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The Separation of Competition Law Enforcement Powers Between Competition and Regulatory Authorities in Georgia

ABSTRACT:

The presented work is focused on researching the essence of public enforcement of Georgia's competition legislation, its mechanisms, and the issue of separating its enforcement competencies between the respective state authorities.

In 2020, the Georgian Law on Competition underwent comprehensive reform. This reform introduced a unique approach to the enforcement of said Law. In particular, the Competition and Consumer Protection Agency and the National Regulatory Authorities were defined as executive bodies of the Georgian Law on Competition. Furthermore, due to these reforms, the law now envisages many procedures and methods to separate the enforcement competencies between these state bodies. However, the relevant procedural provisions do not provide a straightforward solution to all the issues related to the separation of competencies. In the last five years, it has been seen that such gaps have led to significant issues in practice. Therefore, the sole purpose of the presented paper is to study these problems and offer relevant scientific solutions.

Keywords: Competition Law, Enforcement of Competition Law, Enforcement of Competition Law in Regulated Sectors, Enforcement of Competition Law by National Regulatory Authorities.

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I. Introduction

As a result of the reforms carried out in 2020 in Georgia, the National Regulatory Authorities were empowered to enforce the Law of Georgia on Competition together with the Georgian Competition and Consumer Agency (hereinafter – the Agency). The mentioned reform added a comprehensive character to the Georgian competition legislation, to the extent that it gained the ability to be enforced similarly in all sectors of the economy. Accordingly, Georgia has fulfilled the requirements envisaged in Article 204 of the Association Agreement with the European Union. However, this reform raised additional problematic issues regarding the separation of powers between the Agency and National Regulatory Authorities.

The primary purpose of the present paper is to research these problematic issues and develop proper legal means to solve them. It serves to solve the problems that may be faced by the National Regulatory Authorities and the Agency in terms of determining the respective entity which enjoys the authority to enforce the competition legislation in particular cases.

II. Public Enforcement of the Competition Law

The Georgian Law on Competition envisages several provisions that should ensure the formation and adequate protection of a healthy, competitive environment in the relevant markets of the country. These provisions have a prohibitive nature, and refer to actions taken by state authorities on the one hand, and undertakings on the other. Examples of such provisions are the clauses prohibiting anti-competitive agreements, abuse of dominant position, unfair competition, or anti-competitive concentrations. In order to maintain effective competition, along with these substantive provisions, the law also provides special procedural norms, according to which the enforcement of these prohibitive clauses occurs in the country. Hence, enforcing competition legislation means implementing such measures by the competent authority that are envisaged by the law and which aim to identify, prevent, and address actions prohibited by competition legislation. Any such measure taken individually may be regarded as an executive action or executive measure. Therefore, competition law enforcement may also be described as a combination of several executive actions or measures.

It is also necessary to clarify the meaning and content of the competence to enforce competition legislation. In this regard, the concept of this competence refers

to the authority enjoyed by the particular public body to use executive measures determined by the competition legislation. Furthermore, in this process, the sole purpose of using a particular executive action is to detect or prevent the anti-competitive conduct prohibited by the law. In addition, the use of executive measures, along with the detection of violations of the competition legislation, may also serve to assess the level of competition in the relevant markets of the country, and to prepare relevant recommendations, etc.

The primary executive measure is the adoption of an individual administrative-legal act (decision) by a body with the relevant enforcement authority.[1] Such a decision establishes a violation of competition legislation by a particular entity and imposes an appropriate sanction on it. In addition, the executive measure also refers to decisions made within the power of the control of concentrations, imposing the obligation of undertakings to perform specific actions to improve the competitive environment.

The use of executive measures provided by Georgian Law on Competition by the respective public entity is considered public enforcement of competition legislation.[2] This is because, at such times, this entity exercises public authority.

Alongside public enforcement, the theory and practice of competition law also recognize the concept of private enforcement.[3] In general, private enforcement of competition law refers to claims for damages by victims of specific anti-competitive conduct under Civil Law.[4] Since private enforcement does not involve issues related to the separation of competencies between executive bodies, this topic lies beyond the scope of this study.

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1 Whish, R., Bailey D., Competition Law, 7th Edition, Oxford University Press, 2012, 253; Emmerich V., Kartellrecht, 13. Auflage, Beck C. H., 2014, 453.

2 Colino S., Competition Law of the EU and UK, 7th Edition, Oxford University Press, 2011, 59; Moritz L., An Introduction to EU Competition Law, Cambridge University Press, 2013, 361; Adamia G., Die Aussichten der privaten Durchsetzung des Kartellrechts in Georgien am Beispiel des Missbrauchs der marktbeherrschenden Stellung, Deutsch-Georgische Zeitschrift für Rechtsvergleichung, No. 10, 2020, 22 and following.

