-monopolistic position in a product or service, uses that position to limit and condition a related market, has by its own characteristics a clear anti-competitive effect by placing competitors at a clear disadvantage, so it must be considered an abuse of dominant position”.



Regulation on Automated Administrative Action²³



Juanita Pedraza Córdoba
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Carlos III University of Madrid*

It is hard to find, in recent history, a topic as controversial as the transformation of social dynamics resulting from the widespread use of artificial intelligence. The Public Administration has not escaped this phenomenon and, in Europe, following the Digital Compass 2030 [COM (2021) 118 final, March 9], a series of studies and normative processes (aimed at the production of hard and soft law) has been unleashed, attempting to generate trust and legal security among associates.

One of the paths that discussions follow is the need to define safeguards that manage to extract the maximum potential of technology, while eliminating or mitigating the risks that its use poses for the enjoyment of rights and guarantees of the governed, and within that channel, preliminary issues inherent in the process of replacing people with computer systems, in all or some of the phases that make up administrative actions, should be resolved before the Administration embarks on a project of using artificial intelligence, aimed at promoting digital public services and turning it into a true service platform.

This article intends to outline the problems and possible solutions offered by the interpretation of the Spanish legal framework at the state level, comprised of Article 41 of Law 40/2015, October 1, on the legal regime of the public sector (hereinafter: LRJSP) and Article 13 of Royal Decree 203/2021, March 30, which approves the Regulation of action and functioning of the public sector by electronic means. The first consideration arises spontaneously: introducing a change of this magnitude warrants more comprehensive regulation, which provides security, both to the holders of administrative bodies and to citizens, since the aforementioned rules are basically limited to: (1) Generally enabling automation, as a type of electronic processing of administrative action, in which the body that approves the specifications, the programmer, the auditor, as well as the person competent to know the

resources must be identified beforehand; (2) Prescribing the mandatory publication of the decision to automate on the website of the corresponding organization.

However, the absence of detailed and express regulation cannot be used as an excuse to delay the development of the automation process, as long as it is assumed as an instrument to guarantee the observance and realization of the constitutional (CE: Article 103) and legal (LRJSP; Article 3) principles that govern the organization and administrative activity, and especially, effective service to citizens; in other words, in the administrative field, an automation process can only be considered if there is a concrete and tangible benefit for the governed, which coexists with the streamlining and improvement in the conditions of execution of the tasks of public employees.

Unlike private organizations, administrations are not satisfied with the reduction of time and cost as justification for replacing the intervention of a person with a system, since they are vicarious organizations, which find their reason for being in the service of citizens and are subject to accountability: automating, therefore, is a decision preceded by the collection of evidence on the effective improvements that the use of systems introduces in the realization of the general interest entrusted to the deciding administration. To identify these evidences, administrations must carry out a prior analysis aimed at adopting the decision to automate, which includes: (1) Verification of the existence of infrastructural conditions to carry out the automation (availability of quality data and technical and personal means for the management of the entire data life cycle); (2) Inventory of actions, with identification of concrete improvements that can be introduced so that public services are delivered more efficiently to people.

It is important to highlight at this point that the improvement can be indirect, in the sense that it is decided to automate, for example, a routine action, with ad intra effects, with the purpose of allocating human resources to the execution of another that demands personalized attention of higher quality. The improvements should be able to be specified by making an optimal composition among various criteria: gains in agility, reliability [technical and legal], simplicity, objectivity, and transparency. None of these criteria is prevalent over the others, among other reasons, because neither the CE nor the law establishes a

²³ This work was funded by a public research project of the Spanish State Research Agency, AEI, reference PID 2020-116855RB-I00 (Automated administrative decision-making processes: conditions, limits, and legal guarantees).

hierarchy among them, so that effective improvement can be perceived as a Pareto optimum in which no interest can be overwhelmed by another; (3) Once the improvements have been identified, a risk analysis must be carried out on the exercise of the rights of citizens and also of public employees, which includes an assessment of impact and probability. Only in case the residual risk (the one that results from its delimitation, once the appropriate technical and organizational measures have been identified) is lower than the effective improvement, can an automation process be carried out. In general, the residual risk is lower by automating only a part of the action, in massive procedures, that involve the exercise of regulated powers and in which the possibility of decision (temporal factor) is, in itself, essential to protect the rights; (4) Once the actions susceptible to automation have been specified, a joint decision must be adopted, using an integral vision of the organization that recognizes the interdependence between the actions, determining the means that allow attributing the result of the systems to the organization, setting measurable objectives, methodologies and supervision times, as well as guaranteeing the participation of citizens with a view to having quality information that allows the strengthening of risk analysis, while contributing to increasing their confidence; (5) The execution of the decision to automate is comprised of several phases: (a) Design: the subjects that are going to be replaced by the system and those who are going to interact with it, including the citizens, must participate, so that the definition of the requirements really meets the needs and achieves the objectives. Likewise, the design will include the definition of the governance of the hybrid decision-making system, that is, the conditions of interaction between the system and people, establishing the purposes of human intervention. This point is of vital importance, since the notion of system design, in the field of administrations, must include not only technical components, but also organizational/legal ones, especially those that determine when public employees must intervene, what is expected of their intervention and how their training and organizational position will make it possible for them to fulfill the tasks entrusted to them. Good governance must prevent measures that eliminate the bias of automation (the tendency of subjects not to deviate from the recommendations or not to question what is revealed by the systems) among which those that allow the intervention of the interested parties stand out, either to validate the quality of the

data or to express conformity or disagreement with the provisional decisions, as well as those that promote the joint analysis of elements of judgment and evidence by the bodies. In the Spanish legal system, this model of governance leads to a preference for recourse to automation in the elaboration of procedural acts and reports (mandatory or optional, but not binding) over the production of resolutive acts; (b) Programming and validation: the reliability (technical and legal) of the system that generates the automated act or action must be validated, using quality data and suitable testing methodologies (including sandboxes), before its implementation; (c) Execution: the use must be constantly supervised, both by internal and external bodies, including the interested parties.

The proposed governance model starts from the premise that supervision is not only a competence attributed to a body, but it is an infrastructural concept that permeates all the interventions of the subjects that participate in the action: the interested parties contribute to supervision when exercising their right to allege or appeal, the investigation and resolution bodies verify the good functioning of the system when they use its result in the exercise of their competence, and each body that exercises legal control must be in a position to detect and correct a failure and the last two must report recurrent failures to the system's supervisory body. The supervision of the system must be integral and iterative and this is one of the reasons that accompany the obligation to use only traceable and explainable systems in the Administrations. There are no administrative actions immune to control and the exercise of this function demands knowledge: the one that is revealed in the motivation or in the observance of the duty of transparency.

Another issue lies in defining the degree, the intensity and especially, the ownership of the right to know: each legal system will provide the keys for the configuration of the principle of significant transparency, as well as for the exercise of the inalienable control competences attributed to some bodies. The decision-making and execution process outlined above is also applicable if the technique used by the system can be qualified as artificial intelligence: in this case, the analysis of the risks and the corresponding management measures must be carried out under the European regulations, soon to be approved, which provide more elements of judgment for the deciding bodies, responsible for promoting innovation, without sacrificing, or endangering, the rights of the associates.