3 საქართველოს კონკურენციის სამართალი, ლ. ჯაფარიძის და ქ. ზუკაკიშვილის რედაქტორობით, თბილისი, 2019, 486 [sakartvelos k'onk'urentsiis samartali, l. japaridzis da k. zuk'ak'ishvilis redakt'orobit, tbilisi, 2019, 486]; Moritz L., An Introduction to EU Competition Law, Cambridge University Press, 2013, 361.

4 Monti G., EC Competition Law, Cambridge University Press, 2007, 424; Adamia G., Die Aussichten der privaten Durchsetzung des Kartellrechts in Georgien am Beispiel des Missbrauchs der marktbeherrschenden Stellung, Deutsch-Georgische Zeitschrift für Rechtsvergleichung, No. 10, 2020, 22 and following.

III. Sources of the Georgian Competition Law

In Georgia, several legal acts include provisions aimed at ensuring free and effective competition in the country's markets. The Constitution of Georgia[5] entails one of the most important clauses in this regard: Article 6(1) of the Georgian Constitution guarantees economic freedom in the country. Article 6(2) further states that the state shall develop a free and open economy, as well as free enterprise and competition. The need to protect free competition obliges the state to create a legal order that ensures the establishment of free competition in the relevant markets of the country, its development, and the protection of the natural process of economic competition.[6]

The primary source of competition legislation in the country after the Constitution is the Law of Georgia "On Competition".[7] It establishes the principles of protection against unlawful restriction of free and fair competition. The law defines actions that unduly restrict free trade and competition, the legal grounds for detecting and preventing restriction of free trade and competition, and the competencies of the proper public entities.

By-laws adopted based on the Georgian Law on Competition are also part of the Georgian competition legislation. In this case, first of all, the secondary legal acts adopted by the Georgian government and the chairperson of the Georgian Competition and Consumer Agency should be taken into account.[8] In addition, the National Regulatory Authorities have also adopted relevant by-laws in the areas subject to their regulation, which are also an integral part of Georgian competition law.[9]

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5 The Constitution of Georgia, 24 August 1995.

6 Adamia G., Constitutional Aspects of Economic Competition, Constitutional Law Journal, Vol. 2, 2020, 109.

7 Law of Georgia "On Competition", 8 May 2012.

8 Resolution No. 529 of the Government of Georgia "On Approval of the Rules for De Minimis State Aid and General Rules for the Provision of State Aid", 1 September 2014; Resolution No. 526 of the Government of Georgia "On Exemptions from the Prohibition of Anticompetitive Agreements", 1 September 2014; Order No. 39 of the Chairman of the Georgian Competition and Consumer Agency „On Approval of the Rules for the Submission and Review of Notifications on Concentration", 26 October 2020, etc.

9 Specifically, in the energy and water supply sector, the "Rules for Monitoring the Energy Market" approved by the Resolution No. 7 of the Georgian National Energy and Water Supply Regulatory Commission, 30 March 2021, are in force. In the financial sector, the "Rules for Investigating Possible Competition Violations, Submitting Complaints/Statements, and Reviewing Cases" approved by the Order No. 67/04 of the President of the National Bank of Georgia, 18 May 2021, and the "Rules for Submitting and Reviewing Notifications on Market Analysis and Concentration" approved by the Order No. 68/04 of the President of the National Bank of Georgia, 28 May121 2021, are in force.

IV. Enforcement Authorities and the Applicability of the Competition Law in the Regulated Sectors

1. Legal and Economic Characteristics of Regulated and Non-Regulated Sectors

Determining the extent of executive authority in safeguarding free competition relies on distinguishing between the regulated and non-regulated sectors of the economy. According to the unique approach of the Georgian legislator, the National Regulatory Authorities enforce the competition legislation in the respective regulated sectors of the economy and other sectors – the Competition Authority. Considering the above, the Georgian legislator provides the legal definition of the regulated sector in the Competition Law itself. In particular, Article 3(q) of the Law contains a list of those areas of the economy considered regulated sectors in the sense of Georgia's competition legislation. As such, the Georgian legislator defines the areas established by the Organic Law of Georgia "On the National Bank of Georgia", the Law of Georgia "On Electronic Communications", the Law of Georgia "On Broadcasting", and the Law of Georgia "On Energy and Water Supply".[10] From the mentioned explanation, it is clear that the Georgian competition legislation considers the banking and financial sector of Georgia, the communications and broadcasting sector, and the electricity, natural gas and water supply sectors as regulated sectors of the economy. In addition, according to the named Article 3(q) of the Law, a special type of regulated sector of the economy is the sphere of municipal services, in which free price formation and competition are limited, and which is defined as a regulated economic sphere by the decree of the Government of Georgia and is subject to tariff regulation.[11]

Unlike the regulated sphere of the economy, the law does not explicitly define the term of the unregulated sphere of the economy, resulting in its scope being unrestricted. Consequently, all sectors of the economy not covered under Article 3(q) of the Law are considered part of the unregulated sphere of the economy.