NEWS FROM THE REGION



Conferences in the past semester

RCC seminars

Introductory Seminar for New Staff

A seminar was organised on 5-8 February 2024 in Bilbao for new officials from the beneficiary authorities on relevant topics in competition law and economics, including abuse of dominance, anti-competitive agreements, merger control, advocacy, economic and procedural issues. It was organised in close cooperation with the University of Deusto, the Spanish National Markets and Competition Commission (CNMC) and the Basque Competition Authority. Its primary aim was to create a community of enforcers that can contribute to a more uniform and robust application of competition law, enabling consumers to benefit from competitive markets in the region.

As well-designed competition law, effective law enforcement and competition-based economic reforms promote consumer welfare and economic growth, while

making markets more flexible, the seminar also aimed to provide participants with a deeper understanding of the different areas of competition law. It was led by 7 experts and attended by 41 participants from 17 jurisdictions, who actively participated in the Q&A sessions and further enriched the discussions.

The evaluation of the seminar is especially noteworthy, as attendees rated the overall usefulness of the topics and the quality of the break-out sessions 4.8 out of a maximum of 5. The comments from both experts and participants indicate that the seminar was a rewarding experience, a great opportunity to exchange views, and a very useful tool to enhance the efficiency of agencies.

We drew on the following team of experts from Belgium, Italy, Luxembourg and Spain to better understand the opportunities and challenges in our daily practice:



Caní Fernandez
President
Spanish National Markets and Competition Commission



Renato Ferrandi
Director of International and EU Affairs
Italian Competition Authority



Micaela Domecq
Special Adviser
Spanish National Markets and Competition Commission



Griet Jans
Chief Economist
Belgian Competition Authority



María Pilar Canedo
Academic Director of OECD-GVH RCC OECD



Luis Palma Martos
Member of the Andalusian Competition Council



Mattia Melloni
Member of the Luxembourg Competition Authority



Heads of Agencies Meeting

The Heads of Agencies of the RCC beneficiaries meet every two years to exchange experiences, and to discuss topics of common interest and challenges. This year the meeting took place on 26 March and focused on merger control and judicial review to facilitate the effectiveness of our agencies. Furthermore, we discussed our daily practice and looked at ways to further improve cooperation in the region as high-level expertise and cross-border cooperation have become rather necessary in an increasingly interconnected and globalised world.

The keynote speech was given by Frédéric Jenny whose thoughts on the main goals of European competition law and the adequacy of competition law enforcement were of immediate relevance and of great value to all the participants of the meeting.

The judicial review of competition decisions is a concern in many jurisdictions around the world as competition cases deal with complex issues that require sophisticated analysis. Indeed, building a solid case that can withstand judicial scrutiny requires the use of indirect

evidence as companies often use intricate systems to hide their unlawful behaviour. In this regard, Maria Ioanna Rantou gave an in-depth overview of the judicial scrutiny of competition decisions from the perspective of the Court of Justice of the European Union, and Francisco Marcos stressed the intense judicial control to which the decisions of national competition authorities are subject in practice.

There have only been a few cases in the recent decade that have raised the question of the future evolution of the market when evaluating mergers, one of which is the Illumina/Grail case of the European Commission. Pál Csiszár elaborated on this highly relevant topic and shared some of the recurring challenges in enforcing mergers and how to address them. Patricia Brink discussed the merger and acquisition regulations applicable in the United States and emphasised that it is important to make a case-by-case analysis to better understand the characteristics of the affected markets, the strategies of the companies and the possible responses of the competitors.



Patty Brink
Senior Counsel
U.S. DOJ



Frédéric Jenny
Chairman of the OECD
Competition Committee



Paul Csiszár
Director
DG Competition European
Commission



Maria Ioanna Rantou
Referendaire
European Court of Justice



Francisco Marcos
Professor of Business IE
School Madrid



Outside Seminar in Moldova

The seminar focused on competition and regulated markets with a special focus on construction, transport, telecommunications and energy markets. It was held on 15-17 April 2024 in Chisinau in cooperation with the Competition Council of the Republic of Moldova and the OECD Global Relations and Cooperation Directorate. The workshop was led by 7 experts with vast experience in regulated markets and attended by 42 representatives from 12 jurisdictions. We are especially pleased to have been able to hold our workshop in Moldova as discussions on the initiative had been ongoing for many years, ever since the outbreak of the COVID-19 pandemic.

The relationship between competition and regulation has always created tensions and opportunities; indeed, the existence of network effects, market failures or imperious reasons of general interest makes regulation crucial in certain cases. Energy, telecommunications, postal services, transport and pharmaceuticals are clear examples of this. However, the influence of lobbies and regulated industries

in the aforementioned sectors may affect regulation in a way that is not coherent with competition law principles and general interest protection. The seminar dealt with the principles that govern the relationship between competition and regulation and the various possibilities to address the challenges that competition agencies usually face.

Vitaly Pruzhansky gave a detailed overview of the practical aspects of competition enforcement and advocacy in the electricity and fuel sectors, while Mihaela Eva Prokopová further discussed the enforcement experiences of the Czech Republic in the transport sector. Kim Talus presented to the participants the idea of creating an entirely new market – the hydrogen market – and Julia Anderson spoke about competition issues in the telecoms sector, giving concrete examples from the participating beneficiary competition authorities.

The overall satisfaction of the participants was rated 4.4 out of a maximum of 5.



Julia Anderson
Research Analyst
EBRD



María Pilar Canedo
Academic Director of OECD-
GVH RCC OECD



Mihaela Eva Prokopová
Officer at the International
Unit of the Czech Office for
the Protection of Competition



Kim Talus
Professor
University of Eastern Finland
Law School



Vitaly Pruzhansky
Partner
RBB Economics



Core Seminar on Tackling Bid Rigging in Public Procurement

Our latest workshop entitled “*Tackling Bid Rigging in Public Procurement*” took place on 14-16 May 2024 at the headquarters of the Hungarian Competition Authority (GVH) in Budapest.

Bid rigging is one of the most serious violations of competition law affecting a rather significant percentage of the countries’ GDP and services to citizens. These practices mostly remain hidden and are difficult for competition authorities to detect, and even if they are detected, they are not easy to prove. In this respect, the workshop focused on the various practices that fall within the scope of bid rigging, the tools for detection and the different means for creating strong and solid cases to withstand judicial control. Five speakers from OECD member countries

presented case exercises and illustrated enforcement and advocacy measures implemented in their jurisdictions in light of the OECD Guidelines for Fighting Bid Rigging in Public Procurement. The workshop was attended by 34 participants from 17 different jurisdictions who expressed their appreciation of the topic and actively participated in the Q&A sessions and hypothetical case studies.

The success of the seminar is further indicated by the evaluation results as participants rated the overall usefulness of the event and the quality of its organisation 4.9 out of a maximum of 5. It is also clear from the feedback received from the participants that they highly value networking opportunities in addition to professional development.