[10] Law of Georgia "On Competition", 8 May 2012, Art. 3.

[11] საქართველოს კონკურენციის სამართალი, ლ. ჯაფარიძის და ქ. ზუკაკიშვილის რედაქტორობით, თბილისი, 2019, 500 [sakartvelos k'onk'urentsiis samartali, l. japaridzis da k. zuk'ak'ishvilis redakt'orobit, tbilisi, 2019, 500].

2. Competition Authority and National Regulatory Authorities

The Agency is the central enforcement authority of Georgia's competition legislation. However, the Agency is not the only body with the power to enforce the law. In particular, Article 4(2) of the Law establishes that, in cases expressly provided for by the law, the law is enforced by the National Regulatory Authorities. Thus, the Agency has the competence to enforce the competition legislation of Georgia on the one hand, and the National Regulatory Authorities on the other.

The term of the National Regulatory Authority is defined in the special Law on National Regulatory Authorities. According to this legal definition, the National Regulatory Authority is a legal entity of public law with special powers, created by the state to regulate particular sectors of the economy. Furthermore, the National Regulatory Authority does not have a state-controlling body and acts within the scope of powers established by legislation. This law also states that only two such regulatory authorities exist in Georgia: the National Communications Commission of Georgia and the Georgian National Energy and Water Supply Regulatory Commission. Nevertheless, for the purposes of competition legislation, the National Bank of Georgia is also considered a regulatory authority.[12] This is because competition law considers the financial and banking sectors as a regulated sector of the economy, and the National Bank is their regulator.

Based on the above, the National Bank of Georgia, the National Communications Commission of Georgia, and the Georgian National Energy and Water Supply Regulatory Commission, enforce the competition legislation in Georgia in respective regulated sectors in the exceptional cases the law provides. In all other sectors, the Agency is competent to enforce the law.

3. Mandatory and optional norms

As the main body with the authority to enforce the Competition Law, the Agency makes full use of the entire Competition Law of Georgia. One of the main reasons for this is that the Agency is created based on the Competition Law of Georgia, and this law, along with the substantive provisions protecting effective competition, also contains certain procedural norms that apply entirely to the Agency.

A different legal situation arises regarding the National Regulatory Authorities, established based on a special law regulating the respective sector. Moreover, in the

[12] Ibid.

case of the National Bank of Georgia, the relevant legal basis for establishing it is also envisaged by the Constitution of Georgia. It should be noted that special legislation applies in areas under the regulation of respective regulatory authorities, and special laws define their powers and the directions of their activity. In addition, the Competition Law states that there is a special restricted scope of competence for these National Regulatory Authorities in terms of enforcement of competition legislation.

In this regard, Article 31 of the Georgian Competition Law is particularly significant. It establishes the primary legal framework for delineating competencies between the Agency and the National Regulatory Authorities in enforcing competition legislation. Article 31(7) distinguishes between two categories of competition law norms. Specifically, one category comprises norms that regulatory bodies are directly obligated to apply. The obligation to apply the second category of provisions, as Article 31(7) provides, arises only when the special sector-specific legislation does not stipulate otherwise. Thus, the first category of the norms is mandatory for the National Regulatory Authorities to apply, while the second is optional.

In particular, the norms prohibiting anti-competitive agreements and regulating exceptions from this prohibition,[13] the norm prohibiting the abuse of a dominant position,[14] a significant portion of the norms related to the control of concentrations,[15] as well as the provisions concerning the statutes of limitations,[16] sanctions[17] and cooperation programs,[18] are of a mandatory nature. In contrast, the norms defining the content and indicators of a dominant position,[19] specific provisions related to the control of concentrations,[20] the articles establishing the authority of the Agency,[21] some procedural norms related to enforcement, and the norm concerning sanctions for the non-delivery of information, have an optional character.[22]

In this case, identifying the teleological or logical basis for classifying specific provisions of the Georgian Competition Law as mandatory or optional norms presents

[13] Law of Georgia "On Competition", 8 May 2012, Arts.7-9.

[14] Ibid., Art. 6.

[15] Ibid., Arts. 11 (1-8), Art. 11^1 (1, 2, 4, 6-12).

[16] Ibid., Art. 27.

[17] Ibid., Art. 33.

[18] Ibid., Art. 33^1.

[19] Ibid., Art. 5 (5) (i).

[20] Ibid., Art. 11^1 (13-14).

[21] Ibid., Art. 18.