Botond Horváth
Head of the Cartel Section
Hungarian Competition
Authority



María Pilar Canedo
Academic Director of OECD-
GVH RCC, OECD



Christoph Brunner
Officer at the International
Unit of the Czech Office for
the Protection of Competition



**Mehmet Ömür
Pasaoglu**
Head of Supervision and
Enforcement Department-VI
Turkish Competition
Authority



Raphaela Grünmann
Senior Case Handler
Austrian Competition
Authority



OECD conferences

Competition Committee. June 2024

In June 2024, the OECD hosted the Competition Week, a gathering of the competition agencies of the Member States and organized several roundtables on the following topics.

Artificial intelligence, data and competition

It discussed recent developments in Artificial Intelligence (AI), particularly generative AI, which could positively impact many markets. While it is important that markets remain competitive to ensure their benefits are widely felt, the lifecycle for generative AI is still developing. The discussion focused on three stages: training foundation models, fine-tuning and deployment. It is too early to say how competition will develop in generative AI, but there appear to be some risks to competition that warrant attention, such as linkages across the generative AI value chain, including from existing markets, and potential barriers to accessing key inputs such as quality data and computing power. Several competition authorities and policymakers are taking actions to monitor market developments and may need to use the various advocacy and enforcement tools at their disposal. Furthermore, co-operation could play an important role in allowing authorities to efficiently maintain their knowledge and expertise.

The intersection between competition and data privacy

Data plays an increasingly important role for online platforms and the majority of digital business models. Along with data becoming central to competition and the conduct of actors in digital markets, there has been an increase in data privacy regulations and enforcement worldwide. The interplay between competition and data privacy has prompted questions about whether data privacy and the collection of consumer data constitute an antitrust issue. Should competition considerations be factored into decisions by data protection authorities, and, if so, how can synergies between the two policy areas be enhanced and tensions overcome? The round-

table explored the links between competition and data privacy, their respective objectives, and how considerations pertaining to one policy area have been, or could be, incorporated into the other. It investigated enforcement interventions and regulatory measures that could foster synergies or lead to potential challenges and offers insights into models for co-operation between competition and data protection authorities.

Pro-competitive industrial policy

Recent global developments, and a number of serious crises, have led to large government interventions in many jurisdictions, driving a debate on whether there is a need to rethink the role of industrial policy in modern economies. The discussion explored how to use industrial policy and make it pro-competitive. Competition authorities can play a crucial role in strengthening the impact of industrial policy: by ensuring that competition principles remain a cornerstone of carefully designed industrial policy. Moreover, competition enforcement keeps markets more competitive, laying a solid foundation for industrial policy.

Monopolisation, moat building and entrenchment strategies

Competition authorities have already acquired significant knowledge about the concept of market power and dominance as well as practical experience when assessing anticompetitive practices. However, the introduction of potential new concepts, such as economic moats and entrenchment, may complicate this analysis and further blur the lines between lawful and unlawful practices. The roundtable discussed the relationship between economic moats and entrenchment with market power and calls for further reflections among competition authorities and practitioners on the challenges these concepts may pose. It explored several possible options, including incentivizing the use of investigative and analytical techniques, as well as strengthening regulatory tools.

Competition and regulation in professions and occupations

The regulation of occupations is widespread, extending beyond the liberal professions, such as lawyers and engineers, to a broader set of other economic activities. Competition authorities have long been active in improving competition in these markets, both through enforcement action and by advocating to make regulation more pro-competitive. The goal was to support competition authorities' advocacy efforts. It included an overview of

the literature about the effects of regulation of professional services, which competition authorities can draw on to advocate for the benefits of less restrictive regulation where appropriate. The discussion also brought together analytical frameworks developed by the OECD and jurisdictions such as Australia, the US and the EU to assess regulatory barriers to competition. Case studies of advocacy efforts from competition authorities across a range of OECD member countries were also developed.



INSIDE A COMPETITION AUTHORITY: GEORGIA



Agency Questionnaire

1. Relevant competition legislation

The Georgian Law “on Competition”, as aligned with EU respective legislation, covers anticompetitive agreements, abuse of dominant position, unfair competition, concentrations (mergers) and state aid.

2. Agency competences

- Antitrust (agreements and abuse of dominance)
- Mergers and acquisitions
- Advocacy to other public bodies
- Market studies
- State aid
- Consumer protection
- Dumping
- E-commerce related issues (part of consumers rights).

3. The institution

A. Structure of the Agency

a. Chairperson

Dr Irakli Lekvinadze was appointed by the Prime Minister of Georgia in December 2019 (the chairman is appointed by the Prime Minister of Georgia without time limitation).

b. Members of the Board

The Georgian Competition and Consumer Agency does not have a Board, and provisions regarding the Board will enter into force from 1 January 2025.

c. Key persons

Mr Levan Kalandadze, Deputy Chairman, started his mandate in January 2020. The Deputy Chairman is appointed by the Chairman without time limitation.

d. Staff

In total, the GCCA has 66 employees (including administrative staff, state procurement dispute resolution counsel’s administrative staff, technical staff, etc.).

Field of work	Number of case handlers/managers
Antitrust	12
Mergers and acquisitions	5 (mergers, market studies and state aid are dealt with by the same department and staff)
Market studies	5 (mergers, market studies and state aid are dealt with by the same department and staff)
Advocacy to other public bodies	From time to time each employee is involved in advocacy, there are no specific people for this task.
State aid	5 (mergers, market studies and state aid are dealt with by the same department and same people)
Consumer protection	9
Anti-dumping	3
Training Research Centre	5
Management	4 (Chairman, Deputy Chairman, Representative in Adjara, Audit)
Communications Department	6
Administrative Department	7
Contracted persons (IT, housekeeper, driver, etc.)	7
State procurement dispute resolution counsel’s administrative staff	8
TOTAL	66

B. Level of independence

a. System of appointment and detachment for the Chairperson and other key roles

The Chairman is appointed by the Prime Minister of Georgia, the Deputy Chairman is appointed by the Chairman.

b. Budgetary and structural issues

The Agency is a Legal Entity of Public Law; it is an independent entity and is not under any Ministry. The GCCA is funded by the State Budget. Decisions in the Agency are taken by the Chairman.

c. Relations with other institutions

The Agency's relationship with regulators is provided for under the Law "on Competition", which defines the obligation of cooperation while handling specific types of cases. The GCCA also has MoUs with many state authorities, otherwise, as the Agency is also one of the public authorities, communication is smooth. The Agency submits its annual Report to the Parliament as part of the accountability requirements. The GCCA cooperates with the Parliament closely where the adoption or amendment of the relevant laws are discussed.

d. Accountability

The Agency is accountable to the Parliament and the Prime Minister of Georgia. The GCCA reports to the Parliament and the Prime Minister before 1 May of each year.

C. Decision making

a. Internal procedure on competition cases

Each department takes their decisions by themselves, which are later presented to the Chairman and the Deputy Chairman. Decisions are taken mostly through consultations.

During investigations, the whole process is led by the investigation team (if necessary, consultations may be held with other employees). At the end of the investigation, the team presents the final draft decision to the Chairman, who has two options: either to approve it or return it to the investigation team for further clarifications.

b. Control of the decisions taken

Yes, decisions can be subject to a full judicial review. Georgia does not have specialized courts of any kind.

4. Enforcement over the last 24 months

A. Cartels

a. Main cases

1. *Case of Delta Development Group (05.12.2022)*

The GCAA completed the investigation based on a complaint by "Delta Development Group" on the alleged violation of Articles 6 and 7 of the Law of Georgia on Competition by the companies operating in the field of translation and interpretation services. The investigation confirmed the violation of Article 7 of the Law of Georgia on Competition by the two respondent undertakings and one of the translator-interpreters. According to the Agency's decision, the mentioned undertakings were subjected to an appropriate financial sanction and instructed to immediately eliminate the violation of the law.

2. *Case of Delta Development Group (III) (05.12.2022)*

The GCCA completed the investigation based on a complaint by "Delta Development Group" on the alleged violation of Articles 6 and 7 of the Law of Georgia on Competition. The investigation confirmed the violation of Article 7 of the Law of Georgia on Competition by the unified economic entity "Tbilisi Business House" (ID: 204564293) and an individual entrepreneur, Suma Mia, a citizen of Bangladesh. The defendant undertakings were subjected to an appropriate financial sanction and were ordered to eliminate the violation of the law. The obligation established by the Agency to eliminate the violation of the law was not fulfilled by the parties. Accordingly, due to failure to eliminate the violation established by the decision of the Agency, the Agency imposed a fine on the unified economic entity "Tbilisi Business House" and the individual entrepreneur Suma Mia.

3. *Case III of Oil Company (17.08.2023)*

The GCCA completed an investigation in the motor fuels market. The case concerns the maintenance of high prices in the retail market of motor fuels in the period of March-August 2022. The investigation implemented by the National Competition Agency has confirmed the violation of Article 7 of the Law of Georgia on Competition by LLC "LUKOIL-Georgia", JSC "WISSOL Petroleum Georgia", LLC "San Petroleum Georgia", LLC "SOCAR Georgia Petroleum" and LLC "Rompetrol Georgia". According to the Agency's decision, the undertakings have been subjected to the relevant fine of up to GEL 4 million in total. Moreover, in order to improve the competitive environment in

the market, the Agency issued necessary recommendations.

4. Case of Pharmaceutical Market (29.12.2023)

The GCCA established the violation of Article 7 (concerted practices) of the Law of Georgia on Competition by four companies. These companies, namely Aversi, Gepha, PSP, and Mermis, agreed on prices and price fixing within the state funding programme for oncology medicines from 2021 to 2023 (including August). The National Competition Agency has imposed a fine of up to GEL 53 million on these companies.

5. Case of Online sale of cinema tickets (29.12.2023)

The GCCA established the violation of Article 7 (restrictive agreements) of the Law of Georgia on Competition in the online cinema ticket sales market. According to the decision of the National Competition Agency, the complainant (E-Tickets LLC) and the defendants (Tineti LLC and the unified economic entity "Distribution Company") were fined more than GEL 1.6 million for anti-competition agreement. However, JSC TBC Bank and TBC Bank Group PLC were not found in violation of Article 7, and violation was not established against "Distribution Company" LLC. The National Competition Agency issued three recommendations to relevant entities to improve the market for online sales of tickets for cultural, entertainment, creative, sports, leisure and tourism, educational, transport and other types of events/products/services.

b. Fines

GEL 57 969 251 mln

c. Number of cases

Infringement decisions	6
With fines	6
Inadmissibility	1
Withdrawal of complaint	1
TOTAL	8

B. Non-cartel agreements

The Georgian Law on Competition does not consider non-cartel Agreements, all the Agreements which fall under Art. 7 of the Law are cartels.

C. Abuse of dominance

a. Main cases

1. Case of Georgian Insurance Group (28.06.2022)

The National Competition Agency of Georgia completed the investigation based on a complaint by the

"Georgian Insurance Group", on the alleged violation of Article 6 of the Law of Georgia on Competition by "Geo Hospitals", and the "Risk Management and Insurance Company Global Benefits Georgia". As a result of the investigation, the fact of violation of the law has not been confirmed. However, "Geo Hospitals" has been instructed to consider the issue of providing family doctor services on Saturdays, in case of an address from the "Georgian Insurance Group", and after reaching an agreement on commercial conditions, to ensure the conclusion of a corresponding contract under equal and non-discriminatory conditions.

2. Case of Delta Development Group (05.12.2022)

The Georgian National Competition Agency completed the investigation based on a complaint by "Delta Development Group", on the alleged violation of Articles 6 and 7 of the Law of Georgia on Competition by the companies operating in the field of translation and interpretation services. The investigation confirmed the violation of Article 7 of the Law of Georgia on Competition by the two respondent undertakings and one of the translator-interpreters. The undertakings were subjected to an appropriate financial sanction and instructed to immediately eliminate the violation of the law. Also, a recommendation was issued to the undertakings for consideration.

3. Case of MGL Georgia

The Georgian National Competition Agency completed the investigation based on a complaint by "MGL GEORGIA". The case concerned the alleged violation of Articles 6 and 113 of the Law of Georgia on Competition by "GNS Georgia". According to the received and processed information, the fact of violation of the law on the part of the respondent undertaking has not been confirmed.

4. Case of Online tickets Market (29.12.2023)

The Georgian National Competition Agency established a violation of Article 7 (restrictive agreements) of the Law of Georgia on Competition in the online cinema ticket sales market. According to the decision of the National Competition Agency, the complainant (E-Tickets LLC) and the defendants (Tineti LLC and the unified economic entity "Distribution Company") were fined more than GEL 1.6 million for anti-competition agreement. However, JSC TBC Bank and TBC Bank Group PLC were not found in violation of Article 7, and violation was not established against "Distribution Company" LLC. The National Competition

Agency issued three recommendations to relevant entities to improve the market for online sales of tickets for cultural, entertainment, creative, sports, leisure and tourism, educational, transport and other types of events/products/services.

b. Number of cases

Non-infringement decisions	4
Inadmissibility	2
Withdrawal of complaint	1
TOTAL	7

D. Unfair competition

a. Main cases

1. Case of the "Sea" (20.09.2022)

The Georgian National Competition Agency completed the investigation of the case based on a complaint by "S.E.A", which was related to the possible violation of Article 113 of the Law of Georgia on Competition by the company "BST" operating in the field of tourism services. In particular, the illegal use of identical trademarks and vehicle appearance of the applicant was identified. According to the Agency's decision, the mentioned company was subjected to a financial sanction and ordered to eliminate the violation of the law.

2. "Sea" II (19.06.2023)

On September 20, 2022, the Georgian National Competition Agency completed the investigation of the case based on a complaint by "S.E.A" and established the fact of violation of Article 113 of the Law of Georgia on Competition by the company "BST". The mentioned company was subjected to a financial sanction and ordered to eliminate the violation of the law. The obligation established by the Agency was partially fulfilled by the company "BST". Accordingly, due to the partial elimination of the violation, a fine was imposed on the company.