[22] Ibid., Art. 32.

particular challenges. At first glance, only the substantive norms stipulated by the law might be mandatory for all bodies with executive competence, while procedural norms are not. However, this conclusion is not entirely accurate, as some substantive norms under the law do not necessarily apply to regulated sectors. Conversely, certain norms with procedural content are mandatory for regulatory bodies to enforce.

For example, Article 3 of the Competition Law defines a dominant position, while Article 5 provides the parameters and indicators for evaluating the market power of an individual undertaking in a specific case. The legal definition of this concept, and the norm establishing the relevant parameters, cannot be classified as procedural provisions. In contrast, Articles 22-25 of the Law contain procedural rules, such as those governing the submission of applications and complaints, case analysis, and other related processes, which the relevant state body must apply when enforcing the law. However, these provisions possess the same optional character for National Regulatory Authorities.

Moreover, Articles 3(i), 5 and 6 collectively establish the factual composition of the abuse of a dominant position. While Article 6 of the Law serves as a mandatory provision applicable across all sectors of the economy, articles 3 and 5 do not share the exact obligatory nature. Consequently, a legal situation arises in which the content and prerequisites of a dominant position in regulated sectors of the economy may be defined differently under sector-specific legislation. This is even though the actions prohibited for undertakings with a dominant position are uniformly applicable across all sectors of the economy.

With this approach, the Georgian legislator allows for the possibility of different indicators and parameters determining the dominant position across various sectors of the economy. As a result, under conditions of varying market power, particular undertakings in regulated and non-regulated sectors may be classified as dominant enterprises. For instance, sector-specific legislation may define a 50 percent market share as a prerequisite for establishing dominance, while in non-regulated sectors, a 40 percent market share may be sufficient to qualify an undertaking as dominant. Consequently, the prohibitions outlined in Article 6 of the Law may apply to enterprises with a 40 percent market share in non-regulated sectors, but similar prohibitions may not apply to companies with an equivalent or higher market share in regulated sectors.

4. Conflict and Convergence of Norms

The separation of enforcement powers between the competition and regulatory authorities gives rise to the conflict and convergence of norms that must be used by a National Regulatory Authority in particular cases. Such a case occurs when there is an overlap between the norms entailed in the sector-specific legislation and the optional norms provided by the Competition Law. This directly follows from Article 31(7) of the Law, which establishes that regulatory authorities are obligated to apply the optional norms contained in the law only when sector-specific legislation does not stipulate otherwise.

It should be noted that both legislative acts and subordinate normative acts govern regulated sectors. Notably, the relevant regulatory bodies are typically empowered to adopt such subordinate normative acts. Furthermore, according to the Article 7(1) of the Organic Law of Georgia "On Normative Acts", the term "legislation" encompasses both legislative and subordinate normative acts. Consequently, a situation arises where priority is given to the subordinate normative acts adopted by the respective regulatory bodies, rather than to the optional norms of the Competition Law.

The applicability of the rules outlined in Article 11^2 of the Competition Law to regulated sectors may be considered for greater clarity. This article is an optional norm that governs the grounds for exemption from the obligation to submit a notification about concentration and other related issues. Due to its optional nature, this norm will apply to regulated sectors only if the special sector-specific legislation does not stipulate otherwise.

Considering the above, it is possible for sector-specific legislation to expressly provide provisions that differ from Article 11^2 of the Competition Law, or to establish a set of provisions defining alternative grounds for exemption from the obligation to submit a concentration notification. In such cases, it is evident that the sector-specific legislation contains provisions that diverge from the optional norms of the Competition Law. However, it is also possible for sector-specific legislation to introduce norms that are not expressly contradictory to those of the Competition Law, but instead serve as complementary provisions. Such sector-specific norms may supplement the rules established by the Competition Law. Accordingly, two types of interactions between norms may arise: (1) a conflict between the Competition Law and sector-specific legislation, and (2) the convergence of norms, where sector-specific legislation complements the provisions of the Competition Law.

If a specific norm of sector-specific legislation conflicts with an optional norm provided by the Competition Law, the regulatory body of the regulated sector applies only the norm established by the sector-specific legislation. For example, Article 25 of the Competition Law sets the period for investigating a case at 6 months, which may be extended to 18 months. In contrast, Article 32(4-5) of the "Energy Market Monitoring Rules" (approved by Resolution No. 7 of the Georgian National Energy and Water Supply Regulatory Commission on March 30, 2021) set the investigation period at 7 months, with the possibility of an additional 4-month extension.

This creates a situation where there is a contradiction between the optional norm of the Competition Law and the norm established by sector-specific legislation, as the same issue is regulated differently by two distinct legal acts. In such cases, priority is given to the sector-specific legislation in the relevant regulated sector. Consequently, when enforcing the law, the Georgian National Energy and Water Supply Regulatory Commission will apply the provisions of Article 32 of the aforementioned rules, rather than Article 25 of the Competition Law.