3. The case of "MGL GEORGIA" (25.08.2023)

The Georgian National Competition Agency completed the investigation based on a complaint by "MGL GEORGIA". The case concerned the alleged violation of Articles 6 and 113 of the Law of Georgia on Competition by "GNS Georgia". According to the received and processed information, the fact of violation of the law on the part of the respondent undertaking has not been confirmed.

4. Case of "Tsereteli Mexican" (28.11.2023)

In November 2023, the National Competition Agency completed an investigation based on a complaint filed on March 7, 2023 by "Tsereteli Mexican" LLC. The investigation confirmed that "Mexican Hot Dog on Tsereteli" LLC and "Mexican on Tsereteli N1" LLC violated Article 113 of the Law of Georgia on Competition. According to the Agency's decision, the mentioned company was subjected to a financial sanction and ordered to eliminate the violation of the law.

b. Number of cases

Infringement decisions	3
With fines	2
Without fines	1
Non-infringement decisions	1
Inadmissibility	7
TOTAL	11

E. Merger Review

a. Number of cases

Unconditionally cleared mergers	9
Cleared with fines	6
TOTAL CHALLENGED MERGERS	15

b. Main cases

1. Case of "Geo Hospitals" and "Amtel Hospital First Clinic" (15.04.2022)

The National Competition Agency has approved the purchase of 100% of the shares of "Amtel Hospital First Clinical" by "GEO Hospitals". The Agency has determined that the relevant market(s) is low-concentrated and that the concentration would not result in a substantial change in the HHI index. The planned concentration, in accordance with Article 11 of the Law of Georgia on Competition, does not substantially restrict effective competition and is compatible with the competitive environment.

2. Case of "Anagi" and "GTC Trading" (20.05.2022)

The National Competition Agency has approved the purchase of a 50% share of "GTC Trading" by "Anagi" LLC. The Agency determined that the concentration between "Anag" and "GTC Trading", in accordance with Article 11 of the Law of Georgia on Competition,

does not substantially restrict effective competition and is compatible with the competitive environment.

3. Case of "European University" and "Jo Ann Medical Center" (18.08.2022)

The National Competition Agency has approved the merger to be implemented by the "European University" and "Jo Ann Medical Center". "Europe University" operates in the educational market, and "Jo Ann Medical Center" in the market of providing medical services. As part of the assessment of the impact of the implemented concentration on the competitive environment, the Agency studied the level of concentration in the market of the single-level educational programme of a licensed medical - HHI 1290 and in the market of providing medical stationary and ambulatory services - HH 398. The Agency determined that the concentration does not substantially restrict effective competition in the goods or services market of Georgia or its part and is compatible with the competitive environment.

4. Case I of "San Petroleum Georgia" (24.08.2022)

The Georgian National Competition Agency has approved the merger to be implemented by the company "San Petroleum Georgia" by gaining control over 32 gas stations owned by 23 undertakings. The concentration concerns the retail market of auto fuels (gasoline, diesel). The volume of the retail market in 2021 was 1,322,225 thousand litres; the number of companies operating in the retail market 506; the number of gas stations operating in the retail market 1,232; the market Concentration Index (HHI) 868; HHI after the implementation of the concentration 924. The retail level of the corresponding market is low-concentrated, and as a result of the concentration the index increases by 56 units, which is not a significant change. The expected change in the concentration index is also insignificant in the level of market imports.

5. Case II of "San Petroleum Georgia" (20.10.2022)

The Georgian National Competition Agency has approved the planned merger to be implemented by the company "San Petroleum Georgia" by gaining control over the gas station owned by "Iberia Service". The Agency evaluated the competitive environment at the national level, the volume of the retail market in 2021 was 1,322,225 thousand litres; the number of companies operating in the retail market 506; the number of gas stations operating in the retail market 1,232; the market Concentration Index (HHI) 906; HHI after the

implementation of the concentration 913. The volume of the retail market in Batumi in 2021 was 130,320 thousand litres; the number of companies operating in the retail market 37; the number of gas stations operating in the retail market 77; Market Concentration Index (HHI) 1117; HHI after the implementation of the concentration 1,140.

6. Case of Individual Zaza Gogotishvili and "CMC" (21.11.2022)

The Georgian National Competition Agency has approved the planned merger by establishing a joint venture between Zaza Gogotishvili and CMC. The merger concerns the import/export of building materials, construction and architectural services markets. According to the Agency's assessment, the relevant market/markets are low-concentrated. Taking into account the market share of the parties participating in the concentration, as well as their interdependent undertakings, the planned concentration does not have a significant impact on the market and is compatible with the competitive environment.

7. Case of "Silk Road Engineering" and "Pharmarea" (18.05.2023)

The National Competition Agency has approved the purchase of 100% of the shares of "Pharmarea" by "Silk Road Engineering". The agency evaluated the agricultural machinery and spare parts production market. In 2021, the volume of the wholesale market of agricultural machinery, equipment and property amounted to GEL 169.3 million, the number of participating entities was 134, and the market concentration index (HHI) 463.14, which is an indicator of a low-concentration market. The volume of the import of agricultural machinery, equipment and property in 2021 amounted to GEL 186.4 million, the number of participating entities was 1175, and the market concentration index (HHI) 463.14, which is also an indicator of a low-concentration market.

8. Case of "Roniko" and "Arttime" (18.05.2023)

The National Competition Agency has approved the purchase of 100% of the shares of "Arttime" by "Roniko". The Agency determined that the concentration implemented between "Roniko" and "Arttime" does not change the commodity structure of the relevant market, and therefore, the concentration is compatible with the competitive environment.

9. Case of Individual Temur Bolkvadze and “Legometal” (18.05.2023)

The National Competition Agency has approved the purchase of 100% of the shares of “Legometal” by Temur Bolkvadze. In order to examine the compatibility of the implemented concentration with the competitive environment, the Agency assessed the competitive environment in the non-ferrous scrap export market. The volume of non-ferrous metal scrap exports in 2021 amounted to GEL 271.7 million, the number of participating entities was 46, and the market concentration index (HHI) 1,474.77, which is an average concentrated market indicator. The Agency has determined that the implemented concentration in accordance with Article 11 of the Law of Georgia on Competition does not substantially limit effective competition and is compatible with the competitive environment.

10. Case of “White Square Isan” and “Anagi Development 2” (22.08.2023)

The Georgian National Competition Agency has approved the merger of “Anagi Development 2” and “White Square Isan” in the construction market. The case concerned the purchase of a 50% share of “Anagi Development 2” from “Anagi” by “White Square Isani”. The Agency evaluated the market of the construction of residential and non-residential buildings. According to the received and processed material, the volume of the mentioned market in 2022 amounted to GEL 8,084,435,501, and the market concentration index (Herfindahl-Hirschman Index, HHI) was 61.41, indicating a low-concentration market. As a result of the implementation of the concentration, the HHI would increase to 64.14, and the index change according to Δ HHI would be 2.73. According to the Agency’s decision, as a result of the planned concentration, there will be no significant change in the concentration index in the relevant market, and it is compatible with the competitive environment.

11. Case of “Diplomat Georgia” and “Kant” (22.08.2023)

The Georgian National Competition Agency has approved the merger of “Diplomat Georgia” and “Kant” in the FMCG market. The case concerned the purchase of a 75% share of “Kant” by “Diplomat Georgia”. The Agency assessed the competitive environment in the import and wholesale trade of food and beverage products, as well as in the market of distribution services. The Agency determined that the implemented concentration in accordance with the Law of Georgia

on Competition does not substantially restrict effective competition and is compatible with the competitive environment.

12. Case of “GMSC Medical Services Company of Georgia” and “MedCapital” (01.09.2023)

The Georgian National Competition Agency has approved the planned merger in the medical inpatient and outpatient services sector. The case concerns the purchase of a 50% share of “PSP Pharma” in “MedCapital” by “GMSC Medical Services Company of Georgia”. According to the received and processed information, and Article 11 of the Law of Georgia on Competition, the Agency determined that the planned merger between the “GMSC Medical Services Company of Georgia” and “Medcapital” does not substantially limit effective competition and is compatible with the competitive environment.

13. Case of “Repsol” and “Iberkompani” (05.12.2023)

The Agency recognized as admissible the notification on the concentration to be implemented by “Repsol” LLC through gaining control over 4 gas stations owned by “IberCompany” LLC. The concentration concerns the retail market of auto fuels (gasoline, diesel). The volume of the retail market at the national level in 2022 amounted to 1,311,160 thousand litres, the number of companies operating in the retail market was 487, the number of gas stations operating in the retail market was 1,250, and the market concentration index, (Herfindahl-Hirschman index, HHI) was 949.7, indicating a low-concentration market. As a result of the concentration, the Herfindahl-Hirschman index would increase to 950.30, and the index change HHI would be 0.56. Therefore, as a result of the planned concentration, there will be no significant change in the concentration index in the relevant market

14. Case of “Mnkorpi” and “Lexwell” (05.12.2023)

The Agency has approved the merger between “Mnkorpi” LLC and “Lexwell” LLC. “Mnkorpi” produces ferroalloys, while “Lexwell” operates in the construction and development sector. After analysing the market, the Agency determined that the volume of turnover in the residential and non-residential building construction market in 2022 was GEL 8,084,435,501, and the market concentration index (Herfindahl-Hirschman index) was 63.96, indicating a low-concentration market. Since “Mnkorpi” did not operate in the relevant market of construction of residential and non-residential buildings before the

concentration, there will be no change in the concentration index (HHI) after the implementation of the merger.

15. Case of “Ioseb Tatarashvili” and “Charm Trading” LLC (29.12.2023)

The National Competition Agency has approved the merger between “Ioseb Tatarashvili” and “Charm Trading” LLC, recognizing it as an admissible concentration. The Agency evaluated the competitiveness of the relevant market by assessing both the level of imports and the wholesale and retail supply. According to the Agency’s decision and based on the assessment, it was determined that the relevant market is low-concentrated and that the concentration would not significantly change the concentration index.

5. Judicial reviews over the last 24 months

A. Outcome of judicial reviews by the Supreme Courts

Entirely favourable judgements (decision entirely upheld)	1
TOTAL	1

B. Outcome of judicial reviews by the first instance Courts

Entirely favourable judgements (decision entirely upheld)	4
TOTAL	4

C. Main judgements

1. Poti Port Case

The Poti Port case was one of the first abuse of dominance cases for the Agency itself. 14 terminal companies operating in Poti submitted a complaint to the Agency regarding abuse of dominant position by the JSC “Poti Sea Port”, expressed in the introduction of a mandatory new combined tariff. As a result of the investigation, the new scheme introduced by the port was found to be an abuse of dominant position, however, the new scheme has not been activated, violation by the port has not been established, and no sanctions have been imposed. The court of first instance entirely agreed with the GCCA findings.

2. Outdoor Advertising Case

The Competition Agency of Georgia completed the investigation based on a complaint by “Geverse Development”. The case concerned the fact of compliance with the competition legislation of the action taken by the company “Outdoor.ge” in Tbilisi, on the right

bank of the River Mtkvari, in the outdoor advertising permit service market. As a result of the investigation, the violation of Article 6 of the law on competition of Georgia was established, implying an abuse of dominant position. The company was subjected to a financial sanction under the law, and in order to improve the competitive environment in the relevant market, appropriate recommendations have been issued. The case was very complex, as outdoor.ge was active in both the upstream and downstream markets. For the GCCA, it was important for the development of competition policy how the court would look at the market definition. The court of first instance fully agreed with the GCCA findings.

3. Batumi Municipality Case

“Libo” LTD submitted a complaint to the Competition Agency of Georgia against the Batumi Municipality City Hall. The complainant indicated that the respondent restricted competition in the process of prolonging the validity of permission for outdoor advertisement activities in Batumi. The Agency established a breach of competition law by the Batumi Municipality City Hall and instructed the respondent to take appropriate measures for competition restoration. Beside the fact that this case defined the distortion of competition by state authorities, it was one of the first cases upheld in all three instances of the Georgian court system. In this case, the GCCA made important evaluations/explanations often quoted in other decisions.

6. Advocacy over the last 24 months

A. Initiatives related to public bodies

The GCCA holds its international Conference annually, which is an important platform to share experiences with different international and national stakeholders. The International Conference on “Competition and Consumer Rights” is a collaborative effort involving five regulatory agencies: the Georgian Competition and Consumer Agency, the National Bank, GNERC, the State Insurance Supervision Service, and the Communications Commission. Delegations from 20 countries, as well as heads of agencies from 10 different countries in the competition and consumer sectors, participated in the latest conference. The event also drew government and parliamentary representatives, local and international experts, and individuals from public agencies, regulatory bodies, academia, and the business sector.

Also, awareness raising events have been conducted in different regions of Georgia regarding competition and anti-dumping.

B. Market studies

During 2022-23 several market studies were conducted, specifically the auto fuels market monitoring (which is permanently ongoing because of high interest), the glass waste collection/recycling market monitoring, the bank insurance market monitoring, and the liquid and natural gas market monitoring.

C. Initiatives related to the General Public

The GCCA recently conducted two international conferences, which are held annually. The three-day event is jointly organized by the Georgian National Competition Agency, the National Bank of Georgia, the National Energy and Water Supply Regulatory Commission of Georgia, the Communications Commission and the State Insurance Supervision Service of Georgia.

The involvement of representatives from public and regulatory bodies, the academic and business sectors, international organizations, experts of the field and counterpart authorities in the conference will further increase the synergy among the participants. The protection of the principles of fair competition and consumer rights is the most important factor for the development of a sustainable and inclusive economy.

Students are frequently approached by the GCCA at both consumer protection and competition events. The

events are primarily aimed at raising awareness among students regarding GCCA's different tasks and activities. With regard to the universities, the GCCA has MoUs with most Georgian universities, creating a platform for cooperation on different levels.

The GCCA is very active in regard to mass media communication involving different television and radio channels and online media platforms. The GCCA aims to introduce the activities conducted by the Agency to the broader society.