Along with similar cases mentioned above, it is also possible that the norm stipulated by sector-specific legislation does not directly contradict the optional norm of the Competition Law, but instead serves to complement it. As an example, Article 41 of the "Energy Market Monitoring Rules", valid until March 30, 2023, and approved by Resolution No. 7 of the Georgian Energy Regulator of March 30, 2021, provided a specific basis for exemption from the obligation to submit a notification regarding concentration in the energy and water supply sectors. Specifically, the norm exempted a water supply licensee involved in a concentration in the water supply sector, who was not directly or indirectly connected to an energy market participant or energy activity, from the obligation to submit a concentration notification to the Georgian National Energy and Water Supply Regulatory Commission.

Article 11^2 of the Competition Law, an optional norm, also serves as the basis for exemption from the obligation to notify about concentration. The first paragraph of this article establishes three specific cases in which an undertaking is exempted from the obligation to notify the respective authority about a concentration. Furthermore, these grounds did not create any contradiction with Article 41 of the Energy Market Monitoring Rules.

As a result, a situation arose where the law and sector-specific legislation established rules to regulate the same issue without conflict. However, the 'Energy Market Monitoring Rules' did not reference the inapplicability of Article 11^2 of the Law in the

energy sector. Therefore, it is clear that Article 41 of the Energy Market Monitoring Rules complemented Article 11[2] of the Law in the energy sector, allowing both norms to be applied concurrently, with no conflict between them.[23]

Based on the above, it can be concluded that if a particular norm of the sector-specific legislation complements the optional norm of the competition law, and such legislation does not explicitly reserve the application of the optional norm of the competition law, then both norms are applied concurrently in the relevant regulated sector. Such a case should not be interpreted as constituting a "different regulation", as outlined in Article 31(7) of the Law.

In practice, there may be cases where the sector-specific legislation does not address the issue covered by the specific norm of the Competition Law. In such instances, if the sector-specific legislation does not explicitly exclude the applicability of a particular optional norm of the Competition Law, then it can be applied within the relevant regulated sector. As an example, Article 11[2] of the Competition Law may be considered. Suppose, in the sector-specific legislation, neither addresses the grounds for exemption from the obligation to submit a notification about concentration, nor explicitly precludes the application of Article 11[2] of the Law in that area. In that case, this article of the Competition Law will remain applicable in that sector.

V. Defining Authority for the Application of Executive Measures

1. Roles and Responsibilities of Enforcement Authorities

International experience shows that most competition laws establish a broad range of tasks and powers for competition law enforcement authorities. An analysis of these tasks and powers provides valuable insight into the roles and functions of the relevant administrative bodies. These functions typically include investigating potential anti-competitive agreements, receiving and handling complaints, imposing sanctions on violators, making recommendations, conducting research, publishing reports, informing the public within their jurisdiction, and offering assistance or consultations in legislative activities.[24]

[23] On March 30, 2023, an amendment was made to the "Energy Market Monitoring Rules". As a result, Article 42 of the amended rule clarified that the special rule contained therein does not exclude the application of the optional norm corresponding to the Law of Georgia on Competition.

[24] See: Model Law on Competition, United Nations Conference on Trade and Development, UNCTAD

In the Georgian context, the issue of separating competencies so as to enforce competition legislation does not arise regarding all the aforementioned powers. In particular, as defined by Georgian legislation, each executive body can carry out specific enforcement measures within its respective competence without overlapping the powers of the competition agency. Such measures include participation in legislative processes, providing consultations, and producing statistical data.

In contrast, the issue of separating powers between the competition agency and regulatory bodies becomes significant when implementing measures related to detecting alleged anti-competitive actions, identifying law-breaking undertakings, imposing sanctions, and other similar actions. Under Article 31 of the Law, two key procedures can be identified as central to the enforcement of competition legislation: case investigation and concentration control.

For the purposes of this paper, it is relevant to consider market monitoring as another critical executive measure.

2. Market Monitoring

Market monitoring is a mechanism within the powers of the executive body that enables the observation of processes in specific goods or services markets within the country. Through market monitoring, it is possible to conduct a general assessment of the quality of competition and identify potential issues that may hinder the natural development of competitive processes.[25]

The results of market monitoring ultimately guide the future actions of the relevant enforcement authority. Market monitoring may reveal that certain regulations adopted by state bodies disproportionately restrict the development of specific markets and hinder the establishment of a healthy competitive environment. In such cases, the executive Agency is authorized to issue recommendations and address the deficiencies identified during monitoring.