Besides, the GCCA is also active on different social media platforms, including LinkedIn and Facebook, which brings more flexibility to share information on a daily basis.

D. Other capacities

With the assistance of the Twinning Project, the GCCA organizes different awareness raising events for business representatives and other stakeholders.

Also, as competition enforcement is very important, the GCCA also aims to participate in the awareness raising process for judges. In this regard, the GCCA organizes at least twice seminars every year.

As stakeholders are more and more interested in GCCA's activities, the GCCA also provides consultation to interested parties on request, which mainly involves giving more information on what kind of activities are considered a breach of law according to national legislation.

Biography – Mr. Irakli Lekvinadze



Mr. Irakli Lekvinadze has served as Chairperson of the Georgian Competition and Consumer Agency since 2020. He is a Doctor of Business Administration, and Associate Professor at Caucasus International University. His professional career began in 2000 in the „Association of Young Financiers and Businessmen”, where he held the position of Vice-President until 2006. Over the years, he engaged in business consulting and educational activities. He was a lecturer of economic and business courses at the International Republican Institute (IRI) and the Netherlands Institute for Multiparty Democracy (NIMD) and a member of the Advisory Board of the Ministry of Finance. From 2015 to 2018, he was the Deputy Mayor of Tbilisi City, overseeing transport and local economic development. Between 2018 and 2020, he served as a Business Ombudsman of Georgia. Additionally, from 2009 to 2016, he lectured on business and economics at various universities.

Interview with the Chairperson

How would you describe the mission of your Agency and its impact on your society and economy?

The mission of the Georgian Competition and Consumers Agency (GCCA) is to promote fair competition and protect consumer rights within the Georgian marketplace. This encompasses several key objectives, such as ensuring fair competition, protecting consumer rights, enforcing regulations and promoting market transparency.

The Agency works to prevent monopolistic practices, cartels and other anti-competitive behaviours among businesses. By fostering a competitive environment, it aims to enhance efficiency, innovation and economic growth. Moreover, the Agency protects consumers from unfair or deceptive practices, among them misleading advertising, dark patterns and product misrepresentation. This helps to build trust between businesses and consumers and ensures that individuals can make informed decisions when purchasing goods and services.

In the process of enforcing competition and consumer protection laws, the GCCA investigates cases based on received complaints and in case of violation, applies sanctions to those who breach regulations. Additionally, the Agency issues strategic recommendations aimed at strengthening competitive dynamics, promoting informed consumer choices, and fostering a transparent economic ecosystem.

Furthermore, It is notable that, in July 2020, Georgia made a significant step forward in the area of trade defence policy by adopting its first legislation on anti-dumping, in full compliance with the EU-Georgia Association Agree-

ment. The Law designates the GCCA as the investigative authority and defines its responsibilities. The Agency is in charge of enforcing the anti-dumping policy, which includes monitoring the domestic market, investigating anti-dumping cases, assessing consequences and submitting its conclusions to the Government of Georgia, which is responsible for taking a final decision on the imposition of anti-dumping measures. Implementing anti-dumping measures is vital for maintaining fair trade and ensuring competitive balance. This approach highlights the significance of fair trade by fostering a competitive environment where all businesses have equal opportunities to succeed.

Overall, the GCCA significantly contributes to Georgia's alignment with the European Union (EU) standards through its rigorous enforcement of competition and consumer protection laws, as well as anti-dumping measures. This is crucial for Georgia's journey towards EU integration and fulfilling the obligations of the association agreement with the EU. By fostering a fair and competitive marketplace that adheres to the regulatory framework and principles of the EU, the GCCA not only promotes economic growth and consumer welfare within Georgia but also underscores the Country's commitment to meeting the high standards necessary for EU membership.

What is the level of competition awareness in your country? Do policymakers consider competition issues? Is competition compliance a significant concern for businesses?

In recent years, awareness of competition issues has significantly increased in Georgia due to economic reforms,

globalisation, and the efforts of the Georgian Competition and Consumer Agency (GCCA) to educate various societal segments, including consumers and businesses.

Georgian policymakers have integrated competition issues into the broader economic policy dialogue, evidencing a proactive approach to strengthening competition laws, refining regulatory frameworks, and expanding the GCCA's enforcement capabilities. The Country's alignment with international standards, notably those established by the Organization for Economic Cooperation and Development (OECD), further emphasises the significance of competition policy for economic development.

Moreover, adherence to competition law has become a crucial concern for Georgian businesses. The GCCA's vigorous enforcement activities and the implications of non-compliance have led businesses to prioritise regulatory adherence increasingly. Consequently, the adoption of competition compliance programs has become widespread among companies aiming to reduce legal vulnerabilities, uphold ethical standards, and protect their market reputation.

Despite the progress, there is still potential for further enhancing competition awareness through ongoing education and outreach. The engagement of policymakers and the proactive stance of businesses towards compliance highlight Georgia's commitment to creating a competitive and sustainable economic environment.

Do you think that the situation has significantly changed as a result of your Agency's engagement in publishing reports and imposing sanctions?

Since the establishment of the Georgian Competition and Consumer Agency (GCCA) and its active engagement in publishing reports and imposing sanctions, there have been noticeable positive changes in the market landscape. These initiatives have enhanced transparency, accountability, and compliance with competition laws in Georgia's business community.

The abovementioned approach serves not only as a deterrent against unfair practices but also as an educational tool, enlightening businesses about the critical importance of regulatory compliance. This has resulted in a more equitable marketplace where fair competition is encouraged and consumer rights are protected.

Furthermore, the GCCA's actions have contributed to cultivating a more trustworthy business environment, promoting the improvement of consumer welfare across Georgia.

What are the main challenges that your authority is facing? What are your priorities for the near future?

The GCCA faces several challenges, such as resource constraints - limited human and financial resources may impact the GCCA's ability to enforce competition, consumer protection and anti-dumping laws comprehensively, carry out investigations and provide extensive outreach and educational programs. Moreover, rapid technological advancements and the shift towards digitalisation present new challenges, such as issues of online market dominance, data privacy concerns, and the application of competition regulations in digital marketplaces.

To address these challenges and fulfil its mandate effectively, the GCCA's priorities for the near future may include: **Capacity Building:** We aim to invest in targeted training programs and skill-enhancement initiatives for our staff. This will strengthen our proficiency in examining complex cases and deploying robust enforcement strategies; **Stakeholder Engagement:** By strengthening ties with businesses and other stakeholders, we aim to boost awareness, foster compliance, and address new challenges together; **Legislative Reform:** We support essential changes to our legal and regulatory framework, particularly in areas regulating digital markets. These updates are crucial to keep pace with evolving market trends and technological advancements, ensuring that our laws stay efficient and applicable. This involves advocating for interoperability, securing data portability, and addressing anti-competitive behaviour within digital platforms. Finally, **International Cooperation:** Enhancing our collaboration with international organisations, regional competition authorities, and other relevant stakeholders is essential. By exchanging best practices, sharing information, and coordinating cross-border cases, we can strengthen our enforcement efforts.

By focusing on these priorities and addressing the challenges effectively, the GCCA can continue to play a crucial role in promoting fair competition in Georgia.