Additionally, market monitoring can lead to the investigation of individual state entities if it uncovers reasonable suspicion of a violation of Article 10 of the competition law. Such violations involve restrictions on competition imposed by state

Series on Issues in Competition Law and Policy, UN, New-York, 2007, <https://unctad.org/system/files/official-document/tdrbpconf5d7rev3_en.pdf> [10.06.2024].

[25] Guide on Market Studies for Competition Authorities, Organisation for Economic Co-operation and Development, DAF/COMP/WD (2018) 26, 23 May 2018, 4.

authorities, the government of an autonomous republic, municipal authorities, or other administrative bodies, which are deemed inadmissible under competition law.

Market monitoring is also able to uncover indications of other types of competition law violations. This may occur when the executive body identifies irregularities in the competitive processes of a specific market, suggesting artificial interference in market dynamics. Such interference is a key indicator of potential competition law violations by individual undertakings. In these instances, the executive body identifies the suspected violators and initiates an investigation to examine the alleged breach of competition legislation.

Market monitoring also helps executive authorities obtain valuable information and data about the structure and functioning of a particular product or service market, which may be used in the future in investigating cases related to alleged violations of competition law, or in controlling concentrations. In addition, the data obtained from market monitoring can be valuable for decision-making, policy planning, and the implementation of various measures by individual state bodies. Based on market monitoring, it is also possible to evaluate the effects of a decision already taken by the relevant executive body, and analyze the impact of this decision on the relevant market.

Given the nature, goals, and tasks of market monitoring, the law does not contain provisions regarding the separation of competencies for this enforcement mechanism. This is because market monitoring does not directly establish competition law violations or impose sanctions on individual undertakings. Instead, the executive body generally analyzes the goods and services markets, gathering information and data, based on which it may take various actions, such as initiating investigations or issuing recommendations.

Thus, both the competition agency and the relevant regulatory bodies have the authority to monitor markets within their respective sectors. The competition agency monitors markets in unregulated sectors of the economy, while regulatory bodies focus on the regulated sectors.

3. Investigation of Alleged Violations

3.1. The Essence of Case Investigation

The prohibitive norms in Georgian competition legislation apply to both undertakings and state bodies to ensure a healthy competitive environment in the country's

relevant markets.[26] The mandatory norms in regulated sectors primarily concern prohibitions directed at undertakings. In this regard, Articles 6 and 7 of the Competition Law, prohibiting anti-competitive agreements and abusing dominant positions, are particularly significant. Investigation is a process through which the relevant executive body identifies the abuse of a dominant position or anti-competitive agreements as offences, and imposes sanctions on the responsible undertakings.

The competition agency also uses investigations to detect unfair competitive practices[27] and anti-competitive actions by state authorities.[28] However, in these cases, the issue of separating competencies between the Agency and the National Regulatory Authorities is not relevant, as these norms are neither mandatory nor optional for enforcement within regulated sectors.[29] Therefore, this paper focuses solely on investigating alleged violations of articles 6 and 7 of the Law.

Investigation is the process of gathering evidence and giving it legal evaluation, and it is conducted by the Competition Authority on an alleged violation of competition.[30] Investigating a potential violation of the Competition Law is a complex process that requires thorough legal and economic analysis. As a result, investigations often demand significant administrative resources and time. Depending on the jurisdiction, the investigation of a case may last several years, particularly in precedential cases, or those with significant potential impact on market structure.[31]

The case investigation process includes procedural measures such as requesting information from relevant entities,[32] conducting on-site inspections of undertakings,[33] and receiving explanations. The use of specific measures by the relevant ex-

[26] ადამია გ., ექსკლუზიური ვერტიკალური დათქმების კონკურენციის შემზღუდველ შეთანხმებად კვალიფიკაცია და მისი სამართლებრივი შედეგები ქართული, გერმანული და ევროპული კავშირის კონკურენციის სამართლის მიხედვით, სადოქტორო დისერთაცია, თბილისი, 2022, 8 [adamia g., eksk'luziuri vert'ik'aluri datkmebis k'onk'urentsiis shemzghudvel shetankhmebad k'valipik'atsia da misi samartlebrivi shedegebi kartuli, germanuli da evrop'uli k'avshiris k'onk'urentsiis samartlis mikhedvit, sadoqtoro disertatsia, tbilisi, 2022, 8].

[27] Law of Georgia "On Competition", 8 May 2012, Art. 11[3].

[28] Ibid., Art. 10.

[29] Art. 31(7) of the Georgian Law "On Competition" does not include any reference to such provisions.

[30] Colino S., Competition Law of the EU and UK, 7th Edition, Oxford University Press, 2011, 77.

[31] Competition Enforcement in the Pharmaceutical Sector (2009-2017), Report from the Commission to the Council and the European Parliament, COM (2019), Brussels, 28 January 2019, 9, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52019DC0017> [10.06.2024].