What are the strengths and weaknesses of your authority?

First of all, the authority's main **strength** is the **well-defined legal framework** the Agency operates within, which outlines its powers and responsibilities in enforcing competition, consumer protection and anti-dumping laws, and secondly, **the transparency** that the Agency maintains in its operations by engaging stakeholders, publish-

ing reports, guidelines and other relevant information for the public, that fosters trust and accountability.

On the other hand, as I mentioned, the GCCA faces several challenges that need to be addressed. One of the primary challenges is the digitalisation of technological infrastructure. In today's increasingly digitalised economy, technological advancements have transformed the way businesses operate and interact with consumers. This digital transformation presents both opportunities and challenges for competition authorities like the GCCA, and adapting to these changes requires specialised expertise to tackle issues and ensure compliance within these complex online ecosystems. Moreover, the rapid pace of technological advancements necessitates the digitalisation of our operational processes. This transition is crucial for navigating the intricacies of the digital landscape effectively. Adopting digital tools and technologies will streamline administrative functions, bolster data management, and facilitate seamless communication and collaboration.

If you could make one major change in your national competition law tomorrow, what would you choose?

In the context of potential amendments to our national competition law, it is critical to prioritise the enhancement of state aid regulation. Aligning our legislation with European Union best practices is crucial, especially considering Georgia's status as a candidate country for EU membership.

We are currently engaged in an active and collaborative process aimed at revising our legislation regarding state aid, with promising developments expected in the near future within the Parliament of Georgia. I am confident that such legislative advancements will significantly bolster our competition law framework. This is not just about legal compliance; it is about a solid foundation for our country's economic aspirations, ensuring a fair and competitive market environment that benefits everyone.

Over the last two years, what decisions have been adopted by the authority that make you particularly proud, and what are the cases that could have been conducted better?

Regarding competition issues over the last two-year period, I would like to highlight several case investigations and strategic market monitoring results executed by the Agency.

Case of Oil Commodity - on August 17, 2023, the Agency investigated the motor fuels market. The investigation revealed cartel agreements and confirmed violations of the Law of Georgia on Competition by several companies. As a result, these undertakings were collectively fined up to GEL 4 million. Additionally, to enhance market competitiveness, the Agency issued recommendations aimed at improving the competitive environment.

Case of Pharmaceutical Market - The Agency has identified another cartel agreement and a breach of the Law of Georgia on Competition by four pharmaceutical companies. These companies engaged in price-fixing activities within the state-funded program for oncology medicines spanning from 2021 to 2023. Consequently, the GCCA has levied fines totalling up to GEL 53 million on these entities.

Case of Online Sale of Cinema Tickets - The Agency has determined a breach of the Law of Georgia on Competition within the online cinema ticket sales market. Following the Agency's decision, the complainants and the defendants were collectively fined over GEL 1.6 million for engaging in anti-competitive agreements. Additionally, the GCCA issued three strategic recommendations to relevant public entities aimed at enhancing the market for online ticket sales across various sectors, including culture, entertainment, sports, leisure and tourism.

Monitoring of the Bank Insurance Market - The Agency monitored the market for insurance products during the sale of credit products by commercial banks. According to our assessment, the market for credit products was highly concentrated between 2020 and 2022, with a stable character and share distribution among large undertakings. Consequently, we issued six mandatory recommendations to improve the competitive environment in the market.

Pharmaceutical Market Monitoring - The Agency monitored the pharmaceutical market for the period from 2016 to 2020. The monitoring process encompassed two main components: a general economic analysis and an examination of specific or selected medications. The primary focus of the Agency's investigation was on retail medicine prices, with an emphasis on assessing the influence of key factors on price fluctuations. As a result of the monitoring, the Agency issued 13 strategic recommendations aimed at addressing various aspects of the pharmaceutical market.

Do you feel supported by the administration, the citizens and the business community?

The GCCA benefits significantly from support provided by the government and citizens, which is foundational to our operations. The government administration plays a critical role in supplying us with essential resources and a strengthening legal framework. The support from citizens, on the other hand, is instrumental in increasing awareness about consumer rights and the value of fair competition. Informed citizens who actively report violations immensely contribute to our ability to detect and address marketplace discrepancies.

While we enjoy considerable support from the society and citizens, we acknowledge that the level of support from the business community is positive but tends to be more moderate. The businesses' understanding and compliance with competition and consumer protection laws is crucial for fostering a culture of fair competition and ethical business practices. Consequently, we are committed to working closely with the business sector to enhance their cooperation and adherence to regulations, recognising the importance of their role in achieving a balanced and transparent market environment.

Do you find that international and regional cooperation is helpful? Is it working well?

International and regional cooperation is highly beneficial for the Georgian Competition and Consumer Agency (GCCA) in fulfilling its mandate of promoting fair competition. It provides advantages for the Agency, such as **Knowledge Sharing** – Collaboration with international and regional counterparts allows the GCCA to access best practices, experiences and expertise from other jurisdictions that help us to enhance our capabilities in areas such as enforcement strategies and policy development; **Capacity Building** - International and regional partnerships often involve training programs, workshops, and technical assistance initiatives that can help the GCCA staff develop the specialised skills and knowledge necessary to address complex issues effectively; **Information Exchange** - Cooperation facilitates the exchange of information and data between the GCCA and its counterparts and can be invaluable for identifying emerging trends, cross-border violations and cooperative enforcement opportunities; **Harmonisation of Standards** - par-

ticipation in international and regional forums enables the GCCA to contribute to the development of common standards and guidelines that promote consistency and coherence in regulatory approaches across different jurisdictions.

Finally, international and regional cooperation can complement the GCCA's efforts and contribute to more robust competition and consumer protection regimes in Georgia.

What is your opinion about the OECD-GVH Regional Centre for Competition? Do you have suggestions for improvement?

We sincerely appreciate and hold in high esteem the efforts of the OECD-GVH Regional Centre for Competition in advancing competition policy and enforcement across Eastern Europe, Central Asia, and the Caucasus. The Centre significantly contributes to the development of robust competition practices that promote economic growth, innovation, and consumer welfare throughout our region. We recognise the Centre's commitment and the substantial impact it has made, which indeed sets a benchmark in our collective endeavour to foster a fair and dynamic economic landscape. However, in a spirit of constructive dialogue and with the highest respect for the Centre's achievements, there's an opportunity to build upon these solid foundations to reach even greater heights.

Expanding the Centre's outreach could bring in a broader circle of engagement, inviting fresh perspectives and energising our collective efforts. Diversity has a richness that could benefit our discussions and initiatives. Similarly, tailoring capacity-building programs more closely to the nuanced needs of various jurisdictions, especially in emerging markets, could sharpen our tools and strategies, enabling us to navigate the complex challenges of competition enforcement with even greater accuracy.

In sharing these thoughts, we aim to contribute to the ongoing dialogue on enhancing the efficacy and impact of the OECD-GVH Regional Centre for Competition. It is with deep respect and admiration for what has been achieved thus far that we look forward to the possibilities that lie ahead, confident in our collective ability to continue making strides in promoting fair competition and protecting consumer welfare in our region.

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