[32] Colino S., Competition Law of the EU and UK, 7th Edition, Oxford University Press, 2011, 83; Moritz L., An Introduction to EU Competition Law, Cambridge University Press, 2013, 376.

[33] საქართველოს კონკურენციის სამართალი, ლ. ჯაფარიძის და ქ. ზუკაკიშვილის რედაქტორობით, თბილისი, 2019, 143 [sakartvelos k'onk'urentsiis samartali, l. japaridzis da k. zuk'ak'ishvilis reda-

ecutive bodies during the investigation depends on the scope of authority granted to these bodies, the nature of the case, the requirements of the investigation, and other relevant circumstances.[34]

The Agency's powers in investigating a case are determined by the Competition Law. Specifically, under Article 25(4) of the Law, the Agency is authorized to request the information and documentation necessary for the investigation. Paragraph 5 of the same article also allows the Agency to summon individuals for explanations. One essential and effective mechanism in the case investigation process is the on-site inspection of the relevant economic agent, which the Agency can carry out based on a court decision, as outlined in Article 25(6). On-site inspections include reviewing documents related to the economic agent's activities, including financial and economic records, regardless of confidentiality or storage rules, making copies of those documents, and obtaining explanations on-site. The Agency's powers in the case investigation process are further outlined in the Article 18(1) of the Law.

In accordance with Article 31(7) of the Competition Law, Articles 25 and 18 are optional norms. As such, these norms apply to regulatory bodies only when no other provisions are established in the respective sector-specific legislation. However, it is important to note that the rules outlined in articles 18 and 25 pertain to the investigation process and are also addressed in the relevant normative acts adopted by the regulatory bodies.[35] Therefore, when regulatory authorities enforce the law and a conflict arises between these norms, the rules concerning the conflict and convergence of norms, as stipulated in Article 31(7) of the Competition Law, shall apply.

3.2. Division of Competencies in Case Investigations

Issues related to the separation of competencies between the Agency and respective National Regulatory Authority in the enforcement of competition legislation are regulated by Article 31 of the Competition Law. According to the first paragraph, a

kt'orobit, tbilisi, 2019, 143]; Moritz L., An Introduction to EU Competition Law, Cambridge University Press, 2013, 376; Colino S., Competition Law of the EU and UK, 7th Edition, Oxford University Press, 2011, 83.

[34] Moritz L., An Introduction to EU Competition Law, Cambridge University Press, 2013, 367.

[35] Resolution No. 7 of the Georgian National Energy and Water Supply Regulatory Commission on "Rules for Monitoring the Energy Market", 30 March, 2021, Arts. 6, 20, and subsequent articles; Order No. 67/04 of the President of the National Bank of Georgia on the "Rules for Investigating, Submitting, and Reviewing Complaints/Statements Related to Possible Violations of Competition", 18 May 2021, Arts. 2, 9, and subsequent articles.

complaint or statement regarding a potential violation of competition legislation in a regulated sector of the economy may be submitted to either the respective regulatory body or the Agency. This provision generally allows individuals the alternative option to submit a complaint or application to either the Agency or a National Regulatory Authority. However, the first and subsequent paragraphs of the same article establish a specific rule for cases where a complaint or application is submitted solely to the Agency.

In particular, according to the second sentence of Article 31(1) of the Competition Law, if a complaint or statement related to an alleged violation of competition legislation is submitted to the Agency, and the alleged violation occurs in a regulated sector of the economy, the Agency must forward the complaint or statement to the relevant regulatory body within five working days.[36] Article 31(2) provides an exception to this general rule, outlining specific cases in which the Agency does not forward the complaint or statement to any regulatory body, but handles it per the Competition Law. These cases arise when the alleged violator is not an undertaking operating in the particular regulated sector when the case involves undertakings from different regulated sectors, or when the alleged unlawful action is carried out by undertakings operating in the regulated sector, but the action itself (the subject of the dispute) is not carried out within the regulated sector. Therefore, in the situations specified in Article 31(2) of the Law, the Agency always handles the case.

The same principle applies when the complaint or statement related to an alleged violation of competition legislation is submitted to a specific regulatory authority. If one of the cases outlined in Article 31(2) is met, the regulatory body will forward the complaint or statement to the Agency.

Despite the legislative arrangement discussed above, there may be cases when individual regulatory bodies and agencies cannot agree on which authority should investigate a case. In this regard, Article 31(3) of the Law establishes an important rule: if the competent authority cannot be determined regarding the investigation of a particular case, consultations between the Agency and the regulatory body can be held over 30 calendar days to determine the relevant authorized body.

Thus, according to Article 31(3) of the Law, the Agency and the relevant regulatory body are empowered to determine, by mutual agreement, which body is competent

[36] საქართველოს კონკურენციის სამართალი, ლ. ჯაფარიძის და ქ. ზუკაკიშვილის რედაქტორობით, თბილისი, 2019, 528 [sakartvelos k'onk'urentsiis samartali, l. japaridzis da k. zuk'ak'ishvilis redakt'orobit, tbilisi, 2019, 528].

to handle a specific case. While these bodies are guided by the principles outlined in Article 31(1-2), they ultimately base their decision on the factual circumstances of each case. If the relevant authorized body cannot be determined through mutual agreement, the Agency will handle the case as per Article 31(4) of the Law.

According to the aforementioned approach, it can be argued that the legislator grants both the Agency and the regulatory bodies broad authority to determine the competent body for handling a specific case. This is evident in the fact that the legislator allows the regulatory bodies and the Agency to agree on the separation of powers and decide who will continue investigating the case. However, in practice, the provision that, in the event of a disagreement between the regulatory body and the Agency the case is always handled by the Agency, could lead to certain challenges.

Within this framework, determining competence in a specific case partially depends on the regulatory body's discretion. In particular, if the regulatory body believes that a particular case falls outside its scope of competence, the responsibility to investigate the case remains with the Agency. Unlike the regulatory body, the Agency, as the primary enforcement body, lacks any mechanism to exclude its competence over a specific case. Therefore, theoretically, there is a high likelihood that, despite the provisions of Article 31(2) of the Law, the investigation of a case within a regulated sector will be conducted by the Agency without questioning the legitimacy or appropriateness of its decision in this regard.

4. Concentration Control

Concentration control is one of the key instruments for maintaining a healthy competitive environment in markets. It refers to situations where two or more independent undertakings merge to form a single undertaking. Article 11(1) of the Law also defines another type of concentration, one that includes the acquisition of direct or indirect, full or partial control over one or more undertakings through the purchase of securities or shares, contracts, or other means, by one or more undertakings or by one or more other persons who, under competition law, are not considered undertakings but who already control at least one undertaking. Creating a joint venture is also considered a concentration if it performs all the functions of an independent undertaking for an extended period.

Unlike case investigations, merger control is an ex-ante mechanism for competition protection. In this context, the relevant executive body conducts a preliminary

assessment of specific actions (such as mergers, share purchases, etc.). If it determines that the planned concentration would significantly restrict competition in the goods or services market of Georgia or a part of it, the Agency will not approve the concentration. In such cases, the planned concentration cannot be implemented.

Article 31 of the Law also governs the competence-sharing between regulatory bodies and the Agency in implementing concentration control. In this regard, the same principles of cooperation and division of responsibilities apply as those discussed for case investigations. Specifically, when a notification of a planned concentration is submitted, the Agency or the relevant regulatory body must assess whether the concentration will significantly affect competition within the market.

In cases where the planned concentration concerns a sector under the jurisdiction of a specific regulatory body, the notification will be forwarded to that body for further review. If the concentration affects multiple sectors, or if there is any uncertainty regarding which body has the authority, the Agency and the regulatory body will consult with each other to determine which institution is best suited to handle the assessment. Should there be any disagreement between the two bodies, the Agency has the final say in handling the concentration case.

Furthermore, if the regulatory body concludes that the concentration does not fall within its domain, it will promptly refer the matter to the Agency, ensuring no delay in the review process. This ensures that competition protection remains effective across all regulated sectors of the economy.

VI. Conclusion

As a result of the reasoning developed in this paper, it can be concluded that the separation of competencies between the Agency and the regulatory bodies of the regulated sectors of the economy is one of the key cornerstones of the enforcement of competition legislation in Georgia.

In enforcing competition legislation, an important distinction is made between mandatory and optional norms of the law. Mandatory norms are those provisions that must be enforced and applied across all sectors of the economy. In contrast, optional norms apply to regulated sectors only if no other provisions are specified by the legislation governing that specific sector.

Resolving conflicts between optional norms and those stipulated by sector-specific legislation is crucial in practice. If there is a direct contradiction between these

norms, the provisions of the special legislation governing the regulated sector will prevail. If the special legislation complements the optional norms of the law, both sets of norms can be applied in parallel. If the special legislation does not regulate the issue addressed by the optional norm, the optional norm will apply unless the sector-specific legislation explicitly excludes its use.

Regarding the enforcement process, it was also found that the issue of the separation of competencies is central to concentration control and case investigations in Georgia. The rules and principles of the division of powers between the Agency and the regulatory bodies are analyzed in this paper. One important finding from the analysis of the existing legislation is that, in determining the authority to investigate a specific case, regulatory bodies enjoy broader discretion compared to the Agency. However, regardless of the Agency's position, if the regulatory body deems that a specific case falls outside its competence, the Agency is always obligated to investigate the case and make an appropriate decision.

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